IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 178

No. 202103227 A2

Royal Courts of Justice

Wednesday, 2 February 2022

Before:

LORD JUSTICE EDIS
MR JUSTICE CHOUDHURY
HER HONOUR JUDGE DHIR QC

REGINA
V
DAVID JAMIE KEELING

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CACD.ACO@opus2.digital

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MS. M. HEELEY QC appeared on behalf of the Respondent.
MS. F. ROBERTSON appeared on behalf of HM Solicitor General.

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J U D G M E N T

LORD JUSTICE EDIS:

1 This is an application by Her Majesty's Solicitor General for leave to refer a sentence on the basis that it was unduly lenient and should be increased by application of the power given by s.36 of the Criminal Justice Act 1988.

2 Jamie Keeling is now 26 years old. On 15 September 2021 he pleaded guilty to an offence of robbery. At the same hearing, he was sentenced to two years' imprisonment suspended for 18 months with requirements to complete 120 hours of unpaid work, 10 rehabilitation activity requirement days, a three-month electronically monitored curfew from 8.00 p.m. to 6.00 a.m. and payment of £1,200 in compensation.

3 The judge who passed this sentence was HHJ Raynor sitting in the Crown Court at Leicester. The history of the case which led to that sentence being imposed is unfortunate and we shall have to set it out with some care. We shall start though by setting out the facts of the offence itself.

4 The offence occurred on 28 July 2020 when the victim, Mr Allison, was in his van which was parked overnight at the Charnwood Water Ski and Wakeboard Club at Thurmaston in Leicester. He is a keen fisherman and is in the habit of parking there overnight, sleeping in his van and fishing during the hours of darkness.

5 In July 2020 the Covid pandemic was affecting the whole country. It had caused him, according to his statement, for reasons which he does not explain in detail, to sleep in his van for a period of about four months prior to the incident. The van had been fitted with a bed so that he could do this. The place where he parked near the fishing lake is described as "secluded". It is reached by means of a private track. There is a “no entry” sign at the gate and the gate is locked, with access being obtained by the use of a code. Mr Allison says that he was not in the habit of locking his van when he slept in it, because he thought that those arrangements were themselves sufficient security.

6 On this night, he set up his rods and went to bed at about 1 o'clock in the morning. After about an hour, he was woken up by what he describes as screaming. The doors to the van were flung open by three men wearing face coverings, one of whom was Jamie Keeling. Mr Allison said that Mr Keeling had a claw hammer and was swinging it in the van, striking Mr Allison's legs and feet, and also striking the wooden kitchen worktop which is part of the van's interior. He was shouting "We want your money, Blad. Give me your money, Blad." Mr Allison grabbed his fishing knife and swung it towards the offender. He thought that he caused a cut. He describes it as "nicking" him in the arm with the knife. He was shouting, "I haven't got any money." The men shouted back at him. He then threw his wallet at them saying, "That's all I've got". One of them took the wallet, but shouted, "We don't want your wallet. We want your dough." They emptied the wallet, taking £30 in cash, some form of credit card, a debit card, a driving licence and some other documents and threw the wallet back at Mr Allison. They searched the van looking for money. Mr Allison offered them his fishing rods, but they said they wanted his money. While this was happening, the offender continued swinging the hammer, hitting things in the back of the van. They then backed off saying, "Don't follow us. Don't come out of your van," slammed the door, and went.

7 Mr Allison rang the manager of the park who lived in a caravan nearby and said what had happened. The manager said that when he went there he saw Mr Allison limping, hysterical and shaken up. When the police attended, they found a silver letter opener or dagger that was around 12 inches long on the floor of the van and which Mr Allison had seen in

the possession of one of the other men during the incident. Bloodstains were seen. On analysis subsequently that blood matched that of Jamie Keeling.

8 He was arrested and interviewed on 13 October 2020. He provided a prepared statement in which he said he had been at the fishing lake on the night of this offence. He said that he had been injured with a knife of some sort to his right-hand which had caused him to bleed. He denied having had a claw hammer or weapon of any kind. He did not accept that he was guilty of robbery and did not accept that money was taken or threats used. He then answered the questions that were put to him, saying "no comment". The second interview took place later that same month and, again, he answered the questions "no comment".

