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Case No: 201804592/A1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Tuesday, 18 December 2018

B e f o r e:

LORD JUSTICE HOLROYDE

MRS JUSTICE ANDREWS DBE

RECORDER OF STAFFORD

(HIS HONOUR JUDGE MICHAEL CHAMBERS QC)

(Sitting as a Judge of the CACD)

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 OF THE CRIMINAL JUSTICE ACT 1988

R E G I N A

v

TOMMY JOE TREMAYNE

Computer Aided Transcript of the Stenograph Notes of
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(Official Shorthand Writers to the Court)

Mr J Polnay appeared on behalf of the **Attorney General**

Ms R Bradberry appeared on behalf of the **Offender**

J U D G M E N T (Approved)

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1. LORD JUSTICE HOLROYDE: On 10 September 2018, in the Crown Court at Taunton, Tommy Joe Tremayne pleaded guilty on re-arraignment to an offence of assault with intent to rob, contrary to section 8(2) of the Theft Act 1968. He was sentenced to a 2-year community order with a requirement to undertake 200 hours unpaid work and to complete over 20 days a rehabilitation activity requirement. He was also ordered to pay compensation to the victim of the offence in the sum of £500.
2. Her Majesty's Solicitor General believes that sentence to be unduly lenient and accordingly applies, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing can be reviewed.
3. We express at the outset our gratitude to counsel, Mr Polnay for the Solicitor General, and Ms Bradberry, here, as below, for Mr Tremayne. Their written and oral submissions have been of a high quality and have been of great assistance to the court.
4. The offence was committed on 15 September 2016. Mr Tremayne was then aged 24. As the pre-sentence report before the sentencing judge indicated, Mr Tremayne's life as a child had been chaotic. For some of his childhood his mother was in prison and he had lived with an aunt. He was excluded from school at the age of 14 and attained no formal qualifications before reaching school leaving age. He ran away from home at the age of 15 and thereafter lived on the streets, spending his time with older men who introduced him to drugs. He described to the reporting probation officer that he had been a victim of sexual abuse. He committed crimes to finance his drug habit. By the time of the sentencing of the present offence he had accumulated some 80 previous convictions, the majority of which were for offences of dishonesty but some of which were for offences involving drugs, damage and violence.
5. The victim of the offence was Mr Mullins, a man aged in his early 50s who has the misfortune to have sustained a brain injury and to suffer from learning difficulties and schizophrenia. His disabilities required him to live with carers. A witness to the events described Mr Mullins as "dishevelled and vulnerable".
6. Mr Mullins enjoyed visiting and sitting in a local park and was doing so when he was approached by Mr Tremayne. Mr Tremayne was heavily intoxicated. He had been spoken to by police officers only about 15 minutes earlier. He approached Mr Mullins and demanded his money. Mr Mullins tried to run away. Mr Tremayne chased him and shouted at him. Mr Mullins asked to be left alone. But Mr Tremayne continued to pursue, his conduct being described by an eyewitness as "very aggressive". Mr Mullins then slipped or tripped and went to the ground. Mr Tremayne, shouting "give

me your money", knelt on him, held him down and punched him. He then bit off the top of Mr Mullins's right ear before, as a witness described it, swaggering off.

