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Case No: 202202513 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT TEESIDE
HIS HONOUR JUDGE STEAD
T20217173

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 February 2023

Before :

LADY JUSTICE WHIPPLE
MRS JUSTICE CUTTS
and
HER HONOUR JUDGE ROBINSON

Between :

Anderson
- and -
Rex

Appellant

Respondent

Mr Jonathan Harley for the **Appellant**
Respondent was not present or represented

Hearing dates : 16 February 2023

Approved Judgment

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HHJ Robinson :

Background

1. This is an appeal against sentence brought with leave of the Single Judge. On 15 July 2022, the appellant was sentenced by His Honour Judge Stead at Teesside Crown Court to a total sentence of 8 years 10 months detention in a Young Offenders Institute for a total of 12 offences to which he had pleaded guilty at various stages. The sentences were as follows:

Indictment T20210299

A burglary contrary to s.9(1)(b) of the Theft Act 1968 and an attempted burglary contrary to s.1(1) of the Criminal Attempts Act 1981, both non-domestic, committed on 2 November 2020: 8 months detention concurrent on both.

Committal for sentence S202100417

Two attempted burglaries contrary to s.1(1) of the Criminal Attempts Act 1981, both non-domestic, committed on 16 February 2021: 8 months detention concurrent on both.

Indictment T20217173

A series of offences all committed on 14 May 2021 –

- a. Burglary of a dwelling contrary to s.9(1)(b) of the Theft Act 1968: 4 months detention concurrent
 - b. Dangerous driving contrary to s.2 of the Road Traffic Act 1988: 12 months detention consecutive
 - c. Having an article with a blade or point contrary to s.139(1) of the Criminal Justice Act 1988: 24 months detention concurrent.
 - d. Two attempted robberies contrary to s.1(1) of the Criminal Attempts Act 1981: 67 months detention on both, concurrent to each other but consecutive to the other sentences.
 - e. Unlawful wounding contrary to s.20 of the Offences against the Person Act 1861: 19 months detention consecutive.
 - f. Criminal damage contrary to s.1(1) of the Criminal Damage Act 1971: 1 month detention concurrent.
 - g. Possession of an offensive weapon on school premises contrary to s.139A(2) of the Criminal Justice Act 1988: 3 months detention concurrent.
2. The appellant was also sentenced for three traffic offences sent to the Crown Court under s.51(11) of the Crime and Disorder Act 1998, namely driving otherwise than in accordance with a licence contrary to s.87(1) of the Road Traffic Act 1988 and Schedule 2 of the Road Traffic Offenders Act 1988, using a vehicle without insurance

contrary to s.143 of the Road Traffic Act 1988 and Schedule 2 of the Road Traffic Offenders Act 1988 and failing to provide a specimen for analysis contrary to s.7(6) of the Road Traffic Act 1988 and Schedule 2 of the Road Traffic Offenders Act 1988: no separate penalty and licence endorsed on all three.

3. There are two grounds of appeal: (1) the sentence of 67 months for the attempted robberies was wrong in principle, the offences being placed in the wrong category of the sentencing guideline, and manifestly excessive, and (2) the total sentence of 8 years 10 months was manifestly excessive.

