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No: 201900829/A3

**IN THE COURT OF APPEAL**

**CRIMINAL DIVISION**

Royal Courts of Justice

Strand, London, WC2A 2LL

Thursday, 11 April 2019

**B e f o r e:**

**LORD JUSTICE FULFORD**

**MR JUSTICE SWEENEY**

**MR JUSTICE DINGEMANS**

**REFERENCE BY THE ATTORNEY GENERAL UNDER**

**S.36 OF the CRIMINAL JUSTICE ACT 1988**

**R E G I N A**

**v**

**GARY BOOTHE**

**Ms J Ledward** appeared on behalf of the **Attorney General**

**Mr N Robinson** appeared on behalf of the **Offender**

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## **J U D G M E N T**

(Approved)

1. LORD JUSTICE FULFORD: This is a Reference by the Attorney General, under section 36 of the Criminal Justice Act 1988.

2. On 3 January 2019, Gary Boothe, who is 40 years old, pleaded guilty to various counts on multiple indictments: (a) indictment 1 (T20187209) theft, contrary to section 1(1) of the Theft Act 1968 and having a bladed article in a public place, contrary to section 139 of the Criminal Justice Act 1988; (b) indictment 2 (T20187208) robbery, contrary to section 8 of the Theft Act 1968, and having a bladed article in a public place, contrary to section 139 of the Criminal Justice Act 1988; (c) indictment 3 (T20180445) theft, contrary to section 1(1) of the Theft Act 1968; and (d) indictment 4 (T20180446) theft, contrary to section 1(1) of the Theft Act 1968. There was no basis of plea. A further count of robbery on indictment T20187029 was left to lie on the file.

3. On 4 February 2019 Boothe pleaded guilty to two counts in indictment 5 (T20197031): robbery, contrary to section 8 of the Theft Act 1968, and having a bladed article in a public place, contrary to section 139 of the Criminal Justice Act 1988. Again, there was no basis of plea and Boothe asked for two offences of theft and one of attempted theft to be taken into consideration.

4. On the same day, Boothe was sentenced by Ms Recorder J Martin QC in the Crown Court at Bournemouth as follows:

1. indictment 1, theft and possession of a bladed article, he was sentenced to 6 months' imprisonment on each count concurrent;
2. on indictment 2 for robbery, he was sentenced to a 10 years' extended sentence, under section 226A of the Criminal Justice Act 2003 (a custodial term of 5 years and an extension period of 5 years) to be served consecutively and for possession of a bladed article, he was sentenced to 6 months' imprisonment concurrent;
3. on indictment 3, theft, there was a term of 4 months' imprisonment to be served concurrently;
4. on indictment 4, theft, there was a period of 4 months' imprisonment, again to be served concurrently; and
5. on indictment 5, robbery, there was a 10 year extended sentence, under section 226A of the Criminal Justice Act 2003, comprised of a custodial term of 5 years and extension period of 5 years, to be served concurrently and for possession of a bladed article there was a sentence of 6 months' imprisonment to be served concurrently.
5. Ancillary orders were made for forfeiture and the destruction of the knives.
6. The total sentence therefore was a determinate sentence of 6 months' imprisonment to be served consecutively with concurrent extended sentences of 10 years, comprising custody of 5 years with a 5 year extension period.

7. It is those sentences that are the subject of this application and we have referred to the offender (Mr Boothe) for convenience as "the defendant" throughout this judgment.

8. The offending can be summarised as follows. It began on 14 October 2018, when the defendant stole £200 from a till in a Sainsbury's store. This was one of the offences taken into consideration. On 15 October 2018 the defendant carried out a till point theft at a Co op store. Whilst paying for an item of small value, he took the opportunity to snatch cash from the open till. The cashier tried to close the till on his fingers and a short struggle ensued before the defendant was able to get away with £80. A bag containing a knife was dropped by the defendant during the incident although the weapon was not produced. The defendant was identified on CCTV footage. These events were reflected in the charges of theft and possession of a bladed article in indictment 1.

9. On 16 October 2018 the defendant committed two offences of theft. He stole an iPad, valued at £399, from an electronics store (the count of theft in indictment 3) and a quantity of goods from "Vape of Good Hope" valued at £727.92 pence, by placing the items into his bag before running away (the count of theft in indictment 4). He was identified from CCTV footage.

