

IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202300644/A3
NCN: [2023] EWCA Crim 912



Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 7 June 2023

Before:

LADY JUSTICE MACUR DBE

MR JUSTICE CHOUDHURY

MR JUSTICE CONSTABLE

REX

V

CAMPBELL MCKEEGANS

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MR A RADLEY appeared on behalf of the Appellant.
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J U D G M E N T

MR JUSTICE CONSTABLE:

Introduction

1. On 27 February 2023, the appellant was sentenced by HHJ Lucking to 26 months' detention in a young offender institute on one count of making a threat to kill, contrary to section 16 of the Offences Against the Person Act 1861, following a guilty plea. The appellant appeals against sentence by leave of the single judge.

2. The four grounds advanced in writing by Mr Radley, counsel for the appellant, were as follows: (1) the entry point of the sentence guidelines for the offence was placed too high for the facts of the case; (2) the judge departed from the Crown's assertion that this offence was at a lesser category of offending (3) insufficient weight was given to the vulnerabilities identified in the pre-sentence report, supporting the appellant's assertion that he was covertly given a drug before the offence leading to a loss of inhibitions and feelings of fear and being tricked into a possible addiction and (4) the principle of totality had not been applied to the sentence fairly.
3. The appellant was 10 days shy of his 18th birthday at the date of the offence; he was 19 years old when sentenced. When granting leave the single judge did not specifically refer to any of the four grounds that had been advanced by way of appeal but instead identified the appellant's age at the time of the offending and the delay in sentencing as factors to which insufficient weight may arguably have been given by the sentencing judge.

The Facts

4. On 23 November 2021, the appellant was arrested at the address of another male. A search of the address led to a Nokia mobile phone being seized and a 5 minute and 19 second video was found on the phone. This video was made by the appellant. It showed a male (the complainant) being told to, and complying with instructions, to insert an object into his anus. He then struggled to remove the item whilst the appellant issued verbal threats to kill him if he did not remove it. Effectively this was "plugging" drugs. At the start of the video the appellant is heard to encourage the complainant to plug the item. The complainant can be heard saying: "This is so humiliating". The video showed him with his trousers down and he was told to bend over more so he could plug the object

as instructed. The appellant and a second male could be heard laughing.

5. Once the complainant had successfully plugged the object, he was told to "unbank that now". He started to try and remove the package but was unable to do so quickly enough. The appellant became increasingly aggressive demanding "unbank the fucking pack now" and "hurry fuck up or I'm going to kill you". The complainant squatted in an effort to remove the package and asked if he could go to the toilet, the appellant said: "I'm going to have to kill you now bro". The complainant was allowed to go to the toilet and sit on it to see if he could remove the package. He was told to hurry up and replied: "It isn't easy with you guys watching". The video showed him trying to get the package out and the appellant saying: "It's £1,000 in you, I'm going to kill you bro, I'm going to stab you up". After this the appellant started counting down from 5, saying: "I'm going to do mad things. I'm going to cut him open. I'm going to kill you bro if ain't out in 5 minutes." The appellant then says: "Give me the Rambo, bro" (meaning a type of knife) and could be seen holding a machete on the video and saying: "I'm going to stab you up, I'm going stab you up. I'm going to kill him. I'm going to put this knife in his neck if you don't get it out." The appellant became increasingly agitated and angry that the package had not been unplugged. The footage ended after 5 minutes and 19 seconds, and at that point the complainant had not managed to remove the package.

6. *The Sentence*

7. The judge sought to categorise the offence within the Sentencing Guideline for threats to kill. A note submitted by previous counsel for the prosecution, in advance of what became an adjourned hearing for sentence, had identified the categorisation as higher culpability because a weapon was visible and as category 2 for harm. Category 2 is harm

which falls between categories 1 and 3 and, in particular, some distress caused to the victim. Category 1 includes *very serious distress* caused to the victim. The judge agreed with higher culpability and, quite rightly, no criticism is made of that in this appeal in Mr Radley's oral submissions today. The judge was however concerned that category 2 understated the level of harm. The court had been provided with a story board of the 5 minute 19 second video, which included stills taken from key moments in the video. However, the judge wished, quite correctly, to see, and importantly, hear the video. This was done in the company of counsel, in chambers rather than in open court given the content of the video. Having seen the content of the video, the judge formed the view that the complainant was not just subjected to some distress but was *significantly distressed* and moreover humiliated. She said that she considered the correct categorisation of harm to be category 1, and counsel for the prosecution (a different counsel from counsel who had prepared the Sentencing Note) appeared to agree.

