

Neutral Citation Number: [2019] EWCA Crim 1542

No: 201902524/A1-201902618/A1

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 15 August 2019

B e f o r e:

LORD JUSTICE HICKINBOTTOM

MRS JUSTICE CARR DBE

MRS JUSTICE ANDREWS DBE

R E G I N A

v

IVANA HUSSAIN

SARAH LUCY O'LEARY

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Mr M Butler appeared on behalf of the **Appellant Hussain**

Ms C Mawer appeared on behalf of the **Appellant O' Leary**

J U D G M E N T

(As approved)

MRS JUSTICE CARR:

Introduction

1. On 5 March 2019, in Harrow Crown Court, Ivana Hussain ("Hussain") (now aged 21) and Sarah O'Leary ("O'Leary") (now aged 20), pleaded guilty to conspiracy to steal contrary to section 1(1) of the Criminal Law Act 1977. On 5 July 2019 Hussain was sentenced to 12 months' immediate imprisonment and O'Leary to a term of 12 months' immediate detention in a Young Offender Institution. Their co-accused, Marlie O'Connor ("O'Connor") (aged 34), pleaded guilty to robbery and was sentenced to 3 years 9 months' imprisonment. There is rightly no challenge by him to that sentence. These are the appeals against sentence on the part of Hussain and O'Leary.

2. The appeals raise issues concerning, in particular, the correct application of the Sentencing Council's Guideline on the Imposition of Community and Custodial Sentences to the particular facts of these cases. Both appellants are young and of previous good character. One has serious mental health problems and was in the middle of a degree course at the time of sentence. The other was the sole carer of a young 3-year-old boy.

The Facts

3. Hussain was the partner of O'Connor. Together they and O'Leary, who was a friend of Hussain, planned a staged robbery in the Perivale branch of Ladbroke's where O'Leary worked. On 26 May 2018 O'Leary had extensive telephone contact with Hussain and communication between the two continued into the next day. By 8pm that O'Leary was at work; there were further telephone calls between O'Leary and Hussain at around this time. At 8.15pm Hussain and O'Connor, along with Hussain's child, waited at a bus stop close to O'Leary's place of work. At 8.30 pm, after a significant quantity of cash had just been removed from the gaming machines, O'Leary sent Hussain a text message. Following receipt of that text message Hussain and O'Connor immediately separated. O'Connor headed to the Ladbroke's branch whilst, Hussain, wheeling her child in a pushchair, headed towards the canal. O'Connor, brandishing an extendable baton and wearing a black skull facemask, entered the shop just after 8.30 pm and demanded money. Whilst O'Leary filled the bag with approximately £6,600 from the safe, O'Connor snatched a mobile telephone from the hand of a customer present and smashed it with the baton. He also shouted at another customer to stay out of the shop. One of O'Leary's fellow employees, Fiona Pereria, had been behind the counter and was naturally very shaken. O'Connor took the bag and ran from the shop where he then rejoined Hussain nearby. At 9.15 pm Hussain attempted to call O'Leary twice. O'Leary sent Hussain a text at about 11.30pm and then made multiple attempts to call her the following day. Following the offence Fiona Pereria asked why she had given O'Connor money from the safe when it was company policy to give money from the till in such situations.

4. Police attended the scene and statements were taken from O'Leary amongst others. O'Leary provided her mobile telephone number to officers. Her call records were then investigated showing the contact between herself and Hussain set out above. CCTV footage seized from the vicinity also showed Hussain and O'Connor together near the shop at the material time. The two had been captured on footage taken after the offence. Hussain's presence had effectively provided cover for O'Connor as he fled the crime scene.

5. Hussain and O'Connor were arrested on 4 February 2019. Hussain answered "no comment". O'Leary attended the police station by prior appointment on 11 February and also answered "no comment".

6. As we have already indicated, both Hussain and O'Leary were of previous good character. Hussain pleaded guilty on a basis of plea. She had known O'Leary for about 3 years but was no longer in contact with her. Prior to 27 May O'Leary told her and O'Connor that she could facilitate the theft of money from Ladbroke's by way of a staged robbery. She did not know or suspect that O'Connor would carry a weapon. Hussain said she believed the amount stolen was £4,200 although O'Connor, in his basis of plea, made it clear that it was some £6,600. Hussain said that O'Leary received some £2,000. Hussain regretted her part in the theft and said she would be prepared to give evidence against O'Leary at trial. O'Leary also pleaded guilty but not on any specific basis.

7. Hussain said that they used the money that she received from the crime to pay bills and purchase food, O'Leary said she received her £2,000 which she used to purchase a car.

The Sentence below

8. When sentencing the appellants, the Judge commented that whilst this had been an “inside job”, with O’Leary acting as the “inside person”. O’Leary’s colleague and other customers would not have known that. It would have been a frightening incident for them. When considering the sentences for the women the Judge said that he considered the Sentencing Council Guideline for Theft and the Guideline for Theft from a Shop but noted that the offending did not fall easily within either. There had been significant harm and significant money taken. Within the Guideline for Theft from a Shop the offence would fall within category 1, within the general Guideline for Theft, category 3.

9. In respect of O’Leary there had been a breach of trust: she knew the security measures and had telephoned to let them know when to enter the shop. There had been clear planning particularly between O’Leary and O’Connor. The Judge did not go behind the bases of plea but observed that O’Leary and O’Connor must have been aware that there was at least a risk that force would be used. The theft involved intimidation or the threat of force. Hussain had provided cover for O’Connor by being present with her child.

10. The Judge then went on to say:

”In terms of mitigation for the two of you, your ages, your previous good character - in respect of you, O’Leary, the psychiatric report, I take that into account. It is likely that you have an emerging personality disorder. In terms of you, Hussain, you have a young child. I am prepared to give you full credit for your pleas of guilty ...

I make it clear that I have an eye on the Sentencing Council’s Guidelines for Sentencing Young People. I also have an eye on the Sentencing Council’s Guidelines for Community Sentences. I have given consideration to both, but, in my view, this matter is so serious that only an immediate custodial sentence can be justified for all three of you but I make it clear that in respect of you, O’Leary and you, Hussain, I have significantly reduced the starting point.”

11. He went on to say that, had the women gone to trial, the sentences for both would have been 18 months; after full credit for guilty pleas this was reduced to 12 months’ detention for O’Leary and 12 months’ imprisonment for Hussain.

12. Grounds of Appeal for O’Leary

Ms Mawer, on behalf of O’Leary, advances in summary the following grounds of appeal. First, the Judge was wrong to place O’Leary’s offending within culpability A category or, in the alternative, the Judge erred in fixing the quantum of sentence that he did. She submits that this was not a case of a breach of a high degree of trust, this was not sophisticated offending and there was no significant planning. She submits that in circumstances where O’Connor alone was the instigator of the offence and responsible for the violence, it cannot be said that O’Leary played a leading role. Alternatively, she submits, that there should be a downward adjustment within category 3A

to reflect the appropriate level of culpability.

13. Secondly she submits that the Judge erred in failing to exercise his discretion to suspend the sentence. She submits that insufficient regard was given to the following factors in particular: O'Leary's youth (she was 19 at the time of offending), the unchallenged finding of the Probation Service that her offending was caused by immaturity, her mental health problems and the level of her culpability. Further, Ms Mawer points to the impact of a custodial sentence upon O'Leary. There was strong evidence that detention would have a highly detrimental effect on her, in particular the timing of a sentence of detention would be particularly and disproportionately damaging, given the stage which O'Leary had reached in her university studies. Finally, Ms Mawer says that the Sentencing Council Guideline for Imposition of Community and Custodial Sentences was not properly considered by the Judge. None of the factors militating against the suspension were present, she submits, and those factors in favour of suspension, in particular a realistic prospect of rehabilitation and strong mitigation were present.

14. Ms Mawer has referred us to a number of authorities including the following:

1. *R v Balogan* [2018] EWCA Crim 2933 where, at [38], the court confirmed that young age and lack of maturity are still relevant after the age of 18. Where there is evidence that immaturity is a cause of offending the principles applicable to the sentencing of young people are relevant;

2. *R v Shuttleworth* [2019] EWCA Crim 33 at [22]. There the cumulative impact of mitigating features in that case led to the imposition of a suspended sentence on appeal. Ms Mawer went so far as to suggest that *R v Shuttleworth* effectively creates a presumption in favour of a suspended sentence where a first-time offender meets all the prescribed criteria for the imposition of such a disposal;

3. *R v Newsome* [2019] EWCA Crim 921, relied on both to indicate that there are cases where a suspended sentence may be appropriate even where there is a higher level of breach of trust and to demonstrate how the court deals with sentencing defendants with serious medical conditions as identified in *R v Bernard* [1997] 1 Cr App R(S) and *R v Hall* [2013] EWCA Crim 82.

15. In a very recent and lengthy written skeleton argument Ms Mawer has also referred us to the International Legal Framework for Female Offenders as contained in the United Nations Convention on the elimination of all forms of discrimination against women ratified by the United Kingdom in 1986. She draws our attention to the policy considerations derived from, amongst other sources, the so-called "Bangkok Rules". Likewise she has referred us to the statement of the UN Special Rapporteur on Violence Against Women following a mission to the UK in April 2014.

