Case No 202302500/A5

Neutral Citation No [2024] EWCA Crim 171
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM INNER LONDON CROWN COURT
Her Honour Judge Rowley

Royal Courts of Justice, Strand
London WC2A 2LL
Tuesday 6 February 2024

Before:

LADY JUSTICE ANDREWS
MRS JUSTICE CHEEMA-GRUBB
-and-
HER HONOUR JUDGE ROSA DEAN
(THE RECORDER OF REDBRIDGE)

REX
V
EMMANUEL ORLU

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Ms C Mawer appeared on behalf of the Appellant.

J U D G M E N T

LADY JUSTICE ANDREWS:

Introduction

1. On 1 December 2021, in the Crown Court at Inner London, Emmanuel Orlu, then aged 18, pleaded guilty to two counts of robbery and one count of having an offensive weapon. Those pleas were indicated at the Magistrates' Court and attracted full credit. Sentencing was adjourned to the conclusion of another matter, which resulted in his acquittal, following a retrial, on 10 March 2023.

2. Although the applicant was initially remanded in custody, he was released on bail following a bail hearing in September 2022. On 31 May 2023, by which time he was 19 years old, the applicant was sentenced by Her Honour Judge Rowley to a total custodial term of 3 years' detention in a young offender institution. The sentence comprised 3 years' detention on the first count of robbery, 2 years' detention on the second count of robbery and 6 months' detention on the offensive weapon count, all of which were ordered to run concurrently. His application for an extension of 27 days in which to apply for leave to appeal against sentence was referred to the Full Court by the single judge, who indicated that he considered the grounds to have merit.

3. In the light of the explanation for the delay provided by counsel, we grant the extension requested. We also grant leave to appeal, and in the rest of this judgment therefore we shall refer to the applicant as "the appellant".

The Facts of the offending

4. The two robberies were committed on the same day, in the same location, a football pitch in South London. On 13 October 2021, the appellant and a male companion approached a young man named Esteban Salgado, who was playing football. The appellant asked Mr Salgado if he could borrow his bicycle. When Mr Salgado said "No", the appellant simply walked away with the bicycle. When Mr Salgado followed him, the appellant turned around and revealed that he had a knife tucked into his trouser waistband.

5. Mr Salgado's friends telephoned the police. While they were doing so, they witnessed the second robbery. The appellant rode the bicycle that he had stolen towards the second victim, Bayo Badmass, and demanded his jacket and bag, otherwise he would "soak him up". As the appellant reached for something in his jacket, indicating that he had a weapon, the victim handed over his bag and ran away.

6. Both victims were adversely affected by the robberies. Mr Salgado said that seeing the knife was terrifying and the experience had been scary and distressing. It had left him feeling very cautious about being in the area and he was more worried now about taking

his possessions out with him. Mr Badmass said that he had lived there his whole life and that this had changed his relationship with his home. Not only did they steal his belongings but they stole his peace of mind. He also said that the incident had weighed heavily on a pre-existing illness.

7. The police apprehended the appellant and his companion, Nobel Adamu, in a communal hallway on the top floor of a block of nearby flats. The appellant attempted to get away, but was detained and handcuffed. Mr Salgado's bicycle was leaning against the wall and the appellant was wearing Mr Badmass's bag. He still had the knife tucked into his trouser waistband. Mr Badmass's wallet had been emptied and his identity cards had been thrown onto the floor of the stairwell. Mr Adamu remained with the officers. Although he was also arrested and charged with robbery, in the event the Crown offered no evidence against him.

8. The appellant was in breach of a GPS monitored bail condition which prohibited him from going south of the river Thames. Despite his youth, he already had five convictions for seven offences since January 2019. These included a 2019 conviction for threatening with a bladed article on school premises, two convictions for possession of a bladed article in a public place in 2020/2021 and a 2019 conviction for battery. He was on bail for the 2021 offence at the time of the robberies.

The sentencing hearing

9. The appellant offered a guilty plea on the basis that he was the victim of modern slavery. He stated that for the past 3 years he had been subject to continuing threats of violence and coercive influences from London-based gangs, who had indebted him and forced him to commit criminal offences in order to make money for them. In consequence, he and his family had to move from their previous address to East London, but a gang had discovered their new address and attempted to break into the property. The incident was reported to the police, but he and his family continued to receive death threats from the gang. Since he had nowhere to hide, he had travelled to South London in an attempt to resolve the situation with the gang by meeting with them; but that morning, they had told him to commit robberies to repay his debts, and that any item of value he could bring to them would significantly reduce his financial obligations to them.

10. So far as the knife was concerned, the appellant said he was in possession of it to protect himself in case he was physically attacked by members of the gang when he went to meet them.

11. By the time of the sentencing hearing, the Single Competent Authority had made a decision, on 9 February 2023, that there were conclusive grounds to accept that the appellant was a victim of modern slavery: specifically, that he was forced into drug dealing in London, Milton Keynes and Basingstoke, in a period between approximately 2018 and 2020.

12. The prosecution and the defence each produced sentencing notes. The Crown submitted

that under the Definitive Sentencing Guidelines for Street Robbery, count 1 was a culpability A offence because of the production of the bladed article to threaten violence, and count 2 was culpability B because no weapon was produced to back the threat, although the appellant did make a gesture which suggested he was going to produce one if Mr Badmass did not comply. Each offence fell within category 2 for harm. The starting point on count 1 was therefore 5 years' custody with a range of between 4 and 8 years and on count 2, the starting point was 4 years' custody with a range of between 3 and 6 years.

13. In the Crown's sentencing note, the prosecution referred to the conclusive grounds decision and to the basis of plea. They said that the Court would need to consider whether the defendant was involved in the commission of the robberies through coercion or intimidation or exploitation and, if so, whether this reduced his culpability either within the range of category A or lowered it to within categories B or C.

14. The Crown submitted that the reason advanced for the appellant's alleged coercion, intimidation and/or exploitation was monetary gain. The amount of the debt had not been disclosed. The appellant had not explained his failure to report the threats to the police, nor why he did not attempt to raise the money through honest means, or even through criminality that did not involve targeting individual members of the public. They said that the use of the knife in the commission of the offences was a choice that the appellant made, clearly with the expectation that it would speed up the process, scare the victims into compliance and so reduce the effort required in stealing their property. They submitted that the conclusive grounds decision did not alter the placement of counts 1 or 2 within the guidelines in terms of culpability and, on that basis, it should not make a material difference to sentence.

15. Ms Mawer, on behalf of the defence, submitted in her sentencing note that there were a number of lower culpability C factors, most pertinently the explanation of becoming involved in the offending through the pressure that was brought to bear on the appellant by reason of his indebtedness to the gang. This was supported by independent evidence concerning his exploitation, including evidence from Children's Social Services and an expert report from Dr Grace Robinson, who stated that the appellant's account, if believed, had a number of features of modern slavery.

16. Given his background, it was submitted that the idea of his paying off the gangs by earning the money was fanciful. Ms Mawer also prayed in aid his cognitive difficulties, suggestibility and decision-making difficulties, as attested to in the psychological report of Dr Rajinder Dyal. That report indicated that he was functioning within the low average to mildly impaired range in most areas of cognition and that the most notable component of his overall intellectual functioning was what the doctor described as "his meagre abilities in the domains of reasoning and making proper judgments". Last but not least, the defence sentencing note relied upon the appellant's youth and immaturity.

17. The judge also had the benefit of a balanced and carefully structured pre-sentence report. This records that the appellant told the probation officer that he committed the offences as he was "backed into a corner" and was being forced to pay back money to a gang. He also stated that the offences were "spur of the moment" and not planned. It was heavily reported within his probation records that he was in a bondage debt to a gang in the Southwark area. His mother had also corroborated that he was in debt to a group.

18. The author said that the current offences were an escalation of the appellant's previous offending, but that she would have assessed them as part of a pattern of his involvement with a gang lifestyle. She took into account Dr Robinson's report, and that the appellant's personal history and experiences made him more susceptible to grooming and exploitation, but she also noted that the appellant appeared to lean quite heavily on this and took minimal responsibility for his offending. She considered that, as was the case with previous YOS officers, the appellant went through the motions of saying what he thought you wanted to hear and disclosing as little meaningful information as possible.

19. The probation officer's assessment was that the appellant knew the risk and was "fully culpable for his actions" which reflected, she said, a lack in consequential thinking, a lack of maturity, and triggers around employment, finances, lifestyle and associates. She said that although he had a significant history of being exploited by males from the Rockingham Estate, his previous probation officer had spoken of her concerns regarding his life-style/associates and that he may still seek out a negative peer group. He had voluntarily travelled from the family's new address to South London more than once.

20. There was also reference in the report to the appellant's lack of enthusiasm for further education and to his pretending that he had got a job in a restaurant working night shifts so that he could get his bail varied. He had admitted his lack of motivation and, although he said that he was in the process of applying for Universal Credit, the author of the pre-sentence report was sceptical about this. She was concerned about his absence of any source of income other than to be dependent on friends and family, and identified financial issues as a major concern. She said he had made little progress since his release in September 2022 to try to find a legitimate source of income and that he could be susceptible to becoming involved once more in financially motivated offending.