7. Mr Tremayne was arrested nearby. He was aggressive with the arresting officers. At the police station he made remarks appearing to say that he had beaten up someone who had raped him. Plainly Mr Mullins had done no such thing. When interviewed under caution, Mr Tremayne made no comment to the questions but put forward a prepared statement in which he expressly denied the offence. He initially pleaded not guilty. The case was prepared for trial and defence expert evidence was obtained with reference to bloodstaining found on Mr Tremayne's clothing.
8. Mr Mullins, for his part, was taken to hospital after the incident. His injured ear was stitched but we understand he is left with a very visible deformity. In a victim personal statement prepared about 6 months after the assault, Mr Mullins said that for about 2 months after the incident he had not visited Taunton at all and then had only visited in the company of care staff. He had not returned to the relevant park. He now avoided back streets, became frightened if he saw people in groups and still became upset when he reflected on the incident.
9. At the time of committing this offence Mr Tremayne was on licence from a sentence of 30 months' imprisonment which had been imposed on 8 January 2015 for an offence of robbery. The circumstances of that offence were that Mr Tremayne, whilst intoxicated by drink and/or drugs, had robbed a shopkeeper at knife point. Remarkably, that offence had itself been committed whilst on licence from a prison sentence totalling 23 months for a number of offences of dishonesty, driving whilst disqualified and breach of a suspended sentence. Thus, to put it shortly, at the time of the present offence, Mr Tremayne was on licence from a sentence imposed for an earlier offence which had itself been committed on licence.
10. Following his arrest for the present offence it seems that Mr Tremayne was on bail for a time but was then recalled from licence in about early January 2017 and remained in prison until 4 July 2017. Although we do not have precise dates, we take it that he was recalled from licence for a period of about 6 months.
11. It is also relevant to note that in July 2016 Mr Tremayne had committed an offence of criminal damage to which he was later to plead guilty. He had been required to attend court on 19 September 2016. It follows that this offence, in addition to being committed on licence, was committed only days before he was due to appear in a court.
12. Having been charged with the present offence, Mr Tremayne was sent for trial by the magistrates on 8 February 2017. He then made no fewer than 10 Crown Court appearances before entering his guilty plea. An initial listing for trial was stood out because both prosecution and defence wanted more time to prepare and in particular, the prosecution had not served all their evidence. A later trial listing in November 2017 did not proceed because of a combination of a lack of court time and the defence lawyers still awaiting the report from the instructed expert witnesses. In the course of these hearings a defence case statement was served in which Mr Tremayne denied that he was the person who had assaulted Mr Mullins.

13. His eleventh appearance in the Crown Court was on 10 September 2018, when the case was listed for trial. Counsel on his behalf sought a Goodyear indication, on the basis of a guilty plea accepting the prosecution evidence as to the facts, but asserting that Mr Tremayne had little, if any, recollection of the incident because of his level of intoxication. Submissions were made to the judge as to the guidelines. Although there is no offence-specific guideline for the offence of assault with intent to rob, it was common ground between the parties, and accepted by the judge, that the Sentencing Council's Definitive Guideline for Robbery Offences, in particular the section devoted to street robberies, was relevant to this case. In terms of that guideline the prosecution then submitted that it was a category 1B offence. The defence submitted that it was between category 1B and category 2B. The judge took the view that it was a category 2B offence. He indicated that he would be prepared to give credit for a guilty plea of between 15% and 20%, because although the plea would be coming very late in the day, it would spare a very vulnerable victim from having to give evidence. By that route the learned judge indicated that in the event of a guilty plea at that stage the maximum sentence he would impose would be one of 3 years 4 months' imprisonment.
14. Mr Tremayne then entered his guilty plea. An alternative count of wounding with intent was ordered to lie on the file.
15. The pre-sentence report referred, as we have indicated, to the very unhappy personal history of Mr Tremayne. It indicated that he was now living with a female partner who had mental health problems and for whom Mr Tremayne acted as carer. The report regarded Mr Tremayne as being unable to comply with an unpaid work requirement because of his care responsibilities. It was however submitted by counsel on Mr Tremayne's behalf that the practical difficulties of his care responsibilities towards his partner could be overcome and should not stand in the way of a community order.
16. The author of the pre-sentence report observed that immediate custody "would have a negative impact on Mr Tremayne's mental health". She assessed his level of risk as being manageable in the community and said that immediate custody "would provide Mr Tremayne with significant barriers in the future which could lead to further offences being committed". She proposed a community order of 24 months' duration with a rehabilitation activity requirement, focusing on victim awareness and alcohol and substance misuse and also combined with a curfew requirement and a financial penalty.
17. On Mr Tremayne's behalf, counsel submitted that his personal circumstances had changed dramatically since the commission of the offence. In the long period which had elapsed he had stopped taking illicit drugs, had cut down on his consumption of alcohol and was now living with and caring for his partner. He had mental health issues of his own for which he had appropriately consulted his general practitioner. Counsel acknowledged that since his commission of this offence, and following his release from the period of recall to custody, Mr Tremayne had been involved in an incident with a neighbour, which had resulted in his pleading guilty on 14 July 2018 to an offence contrary to section 4 of the Public Order Act, for which he was fined. That offence, as we understand it, involved threatening words or behaviour in the course of an incident which, as counsel put it "got out of hand". She submitted that Mr

Tremayne was fearful, that if imprisoned he would resort to the use of drugs in order to cope with his sentence, and that on release he would be thrown back into the company of undesirable companions from whom he had succeeded in distancing himself.

18. In his sentencing remarks, at page 12C-G the judge said this:

"A sentence of 3 years and 4 months' imprisonment, even though you pleaded guilty on the day of trial, would be justified. I do not consider, in the circumstances, however, that such a sentence would benefit either society on a wider basis or you on an individual basis, and I am going to take an exceptional course of action and sentence you considerably outside the guidelines.

