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IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT WARWICK

MR RECORDER DAVID MASON 23N51067823

CASE NO 202402592/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 12 September 2024

Before:
LORD JUSTICE SINGH

MRS JUSTICE MAY

MR JUSTICE GRIFFITHS

REX

V

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988

FRANKIE MAUGHAN

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR D BISHOP appeared on behalf of the Solicitor General.

MR N DEVINE appeared on behalf of the Offender.

J U D G M E N T
(Approved)

LORD JUSTICE SINGH:

Introduction

1. This is an application on behalf of His Majesty's Solicitor General for leave to refer sentences to this Court, under section 36 of the Criminal Justice Act 1988 ("the 1988 Act"), on the ground that they were unduly lenient.
2. The respondent offender was born on 27 May 2002. He was aged 19 to 20 at the time of the offences and 22 at the date of sentence. On 12 June 2024, in the Crown Court at Warwick, the respondent pleaded guilty to two offences. On 19 June 2024, at the same court, he was sentenced by Mr Recorder David Mason as follows. On count 1, an offence of robbery, contrary to section 8(1) of the Theft Act 1968, he was sentenced to 20 months' imprisonment. On count 2, an offence of fraud, contrary to section 1 of the Fraud Act 2006, he was sentenced to 12 months' imprisonment, made concurrent. That therefore made a total sentence of 20 months' imprisonment. An appropriate victim surcharge order and a restraining order were imposed.

The Facts

3. The facts can be taken from the agreed terms of the Final Reference filed on behalf of the Solicitor General. In summary, the offender targeted a vulnerable victim and "cuckooed" his home. Having established himself in the victim's home, the offender robbed the victim by producing a large machete and threatening to cut off the victim's hands and stab him in the leg unless the victim handed over his bank card and PIN. Having obtained the victim's bank card and PIN, the offender fraudulently used the bank card to fund his lifestyle by paying for food, hotels, fuel, taxi journeys and making cash

withdrawals of a total of £3,620.83 over a period of weeks. The offending was revealed when a friend of the victim visited his home address and he told her what had happened. The victim's home had been extensively soiled by the offender's dog and damage had been caused to it. The victim was ultimately compelled to leave his home and the local area. The facts are set out in more detail in the Final Reference and are not materially in dispute. We will refer to them as necessary in the course of this judgment.

The Sentencing Process

4. The maximum sentence for the offence of robbery is life imprisonment. The maximum sentence for the offence of fraud is 10 years' imprisonment. The offender had six previous convictions for eight offences. They began in 2015, when he was aged only 14. Of most relevance for present purposes is this. On 8 December 2022 (when he was aged 20), he was sentenced to an overall sentence of 32 months' detention in a young offender institution for two offences of inflicting grievous bodily harm and one offence of assault occasioning actual bodily harm. Those offences were committed on the following dates. On 25 February 2022, for an offence of assault occasioning actual bodily harm, a sentence of 15 months' detention. On 6 May 2022, for an offence of wounding/inflicting grievous bodily harm, a concurrent sentence of 24 months' detention. On 14 June 2022, for a further offence of wounding/inflicting grievous bodily harm, a concurrent sentence of 32 months. On 10 November 2023, the offender was released on licence at the halfway point of that sentence. However, on a date before 12 June 2024, that is his plea and trial preparation hearing, when he pleaded guilty to the present offences, the offender was recalled to custody to serve the remainder of that earlier sentence.
5. The sentencing court had before it, as does this Court, two statements: the victim's

personal statement, provided on 14 June 2024, described how during the incidents he had been scared and could not sleep. He thought that he was going to get stabbed and killed. He described the offender as having a “Jekyll and Hyde” personality. As a result of the offender taking so much money from him, the victim panicked about being unable to pay his bills, he had been without food and was left short of basic items. He struggled to talk about what had happened. His sleep was still affected by thoughts of what the offender had done to him. The victim’s sister also provided a statement in August 2022, in which she described the victim as a “sweet, innocent and easily led” man who had been alcohol dependent for 20 years but who had been managing to live independently prior to the offences. She said that the victim was now living out of the area for his own safety. During the time that the offender was in the victim’s house and taking his money, his alcohol consumption had massively increased. In July 2022, she was cleaning the victim’s home, which had been left in an untidy state, when she found a handwritten note in her brother’s writing which read: “If I die, my name is Ian Parson. Phone my sister ...” She was heartbroken to think that her brother had been so scared during the incidents with this offender that he thought he might die. The incidents had forced the victim out of his home and out of the town where he was living. When the victim visited that town subsequently, he would visibly shake and say that he felt scared.

6. The Sentencing Council has issued relevant guidelines in relation to these matters. Of most direct relevance is the Guideline on Robbery in a dwelling, which took effect on 1 April 2016. The court must first determine the offence category by reference to culpability and harm. As to culpability, there is no issue and none was before the sentencing court. The guideline provides that an offence would fall into category A, that

is high culpability where a bladed article is produced and violence is threatened. As to harm, the guideline requires the court to weigh up all the factors to determine the harm that was caused or was intended to be caused to the victim. The guideline sets out the following factors which are potentially relevant to this case. Category 1 harm includes cases where there has been a serious psychological harm caused to the victim. It also includes cases where there has been soiling, ransacking or vandalism of the property. Category 3 relates to cases where, for example, there is no or minimal harm caused to the victim, or limited damage or disturbance to property. No-one has suggested category 3 was relevant to this case. Category 2 embraces other cases where the characteristics for categories 1 or 3 are not present.

7. The Definitive Guideline goes on to recommend the following sentencing ranges. If an offence falls within category 1A, the suggested starting point is 13 years' custody with a range of 10 to 16 years. If an offence falls within 2A, the starting point recommended is 8 years' custody with a range of 6 to 10 years. There must, of course, then be taken into account statutory and other aggravating factors together with mitigating features. Finally, there is no issue in this case that the offender was entitled to a discount of 25 per cent to reflect the stage at which he pleaded guilty to the offences, namely at the plea and trial preparation hearing.
8. It is not necessary, for present purposes, to refer to the Definitive Guideline on Offences of Fraud, although that was also taken into account by the sentencing judge and has been by this Court. It is however relevant to mention the Sentencing Council's Guideline in relation to Totality. That guideline applies where an offender is being sentenced for

multiple offences or when sentencing an offender who is already serving an existing sentence. The guideline makes clear that the overriding principle is that the overall sentence should reflect all offending behaviour with reference to overall harm and culpability, together with the aggravating and mitigating factors relating to the offences and those personal to the offender, and must be just and proportionate. The general approach section in the guideline contains a drop down box on sentencing for offences committed prior to other offences for which an offender has been sentenced. It provides that the court should first reach the appropriate sentence for the instant offences, taking into account totality in respect of the instant offences alone. The court then has a discretion whether to make further allowance to take into account the earlier sentence, whether or not that earlier sentence has been served in full. The court should consider all the circumstances in deciding what, if any, impact the earlier sentence should have on the new sentence. It is not simply a matter of considering the overall sentence as though the previous court had been able to sentence for all the offences and then deducting the earlier sentence from that figure. A non-exhaustive list of circumstances is then set out. The guideline provides specific guidance in relation to passing custodial sentences where the offender is subject to an existing custodial sentence. Importantly, it states that the new sentence should start on the day it is imposed (see section 225 of the Sentencing Act 2020 or the Sentencing Code) which prohibits a sentence of imprisonment running consecutively to a sentence from which a prisoner has been released. If the new offence was committed while subject to licence or post-sentence supervision, the sentence for the new offence should take that into account as an aggravating feature. However, the sentence must be commensurate with the new offence and cannot be artificially inflated with a view to ensuring that the offender serves a period in custody additional to any

recall period. This is so even if the new sentence will in consequence add nothing to the period actually served.

9. The judge had the benefit of a Sentencing Note from the prosecution. However, as we understand it, in chronological terms, that was uploaded to the system on 13 June 2024, before the victim's personal statement was uploaded to that system on 18 June 2024. Accordingly, it was not available to the prosecution in preparing the Sentencing Note. We mention this simply because it may help to explain at least, to some extent, why the prosecution took the stance that they did.

10. The prosecution submitted to the sentencing judge that the appropriate category for the offence of robbery was category 2A. The defence submitted that the offender should have been dealt with for all matters in 2022. It was submitted that, had that occurred, the robbery offence would have been the lead offence but taking account of totality, the offender would not have received an overall sentence of more than 6 years' detention.

11. It is important to recognise that, in this case, there were the following aggravating factors. First, the offender's previous convictions for robbery and possession of a bladed article. Secondly, the commission of the offences whilst being subject to bail. Thirdly, the victim was targeted due to his vulnerability or perceived vulnerability. Fourthly, the victim was compelled to leave his home. Finally, there was a failure to comply with the community order imposed in May 2022. It also has to be acknowledged that there was the significant mitigating factor which was the offender's relative youth at the time of the offending.

12. In his sentencing remarks, the judge accepted the joint position taken by the prosecution and the defence that the offence of robbery fell into category 2A. He recognised the complexity and difficulty, as we do as well, of sentencing the offender in the circumstances of this case, in particular that he had been recalled on the earlier sentence. The Recorder mentioned that the offender would accordingly be released in April 2025. He accepted the defence submission that, had the offender been dealt with for all the matters at the same time, it was unlikely that the sentence would have been greater than 6 years. Turning to the offence of fraud, the Recorder said that the sentence would have been one of 20 months' imprisonment. He would reduce that to reflect totality to 16 months and reduce it further to reflect the guilty plea, thus resulting in a sentence of 12 months. He went on to observe that the offender would serve this sentence whilst he was serving the sentence for which he had been recalled.

Submissions on behalf of the Solicitor General

13. On behalf of the Solicitor General, Mr Bishop accepts that the judge was correct to take the robbery as the lead offence but submits that the starting point selected of 8 years' custody, after trial, was too low. First, notwithstanding the stance taken by the prosecution in the court below, Mr Bishop submits that the appropriate categorisation of the robbery should have been as a category 1 harm case. Mr Bishop reminds us that on a Reference such as this, the law officers are not bound by any concession made by the prosecution in the court below as regards categorisation of offences provided there is a proper and substantial justification for departing from it (see *Attorney General's Reference (R v Stewart)* [2016] EWCA Crim 2238; [2017] 1 Cr App R(S) 48 at [33] to

[34] in the judgment of Davis LJ).

14. Mr Bishop submits that category 1 harm may be demonstrated by serious psychological harm caused to the victim. Here the victim personal statement detailed how even some 2 years after the offences the victim still struggled to talk about the incident. He was struggling emotionally and his sleep was affected by thoughts of what the offender had done to him. His sister's statement recorded that as of August 2022, the victim had been forced to move out of his home and out of the area. When attending his home to clean the property she had found the handwritten note from the victim which we have quoted earlier. Those factors justified a finding, submits Mr Bishop, that serious psychological harm had been caused and the appropriate category was therefore category 1. Furthermore, Mr Bishop submits that category 1 harm may be demonstrated by soiling, ransacking or vandalism of a property. In this case, the offender's dog had heavily soiled at least one of the rooms in the victim's home and further there had been damage caused to the property during an incident between the offender and other individuals.

15. In the alternative, Mr Bishop submits that, even if the judge was correct to categorise the robbery as a category 2 harm case, he should then have made an upward adjustment from the starting point to reflect the aggravating factors in this case. Further, an upward adjustment was also required in order to reflect the fact that a sentence had to be passed on count 2, which was being made concurrent. Mr Bishop fairly accepts that there was nothing wrong in principle with making count 1 the lead offence, but then the overall gravity of the offending had to be reflected in the total sentence. He submits that a consecutive sentence could have been justified on count 2 but, if the sentences were to be

made concurrent, there was, in effect, no punishment for the offence of fraud. Thirdly, having reached a sentence of 6 years' custody, it is accepted that the judge was entitled to make a reduction to reflect totality arising from the chronology of the offending in this case and the previous sentences imposed in December 2022. However, Mr Bishop submits that the reduction from 6 years to 20 months, which represents over 66 per cent, gave disproportionate weight to totality and led to a sentence which was outside the range reasonably open to the Recorder. It is not accepted that had the offender been dealt with all matters in December 2022, he would have received a total sentence of only 6 years' custody. The Recorder did not have any information as to the factual circumstances of the other offences. It was not possible to assess whether a *dangerousness* sentence would have been acquired had the court been dealing with all matters together. Further and in any event, by indicating the robbery would have been the lead offence, the judge did not appear to factor in the significant increase that would have been required to take into account three other serious violent offences and the fraud.

Mr Bishop acknowledges, as do we, that this was a difficult sentencing exercise. He accepts that no criticism can be made of the credit allowed of 25 per cent for the guilty plea. Nevertheless, in conclusion he submits, the sentence was outside the range of sentences reasonably open to the Recorder, and was unduly lenient.

Submissions on behalf of the respondent

16. On behalf of the respondent offender, Mr Devine submits that the sentence could be regarded as lenient but was not unduly so. He submits that the sentence passed was a reasonable one in the circumstances of this case. He submits that the robbery offence was properly placed into category 2 harm. All of these offences took place either just

before or after the offender's 20th birthday, so he was still a young and immature man. The sentence passed in December 2022 was his first experience of custody. Further, Mr Devine submits that there was a significant delay of 2 years in getting the case to court and this was not the fault of the respondent. Before this Court, at the hearing, Mr Devine has also emphasised the various aspects of personal mitigation which were available to the respondent, including his difficult upbringing. Most importantly, Mr Devine submits that engaging in the notional exercise of considering what sentence would have been passed had all the matters been dealt with together, the judge would have had to take into account the principle of totality. The sentence arrived at will lead to the earliest release date being April 2025. Mr Devine submits that this fell within the range of reasonable sentences available to the Recorder.

Our Assessment

17. The principles to be applied on an application under section 36 of the 1988 Act are well established and were summarised in *Attorney's-General Reference (Azad)* [2021] EWCA Crim 1846; [2022] 2 Cr App R(S) 10 at [72], in a judgment given by the Chancellor of the High Court as follows:

“1. The judge at first instance is particularly well placed to assess the weight to be given to competing factors in considering sentence.

2. A sentence is only unduly lenient where it falls outside the range of sentences which the judge at first instance might reasonably consider appropriate.

3. Leave to refer a sentence should only be granted by this court in exceptional circumstances and not in borderline cases.

4. Section 36 of the 1988 Act is designed to deal with cases where

judges have fallen into ‘gross error.’”

18. Applying those principles to the present case, in essence we accept the submissions made on behalf of the Solicitor General. This case could have been regarded as falling within category 1 harm, although we tend to the view that it would have been towards the lower end of the range. If it was, however, to be placed within category 2 harm, a significant uplift was then required to reflect the aggravating factors in this case. Furthermore, an uplift was then required to reflect the other offending, including the fraud offence on count 2. A sentence for an adult would have been well above the top of the range for a category 2A offence, that is more than 10 years. Most importantly, we consider that, if the offender had been sentenced for all matters together in December 2022, which is the approach which the defence urged upon the Recorder and which the Recorder embarked upon, the present robbery would have been the lead offence and the sentence passed for it would have had to reflect the overall gravity of the offending including the three other serious matters of violence. The appropriate sentence could not have been as low as 6 years (that is the equivalent of 8 years after trial) as the defence had submitted and as the Recorder accepted; it would have been at least 10 years after trial, even allowing for the offender’s relatively young age. Taking account of the guilty pleas, it should therefore have been at least 7½ years.

19. The principle of totality can be reflected in the following way. By June 2024, the respondent had served 18 months in custody (the equivalent of a sentence of 3 years). That strongly suggests that the appropriate sentence for the present offences would have been 4½ years, thus arriving at a total of 7½ years which, in our view, was the minimum that should have been imposed in total if the sentences had all been passed at the same

time. We therefore conclude that the minimum sentence that is required on count 1 (the robbery offence) is 4½ years. There is no need to alter the sentence on count 2 since that will remain concurrent.

Conclusion

20. For the reasons we have given, we grant the Solicitor General leave to refer the sentences to this Court under section 36 of the 1988 Act. On that Reference, we substitute a sentence of 4½ years' custody.

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

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk