Neutral Citation No. [2024] EWCA Crim 236

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202303101/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 23 February 2024

Before:

LORD JUSTICE DINGEMANS
MR JUSTICE WALL
THE RECORDER OF NORWICH
HER HONOUR JUDGE ALICE ROBINSON
(Sitting as a Judge of the CACD)

REX
V
SOLOMON ABDUL

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MR R SERGENT appeared on behalf of the Appellant
MISS F ERTAN appeared on behalf of the Crown

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction

1. This is the hearing of an application for an extension of time in which to seek leave to appeal, and for leave to appeal against sentence, which was referred to the full court by the single judge. We grant the extension of time, for reasons given below, and leave.
2. The appellant is a 27-year-old man, having been born on 18 March 1996. On 23 October 2019 in the Crown Court at Woolwich the appellant, who was then aged 23, pleaded guilty to two counts of aggravated burglary. These had occurred in April and May 2019. He was given 25 per cent credit when sentenced for his plea on count 1 and 10 per cent credit for his plea on count 2, for reasons that will become apparent.
3. On 16 August 2019, so before the pleas of guilty had taken place, there was a hearing in relation to a proposed transfer of legal aid during which it became necessary to outline other matters which were then being considered to be brought against the appellant. The court was made aware of various drugs offences which were being investigated in Wales and two other incidents of what might have been (if proved) aggravated burglary.
4. In any event, on 8 August 2019 in the Crown Court at Woolwich the appellant was convicted of assault occasioning actual bodily harm and having an article with a blade or point. Those offences had taken place at the time of the second aggravated burglary and the judge treated the trial as the equivalent of a *Newton* hearing to determine what the appellant had done on the occasion of the second aggravated burglary and that explains the reduced credit for the second count of aggravated burglary.
5. On 17 January 2020 there was a hearing at which it was proposed to sentence the appellant. A pre-sentence report had been ordered and obtained and everyone attended

for sentence, although there were some difficulties with producing the appellant. The judge had seen from the earlier comments on the Digital Case System in relation to the transfer of legal aid that there were other outstanding matters in relation to the appellant and sought further information.

6. We were told today, and have now had the opportunity to confirm by looking at the court log, that the proposed adjournment was opposed on behalf of the appellant and that was on two bases: first of all that that would delay sentence, which was objectionable; and secondly the point of principle which was that the judge should not be looking at matters that were not yet proved in relation to sentence because those could not be taken into account. It seems that the judge overruled the objections without any formal ruling, or we have seen no formal ruling. The ruling was effectively implicit in his directions that the officer in the case should attend at the next hearing and that the prosecution should upload information about the other alleged matters.

7. In those circumstances, counsel then acting for the appellant uploaded a sentencing note for that hearing dealing with the various matters but not repeating, because no doubt of the understanding that there had been a ruling against the point, the point of principle that the other matters were not proved. It was on that basis that on 13 February 2020 in the Crown Court at Woolwich the appellant, still aged 23, was sentenced to an extended sentence of three years on count 1, which was a custodial sentence of two years and an extended licence period of one year, and a consecutive sentence of eight years and two months, comprising a custodial term of seven years and two months and an extended licence period of one year. No separate penalty was ordered for the assault occasioning actual bodily harm or having an article with a blade or point. This made an aggregate sentence of an extended sentence of 11 years and two months, comprising a custodial

term of nine years two months and an extended period of licence of two years.

The extension of time

8. The appellant requires an extension of time of some 1,274 days. Although new solicitors were instructed within 18 months of the sentence and after funds were raised there were delays in obtaining a transcript of the sentencing remarks, medical records and information from the Ministry of Justice. There were then delays in obtaining further reports and funding.

9. In circumstances where it is now common ground that the extended sentence on count 1 is unlawful, we consider that it is in the interests of justice to extend time. This is a substantial period of time with which we are confronted but as the sentence is unlawful there is no principled reason to refuse the extension, and it is in the interests of justice to grant it.

The relevant circumstances of the offences

10. On 17 April 2019 the complainant in count 1, who was working as an escort, had rented a studio apartment in London for one might. The appellant called the complainant and made arrangements to attend the apartment. However, this had been a ruse on the appellant 's behalf as the appellant attended, along with an accomplice, to gain entry to the property and steal from the complainant. Once the appellant entered the property he went to the toilet and 'phoned his accomplice. The appellant subsequently walked past the complainant and opened the door to the apartment and the appellant's accomplice came into the apartment. The complainant was asked for money and the appellant's accomplice pulled out a knife and pointed it towards the complainant. The complainant pointed towards her purse and said that was all she had and offered her mobile phone.

11. The appellant submitted a basis of plea which made it clear that he then said to his

accomplice that he believed the complainant and it was his co-accused, who was never located, who then removed the £320-odd from the complainant's purse. The appellant had left the apartment before his accomplice.

12. As far as the second count of aggravated burglary was concerned, as well as the assault occasioning actual bodily harm and possession of a bladed article, that took place on 17 May 2019 - so effectively just over a month later. The complainant, who was an escort, had rented a room at a Holiday Inn in Farnborough, Hampshire. The appellant made arrangements to come and see her. He once again attended the property and gave the complainant £120 before watching where she put the money. The appellant then went to the lavatory before opening the door for an accomplice. The appellant knew that his accomplice was carrying a knife. The complainant was subsequently ordered onto the bed and the appellant held the knife to the complainant's throat whilst demanding to know where the money was. The complainant would not say where the money was and so the appellant slowly ran the knife along her face. As the appellant and accomplice searched for money they became more aggressive and the appellant's accomplice held the complainant in a choke hold and dragged her along the floor when she tried to escape. Threats were made to the complainant and she was cut to the chest, thigh and face with the knife. It is right that those were not, as Mr Sergent pointed out, slashing motions but we have seen the photographs and the marks that were left. The complainant's purse was taken which was said to contain between £550 and £650 in cash. The appellant and his accomplice subsequently left the room. It can be seen why the facts relating to the appellant's possession of the knife and assault occasioning actual bodily harm were very significant to be found and established in a fair and transparent manner against the appellant for the purposes of sentencing. It was in fact CCTV and other cell site evidence

which had led to the arrest of the appellant.

13. In interview the appellant gave an account and eventually admitted some of the offending.

The sentence

14. As already indicated, a pre-sentence report was requested and that dealt with the issue of dangerousness. The pre-sentence report recorded at paragraph 4.2:

> "It is against the above background, especially the clear escalation in seriousness, offending behaviour and harm posed, that Mr Abdul's risk of harm has been increased, and he is now assessed as posing a high risk of serious harm. That risk is primarily posed to known individuals, the current victims, but also members of the public, namely any female sex worker he may meet, and can now involve the use of weapons. As these are his first recorded serious violent type offences, that risk is not however, assessed as being imminent."

15. At paragraph 4.5 the author went on to state:

> "As these are Mr Abdul's first recorded violent offences, the Court may feel that he does not fit the criteria for an Extended Sentence ... "

16. And Mr Sergent has relied in particular on this last passage in the grounds of appeal in relation to dangerousness.

17. As already indicated after the adjourned hearing on 17 January 2020 matters came back before the judge on 13 February 2020. The judge referred to the authority of *Considine* [2007] EWCA Crim 1166, [2008] 1 WLR 44, as entitling him to take account of all of the information that was before him relating to Mr Abdul. The court considered the wording of section 229(2) of the Criminal Justice Act 2003 and referred to the fact that the Court of Appeal said that the critical word was "information". The judge summarised some

previous convictions and other matters before noting that those matters were of limited assistance to him on the issue of dangerousness.

18. The judge then turned to two similar alleged incidents. The first was an incident in the Crown Plaza Hotel in London on 20 April 2019. That was some three days after the matters which were the subject of count 1. The victim in that case had complained of two males entering her hotel room where she was working as an escort, money being stolen from her in a knife point robbery where one person had a machete and the other a small kitchen knife and the people had said to her: "We are not here to hurt you, just give us your money." A phone had been used in that case to contact the escort and that was a phone which had been linked at the trial to the appellant. The SIM from that was taken when the appellant was arrested and in fact at that stage the appellant was attempting to bite through the SIM card.

19. The judge referred to a second matter which had occurred some two days after the first alleged matter. That was in the same hotel, the Crown Plaza in London on 22 April 2019. Again there was an escort who was in her room and at some stage in the middle of the evening two men burst into her room, one with a nine-inch knife which was brandished, valuables were taken, some cash was taken, keys and cards. The victim was reported to be agitated. In neither case did the victims support a prosecution and it seems from the information that we have that that was the reason that there was no further action taken in relation to those matters.

20. The appellant, it seems, was interviewed in relation to those matters and made no comment interviews, so there was nothing to suggest that these were matters which the appellant had accepted.

21. The judge turned to the appellant's record and noted that he was not heavily convicted.

He had been convicted of possession of cannabis in 2012/13, a burglary and theft of a non-dwelling and various other drug matters. Then he was convicted in 2014 for possession of crack cocaine with intent to supply when he was given a suspended sentence. On 10 March 2017 he was convicted of possession of heroin with intent to supply and on a guilty plea was given 18 months in a young offender institution. It seems that the offences which were the subject of counts 1 and 2 on the indictment and, if the appellant is linked to the other matters, the other matters all occurred after his release from that Young Offender Institution.

22. The judge then turned to the issue of setting the sentence. The judge assessed that this was a Category 1A offence for the purpose of the offence-specific guidelines. The reason that it was Category 1 was because violence was used and there was Category A because there was planning and organisation with two persons involved. The judge noted that each count had a starting point of 10 years and the judge recorded the relevant range. The judge reduced the sentence to eight years to take account of the fact that the escorts, although in their own rooms in the respective hotels, they were not in their own homes and he gave 10 per cent credit as already indicated, on count 2 to come up with the sentence of seven years two months. He did not explain his workings in relation to count 1 but imposed a sentence of two years which, if credit is allowed for 25 per cent which the judge indicated he would allow, means a sentence after trial and before discount for plea of around three years eight months would have been the sentence that was imposed.
23. The judge did make a finding of dangerousness and that was the reason that the extended sentences were then imposed.

Matters after sentence

24. It now appears, although it was not apparent from the papers which were before us this

morning, that the other matters which had been referred to, including drugs investigations in Wales and these two matters relating to the two unproved instances were not proceeded with.

The appeal

25. There are effectively three grounds of appeal which are advanced on behalf of the appellant. The first is that the extended sentence on count 1 is unlawful. The second is that the judge's sentence was simply too long as an issue of totality. The third is that the finding of dangerousness was wrongly made.

26. So far as the prosecution are concerned, they accept that the extended sentence on count 1 was unlawful, although they point out that the sentence could be properly re-arranged and the sentence on count 2 increased to reflect the dangerousness found in relation to count 1. So far as issues of totality are concerned, the prosecution submit that the sentence was perfectly appropriate, and so far as the issue of dangerousness is concerned the prosecution submit that the judge was right to find that the appellant was dangerous.

An unlawful sentence on count 1

27. We turn therefore to the first ground. As to the first ground, we agree that the extended sentence in relation to count 1 was unlawful. This is because the appellant had not been convicted of a specified offence before his conviction on count 1 and because the sentence which was imposed was less than two years. Section 226A of the Criminal Justice Act 2003 was the relevant provision then in force, (section 280 of the Sentencing Act 2020 now produces in many respects the same provisions) and provided that:

> "(1) This section applies where— (a) a person aged 18 or over is convicted of a specified offence (whether the offence was committed before or after this section comes into force), (b) the court considers that there is a significant risk to members of the public of serious harm occasioned by

> the commission by the offender of further specified offences, and ... (d) condition A or B is met.
> (2) Condition A is that, at the time the offence was committed, the offender had been convicted of an offence listed in Schedule 15B.
> (3) Condition B is that, if the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term would be at least 4 years."

28. As already indicated, neither of those conditions were met and in those circumstances the extended sentence on count one is unlawful.

A proper determinate sentence

29. As to the second ground and the issue of the length of the determinate sentence, there were two separate Category 1A aggravated burglaries committed against the complainants, who were separate complainants. The judge reduced the sentence from the starting point of 10 years on count 2 because it was not the escorts' own home, which might have been considered to be in some respects to be a generous discount. The judge took a starting point in relation to count 1 of under four years and that must have been to reflect totality. The overall determinate sentence which was two years on count 1 and seven years two months on count 2 was not manifestly excessive given the separate criminality and separate harm caused to separate victims.

The issue of dangerousness

30. We therefore turn to the final issue which is dangerousness. It is apparent from the provisions of section 229(2)(c) of Criminal Justice Act 2003 that the court may take into account any information about the offender which is before it. We pause to note that this provision is effectively mirrored by section 308 of the Sentencing Act 2020. However, as was made clear in *R v Considine* [2007] EWCA Crim 1166; [2008] 1 WLR 414 (*Considine*) that will include evidence which the judge has heard at trial or which the

appellant has admitted for example to the writers of pre-sentence reports or other professionals. *Considine* however made it clear when considering other authorities including *R v Johnson* [2006] EWCA Crim 2486; [2007] 1 WLR 585 and *R v Kidd* [1998] 1 WLR 604 that when reaching a conclusion adverse to the defendant the judge should not rely on a disputed fact unless it could be resolved fairly to the defendant, see paragraph 35.

31. It is now apparent from all the information before us that the judge took into account two contested allegations in relation to other sex workers which the judge should not have taken into account. It is right that the original objection to this information being taken into account seems to have been raised when the issue of an adjournment was being proposed by the judge and it does not seem that the judge was referred to any particular authorities in relation to the matter. However, it is clearly wrong to take into account unproven disputed allegations against a defendant, unless the disputed fact has been resolved fairly against the defendant. As Mr Sergent put it in his helpful submissions, the Crown could have asked for these matters to be taken into account or they could have preferred an indictment and asked whether the appellant was prepared to plead to them. Neither took place. In our judgment, the judge was in error in taking into account in his assessment of dangerousness the two other matters in relation to the other sex workers which were not proved or admitted by the defendant.

32. That means that we must consider the question of dangerousness ourselves. Miss Ertan on behalf of the prosecution reminds us of the facts of these particular offences, counts 1 and 2, and in particular the facts that were proved at the trial in relation to the assault occasioning actual bodily harm and possession of a bladed article against the appellant. That trial was effectively a *Newton* hearing where the matters were fairly proved.

Mr Sergent on behalf of the appellant draws attention to the fact that the appellant was aged 23 at the time, that in his background there was no previous conviction for any violent offending, that he has in fact made progress in prison and that even if the statutory provisions were satisfied, it might be a case where the court should exercise its discretion not to make a finding of dangerousness and impose the extended sentence. Mr Sergent relies in particular on the passage in the pre-sentence report to which we have already referred.

33. We turn back to the matters which were proved against the appellant. These were two planned attacks against escorts which involved setting up the escorts by means of a telephone call and a booking for sexual services where the appellant was working with another who was armed on both occasions with a knife. On the first occasion the production of the knife was sufficient to enable the complainant to hand over what she had, which the appellant accepted was very little, before it seems his co-accused had found more. But as far as the second count was concerned, this was a serious aggravation in offending. This was because the appellant had gone to the lavatory before opening the door for his accomplice, he knew that his accomplice was carrying the knife, the complainant had been ordered onto the bed and it was the appellant who had held the knife to the complainant's throat whilst demanding to know where the money was. The complainant would not say so and so the appellant had slowly run the knife along the complainant's face. The appellant and the accomplice had become more aggressive and the accomplice had held the complainant in a choke hold and dragged her along the floor. Threats were made to her and she was cut to the chest, thigh and face.

34. In all those circumstances, and notwithstanding the points which Mr Sergent has fairly made, in our judgment there was a significant risk to members of the public of serious

harm occasioned by the commission of further offences by the appellant. In our judgment it was appropriate to make a finding of dangerousness and an extended sentence on the appellant, notwithstanding at that stage his comparative youth of 23 years and the difference in the previous offences. This was because he had shown a willingness to aggravate and increase his offending and to use violence and knives against members of the public.

35. For all those reasons, although the appellant is right to point out that the judge had taken into account information that should not have been taken into account against him on the assessment of dangerousness, we are sure that the finding of dangerousness was properly made.

Conclusion

36. That leaves only the issue of the unlawfulness of the extended sentence on count 1. In the circumstances we allow the appeal to the extent that we set aside the extended sentence on count 1 and leave that as a determinate sentence of two years. Trying to respect, so far as possible, the judge's approach to the way of structuring this sentence, (although we record it might have been easier if he had taken count 2 as the lead offence) we will leave count 1 with a determinate sentence of two years' imprisonment and then order a consecutive sentence, as before, an extended of eight years and two months, which is seven years two months determinate and one year extended sentence.

37. That means that the appeal succeeds to the extent that the extended sentence of 11 years two months is replaced by the extended sentence of 10 years two months, comprising a custodial element of nine years and two months and an extended sentence of one year. We conclude this judgment by thanking Mr Sergent and Miss Ertan very much for their assistance this morning.

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

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