

[2019] EWCA Crim 1419
No: 2019 00257 A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday 18 July 2019

B e f o r e:

LORD JUSTICE MALES

MR JUSTICE JAY

MR JUSTICE EDIS

R E G I N A

v

DANIEL McALLISTER

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd Lower Ground, 18-22
Furnival Street, London EC4A 1JS Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr Shufqat M Khan appeared on behalf of the **Appellant**

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

1. **MR JUSTICE JAY:** On 19th December 2018, at Lincoln Crown Court, Daniel McAllister was sentenced by His Honour Judge Easteal, on his guilty pleas, to a total term of imprisonment of 10-and-a-half years, which was composed as follows: on count 2, causing an explosion likely to endanger life or cause serious injury to property, contrary to section 2 of the Explosive Substances Act 1883, 7-and-a-half years' imprisonment; on count 3, burglary of a non-dwelling, contrary to section 9(1)(b) of the Theft Act 1968, 3 years' imprisonment consecutive; on count 4, dangerous driving, contrary to section 2 of the Road Traffic Act 1988, 16 months' imprisonment concurrent. McAllister was also disqualified from driving, with the mandatory extended driving test requirement. The court record sheet states that the period of disqualification was 8 years 2 months and 10 days, but in open court the judge stated that the period would be one of 3 years, to come into effect at the halfway point of sentence. Other orders were made which are not the subject matter of this appeal, which McAllister brings with the leave of the single judge.
2. The facts are that in the early hours of the morning on 19th September 2018 the appellant, together with two or three unknown others, travelled in a stolen high performance Audi car on false numberplates to Grantham. They then used explosive gas to break open a ATM machine at a Co-op store. They used a circular saw to cut through the heavy duty security shutter to gain access to the front of the ATM, wrenched open the ATM and then caused an explosion to open the rear of the machine. This was done by inserting a pipe into the front of the ATM and then pumping an explosive gas (believed to be acetylene) into the machine. The gas was from a large cylinder they brought with them and was ignited using a homemade ignition device. This technique required considerable expertise as if too much gas is used then the money inside the ATM would be destroyed and if too little is used the ATM would withstand the blast.
3. Following the explosion, they broke into the store by cutting a door away and smashing a glass panel. They removed the security devices on the rear of the ATM using a circular saw and emptied it from the inside, taking approximately £20,000. The explosion caused significant damage to the machine and also to the fabric of the building.
4. The men left the premises and drove away at high speed, with the appellant at the wheel. The police were alerted, and just south of Newark a police car started to follow the vehicle. The appellant lost control of the vehicle on the A17, having crossed the central island of a roundabout. It left the road and crashed into a ditch. The appellant suffered multiple injuries and was unable to make off on foot. The other offenders all escaped and have not been apprehended. The appellant was found lying against the open passenger side door. He was taken to hospital, where he remained for three weeks. The car was searched and a burglar's kit was recovered, which included a sledgehammer, a jemmy bar, a circular saw, a hammer and a chisel. There was a pipe with tubing, four ignition devices, a number of gas cylinders, several sets of false plates, a balaclava and gloves. A holdall containing the stolen money was recovered from the back seat. The cost of repairing the ATM was £13,000.
5. After he was discharged from hospital, the appellant was interviewed on 13th October.

He claimed he was the rear seat passenger in the Audi. He said that he had been coerced into taking part in the offences because of the theft of £6,000 worth of cocaine by an associate of his. He said he had been made to wear gloves and a face covering, that he had not been involved in the burglary or the explosion, and that all he had done was to give the others directions to Grantham sitting in the rear of the vehicle. He subsequently pleaded guilty to the offences.

6. There was a basis of plea which the judge considered. In it the appellant stated that he owed money to people whom he did not wish to name. There were threats of violence on him, his pregnant partner and children. The judge stated that he expressed no view as to whether the appellant's position as part of this professional gang was the result of indebtedness: it made precious little difference, as he put it, to the outcome. The judge did not accept that the appellant was forced into engaging and being part of this gang's activities; and it is to be noted that the second line in paragraph 1 of the basis of plea was abandoned. We consider that the judge's approach to the basis of plea was correct and no appeal point arises.
7. As for his antecedents, the appellant was born in September 1977. He had appeared before the court on eleven previous occasions for 21 offences between 1994 and 2016. His earlier offences were mainly for theft, aggravated vehicle taking and driving offences. In 2017 he was sentenced to 3 years' imprisonment for possessing an imitation firearm with intent to cause fear of violence. In 2012 he was sentenced to 54 months' imprisonment for committing arson recklessly, theft of a vehicle and criminal damage. In March 2016 he was sentenced to 20 months' imprisonment for a section 47 ABH. This entailed throwing an acid-type substance at a police officer. In April 2016 he was sentenced to 10 months consecutive for handling stolen goods.
8. There was no pre-sentence report before the judge. We confirm that no such report either was or is necessary.
9. In his sentencing remarks the judge stated that the primary offences had all the hallmarks of professionalism and the responsibility amongst the gang was shared. The appellant's position was aggravated by his criminal record which we have summarised. The appellant was, as the judge stated, a ruthless and determined criminal.
10. The judge stated that he did take mitigation into account. Despite his long criminal record the appellant was now a shadow of the man he was back in September because during the crash he caused as he tried to escape, he suffered life-changing injuries. The prognosis was unknown, but he appeared at the Crown Court via video link in a wheelchair and was visibly suffering the effects of his injuries. The judge kept in mind that he was fortunate still to have the support of his partner.
11. The appellant was entitled to 25% deduction for plea. The judge bore in mind the case of Attorney-General's Reference Nos 74-78 of 2014 [2015] 1 Cr App R (S) 30. In that judgment two defendants were each involved in a single explosion or attempted explosion, as well as conspiracies to burgle. The Court of Appeal indicated, in a case involving