The facts

Indictment T20210299

4. At 11pm on Monday 2 November 2020, a dark coloured motorcycle with two males on it came to a stop on Cumbernauld Road in Thornaby outside the Premier Store. The two men approached the premises and forcibly lifted the metal shutter by approximately two feet. The first male then climbed underneath the shutter and tried the main door, which was locked and secured. That male then emerged, and the two men made their way back to the motorcycle and drove off (count 1).
5. Shortly after 11.30pm the same evening three males broke into the One Stop Convenience Store on Trenchard Avenue in Thornaby. They were on the same motorbike as earlier. One of the males used an axe to smash the door window, allowing the other two to gain access. A bag was filled with cigarettes from behind the shop counter. Another of the males picked up a bottle of spirits before leaving. A total of £682.16 of stock was taken, including 66 packets of cigarettes valued at over £660. The shop suffered significant damage. The quoted cost for the repairs to the glass in the door was £500, and the value of the damaged shutters covering the door and cigarette cabinet was around £560 (count 2).
6. The appellant was stopped by police and arrested early the following morning on 3 November wearing the same distinctive track suit bottoms as could be seen in CCTV of both offences. Footprints on the shop counter surface at the One Stop shop were forensically examined and matched shoes he was wearing on his arrest. He gave a no reply interview later that day and was released on bail. The appellant was 17 years of age at the time.
7. On 22 April 2021 the appellant was sent a postal requisition, and on 27 May 2021 he was sent for trial by Cleveland Magistrates Court. He pleaded not guilty at the PTPH on 23 July 2021. He changed his plea to guilty at a FCMH on 31 August 2021.
8. At 23.54 on 23 October 2020 there was a burglary at a Premier Store in Nunthorpe, Middlesbrough. The appellant was suspected of being involved and was arrested and interviewed on 26 October to which he answered no comment. He was again released on bail. On 9 February 2021 he was charged with that offence, he attended Cleveland Magistrates Court on 25 February 2021 and was bailed to a hearing on 13 April. He did not attend this hearing and on 16 April he admitted an offence of failing to surrender. Much later, on 16 November 2021 he was sentenced for that offence to a fine of £120. It does not appear that the substantive charge of burglary was proceeded with.

Committal for sentence S202100417

9. In the meantime, at 9pm on 15 February 2021, the owner of the Go Local store on Cumberland Road in Middlesbrough closed the shop. Shortly before 1.20 am on 16 February a resident from across the road observed the shop being broken into. The bottom half of the shutters were damaged and an attempt had clearly been made to gain entry. A review of CCTV revealed four males attempting to gain entry (offence 1).
10. At 11pm on 15 February the Sainsbury's store on Acklam Road closed for the night. Shortly after 1.30 am on 16 February the alarm was activated. A resident observed males attempting to gain entry. The shutters were damaged, as were the glass automated doors which were smashed and the metal poles holding metal panels were bent. It was apparent that a vehicle had been driven into the store. Behind the tills were smashed alcohol bottles. The store had to be closed for one day and the loss and damage was estimated at just under £16,000, plus the loss of a day's trading amounted to £15,000 (offence 2).
11. These offences were committed 4 days after the appellant turned 18 years of age. It is not clear how he was identified as being responsible for them or when he was charged. On 16 November 2021 he pleaded guilty to the offences at Cleveland Magistrates Court and was committed to the Crown Court for sentence in custody.

Indictment T20217173

12. At about 6.30am on Friday 14 May 2021, Jessica Butler and her partner Lewis Thompson were disturbed by a number of men who were in the process of stealing from their house whilst they and their three young children were in bed. The men stole a quad bike and another bike belonging to their children. Mr Thompson chased the thieves off and there was a confrontation between them (aggravated burglary, count 2). Ms Butler's Vauxhall Insignia motor vehicle was also stolen (theft, count 3). In due course the Crown offered no evidence against the appellant on both counts and not guilty verdicts were entered.
13. At about 7.30am a Traffic Officer saw the Insignia being driven by the appellant. He followed it, illuminating his blue lights. The appellant accelerated away, quickly reaching speeds of 70 miles per hour on the streets around a housing estate, weaving and overtaking vehicles as he was being chased. He drove over a grassed area between two streets. He drove through several red lights and drove the wrong way down a one-way street. He drove onto the A66 heading west on the eastbound carriageway, causing other traffic to take evasive action. He left the A66 at the Marton Road interchange. At this point, one of the Officers following was able to see that there were two males in the front of the car. The appellant was laughing at the Police Officers and stuck his middle finger up at them as he drove down the slip road, again in the wrong direction. He continued to drive on the wrong side of the carriageway at speed, again at speeds of up to 70 miles per hour, until the Police lost sight of the vehicle (dangerous driving, count 4).
14. On 1st July 2022 the appellant admitted the summary offences, related to the dangerous driving, of driving otherwise than in accordance with a licence, using a

motor vehicle without insurance and failing to provide a specimen of blood for analysis.

