Neutral Citation Number: [2020] EWCA Crim 1388

Case No: 202000794 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CHESTER
His Honour Judge Woodward
T20197335

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29th October 2020

Before :

LORD JUSTICE MALES
MR JUSTICE SPENCER
and
HH JUDGE AUBREY QC
(sitting as a Judge of the Court of Appeal (Criminal Division))

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Between :

THE QUEEN	**Respondent**
- and -	
LEE HODGIN	**Appellant**

- -
- -

Mr John Weate, solicitor advocate, for the **Appellant**

Hearing date: 23rd October 2020

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Approved Judgment

Covid-19 protocol: This judgment will be handed down by the Court remotely, by circulation to the parties' representatives by email and, if appropriate, by publishing on www.judiciary.uk and/or release to Bailii. The date and time for hand down will be deemed to be 29th October 2020 at 10.30 am

Mr Justice Spencer :

1. This appeal against sentence, brought by leave of the single judge, raises an issue of considerable practical importance in relation to credit for indicating a guilty plea.

2. At the conclusion of the hearing on 23rd October 2020 we announced that the appeal was dismissed, but that in view of the importance of the practical issues raised we would give our reasons later in writing.

The issue

3. The Sentencing Council's Definitive Guideline on Reduction in Sentence for a Guilty Plea, effective from 1st June 2017, provides at section D1:

> **D1 Plea indicated at the first stage of the proceedings**
> Where a guilty plea is indicated at the first stage of proceedings, a reduction of **one-third** should be made (subject to the exceptions in section F). The first stage will normally be the first hearing at which a plea or indication of plea is sought and recorded by the court.

We shall return to the exceptions in section F.

4. Since 2012, the Criminal Procedure Rules have required:

> **9.7(5)** If the [magistrates'] court sends the defendant to the Crown Court for trial, it must … ask whether the defendant intends to plead guilty in the Crown Court and (i) if the answer is 'yes', make arrangements for the Crown Court to take the defendant's plea as soon as possible, or (ii) if the defendant does not answer, or the answer is 'no', make arrangements for a case management hearing in the Crown Court;
>
> and (b) give any other ancillary directions…

> **9.5(1)** The magistrates' court officer must (a) serve notice of a sending for Crown Court trial on (i) the Crown Court officer, and (ii) the parties; (b) in that notice record….(iii) any indication given by the defendant under rule 9.7 of intended guilty plea,…

5. The issue in this appeal is whether the necessary "indication of plea" was given in the magistrates' court when the defendant was sent for trial, and, if it was not, whether the appellant should nevertheless have received full credit of one-third in the particular circumstances of the case.

6. On 13th February 2020 in the Crown Court at Chester the appellant was sentenced by His Honour Judge Woodward to a term of 6 years 9 months' imprisonment, having pleaded guilty to a very serious offence of conspiracy to commit burglary. He was afforded credit of 25% for his guilty plea which had been entered some 10 weeks earlier at the plea and trial preparation hearing (PTPH) on 6th December. The sole

ground of appeal is that the appellant should have been afforded full credit of one-third for indicating in the magistrates' court, when he was sent for trial, that it was a "likely guilty plea". Was that an "indication of a plea of guilty" entitling him to full credit of one-third pursuant to the guideline?

7. There is, on the face of it, a potential conflict in the authorities on this point in previous decisions of this Court over the past 18 months, although on careful examination we are satisfied that in fact there is no such conflict, for reasons which we shall explain.

The facts of the offence

8. The facts of the offence can be very shortly stated in view of the narrowness of the issue raised in the appeal.

9. The appellant, now aged 33, was one of six defendants who pleaded guilty to the same conspiracy and were sentenced on the same occasion. The conspiracy involved 39 separate burglaries committed over a three-month period between 3rd August and 5th November 2019. The vast majority were commercial burglaries but there were also two domestic burglaries. The offending covered a large geographical area, across Lancashire, Cumbria, Merseyside, Cheshire, North Wales and Shropshire.