9 Mr Allison sustained swelling and bruising to his right forearm, a small cut to the back of his right hand and bruising to his legs. A pre-appeal report was prepared for the purpose of this hearing in the Court of Appeal. In that Mr Keeling gave an account which is different in some respects from the account given by Mr Allison. He did, however, say that he had received information from his associates before the offence was committed that there were drugs and money in the camper van. He therefore accepted that this offence was targeted in pursuit of drugs and money, which is an explanation of the account given by Mr Allison of the attackers' rejecting the small amount of money in his wallet and persisting in trying to find what they had really come for; namely, what they thought would be a considerably larger sum of money. He also denied having had the hammer.

10 Before us Ms Michelle Heeley QC, who has appeared for Mr Keeling on this reference but did not appear before the judge below, has accepted that this reference must proceed on what she describes as a "full facts basis". Like the judge, therefore, we will approach this case on the basis of the account given by Mr Allison. One of the consequences of this is that, although the offender has been candid in some respects, he continues to minimise his guilt.

11 The offender has one conviction for theft of a bicycle for which he was ordered to pay a small sum in compensation on 24 May 2017. He has no other convictions of any kind and was rightly dealt with by the judge on the basis that that previous conviction could not in any real way aggravate the offence for which he was sentenced.

The History of the Proceedings

12 The first appearance before the Magistrates' Court took place on 15 February 2021. The magistrates sent the matter for trial under s.51A of the Crime and Disorder Act 1988. No indication of plea was given. The Plea and Trial Preparation Hearing took place on 29 March 2021 in the Crown Court at Leicester and a not guilty plea was entered. The trial was adjourned to take place during the week beginning 27 September 2021. As will become apparent, it is necessary to evaluate for the purposes of this application whether or not there was any delay in these proceedings which might operate as a mitigating factor. The case proceeded from interview to trial date in less than a year and the time between the first appearance in the Magistrates' Court and the trial date was a little over seven months. That was achieved during the chaotic conditions created by the pandemic, but even in normal times could not be described as involving any form of delay which could properly operate as a mitigating factor.

13 He served a defence statement, which set out an account of events which he has now abandoned. By some means which is not entirely clear to us, the case then came to be listed on 15 September 2021 before Judge Raynor. It seems to have been listed as a pre-trial review, perhaps at the instance of the court. We have seen a transcript of what then transpired. The hearing began before defence counsel who then represented Mr Keeling

was present. She was attending by remote means. The prosecutor was present; it is not clear from the transcript whether remotely or in person, but it does not matter. When the case was called on, defence counsel was still in the process of logging on and contact was made with her and she then arrived. The judge began the hearing by addressing the prosecutor, saying:

> "Okay. The defendant is 26 years old, one previous for a theft, I think, theft of a cycle in 2017."

14 He then asked what the starting point was for the robbery, which at this stage was the subject of a forthcoming trial. The prosecutor submitted that it was a category 2A case for the purposes of the guideline and said that the starting point was five years and the range was four to eight. That is the starting point and range for the guideline in relation to less sophisticated commercial robberies, rather than the guideline which the Solicitor General now submits should have been applied; namely, the guideline for robbery in a dwelling. Having received that submission, from which he did not demur, the judge then invited defence counsel to "headline the mitigation".

15 He asked whether the offender was working. Defence counsel said that he was and that he had worked all his life. He was employed as a road sweeper. The judge then inquired about his means and said this:

> "Okay, Ms Hodgson. If he pleads now, suspended sentence, 24 months suspended for 18 months, 120 hours of unpaid work, potentially curfew, but I am not sure, curfew potentially to fit in with his work and to pay £1,200 compensation to Mr Allison. Do you understand?"

16 The defendant said that he did understand. To make that even more certain, the judge said this:

> "So, if you want to plead guilty to this now, the charge gets put back to you and you plead guilty to it. The charge is robbery of the man in the van on 28 July. At the moment you have pleaded not guilty and that is in for a trial on 27 September, but if you decide …….you could obviously get an immediate sentence of imprisonment if it went to a jury and they found you guilty. I am offering you what some might say is a deal today."

