

*[2019] EWCA Crim 1279*

No: 201901488/A4

**IN THE COURT OF APPEAL**

**CRIMINAL DIVISION**

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 4 July 2019

**B e f o r e :**

**LORD JUSTICE IRWIN**

**MR JUSTICE KERR**

**HIS HONOUR JUDGE PATRICK FIELD QC**

(Sitting as a Judge of the CACD)

**R E G I N A**

v

**"A"**

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**Mr R Rutter** appeared on behalf of the **Appellant**

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

(As approved)

1. HIS HONOUR JUDGE PATRICK FIELD: The appellant in this case was born on 28 August 2001. He is now 17 years old. He appeals against his sentence with the leave of the single judge. Reporting restrictions, pursuant to section 45 of the Youth Justice and Criminal Evidence Act 1999 continue to apply to this case and nothing relating to the appellant shall be included in any publication while he is under the age of 18 if it is likely to lead members of the public to identify him as a person concerned in the proceedings.

2. On 22 February 2019, in the Crown Court at Cardiff, the appellant pleaded guilty to four offences and on 18 March he was sentenced as follows. For an offence of robbery, contrary to section 8(1) of the Theft Act 1968, he was sentenced to 3 years and 4 months' detention pursuant to section 91 of the Powers of Criminal Courts (Sentencing) Act 2000. In respect of having an article with a blade or point, contrary to section 139 of the Criminal Justice Act 1988 (count 3 on the indictment) and two offences of attempted robbery (counts 4 and 7 on the indictment) there were no separate penalties. Thus the total sentence was 3 years and 4 months' detention. He

also faced count 6 on the indictment alleging possession of an offensive weapon (a screwdriver) and this was ordered to remain on the file on the usual terms.

3. His co-accused, Jamie Davies, who was born on 22 July 2000 and so is about a year older than the appellant, pleaded guilty and was sentenced on count 1, that is robbery, to 4 years' detention; on count 2, possession of a bladed article to 4 months' detention; on count 4, that is one of the attempted robberies, to 30 months' detention; on count 5, possession of an offensive weapon, to 4 months' detention; on count 7, the second of the attempted robberies, to 30 months' detention; on count 8, driving whilst disqualified to 2 months' detention; on count 9, a count of dangerous driving, to 12 months' detention and count 10, possession of cannabis, to 1 week's detention. All sentences were concurrent and the total sentence for the co-accused was 4 years' detention in a young offender institution.

4. The facts, in summary, are these. All of the offences to which we have referred occurred on 21 January 2019, starting with count 1, the robbery. At about 6 o'clock on the morning of 21 January Janet Caffrey left home in Pontycymer to go to work. She went to her blue Hyundai motorcar that was parked outside her house with the passenger door immediately adjacent to the pavement. She placed her laptop in the front nearside footwell and her handbag on the passenger seat. She then got into the driver's seat and was entering her journey details into her satellite navigation device when she noticed the appellant and Jamie Davies walking along the pavement towards her. They looked in through the passenger window of the car before Jamie Davies quickly approached the driver's door. Mrs Caffrey could see that he had a knife with him. He opened the door and told her to get out. As she did so, Davies held the knife within a centimetre or two of her chest. Simultaneously the appellant opened the passenger door. He removed Mrs Caffrey's handbag and her mobile phone and threw those onto the pavement before getting into the passenger seat. Davies got into the driver's seat and then drove off at speed, colliding with a Ford Fiesta belonging to Mrs Caffrey's daughter in the process although causing little damage to it. The laptop computer was later found discarded at the side of the road some distance away.

5. Turning next to count 4, the first attempted robbery. At about 9.05 during the same morning James Hurley was driving his motorcar along Bridgend Road in Maesteg when he was overtaken at speed by Janet Caffrey's stolen Hyundai motorcar driven by Davies. It stopped immediately in front of him causing Mr Hurley to slow down and come to a halt. As he did so both of the front doors of the Hyundai were opened. The appellant got out of the passenger door. He then leaned into back of the Hyundai and put on a ski mask or balaclava which covered his face. Davies remained in the vehicle. The appellant, who appeared to Mr Hurley to be armed, made his way over to Mr Hurley's car whereupon Mr Hurley put his vehicle into reverse and then drove around the Hyundai and away. The appellant and Davies both got back into the Hyundai and followed Mr Hurley for a short distance before pulling in by the school at LLangynwyd.

