

[2020] EWCA Crim 566

No: 201903727/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 23 April 2020

(VIRTUAL COURT)
Before:
LADY JUSTICE CARR DBE

MR JUSTICE GOOSE

MR JUSTICE SAINI

R E G I N A

v

OMAR MOHAMED HUSSAIN

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Mr C Durrant appeared on behalf of the **Applicant**

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1. On 16 September 2019 in Croydon Crown Court the applicant, who was born on 16 February 1999 and is now 21, was convicted of robbery contrary to section 8(1) of the Theft Act 1968 and sentenced to five-and-a-half years' imprisonment. His co-defendant, Ayles Benzahi, who was born on 20 August 1997 and of previous good character, was also convicted and sentenced to four-and-a-half years' imprisonment.
2. The applicant renews his application for leave to appeal against sentence.

The Facts

3. On 5 April 2019 Jothirajan Kirubakaran was driving his friend, Dilushanth Karunandan, along Carshalton Road, Sutton. At 9.40 pm they turned into Manor Park Road which ran adjacent to Manor Park, a large communal public space. The applicant stepped out into the middle of the road in front of the vehicle bringing it to a halt. He was wearing dark clothing and holding two bags. Benzahi opened the driver's side door and threatened the driver with a 6-inch kitchen knife. He was wearing a balaclava and also dark clothing. He held the knife towards the throat of the driver and threatened him to hand over whatever he had of value. Jothirajan Kirubakaran began emptying his pocket,s which in fact contained £5460 since he was en route to purchase a car. Concerned at the length of time that Jothirajan Kirubakaran was taking, the applicant grabbed his car keys and snatched the money from him.
4. A police car arrived just as the robbery was taking place and the applicant and Benzahi were seen to run away into a nearby park. They were chased and as they fled the proceeds of the robbery were dropped. Benzahi discarded the knife and also some clothing. He was found in a nearby alleyway by police. The applicant was later found hiding in a wheelie bin in a nearby garden. He also had discarded some of his clothes nearby.
5. The applicant has two previous appearances for four offences. In 2015 he was sentenced to a youth rehabilitation order for robbery, theft and having an article with a bladed point in a public place. In 2019 he was convicted on a guilty plea to theft again and in the form of shoplifting.

Grounds of Appeal

6. In clear and able submissions Mr Durrant for the applicant argues, first, that the Judge erred in placing this street robbery in category 2A of the Sentencing Council Guideline for Robbery when, on the evidence of only minimal psychological harm, it was in fact a category 3A case. Whilst it is accepted that this was a culpability A case, nevertheless

there should be a downward trajectory within that categorisation, given that there was only one high culpability factor present. As for harm, there were no victim impact statements, the incident was short and there was no injury as such. It was therefore either a low category 2A case or a category 3A case. In summary, the starting point of 5 years adopted by the judge was too high.

7. Secondly, he submits that the Judge wrongly failed to attribute a leading role to Benzahi and a lesser role to the applicant. The applicant did not disguise himself as did Benzahi, nor did he produce the knife. He was not the driver to the scene. He only stood in the road.
8. Thirdly, he submits that the Judge allowed an unjustified and exaggerated uplift for the applicant's previous conviction for robbery committed in 2014 when he was only 15. The knife found on that occasion was not used in the robbery and the increase of 1 year granted by the judge to reflect this aggravating feature was simply too much. The ultimate sentence being a year more than that imposed on Benzahi was unjust on the ground of disparity.
9. Finally, Mr Durrant submits that the Judge placed too little weight on the personal mitigation available to the applicant. The applicant's mother was chronically unwell by the end of 2018 and was bedridden. The applicant was the youngest at home and had caring responsibilities. He had a job and also a promising modelling contract. He was seeking money to support his mother. This was his first time in custody, and we are told that the applicant is finding it hard to cope with his current environment.

Analysis

10. We address each ground of appeal as follows.
11. First, as to categorisation it is not disputed that the offence was high culpability A because a bladed article was produced (namely a knife) to threaten violence. In our judgment it cannot be said that the Judge was not entitled to consider this to be category 2 offending on the basis that there was more than no or minimal physical or psychological harm caused to the victims. It must have been a terrifying incident, in the dark, involving two attackers with a knife, one wearing a balaclava. As the Judge said, it was a knife-point robbery in very frightening circumstances. Jothirajan Kirubakaran also knew that he had some £5,000 in his pocket. He indicated that he was so shaken by the knife that he did not remember much else.
12. The Judge was well placed to assess the level of harm and culpability following trial. The starting point was therefore fairly one of 5 years' custody with a range of 4 to 8 years.
13. Secondly, as to role, the applicant and Benzahi willingly participated in and were equally responsible to this offending. It cannot be said that the applicant's role was merely "peripheral". It was his actions that initiated the entire incident. Again, the Judge was well placed to assess the applicant's role following trial.

14. Thirdly, the Judge was right and indeed obliged to treat the applicant's previous convictions as aggravating factors. The applicant's previous offending, albeit the previous robbery was committed when he was only 14, was nevertheless significant. There is nothing in the disparity argument, not least since Benzahi was of previous good character.
15. Finally, as for personal mitigation, the Judge expressly took this into account, referring, amongst other things, to the loss of career that the applicant would now suffer and also to his youth.
16. For these reasons we do not consider it to be arguable that the sentence of five-and-a-half years was manifestly excessive. This was serious criminal offending involving street knife crime.
17. This renewed application is therefore rejected save for one adjustment: the applicant was aged 20 when convicted and by virtue of section 96 of the Powers of Criminal Courts (Sentencing) Act 2000 the sentence ought to have a term of detention in a young offender institution. We so order.
18. LADY JUSTICE CARR: Mr Durrant, thank you again. I repeat the court's gratitude for your very helpful and clear submission. I hope that you have found the format of the hearing satisfactory.
19. MR DURRANT: I have. Thank you very much.

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