indeed very similar facts to the instant case, that it was appropriate that consecutive sentences should have been passed. It was necessary to pass appropriate deterrent sentences. We note that the sentences imposed on appeal in relation to the conspirators most directly involved were of 10 years' imprisonment before credit for their pleas.

12. The judge stated that he kept in mind totality when imposing the sentences. He said that the starting point, as he put it, on counts 2 and 3 were 10 years and 4 years' imprisonment respectively before credit was given for the plea.
13. We would add that under the Sentencing Council's Burglary Guideline the appropriate starting point for this offence was 2 years' imprisonment, with a sentencing range of 1 to 5 years. As we have observed, consecutive sentences were imposed.
14. In respect of the dangerous driving, which, as the judge said, had caused catastrophic injury to the appellant, it might have caused similar injuries to a number of innocent people, which is what made it so serious. The starting point was 16 months. After 25% credit for plea he was sentenced to 12 months concurrent bearing in mind totality.
15. Finally, the judge said that he had considered whether to pass an extended sentence, but particularly given the appellant's circumstances now, that would be neither necessary nor appropriate. The sentence imposed was "long and hard" because of the seriousness of his criminality.
16. The grounds of appeal, developed with effectiveness and economy before us orally by Mr Khan, are that, first, the judge failed to take into account totality, in as much as he imposed consecutive sentences on counts 2 and 3 by simply aggregating the sentences appropriate for each offence without making further allowance, and, secondly, that insufficient regard was paid to the appellant's personal mitigation: the fact that he had been so seriously injured and that prison would be correspondingly harder. The appellant does not take issue with the judge's adjusted starting points as such, that is to say viewed on an isolated basis before credit for the pleas, but looking at this in the round the submission is that an adjusted starting point of 14 years before credit for the pleas was manifestly excessive.
17. We have carefully considered these submissions, which we can take in the round. The judge said that he had taken into account totality, and he was clearly entitled, in line with Court of Appeal authority, to impose consecutive sentences. Under page 7 of the Sentencing Council's Definitive Guideline on Offences taken into Consideration and Totality, the judge was not required to reduce either or both elements of the consecutive sentence in a manner pressed on us by Mr Khan. It was only incumbent on him to do so if the upshot would be unjust and disproportionate. In our view, although this was certainly a harsh sentence, the outcome could not be so characterised; and in any event the judge reflected totality to the extent necessary and appropriate by passing a concurrent sentence for the dangerous driving matter.
18. Whereas it is correct that the appellant's injuries have been life-changing, we have not

received medical evidence about this. However, we accept Mr Khan's explanation as to the present position. Nonetheless the fact remains that these injuries arose directly out of the appellant's criminal activities overall, including his dangerous driving at the moment he was injured, when he was escaping apprehension. The judge said that he took into account the available mitigation, and we are unable to conclude that the overall sentence he imposed was manifestly excessive.

19. A difficulty does arise in relation to the disqualification period that the judge imposed. As we have said, the judge stated in court that the appellant would be disqualified for a period of 3 years and "that disqualification will begin and come into effect and start at the halfway point of your sentence". The court record indicated differently, but it is the sentence pronounced in court which is material and operative.
20. The effect of paragraph 42 of the Court of Appeal's judgment in R v Needham [2016] EWCA Crim 455 is that the sentence takes effect from the day it is pronounced, not at the date of release. We are unable to adjust the sentence to reflect the judge's clear intention, given the impact of section 11(3) of the Criminal Appeal Act 1968. The sentence as pronounced in court to the extent that the judge stated that the disqualification period will begin and come into effect and start at the halfway point was an unlawful sentence, and that part of the disqualification order must be deleted.
21. The outcome is that the appellant is disqualified from driving for a period of 3 years. To that extent only this appeal is allowed. In relation to the substantive matters which we have covered the appeal is dismissed.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: Rcj@epiqglobal.co.uk