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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/00736/A4
NCN: [2022] EWCA Crim 751



Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 28th April 2022

B e f o r e:

LORD JUSTICE HOLROYDE

MRS JUSTICE McGOWAN DBE

MR JUSTICE CHOUDHURY

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E G I N A

- v -

FARIS UDDIN

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Miss F Robertson appeared on behalf of the Attorney General

Mr S Rippon appeared on behalf of the Offender

J U D G M E N T

Thursday 28th April 2022

LORD JUSTICE HOLROYDE:

1. Is it lawful to suspend a minimum sentence of imprisonment or detention in a young offender institution imposed pursuant to section 35 of the Sentencing Code for a repeat offence involving a weapon or bladed article? That is one of the questions raised by this application.

2. On 20th October 2020, Faris Uddin ("the offender") , then aged 18, threatened and robbed 16 year old Taran Dhaliwal. At his trial in December 2021, in the Crown Court at Wolverhampton, he was convicted of offences of robbery, contrary to section 8 of the Theft Act 1968 (count 1) and having a bladed article in a public place, contrary to section 139(1) of the Criminal Justice Act 1988 (count 2). On 9th February 2022, he was sentenced to a total term of 24 months' detention in a young offender institution, suspended for two years, with an unpaid work requirement and a rehabilitation activity requirement. Her Majesty's Solicitor General believes that total sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988 for leave to refer the case to this court so that the sentencing may be reviewed.

3. For present purposes, the facts can sufficiently be summarised as follows. The offender, who was accompanied by an unknown man, encountered Taran Dhaliwal in the street. There appears to have been a history of conflict between the offender and Taran Dhaliwal's older brother. The offender asked Taran Dhaliwal where his brother was and began to accompany him home. Taran Dhaliwal ran away, but slipped and fell. The offender caught up with him and said, "Now you've run, you're definitely going to get stabbed". The other man who was present tried, unsuccessfully, to persuade the offender to leave. The offender lifted his coat and showed Taran Dhaliwal the handle of what appeared to be a knife. He then demanded Taran Dhaliwal's mobile phone and headphones. When this demand was refused, he threatened to stab him. Taran Dhaliwal then surrendered the items and the offender left.

4. The offender was arrested on 8th November 2020. He entered a not guilty plea on his first appearance in the Crown Court on 8th December 2020. He was on bail, subject to a qualifying curfew, until the conclusion of the proceedings.

5. Following conviction, sentence was adjourned and a pre-sentence report was prepared. Taran Dhaliwal did not make a Victim Personal Statement, but the judge had seen him give evidence.

6. The offender was aged 19 at the time of conviction and sentence. He had previously been convicted of an offence of having a bladed article, namely an axe, in a public place, and an offence of possession of cannabis, both of which had been committed on 23rd February 2020. On 11th August 2020 he was made subject to a referral order for 12 months in respect of those offences. He was of course subject to that referral order when he committed the present offences only about two months later.

7. The offender was working for his father as a builder. Two testimonials were provided by householders for whom he had worked: they described him as polite, hard-working, conscientious and trustworthy. The pre-sentence report described certain family difficulties which had been experienced by the offender and the rather socially isolated life which he was leading, although he had a steady girlfriend. The pre-sentence report noted that the present offences were committed very soon after the referral order had begun, at a time when it appeared that the offender had not developed sufficiently to avoid further incidents, but recorded that he had made good progress thereafter. He had completed all the requirements

under an order which involved intensive supervision. The author of the report felt that the offender was now capable of reflecting on his past behaviour and was showing signs of increasing maturity.

8. Submissions were made to the judge about the Sentencing Council's relevant definitive guideline. In relation to count 1, having regard to the fact that only the handle of the knife was displayed, the judge took the view that culpability straddled category A, "production of a bladed article to threaten violence", and category B, "threat of violence by any weapon (but which is not produced)". Having seen Taran Dhaliwal give evidence, he placed harm in category 3. He noted the category A3 starting point of four years' custody, but said that he looked towards the bottom of that range, which is three years' custody, and the top of the B3 range, which is four years. In relation to count 2, the judge agreed with both counsel that the offence fell into category A2, with a starting point of six months' custody, and that the minimum sentencing provisions applied. The judge identified the mitigation as being the offender's age, the delay in the matter coming to trial, and the fact that there had been no further convictions. He concluded that the appropriate sentences of detention in a young offender institution were two years on count 1 and six months concurrent on count 2. Having, he said, thought about it long and hard, he decided that he could suspend those sentences. He explained that he was doing so because he wanted to make sure that, as a young man, the offender was given the best chance possible. He therefore imposed the suspended sentence orders to which we have referred. He also ordered that the offender pay compensation of £500 to Taran Dhaliwal.

