IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Couts of Justice
The Strand
London WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT CHELMSFORD
(HER HONOUR JUDGE LORAM KC) [42MR2037323]

Case No 2024/02627/A2, 2024/02628/A2
2024/02630/A2 & 2024/02631/A2
[2024] EWCA Crim 1434

Friday 11 October 2024

B e f o r e:

LORD JUSTICE POPPLEWELL

MR JUSTICE MURRAY

THE RECORDER OF LEEDS
(His Honour Judge Kearl KC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E X

- v -

MOHAMMED FATHI
BAILEY RUSCOE
PETER CLEGG
KAI HURST

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

J U D G M E N T
(Approved)

A P P E A R A N C E S:

Mr N Holland appeared on behalf of the Attorney General

Mr J McCrindell appeared on behalf of the Offender Mohammed Fathi

Mr D Setter appeared on behalf of the Offender Bailey Ruscoe

Miss L Bald appeared on behalf of the Offender Peter Clegg

Mr S Cox appeared on behalf of the Offender Kai Hurst

Friday 11 October 2024

LORD JUSTICE POPPLEWELL:

1. Following a trial in the Crown Court at Chelmsford before Her Honour Judge Loram KC and a jury, the offenders, Fathi, Ruscoe, Clegg and Hurst were each convicted of one offence of conspiracy to commit aggravated burglary. Fathi and Hurst were sentenced to nine years' imprisonment. Rusco and Clegg were sentenced to seven and a half years' imprisonment. At the date of sentence, Clegg was just shy of his 21st birthday; it should therefore have been expressed as detention in a young offender institution.

2. The Solicitor General applies, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer to this court each of the sentences as unduly lenient.

The Offence

3. The offenders were all residents of Greater Manchester at the time of the offending. On the evening of 20 July 2023, they drove together from Manchester to Essex in a hired car. Having arrived at Ilford in East London at around 11 pm, they then drove on to Southampton where they arrived at around 3 am. The car was stationary in Southampton for an hour before it travelled to Essex, where it arrived in Queens Road, Loughton shortly after 6 am. The car was seen to drive back and forth on Queens Road in the minutes prior to the offence.

4. The car parked up near to an address in that road where Daniel and Gaynor Hunt and their adult son Nathan lived in the ground floor flat. Clegg (the driver) remained in the vehicle. The other three got out of the car armed with a pepper spray (or pepper sprays) and a knife (or knives).

5. Nathan Hunt was in bed in his bedroom which was situated at the front of the property.

He had just woken up. The bedroom window was open. The offenders opened the bedroom curtains from the outside and one of the offenders put his leg through the window as he attempted to enter the property. In his witness statement, Nathan Hunt described two men attempting to enter his bedroom through the window and a third standing outside the window. He saw that one of the offenders was armed with a long knife. He attempted to fight the offenders off. A can of pepper spray was discharged in his face, which temporarily blinded him.

6. His parents had been alerted by the noise. Daniel Hunt went to his son's room where he saw the three offenders attempting to enter the property. He went to the kitchen, picked up a meat cleaver and went outside to confront the offenders. He did so by waving the meat cleaver in their direction. Unfortunately, he lost his footing which caused him to drop the meat cleaver, and it was picked up by one of the offenders. All three then chased Mr Hunt as he retreated down the narrow alley at the side of his house which led to the door at the back of the property. Fathi and Ruscoe were wearing face coverings. Fathi was brandishing a knife. Hurst was holding the meat cleaver. It was for Daniel Hunt a dead end. When he reached it and was cornered, the three offenders punched and kicked him in the head and side, causing minor injuries. At that stage Daniel Hunt said that he had called the police. One of the three offenders shouted "Let's go". They desisted from their attack, ran back to the car and the car was driven off, leaving the area. They had not in fact pursued any attempt to enter the property either after meeting resistance from Nathan and before his father emerged, or after chasing his father towards the back of the house, down the alley.

7. The offenders drove off in their car towards the Northwest of England where in due course the car was stopped by the police on the M6 motorway.

The Offenders

Mohammed Fathi

8. Fathi was the oldest of the four; he was aged 22 at the time of the offence. He had 14 previous convictions for 31 offences committed mostly as a juvenile, but the last two were committed when he was aged 18 and 19 respectively. The last included an offence of going equipped for theft. None of the offences was for burglary or aggravated burglary. Those involving violence against the person or possession of a weapon were as follows:

(i) A robbery committed when he was aged 16 and a robbery and affray committed when he was aged 17, for all of which he was sentenced to a youth rehabilitation order.

(ii) Another robbery committed when he was aged 16, for which he was also sentenced to a youth rehabilitation order.

(iii) There was a separate series of offences committee again when he was aged 16, comprising an offence of being in possession of an offensive weapon in a public place, two robberies, three attempted robberies and a common assault, for all of which he was sentenced to a youth rehabilitation order with a curfew. That sentence was varied a few months later as a result of its breach, to a six month Detention and Training Order.

9. The longest custodial sentences which Fathi had received for previous offending were that six month Detention and Training Order and a sentence of four months' imprisonment for dangerous driving, committed when he was aged 19.

10. A pre-sentence report identified that Fathi sought to minimise both his involvement and

culpability. He expressed some sorriness for those who were hurt and some remorse over the evening's events. He had come to this country from Iraq, aged 10. He was academically behind his peers and unable to speak English, which significantly compromised his education and left him marginalised and isolated. As a result of parental aggression in the home, he and his siblings had been temporarily removed from the family home and made the subject of Children in Need plans. He was suffering from anxiety and depression. The author of the pre-sentence report said that some of his difficulties "aligned" with his childhood trauma. A maturity screening test gave a score indicating immaturity, which would manifest itself in poor temper control, being influenced by others, the need for stimulation and a lack of consequential thinking skills. The author expressed the view that his immaturity and willingness to be led into crime would have played a major role in his poor thinking, leading to him becoming involved with friends in committing the offence of aggravated burglary. The author considered that he was unlikely to be the influencer in his peer group, despite his offending history. The author assessed him as posing a high risk of serious harm to the public based on the circumstances of the aggravated burglary offence itself, but that risk was likely to be reduced through undertaking programmes and making constructive use of his time. The author did not recommend that an extended sentence was necessary to address the risk of harm.

11. At the sentencing hearing there were submitted on his behalf numerous character references; prison conduct reports which indicted that he was using his time constructively; a letter written by Fathi himself in which he expressed his remorse; and documents evidencing that he suffered from moderate to severe depression and anxiety.

12. A prison report obtained since the sentencing hearing records that he has presented as motivated to engage with risk reduction work in the form of thinking skills and victim awareness, and he has spent his time seeking to gain skills to help him with employment on

release.

Bailey Ruscoe

13. Ruscoe was aged 21 at the time of the offence. He had 12 previous convictions for 26 offences. None was for burglary or aggravated burglary. His only convictions relating to violence against the person, or the possession of a weapon were an offence of using threatening, abusive or insulting words or behaviour with intent to cause fear or provocation of violence, contrary to section 4 of the Public Order Act 1986, committed when he was aged 14, for which he was sentenced to a youth rehabilitation order; and an offence of possessing a bladed article in a public place, also committed when he was aged 14, for which he was sentenced to a referral order.

14. The longest custodial sentence which he had served was one of 12 months' imprisonment for offences of dangerous driving and driving while disqualified, when he was aged 20.

15. There was no pre-sentence report available in relation to Ruscoe.

16. A character reference was uploaded to the digital case system. The following matters of personal mitigation were advanced on his behalf: his father had significant mental health issues and had been an alcoholic; he had therefore lacked a male role model; at a young age he took on the responsibility of being the male in his household; his sister has cerebral palsy and he was responsible for much of her care when his mother was at work, taking her to and from school. His imprisonment would deprive his mother and sister of his assistance and support. His own schooling had been disrupted by what was then undiagnosed ADHD, which had since been diagnosed by adult Mental Health Services with a formal diagnosis of ADHD.

Kai Hurst

17. Hurst was aged 20 at the time of the offence. He had 18 previous convictions for 64 offences. He had no previous convictions for burglary or aggravated burglary of a dwelling; but he had a single previous conviction for burglary of a non-dwelling, which had been committed when he had just turned 15, for which he was sentenced to a youth rehabilitation order.

18. Hurst's previous offending involving violence against the person or possession of a weapon involved a number of offences committed when he was aged variously between 14 and 16, which attracted sentences of a youth rehabilitation order. In addition, there were three offences of possessing an offensive weapon in a public place all committed on a single day when he was aged just over 18, for which he was sentenced to a four month Detention and Training Order; and an offence of assault occasioning actual bodily harm committed when he was aged 18, for which he sentenced to 14 months' custody. His longest previous custodial sentence was 24 months, which was that 14 months for that offence of assault occasioning actual bodily harm and an additional ten month sentence for dangerous driving, committed when he was aged 19. He committed the index offence whilst he was on licence and unlawfully at large in respect of those sentences.

19. A pre-sentence report recorded that Hurst maintained his innocence, despite the jury's verdict. He has a diagnosis of ADHD, Hyperkinetic Conduct Disorder and Tourettes Syndrome. He had been in care as a child and on an Education Health Care Plan due to emotional, behavioural and social difficulties, having been removed from mainstream education aged 12. His lifestyle as a child was unstructured and influenced by spending time with older pro-criminal groups. The author assessed him as posing a significant risk of serious harm. Nevertheless, the author observed that he had taken positive steps whilst on remand, including completing over 20 certificates, and that he presented to the probation

officer with a positive attitude towards changing things. The author's view was that his young age meant that change was possible if he committed to it and that mistakes made in the past would be improved by interventions and by the ongoing maturity which would develop as he grew older. The author said:

> "There are positives when considering Mr Hurst's potential for rehabilitation and his ability to work to lower the risk of serious harm he poses to others. His age will be a consideration, taking account of maturity, and the majority of his offences having occurred prior to turning 18.
>
> Mr Hurst is at an age at which he is still maturing and could benefit from support to promote his maturity, which in turn could contribute to changes in his thinking and attitudes.
>
> Mr Hurst has expressed a willingness to make the best of his time in custody and, although infrequent, there have been periods of positive behaviour in the community that suggest he has the capacity to make positive changes."

The author did not recommend the imposition of an extended sentence.

20. At the sentencing hearing five character references and a number of further documents showing constructive use of his time in prison were provided. The documents also showed a positive attitude to rehabilitation.

Peter Clegg

21. Clegg was the youngest of the four, having just turned 20 at the date of the offence.

22. He had three convictions for eight offences, committed from 2020 to 2022. None of his previous convictions was for violence, burglary or the possession of weapons. The most serious offence in Clegg's antecedent history is an offence of possession of a Class A drug with intent to supply, committed when he was aged 15, for which he was sentenced to a

community order. This was, therefore, his first custodial sentence.

The Sentencing Exercise

23. The judge concluded that the offenders had set out from Manchester with a plan to commit a burglary, and the likelihood was that they had gone to the wrong address. It involved, she said, a significant amount of planning and organisation in the form of hiring a car, taking balaclavas, the pepper spray and a knife (or knives), and travelling a long distance across the country. That put the offence into culpability category A in the relevant Sentencing Council guideline. So far as harm was concerned, there was the use of violence in the pepper spray applied on Nathan Hunt, and there was the threat of serious violence in holding the meat cleaver over his father and in having the knife available during that part of the incident. There had been significant psychologic impact caused to the Hunt family who were traumatised by the incident which had led to them leaving their home as a result. There was also the category 1 factor of persons being present on the premises. Each of these three aspects placed the offending into category 1 harm in the guideline. The starting point for a category A1 offence is ten years' custody, with a range of nine to 13 years.

24. The judge identified as aggravating features of the offence: the use of face masks; the attack being on a dwelling; and the fact that it was a group attack.

25. Features of the offending which she identified as militating in favour of moving downwards in the category range were that no entry to the property was gained and none was attempted after the initial attempt; it was a relatively short-lived incident; there was no actual use of the knife or the meat cleaver in the second part of the incident; and the offenders desisted of their own volition and fled the scene. The judge did not say, but no doubt had in mind, that this also involved nothing being taken from the property and nothing occurring within the property by way of ransacking or soiling or anything of that nature.

26. During the course of the sentencing hearing the judge said that "there are A1s and there are A1s", meaning, as we understand it, that category A1 is the highest category for the offence and is intended to reflect the most serious ways of committing it, and that in her view this offending fell some way short of the most serious offences of this type.

27. Taking into account all of those matters, the judge treated the starting point by reference to the offending itself as being ten years' custody, before turning to the aggravation and mitigation relevant to the individual offenders. She rejected the suggestion that any of the offenders had shown genuine remorse. She treated their young ages as the most significant mitigation. She addressed the question of dangerousness in the case of Fathi and Hurst and concluded that in each case, by reason of their young aga and personal circumstances, and the length of the sentences imposed, the public would be adequately protected by the period which they would spend in custody, which would necessarily be lengthy by reason of their having to serve two-thirds of the sentences which she would impose and which would allow them to continue to mature in the way they had shown initial signs of doing.

28. For each of the offenders the judge balanced the aggravating features of their previous offending against the mitigating features of their young age and the other personal mitigation to which we have referred. She determined that the sentences for Fathi and Hurst should be reduced by one year for those matters, to become sentences of nine years, and that those for Ruscoe and Clegg should be reduced by two and half years, to become sentences of seven and a half years.

The Solicitor General's Submissions

29. On behalf of the Solicitor General, Mr Holland seeks to argue that the sentences were in all four cases unduly lenient for four reasons. The first is a submission that the presence of

more than one factor identified in harm category A in the guideline required the judge to have started above the category starting point of ten years. Mr Holland placed particular emphasis on the factors of violence and the serious threat of violence. Within that submission particular emphasis was placed on what had happened when chasing Mr Hunt down the alleyway with the threat of serious violence from the meat cleaver and a knife, whilst two of the offenders wore face masks. He also relies in particular on the category factor of substantial psychological impact on the Hunt family as a result of the incident.

30. Mr Holland's second submission is that the judge ought also to have adjusted the starting point upwards from the starting point of ten years in the category range for the aggravating features which she identified in relation to the offending.

31. We unhesitatingly reject these two submissions for two reasons, one of which is procedural, the other substantive.

32. The procedural reason arises from the fact that neither of these grounds was identified in the applications made by the Solicitor General for permission to make the reference. Section 36 of the Criminal Justice Act 1988 requires that if it appears to the Attorney General that a sentence is unduly lenient, he (or she) may apply, with the leave of the court, to refer the case to the Court of Appeal, who may then quash the sentence imposed and pass another sentence in place of that imposed by the sentencing court. The application for leave to make the reference and the reference itself are two quite separate matters, notwithstanding that they are commonly listed to be heard together in a rolled-up hearing, with the judgment of the court addressing both leave and the Reference itself.

33. Schedule 3, Part 1 to the Act provides for a 28 day time limit after the passing of the sentence, or the last of the relevant sentences, within which the leave application must be

made. That time limit is a statutory condition. It is not open to a court to extend it as a matter of discretion.

34. Applications for leave to refer a sentence to the Court of Appeal as unduly lenient are further governed by Part 41 of the Criminal Procedure Rules 2020 (SI 2020/759). Part 41.3(3) provides:

> "An application for permission to refer a sentencing case must —
>
> …
>
> (b) explain why that sentencing appears to the Attorney General unduly lenient, concisely outlining each argument in support; …"

In other words, the grounds must be set out in the permission application.

35. Part 41 also makes provision for withdrawing or varying those grounds. Part 41.5 provides that where the Attorney General wants to vary an application for permission to refer a sentencing case, he (or she) may do so before the hearing by serving notice on the Registrar of Criminal Appeals and on the defendant, but may only do so at a hearing if the court gives permission.

36. We drew these matters to the attention of Mr Holland when he commenced making his submissions. Following an adjournment to allow him to consider them, he made an application, as he needed to do in accordance with Part 41.5, for permission to advance the first and second of his grounds. In doing so, he suggested that he should have permission because these additional points had been identified in the Final Refence which had been served, and the offenders had had an opportunity to address them and, indeed, had taken that

opportunity in responses which they had all served. That, however, is not, in our view, sufficient of itself to justify giving permission. The rules provide that the grounds should be identified in the original permission application. That is because if the Solicitor General, on behalf of the Attorney General, is to launch a Reference, careful thought should be given both as to whether to do so and on what grounds to do so. If a variation is sought thereafter at the hearing, it seems to us that good reason needs to be put forward as to why the new grounds were not originally included and why it would be right to allow them to be included at the late stage. Mr Holland's submissions addressed the second of those, but did not address the first. We have not been provided with any good reason as to why these grounds, if they had merit, were not included in the original permission application. We have to say that the position appears to be one in which they were added merely as an afterthought. Accordingly, we refuse permission.

37. That is not, however, our only reason for rejecting these grounds. The second is the substantive reason that we do not think they have even arguable merit. Where the offence should be placed within category A1 was a matter for the exercise of judgment by the sentencing judge who was well placed to assess both the culpability and harm involved in the offence, having presided over the trial. It was well within the ambit of such judgment to treat ten years as the starting point for the offending for the reasons she gave. We do not regard the contrary as being seriously arguable, let alone as contributing to a sentence being unduly lenient. She had to balance the extent to which the planning as a matter of culpability put it at the appropriate place in the range. She had to assess the extent to which the various harm factors had a bearing on where it was to be put in the range, and she rightly had in mind where this offending had to sit in the range of different kinds of offending which would fall within the highest category, bearing in mind the circumstances of other offences which might come within the category. The suggestion that merely because there was more than one harm category factor she was obliged to start above the ten year starting point in the range is

hopelessly misconceived. Where an offence sits within a category, by reference to culpability and harm, is an exercise of evaluative judgment in applying the factors, not a matter of totting up the number of factors involved. We do not think that the judge in this case can be faulted in the evaluative judgment which she exercised.

38. The third point advanced by Mr Holland is that too much weight was given to the mitigation in the context of the aggravating feature of the offenders' previous convictions. Again, we have no hesitation in rejecting this submission. The previous offending was an aggravating feature to an extent which differed between the four offenders, and it was expressly recognised as such by the sentencing judge. However, that offending, so far as relevant, had mostly been by the offenders when they were children, and even for those with the most numerous or serious convictions, in so far as relevant it was of an entirely different nature and order to the index offence. It could properly be treated as significantly outweighed by youth, immaturity and the personal mitigation which each of the offenders had in their different ways.

39. It bears repeating again – although it has been repeated in many cases – that emotional and behavioural maturity is typically not complete at the age of 18 and continues, typically, into a young person's mid-20s.

40. In the Final Reference it is conceded on behalf of the Solicitor General that the judge was entitled to make what were described as "significant downward adjustments" for mitigation. The judge had had the opportunity during the trial to assess the offenders and the extent to which their behaviour was influenced by their maturity, or lack of it; and in the case of Fathi and Hurst she had the benefit of the assessment of the probation officers who had compiled the pre-sentence reports who referred to those offenders' immaturity in their different ways, as we have identified. The reduction for youth, immaturity and the significant

personal mitigation was well within the ambit of the evaluative judgment which was available to the judge, and again we do not regard the contrary as seriously arguable, let alone as contributing to a sentence which is unduly lenient.

41. The fourth point advanced by Mr Holland applies only to Fathi and Hurst. It is that the judge ought to have found them to have been dangerous, in particular, he submitted, in the light of their antecedent offending, and that the judge ought to have imposed extended sentences in their cases.

42. This seems to us no more arguable than the other grounds which are advanced. The judge gave consideration to the question of dangerousness. There was no entrenched pattern of previous offending in the case of either offender which would necessarily contribute to a finding of dangerousness – that is to say, a significant risk of serious harm to the public. In so far as the risk arose, it arose from the index offence. By the time of the sentencing hearing, both offenders were showing practical signs of a determination to take steps which would reduce the risk of offending. The judge concluded that the public would be sufficiently protected by the lengthy determinate sentences which she would impose, given both the likelihood of the offenders maturing and the fact that they would spend two-thirds of their sentence in custody and that on release they would be subjected to the sort of licensing conditions identified in the pre-sentence report, including MAPPA reference. That was a view supported by the pre-sentence reports, neither of whose authors suggested the need for an extended sentence. Again, we do not think that the position taken by the sentencing judge in this respect can properly be criticised. Accordingly, we reject this ground too.

43. In conclusion, therefore, we refuse the application for leave to make the references. The sentences remain undisturbed, save only for the correction to Clegg's sentence in that it should have been expressed as one of detention in a young offender institution, rather than

one of imprisonment. The periods of custody remain the same.

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

Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
