

NCN: [2020] EWCA (Crim) 554
No: 202000444 A4; 202000445 A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 20 February 2020

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE LEWIS

MRS JUSTICE MAY DBE

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

R E G I N A

v

DAVID MASTER MERCER
KIRSTY LOUISE NORRIS

Mr T Schofield appeared on behalf of the **Attorney General**

Mr N Hamblin appeared on behalf of the **Offender Mercer**

Mr R Dogra (Solicitor Advocate) appeared on behalf of the **Offender Norris**

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 Attorney General seeks leave to refer sentences passed on the two offenders in the Crown Court at Lewes by Her Honour Judge Arnold on 9 January 2020, under section 36 of the Criminal Justice Act 1988, as unduly lenient.
2. David Mercer is 25 and Kirsty Norris is 31. On 24 October 2009, in the Crown Court sitting at Lewes, the offenders pleaded guilty to an offence of robbery (count 1), contrary to section 8 of the Theft Act 1968, and five offences of fraud by false representation, contrary to section 1 of the Fraud Act 2006 (counts 2 to 6).
3. Sentencing was adjourned for reports, and it was on 9 January 2020 that each offender was sentenced to terms of 24 months imprisonment suspended for 24 months with a rehabilitation activity requirement for a maximum of 35 days.
4. In summary, the victim of these offences was 56-year-old Christopher Burke. He was a disabled man who was robbed in his own home. Norris had befriended him and, in what was a betrayal of the kindness he showed her, she planned, with her partner Mercer, to trick him into allowing Mercer into his home so that he could steal cash and a bank card whilst she distracted him.
5. Once invited into the victim's home to share a meal, Norris telephoned Mercer to give him the signal to put their plan into effect. Mercer came to the victim's door claiming to be from the council, and when he became suspicious and refused to let him in,

Mercer punched him several times to the face and neck, leaving only when he had stolen his Christmas money and bank card. The offenders then went on a spending spree with the bank card, buying new clothes among other items.

6. In more detail: Christopher Burke is a vulnerable person owing to a variety of serious medical conditions and disabilities including hydrocephalus (an accumulation of fluid on the brain), cerebral palsy (a group of movement disorders), dyspraxia (a condition affecting balance and coordination), caetextia (context blindness in those on the autistic spectrum) and Asperger's Syndrome (a disorder which affects social awareness and the ability to infer thoughts, emotions and feelings in others). In addition to his physical and mental disabilities he was vulnerable, in that he had been previously the target of violent attacks in his hometown of Hastings, to such a degree that the authorities had moved him to Brighton for his personal protection.
7. The Attorney General submits that these disabilities and vulnerabilities were well known to Norris since she had met him 18 months before the index offences and had introduced him to Mercer.
8. The victim believed that Norris was his friend and showed her kindness by providing her with food and company; and helping her more generally in her life. In the late morning of Tuesday 16 October 2018, she went to his home. He cooked her a meal with the little money that he had. He noticed that she appeared to be on edge, but thought nothing of it. She went to use the toilet and he overheard her talking on the telephone. She was calling Mercer as they had planned in order to give the signal to put their plan into effect.

Shortly afterwards, Mercer pressed the external intercom button and, when Christopher Burke answered it, claimed he was from the council and had come to inspect the hole in the ceiling of the flat. That information about the hole had come from Kirsty Norris, who knew about the hole from previous visits to the flat.

9. When Christopher Burke opened the door, he was suspicious and asked Mercer for some identification. Mercer left and returned some 10 minutes later with what appeared to be a driving licence. When Christopher Burke still refused to let him into his home, Mercer slammed him back against the door saying: 'I want money. Give me money now', and punched him four or five times, putting his hand into the bag which was hanging around his neck. The victim tried to keep him out of the flat and punched him approximately three times in the face to defend himself. Whilst Mercer was subjecting Christopher Burke to this attack Norris feigned surprise and pushed Mercer, pretending to help the victim. Mercer managed to steal the victim's bank card and cash, which had been in the bag with a broken zip hanging around his neck, before running away. Norris remained and kept up the pretence of not being involved in the robbery, although the reality of her involvement soon dawned on the victim. The offenders had stolen all of the money that he had been saving for Christmas.

