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IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2023] EWCA Crim 525



Nos. 202300610 A2
202300613 A2

Royal Courts of Justice

Tuesday, 25 April 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE JAY
HIS HONOUR JUDGE LEES

**A REFERENCE BY HIS MAJESTY'S SOLICITOR GENERAL
UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988**

REX
V
WASIO KODAOLU
MICHAEL BENSON

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MS F ROBERTSON appeared on behalf of the Applicant Solicitor General.

MR P ROMANS appeared on behalf of the Respondent Kodaolu.

MR B GILBERT appeared on behalf of the Respondent Benson.

J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

1 On 27 April 2021, in the Crown Court at Aylesbury, Michael Benson and Wasiu Kodaolu pleaded guilty to a single count of conspiracy to rob. On 1 February 2023 Benson was sentenced to five years and three months' imprisonment and Kodaolu was sentenced to five years' imprisonment. HM Solicitor General now applies for leave to refer those sentences pursuant to section 36 of the Criminal Justice Act 1988. He submits that each sentence was unduly lenient.

The Factual Background

2 Between December 2018 and May 2019, a series of frauds were carried out against O2. Legitimate customer accounts were accessed by the fraudsters. Fraudulent orders were placed for iPhone XS Max handsets, the fraudsters calling O2, purporting to be the customer, and claiming that their handset had been lost or stolen. Voice alteration devices were used when making these calls. The handsets fraudulently obtained were delivered by the courier service DPD. Each delivery, as was common, was given a one-hour delivery window. The progress of the delivery could be tracked on the DPD app or website. Those involved in the obtaining of the handsets were able to obtain the delivery details for each order. They tracked the progress of the delivery. By this means, two or three people were able to intercept the delivery and to snatch the handset from the DPD driver as he approached the delivery address. Where necessary, force was used or threatened. On occasion the DPD driver would be pushed to the ground or punched before the handset was grabbed from him. There were 29 occasions between December 2018 and May 2019 on which DPD drivers were the subject of violence or threatened violence with a view to a handset being taken. On all but five of those occasions a handset was, in fact, stolen. The total loss to O2 was £34,050.

3 The robberies or attempted robberies of DPD drivers took place over a wide geographical area of the Home Counties. Drivers were attacked in London, Reading, Slough and various locations in Surrey, Hertfordshire, Essex and Kent.

4 Benson was involved on every occasion that a delivery driver was the subject of a robbery or attempted robbery. On 25 occasions he was one of the people at the scene, directly involved in the taking or attempted taking of the handset. His car was regularly used to transport the robbers to the scene. On the other four occasions he was in telephone contact with the people at the scene. He had recruited Kodaolu and another person to the criminal scheme.

5 Kodaolu was involved in 26 events. His first involvement was in January 2019, that is after he had been recruited by Benson. In the course of the conspiracy he also recruited someone else to assist in the robberies.

6 On 21 May 2019 Benson and Kodaolu were arrested in Cheddington, Bedfordshire, close to the scene of a robbery. The DPD driver had delivered the parcel containing a handset to a female neighbour of the customer who supposedly had ordered the handset. Benson and Kodaolu snatched the parcel from the neighbour who suffered a minor scratch as she tried to stop them taking the handset. They then pushed aside the DPD driver who tried to stop them escaping. They were chased through the village by the driver and others. When confronted they handed back the parcel. The police arrived in time to arrest them.

7 Both offenders were interviewed on the same day. Benson made no comment to all questions put to him. Kodaolu said he had been with Milton, presumably a reference to Benson, who had, without warning, snatched a parcel. He said he had run with Benson

because he had panicked. Following their arrest, the mobile telephones of both offenders were examined. The telephone of Benson had been used on a number of occasions to access the DPD app in order to track the delivery of particular handsets. Two numbers attributed to Mr Kodaolu had been used on many occasions to contact O2 customer services in order to check the status of orders.

8 Benson was interviewed again on 18 June 2019 and 11 November 2019. He continued to make no comment to all questions. Kodaolu was interviewed again on 11 August 2019 and 11 November 2019. In August 2019 he made no comment save to say that he had known Benson for about four years. In November 2019 he provided a short prepared statement denying all involvement in and all knowledge of any conspiracy to rob. Thereafter, he made no comment to all questions.

9 There was and is no evidence that either offender was involved in the underlying fraud which led to the delivery of the handset by DPD. As we have indicated, they were involved in tracking the deliveries and contacting O2 customer services. There is no evidence from where they obtained the information necessary to do that. It is clear that the offenders, together with others, in essence, were the people who carried out the robberies.

The Course of the Proceedings

10 Both offenders were charged on 20 November 2020. This was 12 months after the investigation was complete. They appeared at the magistrates' court on 12 February 2021 and were sent for trial. Neither gave any indication of a plea of guilty. The case was listed for a PTPH on 22 March 2021. The offenders were not arraigned then because there was some evidence that remained to be served. However, it was indicated on their behalf that pleas of guilty would be tendered. The judge adjourned the PTPH. He directed that the offenders should retain the appropriate discount for plea until the next hearing. He ordered the offenders to serve written bases of plea.

