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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2020] EWCA Crim 1775

CASE NO 202002502/A4-202002503/A4-202002504/A4

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 17 December 2020

Before:

LORD JUSTICE FLAUX

MRS JUSTICE CHEEMA-GRUBB DBE

MR JUSTICE MURRAY

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

REGINA

V

OTIS WILLIAM BARRETT

MATTHEW LAWRENCE BROWN

TERRENCE MARK BROWN

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MR P JARVIS appeared on behalf of the Attorney General.

MR P WEBB appeared on behalf of the Offender Barrett.

MR M NICHOLLS appeared on behalf of the Offender M Brown.

MR L MUIR appeared on behalf of the Offender T Brown.

J U D G M E N T

(Approved)

LORD JUSTICE FLAUX:

1. Her Majesty's Attorney General, appearing by Mr Jarvis of counsel, seeks to refer sentences passed down on Terrence Brown, Matthew Brown and Otis Barrett on 4 September 2020 pursuant to section 36 of the Criminal Justice Act 1988. We grant leave.
2. On various dates, the offenders pleaded guilty to three counts of conspiracy to burgle, contrary to section 1(1) of the Criminal Law Act 1977 and one count of burglary contrary to section 9(1)(b) of the Theft Act 1968. The second offender, Matthew Brown, also pleaded guilty to one count of criminal damage contrary to section 1(1) of the Criminal Damage Act 1971. It is common ground that the judge was correct to give each of the offenders the full one-third credit for their guilty pleas.
3. The conspiracies to burgle covered three periods of time: 21 January 2020 to 6 February 2020 (series 1); 9 February 2020 to 28 March 2020 (series 2) and 28 March 2020 to 2 May 2020 (series 3). Each conspiracy concerned an agreement to burgle retail premises with intent to steal (principally cigarettes). The particulars of the count of burglary were that on 26 April 2020 the offenders entered a garage at CMG, Mansard Close, Northampton, as trespassers, and stole cigarettes. The particulars of the count of criminal damage were that on 19 April 2020 the second offender unlawfully damaged an automatic number plate recognition camera belonging to the Northamptonshire Police.
4. On 4 September 2020 the offenders were sentenced to the following concurrent terms of imprisonment. Firstly, the first offender, Terrence Brown (aged 26), was sentenced to 6 years' imprisonment for each conspiracy and 4 years' imprisonment for the offence of burglary concurrent, making a total sentence of 6 years' imprisonment. The second offender, Matthew Brown (aged 30), was also sentenced to 6 years' imprisonment for

each conspiracy, 4 years' imprisonment for the offence of burglary and 2 months' imprisonment for the offence of criminal damage, all concurrent, making a total sentence of 6 years' imprisonment. The third offender, Otis Barrett (aged 26), was sentenced to 6 years and 4 months' imprisonment for each conspiracy and 4 years' imprisonment concurrent for the offence of burglary, making a total sentence of 6 years and 4 months' imprisonment.

The Facts

5. The facts of the offences were as follows. The offenders played a leading role in a group which numbered up to five men who committed a spate of commercial burglaries at night between 2 January 2020 and 1 May 2020. From 23 March onwards these were committed during lockdown at a time of widespread public anxiety and thinly stretched police resources. This spree only ended when the offenders were arrested and remanded into custody on 1 May 2020. Earlier police interventions had included the finding and seizing of getaway vehicles on various dates and the arrest of the first offender on 6 February and his prosecution for handling a stolen car. He was released by magistrates for that offence with a fine on 8 February. These police interventions only served to disrupt the group for short periods of time. New getaway vehicles were found and the offending resumed soon afterwards.
6. The conspirators committed 45 burglaries and attempted burglaries and seven other offences such as theft between 22 January and 1 May 2020. The principal target of the burglaries was cigarettes, which were stolen in bulk and sold by the group for profit. Builders' sacks were used to carry off the stolen haul. On occasions the group targeted other valuable items including two raids (only days apart) on a designer clothing shop in

Northampton and the theft of two motorbikes from a garage.

