

NCN: [2020] EWCA (Crim) 349
No: 201904698 A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 11 February 2020

B e f o r e:
LORD JUSTICE SIMON

MR JUSTICE EDIS

MR JUSTICE CHAMBERLAIN

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

R E G I N A
v
DAVID CONTEH

Mr P Jarvis appeared on behalf of the **Attorney General**
Mr C Burton appeared on behalf of the **Offender**

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22
Furnival Street, London, EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

J U D G M E N T

LORD JUSTICE SIMON:

1. The Solicitor General applies, under section 36 of the Criminal Justice Act 1988, for leave to refer sentences passed on the offender, David Conteh, at Inner London Crown Court on 4 December 2019, as unduly lenient. We grant leave.
2. The offender was charged on indictment with eight offences: counts 1 to 5 and 7 charged offences of robbery, contrary to section 8(1) of the Theft Act 1968, counts 6 and 8 charged the offence of having an offensive weapon, contrary to section 1(1) of the Prevention of Crime Act 1953. At the plea and trial preparation hearing on 2 August the offender (then and now aged 22) pleaded guilty to count 3 and not guilty to counts 1, 2, 4 and 5 but guilty to theft in the alternative. He pleaded not guilty to count 6 and by an oversight was not arraigned on counts 7 and 8.
3. At a mention hearing on 4 November he changed his plea to guilty on counts 1, 2, 4, 5 and 7 and not guilty to count 8. The trial on counts 6 and 8 was confirmed for 4 December.
4. It was on that day (the first day of the trial) that he pleaded guilty to the two remaining counts. He was sentenced by Mr Recorder Sallon QC to concurrent terms of imprisonment: 18 months on counts 6 and 8, the offensive weapon charges, 3 years on counts 1, 2, 3 and 4 and 4 years on counts 5 and 7 - those collectively being the robbery charges. The overall sentence was a term of 4 years' imprisonment.
5. The charges arose out of a spate of criminality between 15 and 21 April 2019, when the

offender robbed a number of shopkeepers occupying convenience stores, making off with alcohol and, on one occasion, with cash from the till.

6. Although there were six robberies there were four direct victims because two of premises were robbed twice. On several occasions violence was used against the shopkeepers. One was struck with a bottle and another grabbed by the throat. On two occasions, on the same day, he took a knife with him and threatened the shopkeepers with it. The offender had previous convictions for robbery and possessing a knife in a public place, and was on licence at the time of the offences.
7. On 15 April 2019 the offender entered a Costcutter supermarket in Tower Bridge Road. He looked at some items on the shelves before he turned and lunged towards alcohol behind the counter. The shopkeeper, Amir Shafiq, tried to stop him. The offender struck him twice on the head with a bottle which caused Mr Shafiq's head to bleed and ripped his jumper. The offender then grabbed three bottles of alcohol worth about £90 and ran out of the shop (count 1).
8. Two days later, on 17 April 2019, the offender entered the same shop. Mr Shafiq was on duty again, and recognised the offender straightaway. The offender said to him: "Give me a bottle. Don't tell the police or I'll beat you". Mr Shafiq was in shock. The offender jumped onto the counter and grabbed a further three bottles of alcohol worth between £60 and £90 and ran off, saying: "Don't tell anyone. Don't tell the police" (count 2).
9. The following day, 19 April, the offender went into Terry's News on Dunton Road SE1 at

around 7.20 am. The shopkeeper was Tarun Patel. The offender pretended to peruse the shelves before placing some eggs, beans and soft drinks on the counter. He asked Mr Patel for two expensive bottles of alcohol. Having been the victim of previous robberies at the shop Mr Patel was weary of handing over bottles of alcohol to anyone before receiving payment. He asked the offender to pay, at which point the offender said that his bank cards were in his car, and left. He returned some minutes later. He was pretending to talk loudly on his mobile phone. As soon as the shop was clear of customers he flipped the counter up to get to the alcohol behind it. He grabbed Mr Patel by the throat and said: "Don't move or I'll smash the bottle on your head". With his spare hand he reached into the open till and pulled out £50 in cash. He said to Mr Patel: "Let me get two bottles". Afraid for his safety, Mr Patel replied: "Okay, no problem". Whilst still holding his neck the offender took two bottles of alcohol worth about £60 and ran off (count 3).