11 The adjourned PTPH was listed on 27 April 2021. Both offenders pleaded guilty. Benson had served a basis of plea which was acceptable to the prosecution. Kodaolu's basis of plea was not accepted. However, it was amended shortly afterwards to an acceptable form. Both men accepted full participation in the robberies and attempted robberies. They did not admit particular acts of violence. Two others were indicted with the offence of conspiracy to rob. They pleaded not guilty. Their trial was fixed for 16 September 2021. The trial could not be heard on that date. It was refixed for 21 September 2022. Shortly before that date, one of the other two defendants pleaded guilty. The trial of the remaining defendant could not proceed in September 2022. It was adjourned until 15 May 2023. Sentencing of these offenders had been adjourned to await the outcome of the trial of the co-accused. When it became apparent that the outstanding trial would not take place until the middle of 2023 the judge decided that those who pleaded guilty could be sentenced without any further delay. In the event, the sentencing hearing did not take place until 26 January 2023.

The Material available to the Judge

12 The judge had business impact statements from DPD and O2. On behalf of DPD, it was said that the robberies of their drivers discouraged other drivers from making deliveries to the extent that drivers would leave the company. In addition, repeated robberies of valuable items would lead to customers, that is those consigning the goods, to lose faith in DPD as a safe means of delivering their goods.

13 On behalf of O2, it was said that the activity which occurred between December 2018 and May 2019 damaged the trust between O2 and their customers. Further, the criminal activity placed additional demands on O2's fraud team.

- 14 The pre-sentence report in relation to Benson rehearsed his account of his involvement in the conspiracy, namely that he co-ordinated the activity on the days of the robberies. He said that others had organised the fraudulent ordering of handsets. They provided him with the details of each delivery. At the time of the report, Benson, who is now aged 32, was acting as the principal carer for his five-year old son whilst his partner went out to work. He was a qualified mechanical engineer and had worked in that capacity until around 2016. He became involved in the conspiracy because he wanted to provide financially for his son. Rather than return to legitimate employment, he joined the criminal scheme. The report noted that Benson had been convicted in October 2007 of an offence of robbery. Benson then had been 16. Though the nature of the robbery had been serious, namely a cash-in-transit robbery when cash had been delivered to a supermarket, his role had been limited. The eventual sentence was a community order.
- 15 The pre-sentence report in relation to Kodaolu, now aged 39, explained his involvement in the conspiracy by reference to debt that he owed. Despite the fact that he had regular employment on a construction site with earnings of around £3,500 a month, he decided to deal with his debt by participating in the conspiracy. He had a child with a partner from whom he was separated. He still saw the child on a regular basis.
- 16 The judge had character references in relation to each offender from family members which spoke highly of their general behaviour. In Kodaolu's case, his employer had also provided a reference. The tenor of the references was that the offenders' involvement in a sustained criminal conspiracy was for them out of character.

The Sentencing Hearing

- 17 The prosecution provided a sentencing note in which they submitted that the appropriate Sentencing Council guideline was for robbery professionally planned, commercial. Both offenders were said to have taken a leading role with Benson's participation being greater than Kodaolu's. Thus, culpability was high. Harm was said to fall into Category 2. That analysis led to a starting point of nine years with a category range of seven to 14 years.
- 18 On behalf of both offenders, it was submitted that they occupied significant rather than leading roles. Others were responsible for the fraudulent ordering of the handsets. Whoever those people were, they were in charge of the conspiracy. Both offenders also relied on the fact that the substantive robberies did not involve significant violence. Rather, they were snatch thefts.
- 19 Finally, the conspiracy had ceased in May 2019. The offenders had led decent lives since then.
- 20 In his sentencing remarks, the judge rehearsed the factual background in some detail. He referred to the business impact statements. He then turned to the case of each defendant.
- 21 In relation to Benson, the judge noted that he had on occasion contacted O2 to check the status of orders. This meant that he was at the heart of the conspiracy. He referred to Benson having "a fairly central role" which included recruiting others. However, he accepted that others had masterminded the conspiracy and that Benson was not "right at the very centre". The judge applied the professionally planned commercial guideline. He observed that the sentencing levels in the guideline applied to a single offence. He concluded that Benson had played a significant rather than a leading role albeit at the upper end of the range for such a role. The relevant category range where culpability was medium rather than high was four to eight years' custody. The judge concluded that the proper

sentence after trial, taking into account aggravating and mitigating features, and before consideration for delay and reduction for the plea of guilty, would have been eight years' custody. The eventual sentence of five years and three months gave some discount for delay and a reduction of 25 per cent for the plea of guilty at the PTPH.

- 22 In relation to Kodaolu, the judge found that his level of culpability was lower than that of Benson. Kodaolu had been recruited by Benson and had been involved in slightly fewer robberies. However, Kodaolu had recruited someone else to join the conspiracy which involved an element of leadership. In his case, the judge found that the sentence after trial would have been seven and a-half years. The eventual sentence of five years' custody allowed for a discount for delay and a reduction of 25 per cent for the plea of guilty.