6. The second attempted robbery to which count 7 refers occurred a few moments later, at 9.15 a.m. Kayleigh Soper was sitting in her motorcar outside the school in Bridgend Road. She had stopped to make a telephone call. Her 6-month-old daughter was asleep in the back of the vehicle. Kayleigh Soper saw the appellant and Davies approaching her. Both were wearing balaclavas and bandannas to cover their faces. One went to each

side of her vehicle and they attempted unsuccessfully to open the doors that had been locked centrally. The youth at the driver's door pulled hard on the handle and pointed the knife that he was carrying - she described it being similar to a steak knife - at Ms Soper through the closed window. She screamed and was frightened for her own safety and for that of her child in the back of the car. When the two youths, that is the appellant and his co-accused realised that they could not get into the vehicle because the doors were locked they walked away.

7. Just over an hour later at around 10.40 that morning a police officer, DC Cole, in an unmarked vehicle, was conducting a search for the stolen Hyundai when that same vehicle passed him travelling in the opposite direction and towards the location of the first robbery in Pontycymer. DC Cole turned his vehicle around and pursued the Hyundai, eventually catching up with it when it became stuck in traffic. The police officer pulled alongside the stolen vehicle and was able to see that Davies was the driver and that the appellant was in the front passenger seat. At DC Cole's instruction Davies pulled over and got out of the car. The police officer stopped his vehicle and knowing that at least one of the youths had previously been armed with a knife, he drew his baton before approaching the stolen car. Davies then jumped back into the driver's seat of the stolen car and reversed at speed. He collided with the unmarked police vehicle and DC Cole had to move out of the way in order to avoid being hit himself. Davies then manoeuvred the stolen vehicle between the police car and a goods vehicle that was blocking his route and tried to drive off. He drove along the pavement colliding with a wall and a number of other vehicles before the Hyundai came to a halt having collided with a lamppost. The appellant and his co-accused got out of the car and attempted to escape on foot.

8. The co-accused, Davies, was detained after a violent struggle by police officers who were nearby making enquiries about the robbery of Janet Caffrey. They were assisted by members of the public including Janet Caffrey's husband and son.

9. Davies was searched. He was found to be in possession of two screwdrivers (the subject matter of count 5) and a small amount of cannabis and two cannabis grinders to which count 10 related. His mobile phone was recovered and that revealed that during the time that the offences were taking place he was communicating with his girlfriend and he referred to the appellant being with him. On the pavement immediately beneath the passenger door of the Hyundai a large black handled kitchen knife was found (this is the knife referred to in count 2).

10. Another member of the public, Callum Burrows, intervened and took hold of the appellant and an off duty plain-clothed policeman nearby also came to assist. The appellant struggled with Mr Burrows shouting at him to get off. DC Cole shouted to Mr Burrows to be careful as the appellant might have a knife and the appellant then produced a knife some 6 - 8 inches in length and started swinging it towards Mr Burrows (this is the subject matter of count 3 to which the appellant pleaded guilty). Mr Burrows felt a pain in his side and thinking that he had been stabbed he released his grip on the appellant who ran away. In fact, Mr Burrows was uninjured. He then pursued the appellant down a railway embankment and onto a track, told him to stop, to put the knife down and to lie on the ground. The appellant was compliant with these commands and he remained there until the off-duty

police officer arrived to arrest him.

11. When interviewed under caution the appellant admitted his presence at all four incidents together with his co-accused. He said they were both in possession of knives. He said they had taken them out with them that night. When questioned as to whether he was under the influence of any substances at the time he described that he had taken Xanax and smoked tobacco through a bong the night before. We note however that it appears from the pre-sentence report that the appellant had in fact consumed a potent and much more varied cocktail of drugs before setting out to commit these offences.

12. When sentencing, the judge had the benefit of a pre-sentence report and also a report from a speech and language therapist. The appellant (who was then, and still is, 17 years old) had shown challenging behaviour since about the age of 7 and had been diagnosed with Attention Deficit Hyperactivity Disorder. This disorder was not well managed because he was not taking his prescribed medication at the time of these offences. His language skills were also found to be in the low/average range for his age, which could lead to frustration and vulnerability. He was assessed as posing a high risk of re-offending and a very high risk of causing serious harm. He lacked remorse and empathy for his victims.

