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IN THE COURT OF APPEAL
CRIMINAL DIVISION



Case No: 2022/01891/A2

Neutral citation number: [2022] EWCA Crim 1837

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 25th November 2022

B e f o r e :

LORD JUSTICE BEAN

MRS JUSTICE FARBEY DBE

HIS HONOUR JUDGE FORSTER KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

HARRISON FRYER

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Mr N Murphy appeared on behalf of the Applicant

JUDGMENT

MRS JUSTICE FARBEY:

1. On 30th May 2018, in the Crown Court at Basildon before HHJ Leigh, the applicant (then aged 24) pleaded guilty to counts 1 and 2 on the indictment. On 8th October 2018, he was sentenced by the same judge as follows. On count 1, aggravated burglary, contrary to section 10(1) of the Theft Act 1968: an extended sentence under section 226A of the Criminal Justice Act 2003, comprising a custodial term of 12 years and an extension period of three years. On count 2, possessing an imitation firearm at the time of committing an offence, contrary to section 17(2) of the Firearms Act 1968: a determinate sentence of three years' imprisonment, which was ordered to run consecutively to the sentence on count 1.

2. There were co-accused. Joseph Pearl pleaded guilty to counts 1 and 2 and was sentenced on count 1 to an extended sentence of 15 years, comprising a custodial term of 12 years and an extension period of three years, and on count 2 to a determinate sentence of three years' imprisonment to run consecutively to the sentence on count 1. In this court, on 8th October 2019, his appeal against sentence was allowed and his sentence was reduced to a determinate sentence of 15 years' imprisonment. Jerome Johnson pleaded guilty to counts 1 and 2 and was sentenced on count 1 to an extended sentence of 14 years, comprising a custodial term of 11 years and an extension period of three years, and on count 2 to a determinate sentence of three years' imprisonment, to run consecutively. On 8th October 2019, his appeal too was allowed and his sentence was reduced to a determinate sentence of 14 years' imprisonment. Christopher Salvador was convicted of count 1 and was sentenced to an extended sentence of 17 years, comprising a custodial term of 14 years and an extension period of three years. Again, on 8th October 2019, his appeal was allowed and his sentence was reduced to a determinate sentence of 12 years' imprisonment.

3. The facts of the case can be taken from this court's judgment in the cases of the co-accused: *R v Johnson and Others* [2019] EWCA Crim 2503. The court observed:

"3. This was a very serious offence of aggravated burglary. The victims were the Wood family who lived in a flat above a dry cleaners in Grays, Essex. There was Mr Wood, his partner Miss Carter and their two children aged 14 and 4.

4. On the evening of 4th December 2017 a number of men ... burst into the flat. They were dressed in black and had their faces covered. They claimed to be the police. The men who entered were Johnson, Pearl, a co-accused Harrison Fryer and Paul Robertson. Salvador had been involved in the planning of the burglary, including being involved in reconnaissance but was not physically present when it took place... The burglars were armed with axes and an imitation firearm.

5. Robertson was the ring-leader. He had recruited [the others] ... It would appear that the attackers had intelligence that a large amount of money was in the flat, although in fact it appears they may have had the wrong flat. There was some money there, but not as much as they expected.

6. In any event, they staged a brutal burglary. Having burst in, they screamed demands for money. The imitation firearm was placed against the children's heads with the adults being warned that unless they revealed the whereabouts of the believed money

the children would be shot. Mr Wood was beaten with axes and threatened with having his head cut off, which he believed. A gun was also pointed at his head.

7. At some point he got free and scuffled with Robertson who sustained fatal injuries from an axe ... The other men left with money and jewellery in the mistaken belief that the police had arrived."

There is no doubt that this was a violent, terrifying and sustained burglary at night in the presence of two children who were threatened with being murdered.

4. The applicant had previous convictions for six offences. They were driving offences, assault, a public order offence and fare evasion.

5. As we have said, the judge recognised the seriousness of the offending by the imposition of a 12 year custodial term for the burglary and a consecutive term of three years' imprisonment for the imitation firearm. Those custodial terms do not form the subject of this appeal. The single target of the appeal is the imposition of the extended licence period.