9. The National Probation Service have helpfully prepared a progress report for the assistance of this court. This does not, of course, affect the propriety of the sentence at the time it was passed, but is relevant to other issues the court has to consider. It was prepared about five weeks after sentencing. It records that the offender had made a positive start to his supervision; he had attended all eight scheduled meetings to date, and had completed 13 hours of the unpaid work requirement. The offender had been taking deliberate steps to reduce the risk of further offences and intended to attend a college as he had a position on an apprenticeship course. The author of the updating report noted that if immediate custody were now imposed, the offender would lose that position and would lose his present momentum to address relevant issues. Custody would therefore impact upon his current and future employment prospects and the support systems which are currently in place to address his psychological and emotional wellbeing.

10. On behalf of the Solicitor General, Miss Robertson submits that the total sentence was unduly lenient. The robbery fell squarely into category A3, with a starting point of four years' custody. It was aggravated by the relevant previous conviction, the failure to comply with the referral order, and the targeting of Taran Dhaliwal as the younger brother of a person with whom the appellant was in conflict. Given the current pressures on the courts, Miss Robertson submits that the passage of a year before trial did not afford any mitigation. For all those reasons, she submits, the sentence on count 1 should have been significantly longer and therefore of a length such that no question of suspension could arise.

11. As to count 2, Miss Robertson submits that the custodial sentence required by statute must be immediate. She relies for that proposition on the decision in *R v Whyte* [2018] EWCA Crim 2437, [2019] 1 Cr App R(S) 35. In the alternative, she submits that a suspended sentence, even if lawful, was contrary to the policy of the legislation and so was itself unduly lenient.

12. For the offender, Mr Rippon (who represented him at sentencing in the court below) submits that the judge was correct to move downwards towards the bottom end of the

category A3 range, and clearly took great care in sentencing a young man who had a potential for rehabilitation. Moreover, having presided over the trial, the judge was in the best position to decide whether the sentence could properly be suspended. In the alternative, Mr Rippon invites this court, if it finds the sentencing to have been unduly lenient, to exercise its discretion not to increase the sentence. He emphasises that the offender was only a few months beyond his 18th birthday at the time of the offences, and therefore only a few months beyond the age at which a different approach to sentencing would have been required. He reminds the court of the well-established principle that the 18th birthday is not to be regarded as a cliff edge beyond which an offender is suddenly invested with full maturity. He points to the contrast between the evident lack of appreciation of past behaviour, revealed by these offences, and the progress revealed by the pre-sentence report and the progress report since that time. As Mr Rippon puts it, the offender was given an exceptional chance, but seized it and has complied positively with all that was required of him. Helpfully updating this court with matters subsequent to the progress report, Mr Rippon tells us that the offender today has confirmed that he has completed more than half the hours of unpaid work. He is currently working for his father four days per week, and in a different job as a mechanic two or three days per week. It is in connection with the latter job that his employer wishes him to enrol as an apprentice.

13. We are grateful to both counsel for their submissions, which, if we may say so, were of a high quality on both sides. We address first the question of law identified at the beginning of this judgment. It is necessary to begin by reciting the relevant provisions of the Sentencing Code introduced by the Sentencing Act 2020. For convenience, we shall refer to these simply by section numbers.

14. Section 315, so far as material for present purposes, provides:

**"315 Minimum sentence for repeat offence involving
weapon or bladed article**

(1) This section applies where –

(a) an offender is convicted of an offence (the
'index offence') under —

...

(ii) section 139(1) of the Criminal Justice
Act 1988 (having article with blade or
point in public place),

...

(b) the offence was committed on or after 17
July 2015, and

(c) when the offence was committed, the
offender —

(i) was aged at least 16, and

(ii) had at least one relevant conviction.

(2) The court must impose an appropriate custodial sentence unless the court is of the opinion that there are particular circumstances which —

- (a) relate to the offence, to the previous offence or to the offender, and
- (b) would make it unjust to do so in all the circumstances.

(3) In subsection (2) 'appropriate custodial sentence' means —

- (a) in the case of a person aged under 18 when convicted of the index offence, a detention and training order of at least 4 months;
- (b) in the case of a person aged 18 or over but under 21 when convicted of the index offence, a sentence of detention in a young offender institution for a term of at least 6 months;
- (c) in the case of a person aged 21 or over when convicted of the index offence, a sentence of imprisonment for a term of at least 6 months.

(4) In this section 'relevant conviction' means —

- (a) a conviction of a relevant offence,

...

(5) In this section 'relevant offence' means an offence under —

- (a) section 1 or 1A of the Prevention of Crime Act 1953 (offences involving offensive weapons), or
- (b) section 139, 139A or 139AA of the Criminal Justice Act 1988 (offences involving article with blade or point or offensive weapon)."

There is no doubt that those provisions applied to the offender in this case.

15. Section 264 provides:

"264 Suspended sentence order for person under 21: availability

(1) This section applies where, in dealing with an offender for an offence, the court imposes a sentence of detention in a young offender institution.

(2) A suspended sentence order (see section 286) is available in relation to that sentence if the term of the sentence of detention in a young offender institution is not more than 2 years.

(3) But a suspended sentence order is not available in relation to that sentence if —

(a) the sentence of detention in a young offender institution is one of two or more sentences imposed on the same occasion which are to be served consecutively, and

(b) the terms of those sentences are in aggregate more than 2 years.

(4) For provision about suspended sentences, see Chapter 5."

16. It should be noted that section 277 makes corresponding provisions in relation to the availability of a suspended sentence of imprisonment for offenders aged 21 or over.

17. Section 286 provides:

"286 Suspended sentence order

(1) A suspended sentence order is an order providing that a sentence of imprisonment or detention in a young offender institution in respect of an offence is not to take effect unless —

(a) an activation event occurs, and

(b) a court having power to do so subsequently orders under paragraph 13 of Schedule 16 that the sentence is to take effect.

(2) A suspended sentence order may also specify one or more available community requirements with which the offender must comply during the supervision period.

(3) An activation event occurs if the offender —

(a) commits another offence in the United Kingdom during the operational period (whether or not punishable with imprisonment), or

(b) during the supervision period, contravenes any community requirement imposed by the order.

(4) The community requirements are listed in column 1 of the community requirements table (see section 287).

(5) Provision about each requirement is made by the provisions of Schedule 9 mentioned in the corresponding entry in column 2 of that table.

(6) In this Code —

'suspended sentence order' has the meaning given by subsection (1);

'suspended sentence' means a sentence to which a suspended sentence order relates.

(7) In this Code, references to a community requirement of, or imposed by, a suspended sentence order are to a requirement specified in the order under subsection (2)."

18. Section 289 provides:

"289 Suspended sentence to be treated generally as sentence of imprisonment, etc

(1) A suspended sentence which has not taken effect under paragraph 13 of Schedule 16 is to be treated as —

(a) a sentence of imprisonment, or

(b) as the case may be, a sentence of detention in a young offender institution,

for the purposes of all enactments and instruments made under enactments.

(2) Subsection (1) is subject to any provision to the contrary contained in —

(a) the Criminal Justice Act 1967,

(b) any enactment passed or instrument made under any enactment after 31 December 1967."

19. In *Whyte* the court considered the minimum sentence provisions and section 189 of the

Criminal Justice Act 2003, which made provisions then in force as to the availability of suspended sentences. Although differently expressed, the effect of those provisions was materially the same as those of the Code which we have quoted. The court at [11] expressed the view that the reference to "imprisonment" in the minimum sentencing provisions was a reference to a term of immediate imprisonment.

20. That view was challenged in a helpful commentary on the case by Dr Lyndon Harris: see [2019] Crim LR 451. It should be noted that *Whyte* was a decision of a two-judge court which had heard submissions only on behalf of the appellant. Having reflected upon it and with the benefit of the fuller discussion of the principles by which we have been assisted today, we are satisfied, with all respect to the members of the court, that the decision in *Whyte* was made *per incuriam* and should not be followed. In our view, it is lawful for a court imposing a minimum sentence of detention in a young offender institution, or of imprisonment, pursuant to section 315 to order that it be suspended. Our reasons are that the provisions of sections 264 and 277 as to the availability of a suspended sentence impose requirements as to the term of the sentence (or the aggregate term of the sentences), but are not qualified in any other way. The provisions of section 289 unequivocally state that – save for the exceptions permitted by subsection (2), which are not applicable to this case – a suspended sentence which has not taken effect is to be treated as a sentence of detention in a young offender institution, or of imprisonment, for the purpose of all enactments. If Parliament had wished to make an exception from those provisions, in order to require any custodial sentence imposed pursuant to minimum sentence provisions to take effect immediately, it could have done so.

21. It may also be noted that in an Impact Assessment dated 3rd July 2015, in which the consequences of legislating for the minimum sentence provisions now contained in section 315 were considered, Ministry of Justice officials expressly contemplated that suspended sentences would be imposed: see in particular paragraph 14, in which it was stated that

"Judges will continue to have the discretion not to impose custody if there are particular circumstances where they deem it unjust to do so, *and the court also has the ability to impose the minimum sentence and suspend it.*" (our emphasis)

22. We would add that our view is consistent with the overall scheme of the statutory provisions, which is that a court must first decide whether a custodial sentence is necessary and only then, if the relevant criteria are satisfied, decide whether it can be suspended. It is also consistent with the Sentencing Council's Imposition guideline, which emphasises that a suspended sentence is a custodial sentence.

