IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 339

No. 202102259 B5
202103045 B5
202103124 B5
202103511 B5

Royal Courts of Justice

Tuesday, 24 January 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE SWEETING
HER HONOUR JUDGE NORTON

REX
V
ADEL YUSSUF
SAMUEL OLUBODE
GEORGE ORJI

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MS S A MEEK appeared on behalf of the Appellants.

J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

1 This is an appeal against conviction by Adel Yussuf together with an appeal against sentence by George Orji. We are also considering renewed applications to appeal against sentence by Yussuf and Samuel Olubode, their applications for leave to appeal having been refused by the single judge.

2 On 24 November 2020, in the Crown Court at Harrow, Orji pleaded guilty to conspiracy to commit robbery (Count 1) and conspiracy to possess an imitation firearm with intent to commit an indictable offence (Count 2). The counts were linked. There were four other defendants on the indictment, including Mr Yussuf and Mr Olubode. They all pleaded not guilty.

3 The trial took place in June 2021. On 21 June, Yussuf and Olubode, and the other defendants, were convicted of Counts 1 and 2. One of the other defendants was a man named Mensah.

4 On 3 September 2021, Yussuf and Olubode were sentenced to 13 years' imprisonment for the conspiracy to rob and a concurrent sentence of four years' imprisonment for conspiracy to possess an imitation firearm. In Orji's case, an extended determinate sentence was imposed; the custodial term was 10 years and six months and the extension period was five years. That sentence, totalling 15 years and six months, was imposed on Count 1. A concurrent sentence of five years' imprisonment was imposed on Count 2. The other male defendant, Mensah, was sentenced to 12 years' imprisonment.

5 The conspiracies related to a robbery which occurred in the early hours of 12 February 2020. A man named Mohsen Al-Salman arrived at his home in Oxhey, North London in his Range Rover. He got out of his car and approached his front door. As he did so, he was confronted by four men wearing balaclavas. One man was brandishing what was treated throughout as an imitation firearm. We say "treated throughout" because the weapon was never recovered so it could only be indicted as an imitation weapon. It looked very real to Mr Al-Salman. The men demanded Al-Salman's watch before they forced entry into his home. Al-Salman was forced to wake his brother, a man called Hussain Ali, who was asleep upstairs. The robbers went through the house. They took another watch, cash, jewellery, designer clothing, designer bags and mobile phones. They left in the car driven by a fifth person.

6 The prosecution case was that Yussuf, Olubode, Orji and Mensah, and another man who was sentenced much later, were present at the scene and directly participating in the robbery. In Yussuf's case, the allegation was he was one of the robbers. He was not the getaway driver. In his basis of plea, Orji accepted that he was the man with the firearm. It is apparent from what we have already described that Al-Salman and Hussain were unable to say anything specific about the robbers, other than they were black men wearing balaclavas. The case against all of the defendants at trial was circumstantial.

7 First, the guilty plea of Orji was used to established that the relevant conspiracies existed.

8 Second, there was evidence relating to the purchase of a tracker device. That tracker device, after the event, was found by Al-Salman on his car. He handed it over to the police. It had clearly been used by the robbers to tract his movements on the night of the robbery. The evidence showed that it was purchased by Orji on 5 February 2020, namely a few days before the robbery.

9 Third, there was evidence related to the placing of the tracker on Al-Salman's car. Cell site evidence, ANPR evidence and evidence from the tracker itself indicated that Orji and Mensah had been responsible for putting the tracker in place, that being on 9 February 2020.

10 There was evidence in relation to the period leading up to the time of the robbery itself. Orji was in telephone contact with Yussuf and Olubode on 11 February 2020. Cell site evidence showed that Yussuf's telephone travelled to an area near Mensah's house in the early hours of 12 February 2020. It was then switched off until the morning after the robbery. It was switched on again in the vicinity of Mensah's house. Cell site evidence showed that phones belonging to Olubode and Orji travelled towards the complainant's house shortly before the robbery and their phones connected to masts which were consistent with them taking part in the robbery.

11 Fifth, there was evidence relating to the attempted retrieval of the tracker. There was cell site evidence showing that the telephones of Orji and Yussuf travelled together to Maidenhead before then travelling to Mr Al-Salman's address in the early hours of 15 February 2020. The inference was that Yussuf and Orji were attempting to retrieve the tracker. As we have said, it had already been removed by Mr Al-Salman and given to the police.