21. The Crown did not seek a *Newton* hearing for the reasons set out in the prosecution note for sentence. In the course of Ms Mawer's plea in mitigation, the judge indicated, more than once, that she was not going to accept the basis of plea. Counsel, properly, indicated that in those circumstances, she considered that there <u>should</u> be a *Newton* hearing. The judge demurred, referring in particular to the contents of the pre-sentence report. Ms Mawer said that her client had accepted that he had put up a front to disguise the extent to which he had been acting at the behest of others, but nevertheless it was accepted in the pre-sentence report that he had been exploited by others, and the extent to which that had happened was referred to by the probation officer.

22. Ms Mawer also referred to evidence that the appellant had taken seriously the criticisms in the pre-sentence report about his lack of commitment to finding a legitimate source of finance. There was evidence before the Court that he had indeed applied for Universal Credit and had an appointment at the Job Centre. As to the suggestion in the pre-sentence report that he was not motivated to undertake further education, there was evidence that he had a place to begin a diploma at a university in Scotland, but he had been unable to take it up because he was on remand at the time. He had not lied in relation to employment, because he had been given a job offer, evidence of which was produced, but taking it up would have meant applying for a variation of his bail, which he had fought hard to achieve and did not wish to affect by making such a further application. Since his release on bail, he had not got into any further trouble. It was submitted that in putting on a front to the professionals with whom he engaged, by being economical with the truth, he was covering up a deep sense of shame.

23. At the start of her sentencing remarks, the judge told the appellant that he would be given full credit for his guilty plea. She also said that she took account of his basis of plea and the medical evidence, but that her assessment would have to be whether those factors were directly linked to the offence under the sentencing guidelines. That is to an extent a reflection of the approach that the prosecution had urged the judge to adopt to the assessment of culpability, which was in accordance with the applicable sentencing guidelines.

24. However, we consider that there is force in Ms Mawer's criticism of the judge's reasoning when seeking to follow that approach, which is not altogether easy to understand and at times appears completely contradictory. Indeed, it is unclear whether the judge was accepting the basis of plea (as she should have done if she did not hold a *Newton* hearing) or whether she was rejecting it and, if so, on what basis she was rejecting it, which would have been unfair to the appellant were she not to follow the ordered procedure of putting him in the witness box and having him cross-examined.

25. So far as the cognitive impairment was concerned, the judge said that she had carefully considered the Sentencing Guidelines for Sentencing Offenders with Mental Disorders but that she had concluded that the appellant's impairment had little or no relevance to his culpability for the two robberies. She indicated that because of his youth, other disorders and the modern slavery decision, she would give a 25 per cent discount from what she erroneously described as "the appropriate starting point" *after* the full discount for his guilty plea.

26. Having accepted the prosecution categorisation of the offences, she rightly identified that because it was his fourth conviction for carrying such a weapon, the offence of possession of the knife attracted a minimum sentence of 6 months' custody. However, because it was part and parcel of the robberies, she said she would make the sentence concurrent. The judge explained that she was not prepared to impose a suspended

sentence because the appellant was identified as a risk of danger to the public and had a history of poor compliance with court orders. These offences were committed whilst on bail and there was no evidence that imprisonment would have any harmful effect upon him. However, she then went on to say that the appropriate sentence would have been above 2 years' detention in any event.

27. Four grounds of appeal are advanced, although there is a degree of overlap between at least the first two of them. First, it is contended that the judge erred in not sentencing the appellant in line with his basis of plea, resulting in a sentence that was manifestly excessive. Secondly, it is contended that the judge failed to identify and sentence on the basis of features of lesser culpability which led to an incorrect categorisation of count 1. Thirdly, the judge erred in failing to exercise a discretion to pass a suspended sentence, and fourthly, the judge was not an impartial Tribunal.

Discussion

28. Although it appears from the transcript of the submissions in mitigation that the judge felt under pressure of time because only 45 minutes had been allowed for the sentencing hearing, it was unwise of her to have interrupted defence counsel quite so much, and to have displayed so much overt impatience with her submissions. However, it does appear that Ms Mawer did manage to make all the submissions that she wished and therefore, in the light of our conclusions on grounds 1 and 2, there is no need for us to say any more about ground 4.