7. The telephone handset seized from the first offender on 6 February included a message from a third party asking if the group "had been out last night" as he wanted to buy some cheap cigarettes. An image on the first offender's phone showed at least £10,000 in cash. The offenders were selling the stolen items for profit. Messages recovered from that handset indicated that they communicated via Snapchat and WhatsApp to discuss potential targets for future raids including screenshots of various designer clothes stores. The group also carried out physical reconnaissance in advance on certain occasions.
8. Messages on the telephone also revealed that the first offender knew to leave the phone behind when going out to commit offences and the preliminary telephone work carried out by the investigators suggested that all three offenders took that precaution. They took a number of other precautions to avoid detection such as sabotaging ANPR cameras, placing cones on the road to delay any police response, throwing cans of antifreeze into the road to deter police pursuit, spraying cleaning fluid or fire extinguishers on surfaces that they touched during a number of the burglaries to eliminate any scientific evidence, using stolen vehicles on recently stolen number plates, storing the stolen cigarettes at remote locations, operating at night and wearing gloves and face coverings. Nonetheless on occasions they were careless: discarded gloves, balaclavas, snoods and builders' sacks were found by the police on several occasions which contained DNA links to each of the offenders.
9. The majority of the burglaries were carried out against supermarkets and convenience stores. Some stores were targeted more than once over a period of days or weeks. The group would also target three or four sites over the course of one night on occasion. Crowbars, sledgehammers and power tools including angle grinders were used to force

entry through doors or windows. A lookout often remained outside and on at least two occasions was seen to be wielding a sledgehammer and a golf club respectively, to be used as weapons if necessary. Once inside the offenders would attempt to force the locked cigarette kiosks, would also sometimes target cash tills or take other items such as alcohol. The total value of the goods stolen in 52 incidents was £298,015.86. Very substantial damage was caused as a result of these raids totalling £118,599.

10. The offences took place across Northamptonshire and a number of other counties including Buckinghamshire, Warwickshire, Leicestershire, Bedfordshire and the Thames Valley area. Once the lockdown began on 23 March the group's focus shifted more towards the Northampton area (where they lived) because travel further afield might have carried greater risk of detection in the prevailing circumstances.
11. As to the offence of criminal damage charged against Matthew Brown, over the course of 19 to 21 April several ANPR cameras in the Northampton area were vandalised. The second offender was captured on CCTV committing one of those vandalisms with the other offender standing nearby. The vandalism was committed to facilitate the group offending.
12. As to the single offence of burglary, at nearly midnight on 24 April 2020, the group stole cigarettes from a Tesco Express in Northampton, but unbeknownst to them Tesco had fitted those cigarettes with a tracking device which showed that after the burglary the group drove at speeds of up to 111 miles per hour to a remote location in Malton where they put the cigarettes into a van which was parked there - doubtless intending to return to them once it was felt safe to do so.
13. On 25 April the police followed the tracker to the scene and located and seized the van which still contained the cigarettes in the builder's sack which had been used to carry

them away. The van and its contents were recovered to the premises of CMG (a civilian police contractor) to be stored. The premises had a secure outer fence and a secure warehouse in the interior in which police exhibits were stored. The group was sufficiently resourceful to be able to identify CMG's premises within less than 24 hours of the seizure. They mounted a determined effort to break into the compound, beginning just after midnight on 26 April. CCTV showed men attempting to force the outer fence at 12.05 am. They hid when a member of CMG staff walked nearby before resuming their efforts minutes later. Having forced the fence they tried but were unable to break into the warehouse, so they left and returned about an hour later with more suitable tools. They finally forced entry and confronted a member of staff inside. They were brandishing crowbars at him, telling him: "There's three of us here so don't try anything" and "We just want our shit from the van". He complied and no violence was actually used. With the employee under guard the offenders forced entry to the van, recovered the cigarettes which were still in the builder's sack and made off with them in their getaway VW Golf. Before leaving they took the opportunity to spray cleaning fluid around the inside of the van in order to destroy any scientific evidence which might have been recovered.

14. Between 30 April and 1 May the group resumed targeting retail premises pursuant to the series 3 conspiracy carrying out reconnaissance of four stores and the burglary of one on 1 May which led to their red-handed arrest minutes later in the planned operation.
15. Where interviews took place no admissions were made by the offenders. When interviewed in relation to the series 3 conspiracy each offender answered "no comment". The offenders were later charged with a series 1 and 2 conspiracies once the series 3 proceedings were already underway. The first offender on his arrest on 6 February had

admitted handling stolen goods in respect of the stolen vehicle, which ultimately proved to be one of the series 1 conspiracy getaway cars, but he denied any wider involvement in the series 1 conspiracy at that stage.

The Offenders' Antecedents

16. The first offender, Terrence Brown, had 15 previous convictions for 25 offences including thefts from shops and dwelling and non-dwelling burglaries. He received a sentence of 2 years' detention in 2013 for a dwelling-house burglary.
17. The second offender, Matthew Brown, had six previous convictions for 15 offences including dwelling and non-dwelling burglaries and attempts to steal. In March 2010 he was sentenced to 3 years' detention, and in October 2013 to 3 years' imprisonment for such offences. There were similarities with the present offences in that the 2010 matters included stealing cigarettes from convenience stores at night and the 2013 matters included stealing registration plates to use on a stolen vehicle as a getaway car for commercial burglaries including one burglary where a filling station was targeted and cigarettes were loaded into a builder's sack.
18. The third offender, Otis Barrett, had a more serious criminal record, with 11 convictions for 25 offences including burglary and theft from non-dwellings, conspiracy to commit burglary with intent to steal from dwellings and non-dwellings and burglary and theft from non-dwellings. He was on licence at the time of the index offending. The 2014 matters were almost identical to this offending, using vehicle and stolen number plates to commit high value commercial burglaries targeting cigarettes.

The Sentencing Hearing

19. There were no reports in this case. An impact statement was produced on behalf of Tesco dealing with the consequences of the multiple raids on its stores and numerous other store owners had provided statements to the police summarising the value of items stolen and the damage caused to their premises.
20. At the sentencing hearing the judge was referred by counsel for the prosecution to the Sentencing Council's Definitive Guideline for Burglary Offences. The maximum sentence for the conspiracies to burgle and the burglary was 10 years' imprisonment. It was common ground that the conspiracies to burgle and the burglary should be placed in category 1 of the Guideline given that there was greater harm and higher culpability. Thus, for all four offences the starting point was 2 years' custody with a sentencing range of 1 to 5 years.
21. Prosecution counsel submitted that all of the greater harm and higher culpability factors were present, save that the offenders did not use or threaten violence against any person during the course of committing the series 1, 2 and 3 burglaries and the trauma to the victims was not beyond the norm for offences such as this. All these features required a significant uplift from the starting point.
22. Prosecution counsel further submitted that the single burglary involved threats of violence to a contractor who was on the premises. In his submission, that offence was substantially different from the other burglaries carried out by the offenders not only because of the threat of violence but because the offenders targeted civilian contractors who were holding evidence seized by the police in the course of an ongoing criminal investigation. He submitted that a single burglary called for a consecutive sentence, to which the judge responded: "Well, it is either that or it's treated as a grossly aggravating feature of the entire offending". Prosecution counsel agreed that it would either have to

be one or the other.

23. In mitigation, defence counsel submitted that the items that the offenders had with them when they committed the burglaries were tools rather than weapons.
24. In his sentencing remarks the judge described all of the offences as part of the same prolific pattern of offending. The offending invariably took place at night and from late March onwards during the lockdown imposed by the Government. On occasions the same premises were targeted repeatedly and the group planned and executed the offences in an efficient and sophisticated way. Sometimes reconnaissance took place. Masks or balaclavas and gloves were worn to try to limit the detection by the police. Tools including power tools were used to effect the burglary and they employed different methods to reduce the risk of detection. Remote locations were used, unconnected to the group, where items that had been stolen were stored in case the police were able to track them down. As their offending progressed they had been able to hone their technique by taking steps to delay police intervention and by removing any of their DNA that could have been left at the crime scene. In the judge's view the offenders were "all organised and very discerning professional criminals of a serious calibre".
25. The burglary on 26 April demonstrated just how bold they had become: they broke into civilian staff premises with crowbars and made off with the stolen cigarettes that the police had earlier taken from them. In addition, they had significant previous convictions. The judge accepted that the offenders had not been seeking to confront anyone in the course of burgling retail premises. He concluded that only a sentence of immediate imprisonment was appropriate. The seriousness of the offending meant the case overall "falls well outside category 1 of the Guidelines". In those circumstances the judge decided to take a starting point "very close to" the statutory maximum sentence of

10 years' imprisonment. He reflected on the prosecution submission that the burglary offence called for a consecutive sentence but decided instead to treat it as "a grossly aggravating feature of your overall criminal conduct". The judge also recognised that he should take into account the fact that conditions in prison are harsher now because of the pandemic.

26. In the case of Terrence Brown the starting point for conspiracies, after trial, taking account of all the aggravating and mitigating factors in his case, would have been 9 years. So, affording him full credit for his guilty plea, the sentence was 6 years' imprisonment. On the single count of burglary the sentence was 4 years' imprisonment concurrent. For Matthew Brown the sentences were the same, 2 months' imprisonment concurrent for the criminal damage offence. For Otis Barrett, taking account of his previous convictions and the fact that he was on licence at the time of these offences, the starting point for the conspiracies would be 9 years and 6 months' imprisonment; with full credit for his guilty pleas that sentence came down to one of 6 years and 4 months with the concurrent sentence of 4 years' imprisonment for the burglary offence.

Submissions for the Attorney General

27. On behalf of the Attorney General, Mr Jarvis submitted that these sentences were unduly lenient. He submitted that the sentencing in conspiracy cases is not straightforward because the more offences that have been committed in furtherance of the agreement, the less helpful the relevant Definitive Guideline, which is based on the commission of a single substantial offence. In the context of conspiracies to commit burglary the Court of Appeal has held that the Sentencing Council's Definitive Guideline for Burglary Offences "whilst not binding in any sense upon the judge sentencing a conspiracy, may

well provide a valuable and important touchstone" - R v Copeland [2015] EWCA Crim 2250; [2016] 1 Cr App R(S) 56. Mr Jarvis submitted that where a defendant has been convicted of a number of similar offences the court will have to consider what a just and proportionate overall sentence should be and then decide how to structure the individual sentences to reach that figure. This is the approach advocated by the Definitive Guideline on Totality. There was nothing in that Guideline that would prevent a court from imposing a consecutive sentence for multiple conspiracies, even if that would result in an overall sentence in excess of the statutory maximum for a single offence, although Mr Jarvis accepted that historically the view was taken that such a course would not be in accordance with principle, as can be seen from the discussion at page 59 of Thomas' Principles of Sentencing (Second Edition). He accepted that the judge had been entitled to treat the conspiracies as part of a series and pass concurrent sentences. The judge had come to the conclusion that all the features of that offending meant that the sentence had to be close to the statutory maximum of 10 years' imprisonment.

28. Mr Jarvis accepted that his conclusion that the sentences, after trial, on those counts would either be 9 years or 9 years 6 months' imprisonment was not unreasonable. The credit for guilty pleas was appropriate so that the sentences on those counts were not unduly lenient. However, he submitted that the judge had erred in his sentencing on the single count of burglary. The sentence passed was equivalent to 6 years after trial, so it was obviously a very serious offence of its kind. He submitted that the judge should not have passed a concurrent sentence for that offence. It constituted a different species of criminality from the conspiracies to burgle involving targeting of evidence gathered by the police and threats to a civilian worker that he would be harmed unless he let them take the cigarettes that they had come for.

29. In his oral submissions to us this morning he amplified the point that that burglary had an element of public interest because it involved interference with the investigation of crime. He submitted that the seriousness of that offence could not simply be subsumed within the sentence of the conspiracies. Given that the judge proposed to take a starting point for the conspiracy close to the statutory maximum, without taking into account this individual burglary, it is difficult to see how he could have been faithful to his own intentions to grossly aggravate the seriousness of the conspiracies by reference to single burglary, when there was little scope for him to increase those sentences from the starting point given how close it was to the statutory maximum for the offence. Mr Jarvis submitted that the sentence for the burglary should have been consecutive which would have resulted in overall sentences taking account of guilty pleas of 10 or ten-and-a-half years' imprisonment. He accepted in his oral submissions that if a consecutive sentence were passed there would need to be some reduction in the sentence for the burglary, to reflect the issue of totality although that reduction, he submitted, would only need to be a modest one.

Submissions on behalf of the Offenders

30. On behalf of Otis Barrett, Mr Webb, in his submissions to us this morning, submitted that the judge did not err in his approach to sentencing. The overall sentence, after trial, of 9 to 10 years' imprisonment was a significant sentence. The prosecution had agreed that it was open to the judge to either pass a consecutive sentence for the burglary or to pass a concurrent sentence on the basis it was a grossly aggravating feature. The judge had given careful consideration to the appropriate starting point and the sentence at which he had arrived was a significant one which had adequately addressed the criminality overall.

31. Similar submissions were made both orally and in writing by Mr Nicholls, on behalf of Matthew Brown, who again referred to the fact that, as prosecution counsel had accepted, the judge had had a choice as to whether to pass a consecutive sentence for the burglary or a concurrent one, treating it as a grossly aggravating feature of the overall offending. He had taken that course and he had indicated that the grossly aggravating feature of the 26 April burglary had been factored into his overall starting point after trial of 9 or nine-and-a-half years. He submitted there was no error on the part of the judge and he had taken proper account of that grossly aggravating feature in sentencing the second offender.
32. In oral submissions to us this morning Mr Muir, on behalf of Terrence Brown, said that the judge's structure of the sentencing was an entirely proper one and it was never suggested to him at the sentencing hearing that passing a concurrent sentence would not give him sufficient statutory powers. Mr Muir also submitted, somewhat optimistically in our view, that his client was still at a relatively young age and this was a proper and fair sentence to reflect that age. The reality is that although he is a relatively young man, as we have indicated and as the judge accepted, he has a serious criminal record. Mr Muir submitted overall that the sentence which had been arrived at had taken account of all relevant aggravating and mitigating features and could not be described as unduly lenient.

Discussion

33. In our judgment, Mr Jarvis is right that the 26 April burglary merited a consecutive sentence given that it did involve a different species of criminality from the conspiracies to burgle: the offenders effectively interfered with the gathering of evidence by the police

during the course of an investigation, both in stealing back the cigarettes and in endeavouring to destroy any forensic evidence which would implicate them. They also threatened a civilian worker with violence unless he allowed them to engage in that conduct. In any event if, as the judge concluded, the 26 April burglary merited a sentence of 6 years after trial and if, as he said, he was treating the 26 April burglary as a grossly aggravating feature of the overall offending, the sentences, after trial, for that overall offending, of 9 or nine-and-a-half years were unduly lenient.

34. We consider that the overall offending was sufficiently serious to merit sentences which, even after full credit for the guilty plea, are close to the statutory maximum for a single offence of non-domestic burglary. We consider that the sentences passed in respect of the conspiracy counts should stand, namely 6 years' imprisonment in the case of the first two offenders and 6 years 4 months' imprisonment in the case of Barrett (the third offender). The sentences of 4 years' imprisonment imposed for the 26 April burglary should be consecutive to those sentences rather than concurrent, although we will reduce the sentences from 4 years to 3 years to take account of totality. Accordingly, for each offender, we quash the sentence of 4 years' imprisonment concurrent for the 26 April burglary and substitute a sentence of 3 years' imprisonment to run consecutively to the sentences on the conspiracy counts. It follows that the total sentence for the first two offenders, Terrence and Matthew Brown, is now 9 years' imprisonment and for the third offender, Otis Barrett, 9 years 4 months' imprisonment. To that extent this Reference succeeds.

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

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