I am doing so for those reasons:

- 1) you have kept out of trouble for the past two years.
- 2) you seem to have turned your life around, and the drugs and alcohol abuse that was previously a significant factor in your life has come to an end.
- 3) you are the carer for your partner, who is a lady with considerable needs and, without you, it seems her life would become even more difficult.
- 4) you have your own mental health difficulties.
- 5) I consider that it is infinitely better that society should benefit from your rehabilitation rather than you spend a period of imprisonment, where you would get little support on your release and where you may well go back to your past life and way of behaviour."

19. In his submissions to this court Mr Polnay seeks to depart from the submissions of prosecuting counsel below and argues that this case fell into culpability category A of the guideline for two reasons, namely that biting should be equated with "use of a weapon to inflict violence", and that the biting off part of the ear could only be regarded as the "use of very significant force in the commission of the offence". On that view, putting the case into category 1 for harm because of the serious physical and/or psychological harm caused to the victim, Mr Polnay points out that the guideline indicates a starting point of 8 years' custody and a range from 7 to 12 years. In addition, he submits there were a number of serious aggravating features. First, Mr Tremayne has relevant previous convictions. Secondly, he committed this offence when awaiting a court hearing for another matter. Thirdly, he committed the offence whilst on licence. Fourthly, the victim was targeted due to an apparent and actual vulnerability. Fifthly, the offence was committed whilst under the influence of drink and/or drugs.
20. Mr Polnay acknowledges the presence of mitigating features, namely that Mr Tremayne suffers from anxiety and depression, that he had taken steps to try to address his

addiction or offending behaviour and that he was the sole or primarily carer for a dependent relative. This personal mitigation, though highly relevant, he submits can carry only limited weight in the face of such serious offending.

21. As to the credit given for the guilty plea, he submits that there was no good reason to allow more than the 10% credit indicated for a plea at trial in the Sentencing Guidelines Council's guideline which was applicable to this case. He reminds us of the case law which states that the fact that a guilty plea has been entered after a Goodyear indication is not in itself a bar to this court finding a sentence to be unduly lenient, even where prosecuting counsel at the court below has failed to state specifically that the Goodyear indication would not be a bar to an Attorney-General's Reference.
22. Mr Polnay submits that even if in this court disagrees with his categorisation of the offence under the guideline, the offence was simply too serious to be met with anything other than a significant custodial sentence. He submits that the judge below was wrong to allow the mitigating factors to outweigh that consideration.
23. Ms Bradberry submits that the sentence was not unduly lenient. The experienced judge properly considered all the relevant factors and was entitled to take the course which he did. Ms Bradberry submits that the case was correctly placed in category 2B. She argues that it is not appropriate to treat biting as the use of a weapon and submits that there was no basis for regarding this as a case of very significance force. The harm caused was plainly serious but not so serious, she argues, as to fall into category 1. Under the Sentencing Guideline Council's guideline a reduction of 10% for a late guilty plea was not a fixed maximum.
24. She reminds us that the purposes of sentencing specified in section 142 of the Criminal Justice Act 2003 are:
 - "(a) the punishment of offenders
 - (b) the reduction of crime (including its reduction by deterrence)
 - (c) the reform and rehabilitation of offenders
 - (d) the protection of the public, and
 - (e) the making of reparation by offenders to persons affected by their offences."

She argues that the lengthy period which passed between the commission of the offence and the sentencing hearing enabled the court to see that Mr Tremayne had the capacity to be reformed and rehabilitated. His rehabilitation and reform would be the best protection for society. In that respect it would be more effective than, unhappily, previous prison sentences appeared to have been. She quotes in her written submissions the sentencing remark which we have cited above and argues that a prison sentence would have no benefit in terms of rehabilitation, the reduction of crime or the protection of the public. She emphasises the risk that a prison sentence would cause Mr Tremayne to resort once again to drug use and would give rise to the prospect of

homelessness upon release.

25. We have reflected on the able submissions made on both sides. We agree that the Sentencing Council's Street Robbery Guideline is relevant. There is, in our view, room for argument as to the appropriate categorisation of this offence in terms of that guideline and we remind ourselves that at step 1 of the sentencing process the guideline specifically says that:

"Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability."