12 Sixth, in Yussuf's case there was an inference to be drawn to what he said in interview, namely a lie he told. He told the police he had not been with Orji in Maidenhead on 15 February 2020 shortly before the attempt to retrieve the tracker. At trial, it was an agreed fact that they were in fact together.

13 Finally, Yussuf did not give evidence at the trial. Therefore, the jury were given directions that they could draw inferences from his silence. Mr Yussuf's case was that he was not involved in or present at the robbery. He did not give evidence himself, rather he called an alibi witness named Jodie Atkinson. She said that she had met Yussuf at a housewarming party on 11 February 2020. She said that Yussuf had remained at the party overnight until approximately 10.00 a.m. the following morning, namely the very period when the robbery was taking place. She said he left once during the course of the party in order to purchase alcohol, but was only away from the house for about 20 minutes.
The judge directed the jury perfectly properly in relation to that alibi evidence. In particular, he said this:

> "If you conclude that the defendant's alibi is true or may be true, then he cannot have been committing this offence."

14 The single ground of Yussuf's appeal against conviction on which he has leave relates to the judge's directions to the jury in relation to the conspiracies. The prosecution case throughout was that the appellant Yussuf, together with Olubode and Mensah, was one of the four men who robbed Al-Salman and Hussain. The prosecution in the course of the trial did not seek a conviction on any other basis. The issue for the jury was simple: was the circumstantial evidence sufficient to prove his presence and participation.
The directions to the jury were provided to them in writing. They had been discussed prior to their distribution and rehearsal to and rehearsal with the jury. The directions of law were delivered as part of a split summing-up, namely prior to counsel's speeches. The judge said this about the offence of conspiracy in generic term:

> "Someone is guilty of conspiracy if he or she agrees with another person that a course of conduct will be pursued which, if the agreement is carried out in accordance with their intentions, will necessarily amount to or involve the commission of an offence or offences. A conspiracy is a crime of agreement

> which is committed whether or not the planned crime actually took place. In fact, in this case the conspiracy was carried out in that a robbery took place on 12 February 2020".

15 He concluded that section of his written direction by saying this:

> "In this case he would have to be sure before convicting the defendant that he/she shared with at least one other person a plan to rob."

16 In respect of the specific counts, he directed the jury first in relation to conspiracy to rob, posing the core question to be asked in relation to each defendant as follows:

> "Are you sure he/she joined in that conspiracy by agreeing to play some part in it in the full knowledge of the type of crime involved? If yes, the verdict should be guilty. If no, the verdict should be not guilty."

17 He then went on to consider the second count, having directed the jury that they should only consider that count if they convicted of conspiracy to rob. He posed again the core question in these terms:

> "Are you sure he/she joined in the conspiracy to rob **and** knew that part of the plan was that at least one member of the group would carry something with the appearance of a real firearm in order to carry out the robbery."

18 On behalf of Mr Yussuf, it is argued that those directions of law were ambiguous and left the jury in a position where they could convict on an improper basis. It is said that the judge directed the jury they had to be satisfied that the appellant had acted for a shared common purpose "to rob". The directions, so it is argued, left it open to the jury to convict if at any time, even after the completion of the substantive act of robbery, they were satisfied that the appellant knew that a robbery had taken place and agreed to assist Orji in recovering the tracker. The proposition is that there should have been a clear direction to the jury that the crown did not seek a conviction on the indictment if all Yussuf was found to have done was the attempt to retrieve the tracker on 15 February 2020.

19 Ms Meek, who appears for Yussuf today, did not represent him at trial, but she did represent one of the other defendants. She tells us that in the course of discussion prior to the summing-up and counsel's speeches the prosecution were invited to make clear that a person could only be convicted of robbery if they were a robber at the scene based on the evidence the jury had heard. The prosecution confirmed that. It is not suggested, as we understand it, that any further argument was put to the judge in relation to his summing-up and his written directions. Nonetheless, the point is taken now.

20 In our judgment, with great respect, the point has no substance. The language of the directions is prospective. The directions indicated that when the agreement was made it was an agreement that a course of conduct will be pursued. If the conduct, namely the offence of robbery, had already occurred, then self-evidently a conspirator could not agree that a course of conduct will be pursued. The language of the direction makes that perfectly clear. The jury could not possibly have convicted Yussuf had he played no part until the retrieval of the tracker. That conclusion is underlined by Yussuf's conviction of the firearm conspiracy. The language of the specific direction on Count 2 is also prospective, namely "at least one member of the group would carry" a firearm. Were the argument put by Mr Yussuf to have any validity, the word "would" has to be read as "will", which plainly it cannot be. The directions in our judgment make the position perfectly clear.