23. We recognise that by section 315(3)(a) the appropriate sentence for a young offender is a Detention and Training Order, which cannot be suspended. We are satisfied, however, that that reflects the different approach to sentencing those aged under 18, and does not affect our view as to the correct interpretation of the statutory provisions relating to adult offenders.

24. We emphasise that we have been considering the position where, as in this case, a court imposes a minimum sentence but suspends it. Although we do not decide the point, our provisional view is that different considerations will apply if the court concludes, in accordance with section 315(2), that there are particular circumstances which would make it unjust to impose an appropriate custodial sentence.

25. For all those reasons, we are satisfied that it is lawful to impose a minimum sentence of imprisonment or detention in a young offender institution, pursuant to section 315, but to suspend it. Although not unlawful, however, we are also satisfied that suspending such a sentence will only rarely be appropriate, because in most cases the suspending of the sentence would undermine the punitive and deterrent effect which Parliament plainly intended the minimum sentencing provisions to have. There will be few circumstances in which a court concludes that the imposition of an appropriate custodial sentence would not be unjust but, notwithstanding the clear intention of Parliament, that the sentence can nonetheless be suspended.

26. The judge correctly followed the approach set out in the Sentencing Council's Imposition guideline when deciding whether the sentence could be suspended; but he did not factor into his decision, as he should have done, the importance of the punitive and deterrent purpose of section 315. With all respect to the judge, he fell into error in viewing this as a case in which suspension of the sentence on count 2 was appropriate.

27. No challenge is made to the structure of the sentencing: given that the categorisation of the robbery offence reflected the offender's possession of the bladed article, concurrent sentences were appropriate. As to the length of the sentence, however, we are satisfied that the total term of two years' detention was significantly too short. The weapon was shown and therefore "produced", and the robbery accordingly fell into category A3. The judge was entitled, although perhaps a little generous, to move down from the starting point of four years' custody to reflect the fact that the knife was not drawn from its sheath, and the risk of injury was therefore reduced. The robbery was a frightening offence against an adolescent boy, and was aggravated by the previous conviction and by the fact that the offender was subject to a referral order. We do not accept the submission that it was further aggravated by targeting; the initial contact with Taran Dhaliwal was made as a means of bringing the offender into contact with the older brother, not on the basis of targeting him as a potential victim of robbery.

28. As to mitigation, it was an important feature that the offender was only 18 years and three months old at the time of the offence and appears in some respects to have been immature for his age. It was appropriate for that reason to reduce the sentence significantly below that which would be appropriate for a fully mature adult. The passage of time did not in itself provide much mitigation, given that this was a contested trial which would inevitably have involved proceedings over a number of months. What was more important was the clear picture presented in the pre-sentence report of the offender's maturation and avoidance of offending during the overall period of more than 15 months between his commission of the offences and sentencing. The judge was right to give considerable weight to that development in the offender's young life, and we can well understand why he wished to avoid immediate custody if he properly could.

29. Balancing all those factors, we take the view that the sentence on count 1 could not properly have been less than 30 months' detention in a young offender institution, and therefore could not be suspended. For the reasons we have given, the sentence on count 2 should not have been suspended in any event. It the result, the sentencing was unduly lenient.

30. We turn finally to consider whether this court can exercise its discretion not to increase the sentence. The existence of that discretion was confirmed in *Attorney General's Reference No 4 of 1989* (1989) 11 Cr App R(S) 517, in which the Lord Chief Justice indicated, at page 521, that "one obvious instance" of when the discretion might be exercised was where in the light of events since the trial it would be unfair to the offender to increase the sentence.

31. We have found this a difficult decision. For the reasons we have given, the offender could not have complained if he had received a sentence of immediate detention, in relation to which he would have been entitled to credit for one half of the 457 days when he was subject to a qualifying curfew. As against that, the progress report shows that he has continued to respond well to the requirements of his suspended sentence order, has not been convicted of any further offence and has taken active steps to improve his qualifications and to pursue a law-abiding life. It seems to us that all the signs are that since committing these offences now more than 18 months ago, he has done all he can to put his youthful offending behind him. If his sentence is not increased, he will remain subject to the suspended sentence orders until February 2024; he will be able to continue to work and to pay the compensation order; and he will be able to take advantage of his apprenticeship place. By a very narrow margin, we are persuaded that it would be unfair to him to increase his sentence.

32. For those reasons, we grant leave to refer. We find the sentencing to have been unduly lenient; but in the exercise of our discretion we do not increase or vary the sentencing. All aspects of the sentencing therefore remain unaltered.

33. The Crown Court record should be corrected to make clear that the suspended sentences were of detention in a young offender institution, not imprisonment, and that the deprivation order, in relation to a knife found when the offender was arrested, was made pursuant to section 153 of the Code, not the repealed provisions of the Powers of Criminal Courts (Sentencing) Act 2000.

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

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