IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2020] EWCA Crim 1432

No. 201904697 A2
202000162 A2

Royal Courts of Justice

Friday, 8 October 2020

Before:

MR JUSTICE SPENCER
HIS HONOUR JUDGE EDMUNDS QC

REGINA
V
HAMAS KHAN

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MR S. M. KHAN appeared on behalf of the Appellant.

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J U D G M E N T

MR JUSTICE SPENCER:

1 On 10 July 2019 in the Crown Court at Leeds the appellant, Hamas Khan, now aged 21 was sentenced by HHJ Rose to a term of three years and nine months' detention in a Young Offender Institution for a very serious offence of domestic burglary committed in August 2018. He did not initially appeal against that sentence. We shall refer to that as the first indictment.

2 On 27 November 2019, at the same Crown Court, the appellant was sentenced by HHJ Stubbs QC to a term of four years' custody for an offence of conspiracy to burgle dwellings committed in 2016. We shall refer to that as the second indictment. That sentence of four years' custody was ordered to run consecutively to the sentence he was already serving. Thus, his total sentence was seven years and nine months' detention.

3 The appellant lodged an appeal against the sentence of four years on the second indictment. He also lodged an appeal out of time against the sentence on the first indictment. The single judge refused leave and refused the extension of time to appeal against the sentence on the first indictment. Those applications are renewed before us today. The single judge granted leave to appeal against the sentence on the second indictment on the basis that it was at least arguable that the total sentence of seven years and nine months was manifestly excessive, having regard to the appellant's youth and the principle of totality.

4 It is conceded on behalf of the appellant by his counsel that the real issue is whether the aggregate sentence of seven years and nine months was manifestly excessive and whether the later sentence of four years should have been shorter, having regard to totality. There is also a separate ground of appeal in respect of the sentence for the conspiracy on the second indictment; namely, that the judge should have allowed greater credit than five per cent for the appellant's late guilty plea after the trial had begun.

5 A complicating feature of the case is that the burglary conspiracy in the second indictment, although sentenced last in time, dated back to 2016 when the appellant was only 17 years old. It was not until May 2019 that he was effectively charged with the offence. That was because of the complexity of the investigation. By then he had committed the other very serious burglary in the first indictment. He was sentenced for that offence by Judge Rose, as we have said, on 10 July 2019. Judge Rose rightly considered himself tied to the case, because he had presided over the trial relating to the circumstances of the burglary. Even though the appellant had pleaded guilty to the burglary itself, there was still a trial because there was also an allegation of possessing an imitation firearm with intent to cause fear of violence. That was the count on which the appellant was tried before Judge Rose and acquitted by the jury, but it was intimately connected to the facts of the burglary.

6 Judge Rose passed sentence on the first indictment on 10 July 2019, two days before the Plea and Trial Preparation Hearing ("PTPH") for the second indictment, the conspiracy. Ideally of course all matters should have been sentenced at the same time. However, the appellant was not at that stage indicating any intention of pleading guilty to the conspiracy indictment. At the PTPH, two days later, he pleaded not guilty and that indictment was listed for trial in November 2019 with a time estimate of four weeks. There were three other defendants, all pleading not guilty; a further defendant had in fact pleaded guilty already. In those circumstances, Judge Rose cannot be criticised for proceeding to sentence for the burglary on the first indictment. Had the appellant indicated at that stage that he was going to plead guilty to the conspiracy indictment, as he eventually did, all matters could have been dealt with together. To that extent, the fault, and any prejudice flowing from it, lies at the appellant's own door.

7 Mr Shufqat Khan on behalf of the appellant has helpfully set out the history of the various proceedings in his advice and grounds. We are grateful to him for his written and oral submissions here in person before us this morning. We shall deal first with the renewed application for leave and an extension of time in respect of the sentence on the first indictment.