10. On 17 October 2018 the defendant stole £80 from a till in a Wilkinson store. On the same day he attempted to steal cash from a till in a Co op store. These two offences were taken into consideration. On 15 November 2018 the defendant carried out a robbery at a Coral's Bookmakers. He threatened the lone member of staff (Harry Brown) with a 6 inch bread knife demanding that he "give me the fucking money". He climbed onto the counter and crawled towards Mr Brown whilst pointing the knife in his direction. The defendant took £719 in cash. This incident was reflected in indictment 2, the counts of robbery and possession of a bladed article.

11. He was identified from finger and palm prints recovered from the counter top and later at an identification procedure.

12. Mr Brown has described the difficulties he now experiences being at work and trusting other people. He has been constantly on edge, with the result that building a rapport with new customers is very difficult. The defendant has, by his actions, notably disturbed Mr Brown's sleep patterns because of his nightmares of the defendant crawling towards him with a knife and he experiences daytime flashbacks. He suffers a notable degree of stress and anxiety. He has managed to return to work, albeit he is anxious about being alone. He constantly worries whether another robbery is going to take place.

13. On 17 November 2018 the defendant carried out a second robbery, on this occasion at a Betfred Bookmakers. He waited until the other customers had left the premises before jumping over the counter and threatening Lorna Galpin, the lone female member of staff, with a 6 inch bread knife. He was close to where Ms Galpin was standing. He took some £2,440 in cash (indictment 5, the counts of robbery and possession of a bladed article).

14. A victim personal statement from Ms Galpin was before the court. She has been very badly affected by the robbery. She was initially diagnosed with an acute stress disorder which included problems with sleeping, flashbacks and symptoms of extreme anxiety even when at home. She constantly fears she is about to be attacked. She completed a 21 day recovery programme but she has not felt able to return to work and she felt compelled to resign her position at the Betfred store. She has been out of work. In the future she will have to choose her employment with care as she no longer wishes to deal with money at work or to be placed in a situation that might lead to conflict. She often feels anxious walking in public

places and she struggles to visit her local corner shop after dark. She has become extremely conscious of her own personal security.

15. The defendant was arrested in relation to the offences reflected in indictments 1 to 4 and he made “no comment” in interview. He was charged and the charges were sent from the Magistrates’ Court on 23 November 2019. On the material before us it would appear that the defendant indicated at the Magistrates’ Court that he would be pleading guilty to all the offences.

16. At the PTPH, on 3 January 2019, he entered guilty pleas to all the counts in indictments 1 to 4 and he asked for the additional offences we have summarised to be taken into consideration. The proceedings were adjourned for a pre sentence report to be prepared.

17. He was interviewed by the police following this hearing and made admissions to further offences, indicating that the reason for this criminality was to fund his drug addiction and to pay drug debts.

18. These offences were considered to be too serious to be dealt with by way of being taken into consideration and as a result, on 4 February 2019, he was charged in court and the proceedings were nominally sent to the Crown Court, the learned Recorder sitting for these purposes as a district judge. Indictment 5 was then laid, the defendant pleaded guilty and the judge passed sentence as set out above.

19. Although the history is not entirely clear, it would appear that for the entirety of this offending a sufficient indication was given at the first available opportunity that guilty pleas were to be entered such that the defendant was entitled to full credit.

20. The defendant has numerous previous convictions, some 42 offences committed on 20 separate occasions since 1997 (when he was aged 19). These have included several offences of possession of, and offering to supply, controlled drugs, burglary, shoplifting and failing to surrender to custody, for which he has received immediate custodial sentences of varying lengths and sentences that included drug rehabilitation requirements. In 2002 he received a sentence of 4 years’ imprisonment for an offence of robbery. In 2009, he received a further sentence of 4 years’ imprisonment for an offence of attempted robbery plus a consecutive sentence of 6 months’ imprisonment following the activation of a suspended sentence for an offence of battery of which he was in breach. In 2012 he was sentenced to 42 months’ imprisonment for a third offence of robbery.

21. A pre sentence report, dated 27 December 2018, was before the court. The defendant told the author that he felt deeply ashamed and guilty about his behaviour. He described the offending as the behaviour of someone other than himself. We observe that it is not easy to reconcile that contention with his previous convictions which, as we have just set out, are substantial. He described his most recent relapse into drug misuse to the author of the report, which he said led to increasing indebtedness and he “started his slide back into criminality”. He suggested he had kept his relapse into drug misuse from his partner and he had resorted to dishonesty in order to replace fuel in her car. Having considered his previous offending, the author of the report noted that the index offences of robbery suggested there had been no reduction in the seriousness of his offending and, given the use of the knife, “possibly the reverse may be true”. That, in our view, was something of an understatement.

22. The author reported that the defendant had been admitted to a local drug and alcohol treatment centre on 8 December 2017 on his release from his last custodial sentence. He had been in supported, “follow on” accommodation until 31 August 2018 when he was discharged because he had relapsed and measures put in place to assist him to regain sobriety had failed. He had been of no fixed abode until his remand in custody in November 2018. His long history of substance misuse and cycles of relapse and re offending was well documented in the pre sentence report.

23. The author was of the view that the defendant has shown good insight into, and understanding of, his offending and the various risk factors. He is aware he needs to remain drug free in order to desist from further criminality but he is at risk of becoming complacent after a period of abstinence. An approved “classification tool” resulted in an assessment of the defendant as posing a high to medium risk of re conviction within a 2 year period. Being abstinent for a more prolonged period following his next release is critical to reduce the risk of re offending.

24. The author assessed the defendant as posing a high risk of serious harm, bearing in mind the nature of the two index robberies. The risk is of both physical and psychological harm to members of the public, particularly staff working in retail premises. The risk of harm is “immediate” whilst the defendant is unable to manage his addiction to drugs. His ability to engage in further drug treatment is, therefore, the major risk-reducing factor.

25. There were other victim personal statements before the court from the victims of the various thefts, setting out the effects on them and the negative impact that this offending has had on their businesses.

26. The judge dealt with the defendant on the basis that he had pleaded guilty promptly and she accepted that drugs have destroyed his life. Bearing in mind his deteriorating behaviour and the effect of

the offence on Ms Galpin, the judge concluded he is dangerous within the meaning of section 229 of the Criminal Justice Act 2003. The judge then addressed the consequences of an extended sentence as follows:

1. "So, having determined in my mind that you are dangerous, the final step that I need to go through is whether in my discretion it is appropriate to sentence you to an extended sentence of imprisonment or whether a determinate sentence of imprisonment will do. The impact of an extended sentence of imprisonment upon you are twofold. One is the alteration of the time at which you would automatically be released from prison. As your counsel has said, if I pass a determinate sentence of imprisonment you would automatically be entitled to release at the halfway stage.

2. If I pass an extended sentence of imprisonment you do not automatically get released, but you are entitled to apply to the Parole Board at the two thirds stage and they will then determine if you are safe for release. It is a bit like looking into a crystal ball, Mr Boothe, as to how you will be in a few years and to the judge that based on the information that has been provided to me over a very short period of time. The other thing that you get on an extended sentence is further time on licence, further time being controlled if you like, being assisted if you like by the Probation Service.

3. I am intending to pass a sentence upon you of an extended sentence of imprisonment. But in deciding to sentence you to an extended sentence of imprisonment I am going to take into account the impact of how much longer you would spend in prison before you were entitled to be considered for release. So I indicate to you, and I indicate to your counsel, that had I passed a determinate sentence of imprisonment it would have been longer than the sentence that I am going to pass as an extended sentence of imprisonment to take that into account.

4. Because what I want, Mr Boothe, is not a crystal ball. I want someone, after you have served two thirds of your prison sentence, to talk to you. To sit down to discuss with you how you are going to not relapse on your release from prison and for them, people who will have seen you over a much longer of time than I have, to determine whether or not you are safe to be released, whether the public are safe from you and then I want you to have an extended period of licence so that you will then have more time under the auspices of the Probation Service.

5. So that is why I am passing the sentence that I do. That is why in my discretion, having determined that you are dangerous, why I consider it to be the most appropriate sentence in your case."

27. She then set out her approach to the starting point and her approach to the sentence she was going to pass:

1. "As far as the robberies are concerned, the starting point obviously on the first one was 5 years, as it fell squarely within Category 2A but would have been aggravated by the previous convictions to 7 years. The starting point on the second robbery would have been higher, not simply because it is the second one but because of the impact on Miss Galpin. So whilst I would have reflected somewhere between, I think it would have been a Category 2 just but a higher Category 2, therefore, it would have been aggravated with the previous convictions up to a sentence of 8 years had I been sentencing them both separately.

2. Looking at totality and trying to bear in mind totality in this case, that would have been brought down to a sentence of 10 years across the board for the two robberies, this is if it were a determinate sentence, and giving credit for guilty plea, by my maths that would have come down to something in region of 80 months. So Mr Boothe would have been entitled to be released at the 40 month stage, something like that, subject to time on remand.

