

Neutral Citation Number: [2013] EWCA Crim 774

No: 201106866/A4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 21st March 2013

B e f o r e:
LORD JUSTICE TREACY
MR JUSTICE SAUNDERS
HIS HONOUR JUDGE MILFORD QC
(Sitting as a Judge of the CACD)
R E G I N A

v

STEPHEN JACKLEY
Computer Aided Transcript of the Stenograph Notes of
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(Official Shorthand Writers to the Court)

Miss F Krause appeared on behalf of the **Appellant**
Mr G Walters appeared on behalf of the **Crown**

J U D G M E N T
(As approved)

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1. HIS HONOUR JUDGE MILFORD: On 21st August 2009 this appellant, then aged 23, and of previous good character, having pleaded guilty to five offences of robbery, three of attempted robbery, with seven related offences of possession of an imitation firearm, as well as offences of burglary, attempted burglary and assault occasioning actual bodily harm, was sentenced by His Honour Judge Cavell at Worcester Crown Court to a total of 13 years' imprisonment. The sentences of 13 years were imposed concurrently on the offences of robbery, attempted robbery and the firearms offences. In respect of the offences of burglary and attempted burglary the sentences were 18 months and in respect of the assault occasioning actual bodily harm the sentence was 2 years, all concurrent to each other and to the sentences of 13 years.

2. On 16th May 2012 a constitution of this court, presided over by Elias LJ, on a renewed application, granted leave to extend time for appealing and granted leave to appeal against sentence and a representation order. Subsequent to his conviction and sentence a psychiatric report, dated 12th October 2011, had been obtained from Dr Galappathie who found that the appellant was suffering either from Asperger's Syndrome or the traits thereof - information which was not before the sentencing judge. The case was adjourned.

3. On 25th June 2012 the case came back before a constitution presided over by Moore-Bick LJ. The court felt that there was insufficient information in Dr Galappathie's report to permit the court to deal with the case, and so it was adjourned with an order that a report should be obtained from a psychiatrist with expertise in the diagnosis and understanding of Asperger's Syndrome. Such a doctor was to be identified by agreement between the Crown and the appellant. The Crown was directed to attend the adjourned hearing.

4. Such a report has been obtained from Dr Suleman, who has the necessary expertise. He is a consultant psychiatrist at the South London and Maudsley NHS Trust and Lead Clinician at the Lewisham Adult Autism Spectrum Disorder Clinic.

The Offences

5. The appellant's home is in Devon. At the commencement of the academic year 2007 he commenced a course at Worcester University. The first offence in time is an attempted robbery at 5.35 pm on 7th September 2007 at Lloyds TSB in High Street, Exeter. The appellant tried to persuade an employee of TNT, a Mr Beer, who had come to collect the bank's mail to let him into the bank at imitation gunpoint. Mr Beer would have none of it and very courageously attempted to take the gun from him. In the struggle it became apparent it was a plastic BB gun. The appellant's reaction was to take out a knife with a 6 or 7 inch blade and to slash at Mr Beer, causing a minor injury to his chest. The appellant fled, dropping a plastic bag, which contained a crude replica of a bomb. A note, also abandoned, contained an instruction to open the door and get the money or the bomb would explode. On the following day, 8th September 2007, also in Exeter, in South Street, the appellant burst into Ladbroke's betting shop where the staff were cashing up. He was wearing a balaclava and armed with a combat knife

and hammer. He made the deputy manager fill his bag with cash, some £886.

6. There is then a break of more than a month, to 21st October 2007 and a change of location. The appellant had started at Worcester University. The target of the robbery was William Hill's betting shop in Worcester, again at the end of the day. The appellant had entered as a customer but emerged from the lavatory wearing a balaclava, and carrying an imitation pistol and a large knife. On this occasion he stole £530. Mrs Sabeci, who was working in the shop, managed to escape and raise the alarm. She has written to this court setting out how she has been adversely affected, not only by the incident itself but also by seeing a letter of apology that the appellant wrote to the local paper after sentence and then by these proceedings. It brings into sharp relief how long the psychological ill-effects caused by robberies such as these persist. She had also seen him carrying out a reconnaissance for this robbery exactly a week before.

7. The next offence in time, an attempted burglary, occurred on 29th November 2007, at Barclays Bank, Worcester. The appellant cut a bar to a window to try to get in at night. It was his intention to wait for the staff to arrive in the morning and open the safe, so that he would then be able to steal a much larger sum of money than hitherto.

8. The next robbery occurred on Sunday 2nd December 2007 at Coral, the bookmakers, in Worcester, just after opening. He entered as a customer, armed with an imitation firearm and a large knife, wearing a Scream mask. A female employee was forced to open the safe. She was threatened with having her throat slit. He took what he could (£340) and as he was backing away, a customer, realising what was going on, grabbed him. He got away and ran off with the customer in pursuit, who he then threatened with his knife.

9. The night of 13th December 2007 the appellant broke into the NSPCC offices in Worcester. The offices were ransacked and a camera stolen worth £500. Some £5,700 worth of damage was caused. An unusual feature of this offence is that the appellant sent, subsequently, on 14th January, 15th February and 1st April 2008 sums of £250, £355 and £650 to the NSPCC. A note offering them an apology accompanied the first sum.

