Neutral Citation Number: [2018] EWCA Crim 2729

2018/02871/A1

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London

WC2A 2LL

Thursday 15th November 2018

B e f o r e:

LORD JUSTICE FLAUX

MR JUSTICE POPPLEWELL

and

HIS HONOUR JUDGE PICTON

(Sitting as a Judge of the Court of Appeal Criminal Division)

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R E G I N A

- v -

LUKE JOHN BYRNE

_____

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Mr S Weidmann (Solicitor Advocate) appeared on behalf of the Appellant

LORD JUSTICE FLAUX: I shall ask His Honour Judge Picton to give the judgment of the court.

HIS HONOUR JUDGE PICTON:

1. This is an appeal against sentence brought with the leave of the single judge.

2. On 8th May 2018 in the Crown Court at Luton the appellant pleaded guilty to two offences of robbery (counts 1 and 5), an offence of attempted robbery (count 3) and two offences of having an article with a blade or point (counts 4 and 6), contrary to section 139(1) of the Criminal Justice 1988. On 4th June 2018 he was sentenced as follows: on count 1 (robbery, committed on 21st February 2018), two years' imprisonment; on count 3 (attempted robbery, committed on 25th March 2018), two years' imprisonment consecutive; on count 4 (possession of a bladed article on the occasion of the attempted robbery reflected in count 3), six months' imprisonment consecutive; on count 5 (robbery, committed on 5th April 2018), two years' imprisonment consecutive; and on count 6 (possession of a bladed article on the occasion of the robbery reflected in count 5), six months' imprisonment consecutive. Accordingly, the total sentence imposed was one of seven years' imprisonment. However, as the appellant was 19 years of age, the sentence should have been one of detention in a young offender institution. That is a matter that will need to be corrected in due course. No evidence was offered on count 2, an allegation that the appellant was in possession of a bladed article on the occasion of the first robbery in time and a not guilty verdict was entered pursuant to section 17 of the Criminal Justice Act 1967.

3. The facts were these. On 21st February 2018, at 9.15pm, Ali Hidar was at a Texaco petrol garage on Elstow Road in Bedford. Mr Hidar withdrew £80 and as the cash was about to be dispensed from the cash machine the appellant ordered him to stand aside and said, "I've got a knife". The appellant took the money dispensed by the cash machine (count 1) and left the petrol station. It appeared that there was another male with the appellant who had been standing next to the entrance to the shop in the petrol station. The appellant and the other male left together.

4. In his witness statement to the police, the victim related that he felt annoyed, upset and scared as a result of those events. The money was not recovered.

5. On 25th March 2018, at around 6.30pm, Maria Holowienku was at the same cash machine withdrawing cash. She noticed the appellant who appeared to want to use the cash machine and so she finished her current transaction and allowed the appellant to use the machine. However, the appellant hovered near the machine and appeared to talk on his mobile phone. Maria Holowienku subsequently used the cash machine once more and then left the petrol forecourt. As she walked away, she heard a voice from behind her. The appellant then reached into her handbag and began to push the victim whilst trying to get at the cash that was in the bag (count 3). After he had been unsuccessful in either accessing or snatching the handbag, the appellant produced a large kitchen knife some 20cm in length (count 4). He held the

knife approximately 1cm from Miss Holowienku's face. She began to scream. The appellant desisted from tying to steal the bag and ran off.

6. In her Victim Personal Statement Miss Holowienku described the profound effect that the appellant's actions had upon her. She related how she had been left feeling intimidated as a result of her experience. She said that she was now very anxious whenever she left the house. She described the effect upon her life as being "enormous" and said that she no longer felt safe. She said that she constantly felt shock and stress and that she can no longer concentrate as she used to be able to do.