21 Even if all of that were not sufficient to dispose of the argument, we remind ourselves of the direction given in relation to Yussuf's alibi. As we have indicated, the jury were told that Yussuf could not have committed the offence had he been at the housewarming referred to by Jodie Atkinson. This direction is wholly inconsistent with the proposition that the jury could have convicted Yussuf on the basis of his involvement after the robbery itself. The alibi was only of relevance to the time of the robbery itself. It said nothing at all about the time of the attempted retrieval of the tracker. We are quite satisfied that the directions given to the jury were unambiguous. It must follow that the jury's verdicts were safe and the appeal against conviction is dismissed.

22 We turn to sentence.

23 Mr Orji who was born in 1991. He is now 32. He has 13 convictions for 20 offences, which include, in the distant past when he was a youth, convictions of violence. More recently, in 2014, he was convicted of supplying class A drugs when he was sentenced to a term of custody of five years. That conviction was sustained in Swansea in South Wales.

24 Yussef was born in 1997. He is now 26. He has 14 convictions for 20 offences. He had findings of guilt for robbery, burglary and dwelling house burglary when he was still a child or a young person. As an adult, his convictions were for less serious offences, save for his last conviction. On 4 June 2019, he was sentenced to 20 months for an assault occasioning actual bodily harm. At the time of the robbery, he was still on licence in respect of that sentence.

25 Olubode, born in 1991, is now 31. He has three convictions for five offences. In 2010 he was twice convicted of dwelling house burglary. In 2014 he was convicted of supplying heroin and cocaine and sentenced to a custodial term of six years. The date of the offence, as it appears from the antecedents of various defendants, indicates that that was an offence which had some association with Orji. Olubode's conviction was sustained in Cardiff rather than Swansea. In any event, Olubode was still on licence at the time of the robbery.

26 Both Mr Al-Salman and Mr Hussain made short victim personal statements in which they described the continuing anxiety they experienced in their everyday lives resulting from the events of February 2020. However, the most significant fact was that they had moved from their home in Oxhey because of the traumatic associations of that house with the robbery.

27 In his sentencing remarks, the judge began with an explanation of his sentence in each case. He explained that he was going to treat the conspiracy to rob as he described it as "the headline offence". The sentence for the firearms offence would be concurrent, but the use of the firearm was to be treated as an aggravating feature. That approach was plainly correct in the circumstances of the case.

28 The judge then dealt shortly with the facts of the case before moving on to the individual defendants. He observed that the crown had put Mr Orji as the orchestrator and ringleader. The judge assessed that there was little to choose in roles as between the other male defendants. He moved on to consider the relevant Sentencing Council guidelines, in particular the guideline in relation to robbery in a dwelling. He concluded that the offence was a Category 1A offence. It had high culpability. The factors he identified were: use of an imitation firearm to threaten violence, organised and sophisticated preplanning with a potentially high-worth victim being selected, and an electronic tracker being used to track the movements of the victim. In terms of harm, high value items were targeted. There was a systematic and thorough search of the property conducted at gunpoint which was akin to ransack. At no point has it been argued by anyone in the case that the judge was wrong so to categorise the offence.

29 The judge noted other aggravating features: first, the timing of the offence, which was in the small hours of the morning; second, the relatively lengthy nature of the ordeal to which the victims were subjected, the robbery lasting some 20 minutes or so; third, the use by the robbers of balaclavas to conceal their identity; fourth, the attempts to dispose of the evidence, namely the return visit to try and retrieve the tracker, which in the event was unsuccessful.

30 The judge noted that the starting point for a Category 1A robbery at a dwelling was 13 years' imprisonment with a range of 10 to 16 years. In relation to Mr Orji, he said that but for his personal mitigation, which included a positive attitude in prison during the time he had been incarcerated leading up to sentence, he would have put the case at the very top of the range for Category 1A, namely approaching 16 years. He emphasised Mr Orji's role as the orchestrator and recruiter. He referred to Mr Orji's previous convictions. Taking all of those matters into account, he assessed that the determinate sentence should be 14 years' imprisonment, prior to any reduction for plea. That reduction was 25 per cent, the plea having been tendered at PTPH. That took the sentence down to 10 years and six months. He then said:

> "That does not end the sentence for Orji. I have to consider dangerousness."

