

Neutral Citation Number: [2021] EWCA Crim 335

Case No 202100349/A2

IN THE COURT OF APPEAL

CRIMINAL DIVISION

ATTORNEY GENERAL'S REFERENCE UNDER
S.36 CRIMINAL JUSTICE ACT 1988

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Friday 5 March 2021

LORD JUSTICE SINGH
MR JUSTICE DOVE
THE RECORDER OF WESTMINSTER
HER HONOUR JUDGE DEBORAH TAYLOR
(Sitting as a Judge of the CACD)

REGINA
V
AMARAZE KHAN

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(Official Shorthand Writers to the Court)

MISS J WALKER appeared on behalf of the Attorney-General

MR I WEST appeared on behalf of the Respondent Offender

J U D G M E N T

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LORD JUSTICE SINGH:

Introduction

1. This is an application made on behalf of the Attorney General for leave to refer a case to this court under section 36 of the Criminal Justice Act 1988 on the ground that a sentence was unduly lenient.
2. The respondent offender is Amaraze Khan. He was born on 20 December 1986 and is 34 years old. On 10 December 2020 at the Crown Court sitting at Sheffield, the respondent pleaded guilty to an offence of robbery, contrary to section 8(1) of the Theft Act 1968. On 7 January 2021 he was sentenced by His Honour Judge Dixon to 42 months' imprisonment.

The facts

3. The victim, whom we will refer to as DB, has cerebral palsy and uses a wheelchair. He was 58 years old at the time of the offence. He lived alone in a bungalow within an area designed for elderly and vulnerable people.
4. At around 8 pm on 18 November 2019, DB left his front door slightly open, having let his cat out. He moved to the lounge to watch television, facing away from the front door. A few seconds later the respondent entered the property via the front door. When DB heard someone enter he initially thought it was a neighbour who would occasionally come in to help him. He turned his head to see the respondent approaching him. The respondent mumbled something like, "What can I have?" DB asked him to get out. DB manoeuvred his wheelchair slightly towards the side table where he had left his mobile phone. The respondent leaned over him, took the mobile phone with his right hand and tipped over DB's wheelchair sideways. The respondent ran away, leaving DB on the floor. DB would later explain:
 - i. "... I am trying to work out how he managed to tip the chair over. I know they are light but they are not that light. So I don't know whether he's sort of leaned over with his right arm, but got hold of the handle with his left arm and tipped me. But, you know, these don't tip very easily as a rule."
5. Having been left on the floor, it took DB about five minutes to get up onto his knees. He then stretched up to his landline telephone to contact the police. DB was still on the floor when police arrived, which he thought was about 10 minutes later. Normally he was able to get into his wheelchair himself, but on this occasion he was in such a state that he did not want to risk this. A police officer had to lift him back into his wheelchair. DB did not suffer physical injury. He was amazed by this, but observed that he seemed to land properly on his right-hand side.
6. The stolen mobile phone was a Samsung Galaxy worth around £240.
7. A mixed DNA result was obtained from the left handle of the victim's wheelchair. This

result would have been at least a billion times more likely to have been obtained if the DNA had come from the respondent, the victim and two unknown individuals than if it had come from the victim and three unknown individuals. DB would only use this wheelchair inside his bungalow; he had a different wheelchair to use when he went outside.

8. The respondent was arrested on 9 January 2020. When interviewed under caution he said that on the evening of the incident in question he was probably at his aunt's house. He accepted that the victim's address was close to where he lived. He denied having encountered the victim, although he said he had met a man in a wheelchair at the local sandwich shop and helped him to move his wheelchair into position. This was his explanation for the forensic evidence.

Antecedents

9. The respondent had previously been convicted of 25 offences since the age of 15 in 2002. These included offences of burglary, attempted burglary and theft. The most recent offence was committed on 5 December 2013 and was an offence of robbery for which he was sentenced to 40 months' imprisonment on 14 January 2014. This was a street robbery.

Impact on the victim

10. Although there is no formal victim personal statement before us, the impact on the victim can be clearly seen from what he said to the police when he was interviewed. He clearly felt that his home had been invaded and he no longer felt safe in his own home. He had to lock his doors and felt like a prisoner in his own home.

The pre-sentence report

11. The pre-sentence report which was before the judge and is also before us said that there was a low likelihood of serious re-offending over the next two years, but that this failed to take into account dynamic risk factors and individual circumstances. The author felt that it was reasonable to assess that this risk was higher based on the respondent's past and index offending.
12. The report assessed that the respondent posed a high risk of causing serious harm to the general public and known adults. The harm is likely to be physical violence as well as emotional and psychological harm. The report also expressed concern that the respondent seems to target individuals whom he may perceive to be vulnerable, for example due to their age or disability.

Relevant sentencing guidelines

13. The Sentencing Council has issued a definitive guideline on "Robbery - dwelling", which was effective from 1 April 2016 and applies to offenders aged 18 and older. It is common ground before us that this case fell into Category 2B, that is medium culpability and harm, where the characteristics for Categories 1 or 3 are not present. For a Category 2B case the recommended starting point is five years' custody, with a category range of four to eight years.
14. The factors increasing seriousness include the statutory aggravating factor of previous similar convictions. Other aggravating factors include that the victim was targeted due to a vulnerability (or a perceived vulnerability). It has not been suggested to us that any of the factors reducing seriousness were present other than personal mitigation. The guideline also draws attention to the need to consider whether an appropriate sentence for an offender who is dangerous should be imposed.

The judge's sentencing remarks

15. In passing sentence, the judge said of the offence that:

- i. "...what is clear is that you also tipped over [DB]. Now you do not know him, you did not know just how vulnerable he was, you had no idea whether or not he could get back into his wheelchair but, being the cowardly scum that you are, you left him on the floor. Now if he had not have had the mobility that he does he might have stayed there, he might have been unable to move and have had to toilet himself on the floor, not being able to eat or drink and he could well have died. That is how depraved and low this crime is. You simply ran with a mobile phone which doubtless would have got you pounds, whilst that poor man, living the best life he can was left on the floor."

16. Having regard to the definitive guideline and also the burglary guideline, the judge said that the appropriate starting point would put this case at five years after trial, but that the offender's record would increase that to perhaps six years and even then the judge was not convinced "that is not too low". Looking at the case in the round, the judge said that the appropriate starting point would be 56 months but, after taking into account the impact of the current pandemic and reflecting everything else, he arrived at a sentence of 42 months.

17. Although the length of that sentence meant that the judge was not able to pass an extended sentence, since it was below four years, he said that the offender is "an extremely dangerous man". This is particularly because he is unable to control his emotions when he gets into "a bad place".

Submissions for the Attorney General

18. On behalf of the Attorney General, Ms Walker submits that the following aggravating features were present in this case. First, the victim was targeted due to a vulnerability. Secondly, his previous convictions. She submits that those are the two most important aggravating features, but she also reminds this court, thirdly, that the commission of the offence was under the influence of alcohol according to the respondent's own version of events as given to the author of the pre-sentence report, and finally, that the timing of this offence was in the evening. Subject to one observation to which we will return, no issue is taken about these aggravating features on behalf of the respondent. Ms Walker submits that the only mitigating feature was the guilty plea. This is not accepted on behalf of the respondent.

19. So far as the pandemic is concerned, Ms Walker submits that the judge was wrong to give any or any substantial weight to this in the current case. She has drawn our attention to the decisions of this court in Manning [2020] EWCA Crim 592, [2020] 3 Cr.App.R (S) 46, in particular paragraphs 41 to 42; Jones [2020] EWCA Crim. 764, [2021] 1 Cr.App.R (S) 6 and Vacciana [2020] EWCA Crim 1724, in particular paragraph 50.

20. In essence, Ms Walker submits that the sentence in this case of 42 months' imprisonment was unduly lenient having regard to the number and gravity of aggravating features. She submits that the appropriate sentence after trial should have been at the top of the category range, that is eight years' custody. She accepts that a discount of 25 per cent was appropriate for the guilty plea. However, she submits that no substantial reduction to take

account of prison conditions was warranted, even in the current pandemic. Finally, she submits that an extended sentence would have been appropriate in this case having regard to the fact that the respondent was considered to be a dangerous offender.

Submissions for the respondent

21. On behalf of the respondent, Mr West accepts that there were the aggravating features which we have mentioned, but submits that the respondent targeted the area rather than the victim. Nevertheless, he accepts that the area targeted was one where there was a significant likelihood that the victim would be in some way vulnerable.
22. Mr West submits that the mitigation available to the respondent went beyond the guilty plea. In particular, the respondent had suffered recent tragedies in his life. His grandfather, who had brought him up, died in 2019. His brother had been murdered. The respondent was suffering from anxiety and stress and was on medication. Further, submits Mr West, there was genuine remorse on his part and he observes that the respondent had not committed an offence since late 2013.
23. So far as the pandemic is concerned, Mr West submits that this case is not similar to Vacciana and that the pandemic is likely to remain a concern in prisons throughout most if not all of the likely duration of any custodial sentence in this case.
24. Turning to the definitive guidelines, Mr West submits that these are not to be treated as rigid pigeon holes. He submits that the judge was entitled to take into account the guideline on domestic burglary. In relation to the robbery of a dwelling guideline, he submits that there was medium culpability, there was no weapon used or threatened; and he submits that the nature of the force used was reckless rather than intentional. Although it was not minimal force, he submits that it was significantly less than other descriptions referred to in the guideline.
25. Mr West submits that this case fell towards the bottom end of Category 2 harm. He submits therefore that the starting point should have been four years and that the chosen starting point of 56 months was in fact a significant uplift from that. In conclusion, he submits that the resulting sentence of 42 months after a plea was not unduly lenient.

The approach to be taken by this court

26. In giving the judgment of this court in Attorney General's Reference (No 4 of 1989) [1990] 90 Cr.App.R 366, Lord Lane CJ said, at 371:
 - i. "The first thing to be observed is that it is implicit in the section [section 36] that this Court may only increase sentences which it concludes were *unduly* lenient. It cannot ... have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that this naturally gives rise to – merely because in the opinion of this Court the sentence was less than this Court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. ... it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well-placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based

in law as it is in literature." (emphasis in original)

Conclusions

27. In our view the judge should have had regard to the bespoke definitive guideline for offences of this kind, that is robbery in a dwelling. It was unnecessary and potentially confusing to refer to the guideline on domestic burglary. By reference to the guideline on robbery of this kind, it is common ground that this fell within Category 2B. In our view this was a serious case which fell above the middle of Category 2B. The judge was right to say that a starting point after trial of six years might have been too low. In our respectful judgment he then fell into error by reducing that figure rather than increasing it.
28. In our view a starting point after trial of seven years' custody was the minimum which would have been appropriate in this case having regard to both the aggravating features and the mitigation which was available to this respondent. We also consider that the judge was entitled in the circumstances of this case to give some weight, albeit modest, to the impact of the current pandemic on prison conditions.
29. After taking that into account, and all other matters, including the guilty plea, we have reached the conclusion that the minimum term which should have been imposed in this case was one of five years' custody. We agree with Ms Walker that an extended sentence needed to be imposed in this case in view of the dangerousness of this offender. This is supported not only by the pre-sentence report but by the judge's own view. We have reached the conclusion that the minimum extension period which was required to protect the public was one of three years.
30. Accordingly, we grant the application for leave by the Attorney General. We quash the sentence imposed and substitute the following sentence: an extended sentence under section 280 of the Sentencing Code, comprising a custodial term of five years and an extension period of three years.