15. Returning to 14 May 2021, the appellant was next seen at Berwick Hills Primary School at about 8.45am when parents were dropping their children off. He was in possession of a kitchen knife (having an article with a blade or point, count 5) which he had stolen together with a coat from the house of Keith Miller, who lived near to the school, by entering the rear patio door mistakenly left unlocked (burglary, count 1). The knife had a 10 inch blade.
16. The appellant attempted to steal cars belonging to Laura Grant (attempted robbery, count 6) and Emma Wright (attempted robbery, count 7). Ms Grant was in the process of getting her son out of the back of her car. She saw the appellant holding the knife close to his chest area. He tried to pull her away from the car by grabbing her arm and tried to climb into the rear passenger seat. She pushed her son into the car and pulled the appellant away from the car. The appellant said 'please let me in'. He then opened the front passenger door and attempted to get into the car, again she pulled him out. As she was screaming someone came out from the school and the appellant ran across the road and tried to steal Emma Wright's car. Ms Wright had just pulled up near the entrance to the school. As she was in the process of getting her two children out of her car, the appellant ran over to her, still holding the knife. He approached her and said something along the lines of "ere love, can you get me safe from these please". She said "I'm just taking my kids to school, sorry". The appellant then got in the driver's seat of the car and sat there with the knife.
17. At this point a member of the public came and tried to get the appellant out of the car using a metal pole which the appellant took off him. It is not clear whether this was Kayfee Hameed. In any event, Mr Hameed attempted to get the appellant out of the car and the appellant stabbed him twice; once in the hand and once in the leg. Mr Hameed had an elliptical skin tear to the lower third of his right lower leg. The injuries were treated with glue and steri-strips (unlawful wounding, count 8).
18. Staff at the school began to lock down the school, ushering children and their parents into the buildings and locking the doors. The appellant got away from Mr Hameed and was then armed with the metal pole as well as the knife. He ran into the school grounds, chased by the group, and there was a stand-off for about ten minutes, with Mr Hameed trying to persuade the appellant to put down his weapons, two members of staff trying to stop the appellant from going near the buildings, and others trying to prevent the appellant from getting away. During this time the appellant used the metal bar to smash a window in one of the doors giving access to the school building (criminal damage, count 9, and having an offensive weapon on school premises, count 10). Eventually, Mr Hameed and other men with him were able to disarm and detain the appellant until the arrival of the police, who arrested the appellant. The appellant gave no comment in interview about those matters.
19. On 17 May 2021 the appellant was sent for trial in custody. The appellant pleaded not guilty at PTPH on 23 July 2021 but changed his plea to guilty on 25 April 2022, the day of trial.

The sentence

20. The crown put the non-domestic burglaries (and attempts) in category B culpability on the grounds there was some planning, and the group went equipped for burglary. The harm category varied and overall, the judge treated them as in category 2 harm. The starting point was 6 months custody with a range of a medium level community order and 1 years custody. The judge said the sentence after a trial for all 4 offences would be 10 months custody. Taking into account the appellant's youth and pleas, he arrived at a sentence of 8 months on each charge to be served concurrently with each other.
21. Turning to the offences on 14 May 2021, the judge said he was going to give the appellant 20% credit for his guilty pleas. He regarded the appellant's driving as a "quite breath taking" piece of dangerous driving involving very high speeds of up to 70 miles per hour when people were going to work and school in the morning and driving the wrong way on the A66 dual carriageway. The judge regarded it as astonishing that he managed to avoid a collision with the potential for very serious personal injury. He took into account the fact that there was, in fact, no damage or injury, the appellant's youth and totality. He said if the appellant had been tried for this alone, he would have imposed a sentence of 15 months after a trial. He reduced that by 20% for the appellant's plea and imposed a sentence of 12 months. Given the separate nature of the offence he made it consecutive.
22. There was a subsequent discussion with counsel and the clerk about the period for which the appellant should be disqualified from driving, the length of which was unclear. We return to this later. He also ordered the appellant to take an extended re-test.
23. The judge treated the domestic burglary as lower culpability and category 3 harm with a starting point of a high-level community order and a range of up to 6 months. He said the sentence after a trial would have been 5 months, with credit for plea he imposed a sentence of 4 months. Taking into account totality he made the sentence concurrent.
24. The sentence for possession of the knife would have been 30 months after a trial, the top of the range for a category 1A offence as the appellant had a knife in the vicinity of a primary school. That was reduced to 24 months taking into account credit for plea. He sentenced the appellant to 3 months on count 10 (having an offensive weapon on school premises) and 1 month on count 9 (criminal damage), all three sentences to run concurrently.
25. As for the attempted robberies, he described these as 'highly significant'. It was not pre-planned and he accepted the appellant's explanation that he was trying to get away from people who were pursuing him in the belief he had committed the aggravated burglary. However, he took the view that the appellant produced a bladed article to threaten violence, by the brandishing of it rather than express threats, which was an essential element of the offences to which he had pleaded guilty. Therefore, he treated it as a high culpability offence in the sentencing guidelines for street and less sophisticated commercial robberies.
26. The judge referred to the victim personal statements of the two mothers. Laura Grant had to take time off work, experienced panic attacks, took medication, was unable to take her son to school for a week and had been referred for therapy. Emma Wright