16. In summary, Ms Mawer says that there could be no more compelling case for suspension than that of O'Leary.

Grounds of Appeal for Hussain

17. Mr Butler, on behalf of Hussain, advances in summary the following grounds of appeal. First, he submits that the sentence was manifestly excessive. Hussain's case fell within category 3B offending (if not 3C). Although there was some planning, some factors in relation to lesser culpability were all present. There was a limited function under the direction of O'Connor. Hussain was involved through coercion, intimidation or exploitation with O'Connor being 14 years her senior, with a history of offending. He submits that there was little planning and a limited awareness on the part of Hussain of the full extent of the offence.

18. Secondly, Mr Butler submits that insufficient credit was given for Hussain's personal mitigation and the effect of an immediate custodial sentence on her sole dependent and her housing situation. He points to her youth, her good character, her remorse, including an offer of reparation, the fact that she was the sole carer for her 3-year-old son, the history of domestic abuse and the fact she was under the influence of O'Connor, the fact she would lose her local authority accommodation if placed in custody and her diagnosis of depression. Finally, Mr Butler complains on the ground of parity, namely that the same sentence was imposed on both Hussain and O'Leary in circumstances where O'Leary clearly played a more leading role and acted in breach of trust.

19. For Hussain the Judge had before him a number of character references which we have also read. We have been provided with two further letters for Hussain: a letter from her older sister who is the current carer for Hussain's son and also from Hussain's mother. The sister describes how the boy misses his mother and has become very distressed at not being able to see her. He wakes in the night disorientated and unsure of where he is and has started bed-wetting. His nursery pre-schooling which is about to start would be disrupted if he was not able to live at home with his mother. She speaks of how Hussain has worked hard in prison learning transferable skills. Hussain's mother also speaks of the boy's turmoils and distress.

Analysis - General

20. The principles in play are non-contentious. We have not found the international material advanced of any material assistance to our analysis.

21. In broad and summary terms only:

(a) Where there is evidence that offending is linked to immaturity the principles of youth sentencing will be relevant in the assessment of culpability and appropriate disposal;

(b) A serious medical condition (even when difficult to treat in prison) will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate but may enable a court, as an act of mercy, to impose such a sentence;

(c) The fact that a defendant has dependent children is a relevant factor to sentencing. The Article 8 rights of the defendant and any dependent child are engaged. A court must ask whether the sentence contemplated is or is not a proportionate way of balancing the effect on the defendant and his or her children with the legitimate aims that sentencing must serve - see the well-known approach identified in *R v Petherick* [2012] EWCA Crim 214 ; [2013] 1 WLR 1102 (at [17] to [25]);

(d) When considering suspension a balancing exercise is to be carried out - see *R v Tharmaratnam* [2017] EWCA Crim 887 at [14]. Thus, even if a judge takes the view that appropriate punishment would only be achievable by immediate custody, he or she still has a discretion to suspend if there are sufficient factors against such a course;

(e) This court will be slow to interfere with an exercise of judgment as to whether or not to suspend where it is clear that all relevant considerations have been taken into account, including by reference to the Guideline on the Imposition of Community and Custodial Sentences. As was said in *R v Tharmaratnam* (supra) at [14], it will only do so where the decision is plainly wrong in principle or results in a sentence which is manifestly excessive.

21. For the avoidance of doubt, we reject the submission for O'Leary that *R v Shuttleworth* (supra) creates some sort of presumption in favour of suspension if all the factors identified in the Guideline on the Imposition of Community and Custodial Sentences as pointing to suspension are present. It does nothing of the sort. Decisions to suspend, or not, are always fact specific. The Guideline requires the sentencing judge to weigh the factors identified but even then does not purport to provide an exhaustive list of what may be relevant considerations in any given case.

Analysis - O'Leary

22. We do not accept that the Judge was wrong to treat O'Leary's culpability as high. He was entitled to place her offending in category 3A when her offending is considered as a whole. This was not a simple theft: there was a clear and serious breach of trust on O'Leary's part. She knew the security measures at her place of work, for example, whether there was CCTV and the safe would be open. She was in charge of timing, for example, sharing details of when the money was banked. She failed to press the panic alarms. Even if there was not a breach of a high degree of trust, there were additional high culpability factors. She was involved in significant planning. She was at the heart of the exercise. As the Judge commented, she must have known there was at the least a risk of the use or threat of force. This was, on any view, serious offending. For category 3A offending the starting point is 1 years' custody with a range of 26 weeks to 2 years' custody.

23. However, given the mitigation available to O'Leary and the absence of any aggravating factors, we have concluded that the Judge did plainly err in selecting a term of 18 months before applying a guilty plea credit. That term was manifestly excessive taking into account, in particular, the mitigation available to O'Leary: her good character, her youth, her immaturity and her mental health.

