IN THE COURT OF APPEAL
CRIMINAL DIVISION
Case No: 2023/01163/A5
[2023] EWCA Crim 1063

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 8th September 2023

B e f o r e:

LORD JUSTICE FULFORD
(Sitting in Retirement)

MRS JUSTICE STEYN DBE

MR JUSTICE FORDHAM

R E X

- v -

KHLOE SIMMONDS

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Mr R Amarasinha appeared on behalf of the Appellant

J U D G M E N T

Friday 8th September 2023

LORD JUSTICE FULFORD: I shall ask Mrs Justice Steyn to give the judgment of the court.

MRS JUSTICE STEYN:

Introduction

1. On 9th May 2022, in the Crown Court at Isleworth, the appellant pleaded guilty to one offence of theft, contrary to section 1(1) of the Theft Act 1968 (count 1), and to one offence of robbery, contrary to section 8(1) of the Theft Act 1968 (count 2). Ten months later, on 9th March 2003, she was sentenced to six years and nine months' imprisonment for the robbery. No separate penalty was imposed for the theft.

2. The appellant now appeals against sentence with leave granted by the single judge.

The Facts

3. The offences were committed in the early hours of the morning of 26th February 2020. The appellant was then 20 years old. She met the victim of the offences ("V") in January 2020, about six weeks or so before the offences. V was a school friend of Tyler Hicks, who was then the appellant's boyfriend and became her co-defendant on the count of robbery.

4. The appellant was homeless. Out of kindness V, who understood what it was like to be homeless having been in that position himself, allowed the appellant to sleep at his flat for about a month. He gave her a key. There came a point when he asked the appellant to leave. She and Mr Hicks often ignored V's wishes and continued to go round to his flat. But even then, V allowed the appellant to sleep in a tent in his shed. From time to

time the appellant would go into V's flat to spend time with him to "chill" (as V put it).

5. In the early hours of 26th February 2020 the appellant texted angry messages to V accusing him of lying to her when he had said that he was going to sleep. She and Mr Hicks had wanted to spend time with him in his flat, and he plainly did not want them there that evening. The appellant sent V a text suggesting that he had caused the loss of her unborn child. V was at a loss to understand what she was talking about, not least given that the appellant is a pre-operative transwoman. The exchange ended with V saying that he wanted to put their friendship "on hold".

6. At 4 am V was still awake and playing on his games console. The appellant and Mr Hicks went to V's flat. Through his living room window the appellant told V that they wanted to sort out their friendship. That was not true, but she said it to make him open the door and talk to Mr Hicks. While V was doing so, the appellant climbed in through the open window and stole V's mobile phone, before leaving again through the window. That was the conduct reflected in the theft count.

7. Shortly afterwards, the appellant and Mr Hicks returned to the flat. Using the key that V had given to the appellant they let themselves in. The appellant produced and held a large knife, while Mr Hicks demanded money. V said that he had none. They took an Xbox and searched for money while the appellant was still holding the knife, which she pointed at V from time to time. She told V that she was "not afraid to use this" (referring to the knife). The couple threatened V that if he reported them, they would come back. They told him that he would be accused of raping the appellant. They left the flat and then returned after a short time to demand through the open window that V provide the password to his phone. He said that he did not know it. They threatened to "brick" his window before leaving.

8. After the incident V went to stay with relatives. For nearly a week he was too frightened to return to his flat. When he did return, accompanied by his mother, he found that the appellant had posted his smashed mobile phone through his letter box. V subsequently went to hospital to have his physical and mental health checked. He described himself as having a serious medical condition with his heart, giving rise to a "great possibility" that he could suffer a heart attack if he was under too much stress. He said that the incident had caused him a great deal of stress and anxiety, and that he had been scared for his life.