26. Biting can properly be regarded as the use of a weapon. However, we disagree with Mr Polnay's submission as to the use of "very significant" force. There is, as it seems to us, no evidential basis in this case for coming to such a conclusion. In our view, the judge was entitled to conclude that category B was a fair assessment of the level of culpability. As to the level of harm, it seems to us that there was much to be said for Ms Bradberry's initial submission in the court below that the case fell between categories 1 and 2. We agree with Mr Polnay's summary of the relevant aggravating and mitigating features. We conclude that the learned judge would have been entitled to say that the appropriate sentence, before giving any credit for the guilty plea, would be one of 5 years' imprisonment. In the event, it would appear that the learned judge took a sentence of 4 years' imprisonment before allowing a reduction of 15% for the guilty plea. That was, in our view, very generous to Mr Tremayne. Bearing in mind however that Mr Tremayne was for a time recalled to prison and that he has for a time now been subject to the requirements of the order, we would not think it appropriate, at this stage, to depart from the length of sentence which the judge indicated when giving his Goodyear indication.
27. We turn now to the question of whether in all the circumstances of the case it was properly open to the judge to depart altogether from the category range appropriate under the guideline and to impose a non-custodial sentence as he did. The following factors are, in our judgment, relevant. First, with all respect to the learned judge, we think that it rather overstates the position to say that Mr Tremayne had "kept out of trouble for the past 2 years". He had been recalled to prison for some 6 months of that period and when at liberty he had in fact re-offended, albeit in a substantially less serious way. Secondly, the personal mitigation in this case is undoubtedly significant, and it is much to Mr Tremayne's credit that during his recent period at liberty he appears to have been avoiding drugs. The other side of the coin, however, is that during the period after the commission of the offence he was very far from showing any remorse for his actions. After his initial drunken statements about what had happened, he continued to deny the offence and to contest the proceedings. He was of course entitled to do so. But his decision to do so, in our view, weakens the claim that he has shown himself to be reformed. It must not be forgotten that although in the end the guilty plea spared the victim giving evidence, that was at the conclusion of a very lengthy process during which the victim must have been worrying about the prospect that he would have to give evidence.

28. Thirdly, it would be wrong to think that when released on licence after a custodial sentence Mr Tremayne would be left largely without assistance and that meaningful support for him in addressing his various problems could only be obtained by the imposition of a community order.
29. Fourthly, we agree that imprisonment would be hard for Mr Tremayne and risks testing his current good resolutions beyond his capabilities and we agree that that it would be very hard on his partner. But set against all that is the necessity to have regard to the need to impose appropriate punishment for this very serious offence against a most vulnerable person.
30. We bear very much in mind that the experienced judge had a discretion to exercise. He clearly considered the relevant factors and took care to set out his reasoning. We have hesitated as to whether it is right to conclude that he could not properly have come to the decision he did. We are however driven to that conclusion. The sentence imposed, in our judgment, was simply not adequate to reflect, and to provide just and proportionate punishment for, this very serious offence committed against a vulnerable victim whilst on licence. The personal mitigation available to Mr Tremayne has, as it seems to us, received significant acknowledgement in the length of the sentence indicated by the judge below. We accept, of course, that the rehabilitation of offenders is very important and we do not lightly go behind the decision of a judge who has had that factor in mind. It is however important also not to lose sight of the position of the victim.
31. We conclude that the sentence was unduly lenient. We therefore grant leave to refer, we quash the sentencing below in all its aspects and we substitute a sentence of 40 months' imprisonment.
32. Ms Bradberry, the offender will have to surrender. Are you able to assist us with the relevant police station?
33. MS BRADBERRY: Bridgewater Police Station.
34. LORD JUSTICE HOLROYDE: Bridgewater.
35. MS BRADBERRY: Obviously Mr Tremayne is in Taunton, his instructing solicitor hopefully will pass that message on to him as well as today's proceedings and he will have to get himself there. There is a police station in Taunton and I think if he gets into any difficulties he will just have to present himself there and the police make arrangements to get him to Bridgewater.
36. LORD JUSTICE HOLROYDE: Bridgewater Custody Centre. If we say by 4.00 pm today?
37. MS BRADBERRY: Certainly.
38. LORD JUSTICE HOLROYDE: Thank you very much indeed. Is there anything else Ms Bradberry, Mr Polnay?

39. MR POLNAY: I hesitate to raise it, the administration variation of the statutory surcharge.
40. LORD JUSTICE HOLROYDE: There must in addition be the surcharge in the appropriate sum. Thank you for reminding me. £170. We are grateful to the Associate as always.

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