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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 31 July 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE JULIAN KNOWLES

SIR JOHN ROYCE

R E G I N A
v
"AS"

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Mr M Butler appeared on behalf of the **Appellant**

Mr M Riley appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: This appellant (to whom we shall refer as "AS") appeals by leave of the single judge against sentences totalling 33 months' detention, pursuant to section 91 of the Powers of Criminal Courts (Sentencing) Act 2000. That total sentence was imposed for offences of kidnapping, robbery and assault occasioning actual bodily harm, to all of which he had pleaded guilty. AS was only 13 when he committed those offences. Even so, he was significantly older than the two victims of the offences. They were just 11 years old.

2. Orders have been made and confirmed by this court, pursuant to section 45 of the Youth Justice and Criminal Evidence Act 1999, directing in relation to each of the two victims and in relation to each of the five accused to whom we shall refer, that while he is under the age of 18, no matter may be included in any publication if it is likely to lead members of the public to identify him as a person concerned in these proceedings. We shall accordingly refer to the victims as "JO" and "RB" and we shall use initials when referring to other offenders.

3. The offences were committed in the late afternoon of a very cold day in February 2018. JO and RB went together to the local shops to buy sweets. They encountered the appellant (then aged 13 years 8 months), "BH" (then 14 years and 8 months) and "SL" (12 years and 5 months). These three older boys began to follow JO and RB. They told JO and RB to come with them to a field, threatening to strip them and take their belongings if they did not comply. When they arrived at the field, which we understand was only a short distance from where they had encountered one another, JO was able to get away. He had understandably been very frightened and he ran back to the shop where he raised the alarm.

4. RB was then taken further into the field, across other fields and eventually to the area of a lake. In all we understand the distance covered would take about 20 minutes to walk. At some stage the three older boys were joined by two others, "DH" (then aged 14 years 7 months) and "JC" (then aged 14 years 6 months). RB was robbed of his mobile phone and his bag which contained £3. He was punched and was made to fight with one of the older boys, SL. We understand that RB and indeed JO were of small stature. RB was in addition humiliated in a variety of ways: he was made to do star jumps; he was forced to eat a biscuit which had been found pressed into the mud of the field; he was made to walk with a cone on his head. He was then required to take off his jacket and jump into the very cold water of the lake. Having been allowed to get out, he was then made to jump in for a second time. Needless to say, RB was terrified. At times during this sequence of events he was in fear for his life. To compound his misery, his attackers either actually filmed him on mobile phones or pretended to do so during his humiliation. Finally, when RB was allowed to leave the water for a second time, he was ordered to lie on the ground and wait so that the offenders would have an opportunity to leave.

5. AS pleaded guilty to two offences of kidnap (one relating to each of the younger boys), an offence of robbery of RB and an offence of assault occasioning actual bodily harm to RB. BH pleaded guilty to the same four offences. SL pleaded guilty to assault occasioning actual bodily harm. DH and JC, who it will be recalled had joined in events in the fields,

pleaded guilty to kidnapping RB.

6. Victim personal statements were available to the court from RB and JO and also from adult members of RB's family. The statements by the two young boys gave powerful accounts of their fears and their distress. At the time of making the statements (which was about 6 months after the events) both were still suffering significantly. They complained of disturbed sleep, they were both frightened to go out of their homes and they felt unable to travel on the school bus. JO had missed some of his schooling because he was afraid to leave the house, RB had missed school and had also missed sports activities outside of school because he was afraid to go out. His mother had become ill and had lost her job, with consequent financial problems for the family. The family was planning to leave the area in which they had lived all their lives and in which, before these events, they had been happily settled. The harm caused by the offences was undoubtedly serious.

7. All five offenders were sentenced by a Recorder. We pay tribute to the obvious care with which he approached what was, on any view, a most difficult sentencing process. He was not able to deal with all the offenders on the same occasion because AS, having attended court on the day fixed for sentencing, left the building in the course of the day and was not arrested until some weeks later. In due course he admitted a breach of bail. BH was also absent from the first sentencing hearing because he had been arrested the previous day for further offences.

8. AS's antecedents show that as a 12-year-old he had, on different occasions, committed a total of three offences of battery and one of public disorder. Those various offences had been dealt with by referral orders, eventually an order of 12 months' duration.

9. As a 13-year old AS had committed another offence of public disorder and an offence of common assault for which, on 3 August 2017, he was made subject to a youth rehabilitation order with a supervision requirement for 12 months and a curfew for 3 months. The present offences were committed whilst that youth rehabilitation order was in place.

10. We note also that after the present offences, AS received further referral orders for a number of breaches of a criminal behaviour order. He went on, when aged 14, to commit offences of theft from the person, and battery, for which referral orders were again imposed.

11. A substantial body of reports had been prepared to assist the court in the sentencing of AS. Their contents reflected the obvious diligence and care with which they had been prepared. There were, amongst other reports, two by a consultant forensic psychiatrist, Dr Deo. He confirmed the accuracy of a comparatively recent diagnosis that AS was suffering from both Attention Deficit Hyperactivity Disorder (ADHD) and Autistic Spectrum Disorder (ASD). Dr Deo observed that AS appeared vulnerable and easy to lead. He explained in his reports that those suffering with ASD often are easily led and want to please others, especially their friends. He assessed, at an early stage, that AS was only fit to stand trial if he had the assistance of an intermediary. He observed that it was a positive feature that

now that AS's conditions had been diagnosed he could receive appropriate support, and Dr Deo assessed AS as capable of benefiting from therapeutic work. He favoured a non-custodial sentence, if the court felt able to take that course.

12. Officials of the London Borough of Hillingdon had assessed AS's special education needs. Testing carried in February 2019 (by which time AS was aged 14 years 8 months) showed extremely low scores for his general cognitive ability. He was ranked in the first percentile and some of the tests produced age-equivalent scores which put him at the level of a 9 year old. The report noted that AS had general learning difficulties across all areas and had spent much of his adolescence not accessing education. He was capable of being polite, but had a history of challenging behaviour both in and out of an educational setting and was assessed as needing heavy support to integrate back into education.

13. A very thorough pre-sentence report, prepared in February 2019 by Ms Baronowski, recorded that AS had grown up in an environment where violence was both threatened and used, and had been a witness to parental violence. It was a matter of concern that he had shown himself willing to use violence to resolve conflicts.

14. The report noted that AS's mother, who was extremely young when AS was born and who faced a number of problems of her own, had at times found it difficult to manage his behaviour. His father, also a very young parent and a heroin addict, appears to have played little part in AS's life and refused to engage with the professionals.

15. Ms Baronowski referred to the recent diagnosis but noted that AS was, at that stage, unwilling to take his prescribed medication because he did not want to be labelled as "different". She found that he saw himself as a criminal and tended to gravitate towards peers who were also involved in criminality. He had ample opportunity to do so because for a significant time he had not been engaging in education. She noticed that a recurrent theme was AS's misplaced loyalty towards his peer group. She felt, with her considerable experience of dealing with AS, that the present offences were opportunistic rather than planned, and she assessed that AS failed to recognise the full seriousness of his actions or how his actions affected others. She regarded him as a high risk of re-offending, a very high risk of causing serious harm and a high risk to his own safety. He displayed limited remorse and was unable to empathise with others, which was a troubling feature because it was likely to increase the risk of re-offending. Nevertheless, as Ms Baronowski rightly pointed out, he is still very young. He was a persistent offender who met the criteria for a youth rehabilitation order with a requirement of intensive supervision and surveillance. Ms Baronowski put forward a detailed programme for such an order and urged it upon the court as an appropriate alternative to custody.

16. In addition to these and other reports from professionals, the court has been provided with thoughtful letters from members of AS's family and other adults who know him well. The authors of these letters fully recognise the seriousness of the offences and the great distress which had been caused to the victims and their families; they confirm however that AS was easily led and did not always realise the consequences of his actions.

17. As we have indicated, the Recorder sentenced the various offenders on two separate occasions. He drew a clear and, in our view, correct distinction between AS and BH, on the one hand, and the remaining three defendants on the other hand. As for those three, with careful reference to the sentencing guidelines and to particular circumstances of their respective cases, the Recorder granted an absolute discharge to SL and made youth rehabilitation orders in relation to DH and JC. It is unnecessary to say more about their cases, save to emphasise that no sensible argument of unfair disparity could be advanced as between this appellant and any of those three.

18. In his sentencing remarks on 1 April 2019 the Recorder confirmed that he would give AS and BH full credit for their guilty pleas. He indicated that AS's breach of bail would (in the case of an adult offender) merit a custodial sentence of around 2 months. Rather than impose a separate sentence for this offence, the Recorder imposed no separate penalty but took the breach of bail into account when determining the sentence for the other offences. He referred to the very serious facts of the case and the highly damaging impact of the offences on the victims and their families. He took into account the material to which we have referred, particularly noting that AS has a cognitive age significantly below his years but not going into further detail about that aspect of the reports. He assessed BH as having initiated the acts which took place and playing "a leading" role in the offences. He assessed AS as playing "a very significant part in the events", including by preventing RB's escape, and said that the seriousness of AS's offending followed only shortly behind that of BH. We should say at this stage that although some challenge was made to the finding by the Recorder that AS had tripped RB, thus preventing him from escaping at the same time as JO, we are satisfied that the Recorder was entitled to make that finding.

19. The Recorder referred to the Sentencing Council's Definitive Guideline: Overarching Principles for the Sentencing of Children and Young People, which includes an offence-specific guideline for offences of robbery by young offenders. He had also made detailed reference to that guideline at the earlier hearing and in the course of the submissions of counsel. He concluded that a youth rehabilitation order with intensive supervision and surveillance could not be justified because of the seriousness of the offences, because of AS's criminal record and because AS's commission of subsequent offences showed that a non-custodial sentence was no longer in his best interests. The Recorder imposed sentences of 33 months' detention, pursuant to section 91 of the 2000 Act, in respect of each of the offences of kidnap and robbery, with no separate penalty for the offence of assault occasioning actual bodily harm. In BH's case he imposed sentences of detention of 40 months.

20. By an oversight the Recorder omitted to impose the necessary statutory surcharge. That omission is one which this court only has power to correct in the event that the appeal succeeds and some reduction is made in the overall sentence.

21. In his written and oral grounds of appeal Mr Butler, who represented AS below as he does in this court, submits that the sentence was manifestly excessive. He submits that the Recorder did not sufficiently have regard to the principles set out in the Guideline and in particular that he failed to give sufficient weight to the particular vulnerabilities of AS.

Emphasising the evidence in the various professional reports to which we have referred, that AS is easily led and does not always appreciate the seriousness of his conduct, Mr Butler submits that the Recorder should have given significantly greater weight to those features. He relies in particular on principles stated at the very beginning of the Definitive Guideline:

> "1.1 When sentencing children or young people (those aged under 18 at the date of the finding of guilt) a court must have regard to:
> • the principal aim of the youth justice system (to prevent offending by children and young people); and
> • the welfare of the child or young person.
>
> 1.2 While the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and focused on the child or young person, as opposed to offence focused. For a child or young person the sentence should focus on rehabilitation where possible. A court should also consider the effect the sentence is likely to have on the child or young person (both positive and negative) as well as any underlying factors contributing to the offending behaviour."

22. Mr Butler also relies in particular on paragraph 1.5 of the Guideline, which emphasises the importance of bearing in mind factors which may diminish the culpability of a child. The immaturity of a child or young person can impact on his decision making or his risk-taking behaviour. His conduct may be affected by inexperience, emotional volatility or negative influences. The paragraph states:

> "They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour. When considering a child or young person's age their emotional and developmental age is of at least equal importance to their chronological age (if not greater)."

23. For the respondent Mr Riley, who also appeared below, has assisted us with a written respondent's notice and with oral submissions expanding upon that notice. We are grateful to both counsel for the help which they have given in a difficult case.

24. To bring matters up to date, further reports have helpfully been prepared for this court. In a review dated 19 July 2019, the Secure Unit at which AS is held records that his general behaviour had been consistently good during the period of about three-and-a-half months that he has been there. It notes that AS has "received the odd sanction", including two for fighting, but the general picture is that he has applied himself well, is enthusiastic about some of the activities and has a 100% attendance record for his education. In addition, we are pleased to note from this report that AS's mother, who is clearly devoted to him, visits

him several times each week.

25. There is also a further pre-sentence report. This similarly records that AS is doing exceptionally well at the Secure Unit, although there is no suggestion that the previous risk assessment to which we have referred has ceased to apply. The author of the report supports the original proposal of a youth rehabilitation order with intensive supervision and surveillance.

26. We have reflected upon the body of material before us and upon the submissions. As the Recorder recognised, the Guideline makes clear that a custodial sentence must always be a sentence of last resort. The starting point for consideration of the appropriate sentence is the seriousness of the offending, having regard to the culpability of the young offender and the harm caused. But in assessing those factors, the need for an individualistic approach requires the court to consider, amongst other things, the young offender's awareness of his actions and of the consequences of his actions. The maturity and emotional age of the offender, as well as his chronological age, must be considered. So too must be considered any mental health problems or learning disabilities.

27. In relation to the offence of robbery there is, as we have said, a section of the Guideline which deals with this specifically. It lists factors relevant to the sentencing of young offenders. More generally, in the Overarching Principles section of the Guideline it is made clear that if custody is unavoidable the court should, as a rough guide, consider what sentence would be imposed on an adult offender. Paragraph 6.46 indicates - again as a rough guide - that an offender aged under 15 should receive a custodial sentence, if one be unavoidable, of less than half the sentence which would be appropriate for an adult offender.

28. The Recorder was faced with a complex and difficult sentencing process in dealing with all five young offenders and with this appellant in particular. His task was made the more difficult because consideration of the appropriate sentence of an adult offender would have to take into account the additional aggravating feature of the disparity in age between an adult offender and a child victim. The disparity in age in the circumstances of the present case was of course limited to a couple of years.

29. As we have indicated, the Recorder approached his difficult task with great care. He clearly had in mind the provisions of the Guideline. True it is that he did not recite every word of the most relevant paragraphs but it is clear, reading the transcripts of the various hearings, that he gave careful consideration to them.

30. In AS's case there were undoubtedly a number of factors which pointed towards the making of a youth rehabilitation order rather than a custodial sentence. First, AS had plainly had a difficult and unsettled upbringing, in the course of which, sadly, he had become accustomed to violence. His conditions of ADHD and ASD made him easily led and limited his understanding of the effect of his actions on his victims. His overall cognitive limitations meant that he was, in many respects, functioning at a level significantly below his chronological age.

31. On the other hand, as the Recorder said, these were serious offences which would have demanded a very substantial sentence if committed by an older offender. None of the reports which this court has considered suggests that AS did not know that what he was doing was seriously wrong. Nor do they suggest that he was wholly unable to appreciate the distress and fear of his 11-year-old victim, outnumbered as he was 5 to 1 by appreciably bigger boys, or to appreciate the obvious risk of the victim being ordered (twice) to jump into a lake of very cold water without any enquiry as to whether he could swim. Further, AS's previous offending has been dealt with, as we have indicated, by non-custodial orders, in the course of which efforts were no doubt made as far as possible to assist AS to avoid further offending.

32. We have concluded, after careful reflection, that young though AS is, a custodial sentence was unavoidable, for the reasons which the Recorder gave. In general, the Recorder correctly applied both the general principles in the Guideline and the specific provisions relating to offences of robbery. But with all respect to the Recorder, we conclude that when determining the length of the sentence, he did fall into error in his application of the Guideline. First, although he referred to the cognitive deficit shown in the various reports, he did not explicitly refer to, and in our view did not sufficiently take into account, the important features that AS's conditions made him particularly easy to lead and limited his ability to recognise the consequences of his actions. Secondly, and in a related error, the Recorder failed sufficiently to take into account that when comparing the seriousness of AS's offending with that of BH, the difference between the two was not simply 1 year of chronological age: the difference between them was the difference between an older boy and a younger boy who, because of his condition, functioned in relevant ways as a much younger child.

33. For those reasons, whilst we are satisfied that the sentences of detention were and remain necessary, we conclude that they should be reduced in length. The appropriate reduction, in our judgment, is a reduction of 9 months, resulting in a total term of detention of 2 years. We were glad to be told in the course of the hearing that any custodial sentence would in practice continue to be served at the Secure Unit where AS is presently accommodated and where it seems clear from the updated reports that he is making very commendable progress.

34. We accordingly allow the appeal, to the extent that we quash the sentences of 33 months' detention imposed on counts 1, 2 and 3 of the indictment and substitute for them sentences of 2 years' detention, again pursuant to section 91 of the Powers of Criminal Court (Sentencing) Act 2000.

35. The overall sentence having thus been reduced, we must and do correct the technical error made below by imposing the necessary surcharge of £30.

36. LORD JUSTICE HOLROYDE: Mr Butler, Mr Riley, our thanks to you both and our thanks to those behind you, Mr Butler, whose assistance in a difficult case has been considerable.

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

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