17 The defendant said "yes". The judge continued:

> "Which is if you pleaded guilty today, you get what is called a suspended sentence, so that is 24 months' imprisonment hanging over your head for the next 18 months with you doing 120 hours' community work, what is called unpaid work, a curfew, that means wearing a tag around your ankle."

18 The judge then asked what his working hours were and the defendant told him and he fixed the curfew which we have already referred to. The defendant confirmed that he understood all that and the judge continued:

> "Now, I am giving you time to speak with Ms Hodgson if you want to. Some people say 'I don't need to speak to the lawyer. I am happy with that and I will go ahead', but if you want time just let me know and you can have a word with Ms Hodgson."

19 The defendant said "Yes, can I have a word?" The judge said, "Yes, you have a word. You have got your mobile with you?" "It is outside, I am afraid," said the defendant. Arrangements were then made for him to get his mobile phone so that he could call

Ms Hodgson, who was, it will be recalled, attending remotely. The hearing then adjourned according to the transcript at 12.29 and resumed at 1.13 pm. There was therefore a gap of 43 minutes before it resumed.

20 When it resumed, Ms Hodgson asked for Mr Keeling to be re-arraigned, which took place. He pleaded guilty. Pausing in the narrative at that point, it will be noted that no attempt whatever was made by anyone to ensure that the proper procedure for requesting and giving indications of sentence was complied with. That procedure is established in the case of *R v. Goodyear* [2005] 2 Cr. App. R. 20, which is, as the court has previously recently had occasion to say, binding on judges of the Crown Court. A critical feature of it is that the initiative for seeking such an indication must come from the defendant. A judge may do no more than to remind defendants and their lawyers that they may seek such an indication.

21 There then followed a hearing at which the victim personal statement of the victim was read out. He described his terror at waking up to see three men wearing face coverings armed with a claw hammer and a large dagger in his van. He says that at the date of that statement his whole attitude had changed towards being alone and vulnerable. He said that he did not know why he had been targeted and that he still felt unsafe. Having read that out, the judge said:

> "Yes, thanks very much. I have indicated the sentence. If you want to headline any mitigation, Ms Hodgson."

22 Ms Hodgson then embarked upon her mitigation. She referred to his work record, and his mental health difficulties, which she described. She made some submissions about the guideline in brief terms and asked for credit for the guilty plea. The judge then moved directly to sentence. It is important to record what he said about the van. An issue arises before us as to whether the van was to be regarded as a dwelling for the purpose of selecting the appropriate guideline or not. The judge's finding on that question was as follows:

> "Now, what happened on that day is a gentlemen called Mark Allison, who had encountered difficulties during lockdown and I read into he was no longer living in a house or other dwelling. He was forced to start living in a camper van in an area where he had been actually living for four months at the time of this incident and he was also on occasion doing some night fishing at that location."

23 The judge then set out the facts and moved to turn to the guideline. He was referring only to the guideline which the prosecutor had earlier invited him to apply, that entitled “Robbery-street and less sophisticated commercial”.

24 The judge identified category 2A in that guideline as relevant, with a starting point of five years and a range of four to eight years. Had he referred to the guideline for robbery of a dwelling, he would have observed that the starting point for a category 2A offence is eight years with a range of six to 10 years. He moved on to say:

> "In this case these are guidelines, not tramlines, but I do, nevertheless, take a starting point of 42 months' imprisonment. There is then though I think significant mitigation available to the court and that is your very limited previous convictions, the fact that this was an offence which was totally out of character, that you are a working man and contributing to society. You have expressed remorse for what you did that night. There has also been an element of delay in this case. Now, on account of those matters, the notional sentence before giving you credit for plea goes down to 28 months' imprisonment. I then give you 15 per cent credit for your plea because your trial was in a couple of weeks' time, 15 per cent off 28 months is

> four months. I then look on the guideline on the imposition of community and custodial penalties ... "

and decided that the sentence could properly be suspended.

