IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202103752/A1
NCN [2022] EWCA Crim 400

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 8 March 2022

LORD JUSTICE HOLROYDE

MR JUSTICE JULIAN KNOWLES

MR JUSTICE COTTER

REGINA
V
JACOB TALBOT-LUMMIS

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MS D ELLIS QC & MR N MURPY appeared on behalf of the Appellant.
MS R KARMY-JONES QC appeared on behalf of the Crown.

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J U D G M E N T

1. LORD JUSTICE HOLROYDE: This appellant, who was aged just 15 years 8 months at the time of his offending, was convicted of offences of attempted murder (count 1) and possessing a firearm with intent to endanger life (count 3). His victim (to whom we shall refer as "V") was another schoolboy of a similar age. The appellant was sentenced on count 1 to an extended determinate sentence of 29 years, pursuant to section 254 of the Sentencing Code, comprising a custodial term of 24 years and an extended licence period of 5 years. He appeals against his sentence by leave of the single judge.
2. We make clear at the outset that reporting restrictions apply to this case. The appellant may be named but three other young persons may not. They are the victim ("V"), a witness who was a schoolboy friend of the appellant (whom we shall call "W1") and a witness ("W2"), a young girl who witnessed the events. In the court below, HHJ Levett made an order pursuant to section 45A of the Youth Justice and Criminal Evidence Act 1999. That order continues in force. It relates to the three young persons we have just mentioned and the restrictions apply to the proceedings in this Court.
3. We therefore make clear that until further order (i) no matter relating to either V, W1 or W2 shall be included in any publication if it is likely to lead members of the public to identify any of them as being a person concerned in the proceedings and (ii) without prejudice to the generality of (i), the following matters shall not be included in any publication during the lifetime of V, W1 or W2 if their inclusion is likely to have the result mentioned in (i), namely his or her name, his or her address and any still or moving picture of him or her.
4. The appellant and V had known each other since they were at primary school. The appellant had reported to his mother and stepfather that he had over the years been repeatedly bullied by V. In the summer of 2020 he began to speak to his friend W1 about wanting to kill V. W1 regarded the plan, which included subsequent flight to Guatemala, as a fantasy on the appellant's part.
5. As a result of the Covid-19 pandemic, the boys had been absent for school for most of the time between March 2020 and the end of that summer term. The appellant's contact with V during that period had been very limited. They were due to return to school at the start of the autumn term on Monday 7 September.
6. It appears that the appellant's grandfather owned two shotguns, one being a double-barrelled shotgun which was larger and more powerful than the other. The appellant had on a number of occasions used the smaller shotgun to shoot at clay pigeons with his grandfather. He had also fired the larger shotgun on a few occasions.
7. On Sunday 6 September the appellant secretly moved the larger double-barrelled shotgun to his grandfather's garage, where he hid it with two boxes of cartridges. He then spent some time with W1, and told him that he planned to shoot V and then flee to Guatemala.
8. Very early on the Monday morning the appellant took the keys to his father's car. It appears that, despite his young age, he had unlawfully driven a car on a number of previous occasions. He went to his grandfather's house, where he collected the shotgun and cartridges from the garage. He then drove to a local forest, where he discharged the shotgun. He sent a message to W1 saying: "I am going to do it".
9. The appellant then drove to the street where V lived and parked near V's home. He waited there for more than an hour. He sent V a text message asking to meet him at 8.40 am. Around that time, V left his house ready to go to school. As he approached the car the appellant shot him in the face at very close range. The appellant told a passing

schoolgirl (W2) to run. He then drove away, apparently believing that he had killed V. He discarded his mobile phone. He was intercepted by Police outside his grandfather's address. When arrested he said: "I've done what I wanted to do, as scummy as it is. I will 100% co-operate with you".