10. The offences were planned and sophisticated. The premises targeted included dry cleaners, restaurants, public houses, garages and bus depots. The burglaries took place in the early hours of the morning when it was believed that large quantities of cash would be held in a safe on the premises. The conspirators often travelled to the targeted premises in vehicles bearing stolen or cloned registration plates to avoid detection. One of the premises targeted was a branch of the British Legion, shortly before Remembrance Day, the conspirators believing that a significant amount of cash would be stored there. In one of the domestic burglaries the householders were asleep in bed when they were burgled. The total value of the property and cash stolen was in excess of £100,000. Loss and damage was estimated at a further £101,000.

11. At the time of the offences the appellant was on licence from a sentence for burglary. He was arrested on 7th November 2019. In interview he answered no comment to all questions.

The chronology of the proceedings

12. The appellant was charged, not with any individual burglaries, but with conspiracy to burgle a large number of premises. The charge set out a long list of the individual properties and alleged that he had conspired with others to burgle those properties between the dates we have mentioned.

13. He appeared at the magistrates' court on 8th November, the day after his arrest and charge. He was represented by a solicitor. Because the offence of conspiracy was indictable only, the case had to be sent to the Crown Court for trial.

14. As required, Part 1 of the appropriate prescribed standard Better Case Management (BCM) form was completed by the appellant's solicitor before the hearing. It required an answer to the question: "Has the defendant been advised about credit for guilty pleas?" The box for "Yes" was ticked. Immediately beneath, the form stated:

> "Pleas (either way) or indicated pleas (indictable only) or alternatives offered".

In the box beneath the solicitor wrote:

> "Likely guilty plea."

The appellant was sent for trial, with the PTPH in the Crown Court set for 6th December.

15. On 12th November a detailed police case summary (MG5), running to 45 pages, was uploaded to the Digital Case System (DCS). On 4th December a detailed sequence of events and telephone attribution report, running to 149 pages, was uploaded to the DCS, incorporating maps, CCTV stills, cell site evidence placing defendants' mobile phones at relevant scenes, and evidence extracted from their mobile phones including messages and photographs.

16. The following day, 5th December, the appellant's solicitor advocate, Mr Weate, made the following entry on the DCS: "As indicated on the sending form, Hodgin will plead guilty to count 1. The appointment to identify the particular offences he was involved in was cancelled… In any event he admits to involvement in a significant number of the allegations."

17. At the PTPH next day, 6th December, the appellant entered a guilty plea, as did the other defendants. As the appellant was not admitting all the individual burglaries the court directed that a basis of plea be submitted by 20th December and set a provisional trial of issue hearing for 10th February 2020.

18. On 17th December the appellant's basis of plea was uploaded to the DCS. Of the 39 separate incidents alleged by the prosecution the appellant accepted involvement in only 18 specific burglaries and thefts.

19. On 7th February 2020 prosecuting counsel uploaded a detailed draft opening and indicated that following discussions between the defence teams and the prosecution a trial of issue would be required in respect of only one defendant: the appellant.

20. On 10th February Mr Weate made an entry on the DCS to the effect that he and the prosecution were in communication with a view to resolving the trial of issue; he was confident this would occur although final instructions would be required at court as there had been no opportunity for a further conference with the appellant in prison.

21. On 12th February Mr Weate made a further entry on the DCS to the effect that, subject to final confirmation in conference with the appellant at court, agreement had been

reached on the appellant's basis of plea and no trial of issue would be required. Judge Woodward, the assigned sentencing judge, acknowledged this information on the DCS and requested that a draft basis of plea be uploaded. That was done the following day, 13th February. In the revised basis the appellant now accepted involvement in a total of 31 separate incidents out of 39, more than twice the number he had previously admitted.