3. My intention, therefore, is to say, because I am going to pass an extended sentence having determined that he was dangerous, that the sentence, the starting point for the two offences of robbery, I am going to make them concurrent to this extent. Prior to any plea, in respect of the second robbery, the one on 17 November, the starting point would have been 7½ years. The sentence on the first robbery concurrent with that one would be 6 years. I give full credit, as I indicated that I would, and that brings the sentence down to 60 months, 5 years.

4. The custodial term in respect of the robberies, therefore, will be 5 years' imprisonment. That is going to be extended by a period of 5 years. By my calculation, therefore, Mr Boothe would still be entitled to consideration for release at the 40 month mark, but the decision as to whether he will be left to those who will have seen him over those preceding 40 months and to determine how he is doing and whether he is true to his own wishes to resolve the issues, as he says to take ownership. However, that is not quite all I have to sentence for and I am minded that the other significant offence in the series of offences was the theft and possession of the bladed article at the Co op on 15 October.

5. Looking at the guidelines in respect of possession of bladed articles, looking at the concerns that we are all aware of, the public concerns that we are all aware of in respect of the possession of the bladed article and the fear that Elaine Burden, Bowden [sic], had in fact when she discovered the knife, to my mind this is an offence that would have justified a sentence of at least 9 months' imprisonment and I will reduce that down with full credit to 6 months. But that will be consecutive to the extended sentence."

28. The learned Recorder finally summarised the sentences she was going to impose as follows:

1. The theft and the bladed article at the Co op on 15 October, for the reasons that I have already set out there was a starting point of 9 months. I reduce that down to a sentence of 6 months' imprisonment. As far as the offences of 16 October, the two thefts that followed and the TIC's, for what it is worth which I have taken into consideration, there will be concurrent sentences of 4 months on each. As far as the two robberies on 15 November and 17 November, for the reasons that I have already set out, I consider that an extended sentence is the only appropriate sentence that I can pass.

2. For the reasons that I have set out already in my earlier remarks, having decided on a starting point of 7½ years for the 17 November offence, 6 years for the other one, but in making them concurrent I sentence you to 5 years' imprisonment. You will serve two thirds of that sentence of imprisonment, Mr Boothe, and then your case, only then, can be referred to the Parole Board who will determine your release date. You will not serve more than the whole custodial term of 5 years.

1.

1. On release you will be on licence which will last to the end of any period remaining on the custodial served and then you will serve the extended licence period of 5 years which will begin after the custodial term has expired. Your licence will be subject to conditions and if any of the conditions

are broken you would be liable to have your licence revoked and return to custody.”

2. Ms Ledward, on behalf of the Attorney General, reminds the court that in respect of the offences of robbery there were factors which tended to place the offending in category either A1 or A2 of the Robbery Definitive Guideline (effective from 1 April 2016) for offences of street, or less sophisticated commercial, robbery. Category A1 has a starting point of 8 years’ custody with a range of 7 to 12, and category A2 has a starting point of 5 years’ custody with a range of 4 to 8 years. The production of a bladed article to threaten violence is a factor that can demonstrate high culpability. Serious psychological harm, particularly relevant to the offence of robbery in indictment 5 and the affect that it had on Ms Galpin, would be relevant as to whether it was a category A1 or category A2 case, or somewhere in between.

3. Ms Ledward highlights certain aggravating factors in this case. The overall offending revealed an intensive period of acquisitive crime. The defendant’s previous convictions included several offences of a similar type, committed on a regular basis over recent years. He had, on occasion, targeted lone shop staff. He had committed these offences whilst under the influence of drugs.

4. Ms Ledward correctly indicates that the defendant can properly rely on his admissions in interview and the extent to which he revealed his responsibility for further offending, his subsequent guilty pleas and his statement of remorse.

5. We are reminded that the Offences Taken into Consideration and Totality Definitive Guideline applies in this case. Additional incidents of criminality should generally be treated as an aggravating feature, justifying an upward adjustment from the starting point. However, Ms Ledward reminds us that the court should also consider whether the frank admission to a number of offences is an indication of the defendant’s remorse as well as his determination, or a demonstration of steps taken, to address his addiction and offending behaviour. As to totality, the court should pass a total sentence which reflects all of the offending behaviour in a way that is just and proportionate.