10. V suffered severe, life-threatening injuries. His life was fortunately saved by immediate and skilled medical intervention. He remained in hospital for a very long period and is left with permanent disability. His education has been adversely affected and his career plans abruptly ended. He is no longer able to play musical instruments, which were a very important part of his life. Although it is unnecessary for present purposes to go into further detail, there can be no doubting the seriousness of the injuries and their enduring consequences.
11. The indictment against the appellant included a charge of wounding with intent (count 2), which was an alternative to count 1; and a charge of possessing a firearm with intent to cause fear of violence (count 4), which was an alternative to count 3. Well before the trial date, the appellant pleaded guilty to count 4. The prosecution did not accept that plea and the trial proceeded. The appellant's defence was that he had not intended to kill or injure V but had intended to kidnap him, take him to the forest and fire shots close to him, so as to frighten him. The jury returned the guilty verdicts we have mentioned.
12. At the sentencing hearing on 1 November 2021, the judge was assisted by a substantial body of material. Victim personal statements from V and his family made clear that, in addition to the grave injury which V had suffered, his whole family had been severely affected by the offences, which were of course committed very close to the family home. Statements by the headteacher of the boy's school and by a senior police officer described the profound impact on the school and the wider community of this shocking incident. In the immediate aftermath of the shooting, when inevitably information was emerging piecemeal via social media, parents understandably feared for the safety of their children. Thereafter, staff and pupils were significantly affected by the events.
13. Suffolk County Council's Youth Justice Service had prepared three reports addressing the issue of dangerousness. The first described the appellant as being remorseful and having insight into the harm he had caused and concluded that he presented only a low risk of causing serious harm by further offending. This report was however open to criticism because it did not take into account the jury's rejection of the appellant's claimed intention to do no more than frighten V. The second report, prepared by a different author, assessed a medium risk that the appellant would cause serious harm by committing further offences but concluded that he was not "dangerous" as that term is defined for sentencing purposes. That report was open to criticism on the ground that the author had not spoken to the appellant at any stage. The final report, prepared by a third author, was based on, amongst other things, interviews with the appellant. The author reported the appellant as saying that he had become very anxious about the prospect of returning to school and facing further bullying. The author noted that the appellant had failed to share the full extent of that anxiety with his family, but pointed out that he was only 15. The report concluded that the appellant was unlikely to commit further offences of a serious nature.
14. The judge also had reports about the appellant from Dr Frank Farnham, consultant forensic psychiatric, and Dr Michael Watts, consultant forensic neuropsychologist. Dr Farnham referred to the appellant's history of significant childhood emotional

difficulties, his father having been in prison for a number of years and his mother suffering from problems linked to depression and alcohol. He diagnosed the appellant as suffering, at the time of the offences and in the preceding months, from a depressive disorder of moderate severity. Dr Watts similarly spoke of the appellant's formative years having been marked by significant dysfunction involving an emotionally impoverished and unstable home environment.

15. Although those reports were of course prepared after the appellant had been convicted, it should be noted that there was also evidence from the appellant's general practitioner that the appellant had presented, many months before the shooting, with complaints of anxiety and stress.
16. The judge also had letters from the appellant's father and step-grandfather, making clear that the appellant's offending was out of character. To similar effect, evidence in the case appears to have shown the appellant to have been appropriately behaved at school before these dreadful crimes.
17. In his sentencing remarks the judge referred to the seriousness of gun crime and the need for deterrence. He also referred to the effects of violent video games of the kind which the appellant had enjoyed. He rightly gave weight to the victim personal statements. He described the offences as having been pre-planned and premeditated. He accepted that there had been a complicated relationship between the appellant and V, but did not accept that there had been bullying on the scale suggested. He noted that the appellant appeared to be fascinated by guns and to be entrenched in violent video games.
18. The judge took into account the views expressed in the reports of the Youth Justice Service and the prospect that the appellant would mature. He emphasised however that, unlike the authors of the various reports, he had heard all the evidence in the case. He concluded that the appellant met the criterion of dangerousness, in particular taking into account that he had intended to kill; he had done nothing to assist V after shooting him; he had shown no mercy or restraint in the shooting; and he had in effect ambushed V, deliberately firing at him from very close range.
19. The judge referred to the Sentencing Council's definitive guideline on overarching principles in sentencing children and young persons, and had regard to the guideline for offences of attempted murder committed by adults. He identified the offence charged in count 1 as falling into category 1A of the latter guideline, with a starting point of 35 years' custody and a range from 30 to 40 years. That offence was aggravated by the count 3 offence and by the fact that the shooting occurred in a public place, where it was likely to be and was in fact witnessed by one or more children. He referred to the fact that the appellant had no previous convictions and to other points of mitigation advanced on his behalf. He concluded that the appropriate sentences for an adult offender would be 36 years' imprisonment on count 1 and 18 years on count 3. To take account of the appellant's age he reduced those sentences to 24 years and 12 years respectively. He held that an extended determinate sentence was necessary to address the risk which the appellant posed.
20. On count 1 the judge imposed, as we have said, an extended determinate sentence of 29 years, comprising a custodial term of 24 years and an extended licence period of 5 years. As to count 3, he said the sentence would be one of "12 years' detention which will be concurrent". A question has been raised as to whether the judge intended to pass a concurrent extended sentence or a concurrent standard determinate sentence. We are

satisfied that the judge intended to, and did, impose a concurrent standard determinate sentence of 12 years' detention on count 3.

