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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 1749



No. 2023-03665-A1

Royal Courts of Justice

Friday, 8 December 2023

Before:

LADY JUSTICE WHIPPLE
MRS JUSTICE MCGOWAN
HER HONOUR JUDGE MORELAND

REX

V

EKEDI TSEPHO MSUYA

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MR S HAYDEN appeared on behalf of the Crown

MR J LEFROY (Solicitor Advocate) appeared on behalf of the Defendant.

J U D G M E N T

LADY JUSTICE WHIPPLE:

- 1 On 5 October 2023 the applicant appeared for sentence before Her Honour Judge Brandon at the Liverpool Crown Court and was sentenced to 24 months' imprisonment on one count of attempted robbery with a 4 month term of imprisonment for having an offensive weapon, to be served concurrently. A 10 year restraining order was made. The applicant seeks leave to appeal against that sentence on the basis that the term of imprisonment should be suspended. He also applies to admit fresh evidence to support his application for leave to appeal. The Registrar has referred this application for leave to the full court.

The facts

- 2 On 17 May 2022 at 4.30 in the afternoon Mr Kugathas Vairamuthu was working behind the till of the Queens Store on Breck Road, Liverpool. The applicant entered the store and began shopping. He approached the till and placed items from his basket on the counter as though he intended to pay. He asked for a cigarette lighter which was placed on the counter. He took the lighter, together with a bottle of de-icer that he had selected in the shop and pointed it, threatening Mr Vairamuthu and demanding "give me the till". When the shop assistant refused to comply, the applicant lit the lighter and sprayed the de-icer, causing a large flame which was directed towards Mr Vairamuthu, narrowly missing him. Mr Vairamuthu shouted for help. A colleague, Mr Lucas, appeared from the rear of the shop and wrestled the applicant to the floor and out of the shop. The panic alarm was pressed and the police attended. The applicant fled before the police arrived, leaving his footwear which had been displaced during the scuffle. The footwear was forensically examined, together with the de-icer can, and DNA and a palm print matched to the applicant, resulting in his arrest.

- 3 The applicant was interviewed by police on 21 October 2022. Other than to confirm that he was accused of attempted robbery, he exercised his right to silence and made no comment to all the questions asked of him.

The basis of plea

- 4 The applicant pleaded guilty on a written basis at a case resolution hearing on 30 July 2023. The basis of plea was outside the knowledge of the prosecution, but accepted. The applicant asserted in that basis of plea that he had attempted the robbery under pressure to repay a creditor, that he had been attacked on the evening of 17 May 2022 after this attempted robbery took place and that he had sustained serious injuries during that attack which had left him hospitalised until 1 June 2022

Sentence

- 5 The judge had a number of documents before her.
 - a. First, the applicant's antecedents. He was aged 38 at conviction and 39 at sentence, born on 31 August 1984. He had two convictions spanning the years from 2015 to 2018 but they were not relevant. If sent to prison, this would be his first custodial sentence.
 - b. Second, the pre-sentence report dated 26 September 2023. This recorded the applicant's remorse for his actions. He said he had been desperate at the time to find the money. He said that the money was owed for drugs. The applicant was taking Class A drugs at the time. He also recounted the details of the attack later that night when he was, he said, struck with hammers and run over by a car. He could not get up from where he was left on the road because of broken bones in his ankle. At the time of the pre-sentence report, he was some way off full recovery. He needed

further surgery. He required crutches to walk and was unsteady on his feet. He also had iron deficiency and an under-active thyroid. He had symptoms of depression, anxiety and PTSD, although he had not at that time received medical treatment for his mental health problems.

- c. Third, the judge had a letter from Dr R K Singh, the applicant's general practitioner. That was dated 4 October 2023 and it noted the fractures to the applicant's right leg. That letter recorded that the applicant had had surgery to fix a lower tibia fracture and had now been referred to Mr Milner at Derby "as this is a very complex situation" given that reconstruction options and procedures were being considered. Dr Singh concluded that it would be hard for the applicant in prison with his injuries and he would not be able to walk; he should have a consultation to consider his physical condition.

- 6 There was no victim impact statement, but she had a statement from Mr Vaimaruthu when he spoke to the police immediately afterwards and said he was really scared and upset.
- 7 In passing sentence, the judge signalled that she would allow 20 per cent credit for the guilty plea about which no issue now arises.
- 8 The judge considered the robbery guideline. Culpability fell between categories B and C because the applicant had produced a highly dangerous weapon, although the judge accepted that there had been an element of intimidation as asserted in the basis of plea. The harm was category 2. A category B2 offence would have had a start point of 4 years' imprisonment and a range of 3-6 years. A C2 offence would have had a start point of 2 years' imprisonment and a range of 1-4 years. The judge considered the possession of an offensive weapon and the guideline that accompanies that offence. That offence fell in category A2 with a start point of 6 months' imprisonment. She said totality was relevant

and concluded that the sentences should be concurrent because part and parcel of the same course of conduct.

- 9 The judge took 3 and a half years' imprisonment as her starting point before considering other factors. There were factors which increased the seriousness of the offences: high value goods were being targeted, the contents of the till and the fact that the applicant was under the influence of Class A drugs. His previous convictions were not relevant. In mitigation, the judge noted that the applicant had not got any relevant previous convictions. There were personal references that attested to the applicant's character and the judge was satisfied that there was little planning involved in this offence. She noted that this was only an attempt, that the applicant was genuinely remorseful and had taken steps to address his drug habit and move out of the area. The judge noted Dr Singh's evidence that further medical treatment was required and said that "there is no doubt that a custodial sentence for you would be particularly difficult because of your physical health".
- 10 The judge considered the imposition guideline. She said the offence crossed the custody threshold "by some way". A determinate sentence was appropriate because the applicant was not to be assessed as dangerous. She concluded that:

"There is no reason to believe you would not comply with the court order if you received one, but this is a case where you accept that you had other options but you chose to walk into a shop and threaten the person working there with a highly dangerous weapon, effectively a home-made flame thrower in the course of an attempted robbery, and that being so, appropriate punishment, in this court's judgment, notwithstanding your mitigation, can only be achieved by an immediate custodial sentence. It will be the shortest commensurate with the seriousness of these offences."

- 11 That was to balance the factors set out in the imposition guidelines and to conclude that the only appropriate punishment in the context of this offending was immediate custody. The judge said that the sentence after a trial would have been one of 30 months. Following

credit for plea, she imposed a term of immediate custody of 24 months with a concurrent sentence of 4 months for the offensive weapon.

Grounds of Appeal

12 By grounds of appeal drafted by Mr Lefroy, who represented the applicant at his sentence hearing and before us, it is submitted that the sentence imposed was manifestly excessive and that the custodial period should have been suspended for the following reasons. First, there was a reasonable prospect of rehabilitation. Secondly, there was strong personal mitigation relating to the applicant's medical position and further. Third, fresh evidence has been obtained in relation to the impact on prognosis of his continued imprisonment. Mr Lefroy argued, in his grounds of appeal and before us, that the judge's decision not to suspend the sentence was in part due to the deficiencies in the medical evidence available at the sentencing hearing and that an updated report from Mr Milner (the subject of the application to adduce fresh evidence which we shall shortly address) provides a cogent basis for suspension of the applicant's sentence. Mr Lefroy has supplemented those grounds by oral argument and we are grateful to him.

13 Ms Hayden has appeared by the Crown. She resists this appeal. She seeks to uphold the sentence originally imposed as disclosing no error of principle and not being in any sense manifestly excessive. Further, she draws our attention to the further information from the prison as well to explain the steps that will be taken to obtain medical treatment for the applicant while he is in prison.

Application to adduce fresh evidence

14 The applicant wishes to rely on the letter of Mr Milner dated 12 October 2023, by way of an updating report. That letter was not before the sentencing judge. It has been obtained since.

Mr Milner is the applicant's treating orthopaedic surgeon. Mr Milner says this:

“You are probably aware of his background of a severe fracture of his right distal tibia which was originally fixed at Aintree University Hospital in Liverpool. He then moved to the Derby area and presented in my clinic with an infection associated with the fixation requiring further treatment. His options at that stage were either to have an amputation which he declined or to have a staged limb reconstruction procedure. This involves at least two operations. ... This first stage of surgery was completed on 12 July 2023 following which he had a six week course of antibiotics. He now appears to be infection-free.”

15 Mr Milner suggested that he had planned to perform the second stage surgery on 18 October 2023 but by that stage the applicant had been moved to prison in Liverpool and was unable to attend that appointment. It was in anticipation of this that Mr Milner had sent a letter to the prison medical service and to colleagues who had originally treated the applicant at Aintree University Hospital. Mr Milner went on to say that there was no possibility of suspending the applicant's treatment for two years until he was out of prison because the external fixator was merely a temporising device which did not have sufficient lifespan to hold the leg in place for that period of time. He explained what would happen over the course of months if the second surgery was not proceeded with, noting that “if this is allowed to occur, he may have no option but to have his leg amputated”. Understandably, the applicant was keen to avoid that if at all possible. Mr Milner's suggestion was that the procedure should take place within the next one to two months. He concluded with this, a passage which has been emphasised by Mr Lefroy:

“I would further add that managing complex limb reconstruction in cases like Mr Msuya's is arduous for all concerned at the best of time, and adding into this the uncertainties of attendance at outpatient clinics, sometimes for short notice or unscheduled visits in case of problems, adds an extra layer of difficulty that could impact clinical results adversely. My experience of treating prisoners is often that

for reasons beyond my control they are not always brought to their outpatient appointments when they should be.”

16 By way of response, HMP Risley, where the applicant was transferred on 6 November 2023, has provided a letter authored by Dr Mohammed Hussain, a GP at that prison, dated 16 November 2023. It follows a consultation with the applicant on 14 November 2023. Dr Hussain notes that the applicant has a fracture of his right foot and ankle and that he was walking with an external fixator, which is helping to heal the fracture. He notes the past history of infection in the bone which has been treated. He notes parts of the history and goes on to say this:

“We referred him promptly to Fazakerley Hospital Liverpool where he was originally seen in the beginning. We sent his notes available to us with referral and letter from specialist from Royal Derby. We have requested urgent input from the specialist. We have also prescribed him appropriate pain relief.

We are now awaiting an appointment from hospital.

As healthcare, we shall aim to send him to all appointments to outpatient clinics for surgery as needed and suggested by the hospital. We shall do our best to provide him with rehabilitation and post-operative care as would be suggested by the hospital.”

17 We accede to the application and admit both of these pieces of medical evidence. Neither was available before sentencing. Both are relevant and important to the disposal of this application for leave to appeal. The application is, in essence, founded on Mr Milner’s updated report.

Respondent’s notice

18 We note the terms of the respondent’s notice which opposes leave being granted. The Crown rely on *R v Myers* [2022] EWCA Crim. 1797 at [14] in particular. The Crown say that HMP Risley are already actively managing the applicant’s care.

Discussion

- 19 We detect no arguable error of principle in the judge's sentence. All relevant matters were taken into account. The sentence arrived at was, if anything, merciful for offending of this nature. Account was taken of the applicant's mitigation including his significant medical problems, bringing the sentence down to a term of 30 months before credit for plea.
- 20 The judge considered the imposition guideline and concluded that this sentence could not be suspended. She was entitled so to conclude. Indeed, we agree with that assessment having read into this case ourselves and watched the CCTV of this attack. This was terrifying and dangerous conduct.
- 21 The central issue in this case is whether, in light of the fresh evidence about the applicant's medical condition and treatment, the court is persuaded that this sentence should now be suspended notwithstanding the view that the judge took.
- 22 We consider first the nature and extent of the fresh information. Certainly Mr Milner's letter assists us in understanding the true extent of the applicant's leg injury. The injury is very severe and the applicant needs treatment as soon as possible. Mr Milner says that treatment, in the form of the second operation, must happen within the next month or two. After that, he will need a lengthy period of rehabilitation to give that surgery the best prospect of success. We note that without treatment there is a risk that the applicant will lose the lower limb by amputation.
- 23 However, in our judgment there are two points that must be made in answer. First, although the judge may not have had the full detail that this Court has been given, the judge did know about the applicant's leg injury and the complexity of the treatment required for it. She

knew that the applicant's imprisonment might make treatment more difficult. That much was made plain in Dr Singh's letter and was taken into account by the judge.

24 Secondly, the letter from Dr Hussain indicates that the prison authorities have the applicant's medical needs well in view. A referral has been made to the appropriate NHS hospital specialist. It is a matter of regret to us that we have not received any proper update on the progress of the applicant's medical treatment, given that this appeal hearing is some weeks after Dr Hussain's letter in which the Court was told that the applicant was awaiting an appointment at Fazakerley Hospital. Unfortunately Ms Hayden was not in a position to help us with any update on when the applicant (who has still not been seen at Fazakerley, we were told) might expect an appointment and whether Dr Hussain's referral had been chased up.

25 The prison has an obligation to provide adequate medical treatment for all prisoners. If suitable treatment were not provided, this applicant might have a right of request, complaint or even public law challenge to correct that failure. We do not invite such a course, but it is instructive to think about how such failures could be addressed within the legal system. In this case, we are not able to accept that the need for medical treatment should be a reason to reduce or suspend sentence.

26 There are exceptional cases where that course might be appropriate, as was acknowledged in the case of *R v S & R v M*, [2018] EWCA Crim 318, [2018] 1 WLR 5344 – a case which considered prisoners with deteriorating medical conditions and terminal diagnoses. In our judgment, the fresh evidence does not make this an exceptional case. The evidence confirms the applicant's need for treatment, and the relative urgency of that need. But on the evidence before us from the prison, it appears that situation is understood and the applicant has been referred. He is now in the hands of the NHS.

Conclusion

27 Our assessment is, as was the judge's, that this offending could only be punished appropriately by a term of immediate imprisonment, and we are not persuaded that we should grant leave. We dismiss this application.

Surcharge Correction

28 The Criminal Appeal Office has drawn our attention to the fact that the surcharge in this case was specified in the wrong amount. For offences committed on 17 May 2022, as these were, the amount should have been £156. We therefore direct the court to correct the error by amending the amount of the statutory surcharge to £156 in place of the £190 which was imposed at the time of sentence.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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