Discussion

- 23 HM Solicitor General relies on two features of the case to make good his argument that the sentence was unduly lenient. First, the judge erred in not placing the offenders squarely within the category of high culpability. They were involved in most, if not all, of the substantive offences which the conspiracy represented. They had recruited others. They had contacted O2 (in the case of Kodaolu) or DPD (in the case of Benson) prior to the deliveries being made. Those matters pointed inexorably to the offenders playing a leading role. The fact that others may have been involved at a higher level could not defeat that proposition. Second, the judge failed to reflect the multiple offending. The Solicitor General points to the following statement in the guideline:

"Where multiple offences or a single conspiracy to commit multiple offences of particular severity have taken place sentences of in excess of 20 years may be appropriate."

Whilst this was not a case requiring a very significant uplift in the sentence, it was necessary to increase the starting point to an appreciable extent to allow for the multiplicity of individual offences.

- 24 On behalf of the offenders, counsel who appeared in the court below have argued that the judge's approach was correct. The description of "leading role", in the context of this case, should be reserved for those who hatched and engineered the overall scheme. It was of significance these offenders were directly involved in the robbery; that indicated that there were others further up the hierarchy.

- 25 We remind ourselves of what was said by Lord Lane CJ in *Attorney General's Reference* (No. 4 of 1989) [1991] WLR 41 when section 36 of the 1988 Act was in its infancy:

"A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all relevant factors, could reasonably consider appropriate. In that connection, regard of course must be had to reported cases and in particular to the guidance given by this court from time to time in so-called guideline cases. However, it must always be remembered that sentencing is an art rather than a science. The trial judge is particularly well placed to assess the weight to be given to various competing considerations, and that leniency is not of itself a vice."

- 26 Those principles hold good today, save that sentences now must be considered by reference to the relevant Sentencing Council guidelines.

- 27 In short, we have to ask whether the minimum term imposed by this judge in each case fell

outside the range reasonably open to him.

- 28 The application of any Sentencing Council guideline is not an arithmetical or mechanistic exercise. What was said by Hughes LJ (as he then was) in *Healey and Others* [2012] EWCA Crim 1005, paragraph 9, in relation to the drugs guideline is of general application:

"The format which is adopted by the Sentencing Council in producing its guidelines is to present the broad categories of offence, frequently encountered pictorially in boxes. That is perhaps convenient, especially since it is necessary to condense the presentation as much as possible and to avoid discursive narrative on so wide a range of offending. It may be that the pictorial boxes which are part of the presentation may lead a superficial reader to think that adjacent boxes are mutually exclusive, one of the other. They are not. There is an inevitable overlap between the scenarios which are described in adjacent boxes. In real life, offending is found on a sliding scale of gravity with few hard lines. The guidelines set out to describe such sliding scales and gradations."

- 29 This analysis is of particular significance when, as here, the terms "leading role" and "significant role" are given no further definition beyond confining them to cases where the offence involves group activity. This was a case where there was an overlap between the different types of role. The judge's decision to move up to the upper end of the category range for medium culpability or, to put it another way, the very lower end of the range for high culpability reflected this overlap. The argument that the offenders had a leading role in the robberies themselves is not determinative.
- 30 This conspiracy was a sophisticated scheme to obtain easy access to valuable handsets. The offenders cannot be said on the evidence to have taken a leading role in that scheme.
- 31 Also of significance is that fact that the individual incidents could not easily be described as commercial robberies. Looked at in isolation, each incident bore the hallmark of a street robbery involving limited violence. It was the overall scheme which brought the case within the guideline for professionally planned commercial robbery with the emphasis on the word commercial. As we have said, the offenders, on the evidence, did not play a leading role in that overall scheme.
- 32 We further conclude that this factor is of relevance when considering the argument that the sentences failed to reflect the multiple offences of robbery. In our view, if it had not been for the multiplicity of offending the case would not have been categorised as commercial robbery. In those circumstances, to increase the sentence to take account of multiple offending would involve double counting. As we have said, the sentence after trial identified by the judge was at the upper end of the category range for medium culpability. Equally, it was at the lower end of the category range for high culpability. Another judge might have moved the sentence after trial a little up the category range for high culpability given that the offenders plainly knew the extent of the wider conspiracy and given their contact with O2 and/or DPD. But that, in our view, cannot indicate that the judge in this case went outside the bounds of what would be considered reasonably appropriate.
- 33 It is not possible to say precisely what discount was applied for the delay in these proceedings. It appears to have been around nine months in each case. We do not consider this reduction as unreasonable. There had been a delay of 12 months in charging the offenders. Once they had pleaded guilty, the continuing delay was due to other defendants awaiting trial. Whilst much of the delay was explicable, it was not caused by the

defendants. By the time they were sentenced, they had lived law-abiding lives for three years or more. These circumstances justified the not insignificant reduction in the sentence.

Conclusion

34 We refuse leave to refer these sentences. They fell well within the bounds of what was reasonable given all the circumstances of the case. In our judgment the argument of HM Solicitor General ignores the need to take a nuanced approach to any sentencing guideline. Taking such approach in this case leads us to conclude that these sentences were not unduly lenient.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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