IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/00564/A4

Royal Courts of Justice
The Strand
London
WC2A 2LL

Neutral Citation No.: [2024] EWCA Crim 294

Thursday 7th March 2024

**B e f o r e:**

**LORD JUSTICE LEWIS**

**MRS JUSTICE CHEEMA-GRUBB DBE**

**THE RECORDER OF NORWICH**
**(Her Honour Judge Alice Robinson)**
**(Sitting as a Judge of the Court of Appeal Criminal Divisions)**

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**R E X**

**- v -**

**CARL MacDOWALL**

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**Mr K Volz** appeared on behalf of both Appellant

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**J U D G M E N T**

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Thursday 7th March 2024

**LORD JUSTICE LEWIS:** I shall ask Mrs Justice Cheema-Grubb to give the judgment of the court.

**MRS JUSTICE CHEEMA-GRUBB:**

1. This is an appeal against sentence brought with the leave of the single judge who also granted a representation order. We have been assisted by Mr Volz's concise submissions.

2. Carl MacDowall, who is now aged 24, having been born in December 1999, was convicted on 18th January 2023 after a trial alongside two co-defendants in the Crown Court at Liverpool of kidnapping, possession of a firearm with intent to cause fear of violence, and wounding with intent.

3. On 26th January 2023, at the same Crown Court he was sentenced by the trial judge, His Honour Judge Trevor-Jones, as follows. For the kidnapping, he was sentenced to an extended sentence of 20 years, comprising a custodial term of 17 years and an extended licence period of three years, pursuant to section 279 of the Sentencing Act 2020. Concurrent sentences of eight years and 12 years' imprisonment respectively were imposed for the two other guilty verdicts. In addition, for an offence of being concerned in the supply of Class A drugs, to which the appellant had pleaded guilty on an earlier occasion, a concurrent term of three years' imprisonment was imposed. The judge also had to deal with the appellant for possession of a Class A drug with intent to supply which was charged on a separate indictment to which he had also earlier pleaded guilty. In respect of that separate offence, the judge imposed a sentence of three years' imprisonment, which was ordered to be served before the extended sentence of 20 years. A variety of ancillary orders were made, none of which is concerned in this appeal.

4. We deal with the facts briefly, but in chronological order. On 16th May 2020, officers attended a flat on Shakespeare Road in Lancaster. A man called Johnston, who lived there, told police that two men from Liverpool had been staying in the flat. A search revealed that the kitchen had been set up with items used for the preparation of drugs for onward sale. In the kitchen were scales, drugs, and plastic bags. In one item, there were some 91 wraps of crack cocaine, totalling 4.25 grams, with a street value of over £900. Another exhibit had just over one gram in 10 wraps of crack cocaine, with a value of £100. Other paraphernalia associated with Class A drug dealing was found. The appellant's fingerprints were on 13 white plastic bags which led to his arrest.

5. Thereafter, the appellant committed the offences for which he was tried. At around 5 pm on 15th December 2020 the victim, Jacob Clough-Massey, was kidnapped at gunpoint by the appellant (who was then aged just 21 years) together with two co-defendants. They assaulted Mr Clough-Massey outside his front door and pushed a shotgun into his chest. He was beaten, forced into a car and driven around the area for about an hour and a half. He was then left in an area of Halewood with the appellant and one co-defendant. They were holding the shotgun. The appellant and his co-defendant made a series of phone calls to Nicole Cook (the co-defendant's girlfriend). In due course, at about 7.30 pm, one of them shot Mr Clough-Massey in the leg.

6. The rationale for the kidnapping became apparent on investigation. The kidnappers had tried to obtain £5,000 from James Clough (the cousin of the victim), because they had information that James Clough had recently won £50,000. The appellant knew James Clough from school.

7. Following the shooting, the victim was left alone and bleeding in an unlit country lane.

Fortunately, he was spotted by a driver who stopped and called the emergency services. Despite their help and assistance, Mr Clough-Massey was left with permanent nerve damage, pain in his leg, and a burning sensation  Doctors decided that it was necessary to leave a large number of pellets in his leg.  They remain there, causing discomfort which will not abate.

8.  The appellant had three previous convictions for four offences, including possession of a bladed article in January 2015, but none for previous offences of violence.  He had never previously served a custodial sentence.

9.  When considering the question of dangerousness, upon which the extended sentence was predicated, His Honour Judge Trevor-Jones said:

> "Simply taking these three offences, counts 1 to 3 on their own, there is no doubt in my mind that you all do present that risk. This is because of the premeditated planning to carry out those offences together and with your agreement to shoot your victim with a shotgun if necessary."

