This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202202128/A4

[2022] EWCA Crim 1734

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 25 November 2022

Before:

LORD JUSTICE WARBY
MRS JUSTICE McGOWAN DBE
THE RECORDER OF LIVERPOOL
HIS HONOUR JUDGE MENARY KC
(Sitting as a Judge of the CACD)

REX
V
DWAYNE NEIL

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR O LANLEHIN appeared on behalf of the Appellant

J U D G M E N T
(Approved)

LORD JUSTICE WARBY:

1. This is an appeal against sentence by Dwayne Neil, now aged 33.
2. On 10 June 2022 he appeared for sentence in the Crown Court at Wood Green, having earlier pleaded guilty to an indictment comprising 11 counts. These were robbery (count 1), theft (count 2), common assault (count 3), racially aggravated harassment (counts 4, 6 and 9), assault by beating (count 5), assault occasioning actual bodily harm (counts 7 and 8) and criminal damage (counts 10 and 11).
3. The sentencing judge, having considered the facts of this litany of offending, the appellant's criminal record, a psychiatric report and two detailed pre-sentence reports found the appellant to be dangerous. He imposed an extended determinate sentence of 10 years, comprising a custodial term of seven years and an extended licence period of three years.

<u>The facts</u>

4. All of the offending took place on the same day, 19 December 2021. It began with the robbery. This took place in a street in East London in the early hours at around 2.00am. The appellant, who was riding a push bike, approached a young woman called Alix D'Agay who was walking home. He grabbed at her phone then got off his bike and forced her to the ground. He got on top of her and demanded her bag or money. She gave him £600 from her wallet and he made off. She sustained scratches and bruising. She was scared, angry, upset, shocked and very tired and as those feelings subsided she felt vulnerable and fearful of going outdoors alone. She was diagnosed with Post Traumatic Stress Disorder.
5. About two hours later, shortly after 4.00am, the appellant approached Michaela Paoletti and Akinbiyi Akintan as they walked into the Craft Hotel in East London. He used

racially abusive language towards Akintan, calling him a black cunt and a pussy. When Paoletti attempted to diffuse the situation the appellant went behind her, grabbed her glasses and left her disorientated. He continued to ride around on his bicycle, abusing them verbally. When Akintan moved between the appellant and Miss Paoletti the appellant kicked him in the leg. This episode gave rise to counts 2, 3, 4 and 5.

6. Miss Paoletti was very shaken up and distressed and in the longer term the experience exacerbated an existing anxiety condition. She maintained enough composure to telephone the police who attended soon afterwards and arrested the appellant.
7. The remaining counts involve physical and verbal assaults on police officers and damage to police property. One of the officers who attended the scene was PC Lucas Collins. As the appellant tried to cycle away, PC Collins used his PAVA spray to incapacitate him. The appellant spat at the officer and some spit and some of the spray went into the officer's eye. That assault gave rise to count 7.
8. The appellant was apprehended. Upon arrest he claimed to have swallowed 10 wraps of cocaine and was therefore taken to Homerton University Hospital. As PC Hakin Houssein went to get him out of the police vehicle, the appellant called him a Jewish cunt and Hitler. He returned to the attack when they were inside the hospital, repeating the Turkish abuse and making threats to kill the officer. That gave rise to count 6. The appellant then assaulted PC Rafal Szmydynski by kicking him to the face and spitting in his eye and his face. That was count 8.
9. The appellant was then taken to the Bethnal Green Custody Suite. Counts 9, 10 and 11 reflected what happened then. On the way the appellant damaged the van by spitting. In his cell he urinated on the floor and poured coffee on it, and he used racially abusive language towards Designated Detention Officer Julia Jorge. He called her a black bitch

and later asked her why she had not cleaned up his urine, stating that black people used to be slaves.