The Reports

9. A report was obtained from Dr Lawrence Yong, a Principal Clinical Psychologist, prior to sentencing and put before the Recorder by the defence. Dr Yong's assessment, which was cut short as the appellant, who has autism and Attention Deficit Hyperactivity Disorder ("ADHD") diagnoses, said after two hours that she did not wish to continue. Consequently, there were a number of matters on which he was not able to give an opinion. Nevertheless, Dr Yong advised that the appellant's reports of excessive alcohol use, which were corroborated by her grandmother and medical records going back to August 2020, met the criteria for a Disorder due to use of alcohol, unspecified, according to the International Classification of Diseases 11th Revision diagnostic manual.

10. At paragraph 7.2.2 of his report, Dr Yong stated:

> "… [The appellant] reported that she had drunk 'a lot of alcohol' at the time to the extent of blacking out and not remembering the offences. Assuming this is true, her thinking and behaviour would likely to have been far more impacted by her intoxication than having diagnoses of ADHD and autism."

11. At paragraph 7.1.11 Dr Yong advised:

> "Based on the available information, it is my opinion that [the appellant] at the very least has struggled with significant emotional distress that co-occurs with excessive alcohol use, which can lead to suicidal thoughts and actual self-harm. It is unclear to what level of severity she currently experiences these, as her self-report was contradictory. It is my opinion that [the appellant's] reticence to engage in this assessment was accompanied by her minimising her accounts of her past and current difficulties. This may be due to her not feeling safe enough in relationships to others to be vulnerable about her difficulties and trust that she will be helped by them. This appears to be a longstanding tendency rather than specific to this particular assessment. Her medical records indicate that she has alerted others to her need for help but subsequently departed before receiving it, such as at the Northwick Park Hospital Emergency Department on 12th October 2020 and Urgent Care Centre on 11th December 2020. Unfortunately [the appellant] struggles with feeling trusting enough of others to effectively receive their care can lead to a cycle where her sense that others do not, cannot or will not help her are reinforced, leaving her less likely to be helped in future. There is thus a risk that her evasiveness and minimisation of the specific difficulties she faces leads others to underestimate her struggles. …"

12. Dr Yong expressed the view that if, being a transwoman, she receives a custodial sentence in a male prison, "there could be a heightened risk of [the appellant's] mental health deteriorating". In addition, he observed that, given her history of self-harm and suicidal ideation in the recent past, she is at increased risk of these in a male or female prison. She "appears to have few adaptive ways of coping with her mental health".

13. The Recorder also had the benefit of a pre-sentence report. Its author noted that the appellant agreed with the facts presented by the prosecution, but that she did not remember much of what had happened on the day of the robbery as she had been intoxicated through alcohol misuse. The author observed:

> "… [The appellant] Ms Simmonds takes very little accountability and places the blame solely at the feet of Mr Hicks, claiming she would not have committed the offences had it not been for his encouragement. She expressed regret but failed to display remorse; this may be owing to her diagnosis of autism and her ability to express and demonstrate emotions appropriately."

14. The author of the pre-sentence report notes that the appellant has diagnoses of autism and ADHD and that she had attended a school for those who suffered with autism which was able to accommodate her needs. The author stated that "[the appellant] presents as someone who is extremely vulnerable…" Her offending behaviour was described as shedding light on "her immaturity and lack of consequential thinking".

The Sentence

15. The Recorder observed that although this was a very sad case involving three young people who were all vulnerable by virtue of their mental health difficulties, a knifepoint robbery in a person's home has to be met by a prison sentence measured in years.

16. He treated the robbery count as the lead offence. He observed that the theft was part of the picture which aggravated the robbery, and so he would give a "small uplift" for the theft. The Recorder applied the Sentencing Council's Robbery (Dwelling) Guideline. He assessed that the offence fell within category 2A, as submitted by the defence. The appellant's culpability was high (A), because she had produced a bladed article to threaten violence, and, as a trusted keyholder, she had abused her position. With respect to harm, the Recorder observed that very high value goods were not targeted or obtained. The cost of replacing the Xbox was £110. The flat was not ransacked or soiled. There has been real psychological harm to V, who had a medical condition as a result of which he had feared that the stress might cause him to have a heart attack. Although it was not "serious psychological harm", such as to put the offence in harm category 1, the psychological harm was such that the offence fell within harm category 2.