10. When the offenders were reunited they indulged in a spending spree with the stolen bank card, making a number of purchases which were captured on CCTV footage over a period of just over an hour: at Well Down £3.18 (count 2), at Primark £25 (count 3), also at Primark a further transaction of £18 (count 4); Boots £8 (count 5) and Sports Direct £6.05 (count 6). They changed into the new clothing they had bought at Primark.

11. The victim suffered cuts and bruising to his face and neck as a result of the robbery.

12. Just over a week later, on 25 October 2018, the offenders were arrested at the home they shared in Brighton. In a lengthy interview on the same day, Mercer denied the offences, claiming that he had never been to the victim's home and asserting a wholly false alibi. Norris made no comment in her interview. When they were interviewed again on 12 November, they each made no comment.

13. Christopher Burke expressed his feelings in a moving and articulate victim statement:

I've been scared of people all my life because of the negative ways they react to my disabilities. I feel I am often seen as a target and in fact that's why I am living in Brighton. I had so many problems with people burgling, attacking, bullying me where I used to live. The police there helped me to move to Brighton for my own protection.

I thought I was safe here. I was trying to rebuild my life, maybe make friends. I was feeling more confident and positive about life. Now, because of this incident, it just feels like I'm starting over again, scared to go out, scared to make friends as I can't tell if they are for real or if, like Kirsty, they're just setting me up.

The attack left me with contusions around my face and a blackened eye but inside they made me feel puzzled and scared. Why I was being treated by someone I, till then, thought of as a friend I'd had for 2 years? I couldn't work out why Kirsty and her partner had suddenly turned on me, or what I'd done to cause this attack. I'm scared all the time now, all the time even now. When I first moved down here, it was such a relief to be free of the situation I was in in Hastings. I felt euphoric given new opportunities I thought I was going to get. I could prove myself able to hold down a voluntary job, make friends and be with people for once. Now I am back to where I was, scared of everyone, scared to be with people, even unsure how to react if people talk to me. I want to fit in with others, disabilities aside. But I struggle with understanding how to know what they are not going to treat me like Kirsty and her partner did.

I find myself avoiding other people more often since the attack which was

over a year ago. I am choosing times to go out when I hope fewer people will be around. I am not going to city centre because I am that scared of everyone in the busier areas. I am constantly worried I will be attacked or targeted. I no longer try to talk to others just in case I pick the wrong ones.

Later, he added:

I cannot believe that the attack happened as I honestly would have referred to Kirsty as a friend at the time. I feel that I was targeted because of my disabilities. I thought Brighton would be more accepting of my physical differences as it has a reputation for being more accepting. I am realising that for people like me that reputation is greatly exaggerated, if it exists at all.

14. So far as their antecedent history was concerned, Mercer had received a suspended sentence on 20 December 2013, for offences of arson, making a threat to kill and having a bladed article in a public place. The offences took place on 31 May 2013 and were all committed against a former partner. On 11 September 2014 he breached that suspended sentence order by committing an offence of battery on 10 June 2014 against another partner during the operational period of the earlier suspended sentence order. He was made the subject of a further suspended sentence order on 23 March 2015 and the earliest suspended sentence order was not activated.

15. Norris had been conditionally discharged for a period of 12 months on 18 September 2006, for an offence of theft committed on 22 November 2005. She received a suspended sentence on 10 September 2014, in respect of four offences of theft from a dwelling and two offences of fraud by false representation committed between January and March 2014. Those offences bore a similarity to the index offences in that they were also committed against a vulnerable autistic victim, who was living in housing for people with severe learning difficulties, whom she had befriended. She went to the victim's flat,

kissed him and then suggested that he take a shower. When he left the room, she stole his iPhone and £50 in cash. In 2015 she breached the suspended sentence order which was imposed on 10 September 2014. The sentence was not activated.

16. The sentencing court had a number of reports. In respect of Mercer the author of the pre-sentence report concluded that the risk of him re-offending was medium and the risk of him causing serious harm to members of the public by the commission of further offences was also medium. The author of the report considered that his response to previous supervision was good, notwithstanding the fact that he had previously offended during the operational period of a suspended sentence order. The report stated, 'probation records show that Mr Mercer completed his last sentence with positive feedback. He demonstrated a capacity to change although this was in some ways inhibited by rigid thinking and lack of consequential thinking.' In his interview with the probation officer, Mercer blamed Norris for pressuring him into committing the robbery. He confirmed that the victim had been identified as a target owing to his vulnerability. The plan was to commit a distraction burglary, and that violence would only be used if the need arose. He claimed to feel 'dreadful' about what he had done and professed a desire to make it up to the victim.

