

IN THE COURT OF APPEAL
CRIMINAL DIVISION
No: 201904430/A3-201904569/A3
[2020] EWCA Crim 1225

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 3 July 2020

LORD JUSTICE FLAUX

MR JUSTICE WILLIAM DAVIS

MR JUSTICE FORDHAM

R E G I N A

v

ANDRE BYRON HEWITT
JOVAN MULCARE

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Mr A Power appeared on behalf of the **Appellant Hewitt**
Mr T Copeland appeared on behalf of the **Appellant Mulcare**

J U D G M E N T

MR JUSTICE FORDHAM:

1. Andre Byron Hewitt and Jovan Mulcare, now both 28 years of age, came to be sentenced before Mr Recorder Walker (as he then was) (“the judge”), at Birmingham Crown Court on 22 November 2019, for robbery. They were sentenced with a third defendant, Aviz Alimi. A fourth defendant was acquitted. Alimi had pleaded guilty at the pre-trial preparation hearing (“PTPH”) in the Crown Court on 29 May 2019. Hewitt pleaded guilty six weeks later on 12 July 2019. Mulcare pleaded not guilty and was convicted after a trial before the same judge and a jury. Hewitt and Mulcare advance a number of grounds of appeal against sentence. The single judge granted Hewitt leave to appeal on one ground, refusing leave to appeal on the other grounds advanced by him and on all of the grounds advanced by Mulcare. Except for one ground relating to totality, all grounds which were refused leave by the single judge have been renewed before us and in their oral submissions to us counsel for Hewitt, Mr Power, and counsel for Mulcare, Mr Copeland, have relied on their written submissions embodied within the grounds of appeal, as well as the points they have emphasised orally.
2. The robbery took place outside a Birmingham City Centre nightclub, just before 4.00am on 21 April 2019. Hewitt, Mulcare and Alimi, as the judge explained in his sentencing remarks, had all come out of the nightclub, and so had Mr Rahan Hussain. Mr Hussain was alone and in a bad way, vomiting from alcohol. There was a confrontation between Hewitt and Mr Hussain. Hewitt grabbed Mr Hussain around the throat and forced him backwards against the shutters of a shop. Alimi became directly involved. As the judge explained, having dealt with the trial and having viewed the CCTV, as he said, several times: Mulcare, as could be seen on the CCTV, was standing as guard to prevent anybody from coming to Mr Hussain's assistance. Someone (probably Hewitt) shouted: "He's got a kettle on him" - meaning that Mr Hussain was wearing an expensive watch. Mr Hussain was punched four times to the head, blows landing on his face and the back of his head, all of which could also be seen on the CCTV. The punches, as the judge explained, were thrown in the furtherance of the robbery. Mr Hussain was restrained by his arms and his watch was taken.
3. There was a dispute of fact about whether Hewitt had said to Mr Hussain "give it to me or I'm going to poke you" - in other words, a reference to having a knife. That dispute was resolved by the judge after conducting a Newton hearing. The judge found that those words had not been spoken and he sentenced on that basis.
4. The watch taken during the robbery was valued at tens of thousands of pounds. Mr Hussain put its value at £64,000; the judge observed that other evidence suggested a value of £25,000. It had been a gift from a family member now deceased. Alimi, Hewitt and Mulcare and the fourth person all left the scene in a car but Mr Hussain was able to get its number plate. When the police eventually apprehended the four men in the car the watch was found concealed within the seats between Mulcare and the fourth man.