13. The judge also had in mind when sentencing a number of relevant Sentencing Guidelines including the Definitive Guideline on Robbery Offences, the Overarching Guideline on Sentencing Children and Young People and the Guideline on Totality. As to count 1, she included that there was high culpability because of the use of the knife to threaten violence. The harm fell into category 2 because categories 1 and 3 were inapplicable. Thus, the starting point for an adult offender for this robbery was 5 years in custody, with a range of between 4 to 8 years. Because she intended to pass only one sentence, the judge took account of aggravating features that related to all the offending. These included the fact that the first robbery took place during the hours of darkness immediately outside Mrs Caffrey's house. The third robbery she found to be aggravated by the presence of the baby in the car and all offences were aggravated by the fact that the appellant and Jamie Davies were acting together as a group and both were under the influence of drugs. The fact there were two associated offences of course also aggravated the sentence on count 1 in accordance with the principle of totality.

14. There were, the judge found, mitigating features, namely, the appellant's youth, his remorse, notwithstanding what was said about this in the pre-sentence report, some references that she had before her and the fact that the appellant had no previous convictions.

15. In Jamie Davies' case the judge concluded that the sentence on count 1 before credit for plea should be one of 6 years' detention. With credit this was reduced to 4 years. All other sentences, as we have said, were

concurrent. Accordingly, this sentence for Davies on count 1 was also aggravated by totality.

16. When dealing with the appellant the judge said this:

"Had you been convicted after a trial you too would have faced a term of 6 years' imprisonment had you been an adult, but I reduce that term to 5 years to reflect your youth. You were 17½ years old at the time and when you committed these offences, so you were not that much younger than your Co-Defendant and you were not very far off being 18 in any event."

17. She then allowed one-third credit for his guilty pleas and passed a sentence pursuant to section 91 of the Act of 2000 of 3 years and 4 months' detention in respect of count 1. The judge was satisfied that the offences overall were so serious that only an immediate term of detention under section 91 was appropriate and there was no separate penalty in respect of the other offences.

18. A pre-sentence appeal report that we have read shows that the appellant has made progress in custody. He has shown great remorse for his actions, has produced a letter of apology to one of his victims and has requested to meet another should that person be willing so to do. He is now aware of the impact of his offending, not only upon the victims but also on the wider community. He is working well with the various services in the prison.

19. The grounds of appeal are that the judge failed to give appropriate weight to the appellant's youth and to his lack of previous convictions with the result that the eventual sentence was manifestly excessive. It is not suggested that the judge was wrong to pass an immediate custodial sentence pursuant to section 91. We note that save for a discount in respect of his age the judge equated the appellant's position with that of his co-accused. In so doing we think that she fell into error because not only did Davies have previous convictions but he also committed these offences in breach of a conditional discharge. Furthermore, Jamie Davies faced a number of counts not faced by the appellant. So that the totality equation would have been different in his case.

20. We also conclude that the judge failed to have sufficient regard to the appellant's youth, relative immaturity and mental health problems. We note the contents of paragraph 1.5 of the Guideline on Sentencing Children and Young Persons:

"It is important to bear in mind any factors that may diminish the culpability of a child or young person. Children and young people are not fully developed and they have not attained full maturity. As such, this can impact on their decision making and risk taking behaviour. It is important to consider the extent to which the child or young person has been acting

impulsively and whether their conduct has been affected by inexperience, emotional volatility, or negative influences. They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to

peer pressure and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour. When considering a child or young person's age their emotional and developmental age is of at least equal importance to their chronological age (if not greater)."

21. Also paragraph 6.46 of the same guideline:

"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 mechanically. 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."

22. We also note the conclusion of the pre-sentence report that the appellant acted impulsively in addition to those parts of the report to which we have already referred.

23. Notwithstanding these matters the judge allowed a reduction of just one-sixth on a sentence of 6 years' duration in respect of the appellant's youth. We take the view that a greater reduction was justified albeit not to the full extent envisaged in paragraph 6.46 of the guideline. It follows that we conclude that the overall sentence of 3 years and 4 months was, for the reasons given, manifestly excessive. This was nevertheless serious offending for which a substantial custodial sentence was warranted. We conclude that an appropriate sentence, taking into account the mitigating features and the appellant's age, before credit for plea is one of 4 years' detention.

Reduced by one-third to reflect his guilty pleas this comes to 32 months. We therefore quash the sentence on count 1 and substitute for it a sentence of 32 months' detention pursuant to section 91 of the Powers of Criminal Courts (Sentencing) Act 2000. The appeal is allowed to that extent.

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