He determined that a life sentence was not justified.  In considering an extended sentence, he took account of the relative youth of all defendants and observed that over a lengthy period of incarceration they would be expected to mature.  But these were premediated offences committed when the offenders were unaffected by drink or drugs; there was no evidence of any psychological or psychiatric issues which might otherwise be relevant, or reduce their culpability; and none of the offenders had shown any evidence of remorse.  Each maintained their innocence in the face of the jury's verdicts.  The judge recognised that a substantial determinate sentence would, under present regulations, result in release only after two-thirds of the sentence had been served; but he concluded that the important additional safeguard of involvement of the Parole Board in the decision to release, which is a feature of an extended sentence, compelled him to the conclusion that an extended sentence was required.

10. Mr Volz takes a short point in the appeal which can be encapsulated thus. Although the 17 year custodial sentence is not arguably manifestly excessive, the imposition of the extended licence of three years was not justified and the judge should have acceded to an application for a pre-sentence report to add to the material before him, prior to making a dangerousness determination. He thus fell into an error of principle.

11. Section 30(1) of the Sentencing Act 2020 reads:

> "(1) This section applies where, by virtue of any provision of this Code, the pre-sentence report requirements apply to a court in relation to forming an opinion.
>
> (2) If the offender is aged 18 or over, the court must obtain and consider a pre-sentence report before forming the opinion unless, in the circumstances of the case, it considers that it is unnecessary to obtain a pre-sentence report."

(Subsection (3) deals with offenders under 18.)

> "(4) Where a court does not obtain and consider a pre-sentence report before forming an opinion in relation to which the pre-sentence report requirements apply, no custodial sentence or community sentence is invalidated by the fact that it did not do so."

12. Amongst the provisions which refer to the court forming opinions to which the pre-sentence report requirement applies is an assessment of dangerousness for the purposes of the imposition of an extended sentence of imprisonment. The test to be applied is set out in section 308(1). It is whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences. Subsection (2) of section 308 provides:

"(2) In making that assessment, the court —

(a) must take into account all the information that is available to it about the nature and circumstances of the offence,

(b) may take into account all the information that is available to it about the nature and circumstances of any other offences of which the offender has been convicted by a court anywhere in the world,

(c) may take into account any information which is before it about any pattern of behaviour of which any of the offences mentioned in paragraph (a) or (b) forms part, and

(d) may take into account any information about the offender which is before it."

"Serious harm" is defined in section 306(2) as: "death or serious personal injury, whether physical or psychological".

13. The correct approach to assessing future significant risk was authoritatively stated in *R v Lang* [2005] EWCA Crim 2864. There the court said that the sentencer will be guided but is not bound by the assessment of risk in such reports as are before it. Any sentencer who contemplates differing from the assessment should give counsel the opportunity of addressing the point.

14. That a finding of dangerousness does not lead necessarily to an extended sentence is well established: see *R v Burinskas* [2014] EWCA Crim 334. Ordinary determinate sentences may well provide sufficient protection for the public to meet the purposes of sentencing.

15. It follows that the judge was obliged by law to obtain a pre-sentence report unless there

were sound reasons which made it otiose or (in the word of the statute) unnecessary. We should add that the contents of a report, whether they are in the direction of a dangerousness finding, or point the other way, are part of the information before the sentencing judge and no more. As we have said, this point was established in *R v Lang*.

16. Mr Volz relies on two connected decisions of this court: *R v Johnson and Others* [2019] EWCA Crim 2503, and *R v Fryer* [2022] EWCA Crim 1837. Neither was before the sentencing judge. The appellants in those two cases had been involved in the same very serious offence of aggravated burglary in which they burst into a flat mistakenly believing that there was a large amount of money present. An imitation firearm was placed against the heads of two children and the adults present were threatened that they would be shot if they did not reveal the location of the money. One victim was beaten with axes and threatened with having his head cut off. The appellants were in their late 20s and 30s, but each had limited previous convictions, and none for violence. The sentencing judge refused an application for a pre-sentence report and, having assessed the pre-planning and violence used in the offence itself, determined that the appellant's were dangerous in the sense required by the statute, and in particular took into account the escalation of their offending demonstrated by it. In the judgment of this court in *R v Johnson and Others*, of which Holroyde LJ (now Vice President of the Court of Appeal Criminal Division) was part, the court said at [20] that, whilst it was understandable, given the nature of the crime and that only one defendant had actually asked for a pre-sentence report, that the judge did not order any. However, the court considered that she should have obtained reports, not least because an extended sentence has severe consequences for a defendant, including on his eligibility for release on parole. Furthermore, such a sentence should only be imposed after the most careful consideration of all the relevant information and assessing whether a defendant is dangerous is not always easy.

17. The court referred to a number of cases in which the obtaining of a report was commended and described as "normal" in order to assist in the determination of dangerousness: *R v Myers* [2018] EWCA Crim 1552, and *Attorney General's Reference No 145 of 2006 (R v Carter)* [2007] EWCA Crim 692.

18. So far, we are with Mr Volz, although, as we have noted, where a determinate sentence of at least seven years is imposed, the current position that release can only be permitted after two-thirds has been served.

19. The sentencing judge in the case with which we are concerned would have been assisted, we are sure, by the obtaining of a pre-sentence report in assessing the appellant's dangerousness, and he should have done so, unless it was unnecessary. Whether or not it was unnecessary is less clear. The experienced circuit judge had conducted the trial – not a feature for most of the appellants in *Johnson* and *Fryer*. He had the opportunity to hear the appellant give evidence. He knew that the appellant continued to dispute his guilt, despite the verdicts, and he was sentencing the appellant not just for the very serious attack on Mr Clough-Massey in which a real firearm (not an imitation) had been fired, causing serious injury with long-term consequences, but also for involvement in Class A drug dealing. The facts are much more serious, in our judgment, than those in *Johnson* and *Fryer*.

20. Although ordering a report would have provided the Judge with the fullest information about the appellant before him when making the most significant decision about future risk and how to reflect any risk he found present in the sentencing to be imposed, we think that this is one of those cases in which the judge was entitled to come to the view that it was unnecessary, given the particular circumstances of this case.

21. Section 33 of the Sentencing Act provides that this court must obtain a pre-appeal report

and consider it, unless it considers that the court below was justified in not obtaining a pre-sentence report, or that in the circumstances of the case at the time that it is before this court, it is unnecessary to obtain a pre-appeal report.

22. The single judge directed that a pre-appeal be obtained. We have had the benefit of considering such a report with care. By way of background, the appellant reported to the author of the report that he had become involved in drug dealing from the age of 18 or 19 after completing normal mainstream education. There were no medical or psychological issues in his background. He was in good health. The appellant maintained his innocence. He was challenged on this and, although he admitted that he knew the victim, Mr Clough-Massey, he provided explanations, including that the evidence against him was based on records from a telephone which he described as a "graft phone" (i.e. one that he and others used to carry out drug dealing); he had been stitched up; and the victim had lied about his participation.

23. About the offences of Class A drug dealing and his general background – and we note in this respect that, following his arrest for the kidnapping and associated offences, the police examined the appellant's phone and found "flare messages", which he had sent advising "heavy flake, 30s or two for 50". These texts are to do with the wide distribution lists commonly deployed by drug dealers. The evidence was that those messages were sent on at least four occasions to 179 recipients. This formed the basis for the offence of being concerned in the supply of Class A drugs, for which the appellant received three years' imprisonment, which was ordered to be served concurrently.

24. The author of the pre-appeal report considered that the appellant displayed "negative lifestyle choices, flawed thinking skills and pro-criminal attitudes which legitimise violent and threatening behaviour in certain circumstances". About the Class A drug dealing, the

appellant also expressed the view that the drugs in which he dealt were on danger to people.

25. The risk assessment tool used by the Probation Service takes account of "static factors", such as age, gender and offending history. On that basis, unsurprisingly, the outcome was a grading of medium risk of re-offending and a limited risk of serious harm. However, the author of the report assessed the risk that the appellant poses of causing serious harm by the commission of further specified offences in the future as high. This is an opinion based on the violent nature of the offences of which the appellant had been convicted, his possession with others of a firearm, and the intentional shooting of the victim in the leg, as well as the background to the offending which exemplifies an active involvement with serious organised crime, the appellant's pro-criminal lifestyle and associated attitudes, which are supported by police safeguarding concerns described elsewhere in the report itself.

26. Furthermore, whilst in custody, the appellant has indulged in unacceptable, aggressive behaviour and was found in possession of an improvised weapon, which he said was for his own protection as he had a "£10,000 hit" on his head.

27. The report concludes that the risk posed by the appellant will remain until he has undertaken work to address his offending behaviour. That work will encompass his flawed thinking, behaviour and attitudes, as well as structured victim awareness work. If no suitable offence work is undertaken, then the current risk that he presents will remain on his eventual release.

28. Realistically, Mr Volz recognises that the ultimate opinion expressed in the report does not assist the appellant's case. The gravity of the ordeal imposed on Mr Clough-Massey, the ruthlessness of the group involved, and the callous abandoning of the injured and bleeding man at the roadside, all set against the background of dealing in Class A drugs in which this

appellant had been involved for some time, foreshadowed the almost inevitable conclusion, now supported by a pre-appeal report, that the appellant is indeed a dangerous offender.

29. In the circumstances, the judge's decision that only an extended sentence will provide the necessary protection of the public is unimpeachable. The length of the extension is moderate. Accordingly this appeal against sentence is dismissed.

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