22. Because the basis of plea originally submitted by the appellant was not acceptable to the prosecution, a good deal of further work had to be done by the prosecution in readiness for the trial of issue hearing. A further conference was held with the police and prosecution team, with the sole purpose of identifying the areas of dispute to ensure that the evidence for any trial of issue was limited to those areas. Some of this work related to other defendants who had submitted a basis of plea but much of the work related to the appellant because a great deal of the evidence against him was telephone evidence placing him at relevant scenes with co-defendants. Further telephone attribution work was carried out on this area of the case.

23. The prosecution uploaded to the DCS on 20th January a schedule of areas of dispute for all defendants. The appellant was the last of the defendants to offer an acceptable basis of plea in the days leading up to the proposed date of hearing for the trial of issue.

The judge' sentencing remarks

24. There is no complaint by the appellant about the length of his sentence before credit for plea, nine years imprisonment. In the course of his commendably succinct sentencing remarks Judge Woodward dealt with credit for plea in this way:

> "Turning to the issue of credit, none of you indicated an unequivocal guilty plea at the magistrates' court. One of you indicated that it was very likely you would plead guilty, but I am afraid that is essentially meaningless. All of you pleaded guilty at the first appearance at the Crown Court. You are entitled to 25% credit for that."

25. Pausing there, we should explain that the other defendants had given no indication in the magistrates' court that there would or might be a guilty plea. Some had indicated a plea of not guilty. The appellant was therefore the exception.

The basis of the appeal

26. Mr Weate appeared for the appellant at the sentencing hearing, as he has before us. We are grateful for his written and oral submissions. We are grateful too for the helpful respondent's notice.

27. Mr Weate explains that following the sentencing hearing he became aware of the decision of this court in R v Hewison [2019] EWCA Crim 1278, given on 10th July 2019. One of the issues in that appeal was whether the defendant should have been given credit for indicating a guilty plea in the magistrates' court. In sentencing the

defendant for robbery and burglary the judge had declined to allow full credit for his guilty pleas because the defendant had not pleaded guilty at the lower court. The judge found that an indication of plea at the lower court was not sufficient.

28. On appeal this court allowed full credit of one-third because the sentencing judge had been under a misapprehension in thinking that there had been an opportunity to plead guilty rather than merely indicating a plea of guilty at the lower court. Giving the judgment of the Court, HH Judge Field QC said, at [23]:

> "Finally we turn to the third ground of appeal. At his first appearance before the magistrates on 28th September 2018 the appellant indicated in open court that he was likely to plead guilty to the charges of robbery and burglary. That much is clear from the case management questionnaire for that hearing that was uploaded to the digital case system. The appellant then entered his guilty pleas at the first opportunity in the Crown Court. Robbery, of course, is an indictable only offence. Thus, the appellant was unable to do any more than indicate his guilty plea to the magistrates. It follows, in our view, that the judge was incorrect to say that he should have pleaded guilty at that stage and reduce credit accordingly."

29. With the assistance of the staff of the Criminal Appeal Office, we have been able to examine the actual "case management questionnaire" referred to in Hewison. It is in a very different format from the prescribed form. In contrast to the rubric we have already quoted from on the form in the present case, the equivalent rubric on the form in Hewison posed the question:

> "Pleas (either way) or indicated likely pleas (ind only) or alternative offered."

In the box beneath was written "G" (for guilty). In other words, the question asked was:

"What are the likely pleas indicated?", and in answering "Guilty" the defendant could have said no more to indicate that it was a definite and unequivocal plea of guilty rather than merely a probable plea of guilty.

30. By contrast, in the present case, the equivalent question posed in the form was, in effect: "What plea is indicated?", and the answer given was: "Likely guilty plea". That was not an unequivocal indication that he would plead guilty; it was an indication only that he was likely to plead guilty. The choice of the word "likely" was plainly deliberate.