17. The Recorder observed that the starting point for a category 2A offence is eight years' custody, with a range of six to ten years. The Recorder assessed that the provisional

sentence, prior to adjustment for aggravating and mitigating factors and credit, should be nine years' custody. He said that he would adopt a provisional sentence above the starting point to reflect the harm that was caused to V.

18. The aggravating factors warranting an uplift from that provisional sentence were: the theft; the threats to discourage V from reporting the incident (which were particularly unpleasant as they included a threat to accuse V of rape); the fact that the incident was prolonged and took place in the very early hours of the morning; and the fact that V felt compelled to leave his home. The Recorder recognised that the appellant's intoxication should not be treated as an aggravating factor, given her disorder due to the use of alcohol.

19. The mitigating factors taken into account by the Recorder were: first, the appellant's age (we note that he said that she was 21 at the time of the offences, whereas she was in fact 20 years and two months), but he took into account that she was a young person and bore in mind the guidance of this court that turning the age of 18 should not be treated as a "cliff edge" when it comes to sentencing; secondly, the appellant's lack of any previous convictions; thirdly, her remorse (although he observed that she had engaged in some minimisation of her wrongdoing); fourthly, the delay; and finally, he had regard to her vulnerability, bearing in mind her mental health diagnoses of autism and ADHD, her alcohol disorder, and the fact that imprisonment would be more difficult for her as a transwoman. The Recorder had regard to the guideline on sentencing offenders with mental disorders, developmental disorders or neurological impairments.

20. Balancing the aggravating and mitigating factors that he identified, and carefully noting factors that should not be double counted or which he did not accept applied, the

Recorder assessed that the provisional sentence of nine years' custody should be reduced by one year. Accordingly, the sentence that would have been imposed following a trial was eight years' imprisonment.

21. The Recorder then gave the appellant 15 per cent credit for her guilty pleas, with the result that (having assessed that the appellant did not qualify as dangerous), he imposed a sentence of six years and nine months' imprisonment.

The Grounds of Appeal

22. Mr Amarasinha, who appears on behalf of the appellant and to whom we are grateful for his excellent written submissions, contends that the sentence of six years and nine months' imprisonment for the robbery was manifestly excessive as insufficient reduction was applied for the mitigating factors, and insufficient credit was given for the guilty pleas which were indicated well in advance of trial.

Decision

23. The Recorder's observation that although this was a very sad case, a knifepoint robbery in a person's home must be met with a prison sentence measured in years was clearly right. Nevertheless, although we recognise the care with which the Recorder applied the relevant guidelines and analysed the aggravating and mitigating factors, we are of the clear view that he erred in imposing a sentence of six years and nine months' imprisonment.

24. First, the uplift from eight to nine years, to reflect the psychological harm to the victim, was unjustified. The real psychological harm that he found was the only reason that the harm was not within category 3. The harm described by the victim justified the conclusion that this was a harm category 2 case. An assessment of culpability and harm

did not warrant elevating the provisional sentence within the range above the starting point of eight years.

25. Secondly, in our view, once the aggravating and mitigating factors were taken into account, the result should have been a very substantial downward shift from the provisional sentence of eight years. We recognise that the aggravating factors of the theft of the mobile phone, the threats, the prolonged nature and timing of the incident, and the fact that V felt compelled to leave his home had to be reflected by elevating the provisional sentence. But a much greater downward shift was required to reflect the very strong mitigation, namely:

    a. **The appellant's age and lack of maturity**. As we have said, she was aged 20 at the time of the offence. The author of the pre-sentence report specifically noted her immaturity. In our view, it is apparent that she lacked the maturity of an average 20 year old at the time of the commission of the offences.
    b. **The appellant's lack of any previous convictions**. Although the Recorder took this into account, it is important to note also the lack of any re-offending on the part of the appellant in the three years since the offences were committed, particularly given her age and lack of maturity at the time of the offences. The fact that she has not been in trouble since is important mitigation. While the Recorder noted this fact in the context of his finding that she was not dangerous, he does not appear to have borne it in mind as a mitigating factor.
    c. **The appellant's remorse**. We note that, although the Recorder referred to some minimisation of wrongdoing, only the co-defendant put forward a basis of plea. The appellant indicated her willingness to plead guilty "accepting full prosecution facts" three months before the trial. In relation to her expression of

remorse, we also bear in mind the impact of her autism, as identified in the pre-sentence report.

d. **Delay**. The offences were committed on 26th February 2020, and the appellant's first appearance in the Magistrates' court was on 4th September 2020. She was arraigned and pleaded not guilty on 30th October 2020. On 10th February 2022, the appellant sought a mention for plea, having indicated her willingness to plead guilty to counts 1 and 2. She then did so at the first opportunity on 9th May 2022. At that stage her co-defendant maintained his not guilty plea and the case could not proceed to trial due to lack of availability of counsel. In the event, the appellant was sentenced on 9th March 2023 (two and a half years after her first appearance in the Magistrates' Court).

e. **The appellant's vulnerability**. Imprisonment is likely to have a particularly severe impact on the appellant due to her "extreme vulnerability". There are a number of elements to her vulnerability. She suffers from autism (which was of sufficient severity for her to have been placed in a special school) and ADHD. There are evident mental health concerns. She has an alcohol misuse disorder and she is a transwoman.

26. In *R v Harris (Frederick William)* (No 2000/01540/W3) the court reduced the sentence of a transwoman who was described as being "in the process of a sex change", which was said to have "gone a long way to completion". The court recognised that prison presented "a greater ordeal" to the offender than it would "to somebody who was not in the middle of the sex change procedure", and reduced the sentence from three years to two years' imprisonment. In this case the appellant told Dr Yong in January 2023 that she had identified as female for the past "couple of years". Mr Amarasinha has drawn our attention to the guidance issued by the Ministry of Justice in relation to transgender prisoners (Guidance Overview, the Care and Management of Individuals who are

Transgender), which explains how decisions are made regarding placement of transgender prisoners in the Prison Estate. Although the facts of this case are not identical to those in *R v Harris*, we have no doubt that being a transwoman in a male prison (at least initially, and very probably throughout her sentence) will make the experience of imprisonment more arduous for the appellant.

27. The downward adjustment of one year (from nine years) made by the Recorder, even bearing in mind all the aggravating factors, was substantially too little, given the strength of the mitigation, and resulted in a manifestly excessive sentence. In our view, adjusting for the aggravating and mitigating factors to which we have referred, it is appropriate to reduce the provisional sentence of eight years by two and a half years, to five years and six months, prior to giving credit for the appellant's guilty plea.

28. The Recorder gave 15 per cent credit. The appellant first appeared before the court on 4th September 2020, and she pleaded not guilty on 30th October 2020. She indicated her willingness to plead guilty over 15 months later, which was three months before her trial was set to begin. A discount of 15 per cent was in line with the Sentencing Council's Guideline (Reduction in Sentence for a Guilty Plea, first hearing on or after 1st June 2017), indicating that after the first stage of proceedings, credit should decrease "from one quarter to a maximum of one tenth on the first day of trial, having regard to the time when the guilty plea is first indicated to the court relative to the progress of the case and the trial date".

29. Taking the term of five years and six months, and applying a 15 per cent discount gives a term of four years and eight months' imprisonment. In our view, in the exceptional circumstances of this case, that is the appropriate sentence.

30. Accordingly, we allow the appeal. We quash the sentence on count 2 (robbery) and substitute a sentence of four years and eight months' imprisonment. The order of no separate penalty on count 1 (theft) and the other orders imposed by the Recorder are undisturbed.