25 The first question for us to decide in assessing what the appropriate sentence ought to have been is to determine which robbery guideline was applicable in this case. Ms Heeley concedes that if the court concludes that the proper guideline was that which applies to robbery in a dwelling then the sentence imposed by the judge was unduly lenient. If, on the other hand, we conclude that the guideline for street and less sophisticated commercial robberies should have applied then she submits that the sentence imposed by the judge was lenient, but not unduly so. We shall return to the merits of those submissions having considered the guideline issue.

26 On behalf of the Solicitor General, Ms Robertson submits that for the purposes of this sentencing exercise Mr Allison's van should have been categorised as a dwelling. We were referred to the definition of dwelling, which is contained in s.9(4) of the Theft Act 1968, which says:

> "The term dwelling shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there, as well as at times when he is."

27 We were referred also to a decision of the House of Lords in *Uratemp Ventures Ltd v Collins* [2001] UKHL 43 at para.13 in which Lord Millett gives some guidance about the meaning of the word "dwelling". We have also considered a more recent decision of the Court of Appeal Criminal Division *R v Chipunza* [2021] EWCA Crim 597; [2021] 2 Cr App R 6. That decision considered the directions which ought to be given to a jury which is deciding whether a particular burglary amounts to in law a burglary of a dwelling or not. The facts of that case involved a hotel room which was entered by the defendant at a time when a guest had checked in and was staying in the hotel, but she was not there and her room was being cleaned while she was at work. The Court of Appeal in that case did not decide that that hotel room was not a dwelling. What the Court of Appeal decided in that case was that the judge should have directed the jury more fully in order to draw to their attention the factual circumstances which might have led them to conclude that it was not a dwelling. The appeal was therefore allowed because the judge had failed to do that. It is therefore of limited assistance to our task, which is to apply an appropriate definition for the purposes of the sentencing guidelines. The sentencing guidelines are designed to identify factual characteristics of an offence which are relevant to the assessment of its seriousness. Terms used in them should be interpreted with that purpose in mind.

28 In our judgment, for the purpose of construing the Theft Act 1968 it is necessary to define carefully the meaning of the word "dwelling", in circumstances where an offence is charged as involving a burglary of a dwelling. For the purposes of understanding the guideline, however, a rather more robust approach should be taken. The court's task is to identify the seriousness of the offence by considering the culpability involved and the harm which it caused or might foreseeably have caused. As far as Mr Allison is concerned, he was woken up while he was asleep in the bed where he slept every night for four months by three armed and masked men screaming at him, hitting him and demanding his money. For the purposes of assessing the seriousness of that offence, fine distinctions of law as to the meaning of the word dwelling are unhelpful. What happened to him was just as bad having happened in the back of the van which was his habitual resting place at night every night, as it would have been had he been at his home and had the same thing happened to him there. For that reason, when construing the guidelines, we have come to the conclusion, without hesitation, that the judge was wrong to apply the guideline for street and less sophisticated commercial

robberies and that the appropriate guideline was that for robbery in a dwelling. That is what actually happened here. It follows from Ms Heeley's entirely appropriate concession that this sentence was unduly lenient. That may be said to be the straightforward part of this reference.

29 The more difficult part is what should be the result in the circumstances which happened. It has been necessary for the court to consider the appropriate course of action in a not altogether dissimilar situation in the case of *R v AB* [2021] EWCA Crim 1959 and, [2021] EWCA Crim 2003. That was a reference of a sentence as unduly lenient following an inappropriate indication of sentence given by the sentencing judge. Those decisions were reached in this court on 21 December 2021: arrangements had actually been made to list this reference on the same day so that both cases could be considered by the same constitution. That did not happen, because the court was informed that Mr Keeling had tested positive for Covid and that he wished to be present at the hearing of the reference and his case was, therefore, taken out and has been relisted today.

30 This case has however previously been before this court. There was a hearing on 17 November 2021 when the matter was listed for determination. The court was troubled, unsurprisingly, by the conduct of the judge. The court was concerned that the offender Mr Keeling may have been put under inappropriate pressure to plead guilty and was resistant to the suggestion that it should simply proceed to increase the sentence, thereby reneging on a promise which had been made by a judge to Mr Keeling. We adjourned the case and granted a representation order for leading counsel so that Mr Keeling could have the benefit of expert advice as to what course he should take. It was open to him, had he chosen to do so, to seek leave to appeal against conviction on the basis of oppression, which is what occurred in the decisions announced on 21 December 2021, to which we have already referred.

