Neutral Citation Number: [2020] EWHC 2888 (Admin)

Case No: CO/1304/2020

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT
COURT SITTING REMOTELY

Cardiff Civil Justice Centre
2 Park Street Cardiff CF10 1ET

Date: 29/10/2020

Before :

LADY JUSTICE ANDREWS DBE
and
MR JUSTICE WILLIAM DAVIS

- -

Between :

R (on the application of BB)	**Claimant**
- and -	
West Glamorgan Youth Court	**Defendant**
- and -	
Crown Prosecution Service	**Interested Party**

- -
- -

Ms Nicola Powell (instructed by **Goldstones Solicitors**) for the **Claimant**

The Defendant and **The Interested Party** did not appear.

Hearing dates: 23rd October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on the 29th October 2020.

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Mr Justice William Davis:

1. At the hearing of this application for judicial review on 23 October, we announced that we would allow the claim and quash the decision challenged by the claimant, BB, and that we would give our reasons later. These are our written reasons.

2. BB is now aged 14 having been born in June 2006. On 13 February 2020 when he was still aged 13 he appeared before West Glamorgan Youth Court charged with one offence of robbery (of a pouch of tobacco) and one offence of attempted robbery (of a moped). The offences were alleged to have occurred on 20 January 2020. Three other young people, to whom we shall refer as Z, L and H, were charged with various offences arising out of the same incident. Their precise ages were not clear from the material provided to us, but they were all under 18. Ms Nicola Powell, who presented BB's case with clarity and succinctness, informed us that they were older than BB. Z was aged either 16 or 17.

3. The justices were required to determine the correct venue for the trial. The prosecution argued that these offences were caught by the grave crimes procedure and that, pursuant to s. 51A of the Crime and Disorder Act 1998 (the 1998 Act, formerly s. 24(1)(a) of the Magistrates Courts Act 1980), the court should conclude that it ought to be possible to sentence BB to detention under s. 91(1) of the Powers of Criminal Courts (Sentencing) Act 2000 (the 2000 Act) with the result that he should be committed for trial. The defence submitted that the youth court should retain jurisdiction. In the event the justices sent BB (and the other three defendants) for trial at the Crown Court. At the first hearing in the Crown Court, the judge came to the view that BB should not have been sent for trial and remitted the case to the youth court. The Crown Court had no jurisdiction to take that course. On 5 March 2020 the court again sent BB for trial for the same reasons it had done so in February 2020. With the leave of Julian Knowles J, BB seeks to challenge the ruling in his case by way of judicial review.

4. As is customary West Glamorgan Youth Court has taken a neutral stance to BB's application. The Crown Prosecution Service have been served as an interested party. They have not taken any part in the proceedings.

5. The circumstances of the alleged offences were put before the justices in a police report. We have the same document. The alleged victim was a 16-year-old to whom we shall refer as BA. BA is a friend of Z. At around 6.00 p.m. on 20 January 2020 BA agreed to meet Z at a regular meeting place in Neath in order to sell Z a small quantity of cannabis. BA went from his home on his moped and met Z. Initially everything was friendly. However, within a few minutes L and H together with another male approached. L produced an imitation handgun, pointed it at BA and said "give me your keys". BA was surrounded. Z showed BA a knife tucked into his waistband and said that he would not be afraid to use it. H punched BA on the nose causing it to bleed. The other male (said to be BB) took a pouch of tobacco from BA's pocket. BA began to walk away pushing his moped. As he did so, he was punched from behind and he felt a stab to his left upper arm. A little further on BA, by now having got onto his moped, stopped at traffic lights. He was attacked again by more than one person and he went to the floor. In the course of the attack he was stabbed to the left thigh and sustained a puncture wound. His attackers ran off when a passer-by shouted at them. The police report, beyond stating that BB had taken a pouch of tobacco after others had

produced an imitation firearm and had made threats with a knife, gave no clear indication as to the part played by BB in the incident as a whole.

6. The legal adviser who was in court on 13 February 2020 has provided a note of the proceedings. Although it is not a formal response from the Defendant court, it is appropriate to receive it as the most accurate account of how the justices approached their determination. Z, L and H appeared the same day as BB but were called into court before him. The prosecution submitted that the offences were grave crimes and that the case of each defendant should be sent to the Crown Court. No representations were made by the defence. The justices accepted the submissions of the prosecution and sent the cases of Z, L and H to the Crown Court. When BB was called into court, the prosecution made the same submission in relation to him i.e. that the allegations against him amounted to grave crimes and that his case should be sent to the Crown Court. The prosecution also argued that it was in the interests of justice for BB to be sent to the Crown Court in order to avoid BA being required to give evidence twice. Those representing BB submitted that he should not be treated in the same way as his co-accused and that the allegations in his case did not amount to grave crimes.

7. When considering the competing representations, the justices had regard to the Sentencing Council guidelines for street robbery both in relation to youths and to adults. Looking at the adult guideline the justices concluded that the offences involved high culpability because of the use of and threat with a weapon. Though they had no evidence about the effect of the incident on BA, they considered that harm fell between Category 1 and Category 2 on the basis that BA must have suffered significant psychological harm. They noted that the starting point for a Category 1A offence was 8 years' custody with 5 years' custody being the starting point for a Category 2A offence. Looking at the youth guideline in relation to robbery the justices considered that at least two of the three factors justifying custody or a youth rehabilitation order with intensive supervision and surveillance were present, namely use of or threat with a weapon and use of significant force.

8. With those matters in mind, the justices, noting that a youth rehabilitation order was not available to them, considered the adult guideline and arrived at an adult custodial term in the range of 5 to 8 years. Because of the age of BB, they halved that term to arrive at the approximate sentence for the offence. Thus, they concluded that a sentence in excess of 2 years' custody would be appropriate in BB's case. The justices also took account of the fact that the co-accused had been sent for trial and that, in the interests of justice, there should only be one trial. This was the basis on which they sent BB for trial at the Crown Court.

9. The power to send a child or young person to the Crown Court for trial is set out in Section 51A of the 1998 Act, the relevant part of which is as follows:

> *(2) Where a child or young person appears or is brought before a magistrates' court ("the court") charged with an offence and any of the conditions mentioned in subsection (3) below is satisfied, the court shall send him forthwith to the Crown Court for trial for the offence.*
>
> *(3) Those conditions are—*
>
> *….(b) that the offence is such as is mentioned in subsection (1) of section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 (other than one*

> *mentioned in paragraph (d) below in relation to which it appears to the court as mentioned there) and the court considers that if he is found guilty of the offence it ought to be possible to sentence him in pursuance of subsection (3) of that section;….*

Section 91(3) of the 2000 Act gives the Crown Court a general power to detain a child or young person. It is not a power exercisable by the Youth Court. It is a power to be exercised when no other disposal is suitable i.e. the maximum period of a detention and training order (2 years) is not sufficient.

10. The principles to be applied by the Youth Court when assessing whether "it ought to be possible to sentence" a child or young person to a period of detention in excess of 2 years were explained by this court in *R (H, A and O) v Southampton Youth Court* [2005] 2 Cr App R (S) 30 at [33] to [35]:

> *33. The general policy of the legislature is that those who are under 18 years of age and in particular children of under 15 years of age should, wherever possible, be tried in the youth court. It is that court which is best designed to meet their specific needs. A trial in the Crown Court with the inevitably greater formality and greatly increased number of people involved (including a jury and the public) should be reserved for the most serious cases.*
>
> *34. It is a further policy of the legislature that, generally speaking, first-time offenders aged 12 to 14 and all offenders under 12 should not be detained in custody and decisions as to jurisdiction should have regard to the fact that the exceptional power to detain for grave offences should not be used to water down the general principle. Those under 15 will rarely attract a period of detention and, even more rarely, those who are under 12.*
>
> *35. In each case the court should ask itself whether there is a real prospect, having regard to his or her age, that this defendant whose case they are considering might require a sentence of, or in excess of, two years or, alternatively, whether although the sentence might be less than two years, there is some unusual feature of the case which justifies declining jurisdiction, bearing in mind that the absence of a power to impose a detention and training order because the defendant is under 15 is not an unusual feature."*

These principles were adopted and amplified by Langstaff J in *R (W and M) v Oldham Youth Court* [2010] EWHC 661 (Admin) at [15]:

> *In my view, real prospect involves having regard to the realities of a case. Those realities must necessarily include those matters which it appears, for the time being, may well aggravate an offence in the mind of the sentencing judge, whomever it may come before. They must include those matters which inevitably will be or are likely to be prayed in mitigation. They include the possibilities and probabilities that there may be a plea of guilty. But the matter cannot be approached simply upon the basis that there will necessarily be a trial or there will necessarily be a plea of guilty. There is a general assessment to be made. And the evaluation, it seems to me, must take account of the prosecution case at the highest as it may reasonably be viewed by a court, since it is open to a court to take that*

view, assuming that such a view would not be unreasonable, and that must necessarily inform the view of any committing judge.

11. These principles were set out at a time when the determination of venue was effectively a once and for all decision. There were then only two routes by which a child or young person could be committed for sentence for offences other than homicide and firearms offences attracting a minimum term. They were where the defendant indicated a plea of guilty to an offence within the list of offences in s. 91 of the 2000 at the first appearance in the youth court (s. 3B of the 2000 Act) and where the criteria for a sentence to be imposed on the grounds of dangerousness were met (s. 3C of the 2000 Act). Whenever the Youth Court considered that a sentence of s. 91 detention was a sentence which should be open to the sentencing tribunal, there was no method by which the case could be dealt with by the Crown Court unless it was sent for trial. The decision as to venue was irrevocable in that, when the youth court retained jurisdiction for trial, it had to retain jurisdiction for sentence.

12. In 2015 the position changed. Section 53 of the Criminal Justice and Courts Act 2015 amended s. 3B of the 2000 Act so that it now provides:

"(1) This section applies where on the summary trial of an offence mentioned in section 91(1) of this Act a person aged under 18 is convicted of the offence.

(2) If the court is of the opinion that—
(a) the offence; or
(b) the combination of the offence and one or more offences associated with it, was such that the Crown Court should, in the court's opinion, have power to deal with the offender as if the provisions of section 91(3) below applied, the court may commit him in custody or on bail to the Crown Court for sentence in accordance with section 5A(1) below.

(3) Where the court commits a person under subsection (2) above, section 6 below (which enables a magistrates' court, where it commits a person under this section in respect of an offence, also to commit him to the Crown Court to be dealt with in respect of certain other offences) shall apply accordingly."

Thus, the Youth Court now has a general power to commit to the Crown Court for sentence irrespective of whether the defendant was found guilty after a trial or on their own plea of guilty.

13. The consequence of this legislative change and its impact on the principles to be applied in respect of Section 51A(3)(b) of the 1998 Act was considered by this court in the judgment of Sir Brian Leveson P in *R (on the application of DPP) v South Tyneside Youth Court* [2015] EWHC 1455 (Admin) [2015] 2 Cr App R (S) 59 at [29] to [31]:

29. The test set out in Southampton Youth Court, (whether there was a "real prospect" that the defendant might require a sentence in excess of the powers of the youth court) has been recognised and followed as a sensible interpretation of the requirements of s. 51A of the 1998 Act. When formulated, however, it had to be applied in the context of an irrevocable allocation decision. If the youth court retained jurisdiction for trial and it emerged in the course of the trial that the circumstances were more serious than had been understood at the allocation hearing, the court remained restricted in its

sentencing powers. That factor justified the requirement in Oldham Youth Court to take the prosecution case at its highest.

30. In practical terms, however, the youth court often would have only limited material at the allocation hearing with the result that the "real prospect" test would be met for want of information and in the knowledge that further material emerging later in the proceedings could not permit any change in venue. For my part, I have no doubt in recognising that this will have resulted in an understandable caution in respect of allocation decisions by youth Courts and I am aware that it has been the experience of Resident and other judges in Crown Courts in different parts of England and Wales that cases have been sent from the youth court for trial where, after fuller investigation, it has become apparent that the sentencing powers of the youth court were sufficient to meet the justice of the case…..

31. Because s. 3B (as amended) of the 2000 Act means that the youth court is not making a once and for all decision at the point of allocation, the "real prospect" assessment requires a different emphasis and taking the prosecution case at its highest is no longer necessary; to that extent, the observations of Langstaff J in Oldham Youth Court no longer apply. For the future, there will, of course, be cases in which the alleged offending is so grave that a sentence of or excess of two years will be a "real prospect" irrespective of particular considerations in relation either to the offence or the offender's role in it: such cases are, however, likely to be rare. As the time of allocation and determination of venue, the court will doubtless take the views of the prosecution and defence into account; these views could include representations as the value of privacy of the proceedings or, alternatively, the desire for a jury trial. Subject to such submissions, however, in most cases whether there is such a "real prospect" will generally be apparent only when the court has determined the full circumstances of the offence and has a far greater understanding of the position of the offender. Since the youth court now has the option of committing a defendant for sentence after conviction if the court considers that the Crown Court should have the power to impose a sentence of detention pursuant to s. 91(3) of the 2000 Act, it will generally be at that point when the assessment can and should be made. In that way, the observations in Southampton Youth Court (at para. 33) that Crown Court trial for a youth "should be reserved for the most serious cases" remain entirely apposite. It is worth observing that this approach is entirely consistent with the intended purpose of the amendment as explained by the Parliamentary Under-Secretary of State for Justice during the Report and Third Reading of the Bill: see Hansard, Vol 580, Col 464.

14. The practical outcome of this guidance as to the interrelationship between the allocation provision and the general power to commit for sentence is that it is only rarely that a Youth Court should send a child or young person for trial. Cases in which a defendant under 15 is sent for trial pursuant to Section 51A(3)(b) should be very rare.

15. The justices in this case had very limited information about the role BB played in the attack on BA. The police report was explicit about BB taking a pouch of tobacco from BA after BA had been threatened by others. Beyond that the justices could not properly have determined what direct role BB played in any violence. It does not appear that they attempted to do so. Rather, they relied on the overall circumstances as set out in the police report to justify the conclusion that this was a case in which there was a real prospect of a sentence in excess of the powers of the Youth Court. This ignored the guidance given by Sir Brian Leveson in *South Tyneside Youth Court*. They may be

excused for this, given that it does not appear that the authority was drawn to their attention. Had it been and had they taken proper account of it, BB would not have been sent for trial at the Crown Court.

16. The justices fell into greater error in their use of the Sentencing Council guidelines. At the time of their decision BB was 13. Any consideration of sentence in his case had to begin with the guideline in relation to Sentencing Children and Young People. The guideline emphasises the core principle in relation to an offender who is a child or young person that sentencing should be individualistic. It must focus on the offender, not the offence. Custody is to be imposed only as a measure of last resort. In respect of the imposition of a custodial sentence, the following paragraphs of the guideline are of particular importance:

6.45 Only if the court is satisfied that the offence crosses the custody threshold, and that no other sentence is appropriate, the court may, as a preliminary consideration, consult the equivalent adult guideline in order to decide upon the appropriate length of the sentence.

6.46 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.

6.47 *The individual factors relating to the offence and the child or young person are of the greatest importance and may present good reason to impose a sentence outside of this range. The court should bear in mind the negative effects a short custodial sentence can have; short sentences disrupt education and/or training and family relationships and support which are crucial stabilising factors to prevent re-offending.*

6.48 There is an expectation that custodial sentences will be particularly rare for a child or young person aged 14 or under. If custody is imposed, it should be for a shorter length of time than that which a young person aged 15 – 17 would receive if found guilty of the same offence. For a child or young person aged 14 or under the sentence should normally be imposed in a youth court (except in cases of homicide or when the dangerous offender criteria are met).

17. It does not appear that the justices gave any or any proper consideration to these paragraphs of the guideline. They determined that the offences committed by BB crossed the custody threshold principally by reference to the adult guideline. This was the wrong approach. Even assuming that they had sufficient information to allow them to do so, the justices should first have considered whether in BB's case, taking into account his age, his individual circumstances and his involvement in the offences, no sentence other than custody would be appropriate. Only then should they have considered the adult guideline.

18. Moreover, when considering that guideline they applied it mechanistically, namely the very approach which they were required by the guideline not to take. Finally, having employed a mechanistic approach, they failed to take any account of the fact that BB

was only 13. Reducing the adult sentence by half might have been appropriate had BB been a 15-year-old. It was wholly inappropriate for a child of 13. The guideline notes the expectation that a custodial sentence for a child aged under 14 will be particularly rare. The arithmetical exercise conducted by the justices in this case did not reflect that expectation in any way.

19. These matters in combination are sufficient to lead us to conclude that the decision of the youth court to send BB for trial at the Crown Court was wrong and should be quashed. No court considering his case in accordance with the correct principles could have determined that there was a real prospect that he might require a sentence in excess of the powers of the youth court.

20. We understand that a youth court sentencing a child or young person who pleads guilty, who has no previous findings of guilt and who cannot be categorised as a persistent offender has very limited powers. Where (as here) the defendant is under 15, the only practical option, if the defendant is not to be sent to the Crown Court, is a referral order. But any lacuna in the sentencing regime cannot justify the sending of a child or young person to the Crown Court. The lacuna can only be filled by legislative change. We can see that there may be a compelling argument for extending the powers of the youth court e.g. to allow the imposition of a youth rehabilitation order with intensive supervision and surveillance. Such an extension would permit a flexible approach which is so important when dealing with a child or young person in the criminal justice system.

21. There is a further error into which the justices fell. They took account of the fact that BB's co-accused had been sent to the Crown Court. Thus, they held that it was in the interests of justice that he also should be sent to the Crown Court so that BA did not have to give evidence at more than one trial.

22. The justices had no power to apply the interests of justice test to the issue of whether BB should be sent to the Crown Court. Where a child or young person appears before a magistrates' court jointly charged with an adult and the adult is sent for trial to the Crown Court, the child or young person may also be sent to the Crown Court if it is in the interests of justice to do so: Section 51(7) of the 1998 Act. This sub-section does not apply if there is no adult involved in the case. Then the only power to send a child or young person to the Crown Court is under Section 51A of the 1998 Act. If authority were required for this proposition, it is to be found in *R (W and others) v Brent Youth Court and others* [2006] EWHC 95 (Admin) at [9]:

> *….Where all the defendants are under the age of 18 there is no power to commit a young person to the Crown Court in the interests of justice, as there is where one defendant is over the age of 18 and must be committed to the Crown Court. If all are under 18, the court must make an appropriate decision for each defendant, even if this results in one defendant being tried in the Youth Court and others in the Crown Court.*

It follows that the justices applied a test which was not open to them to apply. Their determination of venue was in part based on a factor which was irrelevant. For that reason also, we conclude that the justices' decision was wrong and must be quashed.

23. We are satisfied that the only proper determination of venue in the case of BB was that he should be tried in the youth court. Therefore, having quashed the decision of the justice in his case, under Section 31(5)(b) of the Senior Courts Act 1981 we substitute for that our decision that BB shall be tried in the West Glamorgan Youth Court.

24. This case demonstrates the importance of applying the guidance given in *South Tyneside Youth Court.* The justices in this case did not so because the judgment of Sir Brian Leveson was not drawn to their attention. It is incumbent on those appearing before a youth court making an allocation decision to ensure that the court is aware of the principles set out in *South Tyneside Youth Court*. We hope that by dissemination of this judgment, those principles will be reinforced.