29. The real issue is as to whether the judge was entitled to treat count 1 as a culpability A case in the light of the basis of plea, at least without giving the appellant the opportunity to go into the witness box and be cross-examined on his account. It may well be that, if she had done so, she would have disbelieved his account of being forced by the gang to go out and commit robberies, but having failed to do so, she was, in our judgment, obliged to follow the basis of plea. Therefore she was obliged to accept that what he was saying about his meeting with the gang on that particular morning was true.

30. The probation officer's assessment in the pre-sentence report was that the appellant was "fully culpable for his actions" though she said they were the result of poor thinking and poor judgment. However, the report provided no justification for refusing to accept the basis of plea without holding a *Newton* hearing. Culpability was a matter for the judge to assess.

31. The factual background to this offending was not seriously in dispute and the evidence that the appellant was in debt to a gang, and that he was vulnerable to exploitation on account of previous involvement with a gang or gangs, appears to have been accepted. The dispute was as to whether those factors lowered his culpability for this offending. His past exploitation appears to have led to his involvement in county lines drug dealing, which is a different form of criminality. The continued threat of violence to the appellant

and his family and the need to pay off the debt as fast as possible may have been the motivation for the offending, and the gang may have suggested that committing a robbery would be the swiftest means of reducing the debt, but, as the appellant accepted when interviewed by the probation officer, these were spur of the moment offences which were his idea. Significantly, he deliberately chose to use the knife as a threat, although, on the other hand, he never removed it from his waistband.

32. We agree with counsel that a balanced assessment of the appellant's culpability would have justified a move down from the starting point in category 2A of 5 years, even if it would otherwise have been appropriate to place the offence into that category for culpability in the first place. Standing back and looking at the matter in the round, we consider that there is force in Ms Mawer's submission that, given that the judge did not hold a *Newton* hearing, she was bound to accept his account of events. She could then have dealt with the matter in one of two ways: she could either have regarded his culpability as reduced to an extent by the degree of exploitation to which he was subjected by the gang to whom he was in debt, and treated that as a category C factor, which would be balanced against the category A factor of the knife, thereby putting the offending into category B; or she could have kept the offence within Category A but treated this matter as significantly reducing his culpability, placing the offending at the lowest end of that sentencing category.

33. Either way, we consider that the appropriate sentence before taking into account other aggravating or mitigating features would have been one of 4 years' imprisonment. That is the starting point in B2 (reflecting the first of the two approaches outlined above). It is also the lowest end of the range in category A2.

34. The Guidelines on Sentencing Offenders with Mental Impairments or Disorders indicate that the sentencing judge should make an initial assessment of culpability in accordance with any relevant offence specific guideline, and *then* consider whether culpability was reduced by reason of the impairment or disorder. In this case, the appellant understood the nature and consequence of his actions and was able to make rational choices. Whilst he exhibited poor judgment, he was not suffering from a learning disability.

35. Although this was not an easy exercise, the judge was entitled, on the basis of the evidence, to conclude that the appellant's cognitive impairment was not sufficiently linked to the commission of the offences to reduce his culpability for them though, like his age and immaturity, it provided him with significant personal mitigation. That meant that in principle the judge was right to consider those matters at the second stage of the sentencing process, after placing the offending in the correct category within the guidelines for harm and culpability.

36. Taking all those matters into consideration, we consider, as we have said, that the judge should have begun with a sentence of 4 years, either by placing the offence into category B2 by dint of balancing the culpability A and culpability C factors or by bringing the

offence right down to the bottom of category A2. As to aggravating factors, there were two robberies, albeit committed on the same occasion, the offences were committed on bail and he was in breach of the prohibition on going to South London. Despite his youth, the appellant had an unattractive criminal record including for possession of bladed articles. However, the strong mitigating features apart from the modern slavery aspects have already been identified, and they warranted a significant downward adjustment.

37. The judge fell further into error in giving credit for the guilty pleas before discounting for those mitigating factors. She should have determined the notional sentence after trial *before* giving credit for the guilty pleas.

38. In our judgment, balancing all the aggravating and mitigating features, including the appellant's troubled history and his apparent willingness to change, and his lack of further offending after being released on bail, and applying a discount of 25 per cent to specifically reflect his age, immaturity and cognitive impairment, would justify a notional sentence after trial on count 1 of 3 years' custody, which would be reduced to 2 years to reflect full credit for the guilty plea.

39. So far as the possession of the knife is concerned, in accordance with section 315(3) of the Sentencing Act 2020, the judge was obliged to impose an appropriate custodial sentence of 6 months. This applied unless the court was of the opinion there were particular circumstances which related to the offence or the offender that would make it unjust to do so in all the circumstances.