31 There was a pre-sentence report in relation to Mr Orji which had been ordered by the judge in order to assist him on that issue. The judge found it unhelpful. We can see why he did. At one stage the report said this:

> "Mr Orji poses a high level of serious risk of harm to the public".

32 Within a few paragraphs the author said this:

> "I assess there is no significant risk to members of the public of serious harm occasioned by the commission of further offences."

33 And concluding with:

> "I acknowledge that with the appropriate interventions there is a possibility that Mr Orji's risk of serious harm could be reduced."

34 The judge concluded these assessments were apparently contradictory. We can sympathise with his view, but as he observed ultimately the issue of dangerousness was a matter for him. He had conducted the trial. Mr Orji had not been a participant, but it enabled him to assess the nature of Mr Orji's offending. The judge said this:

> "I am of the view that there is a significant risk to members of the public of serious harm occasioned by the commission of further specified offences and that there is a need to extend the sentence."

35 The judge identified the reasons for his conclusion. First, Mr Orji's leading role in the offence, with the features we have already identified, including his recruitment of others. Second, his personal use of the firearm. Third, convictions he had sustained whilst a youth to which we have already referred. Fourth, the fact that two firearms, one genuine and one imitation, had been found where he lived in July 2020, namely sometime after the offence. Fifth, the judge observed that unhelpful though parts of the pre-sentence report were, that they did indicate that Mr Orji in his discussion with the author had focused very much on the financial predicament he found himself in, rather than demonstrating any kind of empathy with his victims. A summary of the position as expressed by the judge was this:

> "The facts of this case and his role in it mark a disturbing escalation in a pattern of violence first seen as a youth and a rekindling of serious criminal conduct in adult life through the drugs world."

36 He then said:

> "Having assessed him as dangerous, in my view the public needs protecting. I extend his licence for a period of five years."

37 The judge went on to consider the other defendants. In the case of Mr Yussuf, he noted Mr Yussuf's previous convictions and the fact he was on licence at the time of the robbery. He said that the starting point in his case was 13 years and that was the point at which sentence would come to rest. There was aggravation in his previous convictions and the commission of the offence on licence, but that was counterbalanced by personal mitigation. Thus, the sentence was 13 years' custody with a concurrent sentence for the firearms offence.

38 The judge made a similar assessment in Mr Olubode's case. Plainly, he found that the appropriate starting point was 13 years and that aggravating factors were counterbalanced by personal mitigation. So it was that the sentence was 13 years on conspiracy to rob and a shorter concurrent sentence in relation to the firearms offence.

39 We turn to Mr Orji who has leave to appeal against his sentence on limited grounds. The principal ground of appeal put before the single judge was that the judge had erred in his conclusion that Mr Orji was dangerous. The single judge rejected that proposition and Mr Robinson KC has not renewed that ground before us. The basis upon which the single judge gave leave was that the judge should have considered whether a long determinate sentence would be sufficient protection for the public and should have explained, if he concluded it was not, why he so determined. The argument is that his failure to give any such explanation and the lack of any reason for the duration of the extended licence, taken together, renders the sentence wrong in principle and/or manifestly excessive.

40 In his oral submissions, for which we are most grateful, Mr Robinson said that we had to pose ourselves two questions. First, was it right to say that the sentencing judge did not make it apparent whether an extended determinate sentence was required or, conversely, why a determinate sentence would not be sufficient protection for the public? If the answer to that question is, yes he did make it apparent, then Mr Robinson says the appeal fails. However, moving to the second question, if the judge did fail in that respect, then we have to assess whether the sentence was manifestly excessive. In that regard, Mr Robinson points to the fact that last September, in quite separate proceedings, Mr Orji was convicted of firearms offences relating to the firearms to which the judge referred, the ones found at his home. He was sentenced to a determinate sentence of three years for those offences. They were ordered to run consecutively. Mr Robinson argues that in assessing the judge's sentencing exercise if we agree that he made an error of principle, we should take account of the fact that Mr Orji now will be subject to a determinate sentence in excess of 13 years.

41 We remind ourselves of the particular passages to which Mr Robinson has drawn our attention, namely when the judge said:

> "I am of the view that there is a significant risk to members of the public of serious harm occasioned by the commission of further specified offence and that there is a need to extend the sentence."

42 He referred also to the passage where the judge said that the public needed protecting and he extended the licence period for five years to enable that. The argument is, well, that simply was not enough. The judge should have added:

> "I have considered a determinate sentence. In my judgment it would not be sufficient to protect the public."

