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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 7th April 2020

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE ANDREW BAKER

and

MRS JUSTICE CUTTS DBE

R E G I N A

- v -

R B
J S
H G

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Miss R Scott-Bell appeared on behalf of the Applicant RB
Mr D Lister appeared on behalf of the Applicant JS
Miss S Duckworth appeared on behalf of the Applicant HG

Miss C Brocklebank appeared on behalf of the Crown

J U D G M E N T
(Approved)

Thursday 7th April 2020

LORD JUSTICE HOLROYDE:

1. Each of these young applicants pleaded guilty before a Youth Court to offences of robbery and handling stolen goods. They were committed for sentence to the Crown Court at Preston where, on 12th December 2019, each of them was sentenced to detention, pursuant to section 91 of the Powers of Criminal Courts (Sentencing) Act 2000, for three years ten months. Their applications for leave to appeal against those sentences have been referred to the full court by the Registrar.

2. The applicants are all now 16 years old. Under section 45 of the Youth Justice and Criminal Evidence Act 1999, the court may direct that no matter relating to any person concerned in the proceedings shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings. In the Crown Court, such an order was made in respect of all four applicants. We make a similar order in respect of these proceedings. We shall therefore refer to the applicants by their initials.

3. The offences were committed just after 10pm on 7th October 2019. RB was then aged 15 years 11 months; JS was aged 15 years 8 months; and HG was aged 16 years. They acted together with two others, who have never been identified.

4. The group of five travelled to a convenience store in Salford. They used a car which had been stolen 24 hours earlier, when the thief had driven it away from a petrol station whilst the owner was paying for his fuel. The owner's 11 year old son had been in the car. The thief ordered him out and left him on the forecourt. None of the applicants was alleged to have been involved in that theft, but all pleaded guilty to handling the stolen car.

5. The victim of the robbery was Usman Ali, who had a full-time job during the day but supplemented his income by working in the convenience store during the evenings. He was alone in the shop at the time, with no customers present, when the applicants and another ran in and jumped over the counter. They had their hoods up and their faces covered by balaclavas. HG was armed with a combat or hunting knife, which he brandished threateningly at Mr Ali. Mr Ali was told to get on the floor, where RB held to his head a weapon which was in fact a ball-bearing gun, but which looked to the terrified Mr Ali like a real handgun. JS was equipped with a duvet cover, into which he and the fourth member of the team scooped cigarettes from the shelves. Mr Ali was pulled closer to the till and ordered to open it. The robbers took all the money in the till (£300), about £1300 worth of cigarettes, and Mr Ali's mobile phone. They ran out to the car and sped away. The car was abandoned a short time later. The three applicants tried to continue their getaway in a taxi, but were stopped by the police. When interviewed under caution, they all made no comment.

6. Mr Ali made an initial Victim Personal Statement on the following day, in which he said that when the gun was held to his head he thought that he would die and would never see his wife or family again. He later broke down in floods of tears, could not stop shaking and passed a sleepless night. Although he was not physically injured, he thought that he would never forget the incident.

7. In a further Victim Personal Statement made about eight weeks later, Mr Ali said that the incident had had a huge effect on him and he found it difficult to stop thinking about it. He described two occasions when he had panicked in response to trivial events. He did not envisage a time when he would not react in a similar way. He had stopped working at the convenience store. Although he had been able in the past to deal with matters such as drunken

customers, this incident had been too much for him. He no longer felt safe in that line of work.

8. None of the applicants had any previous convictions. The judge, His Honour Judge Altham, was assisted by pre-sentence reports prepared by the Youth Offending Team. He also had a number of letters from members of the applicants' families. The reports indicated that all three applicants were remorseful. All had felt an element of peer pressure in agreeing to take part in the offence, though it should be noted that each seems to have been associating in recent months with youths who were involved in crime. None appeared to abuse drugs. RB had a realistic prospect of playing professional football. JS had shown academic ability and was working towards GCSEs. They had all responded well to the time which they had spent on remand in custody. In their submissions on behalf of the applicants, counsel urged the judge to consider that Youth Rehabilitation Orders with intensive surveillance and supervision were a proper alternative to custody and were appropriate in all the circumstances.

9. The judge considered the Sentencing Council's definitive guideline setting out overarching principles in relation to the sentencing of children and young people, the adult guideline for less sophisticated commercial robbery, and the guideline for robberies by young offender. In relation to the adult robbery guideline, it was submitted by all counsel that the appropriate category was A2: higher culpability A because of the production of a bladed article and an imitation firearm to threaten, and category 2 harm, because Mr Ali had suffered more than minimal but less than serious psychological harm. The appropriate starting point for an adult would therefore be five years' custody, with a range from four to eight years.

10. The judge, in his sentencing remarks, said that it was clear from the CCTV footage that the offence was well organised and was carried out by a team who had worked out their roles in advance. He referred to the vulnerability of Mr Ali as a man working alone at night providing a public service. He found that Mr Ali had suffered serious psychological harm. He had had to give up his job at the shop and alter his line of work because of the impact of the incident. The judge therefore placed the case into category 1A, with a starting point of eight years' custody and a range from seven to 12 years. He referred to the matters put forward in the pre-sentence reports and assessed the applicants as having broadly similar levels of maturity. He did not find any of them to be a dangerous offender for sentencing purposes. He considered the full range of sentences realistically open to him. The applicants were entitled to full credit for their very prompt guilty pleas. He reminded himself of the principles in the Children guideline, in particular that the principal aim of youth justice system is to prevent offending by children and young persons; that the court must have regard to the welfare of children and young persons; that sentencing must be individualistic; and that custody must always be a measure of last resort. He referred to paragraphs 6.45 and 6.46 of the Children guideline, which indicate that where nothing less than custody is appropriate, the court may consult the equivalent adult guideline and may feel it appropriate, for offenders aged 15 to 17, to apply a sentence broadly in the range of half to two-thirds of the adult sentence.

11. The judge concluded that nothing less than detention pursuant to section 91 of the 2000 Act would meet the seriousness of the offending. The appropriate sentence for an adult offender after trial would be ten years' imprisonment, reduced to six years eight months to reflect the guilty pleas. The judge then made a further reduction on grounds of youth of the order of 45 per cent, and concluded that the appropriate sentence for each applicant was detention for three years ten months. He imposed that sentence on each applicant for the robbery and imposed no separate penalty for the offence of handling.

12. Counsel for the applicants realistically accept that this was a joint offence in which all the offenders played their important parts. They focus on submissions which are equally applicable

to all three applicants, and have also assisted the court with the personal circumstances of each. Without seeking to minimise it, they submit that the effect on Mr Ali fell short of serious psychological harm. Although the decision of this court in *R v Chall and Others* [2019] EWCA Crim 865 makes it plain that a judge does not require expert evidence before making a finding of serious psychological harm, there was here no sufficient basis for that finding. Accordingly, counsel submit that the judge was wrong to place the robbery into category 1A. They further submit that in reaching a notional adult sentence of ten years' imprisonment, the judge gave too much weight to the aggravating features and too little weight to the mitigation. The result of these errors, they argue, is that the judge arrived at much too long a custodial term; that he should have concluded that each of the applicants could properly be sentenced to a Youth Rehabilitation Order with intensive surveillance and supervision; or, in the alternative, if custody was unavoidable, it should have been no more than a Detention and Training Order for a maximum of two years.

13. We are grateful to all counsel for their assistance. We have reflected on their submissions and on the submissions in response of Miss Brocklebank on behalf of the prosecution. In addition to the material which was before the judge, we have been assisted by progress reports from the young offender institution at which the applicants are held. The reports show that they are all engaging well with education in custody and that their behaviour has been generally good.

14. Each of the applicants clearly has a much better side to him. They have no previous convictions and have shown genuine remorse for their offending. They had, however, committed a very serious robbery in which they used two weapons to terrify a man who was providing a public service. The judge had to consider, in accordance with the guidelines to which we have referred, whether the offending was so serious that, despite their youth, the applicants must serve substantial periods of detention. It is, in our view, clear from his detailed sentencing remarks that he adopted a careful and correct approach, and took into account all relevant considerations.

15. We are satisfied that the judge was entitled to find that Mr Ali had suffered serious psychological harm. He had been correct to adjourn the sentencing to allow an opportunity for Mr Ali to make his further statement, because the first Victim Personal Statement was taken so soon after the robbery as to provide little assistance. The second statement showed that Mr Ali's experience has transformed him from a man who was prepared to face the prospect of handling trouble such as a drunken customer to a man who feels unable to work in a shop and who panics in circumstances which, objectively viewed, are nothing to worry about. There are of course more serious cases; but we cannot accept the submission that the judge was wrong to place the robbery into category 1A. We would add that even if it could be said that the harm fell at the upper end of the category 2A range, that is a range which goes up to eight years' custody.

16. We accept that, when considering adjustment of the guideline starting point, the judge could have given rather more weight than he did to the mitigating features. However, bearing in mind that the sentence would be separately adjusted for youth, he cannot be criticised for concluding that the aggravating features outweighed the mitigating features and that the starting point must, therefore, be increased. The notional adult sentence of ten years after trial was stiff but was not manifestly excessive in length.

17. In those circumstances, even making every allowance for youth, immaturity and an element of peer pressure, the judge was clearly entitled to conclude that significant terms of detention were necessary. Any other form of sentence would have been insufficient to reflect the seriousness of the offending. Having reached that conclusion, the judge made a reduction for

youth which was in accordance with the Children guideline. He indicated that it was of the order of 45 per cent; a precise arithmetical calculation was not necessary.

18. In relation to each of the applicants, the judge had to consider both the reduction to be made from the notional adult sentence on grounds of youth and the reduction to be made for the guilty pleas. These applications accordingly raise the issue of the correct sequence in which a sentencer should address those reductions. Each counsel has assisted this court with submissions on this issue.

19. The judge, as we have indicated, first reduced the notional adult sentences by one-third to reflect the guilty pleas, and then made the further reduction on grounds of youth. In doing so, he expressly followed the decision in *R v D* [2019] WLUK 433, in which this court said:

> "Although it was not a mechanistic process, a judge should approach the sentencing of a young offender in the following way: first, it was essential to work out what sentence would actually have been imposed on an adult. That meant identifying the appropriate starting point, then determining whether that notional sentence went up or down according to the aggravating and mitigating factors and then reducing the sentence for a guilty plea. Only after that should the youth discount be imposed. That had the advantage of keeping firmly in mind what the actual sentence of an adult would have been before discounting for an offender's age ensuring that the objectives of the guidelines were achieved."

20. That approach has been adopted in a number of cases since *R v D*, including, for example, *R v Bonner and Munir* [2019] EWCA Crim 2457 at [25].

21. There are, however, other recent decisions of this court which indicate that the correct sequence is to consider the reduction for youth first and the reduction for a guilty plea second: see, for example, *R v Armsden-McClennan* [2019] EWCA Crim 1415 at [14]; *R v Payne* [2019] EWCA Crim 2219 at [8] and [15]; and *R v Peters* [2020] EWCA Crim 66 at [18].

22. One of the reasons given by the Registrar for referring these applications to the full court was that there appeared to be some divergence of authority on this issue and that this case provided an opportunity for the court to give guidance. We are satisfied that it is appropriate to do so and hence, as we have said, we have heard submissions from all counsel. It is clearly desirable that there should be consistency of practice in relation to this issue.

23. In giving such guidance, we emphasise that we are only concerned with cases in which the judge, having followed the principles set out in the Children guideline, has concluded that a custodial sentence is unavoidable and that it is appropriate to consider the appropriate sentence for an adult offender in accordance with the approach indicated at paragraph 6.46 of the Children guideline.

24. In such circumstances, we agree with what was said in *R v D* as to the importance of considering the actual sentence which would be passed on an adult offender. Where there is a relevant definitive guideline, the judge must consider, in accordance with step 1, the appropriate offence category and starting point. The judge must then, at step 2, adjust that starting point

upwards or downwards to reflect aggravating and mitigating features of the offence and any matters of personal mitigation which will not be taken into account when making a reduction on grounds of youth.

25. However, in respectful disagreement with the decision in *R v D*, we are satisfied that the judge should next consider the appropriate extent of the reduction on grounds of youth, and only thereafter go on to make such further reduction as is appropriate to reflect a guilty plea. To make the decisions in that sequence is in our view consistent with the general approach of the Sentencing Council's guidelines. It follows that we agree with the approach taken in this regard in *R v Armsden-McClennan*, *R v Payne* and *R v Peters*.

26. We recognise that as a matter simply of arithmetic, it will in principle make no difference which sequence is adopted. In practice, the two different approaches may yield slightly different results because of an element of rounding down of the sentence.

27. There is, however, one situation in which the different approaches may yield results which differ more significantly. Both the Children guideline, and the Sentencing Council's guideline on reduction in sentence for a guilty plea applicable to adult offenders, provide for circumstances in which an offender needs further information, assistance or advice before indicating his plea: see paragraph 5.16 and exception F1 respectively. It will sometimes be the case that the court finds it appropriate to treat a young offender as needing such advice, and therefore allows full credit for a guilty plea which was not entered at the first stage of proceedings, even though it would not do so in the case of an adult offender. In such circumstances the young offender would be prejudiced if the judge first applied the credit for a guilty plea by the notional adult offender and then applied the discount for youth. Whilst this problem cannot be expected to arise in many cases, it can be avoided altogether if the credit for the guilty plea is given after the reduction for youth.

28. It follows that the judge, in adopting the approach indicated in *R v D*, fell into error. In the circumstances of this case, however, it was not an error which resulted in any prejudice to any of the applicants.

29. For those reasons, we are satisfied that there is no arguable ground of appeal against these sentences. The applications for leave to appeal are accordingly refused.