10. The offending then returned to Devon. It is presumed that the university term had ended. On 19th December 2007 the appellant robbed Lloyds TSB at Seaton. Again, an imitation handgun was involved which he indicated to the female employee was loaded. He obtained £4,830.

11. The following day, 20th December 2007, he carried out an attempted robbery, with an imitation handgun at the Britannia Building Society in High Street, Exeter. The two female employees both demonstrated considerable resolve and he left empty-handed, deliberately dropping a £1 coin of his own.

12. On 17th January 2008 the appellant wrote to the Exeter Express and Echo referring to the robbery and the £1 coin and pointing out that the police had arrested the wrong man. There is then a cessation in the appellant's activities until 4th March 2008,

when the appellant went to the HSBC at Ledbury and demanded £8,500 in a paying slip amended to read "Paying out slip" for the account of "Robin Hood". He placed an imitation handgun on the counter but this robbery did not go to plan and he left empty-handed. The staff member to whom he was making his demands was so shaken that she asked to be moved to a different branch where there were a lot more staff.

13. The following day, 5th March 2008, the appellant robbed Barclays Bank, St John's, Worcester, again, with an imitation handgun and stole £4,100. One of the female staff was so upset that she collapsed and had to be taken to hospital by ambulance and was off work for a fortnight.

14. Pausing there, the police had not arrested the appellant. So it was that he was able to travel to the USA and endeavour to buy a real handgun, using a false identity. He was arrested and the upshot was that he was prosecuted and served 10 months and a further 2 months before he was deported. There was contact from the police in the USA which caused the police in England to search the appellant's room at Worcester University, where a mass of incriminating evidence was recovered, including his notebooks, detailing offences committed and planned, five imitation firearms and two sheath knives as well as what appeared to be a bomb. The campus had to be evacuated whilst an ordnance disposal team determined the item was safe.

15. It was clear that he had researched where best to obtain a gun, and noted that the Vermont, where he was arrested, was the only State in which a gun could be purchased without a licence. Suffice it to say that what was recovered demonstrated the appellant had a very, very strong interest in robbery.

16. Pertinent to this appeal is that amongst the recovered material was a mention of a meeting with "Doc Tippen", who was a mental health adviser at the university and this observation:

"I hate faking stuff, but it's a backup option in case."

We will return to Miss Tippen.

17. In his sentencing remarks the judge discounted back from 20 years for the guilty pleas and arrived at concurrent sentences of 13 years in respect of the robberies, attempted robberies and firearms offences. He found the only mitigating features were that the appellant had used an imitation firearm and pleaded guilty. We express some surprise that sentencing took place without a pre-sentence report. The appellant was a man of good character and some explanation for how he came to commit a spate of such serious offences would ordinarily have been sought. Furthermore, the judge had to consider the issue of dangerousness. The prosecution case was that the attempt to obtain a real firearm was so as to bring it back to the UK for use in further robberies. Indeed, that seemed to be the only sensible inference for the attempted purchase. The confirmation of that is found at paragraph 3.3.11 of Dr Suleman's report. That of course would not have been available to the sentencing judge because the appellant had not admitted his purpose to Dr Suleman. We add that the appellant well knew that he

had a history of involvement with health professionals concerning his mental health, since he was a child, yet no request was made by his legal advisors to the court for a psychiatric report.

18. The circumstance of significance surrounding the offences is that it is clear from what he has subsequently told the medical examiners, that he was drinking to excess and using cannabis.

19. When leave was granted it was to permit argument based on Dr Galappathie's report concerning the appellant's awareness of the consequences of his actions and hence his culpability for those actions which may have been significantly impaired at the material time. The original ground, settled by the appellant himself, argued that the sentence was manifestly excessive per se, and thirdly, his expression of public remorse and his behaviour in custody should be taken into account. No attempt has really been made by Miss Krause today, realistically, to argue the first ground. She concentrates upon the ground upon which leave was granted and upon the effect that Asperger's Syndrome will have on his ability to withstand a prison sentence.

Asperger's Syndrome

20. Dr Suleman makes a confident diagnosis of Asperger's Syndrome. This syndrome first identified by the eponymous Austrian psychiatrist, Dr Hans Asperger, is a pervasive development disorder and the diagnostic criteria are now internationally well recognised. In contrast to autism, those who have the syndrome tend to be of normal or high intelligence.

21. Going back over the medical records, Dr Suleman found that the appellant was the subject of a child protection plan in 2002, as a result of his mother's psychiatric illness and the difficult relationship with his father. He was seen by Child and Adolescent Mental Health Services. His teachers were concerned about the lack of social interaction with other children. In 2003 he was treated with Paroxetine for anxiety and social phobia. He was educated ultimately at a special school, where he obtained GCSEs and A levels. In 2005 he was referred to Adult Mental Health Services, but it was felt their services were not required and he was discharged.