was unable to park her car in the same place through fear and intended to have counselling. He regarded the impact as significant but not sufficiently so to place the offences in the highest category of harm and instead he placed them in category 2. The starting point was 5 years with a range of 4 to 8 years. The judge treated the fact that there were two offences but that they were attempts as balancing each other out. The appellant had some previous convictions for less serious offences, but the judge did not treat those as an aggravating factor. He said the sentence after a trial would have been 7 years which he reduced to 67 months with credit for plea. They were to run concurrently with each other but consecutively with the other sentences.

27. The judge placed the unlawful wounding in category 3B on the grounds the harm was serious but not grave and involved use of a weapon. The starting point is 1 year with a range of up to 2 years. Taking into account that the appellant had stolen the knife, used it for other offending and carried it onto school premises and was using it against a person who was trying to stop him from further offending, he placed the offence at the top of the category range of 2 years and again reduced it for credit for plea to 19 months to run consecutively to the other offences.
28. Thus, the total sentence was 8 months for the 4 burglary offences plus 12 months for the dangerous driving, 67 months for the attempted robberies and 19 months for the unlawful wounding with all other sentences concurrent. The total sentence was therefore 106 months, or 8 years 10 months.

The appeal

29. Mr Jonathan Harley, who appeared before us and the judge below, made submissions in support of the two grounds of appeal: (1) the sentence of 67 months for the attempted robberies was too long because the judge wrongly placed the offences in category A2 of the sentencing guidelines instead of B2 and (2) the total sentence of 8 years and 10 months was manifestly excessive. He acknowledged that the appellant's actions would have been unimaginably terrifying for Ms Grant, Ms Wright, their children and the other innocent bystanders at the school. However, the appellant's actions were a reaction to being pursued by a group of armed men who had mistakenly identified him as someone involved in burgling one of their houses. The appellant's rationale was always to protect himself although the appellant acknowledged that his actions went further than necessary.
30. Mr Harley submitted that although the appellant had a knife, he did not issue verbal threats and he did not wield it in such a way as to threaten violence. The judge found high culpability by reason of the single factor in culpability A of the guideline, namely "Production of a bladed article or firearm or imitation firearm to threaten violence". He submitted that the wording of this element of higher culpability is intended to cover situations in which a weapon is deliberately produced in order to issue a deliberate threat. Here, the appellant formed the intention to take the cars by force and indeed used force by wrestling with Ms Grant in order to get in the car but, contrary to the view taken by the judge, the production of the knife in this case was not intended as a threat and was not a necessary element of the offence of attempted robbery.
31. On that basis the proper assessment of culpability is that it was medium because the case falls between categories A and C. He took no issue with the assessment of harm,

so the case fell within category B2 where the starting point is 4 years with a range of 4 to 6 years. Therefore, he submitted that the judge's approach was wrong in principle.

32. Further, the appellant was 18 at the time of the offence and 19 at the date of sentence. His actions were essentially defensive, though excessively so, as he was being pursued by armed men. He has a poor record but not for violence. Mr Harley submitted that the total sentence of 8 years and 10 months was manifestly excessive in all the circumstances.