10. On 20 April, the offender entered Chris Convenience Store on Dawes Street SE17 at about 7.30 am. The shopkeeper was Sivagi Thambapillai. The offender approached the counter, placed a bottle of soft drink on it and asked Mr Thambapillai for a bottle of white rum. Mr Thambapillai took a bottle from behind the counter and put it down. The offender reached over and grabbed it. There was a struggle during which the offender threw a bottle of soft drink at Mr Thambapillai with force. Mr Thambapillai moved out of the way and the bottle struck the wall. As he dodged out of the way his glasses broke. He ran out of the shop for help. Seizing this opportunity the offender jumped onto the counter, took two bottles of white rum and ran off. In the process some of the shelves behind the counter where sweets were kept were damaged (count 4).

11. On 21 April, the offender went into the Convenience Store at Browning Street S17. The shopkeeper was Magbool Ahmad. The offender walked around the store until the number of customers reduced. He then went behind the counter, pulled out a knife and threatened Mr Ahmed.
12. There was a struggle, during the course of which Mr Ahmed received a number of minor cuts to his hand. The offender grabbed two bottles of alcohol and made off (counts 5 and 6).
13. On the same day the offender returned to Chris Convenience Store in Dawes Street. As before the shopkeeper was Mr Thambapillai. He recognised the offender immediately and pressed the panic alarm several times. The offender went behind the counter where Mr Thambapillai was standing, drew out a knife and threatened him with it. A number of elderly customers were in the shop and saw what was happening but unsurprisingly were too afraid to intervene. Fearing a confrontation Mr Thambapillai backed away. The offender took three bottles of alcohol and made off (counts 7 and 8).
14. He was arrested and interviewed on 4 July. He told the police he was dependent on drugs and that he stole in order to feed his habit. He admitted the robbery in count 3 but said that he had not committed any other robberies. He was subsequently charged.
15. The offender had 14 criminal convictions from eight previous court appearances. His earliest conviction was in July 2011, when he was 14 years old, for an offence of robbery. Since then he had been convicted of possession of cannabis, possession with intent to

supply heroin, cocaine and crack cocaine, assault, assaulting a police constable in the execution of his duty, robbery and having a knife in a public place.

16. On 3 February 2017, he had been sentenced to 15 months' detention for an offence of robbery committed while he was on bail. On 24 November 2017, he received a concurrent sentence of 3 years' detention for an offence of possessing cocaine with intent to supply. He was on release on licence from that sentence when he committed the offences between 15 and 21 April. There were no reports in this case.

17. In his personal statement Mr Shafiq (counts 1 and 2) said that the robberies had left him feeling shocked and frightened. He runs a small business, and even the theft of a few bottles of alcohol can have a significant impact on his profits. He now feels more anxious going to work than he did before.

18. In his personal statement Mr Patel (count 3) said that the crimes had scared him so much that he was selling his business and planned to move away from the area. He does not want his daughter to grow up in the area knowing that there are people like the offender around. He bought his business for £95,000, but was only able to sell it for £75,000 so his decision to sell up has cost him a considerable amount of money.

19. In his personal statement Mr Thambapillai (counts 4, 7 and 8) said the robberies had left him feeling very scared. Since then he has refused to work alone and insists that another person is in the shop with him at all times. He works fewer shifts, and that costs him money. There was no victim personal statement from Mr Ahmed (counts 5 and 6).

20. The Recorder was taken to the Sentencing Council's Definitive Guideline for Robbery for street and less sophisticated commercial robberies. Prosecution counsel submitted that so far as counts 1, 5 and 7 were concerned, there was high culpability, category A because the offender had either produced a knife, in order to threaten victims (counts 5 and 7) or had used a weapon (a bottle) to inflict violence on the victim (count 1). The harm was category 2. Category 2A provides a starting point for a single offence of 5 years' imprisonment and a range of 4 to 8 years. It was submitted that for count 3 there was medium culpability category B, but category 1 harm because there had been a serious detrimental impact on the victim's business as a result of the sale at a loss. Category 1B also provided a starting point of 5 years' imprisonment and a range of 4 to 8 years.

21. As to the other robberies (counts 2 and 4) there was medium culpability and category 2 harm which provided a starting point for a single offence of 4 years' imprisonment with a range of 3 to 6 years.