17. There was a psychiatric report by Professor Chris Fox. This stated that he had a history of depression, with a diagnosis of attention deficit hyperactivity disorder for which he was receiving medication (ADHD). He claimed to hear voices in his head which told him to do things, and explained that he had suffered from low mood, anxiety and anger for most of his life. There was contemporaneous evidence that he had had a disruptive

childhood, and had been the subject of child protection proceedings due to his behaviour and because of poor parenting. He had attended special schools for those with learning disabilities, including a Barnardo's Special Education Needs Boarding School from the age of 13 until he was 18. In conclusion, Professor Fox took the view that:

Regarding a custodial sentence, I believe he would be more vulnerable due to his learning difficulty needs and his ADHD and he would either be potentially taken advantage of or be at risk of suffering from or potentially lashing out with his anger.

18. Mercer suffers from a heart condition for which a loop recorder was fitted on 22 November 2019. An electronic monitoring recording device is placed within 2 metres of his bed and provides the local hospital with downloaded information which is a vital part of the continuing assessment of his heart condition and the need for potential surgery.
19. The pre-sentence report in respect of Norris concluded that the risk of her offending was low to medium. The risk of her committing further serious offences was assessed as low, and the risk of her causing serious harm to members of the public by the commission of further offences was medium. The author of the report considered that her response to previous supervision was good notwithstanding the fact that she had breached a supervision requirement in 2015. In her interview with the probation officer Norris had accepted that she had sought out the victim on the day of the index offence to ask him for money, which suggested a level of planning. She claimed that the victim had attempted to touch her arm and leg in an attempt to get close to her and chat her up, and she showed a poor level of victim empathy. She was 8 weeks' pregnant with Mercer's child. Her four previous children had been taken into care and adopted, and this was the likely destiny of

her unborn child.

20. Records revealed that she had been in previous abusive relationships and had been the victim of sexual abuse as a child when her mother 'sold her to men' for the purposes of sexual exploitation. She had spent part of her childhood in care. The probation officer concluded:

... I would urge the Court to consider the Female Offender Strategy (Ministry of Justice, 2018) which looks to divert female offenders from custody wherever possible due the disproportional impact it can have. Custody can undermine the ability of women to address the issues that have caused their offending. For Ms Norris this is likely to be her lack of consequential thinking combined with her vulnerability by way of her learning disability and exposure to more sophisticated offenders in Prison. She is also vulnerable as a pregnant woman. A further factor that will be disrupted is her housing and her state benefits, both stabilising factors that are likely to have reduced her risk of offending in recent years.

21. A psychological report by Dr Conning found she had an IQ of 65 (which is 'extremely low'), her verbal comprehension was 'extremely low', and she was considered to be 'intellectually impaired'. She had attended a special school as a child, and at 18 had been given support by a care team for adults with learning disability. Dr Conning concluded that her current level of intellectual functioning was compatible with her having a 'global learning disability' and that she was susceptible to exploitation.

22. A psychiatric report by Dr Bekoe concluded that she had 'a mild learning disability' which was unmedicated and incapable of being cured. Dr Bekoe took the view that as a consequence of her limited intellectual ability she was vulnerable and could be vulnerable to sexual and financial exploitation or suggestible and, as a consequence of childhood

neglect and abuse, was prone to stress and depressive disorders. The ultimate conclusion was that she would be 'extremely vulnerable in a custodial setting'.

23. The offenders appeared before the Justices at Sussex Central Magistrates' Court on 26 September 2019. On the Better Case Management forms Mercer indicated that there was 'a factual dispute. Norris made no indication as to her intended plea and requested the service of various items of evidence to identify the issue in the case.

24. The offenders both pleaded guilty to the index offences at the pretrial preparation hearing in the Crown Court.

25. In passing sentence, the Judge made a number of observations. She stated that she had regard to the Sentencing Council sentencing guidelines both for robbery within the home and for community and custodial sentences. She also had regard to the principle of totality, appropriate credit for the guilty pleas, and to the recent case of *PS, Abdi Dahir and CF* [2019] EWCA Crim 2286, which addressed the right approach to sentencing those, like the offenders, who had either mental health or learning disabilities.