5. The judge's approach to sentencing involved four stages and we will be referring to these stages during our judgment. (1) First, there was his categorisation under the Sentencing Council Robbery Definitive Guideline (Street Robbery). He adopted category 2B, with a "starting point" of 4 years' custody and a category range of 3 to 6 years' custody. That was stage 1. (2) Secondly, there was his identification of an "initial point" before turning to address aggravating and mitigating features. That initial point, based on the assessment of culpability and harm, was adjusted down from the 4-year starting point for category 2B and was 3 years' custody. That was stage 2. (3) Third, there was the judge's identification of the appropriate sentence, before any reduction for any guilty plea, having addressed the aggravating and mitigating factors. That was stage 3. It took the sentence up to four-and-a-half years. The judge explained that the outcome of the first three stages was the same for Hewitt and for Mulcare and also for Alimi. (4) The fourth stage was reduction for guilty plea. That was stage 4. The judge gave Alimi one-third reduction and Hewitt 25%. Mulcare, of course, had no reduction. Leaving aside credit for time on remand, to which the judge referred, the custodial sentences for Mulcare and Hewitt were as follows: Mulcare, a custodial sentence of four-and-a-half years, Hewitt a custodial sentence expressed as follows: four-and-a-half years with 25% reduction for guilty plea, resulting in what the transcript recorded as 45 months. We will, for the purposes of our transcript, say that that is 45 months in the sense of the number "45", in words "forty-hyphen-five". The statutory surcharge was applied.
6. The single point on which leave to appeal was granted by the single judge to Hewitt concerns a mathematical miscalculation on the face of the transcript at stage 4, that is to say: reduction for guilty plea. The judge spelled out that but for the guilty plea, Hewitt's sentence would have been "four-and-a-half years". He also spelled out that he was giving Hewitt "25%" reduction for the guilty plea. But the transcript then has him spelling out that the sentence would be "45 months". The problem is that 25% reduction from four-and-a-half years is not 45 months; it is 40.5 months. The Crown in writing, in its respondent's notice and submissions attached, concedes that there was a calculation error and prosecution counsel has apologised for failing to spot it at the time and failing to bring it to the judge's attention. All of this happened notwithstanding that the judge concluded his sentencing remarks by asking all counsel, whether any matter arose from his calculations. He even said this: "I say if I have got calculations wrong, Mr Mulcare, four-and-a-half years" and "Mr Hewitt a quarter off that." The judge's intention was clear. As it happens, the sentence described on a comment on the Digital Case System for Hewitt said "40 months" (that is "four zero" months) which the judge approved as "correct". Later this was 'corrected' to "45 months". As it also happens, the difference between 45 months and 40.5 months is the difference between the words "forty" and "five" separated by a hyphen and the numbers "40" and "5" separated by a full stop. It is neither necessary nor fruitful to say more about how the problem arose, but it did. Nor about what Mr Power told us was his decision not to invoke the slip rule but instead to come before this court with this among other grounds of appeal. What to do about the miscalculation is best revisited when we dealt with all the various grounds of appeal, all refused leave by the single judge and all, except one, renewed before us. We turn then to them.
7. We have been assisted by written and oral submissions - the oral submissions made

remotely, for Hewitt by counsel Mr Power and for Mulcare by Mr Copeland. In arguing that the sentence was manifestly excessive or wrong in principle, both Hewitt and Mulcare, through their counsel, challenge the judge's assessment at his stage 1 (categorisation). There are really two points. First, they say that the judge was wrong to put this offence within category 2B. They say the robbery involved only minimal force (a point emphasised by Mr Power) and in any event, they say, caused only minimal physical or psychological harm amounting really to minor bruising (a point emphasised in particular by Mr Copeland who characterises it as perhaps "the real issue"). The second point is one made by Mr Power on behalf of the Hewitt but adopted by Mr Copeland. It is this: Hewitt says that the judge ignored the whole point of the Newton hearing that the prosecution had invited, and the judge had conducted, with its favourable finding that was supposed to make a material difference to sentence. What on earth, says Mr Power, was the point of the Newton hearing or the impact of the Newton hearing if the sentencing categorisation was 2B and remained 2B particularly, as he submits, because the Newton hearing eliminated any "medium" culpability factor related to "production of a weapon" or a "threat of violence by [a] weapon (which is not produced)"?

8. There is nothing in these points. The judge was entitled to adopt the approach that he did. He said this:

"I take the view that this is more than the threat or use of minimal force. There were four punches and Mr Hussain was grabbed around the throat and compelled to make his way towards the shutters. That, to my mind, is not the use of minimal force and, therefore, this falls within category B culpability. In relation to harm, again although it is argued that there was no physical harm or minimal physical harm or psychological harm caused to the victim, I do not agree with that submission. Mr Hussain described suffering discomfort to his head and face. He was scared and isolated as a result of this."