Sentencing materials

10. Aged 32 at the date of sentence the appellant had a truly dreadful criminal record. Between 2001 and 2020 he had 33 convictions for 76 offences, most of which were relevant in some way to the offending in this case. He had five previous convictions for robbery and five for attempted robbery, two for theft from the person, and three for other forms of theft. His multiple convictions for violence included one for wounding contrary to section 20 of the Offences Against the Person Act 1861, three for assault occasioning actual bodily harm, nine for battery, seven for assaulting a constable, and three for beating of an emergency worker. Four of the convictions for violence dated from 2020. The appellant had three previous convictions for possessing weapons, two for using threatening words or behaviour, and one for aggravated harassment. He had received a previous extended sentence in September 2015 for the wounding and one of the offences of battery.

11. Unsurprisingly, the author of the pre-sentence report recorded that the index offending was part of an established pattern of criminal behaviour. The assessment was that this showed that the appellant countenanced pro-criminal attitudes and the associated lifestyle. The probation officer's assessment was that the appellant's mental health may have been a contributing factor to the commission of the offences, but he was "a prolific violent offender who arms himself with weapons", had little consideration for the consequences of his actions, and his behaviour was entrenched. The officer concluded that the appellant represented a high risk of serious harm being suffered by members of the public through the commission of further specified offences of violence.

12. The main point advanced in mitigation was that the present offending stemmed from a schizo-affective disorder for which the appellant had stopped taking his medication. A psychiatric report was adduced in support of this point. This reported that the appellant now had insight into his disorder and was keen to take treatment for it.

The judge's reasoning

13. The sentencing judge referred to the facts of the offending and analysed the appellant's antecedents before turning to the issue of his mental health. The judge's conclusion was that this did not go directly to culpability and therefore did not affect the categorisation of the offending. That was because the failure to take medication was the appellant's own deliberate act. The proximate reason for it was that he had been refused the drugs for want of an adequate identity document. Finding that it would take up to 10 weeks to get a passport, the appellant had simply given up.
14. The judge then dealt in turn with each of counts 1 to 9, considering the relevant sentencing guidelines and identifying for each offence the guideline starting point, the category range and the relevant aggravating features. He said that counts 10 and 11 added nothing.
15. The judge addressed mitigation. He identified the appellant's mental health history as a general mitigating factor, and he accepted his expressions of remorse. He said that full credit would be given for the guilty pleas which had been delayed only by a genuine need for psychiatric evidence that might have borne on the appellant's fitness to plead.
16. The judge addressed totality, explaining that although this series of offences involved what was in large part separate offending, he had decided to impose a sentence on count 1 to reflect the overall criminality with concurrent sentences on the other counts. The appropriate sentences for counts 2 to 9 were identified as 12 months, two months, four

months, one month, six months, 12 months, 16 months and six months, with no separate penalty on either of counts 10 and 11.

17. Turning finally to count 1, the judge said that the lowest determinate sentence he could impose was one of seven years' imprisonment. He then considered dangerousness, finding that the statutory test was satisfied, that an extended determinate sentence was necessary, and that the appropriate licence period was one of three years.

Grounds of appeal

18. There is no challenge to the finding of dangerousness or to the imposition of an extended determinate sentence in principle. The single judge gave the appellant leave to challenge the length of the custodial portion on the grounds that the judge took an approach that was wrong in principle and passed a custodial term that was manifestly excessive.

19. Three main points are taken in the written grounds of appeal by way of challenge to that aspect of the sentence. It is pointed out that the Recorder did not identify the sentence that would have been appropriate after a trial for any of the offences, but by a back calculation one can see that if he gave full credit for the guilty plea he must have started at ten-and-a-half years. That is said to be clearly excessive for the totality of the offending.

20. Alternatively, it is said the judge must have failed to afford the appellant the full credit which he had rightly said was due. In any event, it is argued, a sentence as long as seven years after credit for plea was disproportionate to the offending taken as a whole and incapable of being justified by the aggravating feature of the appellant's admittedly poor record.

Assessment

21. As the argument today has amply illustrated, this was a difficult sentencing exercise.

That is because of the sheer number of separate offences against a total of seven different victims in a short space of time, the overall seriousness, the considerable aggravation represented by the appellant's dismal criminal record and, on the other hand, the significant mental health issue. There is also a difficulty presented by the need to apply the principle of totality to this multiplicity of offences.