31 After receiving advice, Mr Keeling has elected not to take that course for reasons which we have not been told, but which no doubt include the very strong case that he faces and the significant admissions that he has made at different stages of the proceedings. He has elected, in effect, to have his sentence determined on the basis of the full facts of the case and has chosen not to be put in the position that he would have been in had that hearing of 15 September 2021 never taken place. We make it clear that for the reasons explained in the conviction appeal judgment [2021] EWCA Crim 2003 in the *AB* case, had Mr Keeling sought to appeal against his conviction on the basis that it was unsafe because of the conduct of the judge, that appeal would have succeeded. That in truth was the remedy available to him to cure the adverse impact on him of the judge's conduct. We therefore put out of our mind that conduct when deciding whether we should quash the sentence imposed by the judge and substitute for it the appropriate sentence. We shall, as we shall explain shortly, take the history of the case into account more generally when deciding what exactly that sentence should be.

32 The starting point in the appropriate guideline for a category 2A offence is eight years. We consider that that sentence needs to be reduced for the mitigating factors that were identified by the judge; namely, Mr Keeling has no relevant previous convictions at all, he suffers from mental ill health, he has been diagnosed with a personality disorder, depression and anxiety, he has dyslexia and is said also to have been hospitalised on an occasion having taken an overdose. Some support for that is now available to the court in the pre-appeal report which we have, but which the judge did not have. Two factors identified by the judge as involving mitigation do not in our judgment apply at all. First, the judge was wrong to identify any remorse. We can see no sign of any remorse and have already referred to the account given by Mr Keeling to the author of the pre-appeal report. Secondly, we have dealt with the question of delay already in this judgment, see paragraph 12 above.

Nevertheless, those mitigating factors which do apply do in our judgment have traction and we consider that it would be appropriate to reduce the starting point of eight years to a sentence of seven years having regard to them.

33 We then come to what further discount should be made for the guilty plea. The judge allowed a discount of 15 per cent because the plea was entered very shortly before the trial date which was imminent. That decision at least cannot be impugned. It was an appropriate plea discount. When resentencing in these highly unusual but sadly not unique circumstances, we have to take into account at this stage in the judgment a number of factors. The first is that a plea of guilty was entered. That needs to be supplemented by the fact that that plea of guilty has been adhered to by Mr Keeling in circumstances where, as we have said, he would have been able to secure the quashing of his conviction. There is nothing in the relevant guideline about that, unsurprisingly.

34 Further, we have to factor in the fact that some parts of the judge's non-custodial sentence, the judge's sentence, which was not one of immediate imprisonment, have been complied with to the extent that is possible in pandemic conditions. Certainly the three-month curfew period has elapsed. The rehabilitation activity requirement days have not taken place, but the offender has engaged appropriately to some extent with the Probation Service in that regard. The unpaid work has not been done, but that is not his fault. He is not able to do it in pandemic conditions or at least was not at the time when it should have been starting. So there has been some limited restriction on his freedom. Finally, the sorry history of this case is bound in our judgment to leave him with something of a sense of unfairness. The judge told him what the sentence was going to be. He pleaded guilty. He received from the judge the sentence which he had been promised and he is now going to receive a very substantial sentence of imprisonment.

35 These factors, taken together, seem to us to require a more significant reduction in the sentence than the 15 per cent which the judge allowed for the plea alone. We emphasise this is not a double jeopardy discount neither is it any form of precedent for any more general proposition about how the guideline on reductions for guilty plea might in other circumstances be applied. It is an effort by the court to do justice, as best it can, in the circumstances with which it is confronted. We consider that taking all those matters into account, the appropriate final sentence which we should impose in respect of this offence of robbery is one of five years and three months. Therefore, we give leave to the Solicitor General. We quash the judge's sentences, with the exception of the victim surcharge, which must we think persist and we substitute in place of his order our sentence of five years and three months' imprisonment. Mr Keeling must surrender himself tomorrow at a police station which we shall identify.

CERTIFICATE

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