Discussion

33. Mr Harley's first ground challenges the sentence on counts 6 and 7. The culpability factors in the sentencing guideline for street and less serious commercial robberies are these:

A – High culpability

- Use of a weapon to inflict violence
- Production of a bladed article or firearm or imitation firearm to threaten violence
- Use of very significant force in the commission of the offence
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity

B – Medium culpability

- Production of a weapon other than a bladed article or firearm or imitation firearm to threaten violence
- Threat of violence by any weapon (but which is not produced)
- Other cases that fall between categories A or C because:
- Factors are present in A and C which balance each other out and/or
- The offender's culpability falls between the factors as described in A and C.

C – Lesser culpability

- Involved through coercion, intimidation or exploitation
- Threat or use of minimal force
- Mental disability or learning disability where linked to the commission of the offence

34. Mr Harley criticised the judge's finding that the culpability A factor 'Production of a bladed article... to threaten violence' applies in this case. In his oral submissions he

accepted that by virtue of having the knife in his hand the appellant had ‘produced’ it. He also accepted that Ms Grant and Ms Wright would have felt threatened by the fact he was holding the knife. However, he submitted that before the offender can be said to have produced a bladed article to threaten violence he must intend to produce it for that purpose. As he put it, there must be an active rather than a passive threat with the weapon. In this case, the appellant did not intend by carrying the knife in his hand to threaten Ms Grant and Ms Wright. He had taken it in the earlier burglary in order to defend himself, if necessary, from the group that was following him.

35. Attractively though these submissions were presented, we cannot accept them. In our judgment, the sentencing guidelines should not be interpreted in the restrictive way Mr Harley advocates. The culpability factors relate to the responsibility which the offender bears for his actions. If he produces a weapon which, entirely understandably, causes the victim to fear the use of force, in our judgment it is not open to him to say that he is not culpable for that action because he did not intend the victim to feel threatened.
36. Mr Harley’s construction of the culpability factors would give rise to bizarre, and in our view, unintended consequences. In this case Mr Harley submitted that, on his approach to the culpability factors, the case falls within category B because none of the category A or C factors apply. That has the effect that none of the culpability factors relating to production of a weapon could apply and in step 1 of the sentencing exercise the court must leave wholly out of account that the offender has produced a weapon which has the effect of threatening the victim. We do not consider that to be a tenable reading of these sentencing guidelines.
37. There is no evidence the appellant verbally threatened Ms Grant or Ms Wright. Nor did he brandish the knife or waive it at them. However, they both said that (apart from a brief period) he had it out in front of him and he must have realised it was clearly visible. Despite the fact that it must have been obvious to him, as indeed it would have been to anyone present, that they were terrified because they feared he would use the knife, the appellant did not discard it or put it away. By his plea he accepts that he intended to take the cars by force or the threat of force and took some action which was more than merely preparatory towards achieving that. In our view the judge was entitled to conclude that the category A factor ‘production of a bladed article... to threaten violence’ applied and he was right to place the attempted robberies in category A2.
38. As the judge said, the starting point for these offences was 5 years custody with a range of 4 to 8 years custody. After carefully balancing the aggravating and mitigating factors he arrived at a sentence of 7 years after a trial. In our judgment he was right to do so. These were shocking offences, committed outside a primary school where parents were dropping their children off at 8.45 in the morning. The appellant came towards two mothers who were in the middle of getting their children out of the car, armed with a knife held out in front of him, and he tried to get into their cars clearly intending to drive them away with their children inside. We have watched the CCTV of the children, their parents and teachers rushing into school to escape from the appellant, all were plainly terrified. The judge referred to the long-term trauma suffered by Ms Grant and Ms Wright both of whom needed counselling. Even allowing for the mitigating factors that the offences were both attempts and the appellant’s youth, this was very serious offending. Further, in our view the judge was

entitled to regard the circumstances in which the offences were committed, namely that A was trying to escape from an armed group who were chasing him, as providing limited mitigation given the serious nature of the offences.

39. It is also important to take into account that the judge ordered many other offences committed on 14 May 2021 near the primary school to run concurrently to the sentences for the attempted robberies: a domestic burglary, having an article with a blade or point, criminal damage and possession of an offensive weapon on school premises. As a matter of totality he was entitled to treat those as aggravating the attempted robberies which he regarded as the most serious offences.
40. We consider the judge was entitled to find that the aggravating factors outweighed the mitigating factors by a considerable margin and to place the attempted robberies towards the top of the category range justifying a sentence of 7 years after a trial. The credit he allowed for the appellant's guilty pleas of 20% was in our view generous. Thus, we do not find that the sentences for the attempted robberies of 67 months (or 5 years 7 months) were either wrong in principle or manifestly excessive.
41. We turn then to Mr Harley's second ground, which relates to totality. We acknowledge at the outset that this was an extremely difficult sentencing exercise and we pay tribute to the skilful way in which the judge approached it. The judge plainly had totality in clear view throughout and made downwards adjustments as he went along. We can see the merit in doing it that way.
42. However, standing back, we ask ourselves whether the resulting sentence of 8 years and 10 months was just and proportionate for this multiple offending by a young man who had just turned 19. This is the question posed by the totality guideline. We have come to the view that a shorter sentence could have been imposed, accepting the grave and sustained nature of this offending, and that insufficient account was taken by the judge of totality. We conclude that this sentence, in the unusual circumstances of this case, was manifestly excessive.
43. It is understandable that the judge treated the unlawful wounding offence as a separate act with a separate victim which justified a consecutive sentence. But added to the other sentences ordered to run consecutively, that led to an overall sentence which was too high. In order to arrive at a just and proportionate sentence for the totality of the appellant's offending, in our judgment the right course is to treat all the offences relating to the school on 14 May 2021 as a single episode and make all those sentences concurrent. The sentences imposed for the attempted robberies, which we have upheld on appeal for reasons set out above, are sufficient to mark the seriousness of all of the appellant's offending at the school that morning. Thus, the sentence on count 8 will remain 19 months but will be served concurrently to the 67 months imposed on counts 6 and 7. That reduces the total sentence to one of 7 years 3 months detention. That is still a substantial sentence and rightly so even for a young man of 19 (now 20). This was a sustained catalogue of offending which spanned a period of 6 months and which culminated in the shocking events outside the primary school on 14 May 2021.
44. We therefore allow the appeal to the extent that the sentence on count 8 of indictment T20217173 remains 19 months but will be served concurrently to the sentences on counts 6 and 7 on that indictment. All other sentences remain the same.

Ancillary matters

45. The judge purported to order no separate penalty for the offence of failure to surrender on 13 April 2021 at Cleveland Magistrates Court. The appellant had already been sentenced to a fine for that offence, so the order of no separate penalty was of no effect and we formally quash it.
46. The judge said he disqualified the appellant from driving for the offence of dangerous driving for a period of 5 years. Later he said it was to be 12 months after the appellant's release. He did not in terms specify the extension or uplift periods pursuant to ss.35A and 35B of the Road Traffic Offenders Act 1988 although the court record says "disqualified for 12 months and an extension period of 4 years." As we have reduced the sentence, we will recalculate the disqualification period to achieve the judge's objective of a disqualification of 12 months from the appellant's release.
47. The extension period for the 12 month sentence for dangerous driving is 6 months as the appellant will be entitled to release half way through the sentence. The uplift period for the 8 month sentence for the non-domestic burglaries is 4 months for the same reason. As to the sentence of 67 months for the attempted robberies, although robbery is an offence listed in Schedule 15 of the Criminal Justice Act 2003, the sentence does not exceed 7 years and therefore the appellant is also entitled to be released on licence at the halfway point. Therefore, the uplift period for these offences is 33 months making the total uplift period 37 months. Thus, the total disqualification period is 55 months or 4 years 7 months (12 month disqualification plus 6 month extension plus 37 month uplift). It is then necessary to adjust this to reflect the period the appellant spent on remand prior to sentence which is 14 months (17 May 2021 to 15 July 2022). Therefore, the final disqualification period is 41 months or 3 years 5 months (55 months – 14 months).
48. The judge ordered a statutory surcharge of £190. However, the appellant was 17 at the time of the earliest offences so the surcharge should have been £34. We amend the record accordingly.