40. Turning to Ground 3, Ms Mawer, in her attractive submissions to the court, urged the court that there were factors that would make it unjust to apply an immediate custodial sentence on the basis of the knife alone, especially if a sentencing judge would have suspended the sentence in relation to the robberies and would otherwise be prohibited from doing so because of the mandatory provisions relating to the knife. She pointed to the fact that the earlier offending involving bladed articles occurred at a time when the appellant was under 18, and she drew our attention again to his very disruptive background and the culture within which he was carrying a bladed article.

41. Since the knife was used in the commission of the first robbery, albeit only by being shown to the victim, and this was his fourth offence involving a bladed article in the course of 4 years, it is quite difficult to see on what basis it could be said that a 9-month notional sentence after trial, reduced to 6 months for his guilty plea, was unjust in the circumstances, let alone that it was manifestly excessive. Totality was properly taken into account in making all the sentences concurrent.

42. On the question of suspension, the sentences that the judge pronounced were not within the range to enable them to be suspended. She identified, however, that three of the factors in the guidelines indicating that it would be inappropriate to suspend the sentence were present, namely, a history of poor compliance with court orders; a risk to the public

through his repeated carrying of knives; and that appropriate punishment could only be achieved by immediate custody. The pre-sentence report had assessed the appellant's risk of violence to a partner as high and his risk of violence towards others as medium.

43. On the other hand, as Ms Mawer pointed out, he had already served a great deal of time on remand, even if one discounts the period on remand which overlapped with another custodial sentence. There was strong personal mitigation, and whilst there had been poor compliance with court orders in the past, and whilst he had committed minor breaches of his bail (which did not lead to its revocation) the appellant had not reoffended since his release on bail. This represented a significant step towards getting away from the clutches of the gang. He had also written a letter to the court expressing remorse and showing that he had taken positive steps to seek job opportunities or benefits. That indicated that there was a real prospect of rehabilitation.

44. The author of the pre-sentence report had indicated that the risk factors she identified could be reduced if the appellant ceased contact with all negative peers and formed new pro-social associations, found constructive use of his time through education or paid employment, and avoided going back to South London. Unfortunately, one of the breaches of his bail conditions was that he *had* gone back to South London. The author of the pre-sentence report also felt that he would benefit from undertaking rehabilitative activity sessions and completing the Thinking Skills Programme.

45. Whilst there was perhaps much more to be said in favour of a suspended sentence than the judge gave credence to, on balance, given the propensity of this young man to go back out in public armed with a knife, Ms Mawer's submission that it was appropriate to suspend the sentence was ambitious. Even though the judge did not properly weigh the factors for and against suspension, she did not need to in the light of the sentence that she passed. Having carried out that exercise carefully ourselves, we do not consider that this was a case in which it could be said to be wrong in principle to decide that appropriate punishment could only be achieved by immediate custody. That said, we wish to acknowledge the significant progress that this young man has made since he was released on bail and we note that, as a result of the proper application of the rules relating to time spent in custody and allowance of period on remand and on electronic curfew, he should be released in the not too distant future.

46. On that subject, the judge said nothing in her sentencing remarks. It was drawn to our attention by the Registrar that, although the period spent by the appellant on remand would be administratively dealt with, and therefore the fact that it is not expressly referred to on the face of the custody order should not pose a problem, the judge failed to direct that half the time spent on bail subject to a qualifying curfew condition and an electronic monitoring condition was to count as time served as part of the appellant's sentence, as she should have done, under section 325 of the Sentencing Act 2020. That period of course is subject to any deductions made due to breach of the curfew, but we

know of no such deductions.

47. Ms Mawer was very helpful this morning in providing the Court with the relevant periods. The time spent on remand, she told us, other than that which overlapped with his period in custody for other matters, was one of 229 days. Obviously, if that figure is incorrect, it can be corrected administratively. So far as the period on electronic curfew is concerned, we were told that the total period was one of 251 days, and so half that period, which we will round up to 126 days, should also be credited towards the sentence that is currently being served, and we so direct. The Court will order an amendment of the record for the correct periods to be recorded.

48. We therefore allow this appeal, quash the sentence passed on Count 1 and reduce the custodial term on Count 1 to one of 2 years' detention. The period of 229 days spent on remand and 126 days in respect of qualifying curfew will count towards the time to be served. The concurrent sentences passed on Counts 2 and 3 are otherwise unaffected. We record again our thanks to Ms Mawer for her very helpful submissions, both in writing and orally this morning.