21. As to count 4, to which it will be recalled the appellant had pleaded guilty, the judge said there would be no separate penalty.
22. In her grounds of appeal against the sentence on count 1, Ms Ellis QC, who represents the appellant in this Court as she did below, challenges the length of the notional adult sentence, the extent to which the judge reduced that sentence because of the appellant's youth and the finding of dangerousness. As to the length of the notional adult sentence, she submits in summary that the judge fell into the error of double counting when he moved upwards from the guideline starting point of 35 years; placed too great an emphasis on reducing gun crime by deterrence, a purpose of sentencing which would be consistent with statute when dealing with an adult but was of less significance when sentencing a child; and failed to give sufficient weight to the mitigating factors. Those mitigating factors, in summary, were these. First, the appellant's young age and lack of maturity at the time of the offences. Secondly, his remorse and regret, which had been assessed as genuine by the authors of the various reports. Thirdly, the fact that he had no previous convictions and had, as we have said, attracted favourable comments from a number of sources. Fourthly, the fact that he had been subjected to bullying by V over many years, a fact which Ms Ellis submitted was strongly confirmed by the independent account given to the police by W1 when first interviewed. Fifthly, the dysfunctional upbringing which the appellant had experienced and which had caused him, for example, to be embarrassed about bringing his mother into school, and in that way had inhibited his ability to disclose his anxieties and concerns to adults. Sixthly, his co-operative behaviour when detained by the police. And lastly, the mental disorder which was the subject of unchallenged medical evidence and which had been diagnosed as a problem both before and at the time of the offences.
23. As to the reduction made on grounds of youth, Ms Ellis draws attention to the overarching principles in the Children guideline, in particular paragraph 1.10, emphasising the court's duty to have regard to the principal aim of the youth justice system, which is to prevent offending by young persons, and to have regard to the welfare of the child. She submits that in applying paragraph 6.46 of that Guideline, which gives a rough guide to the application of an adult guideline where that is appropriate in the case of a young offender, the judge wrongly treated the appellant as being more mature than his peers, when there was no evidential basis for doing so. As to dangerousness, Ms Ellis accepts that the judge was not bound to adopt the views expressed in the Youth Justice Service reports, but points out that the appellant had no history of violence or offending. She submits that the judge had no reason to conclude that he was dangerous. Ms Ellis also challenges the sentence of no separate penalty on count 4, which of course does not affect the appellant's overall position but which was, she submits, unlawful.
24. We have also been assisted by submissions today by Ms Karmy-Jones QC, representing the respondent as she did at trial. She accepts that the sentence on count 4 was unlawful. With that exception, she submits that the judge correctly approached the difficult question of sentencing the appellant for his grave offences. She adopts a neutral position as to whether this court should reduce the length of the sentences imposed.
25. We are very grateful to both counsel for their detailed written and oral submissions.

26. It is convenient first to address the issue relating to the judge's pronouncement of no separate penalty on count 4. With respect to him, we are satisfied that the judge fell into error in taking that course. In R v Cole (1965) 49 Cr App R 199 and much more recently in R v Ismail [2019] EWCA Crim 290, this court has explained that, where an offender pleads guilty to the lesser of two alternative charges, but is then convicted of the more serious offence, the effect of imposing no separate penalty for the lesser crime is that the offender then wrongly stands convicted of both offences despite the fact that they are alternatives. He should in such circumstances be convicted and sentenced only for the more serious offence. The appropriate course, therefore, is to order that the lesser offence should lie on the file and not proceed to sentence on that charge. An alternative course which would have been open to the judge would have been to direct that the guilty plea to the lesser evidence offence be vacated and that charge left to lie on the file.
27. We turn to the submissions relating to the sentence on count 1. It is only rarely that a court has to sentence such a young offender of previous good character for offending of such gravity. The judge was therefore faced with a very difficult sentencing process. We acknowledge the obvious care which he took in seeking to address the many points which fell to be considered.
28. As Ms Ellis has submitted, every court must when sentencing a child or young person have regard to the principal aim of the youth justice system and the welfare of the child offender (see section 37 of the Crime and Disorder Act 1988 and section 44 of the Children and Young Persons Act 1933). The Children guideline, at paragraph 1.2, indicates that while the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and focused on the child as opposed to offence focused. At paragraph 1.5 it emphasises the importance of bearing in mind any factors such as immaturity which may diminish the child's culpability. In the present case, the evidence as to the appellant's emotional difficulties and depressive disorder were relevant in that regard.
29. The guideline goes on, at paragraph 4.5, to list some factors which the court will wish to consider in assessing culpability. The list includes the extent to which the offence was planned, the level of force that was used and the awareness of the child offender of his actions and their possible consequences.
30. In the present case, the extent to which the offence was planned was, in our view, exceptional for such a young offender. Where an offence committed by a child is aggravated by planning and premeditation, it will often be the case that the significance of that aggravating feature is reduced by the fact that the planning concerned was that of a young, immature person with limited appreciation of the consequence of his acts. In this case, however, the appellant had clearly formed a very clear plan to murder V and had gone to considerable steps to put himself in a position to do so. The secretive laying up of the shotgun and cartridges for later collection, and the long wait for his victim, show a worrying determination to carry out the plan. So too do his comments to W1 on the previous evening and his admission to the police when detained.
31. Given the unusual and very grave nature of the case, the judge was clearly entitled to have regard to the sentence which would be appropriate for a mature adult and then reflect the appellant's youth by making an appropriate reduction as indicated in paragraph 6.46 of the Children guideline. That paragraph says:

> "When considering the relevant adult guideline, the court **may** feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence **the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age.**"

32. The offence charged in count 1 fell into category 1A of the relevant adult guideline because it involved the use of a firearm. The judge rightly took into account that the offence was also made more serious by the element of planning, which is a high culpability factor in the guideline. Given that the judge was imposing on count 1 a sentence which took into account the conviction on count 3, he was right to reflect both those features. He was also correct to regard as a significant aggravating factor the location of the offence in a street near a school where it was likely to be witnessed by children.
33. The youth of the appellant was largely to be reflected in the reduction from the adult sentence to which the Children guideline refers.
34. As to other mitigating factors however, we see force in the submissions made by Ms Ellis. We recognise that the judge, who had the advantage of hearing all the evidence, did not accept that the level of bullying by V had been as great as the appellant contended. Although that was contrary to the evidence not only of the appellant himself but also of W1, the judge was in the best position to assess the evidence, and there is no basis on which we could go behind his finding. What, with respect, he did not address however, was the full effect of the bullying, whatever its level may have been, on the appellant. In that regard, the evidence that the appellant had sought medical advice months before the offending, the evidence of W1 as to the appellant's frequent displays of anxiety and the expert evidence prepared for sentencing purposes pointed to the appellant suffering from a depressive disorder of moderate severity at the time of the offending. With respect to the judge, that important feature of the case was not reflected in his sentencing remarks. Having balanced aggravating and mitigating factors, the judge concluded that there should be a modest upwards adjustment of the starting point for an adult sentence from 35 to 36 years. In our judgment, that failed sufficiently to reflect features of the mitigation to which the judge did not refer. We take the view that, on a fair balancing of aggravating and mitigating factors, there should have been a modest downward movement from the starting point to a notional adult sentence of 34 years.
35. We then see considerable force in Ms Ellis's submission that the judge failed to make a sufficient reduction from that notional adult sentence to reflect the young age of the offender. There was, in our view, no basis for treating the appellant as being more mature than others of his age. Ms Karmy-Jones has helpfully confirmed that it was no part of the respondent's case to suggest that the appellant was. We therefore agree with Ms Ellis's submission that there was nothing to suggest that the appellant's emotional and developmental age was any greater than that of other boys with a chronological age of 15 years 8 months at the time of offending.

36. The Children guideline is of course only giving a "rough guide" in paragraph 6.46, but although the judge referred to that phrase in his sentencing remarks, he gave no specific explanation for reducing the adult sentence only to the extent which the guideline suggests would be appropriate to a young offender nearing the age of adulthood. Whilst of course the judge was not required to engage in an arithmetical exercise, he should, in our view, have reflected the appellant's young age and consequent immaturity by imposing a sentence closer to one-half, rather than two-thirds, of the notional adult sentence.
37. For those reasons we allow the appeal to this extent. We quash the sentences imposed below. We substitute for them the following: on count 1, an extended determinate sentence of 23 years, comprising a custodial term of 18 years and an extended licence period of 5 years; on count 3, a concurrent standard determinate sentence of 9 years' detention. On count 4, we direct that the count should lie on file and that the court do not proceed to sentence.
38. LORD JUSTICE HOLROYDE: Jacob, have you been able to hear that? Yes, thank you. Have you been able to understand it? Thank you. No doubt Ms Ellis or Mr Murphy will be speaking to you at some stage after this hearing.

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