43 Our view is that that the judge at least implicitly did take the two-step approach to the issue of dangerousness. In the first passage to which we have referred and which we have quoted, the judge did not say there is a significant risk to the public and therefore there is a need to extend the sentence. Rather, he dealt with the two concepts separately: there is a significant risk of serious harm and there is a need to extend the sentence.

44 In our judgment, although the judge arguably could have expressed himself more clearly, it is apparent that he engaged in the exercise which Mr Robinson says he should have done. The judge was saying public protection required a period of extended licence. Even if we are wrong about that, we have to ask ourselves, was the judge wrong in reaching the conclusion he did? We reject the proposition that there is any relevance at all in the sentence imposed last year for the firearms offence. This is a court of review. In engaging in the exercise which Mr Robinson invites us to do, we have to review the position as it was before the sentencing judge in 2021. We cannot take into account later events any more than the judge could have done. Taking those matters into account, we take the view that the judge was faced with a mature adult who led and organised a violence attack on someone's home, having armed himself with what looked very much like a handgun. The absence of serious harm to the occupants on this occasion was in reality a matter of chance. Mr Al-Salman and Mr Hussain were put in real fear and at least there was a significant risk of severe psychological injury. Had either/or both of them been foolishly minded to resist the attack, it is in our judgment fanciful to think Mr Orji would have sounded the retreat: far from it. Orji's motive for the offence was purely financial and it was apparently connected with his involvement in the drugs trade. That is what he told the Probation Officer. When a mature man with a recent history in the drugs trade was prepared to act in the way that Mr Orji did, we are quite sure that the judge was entitled to conclude that an extended determinate sentence was necessary to protect the public. The period of extended licence identified by the judge was, we accept, the longest that could have been imposed. It may be that other judges would have thought it only necessary to impose an extended licence of three years, but it is not for us to second guess what was an exercise in careful judgment by this judge who had heard the trial.

45 It follows that the appeal against sentence is dismissed.

46 Mr Yussuf and Mr Olubode apply to renew their applications for leave to appeal against sentence on a single ground, albeit that it is expressed in three stages. First, there was ample room within the category range to move the starting point lower in their cases than 13 years. Second, there was not enough distinction drawn with the sentence given to Orji. Third, the one-year difference in the starting point between Orji and Yussuf and Olubode was not large enough to reflect Orji's leading role.

47 The first question clearly is whether the judge erred in concluding that a period of 13 years' custody was the appropriate are sentence starting point for Yussuf and Olubode. The judge concluded that there was high culpability because an imitation firearm had been produced as part of a sophisticated offence. Although Orji may have organised the offence and recruited the others, the offence itself was a group activity with each man playing an equal important part. That Orji held the gun of itself was of limited significance. All those who were participating knew that a gun was to be produced. Everyone was masked and ready to deal

with anyone in the house. We consider that anyone taking part in this robbery was bound to be placed at the starting point for a Category 1A robbery before consideration of aggravating and mitigating factors.

48 Both Yussuf and Olubode committed the offence whilst on licence. There were other significant aggravating factors: the timing of the offence; the wearing of masks; the attempt to retrieve the tracker; the fact that the victims had to leave their home. In our judgment the two were relatively fortunate that the judge did not increase the sentence from the starting point, because in our view the personal mitigation was limited. We are certainly satisfied there was nothing about the sentences of 13 years' custody which rendered them manifestly excessive simply by reference to the applicant's particular position. We do not understand that the argument is really put on that basis.

49 The argument has to be that what was otherwise a proper sentence should be reduced because the sentence on Mr Orji was too short. That proposition only needs to be stated to see that it is wholly untenable. We agree that Mr Orji may have been fortunate to have been sentenced on the basis of a custodial sentence after a trial of 14 years. That cannot be the basis for the reduction in the sentence of the other defendants. The test for disparity is whether right-thinking members of the public would think that something had gone wrong in the administration of justice by reference to the difference in the sentences imposed. As was pointed out in *Saliuka* [2014] EWCA Crim 1907, one sentencing error, namely an unduly lenient sentence on one offender, is not to be corrected by an unduly lenient sentence on another offender. Were that to happen, right-thinking members of the public certainly would conclude that something had gone awry. In any event, we were not persuaded that the judge did make any error in the extent of the distinction drawn between Orji and the others. Once the plan had been hatched by Orji, the others were enthusiastic and equal participants.

50 It follows that both applications made by Yussuf and Olubode are refused.

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