Mr Copeland has submitted that those matters, on the evidence before the judge, were incapable of safely supporting a conclusion that there was more than minimal physical harm in the present case. We do not agree. The judge was justified in taking category 2B and then, as his stage 2, evaluating the specific degree and features of culpability and harm, to identify what he called his "initial point" of 3 years. He did that, looking at all the facts. He had well in mind the nature of the harm and the nature of force. He also had well in mind the favourable finding from the Newton hearing which he had conducted. We agree with the single judge when she said: "It is not arguable that the Judge erred in categorisation", adding this:

"Four punches to the head of a vulnerable (vomiting) man is not minimal force. Nor does the victim impact statement reveal minimal or no impact. The Judge was entirely correct to place it within 2B but adjust by reference to 3B and 2C to reflect the fact that it was best seen as a lower end of 2B offence. He thus categorised the offence entirely correctly."

9. In the light of Mr Power's oral submissions there are two further points worth emphasising. Firstly, a Newton hearing, capable of making a material difference in relation to sentence,

is not restricted in its impact to whether or not a different “category” is going to be selected. A Newton hearing can make a material difference within a “range”, as a nuanced approach is taken in the light of all the facts and circumstances relating to culpability and to harm. The second point is that, so far as “production of a weapon” and the “threat of violence by any weapon (which is not produced)”, that is nothing to the point. The factor so far as culpability was concerned that took this case above C (“lesser” culpability) to B (“medium” culpability) was that there was more than the “threat or use of minimal force” and therefore this was an “other case” as it is described in the Guideline. We cannot accept Mr Power’s characterisation that that “other cases” is in some sense, as he described it, “nebulous”. It is significant. It is clear what the judge was doing, and he was right to do it.

10. We turn to the criticisms made of the judge in assessing aggravating and mitigating factors and arriving at the four-and-a-half years’ custody. This was his stage 3. The judge regarded all of the defendants as having relevant previous convictions. He had earlier described in detail Hewitt’s 13 convictions for 20 offences, including assaults in 2007 and robbery and attempted robbery in February 2010. He had described Mulcare’s 6 convictions for 13 offences, including assault in 2013. The judge took into account that there was little or no advanced planning but he explained that this was a victim who was targeted, who was alone at night and drunk and who was physically restrained, from whom an item of extremely high economic value, and high sentimental value, was taken, which there was subsequently an attempt to conceal. These observations all reflect factors described in the Robbery Definitive Guideline at the aggravating and mitigating factors stage of the assessment. The judge then went on to consider the personal mitigation, referring to the aspects which he considered most significant: letters which he had read, medical evidence which he had considered, references and descriptions of work and other activities. It is not arguable that any material factor was overlooked in the judge’s assessment.
11. In the grounds of appeal, Hewitt had submitted that the judge should have addressed totality in the context of three strikes Class A drug offending, for which he was awaiting sentencing at Swindon Crown Court. That point has been abandoned before us, on the basis of subsequent events: that the matter was properly subsequently considered by Swindon Crown Court. But the point was a hopeless one for a more fundamental reason, looking at the position as things stood before the judge, and his approach. The judge was, as the single judge put it, quite right about this point when he said this:

"That is not a matter for today, in my judgment. That is a matter for the judge who comes to sentence you at Swindon Crown Court. He will know about the outcome of today and will quite properly take totality into account when he comes to sentence you there."

12. Mr Copeland for Mulcare submits, next, that the judge should have sentenced Mulcare more leniently than Hewitt, on the basis of lesser role that he played and the duration of time for which he played it. Mr Copeland characterises Mulcare as having been involved in shielding or being a lookout or shield. He emphasised in his grounds of appeal the following points: that Mulcare did not instigate the robbery; that he was not present when it began; that he joined in and stood as a lookout or human shield; that he left the scene

before the more serious violence (punching) started; and that he did not use violence at any stage. Mr Copeland ultimately submitted that that the judge was to be criticised for not having a sufficient close regard to the particular role that Mulcare had played which he submitted needed "a forensic analysis".