7. On 5th April 2018, at around 11.30am, Mr Alex Breeze left his home address to go to the same petrol station on Elstow Road to withdraw some cash. On his way there he had seen the appellant and eye contact was made. Mr Breeze left the cash point, having withdrawn £250. Whilst he was walking home, the appellant approached him from behind and said "Give me your fucking wallet". When Mr Breeze hesitated, the appellant produced a knife (count 6) and pulled Mr Breeze towards an alley way. The appellant then lunged at Mr Breeze with the knife, which caused Mr Breeze to hand over the wallet containing the money (count 5). The appellant then made off.

8. Mr Breeze described the effect upon himself of this experience in similar terms as that of the victim in count 3. He related how he had been caused to become very anxious and that for a few days he struggled even to leave his home. He said that the experience was constantly at the back of his mind and that when outside he frequently had to look over his shoulder. He related that he had become apprehensive when he saw other young men in the street and that caused him to change his route in order to avoid having to walk past them. He asserted that the effect upon both himself and his family had been huge. He also referred to the fact that the money stolen had been saved up by him over a long period in order that he could start to have driving lessons and the loss had caused him real hardship. In addition, he related that the wallet and contents were possessed of sentimental value.

9. The appellant was eventually arrested at his mother's address. A search of the premises was carried out and the police found a knife that matched the description given by one of the complainants.

10. In interview the appellant made no comment to the questions asked of him by the police.

11. In sentencing, the judge remarked that the offences were both frightening and

nasty and that they had had a terrible impact on the victims. The judge commented that the appellant had ruined the quality of life for the victims in the case. The judge expressed some doubt as to the appellant's claim that he had been pressured by drug dealers to offend in order to pay money he owed them but those were matters of mitigation and did not merit any factual resolution, in our view.

12. The prosecution had served some evidence as to the prevalence of this type of offending with knives in the area where the robberies were committed. The judge said that she would bear that in mind. She indicated that the appellant's pleas of guilty would attract full credit. The judge said that she had concluded that the appellant was not to be assessed as dangerous, and that, in any event, the lengthy custodial sentence that was necessary in the case would be sufficient to fulfil the relevant sentencing needs. The judge stated that she had taken account of totality in settling upon the necessary length of sentence.

13. The appellant was aged 18 at the time of sentence. He had four convictions for five offences spanning from 23rd April 2014 to 12th August 2014. His relevant convictions included three offences against the person and one theft.

14. The author of the pre-sentence suggested that the appellant minimised the extent of his offending and sought to blame it on others. The appellant was suggested to be showing adequate remorse and regret for his behaviour, which was said to be due to his incarceration and having had time to reflect on his behaviour and the seriousness of his actions. The appellant apparently agreed that the victims would have felt fear and that a lasting psychological impact would have resulted from his offending. The report noted that the appellant related that he had been diagnosed with Attention Deficit Hyperactivity Disorder and Obsessive Compulsive Disorder. The appellant was assessed as being a medium risk of re-offending. It was noted that the appellant was fully aware that he faced a custodial sentence.

15. The grounds of appeal upon which leave was granted asserted that, although the judge did not indicate what the starting point was, the total sentence passed implied that she must have had in mind a sentence after trial of some ten years and four months' custody, and that is submitted to have been too high. Further, it is suggested that, notwithstanding the prevalence of knife crime, such a starting point failed to acknowledge the appellant's age and the fact that these were his first adult convictions. In addition, complaint is made of the decision by the judge to impose consecutive sentences in respect of the bladed article offences when those features had already operated so as to place the robberies in the highest category.

16. In granting leave, the single judge queried the level of sentence on count 1, given that no knife was produced or severe psychological harm reported by the victim. The single judge also identified that it was difficult to divine from the sentencing remarks how the learned judge had structured the sentences, and in particular that the imposition of consecutive terms for the offences of having a bladed article was not explained. The single judge warned the appellant, however, that in the context of his persistent offending, the full court might well still conclude that the overall sentence was nonetheless correct.

17. We are grateful to the appellant's advocate for his focused submissions made in support of the matters set out in his Advice on Appeal. It is unfortunate that the learned judge did not explain the way she was structuring the sentences or how it was that she categorised the offences in order to end up with the same sentence being passed in respect of counts 1, 3 and 5, where there were some obvious factual differences. It is also right to say that the learned judge did not spell out the degree to which she took account of the evidence concerning the local prevalence of knife-point robberies in this particular area, as she should have done in order to comply with the guidelines contained on *R v Bondzie [2016] EWCA Crim 552* .