26. The Judge added these further remarks. First:

This was, though a particularly mean and unpleasant offence and there was, very clearly, an element of planning but I don't consider that either of you, in the light of what I have read in all of the reports, had any real appreciation of the seriousness of the offence that you were committing or indeed its impact on a very vulnerable victim.

Second:

... it is appropriate to reduce your levels of culpability from what would normally fall into culpability level 2 [she meant B] to culpability level 3 [she meant C] where specific provision is made for mental health and learning disabilities. So far as the harm that was suffered by Mr Burke is concerned, I am in no doubt that the impact on this vulnerable man, particularly in terms of the psychological harm, was serious. Albeit, the goods which were taken and the frauds which were carried out were not of any significant value, they were not insignificant sums of a man of means and nature. But on balance, I take the view that the harm is most appropriately categorised as category 2.

27. For the Attorney General, Mr Schofield made his primary submission by reference to the Sentencing Council Definitive Guidelines for Robbery in a Dwelling. He draws our attention to the observations of this court in *Dance* [2014] 1 Cr App R(S) 51 at paragraph 9 in relation to offences, in that case burglary, which target vulnerable victims:

... distraction burglaries targeted at vulnerable victims are a very serious crime, despite the fact that they may involve no violence to a person or a property. Such offences may well merit a sentence higher than the top of the range in the guidelines (6 years), particularly if there is a pattern of repeat offending of this kind.

28. In summary, he submitted that the robbery offences should have been categorised as category 2A of the Guidelines with a starting point of 8 years and a range of 6 to 10 years. However, he also recognised that there should then have been a downward adjustment to take into account the offenders' learning difficulties and their own vulnerability, and that further credit was due for their pleas, although he submitted that this should have been 25% and not 33%. However, even with these adjustments and appropriate credit, suspended sentences of 2 years did not meet the seriousness of their offending.

29. We received very helpful written submissions on behalf of the offenders which were developed shortly in oral submissions.

30. For Mercer, Mr Hamblin accepted that the robbery was 'a very mean offence', and that the sentence was lenient. However, he submitted that it was not unduly so. He argued that the Judge was right to place the offending in category 2C of the guidelines, with a starting point of 3 years and a range of 2 to 5 years and not category 2A. Having taken the starting point as category 2B, she properly reduced the culpability of the offending to category 2C in order to take into account Mercer's mental disability by reference to the case of *PS, Abdul Dahir and CF*. She was also right to give a full discount of one-third and to suspend the term of 2 years' imprisonment. The first real opportunity to enter pleas was in the Crown Court, and in any event the Judge was in the best position to assess credit for the pleas. Although aged 25, Mercer had no previous convictions for robbery or dishonesty. While it was accepted that he had breached the suspended sentence imposed in December 2013 for arson, threats to kill and having a bladed article, the breach resulted in no action being taken in March 2015, which indicated that the court did not regard the breach to have been significant. There had been no breach of the 6-month suspended sentence imposed in March 2015 for the battery committed in June 2014. Importantly, there had been a break of 4 years and 4 months since this last offence. There had also been a period of 15 months since the index offences had been committed during which no offending had taken place. The psychiatric report by Professor Fox had highlighted Mercer's numerous mental health issues and vulnerabilities. The loop recorder needed electrical equipment installed by his bedside which was most likely not possible if he were to be sent to prison, thus endangering his life. It was, as Mr Hamblin

put it, 'a vital part of the continuing assessment of his heart condition and in the assessment as to the need for any heart surgery'. The probation progress report, dated 27 February 2020, showed that he was abiding by the terms of the sentence.