13. We are satisfied that there is nothing at all in this point. As the single judge said: in effect this is a disparity argument but it is not arguable that it reaches the high hurdle for an appeal on the basis of disparity. We agree. In his sentencing remarks the judge, who it will be recalled conducted the trial in relation to Mulcare preceding the conviction following his not guilty plea said this:

"... the CCTV clearly shows that you each knew the role that you had to play... But once Mr Hewitt had decided to rob Mr Hussain, having targeted a drunk person with a high-value watch, you were all willing participants, you all knew the role that you had to play, you all took part in this robbery."

The judge also specifically described, at the start of his sentencing remarks, how: "At some point, all three of you became involved", with "Mr Mulcare seen on the CCTV acting as guard plainly to prevent anybody from coming to Mr Hussain's assistance". Mr Copeland relied on R v Hattherley [2009] EWCA Crim 1873. At paragraph 7 of the judgment in that case the then Coulson J said this:

"In many cases involving joint enterprise it is unnecessary and unhelpful for the court to differentiate between the defendants, and entirely appropriate for the same sentence to be passed on each."

He went on to say:

"On the other hand, there will be cases where, such is the disparity between the roles played by the different defendants, that justice requires a detailed consideration of the part played by each defendant before an appropriate sentence can be identified."

Mr Copeland's submission comes to this: this case needed to be seen by the judge as falling within the second description. The judge plainly saw this case as falling within Coulson J's first category, so did the single judge, and so do we.

14. That leaves stage 4: reduction for guilty plea. Mr Power, for Hewitt, submits that his reduction should have been one-third, on the basis that his guilty plea (6 weeks after the PTPH) was at the first reasonable opportunity, in circumstances where the CCTV had only then been belatedly disclosed meaning, as it is put in writing, that his legal team was unable properly to advise him. He submitted orally that this is a classic CCTV case, and that his position on level of reduction was borne out by the Newton hearing. This point, in our judgment, is hopeless. The judge said this:

"It is quite clear to me that you were in a position where you knew exactly what was alleged against you at the point that you were here at the Crown Court. You knew what the evidence was."

As the single judge put it:

"As the initiating participant [Hewitt was] well able to form a view as to plea without waiting for advice."

15. This renewed ground of appeal, by which Hewitt submits he should have been entitled to the same full one-third reduction for guilty plea as was described by the judge in the case of the co-defendant Alimi, gives rise to a concern. There is no entitlement to a one-third reduction for a plea of guilty at the PTPH. The one-third reduction is applicable only where a guilty plea is indicated "at the first stage of proceedings". That will normally be in the Magistrates' Court. There is, at the very least, a serious question-mark as to one-third reduction, described in the present case as applicable to a guilty plea at the PTPH, with a 25% reduction then applicable to Hewitt's guilty plea 6 weeks later. The Crown did not evidently raise any point about that before the judge, nor did the Crown raise this point in the respondent's notice before us. We are not in any way to be taken as endorsing the logic that a one-third reduction is generally applicable to a guilty plea entered at the PTPH. It is not. There may have been reasons why in this particular case a one-third reduction for a guilty plea at the PTPH was, exceptionally, justified. We have not investigated or interrogated that point, including at this oral hearing. It has not been raised by any party. It is sufficient that we comment in the terms that we have.
16. For all those reasons, there is nothing in any of the points which are sought to be renewed before us. We refuse leave to appeal on all them. What remains is the ground on which the single judge granted Hewitt leave to appeal, namely the miscalculation which led to four-and-a-half years reduced by 25% producing 45 months rather than 40.5 months. For the reasons we have just given, we resist the temptation to conclude that the 25% was itself over-generous as being based on an unjustified one-third reduction being applicable to a guilty plea at the PTPH, thus cancelling out the miscalculation. We are satisfied that it is appropriate that we uphold the ground of appeal based on miscalculation. In doing so we are giving effect to the judge's clearly expressed intention. We are doing so, moreover, in a case in which the prosecution properly acknowledges that the point was not recognised and brought to the attention of the judge. It is very clear that the sentence in Hewitt's case, had the miscalculation been spotted, would have been not 45 months but 40.5 months. We allow his appeal to the limited extent of substituting a sentence of 40 months 2 weeks.

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

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