22. Thereafter, the appellant travelled extensively, as far afield as Australia and New Zealand. On 4th October 2007 the appellant referred himself to Miss Tippen, a mental health adviser at the university, to whom reference was made in the notes recovered from his room. He told her that he was suffering from Asperger's Syndrome and that he was finding university life difficult. She was unable to confirm this having made contact with his general medical practitioner.

23. There is a short report from her, dated 25th July 2008. She referred him to Dr Sheen, a consultant psychiatrist. It is puzzling that in the light of this the appellant's medical history was not advanced at the sentencing hearing, with his own belief that he was suffering from Asperger's Syndrome.

24. According to Dr Suleman, on 5th March 2008, the same day that he robbed Barclays Bank in Worcester, he was assessed by Dr Sheen and reported paranoid symptoms, namely that he was being followed by two men in black suits. He was prescribed Olanzapine. The next mention of Asperger's Syndrome in the medical records follows an examination by Dr Ray on 30th July 2009, when the appellant is now serving this sentence.

25. In making his diagnosis Dr Suleman notes that the appellant has been a loner since childhood and became increasingly isolated as he grew up. By the time of the offences he was completely isolated. In social communication he has a number of abnormalities, in that he has difficulty communicating with strangers, is socially naive, is too direct when talking to others. He cannot indulge in small talk. He has difficulty coping with change. His interests become obsessions. Once he started the desire to obtain money and commit robberies it became an obsession. The fact that he is able to travel, says Dr Suleman, is not contradictory of Asperger's Syndrome.

26. Miss Krause argues that the judge found only two mitigating features referred to above. In decided cases, this court has found that Asperger's Syndrome has been regarded as a mitigating feature. Had the judge been aware of the true position, he would have made some discount for it. The question this court has to decide is the amount of that discount. She argues that based on paragraph 4.12 of Dr Suleman's report, he will find it the more difficult to serve his sentence than a prisoner who relates normally to other people and the prison system. He is vulnerable, prone to being bullied and finds it difficult to cope with change, as occurs in the prison system regularly. This, she says, is an additional reason for reducing his sentence. His remorse, Miss Krause argues, as indicated by the letter he wrote to the judge was not referred to in the sentencing remarks. As to his behaviour in prison, material has been provided to the court showing that he displays excellent custodial behaviour and is on an enhanced drug free block.

27. Our attention has been drawn to a number of authorities where an offender has had Asperger's Syndrome. In R v Palmer [2011] EWCA Crim 1286, a sentencing appeal in this court, Langstaff J gave the judgment of the court and said:

"We would not wish to lay down any approach of general applicability to those cases in which an appellant is suffering from Asperger's Syndrome or, as it may be, from autism. Each case necessarily must turn on its own facts. But one cannot ignore the link in appropriate circumstances between such a condition and the offence which has occurred. A judge cannot ignore that when considering what it is best to do when sentencing in order to achieve the purposes of sentencing set out in section 142 of the Criminal Justice Act 2003, principal among which is the reform and rehabilitation of offenders and the protection of the public."

28. The specific question which the court wished answered was how Asperger's Syndrome affected the appellant's awareness of the consequences of his actions. Dr

Suleman considers it at paragraph 4.10 of his report and says this:

"The question of Mr Jackley's awareness of the consequences of his actions is a difficult one. In my opinion, Mr Jackley's Asperger's Syndrome was a mitigating factor in the offences committed. He wanted to save the earth and resources. He has stated that the act of committing robberies and the desire to collect money became an obsession for him once he started. His psychiatric assessment around the time of his offence suggest that he may also be suffering from paranoid symptoms at the time, possibly as result of his heavy use of illicit drugs."

In our view, this does not really answer the question at all. Up to the commission of these offences the appellant had lived a law-abiding life. He is at least of average intelligence, having obtained A levels and entry to university. He well knew the difference between right and wrong. We see nothing to suggest in the medical evidence, that he did not appreciate that subjecting male and female employees to threats with guns and knives, in their workplace, whilst masked would terrify them. Indeed, his modus operandi was to strike such fear into his victims so that they would comply with his demands.

29. We do not accept that the medical evidence makes any real causal connection between his Asperger's Syndrome and his offending or demonstrates that he did not fully appreciate the effect that his behaviour would have on others. We cannot accept that by the time he wrote the letter to the court below, which expressed concern for his victims, that he had experienced a damascene moment when he had, for the first time, seen his crimes through the eyes of his victims. His excessive consumption of alcohol and cannabis are, we believe, relevant to his offending. He had also by April 2008 made his own decision to stop taking the prescribed medication. The most which can be said is that once he had made the free and conscious decision to commit robberies, Asperger's Syndrome made it more likely that he would become more obsessed with doing so and continue to offend. That is taking Dr Suleman's evidence at its highest.

30. We do however consider that there is some force in the argument that with his rigid thinking and aversion to change, life in custody will be more difficult for him than a prisoner who did not suffer from Asperger's Syndrome. Given that the material we have seen was not before the trial judge, we are minded to find that it would have made a small difference in sentence, and accordingly we substitute for the sentences of 13 years, sentences of 12 years on each concurrent, making a total sentence of 12 years. To that extent the appeal is allowed.