31. Mr Weate has frankly told us that he felt embarrassed that he was unaware of the case of Hewison when addressing Judge Woodward at the sentencing hearing. He learned of the case subsequently from a colleague. A few days later he wrote to Judge Woodward by email uploaded to the DCS to apologise, drawing the case of Hewison to the judge's attention, and inviting the judge to reconsider credit for plea. No hearing under the slip rule was pursued.

The recent authorities

32. Lest it be thought that the difference in wording between the form in the present case and the form in Hewison is splitting hairs, we should explain that on 29th March 2019, prior to the decision in Hewison, another constitution of this court had considered a similar point and reached the opposite conclusion: see R v Davids [2019] EWCA Crim 553; [2019] 2 Cr App R (S) 33.The case was reported in Criminal Law Week, issue 30 28th August 2019, and is now referred to in Archbold 2021 and in Blackstone's Criminal Practice 2021.

33. In Davids the wording of the rubric on the form differed from that in Hewison but was identical to the wording of the form in the present case, and the entry written below was:

> "Likely to be guilty pleas on a basis."

Giving the judgment of the court, Simon LJ said, at [6]:

> "…[T]hat was not an indication of plea such as to entitle the applicant to full credit. It was keeping his options open, both as to whether a guilty plea would be offered and the basis on which it would be offered. It invites the question: how likely is the plea to be offered - very likely, quite likely or, on balance, more likely than not?"

34. This conclusion in Davids accords with the approach of Judge Woodward in the present case. We note that during prosecuting counsel's opening of the facts, when the appellant's indication in the magistrates' court of a "likely guilty plea" was drawn to his attention, Judge Woodward observed that he could not understand why that had been put on the form:

> "…It means absolutely nothing and is well known to mean nothing".

The judge may, therefore, have had Davids in mind and been referring to the principle established in that case, even though it was not mentioned specifically.

35. Davids has been followed and applied in two further decisions of this Court. In R v Khan [2019] EWCA Crim 1752, in which judgment was given on 20th September 2019, the defendant was charged with an offence of fraud. On his first appearance in the magistrates' court, quoting from the judgment, "…he indicated on the Better Case Management form that he was likely to plead guilty." The case was sent to the Crown Court, and he was granted bail. He absconded but eventually appeared before the Crown Court and entered a plea of guilty to the count of fraud. It was argued on appeal that the judge should have afforded full credit of one-third for the guilty plea in the light of the indication on the Better Case Management form at the magistrates' court. That submission was rejected. Giving the judgment of the court, Soole J said, at [25]:

> "…We do not accept that the indication on the Better Case Management Form justifies full credit. For the reasons given by this court in R v Davids…. the statement that a plea is "likely" is not an indication of a plea of guilty."

36. The same point arose in R v Handley [2020] EWCA Crim 361, in which judgment was given on 15th January 2020. There the defendant was charged with causing serious injury by dangerous driving. He pleaded guilty at the PTPH and was afforded credit of 25%. It was argued on appeal that he should have received full credit of one-third because his guilty plea had been indicated in the magistrates' court. That submission was upheld. Giving the judgment of the court, Flaux LJ said at [27]-[28]:

> "27… In her sentencing remarks the judge said that the appellant did not indicate a guilty plea at the Magistrates' Court. It appears that this is not correct. The relevant box on the Better Case Management form before the magistrates is headed "Pleas (either way) or indicated pleas (ind [which we take to mean indictable only]) or alternatives offered." In that box are written the words "G indication". Mr Mann told us that the appellant was represented by a Duty Solicitor at the Magistrates' Court, to whom the appellant said that he wished to plead guilty. The solicitor indicated that he was not able to give the appellant advice about that because he had not viewed the footage of the CCTV but the appellant still indicated that he wished to plead guilty.
>
> 28. The fact that on the box is written the words "G indication" does demonstrate that the appellant, having been asked before the magistrates for an indication of plea, did indicate that he would plead guilty at the Crown Court. On that basis, pursuant to paragraph D1 of the Reduction in Sentence for a Guilty Plea Definitive Guideline the appellant should be entitled to a full one- third credit. The decisions of this Court in R v Davids… and R v Khan…, to which the single judge referred, are distinguishable: in both those cases the defendant had completed the relevant form only by indicating that a guilty plea at the Crown Court was "likely" in due course, thereby keeping his options open. Understandably, this Court did not consider that that was an indication of a guilty plea. In contrast, here, there was an unequivocal indication."

Conclusion: "Likely guilty plea" is not a sufficient indication

37. We agree that these cases establish that in order to receive full credit of one-third pursuant to the guideline, where at the magistrates' court it is not procedurally possible for a defendant to enter a guilty plea, there must be an unequivocal indication of the defendant's intention to plead guilty. An indication only that he is likely to plead guilty is not enough.

38. The Better Case Management form used in the present case was first published in March 2016 by the Criminal Procedure Rule Committee on behalf of the Lord Chief Justice and is the only authorised version. As a "case management form" specified as such in Annex E to the Criminal Practice Directions, its use is obligatory. Unauthorised variations are not permitted. The Better Case Management form used in Hewison seems to have been an unauthorised variation. For the reasons we have explained, Hewison turned on its own particular facts, and must not be relied upon as authority for the proposition, specifically rejected in the cases of Davids, Khan and Handley, that an indication "likely guilty plea" will attract full credit of one-third. It will not.

39. We emphasise the importance of the correct prescribed Better Case Management form being used in the magistrates' court (and provided to the Crown Court), to avoid the problem illustrated by the case of Hewison, where the incorrect wording of the form used in the magistrates' court led to ambiguity and potential uncertainty.

40. The day before the hearing of the appeal in the present case, on discovering the wording of the form used in Hewison, the Court invited Mr Weate and prosecuting counsel, Miss Anna Pope, to address this point in the light of the other authorities we have cited. We are grateful for their further written submissions.

41. Mr Weate recognised the force of the decisions in Davids, Khan and Handley, and the narrow basis of the decision in Hewison. He now very properly accepts that there was no unequivocal indication of the appellant's intention to plead guilty in the present case.

Should the appellant nevertheless have received full credit for plea?

42. Mr Weate submits, however, that the present case should be regarded as falling within the exception in section F of the guideline, to which we said we would return. Section F1 states:

> **F1. Further information, assistance or advice necessary before indicating plea**
> Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea **sooner than was done**, a reduction of one-third should still be made.
>
> In considering whether this exception applies, sentencers should distinguish between cases in which it is necessary to receive advice and/or have sight of evidence in order to understand whether the defendant is in fact and law guilty of the offence(s) charged, and cases in which a defendant merely delays guilty plea(s) in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal.

43. Mr Weate submits that the charge of conspiracy which the appellant faced in the magistrates' court, the day after his arrest and interview, was far from straightforward. At that stage no detailed case summary had been served. The initial police summary served a few days later ran to 45 pages and a great deal more documentation was served after that before the appellant could be advised properly on his basis of plea. In other words, applying the guideline, he submits that this was a case in which it was necessary for the appellant to receive advice and/or have sight of evidence in order to understand whether he was in fact and in law guilty of the offence charged; it was not a case in which the appellant was merely delaying his guilty plea in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal.

44. Drawing upon his own considerable experience as a solicitor advocate, Mr Weate explained that it is not easy for an advocate in the magistrates' court fully to advise with precision and certainty a defendant who is produced with others from custody in relation to a matter which involves an allegation made up of over 40 acts of criminality. It may be dangerous to do so. Definitive advice and instructions have to be given and received in a more measured way, with time to reflect and consider all relevant issues prior to the PTPH. This was not the way the matter was put to Judge Woodward at the sentencing hearing, where it appears that reliance was placed solely on the indication "likely guilty plea." Mr Weate submits, however, that we should allow the appeal and afford the appellant full credit of one-third.

Discussion and conclusion

45. We have considered this matter very carefully. We understand the practicalities of the situation which the appellant and his solicitor faced at the magistrates' court. However, we cannot overlook the fact that when the appellant did provide a basis of plea, he accepted responsibility only for a limited number of the burglaries in the conspiracy. It was not until much later that he offered a basis of plea acceptable to the prosecution, finally admitting responsibility for twice the number of burglaries he had admitted in his original basis. Indeed, he was the last of the defendants to offer an acceptable basis of plea.

46. It is true that no trial of issue was required in the event, and we bear in mind what is said in the guideline about Newton hearings. At Section F2 the guideline provides:

> **F2. Newton Hearings…**
>
> In circumstances where an offender's version of events is rejected at a Newton hearing… the reduction which would have been available at the stage of proceedings the plea was indicated should normally be halved. Where witnesses are called during such a hearing, it may be appropriate further to decrease the reduction."

47. Here the matter did not proceed to a Newton hearing, so there was no question of halving credit. But where a trial of issue is set down for hearing and prepared for but does not in the event proceed, it remains a matter for the discretion of the sentencing judge to decide what reduction, if any, should be made from the credit to which the

defendant would otherwise be entitled for a plea of guilty entered at the PTPH, in order to reflect the late offering of a realistic basis of plea.

48. In the present case, although we accept that conspiracy can sometimes be a difficult and complex matter for a solicitor to explain to a defendant, the appellant here can have been in no doubt whatsoever that he was involved in a very substantial number of the burglaries listed in the charge he faced, and that he had agreed with others to commit those burglaries. He knew what he had done. He was plainly guilty of conspiracy. Mr Weate confirmed in his oral submissions that there had been pre-interview disclosure by the police the previous day before the appellant gave a "no comment" interview. We note form the police case summary (MG5) that in that interview the appellant was asked about each of the burglaries. He knew perfectly well what the allegations were.

49. We think that in these circumstances he could and should have given an unequivocal indication at the magistrates' court that he would plead guilty to the offence of conspiracy, even if the precise basis of his plea would have to be decided when the prosecution case was served. It was not a case where it would be unreasonable to expect a defendant to indicate a guilty plea because, for example, the prosecution had not determined what charges it was going to bring, or the proposed charges were vague and uncertain. Here the charge in the magistrates' court set out in very full detail the burglaries he was alleged to have conspired with others to commit. Indeed, we note that the charge was much more informative in that sense than the count in the indictment to which he pleaded guilty, which merely alleged (quite properly) that the defendants had, between certain dates, conspired together with others to commit burglary.

50. Looking at the matter in the round, considering both what happened at magistrates' court and subsequently in relation to the delay in offering an acceptable basis of plea, we do not think that the withholding of full credit of one-third was wrong in principle, or rendered the appellant's sentence manifestly excessive. Judge Woodward's decision was quite correct. Had he been made aware of all the authorities to which we have referred in this judgment, and the further arguments now advanced by Mr Weate, we are confident that Judge Woodward would still have concluded, as we have, that only 25% credit for plea was appropriate.

51. For all these reasons, despite Mr Weate's helpful and realistic submissions, the appeal is dismissed.

Postscript

52. In relation to the exception in section F1 in the Guideline (referred to at [42] above) we note and draw attention to the further guidance of the Sentencing Council issued on 23rd June 2020:

> "…In addition, when applying the Reduction in sentence for a guilty plea guideline, the court must consider the exceptions in that guideline. The exceptions include whether there were particular circumstances affecting the defendant's ability to understand the allegations or to receive the advice necessary

> before pleading guilty, or where the defendant pleads guilty to, and is then convicted of, a different offence from that originally charged. In making these considerations, the court must keep in mind the practical difficulties of defendants accessing legal advice during the present emergency."

That further guidance did not apply in the present case, where the relevant stage in the magistrates' court was in November 2019, several months before the restrictions imposed by the Covid-19 pandemic were introduced.