18. All that said, the principal matter upon which we must focus is whether the total sentence was the correct one to pass, or whether there is merit in the submissions that it was manifestly excessive. In order to assess that issue, we have found it easier to start afresh, as opposed to seeking to analyse the sentencing remarks that were, for the reasons identified by the single judge, to a degree somewhat opaque.

19. Our conclusions are as follows. We assess count 1 to be a category 3B robbery, in respect of which the guideline indicates a starting point of two years' custody and a category range of one to four. The exercise of balancing aggravating and mitigating factors would, in our view, produce a sentence after trial of eighteen months, with credit for the guilty plea reducing that to twelve months.

20. Count 3 and 5 appear to be, and certainly in the course of the sentence hearing were treated as, category 1A offences. The production of a bladed article points to culpability A and the serious psychological harm sustained by the victims in counts 3 and 5 indicates category 1 for harm. Even if counts 3 and 5 might be said to be category 2 for harm, there is an overlap between the category ranges and in the particular circumstances of this case the result would be the same. Accordingly, for count 3 the guideline provides for a starting point of eight years' custody, with a range of seven to twelve. The degree of necessary reduction by reference to it being an attempt is minimal, given the appellant's persistence in seeking to steal the handbag, the fact that he held the knife just 1cm from the victim's throat, and the

fact that he only desisted after she screamed. Balancing aggravation and mitigation produces a sentence after trial of seven years' custody. Application of credit for the guilty plea would result in a sentence of four years and eight months' custody.

21. We are of the view that the correct way of dealing with count 4 is to impose no separate penalty, as it is the use of the bladed article that places the offence within culpability A.

22. Count 5 is again a category 1A robbery (or possibly at the top end of category 2A), which, although in respect of certain features was not perhaps as serious as the attempt in count 3, that is balanced by the fact that this was a completed offence. Accordingly, the result would be the same: seven years' custody after a trial; four years and eight months once credit for the guilty plea is applied.

23. As with count 4, we consider that the correct way to dispose of count 6 is again by way of no separate penalty.

24. With the sentences being ordered to run consecutively, leaving aside consideration of totality, the result would then be ten years and four months' custody. That would obviously be much too long a sentence for an offender who is now just 19 years of age and with relatively little by way of prior convictions. Discounting the total sentence to one of seven years does, in our assessment, produce a just and proportionate result.

25. In those circumstances, therefore, it could suffice in order to deal with this appeal for the sentences passed below, subject to them being correctly expressed as one of detention rather than imprisonment, being left as they are currently structured. However, as it is necessary to correct the error arising from the learned judge's misdescription of the sentence she was passing, we have concluded that an exercise of restructuring of the way the sentence is made up represents the more principled approach. Although the result of so doing will require certain elements of the sentence to be increased, that is balanced by a reduction in respect of others. The sentence will remain one of seven years in length. Accordingly, the exercise of restructuring does not offend against section 11(3) of the Criminal Appeal Act 1968. Further, to do so is in accordance with the guidance given by the President of the Queen's Bench Division in *R v Thompson [2018] EWCA Crim 639* at [23].

26. Finally, given that the total sentence that was imposed was the appropriate one in the context of the facts and the relevant guideline, it does not appear to us that the learned judge gave any undue weight to the issue of local prevalence such as

might potentially be thought to engage the principles espoused in *Bondzie* , to which reference has already been made.

27. Accordingly, we propose to restructure the sentence in this way: on count 1, twelve months' detention; on count 3, three years' detention consecutive; on count 4, no separate penalty; on count 5, three years' detention consecutive; and on count 6, no separate penalty. That means that the total sentence remains one of seven years, but that is a sentence of detention in a young offender institution.

28. To that extent, and to that extent only, this appeal against sentence is allowed.