22. In our view the judge's decision to impose a sentence on count 1 that reflected the overall criminality was a proper one. His analysis of the antecedents was impeccable and his approach to the psychiatric evidence was careful, legitimate and, in our opinion, correct.

23. But the structure of the sentencing remarks did depart from the model prescribed by the Sentencing Council in at least three significant respects. Although he identified the category starting point and range for each offence, the judge did not identify a provisional sentence within the range before moving on to consider aggravating and mitigating factors. Nor did he identify the sentence that would have been imposed after a trial, in the light of the aggravation and mitigation. He also failed to set out how he had applied the one-third reduction for guilty plea.

24. These are formal defects and not in themselves a sufficient basis for interfering with a sentence, but they do make the judge's reasoning process opaque and they tend to undermine its cogency. In this case we think these flaws do help explain the imposition of a sentence that in our judgment was to a degree disproportionate and excessive. We agree with Mr Lanlehin for the appellant that something went wrong. We doubt the judge failed to apply the discount for plea, but we do think he may have failed to appreciate the sheer scale of the notional sentence after a trial that was implicit in his conclusion, or that he may have taken a flawed approach to totality. In any event we consider it appropriate to reconsider the sentencing exercise as a whole.

25. The street robbery was correctly placed in Category B2 with a starting point of four years' custody and a range of three to six years. There was aggravation in the form of the previous convictions and the commission of the offence at night. There was an element of targeting of a lone female who was to a degree vulnerable as she was wearing earphones. All of that significantly outweighed the mitigation. It would have justified an uplift yielding a sentence after a trial of about five years but not more. What of the other counts on the indictment?

26. As for counts 2 and 3, the crimes against Miss Paoletti, the theft was a Category 3A offence with a starting point of one year and a range of 26 weeks to two years. The Recorder considered that taking this with the common assault the offending came close to robbery. This and the further aggravation of the previous convictions could just, as the Recorder evidently thought, have merited a sentence after a trial on count 2 of 18 months, but certainly not more, with a concurrent sentence of three months for count 3.

27. The offending against PC Akintan, counts 4 and 5, involved racially aggravated harassment in Category 3C. Applying the guideline that would ordinarily lead to a community order and the assault by beating would result in a fine. We accept the Recorder's conclusion that the combination of these offences coupled with the previous convictions took the case over the custody threshold. In our view the maximum sentences after a trial would have been one of three months on count 4 and six weeks concurrent on count 5.

28. Counts 6 and 9, the racially aggravated harassment offences, were treated by the Recorder as Category 1A offences with a range of a high community order to 26 weeks' imprisonment. We think they were at the lower end of that category and would not ordinarily have merited custody. The offending was against public sector workers and the

degree of racial abuse was high. Again, we accept that those factors coupled with the previous convictions took the case over the custody threshold. But even so, we do not think that more than six months after a trial could be justified in either case.

29. The assaults occasioning actual bodily harm on PCs Collins and Szmydynski, counts 7 and 8, were Category 2B offences with a starting point of 36 weeks and a range of up to 18 months. Although the same aggravating features were present we do not consider either offence was serious enough to merit a sentence after trial in excess of 12 months.

30. The aggregate of the sentences we have identified as the highest reasonable levels of sentence for the offending on each of counts 2 to 9 of the indictment is 57 months, or four years nine months. Adding this to the appropriate sentence on count 1 would bring us to just shy of 10 years. A one-third reduction across the board for the guilty pleas would result in a total sentence of six years three months. But this purely arithmetical approach would not be compatible with the principle of totality. This was a series of offences committed within a relatively few hours on the same day. Although there were multiple victims and a variety of crimes, the offending against the police officers was in substance of the same broad kind and should properly be considered collectively.

31. In our judgment, applying the principle of totality, the just and proportionate custodial sentence for all the offending in this case is one of five years' imprisonment. Accordingly, we quash the custodial portion of the sentence imposed below and substitute a term of five years. We do not alter the extended licence period which will remain at three years. In the result the sentence is now an extended determinate sentence of eight years, comprising a custodial portion of five years and an extended licence period of three years. The ordinary provisions for release, as explained buy the sentencing judge, continue to apply.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk