IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 973

CASE NO 202202402/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 13 July 2023

Before:

LADY JUSTICE WHIPPLE DBE
MRS JUSTICE CUTTS DBE
THE RECORDER OF SHEFFIELD
HIS HONOUR JUDGE JEREMY RICHARDSON KC
(Sitting as a Judge of the CACD)

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR I PEART KC appeared on behalf of the Appellant
MR P EVANS KC appeared on behalf of the Crown

J U D G M E N T

LADY JUSTICE WHIPPLE:

Reporting restrictions

1. There are reporting restrictions in this case pursuant to section 4(2) of the Contempt of Court Act 1981 because there is an outstanding trial listed to be heard later this year of a young person (AF) charged with the same offences as the appellant and his co-accused and arising out of the same events. AF was not fit to be tried at the trial of this appellant and his other co-accused which took place from October 2021 to February 2022. We therefore direct that the appellant's name is to be anonymised to AC. We will anonymise his name and the names of the co-accused in this judgment. That order will doubtless be reviewed once AF's trial has concluded.
2. There was at the time of trial an order made in these proceedings under section 45 of the Youth Justice and Criminal Evidence Act 1999 on account of the appellant's age but the appellant is now 18 years old, although not all of his co-defendants have reached that age. In his case, therefore, that order has lapsed.
3. Further, there was an order at trial under section 45A of the same Act restricting reporting of details which might identify any witness under the age of 18 and that protection endures for that person's lifetime.

Background

4. On 22 October 2021 the appellant, who was then aged 16, pleaded guilty to count 1 on the indictment which was a charge of conspiracy to steal. On 15 March 2022 the appellant, still 16, was convicted of count 2 which was a charge of conspiracy to rob. He was acquitted of the remaining three counts on the indictment: that was count 3, having an article with a blade or point; count 4, murder; and count 5, manslaughter.
5. On 8 July 2022 Her Honour Judge Rafferty KC sitting at the Central Criminal Court

sentenced the appellant to five years' detention on count 2, with a concurrent sentence of four months' detention on count 1. He was 17 years old when sentenced.

The co-accused

6. DA was aged 17 at the time of this offending. He was 18 at trial and sentence. He pleaded guilty to conspiracies to steal and to rob. At trial he was acquitted of murder but convicted of manslaughter. DA was sentenced to 10 years' detention in a young offender institution on the charge of manslaughter with concurrent sentences of six years each for the conspiracies to steal and to rob. The single judge refused leave to appeal his sentence. He later abandoned a renewed application.
7. RR was aged 17 at the time of the offending. He was 18 at trial and sentence. He pleaded guilty to both conspiracies and to possession of a bladed article. Like DA he was acquitted a murder at trial but convicted of manslaughter. RR also pleaded guilty to an additional and separate offence of assault occasioning actual bodily harm committed on a different occasion. He was sentenced to a total of 11 years' detention in a young offender institution with concurrent sentences of six years each for the conspiracies to steal and to rob. The single judge refused leave to appeal his sentence. He later abandoned a renewed application.
8. KD was aged 15 at the time of the offending and 17 at sentence. He was convicted by the jury of conspiracy to rob but acquitted of manslaughter. He was sentenced to four years' detention in a young offender institution and on the same occasion to a further term of one year consecutive for an unrelated robbery offence.
9. ZA entered late guilty pleas to counts 1 and 3 and was convicted on count 2 (conspiracy to rob). He was acquitted of manslaughter. He was sentenced to five years' detention on count 2, with concurrent sentences of six months on counts 1 and 3. On 30 March 2023

the full court allowed an appeal against sentence and quashed the sentence on count 2, replacing it with a sentence of three years' detention. No separate penalty was imposed in respect of counts 1 and 3. That judgment is reported as R v ZA [2023] EWCA Crim 596. In that judgment the appellant in this appeal is referred to as AC.

The facts

10. The facts are set out in the judgment of May J in ZA's case at paragraphs 8 to 26 which we gratefully incorporate without repetition into this judgment. We summarise only the key facts involving this appellant.

11. The appellant was charged with conspiracy but was involved on one day only, that is 17 February 2021. On that day the appellant travelled with AF, RR and ZA on the underground from Tottenham Hale to Golder's Green to collect DA from his home. While travelling on the Northern Line two off duty police officers saw a knife being passed from RR to ZA and were sufficiently concerned to take photographs of the exchange.

12. The group went to a KFC restaurant before meeting up with DA at 16.20 outside his address. At 17.00 the five were seen loitering outside the tube station. The appellant and ZA, both wearing white gloves, forced their way through the ticket barriers. AF stayed outside the station whilst RR and DA remained in the immediate vicinity. The appellant and ZA walked along the tube platform. The appellant entered a carriage and snatched an iPhone 11 from a member of the public. The appellant and ZA then ran out of the station. They handed the mobile phone to AF, after which the three rejoined RR and DA.

13. AF used the stolen iPhone to book a cab. The first car that arrived was too small and so a second booking was made. The driver of the second car arrived and spoke with AF but did not pick up the group. At 17.22 another cab was ordered using the Bolt application

on the stolen iPhone. The cab was booked to collect them from 18C Alderton Crescent and take them to 9 Erskine Crescent in Tottenham. They were collected in a taxi van and arrived at 18.00. RR used the stolen iPhone to order clothing from JD Sports while in the taxi. The group met up with KD again at 18.39.

14. The stolen mobile telephone was used to book another minicab through the Bolt application. The pick up address was 22 Runcorn Close, located close to Erskine Crescent. At 18.43 the driver, Gabriel Bringye arrived in his black Mercedes. AF went over to Mr Bringye and directed him towards Ferry Lane Primary School on the pretence that he had to collect his scooter. Mr Bringye pulled up alongside the school and opened his boot. Two people were seen to walk behind the boot and move around. Mr Bringye turned off the car's engine and got out of the vehicle. The group attempted to rob Mr Bringye of his car. CCTV footage showed that AF stabbed Mr Bringye before the group fled. At 18.53 Mr Bringye managed to get back inside his car and call 999. By this point he was seriously injured and was unable to communicate. Ian White, a site manager for the primary school, saw Mr Bringye in his vehicle. There was blood and vomit on the ground nearby. Mr White called the emergency services at 19.21. Paramedics attended the scene. Despite medical intervention Mr Bringye was declared dead at 20.00. A post mortem examination established that he had been stabbed in the right thigh, severing his femoral artery. There were also defensive injuries to both of his hands. Mr Bringye was aged 37 when he died.

Sentence

15. At a hearing on 8 July 2022 at the Central Criminal Court, Her Honour Judge Rafferty KC sentenced the appellant, ZA and KD. These three defendants were 15 at the time of the offending. They were 17 by the time they were sentenced. All of them had been

acquitted of manslaughter.

16. She described in her sentencing remarks:

> "... a series of offences planned to target and terrify innocent members of the public, all took place during the pandemic, all involved group attacks on the victims going about their daily lives. The purpose of these offences was purely financial gain."

17. She noted the horror of Mr Bringye's death and the deep loss that was felt by his family.

18. In determining sentence on count 2, the conspiracy to rob, she rejected defence submissions that these defendants had not known about the knife and she concluded in relation to all three that they were well aware that knives were to be used in this offence and would be used to threaten the taxi driver. She concluded that the harm caused by this offence fell at the top end of the relevant bracket of the robbery guideline because death had ensued and given the existence of other aggravating features: the value of the car that was targeted (which was a Mercedes and it was high value), the use of pre-stolen mobile phones to call the cabs to avoid detection, the fact that the offences were committed late at night in a quiet dark place and decoys were used, that the evidence was disposed of and that none of those involved made any attempt to summon assistance for Mr Bringye. She said that culpability was also in the top category. That gave a start point of eight years and a range for an adult of seven to 12 years. Her notional sentence after trial was 12 years for an adult. She reduced that sentence by one-third to reflect youth to arrive at eight years as a starting point in this sentencing exercise. She then imposed a sentence of five years' detention on each of the appellant and ZA. In the appellant's case she took account of the fact that he was immature and that he had a single caution from 2020. She took account of the pre-sentence report and the report from the doctor which indicated the

appellant had a low IQ, a moderate learning disability and was suggestible. She concluded he was not dangerous and she bore totality in mind.

19. In this appellant's case she imposed a concurrent sentence of four months on count 1, which included one-third credit for the appellant's early guilty plea to that count.

20. She did not say why she had concluded that a custodial sentence was appropriate or why a Youth Rehabilitation Order with an intensive supervision and surveillance requirement could not be justified.

Appeal

21. On 4 July 2023 the full court, Whipple LJ, Cutts J and His Honour Judge Paul Sloan, the Recorder of Newcastle, granted leave to the appellant to appeal against sentence together with an extension of time and a representation order for Mr Peart KC. The hearing was expedited to today, 13 July 2023 and the Crown was directed to be present at today's hearing.

22. By amended and substituted grounds of appeal, Mr Peart, who represented the appellant at trial and at all stages in this court, submitted that the sentence imposed on the appellant was manifestly excessive, advancing six grounds of appeal, all of which really converged on that central submission. He drew a distinction between the roles played by DA and RR, both of whom were convicted of manslaughter, and possibly AF, who is awaiting trial, contrasting their involvement with the lesser role of the "younger trio" of this appellant, ZA and KD all of whom were 15 at the time of these events and none of whom had anything to do with the death of Mr Bringye.

23. His main ground of appeal, succinctly put at paragraph 19 of his grounds, was as follows:

> "In the light of the Court of Appeal's ruling in the successful renewed sentencing hearing of ZA, it has become apparent that all

> parties in this case, including the single judge, made a fundamental error in approaching the sentence of the younger trio by confining their attention to the adult robbery sentencing guideline in conjunction with the sentencing children and young people guideline."

24. Mr Peart relies on the reasoning in ZA to support this appeal, noting that the appellant and ZA are in similar positions. If anything, he says that this appellant's position is stronger on appeal because the appellant was acquitted of count 3, the possession of a bladed article, whereas ZA was convicted of that count. Further, the appellant was born in May 2005 and is a month younger than ZA. He accepts that the appellant does have a caution on his record whereas ZA had no previous antecedents, but that is only a slight factor. He submits that the sentence imposed was manifestly excessive and seeks a lesser sentence around the length of that imposed on ZA following his appeal.
25. The Crown was present at this appeal at the Court's direction and was represented by Mr Evans KC who appeared for the Crown at trial. He sought to uphold the sentence that had been passed by the judge, maintaining that it was neither wrong in principle nor manifestly excessive.
26. We are grateful to both counsel and to their respective legal teams for all the assistance they have given us.

Discussion

27. We note the careful analysis of May J at paragraphs 49 to 68 of ZA. We respectfully agree with all that is said in those paragraphs, on the issue of the approach which must be taken to sentencing young offenders. At paragraphs 69 to 81, May J addressed the sentencing exercise undertaken by Her Honour Judge Rafferty in ZA's case and found fault with it. The two specific criticisms that she made of Judge Rafferty's approach were that, first, the judge had wrongly allowed the tragic death of Mr Bringye to affect her

consideration of the seriousness of the offences committed by the younger trio who had been acquitted for manslaughter; and secondly, that the judge had failed to refer to the Youth Robbery Guideline at all: see paragraphs 40, 42 and 53 of the judgment. The court held that these errors had resulted in a sentence that was wrong in principle and manifestly excessive.

28. We accept Mr Peart's submission that similar criticisms can be made in relation to the sentencing exercise undertaken by the judge in this appellant's case. She appeared to regard the appellant as having been involved in the death of Mr Bringye without giving proper consideration to his acquittal for the charge of manslaughter. She was not referred to the Youth Robbery Guideline and did not go through the steps advocated in that guideline. She did not indicate what factors she had regard to in relation to this appellant in determining the seriousness of the offending in his case.

29. We conclude that the sentence imposed cannot stand because it was wrong in principle and it was manifestly excessive. We reject Mr Evans' efforts this morning to uphold the sentence. We consider that to be untenable in light of the judgment in ZA.

30. We therefore turn to the materials before the Court to determine the appropriate sentence in this case. We have firmly in mind the prevention of offending and the welfare of the child as the key guiding principles when sentencing young persons, as this appellant was at the point of offending and sentence: section 58 of the Sentencing Code and paragraph 1.1 of the Youth Guideline. We bear in mind the guidance given in the Youth Guideline which is summarised at paragraphs 56 to 61 of ZA.

31. We have had regard to the reports on the appellant which were available to the sentencing judge. Dr Ellena Cooke, forensic psychologist, reported on 13 August 2021. She concluded that:

> "The appellant's cognitive functioning places him in the bottom 0.1 per cent of the population and is within clinical ranges associated with a moderate learning disability. Furthermore, I concluded that [the appellant] is suggestible to influence from others which is exacerbated by his low levels of cognitive functioning, specifically his language and verbal abilities. He experiences significant challenges in understanding and responding to information presented verbally and is likely to struggle to express himself verbally in both formal and informal settings."

32. In her view he was functioning at a similar level to a seven-year-old child. He was vulnerable and suggestible. He was unlikely to be able to assess a situation as risky due to his impaired problem-solving abilities, both verbally and non-verbally. She recommended an intermediary for the trial.
33. We have before us an intermediary report with substantiates concerns about the appellant's ability to follow the trial.
34. We have also had regard to the pre-sentence report which was prepared by Kate Littler of Haringey Youth Justice Service dated 13 April 2022. In that report it was noted that the appellant had a large and supportive family. On the date in question he had gone to meet his friends and did not know others would be there. He felt pressured into stealing the phone from a member of the public on the tube. He demonstrated a high level of immaturity and lack of understanding at the time of the offence in not removing himself from the scene of the criminal behaviour. Miss Littler concluded that his young age and lack of maturity were relevant and that he likely had felt intimidated at the time of this offending. He was genuinely regretful about what had happened. She assessed him as at medium risk of re-offending but thought that risk could be reduced with appropriate intervention. He posed a medium risk of serious harm to the public in future.
35. She expressed concern about the effect on the appellant of a custodial sentence. She

proposed a youth rehabilitation order (a "YRO") of six to nine months with requirements, including an intensive supervision and surveillance requirement (an "ISS") if the court considered that to be suitable.

36. We turn then to the Youth Robbery Guideline. Step 1 involves considering the seriousness of the offence. This offence involved the threat at least and to the appellant's knowledge of a bladed article. That means that under the guideline a YRO with an ISS may have been justified. We take account of all the other features already identified by the court in ZA which tend to indicate the seriousness of this offence.

37. We move to step 2. There are no statutory aggravating factors. There were some other aggravating factors, however, namely the degree of planning, the failure to seek assistance for Mr Bringye and the high value of the goods targeted. There were mitigating factors as well, namely the effective good character of this appellant. We take the view that the single caution a year earlier does not weigh much in the balance. We take account of the regret expressed by the appellant.

38. The judge rejected the submission that there had been coercion or manipulation and we respect that finding which the judge was entitled to make, even if there was some evidence in the psychiatric evidence and the pre-sentence report that this appellant was suggestible and was likely to have been intimidated.

39. Further, it is important to note that although count 2 was charged as a conspiracy, the appellant was involved only for one day. That is a point that was made in ZA.

40. We move to step 3, personal mitigation. This appellant was only 15 and was immature with a level of functioning around seven years old. He has significant communication and learning difficulties.

41. Step 4 deals with credit for guilty plea which does not bite on the conviction for count 2

but it is relevant to count 1 to which he had pleaded guilty at an early stage.

42. Step 5 requires us to review the sentence at which we have arrived.

43. Standing back, we conclude that this appellant would have been suitable for a YRO with an ISS as had been suggested in the pre-sentence report and as indicated as a possibility for this sort of offending in the Youth Robbery Guideline. We do not consider that this offence was so serious that a custodial sentence was required. A custodial sentence for a young offender is a last resort. If we were sentencing in July 2022, by which time the appellant had already spent 16 months in detention, we would not have considered a further period of custody at that point to be necessary. However, as this matter comes before us the appellant has already served 28 months in custody. We understand that he is due for release on licence at the halfway point of his five-year sentence in just a month or two, around September 2022. Taking that into account and in the circumstances, we consider that the appropriate sentence in his case is now one of three years' detention. The effect of that will be, as we understand it, that the appellant will be released forthwith from custody and will be on licence for the remainder of his sentence which will be a period of approximately eight months. We understand that he will live at home with his family during the licence period. We are pleased that many of his family members are in Court today. He knows already that he must comply with the requirements that are imposed on him by his probation officer and that if he offends while he is on licence he may well be recalled to detention.

44. This is to arrive at a sentence which matches that imposed on the appellant in ZA but that is not by design. That is because we have considered the position for this appellant separately and specifically with a focus on him. However, the outcome of parity with ZA does not surprise us. Although there are some differences between the appellant's case

and ZA's case, in the end those differences balanced themselves out and were not significant. Overall, we consider that the seriousness of offending and the positions in which both ZA and the appellant found themselves were roughly equivalent.

45. There are two further matters to which our attention is drawn by the Criminal Appeals office and which we address. First, we quash the concurrent sentence of detention on count 1 which was not a lawful sentence for technical reasons pointed out by the Criminal Appeal Office. For count 1 we impose no separate penalty. Secondly, we confirm that the victim surcharge of £34 applies.

Conclusion

46. We allow this appeal. We quash the sentence of five years' detention on count 2 with four months' detention on count 1 to be served concurrently. We impose instead a sentence of three years' detention on count 2, with no separate penalty on count 1. We confirm that the victim surcharge of £34 applies.