22. Prosecuting counsel did not take the Recorder to the Definitive Guideline for sentencing the offensive weapons offences (counts 6 and 8). It was submitted that the fact that the offender was armed with a knife should properly be considered as a feature of the robberies. The Recorder decided to give 20% credit for the pleas of guilty. He took an overall sentence for the offending of 5 years' imprisonment and reduced that to reach the final term of 4 years. He imposed a 4-year sentence for the two offences where the offender had a knife (counts 5 and 7) and lesser concurrent terms for the other offences.

23. For the Solicitor General Mr Jarvis takes the initial point that for four of the robberies the

starting point for a single offence was a term of 5 years and a range of 4 to 8 years: Counts 5 and 7, where a knife was produced and which the Recorder regarded as the most serious offences, count 3 where the victim had to sell his business and count 1, where a bottle was used as a weapon. But there were two other robberies and looking at the matter broadly, the offender had to be sentenced for six robberies carried out over a period of around 1 week, where there were four victims (two of whom were robbed twice). In the course of committing those offences the offender used or threatened violence against the victims and on two occasions produced a knife that he had taken with him in order to reinforce his threats. Each of these offences carried a starting point of either 4 or 5 years' imprisonment. The offending was also aggravated by the fact that the offender was on licence from an earlier sentence at the time and had a number of relevant previous convictions. There was, submitted Mr Jarvis, little by way of mitigation available to the offender. Mr Jarvis also sidled up to a complaint about the 20% credit for the pleas but the focus of his argument was that this highlights the undue lenience of the overall sentence of 4 years.

24. For the offender Mr Burton recognises that this was a lenient sentence but submits that it was not unduly so. He accepts that three of the robberies fell within category 2A of the guidelines and that the Recorder was bound to treat the other offences as calling for an upward adjustment to what would otherwise be the appropriate sentence for a single offence. It is likely therefore that he took a sentence before mitigation of above 5 years. He submits that the Recorder was entitled to give effect to the mitigation. He had been drawn into drug dealing by a gang when he was very young and had been unable to extricate himself. It was this that led to the conviction in 2017 and the term of 3 years

youth detention. He has, Mr Burton says, been previously unable to articulate the way he has been 'trapped', as Mr Burton put it, into offending. Mr Burton also drew our attention to a document entitled "Instructions of the defendant" which was before the Crown Court. His broad submission is that the current offending was the result of both a continuing need to pay off his drug debt to the gang and his addiction to crack cocaine. He accepts that this is a matter wholly within the knowledge of the offender but highlights his expressed desire to move away from those who controlled him. This background, he submits, provided compelling mitigation which had been acknowledged and properly taken into account by the Recorder.

25. As the Recorder noted in his sentencing remarks, the offender had committed these offences within 3 months of being released on licence for his previous offending. In a spree of robberies he "targeted, attacked and physically assaulted vulnerable single storekeepers in the local High Streets" taking alcohol, cash or both.

26. The relevant sentencing guideline is the Sentencing Council's Definitive Guidelines for Street and Less Sophisticated Commercial Robberies. For the offences where a knife was produced (counts 5 and 7), where violence was used with a weapon (count 1) and where the victim had to sell his business (count 3), the starting point for a single offence was a term of 5 years' imprisonment with a range of 4 to 8 years. For the other two robberies the starting point was a term of 4 years and a range of 3 to 6 years.

27. There was the further aggravation of the offender's previous convictions for robbery and the fact that he had been released on licence shortly before these offences. The fact that

the robberies were not planned, although of little consolation to the victims, reduced the seriousness. An expression of remorse and a self-reported history of exploitation by a gang may carry some weight, and although the Recorder did not refer to it in his sentencing remarks, we accept that he acknowledged this during the course of the mitigation. However the potency of expressed remorse and the background to offending are reduced in effect the more the offender continues to commit crimes. He is now 22. The excuse of youth and immaturity is thin. Nevertheless, there are signs of progress and we accept that there is hope for the future in turning his life around.

28. However, even with some of the mitigation relied upon, the sentence before credit for plea should not have been less than seven-and-a-half years bearing in mind the number of offences and the history of offending. We are not inclined to interfere with the credit of 20% credit for plea. The resulting sentence should have been an overall term of 6 years and not 4 years. The sentence of 4 years was unduly lenient.

29. Accordingly, we quash the sentence of 4 years' imprisonment on counts 5 and 7 and substitute terms of 6 years on each count. The other sentences will remain unaffected.