8 The burglary in question was committed on 1 August 2018 at a house in East Ardsley, Wakefield. The appellant was then 19 years old. The householder David Marriner had just returned from holiday and had parked his Mercedes car on the driveway. Behind the Mercedes was his wife's Volkswagen Tiguan. At around 2 o'clock in the morning, when Mr Marriner and his wife were in bed and their two-year-old son was also asleep in the house, the burglar alarm went off and Mr Marriner heard a loud bang. A team of burglars had made their way to the scene of the offence in a vehicle driven by the appellant. They had tools with them to break into the house. Having failed to gain entry using mole grips and a screwdriver, they forced the door. Hence, the loud bang which was heard.

9 Some of the burglars went into the house, whilst others waited outside. All were wearing balaclavas or other face coverings and gloves. Demands were shouted up to the bedroom window for householders to throw down the keys to the vehicles. Mrs Marriner in fear handed over the keys to both cars. One of the burglars actually went upstairs and kicked down the baby gate. Mr Marriner armed himself with a baseball bat and courageously chased that offender out of the house. The appellant got into the Mercedes and reversed off the drive. Mr Marriner chased him again and smashed the windscreen of the Mercedes in an attempt to prevent it being driven off. The result was that the appellant crashed the Mercedes into a lamppost, causing damage to the value of £60,000. That gave rise to Count 2 on the indictment, aggravated vehicle taking, to which the appellant also pleaded guilty. The appellant made good his escape. He was arrested in due course when DNA evidence linked him to the Mercedes. As we understand it, he was the only one of the burglars who was apprehended.

10 There was a victim personal statement from Mr Marriner. The offence had plainly caused the family great distress. He and his wife remained fearful, nervous and apprehensive. They have struggled to sleep. They were afraid their house would be attacked again and had considered moving house.

11 The appellant had a relevant previous conviction for a single offence of domestic burglary committed in March 2017, some 18 months earlier, for which he had been sentenced in the Youth Court to four months' detention. On that occasion he was part of a gang wearing balaclavas. He had entered the house to steal and, when detected, he had taken to the roof and threatened those who were around the house. By the time of the burglary of the Marriners' home, the appellant had also been interviewed by the police in April 2017 in relation to some at least of the burglaries in the 2016 conspiracy, although he had not been on bail. He had been released under investigation pending further enquiries.

12 In passing sentence, the judge said that he was sure the burglary had been planned in advance. The team of burglars had not chanced upon the house by accident. They were targeting the two expensive vehicles parked on the drive. The appellant played a leading role in the gang. The judge was satisfied that the appellant was fully aware that the house was occupied and had taken the risk that there might also be children in the house. Whether or not the appellant himself went into the house, he was part and parcel of everything that happened. The judge was satisfied that it was a Category 1 offence under the relevant Sentencing Council Guideline and high up in the range of two to six years' custody. Although the appellant had pleaded guilty and would receive 25 per cent credit for his plea,

he had shown no remorse. That was something which no doubt the judge had divined from presiding over the trial. His youth and his limited record went in his favour.

13 The judge concluded that the offence warranted a sentence of five years' custody reduced by 25 per cent for the guilty plea. He imposed a concurrent sentence of nine months for the aggravated vehicle taking. He imposed no separate penalty for related summary motoring offences. The offence of aggravated vehicle taking carried a mandatory disqualification. The judge considered that the period of disqualification the appellant should serve on release from custody was two years, taking account of the period of his remand in custody awaiting sentence, which was clarified later in the day. The relevant extension period was 17 months, making a total of 41 months' disqualification.

14 The sole ground of appeal in relation to the first indictment is that the judge's starting point of five years was too high. Mr Khan has this morning frankly acknowledged in his oral submissions that he had not originally considered that the sentence was manifestly excessive, hence no appeal at the time, and he has not vigorously pursued the renewed application for an extension of time and for leave. He has directed his submissions, quite properly and realistically, at the question of totality across both sentences.

15 We are quite satisfied that the sentence of five years on the first indictment, for the burglary of the Marriners' home, before 25 per cent credit for plea, was fully justified. This was an extremely serious burglary of its kind, in which there was a confrontation with the householders, a child was present in the house, very considerable damage was caused, and untold emotional and psychological harm. The burglary was carried out by a team. It was planned. They went equipped for burglary. The appellant, despite his youth, had played a leading role. He already had a previous conviction for domestic burglary. Had he been older, a sentence of six years would have been fully justified. The judge made sufficient allowance for his youth by reducing that to five years before credit for plea. It is not remotely arguable that the sentence on the first indictment was manifestly excessive. We refuse the renewed applications for an extension of time and for leave.

16 Our attention has been drawn by the Registrar to a technical defect in the way in which the disqualification was expressed and recorded by the Crown Court. The overall period of 41 months was correct. However, it should be expressed in the Crown Court record as a discretionary period of 24 months with an extension of four and a half months pursuant to s.35A of the Road Traffic Offenders Act 1988 and an uplift of 12 and a half months pursuant to s.35B of the Act. We direct that the record be amended accordingly.

17 We turn to the appeal against the sentence of four years' custody for the conspiracy to burgle on the second indictment. That was in fact Count 1 on the indictment. There was also a count of conspiracy to steal, Count 2, which overlapped with Count 1. The judge reflected all the criminality in the sentence on Count 1 and imposed no separate penalty on Count 2.

18 Mr Khan has explained in his written and oral submissions that on the first day of the trial, 25 November 2019, Judge Stubbs allowed the parties more time. A jury panel was selected that afternoon but not sworn. There was some legal argument on the admissibility of part of the evidence, but that was an argument by a co-accused in which this appellant played no part. Indeed, in his oral submissions Mr Khan strongly emphasised that it was this appellant who initiated discussions about pleas. The following day, the court allowed more time for discussions between counsel, because by then a basis of plea had been offered by the appellant which the prosecution needed to consider. During the course of the day the other defendants also offered pleas and, in the event, the case was never opened to the jury. The judge adjourned sentence to the following day, 27 November. We shall return

to the sequence of events in relation to the entering of the pleas when we address the specific ground of appeal which is relevant to him.

19 The evidence in relation to the conspiracy disclosed a large number of separate events, some of them burglaries, some attempted burglaries. The basis of plea advanced by the appellant and accepted by the prosecution acknowledged his involvement in eight domestic burglaries, three attempted domestic burglaries and an offence of making off without payment. Those offences spanned a period of six weeks between 11 October and 24 November 2016. The appellant was 17 and a half years old at the time of the offending.

20 We need not rehearse in detail the facts of the burglaries and attempted burglaries individually. We summarise them only very briefly to convey the overall seriousness of his offending. All the burglaries were committed by two or more of the conspirators.

21 The first burglary on 11 October 2016 was at a house in Keighley. The occupier returned to find that his house had been burgled and jewellery and watches valued at £12,800 had been stolen.

22 The following day, 12 October, there were three further burglaries and one attempted burglary of properties in Ilkley and Shipley. In one of the offences jewellery and electrical items were stolen to the value of £3,700. That was a burglary in the afternoon. A few minutes earlier the appellant and a fellow burglar had visited another house in Shipley. One of them rang the doorbell and banged on the door. The occupier was at home. He knocked on the window and shouted at the male who ran off. The male was carrying bolt-cutters. The same afternoon another house was burgled and a small amount of cash taken, but damage was caused to the value of £2,000.

23 On 30 October 2016 the appellant was involved in the burglary of a house in Bradford at 8 o'clock in the evening. A neighbour heard the alarm and noted a car driving off. A watch and purse with a total value of £250 were stolen. The same day another house in Bradford was burgled. The occupier received a message that the alarm had been activated. He drove home. He found a vehicle parked outside his house with the boot open. A man ran out of the house and got into the vehicle. Three further males got in the vehicle, which drove off. They had stolen electrical items, watches, keys and cash to the total value of some £9,000.

24 On 3 November 2016 the appellant was involved in a burglary of another house in Bradford, in which the keys to a vehicle were stolen. A Honda Jazz valued at £7,000 was driven away.

25 On 23 November 2016 the appellant was involved in a burglary in Bradford in which a watch and jewellery were stolen to the value of £336. A neighbour saw a silver Peugeot driving off with four people in the vehicle with their hoods up. Later the same day the silver Peugeot filled up at a petrol station in Halifax and drove off without paying. The appellant admitted involvement in all this.

26 The following day, 24 November, the appellant was involved in a burglary of a house in Bradford around lunchtime. A CCTV system, electrical items, jewellery and cash were stolen to the value of some £1,640.

27 The final offence in which the appellant was involved was an attempted burglary the same day, 24 November, at a house in Keighley. A silver car pulled up outside. Two males got out and one went to the door and tried the handle. A neighbour saw this and telephoned the police. Two males ran to the car. One of them took a baseball bat out of the vehicle and held it up in the neighbour's direction as a threat. The male then smashed a window of

a neighbour's car before driving off. It is not suggested that the appellant was the person who did the smashing of the car window or the threatening, but he was certainly present and to that extent responsible for the overall criminality on that occasion, as in the conspiracy generally.

28 The appellant was interviewed about some of the burglaries in the conspiracy. As we have indicated, the first time was April 2017, shortly after he had been sentenced to four months' detention for the previous offence of domestic burglary. He was also interviewed again in October 2018. On each occasion, he made no comment.

29 In passing sentence, the judge described this as a highly active, determined and well-planned conspiracy to burgle with an associated conspiracy to steal. Dwelling houses were targeted for high value items and car keys and vehicles were subsequently stolen. The value of the vehicles stolen was well over £100,000 with over £20,000 worth of other property stolen, including electrical items, jewellery and computers. Those involved in the burglaries wore balaclavas and other face coverings to conceal their identity. The stolen cars were given false registration plates. Those involved were armed with weapons and were prepared to use them, a baseball bat and hammer. Physical violence was threatened and used towards witnesses to the crimes. The conspirators travelled to and targeted various locations around West Yorkshire. The judge acknowledged that in sentencing the appellant and the other defendants for conspiracy it was important to balance what the defendants had admitted individually against the wider criminal activity of all those involved in the conspiracy.

30 Four weeks had been set aside for the trial, which prevented other cases being listed in that period with a very severe knock-on effect for the delay in listing cases at Leeds Crown Court, to which the judge made specific reference. The delay in the case coming to court had been caused by the complexities of the investigation, the number of enquiries that had to be made, the use of automatic number plate recognition systems, the analysis of telephone data and the sheer scale of the task facing the police. The judge noted that the appellant had never served a defence statement. He pleaded guilty on the second day of the trial. The appellant must always have known that he was guilty as charged.

31 The judge rejected the argument that credit for plea should be greater than ten per cent. He considered that the appropriate level of credit was five per cent for this appellant and indeed for the other defendants who similarly changed their pleas to guilty on the second day of the trial. The judge referred to the Sentencing Council Guideline on reduction for plea. He said that the appellant and the three other defendants whose cases were listed for trial had chosen to take the case right down to the wire and beyond. They must have seen some advantage somewhere in doing so. The appropriate level of credit in the judge's assessment, having watched the process unfold before him, as he put it, was five per cent for those who pleaded guilty on the second day.

32 The judge acknowledged in his sentencing remarks that because the appellant was only 17 at the time of the offences there should be a reduction in sentence in accordance with the Sentencing Council Guideline on sentencing children and young people. He considered that the appropriate reduction from the sentence for an adult was one-third. The appellant had been active in the conspiracy for a period of six weeks. He joined an ongoing conspiracy. He had not been the instigator, but having joined the conspiracy he was taking a full and active part in excess of the others who fell to be sentenced.

33 The judge referred to the sentence which the appellant was already serving, three years and nine months' detention. He said that the sentence he would pass for this conspiracy must be consecutive, but must also take account of the principle of totality. The appropriate sentence for the appellant, had he been an adult, would have been eight years' imprisonment.

The judge reduced that by five per cent for his guilty plea to 90 months. He then reduced that by one-third to 60 months (five years) on account of the appellant's youth. Finally, to reflect the totality of the sentence the appellant would serve, taking into account his existing sentence, the judge made a further reduction to four years.

34 In his written submissions in the grounds of appeal, Mr Khan argues, first, that the judge took too high a starting point at eight years. Second, he submits that the judge failed to have sufficient regard to the appellant's age, personal mitigation and the fact that part of the delay was not the appellant's fault. Third, he submits that the judge failed to give sufficient credit for the appellant's guilty plea, only five per cent. Fourth, he submits that the judge failed to have sufficient regard to the principle of totality in relation to the sentence which he was already serving.

35 In his oral submissions this morning, Mr Khan has engaged with the court in discussing these points and has dealt with them very fully and attractively. We are grateful to him for his assistance. We have considered carefully all Mr Khan’s submissions, but we are unable to accept them.

36 Taking the grounds of appeal in order, first, the judge's starting point of eight years for an adult was amply justified. The appellant admitted direct involvement in a total of 11 domestic burglaries or attempted domestic burglaries as part of a wider conspiracy. This was serious planned offending on a commercial scale.

37 On the second ground, the judge correctly applied the Guideline for sentencing children and young people, which suggests a sentence within the region of half to two-thirds of the adult sentence for those aged 15 to 17. The appellant was 17 and a half at the time of the offences. There is no indication that he was particularly immature, or indeed immature at all, for his years. On the contrary, all the indications are that he was streetwise and not a mere follower. A sentence at a level of two-thirds of the adult sentence was entirely appropriate.

38 As to the third ground of appeal, for the reasons the judge explained very fully, a reduction of only five per cent for this very late guilty plea was appropriate and well within the discretion of the judge consistent with the Sentencing Guideline. A plea on the first day of trial will attract a maximum reduction of one-tenth, having regard to the time when the guilty plea is first indicated to the court relative to the progress of the case and the trial date. Here, no plea of guilty had been indicated before the trial date and four precious weeks of court time had been set aside. It goes further than that, because in fact on 13 November, only a matter of fortnight or so before the trial commenced, the solicitors for the appellant had completed a certificate of readiness confirming that there was no prospect of it being other than an effective trial.

39 As we have already explained, the judge similarly restricted credit to five per cent for the other three defendants who pleaded at the same time as the appellant. It may be true, as Mr Khan says, that his client in effect set the ball rolling by being the first to offer a basis of plea, but he was the only one of the defendants who pleaded guilty who had not served a defence statement and when that had been clarified by the court officer, whose duty it was to check compliance with the court's directions, it was confirmed that there was no intention of serving a defence statement and the appellant understood the consequences.
The Guideline says that the reduction should normally be decreased further, even to zero, if the guilty plea was entered during the course of the trial. This trial had begun even though the case had not been open to the jury. The judge was best placed to assess the fair and proper reduction for plea. It may be that the decision had been made to plead guilty on the

first day of the trial, but the fact is that the pleas were not entered until the second day. The judge was quite entitled to limit credit to five per cent.

40 We turn to the final ground of appeal, totality. It is quite clear that the judge had the question of totality firmly in mind. He allowed the appellant a further reduction of a year or so on that account. Indeed, as Mr Khan acknowledged when we put the point to him in the course of submissions, had the judge applied the five per cent discount for plea after rather than before the reduction of one-third for his youth, as would be more conventional, the final reduction for totality would have come out at 13 to 14 months. That in our view was quite sufficient in the circumstances.

41 These were very serious offences. In effect, there was a two-year period of offending by committing domestic burglaries: first, these offences in 2016; then the isolated burglary in 2017, for which he received a sentence of detention; and then in 2018 the very serious burglary in which the family home was invaded when the householders were in bed.

42 For all these reasons, we are quite satisfied that the total sentence of seven years and nine months was just and proportionate. A sentence of four years on the second indictment was neither manifestly excessive nor wrong in principle. Therefore, despite Mr Khan's valiant efforts, the appeal is dismissed.

CERTIFICATE

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