31. For Norris, Mr Dogra made s a number of similar points in relation to the sentencing Judge's approach. His overarching point however was that the Reference paid insufficient regard to the mental health problems of his client, their effect on her state of mind when offending, her subsequent lack of empathy for the victim and the effect of a sentence of imprisonment on her. As to the credit for plea, although entered at the PTPH, the Judge properly exercised her discretion to give full credit in the light of his client's mental health and vulnerabilities, which were fully evidenced in the reports that the judge had before her. Although the victim was plainly vulnerable, there was no evidence that Norris knew of these vulnerabilities or the extent of his disabilities. It could not be said that he was targeted because of his vulnerability. Norris has suffered significant sexual and physical abuse as a child, and physical abuse in adult relationships. On the basis of paragraphs 9 and 9.10 of Dr Bekoe's, psychiatric report, her intellectual impairment and extremely low IQ impacted on 'virtually every aspect of her life... including social functioning'. Mr Dogra also drew attention to Dr Bekoe's conclusion that she was vulnerable to sexual and financial exploitation as a consequence of her impaired intellectual ability. Since she was prone to stress and depressive disorders, in his view she would be vulnerable in a custodial setting. Although she had previous convictions for dishonesty, she had no previous record for violence. However, Mr Dogra properly recognised that the previous conviction for theft and fraud by false representation, between January and March 2014 (committed against a vulnerable victim) was relevant

to the sentence for the index offences. However, he submitted that the offending itself was not motivated by the victim's disability, but by her knowledge that he had some money and bank cards; and the level of culpability was B or even on the cusp of B and C. So far as harm was concerned, although it was substantial neither the physical nor psychological harm could properly be described as 'serious'. The harm was therefore at level 2. According to the pre-sentence report there was now a reasonable opportunity for rehabilitation. In conclusion, he submitted that, if the court were persuaded that the sentence of 2 years' imprisonment was the appropriate commensurate sentence, there was sufficient evidence in the reports to support suspending the sentence.

32. The court has received progress reports in relation to each offender which indicate that they have both responded favourably to the sentence imposed, although some of the underlying difficulties identified in the other reports remain.

33. This was, on any view, a difficult sentencing exercise. On the one hand, these were mean and unpleasant crimes committed against a highly vulnerable man who was robbed in his own home where he was entitled to feel, and should have felt, safe. Nor, on the evidence of the reports, were the offences linked to either offender's mental disorder. On the other hand, they had considerable personal difficulties and physical characteristics that were relevant to their ultimate sentence.

34. These potential conflicting considerations were capable of resolution by reference to the guidelines.

35. Like the Judge, we see no good reason for distinguishing between the offenders in the

approach to sentence. In terms of harm, this was on the cusp of category 1 (high) and category 2 (intermediate). There was clearly significant psychological harm to the victim. Indeed, the judge described it as 'serious', which would have taken it into category 1. What is clear is that the robbery and the loss of his money in these circumstances has destroyed both his peace of mind and his enjoyment of his home.

36. So far as culpability was concerned, there was an abuse of friendship by Norris, but not an abuse of a position of trust such as to take it into category A. Nor do we consider that these crimes demonstrated hostility on the basis of the victim's disability. However, it was not an offence of lesser culpability. There was no great sophistication, but the robbery had plainly been planned with phone calls passing between the offenders, and Norris having identified the hole in the roof as an excuse for Mercer to gain access to the victim's home.

37. The robbery should have been characterised at least as a category 2B offence, with a starting point of 5 years and a range of 4 to 8 years. However, there were a number of aggravating features which made the overall offending more serious. The previous convictions and, in the case of Norris, for a very similar offence committed against a vulnerable person. This was a statutorily aggravating circumstance. In addition, the robbery was committed by two offenders and the victim was plainly targeted because of his perceived vulnerability. On this basis the sentence before reduction for the mitigation should have been a term of not less than six-and-a-half years.

38. However, we accept, as did the Judge, that there was considerable personal mitigation

available to these offenders and, at least to that extent, we accept the submissions made on their behalf. It is unnecessary to repeat them other than by way of summary. Both were vulnerable. The sentence of imprisonment will impact on them harder than it would with most members of the population, each in different ways. On the basis of this mitigation we have concluded that the sentence on count 1 before reduction for the plea should have been a term of four-and-a-half years.

39. We see no good reason to interfere with the credit allowed by the Judge for the plea. In the circumstances, it was plainly open to her to give full credit.

40. The result is that the sentence on count 1 should have been a term of 3 years' immediate imprisonment, and the suspended sentence of 2 years was unduly lenient. The consequence is that we grant leave, quash the sentence on count 1 and substitute a term of 3 years' imprisonment in the case of each offender. The sentence on the other counts will remain concurrent.