6. In his helpful submissions, Mr Murphy emphasises that the judge concluded that the applicant was dangerous and imposed an extended licence period without a pre-sentence report. He submits that she should not have done so. He submits further that the judge failed to give sufficient weight to a series of factors that had an impact on the assessment of dangerousness and that diminished the risk of future harm presented by the applicant. He submits that the judge failed to give reasons why factors outside the nature and circumstances of the offences themselves were not relevant to the assessment of dangerousness.

7. We cannot improve on the reasoning of this court in *Johnson* at [21]:

"Section 156(3) and (4) of the Criminal Justice Act 2003 requires a sentencing court to obtain a pre-sentence report before passing sentence unless it thinks such a report is unnecessary. The judge did not do so in this case. That was understandable given the nature of the crime and that only one defendant was asking for a report. However, we consider with respect that she should have obtained reports. An extended sentence has severe consequences for a defendant, including only being eligible for consideration for release by the Parole Board at the two-thirds point of the sentence as opposed to automatic release at the halfway point and such a sentence should only be imposed after the most careful consideration of all the relevant information as is emphasised in section 229 of the 2003 Act. Assessing whether a defendant is dangerous is not always easy. In *Mayers* [2018] EWCA Crim 1552, this court said that it was normal to obtain a pre-sentence report to assist in the determination of dangerousness. Earlier, in *Attorney General's Reference No 145 of 2006 (R v Carter)* [2007] EWCA Crim 692 at para 18, the court said that generally such a report should be obtained where dangerousness is being considered, save in extreme cases. In our judgment, this was not such a case. That is because although, as we have said, this was an extremely serious offence, it is a notable and unusual, indeed extraordinary feature of the case,

that none of the three applicants had any previous convictions for violence or indeed much of a criminal record at all. Although the judge said that the fact that they had gone straight into such violent offending supported a finding of dangerousness, the matter can be argued the other way. In short we think it was unwise for the judge to have embarked on what was not a straightforward sentencing exercise without reports on the question of dangerousness."

In its overall conclusions the court said this:

"26. ... We remind ourselves that the imposition of an extended sentence is discretionary even where there is a finding of dangerousness. Before passing an extended sentence the judge must be satisfied that a lengthy determinate sentence would not be appropriate. ... As we have said, this aggravated burglary was very serious indeed and involved violence and threats against children. However, the reports we have received indicate that the offence was borne out of particular circumstances in which the applicants were when they committed the offence. The risks of Johnson and Pearl re-offending are assessed as low. The ringleader and organiser of the crime, Robertson, is dead and the applicants have little or no criminal record. We are unable to conclude that lengthy determinate sentences, well into double figures, are insufficient for public protection. ... Although the report that we have obtained for Salvador did reach a finding of dangerousness, we prefer the consistent view of the authors of the reports of the other two applicants that they are not dangerous within the meaning of the statute. For consistency we will treat Salvador in the same way because we do not see any proper basis for distinguishing him from the others ..."

8. We have had the benefit of a report from the Probation Service for this appeal. The author of the report does not minimise the seriousness of the offending, the life-changing effect on the victims, or the applicant's responsibility for what happened. The applicant was an immature young man attracted to the "gangster lifestyle", with little thought for the consequences. Despite maturing in prison, he is assessed as posing a high risk of harm to the public.

9. Nevertheless, in our judgment, the risk of harm is reduced by the very lengthy overall custodial term imposed by the judge. Each case turns on its own facts. But, like the court in *Johnson*, we are unable in this case to conclude that a lengthy determinate sentence is insufficient for public protection. We take the same approach as in *Johnson*. We extend time, grant leave, quash the extended sentence on count 1 and substitute for it a determinate sentence of 12 years' imprisonment. The sentence on count 2 remains unchanged.

10. Finally, we observe, as did the court in *Johnson*, that when passing the extended sentence the judge aggregated the custodial element of the extended sentence with the determinate and non-extended consecutive sentence for the firearms offence and said that the appellant had to serve two thirds of both before being considered for release. That was not correct. The two-thirds requirement applied only to the extended sentence. However, as we have quashed the extended sentence, we need say no more.

11. Accordingly, and to the extent set out, this appeal against sentence is allowed.

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