6. Ms Ledward contends that when passing an extended sentence, the judge should not take in to account the early release provisions. There is extensive authority to this effect, see: *R v Malachi and Lawrence [2014] EWCA Crim 631 at paragraphs 39 42*; *R v Hibbert [2015] 2 Cr App R(S) 15*, paragraph 12; Attorney General’s Reference No 27 of 2013 (*R v Burinskas*) [2014] 2 Cr App R(S) 45 at paragraphs 38 39 citing *R v Round and Dunn [2009] EWCA Crim 2667*. As this court in Hibbert observed:

1. 12. We have taken into account the comments made in *R v Round [2009] EWCA Crim 2667*; [2010] 2 Cr App R(S) 45, at [35] to [37], [44] to [46] and [49], as affirmed in *R v Malachi and Lawrence [2014] EWCA Crim 631* at [39] to [42], to the effect that the court should not when sentencing generally take account of the release possibilities, which depend upon Parole Board decisions.

34. In Attorney General’s Reference (No.27 of 2013)*R v Burinskas [2014] 2 Cr. App. R. (S.) 45*, Lord Thomas CJ similarly set out:

1. 38. Other than when fixing the minimum term in life cases in the way we have just described, a sentencing judge may not, when sentencing, take account of the early release provisions see *R. v Round and Dunn [2009] EWCA Crim 2667* at [44], Hughes L.J. said

2. “the general principle that early release, licence and their various ramifications should be left out of account upon sentencing is ... a matter of principle of some importance” .

3. 39. We agree. It is not for the court to correct the anomaly, if anomaly it be, by reducing the appropriate term to take account of the early release provisions. That would, in our judgement, offend the general principle and undermine the purpose of s.246A , which is to ensure that those subject to the new extended sentences serve one-third more of the appropriate custodial term than those sentenced under the old regime.

35. Against that background, it is submitted that the total sentences were unduly lenient, for the following reasons. First, it is argued the Recorder gave insufficient weight to the seriously aggravating feature of the catalogue of additional acquisitive (albeit more minor) offending. Second, she made too generous an adjustment to reflect the principle of totality. Third, although the court was right to conclude

that an extended sentence was necessary, she fell into error in further adjusting the custodial term downwards to take account of the different early release regime that applies to this kind of sentence. The cumulative effect of these factors resulted in an overall custodial term that was significantly shorter than appropriate to reflect the seriousness of this offending, particularly in light of the defendant's previous record.

36. On behalf of the defendant, Mr Robinson submits that when the defendant first entered his guilty pleas there was an expectation that he would be charged with another more serious offence. He immediately indicated he would plead guilty, a step that he took shortly afterwards. This, it is submitted, demonstrates a real degree of remorse and realism on the part of the defendant. It is further argued that the Recorder approached the sentencing exercise correctly and the letter from the appellant before the court demonstrates his full realisation of the seriousness of his offending. He is said to be an articulate man, who found himself in this position following a relapse and it is argued that this personal mitigation, which was of some considerable strength, was reflected in the Recorder's approach.

37. It is quite clear that as regards the extended sentences the Recorder sought to sentence in a way that would secure the defendant's release after a particular period of time. That was impermissible. Having determined that the defendant is "dangerous" the judge should have set the custodial term in the usual way.

38. We are of the view that the judge passed sentences that were unduly lenient for the two robberies, bearing in mind particularly the effects on the victims of the extremely frightening use of a knife. Indeed, the offence involving Ms Galpin had features which took it close to category 1A. We note that the Recorder identified terms of imprisonment, prior to giving credit for an early guilty plea, of 7 and 8 years' imprisonment respectively for these two offences if they had been dealt with separately.

39. Otherwise, although the individual sentences for the various offences of theft and possession of a bladed article in the other indictments were not unduly lenient when viewed in isolation, the overall sentence failed adequately to reflect this catalogue of criminality.

40. In our judgment, the correct determinate sentence for the two robbery counts should have been 12 years' imprisonment, bearing in mind the factors we have outlined above along with the need to ensure that the totality of the sentence is proportionate. Given this is a global sentence, we do not distinguish between them, albeit they are not of identical seriousness having regard to the difference, at least to an extent, of the effect on the victims. That term of 12 years' needs to be reduced by a third to reflect the defendant's guilty pleas, namely 8 years'.

41. We grant leave and allow the Attorney General's application. The sentences on count 1 in indictment T20187208, and count 1 in indictment T20197031 are quashed and we impose on each concurrently, but consecutive to the determinate sentences, an extended sentence (pursuant to section 226A) of 13 years, comprising a custodial period of 8 years with a 5-year extension period. Otherwise the judge's sentences are undisturbed.

42. This application succeeds to that extent.

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