24. In this context, we have read carefully the psychological report from Dr Bowers. O'Leary presents as a complex and very troubled woman who had experienced long-term interfamilial sexual abuse and a separate incident of sexual assault. She had mental health problems as a teenager. She is diagnosed with anxiety, depression and emerging emotionally unstable personality disorder. She has made two serious suicide attempts: she in fact overdosed in June 2019, thus missing the final exam of the first year of her degree course. Her poor mental health made her vulnerable to exploitation. She was highly suggestible and had been seriously mentally unwell at the time of this offence. Her mental condition was linked to her role in the conspiracy to steal. The pre-sentence report before the Judge echoed the link between O'Leary's offending and her lack of maturity.

25. In our judgment, an appropriate term would be one of 9 months' detention, which then falls to be reduced to 6 months' detention after the application of full credit for guilty plea.

26. We then consider whether the Judge should have suspended the sentence by reference to the Sentencing Council Guideline for the Imposition of Community and Custodial Sentences. As already indicated, that requires a balancing exercise to be carried out, taking into account relevant factors in favour

of immediate detention on the one hand and in favour of suspension on the other. On the one hand, this was serious offending and it could be said that appropriate punishment could only be achieved by immediate detention. On the other hand, there was a realistic prospect of rehabilitation and very strong personal mitigation as set out above. It was also reported that the chances of O'Leary recovering were far higher in the community than a custodial sentence. Apparently O'Leary is receiving no mental health treatment currently in detention. She was assessed as a low risk of re-offending and detention would compromise her education, including her degree course at London South Bank University, her prospects and related opportunities.

27. On our finding as to the appropriate term, the period of detention in question has been halved and the context for considering suspension has changed accordingly. The lower the sentence the more appropriate may be suspension. But even by reference to a term of 12 months, the Judge cannot have given adequate consideration to O'Leary's youth, immaturity, mental health and personal circumstances, including her educational situation, all of which presented a complex picture. We have concluded that the Judge's refusal to suspend her sentence resulted in a sentence that was manifestly excessive. A careful assessment of the Guideline against the facts should have led the Judge to suspend the sentence of detention.

28. For these reasons and to this extent, we allow O'Leary's appeal. The sentence of 12 months' detention will be quashed; we substitute it with a sentence of 6 months' detention suspended for 12 months. Given that O'Leary has spent just over a month in detention, we do not propose to impose any conditions. If in the period of suspension O'Leary commits any offence, she will be brought back to court and it is likely that the sentence will be brought into operation.

Analysis: Hussain

29. We accept that Hussain's offending was category 3B, not 3A, offending. We do not accept that it was category 3C offending. A strong feature of the offending was element of planning in which Hussain was repeatedly involved. Hussain's role was also not insignificant, providing a decoy for O'Connor with the presence of her child. Again, as the Judge commented, Hussain must have known at least of the risk of the use or threat of force, not least given her partner's record of violent offending. For category 3B offending the starting point is a high level community order with a range of low level community order to 36 weeks' custody. On this basis it can readily be seen that the Judge's figure of 18 months before credit for guilty plea was manifestly excessive.

30. Taking into account Hussain's personal mitigation, an appropriate term, before credit for guilty plea, would be 12 weeks' imprisonment. Thus after credit a custodial term of 8 weeks' imprisonment is achieved.

31. We then consider whether that sentence should have been suspended. It is more difficult to see how in Hussain's case it could be said that appropriate punishment could only be achieved by immediate custody. Further, all three factors pointing towards suspension were present in her case and powerfully so. There was a realistic prospect of rehabilitation and very strong personal mitigation. Additionally, immediate custody would result in significant harmful impact on her 3-year-old child of whom she was the sole carer. We are concerned that inadequate consideration was given by the Judge to this important factor in line with the approach identified in *R v Petherick* (supra): imprisonment in this case amounted to a disproportionate interference with the Article 8 rights of both child and mother. As was the case in *R v Shuttleworth* (supra), this was a paradigm example of a case where the custodial sentence should have been suspended. The failure to do so resulted in a sentence that was manifestly excessive.

32. For these reasons and to this extent, we allow Hussain's appeal. The sentence of 12 months' imprisonment will be quashed; it will be substituted with a sentence of 8 weeks' imprisonment suspended for 12 months. Given that Hussain has spent just over a month in custody, we do not propose to impose any conditions. If in the period of suspension Hussain commits any offence, she will be brought back to court and it is likely that the sentence will be brought into operation.

33. In these circumstances, Hussain's complaint about parity of sentencing with O'Leary clearly falls away.

Conclusion

34. For these reasons, the appeals of O'Leary and Hussain will be allowed. As already indicated, there is no challenge by O'Connor to his sentence in respect of which there is no proper basis for any complaint.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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