8. In her sentencing remarks, it is clear that the judge took into account, prior to settling on the appropriate categorisation, the basis of plea. The basis of plea accepted by the Crown was that, prior to the incident, the appellant had been given half a roll up cigarette to smoke, it had made the appellant feel like he wasn't himself and he had flashbacks to his childhood when he had witnessed his parents being robbed and his mother had her jaw broken. It made him feel hyperactive and he felt he must have been spiked. He thought it was crack cocaine and he thought he would become addicted. The basis of plea was also reflected in the comments made during interview for the purpose of the pre-sentence report.
9. The judge recognised that if the cigarette given to him by the complainant had been spiked and this had affected the appellant's conduct, this is a matter which could go to the

level of culpability and, at this stage, she also expressly identified extremely distressing aspects of the appellant's childhood, reflected in the pre-sentence report, which may also have affected his state of mind. However, she said that these factors must be balanced against the level of distress caused by the appellant. She described how in the video the complainant becomes very distressed and his voice can clearly be heard rising in a degree of panic in response to the fact the appellant's own voice had become increasingly intense and serious about killing the complainant because of the £1,000 of drugs which the complainant was unable to remove from his body. She stated that, notwithstanding the basis of plea and the appellant's childhood experience, she was satisfied that the distress caused placed this in the category 1 of harm. The judge identified the starting point for a category A1 threat to kill as 4 years within a range of 2 to 7 years. The judge then proceeded to consider statutory aggravating factors, namely the appellant's previous convictions.

10. The appellant had 15 convictions for 44 offences spanning from 2015 to 2021. His previous offences included criminal damage, theft, common assault, resisting a constable, multiple offences of robbery, dwelling burglary, aggravated vehicle taking and using threatening behaviour. In 2017, he had received an 8-month DTO for an offence of aggravated burglary. In 2020, he was made subject of YRO for possessing Class B and his most recent sentence in 2021 was when he was fined for possessing Class B drugs.
11. The judge, in this context, then took account of the damaging and difficult childhood through which lens the appellant's previous convictions should be viewed. The judge referred to the guidance in the Sentencing Council's guidance on Sentencing Children and Young Persons. She identified that, although the appellant was ten days shy of his 18th birthday, she had to bear in mind normally, for a young person aged between 15 and 17,

the guidance states that the court, when considering the relevant adult guidance, may feel it appropriate to reduce the sentence by half to two-thirds of the adult sentence. It is plain that in putting it this way the judge misspoke because the guidance does not say a reduction *by* half to two-thirds but rather a reduction *to* half to two-thirds of the adult sentence for those aged 15 to 17. The guidance also states that this is only a rough guide and must not be applied mechanistically, as indeed the judge reminded herself.

12. Mr Radley, in his written submissions, worked backwards from 26 months, imposed after a full one-third credit for a plea, and calculated that the judge's starting point, prior to the adjustment for youth, was some 62 months. Whilst it may have been better for the judge to have identified her calculation more explicitly, we do not think that this in fact was the likely starting point of the judge. Instead, it seems to us likely that the judge initially identified a starting point of 4 years as set out in the relevant guidance for category A1.

13. Notwithstanding the presence of statutory aggravation features of serious previous convictions, the judge did not then adjust the 4-year starting point upwards for these, in light of the mitigating effect of the appellant's troubled childhood and youth. Prior to a one-third reduction for the guilty plea, the judge's sentence must have been 39 months. Thirty-nine months is an approximate 20 per cent reduction from 4 years (or 48 months) starting point. Thus, taking account of the judge's comments that the discount for youth needed to reflect the fact that the applicant was only 10 days shy of his 18th birthday, it seems to us that the judge reduced the sentence she would otherwise have given to an adult by some 20 per cent, rather than a 33 to 50 per cent referred to in the Guideline.

14. *The Appeal*

15. We shall now consider each of the bases of appeal advanced in writing and in the helpful

oral submissions by Mr Radley today together with the remarks of the single justice. It is convenient to take grounds (1), (2) and (3) together. They all relate to whether the judge was correct to categorise the offence as an A1 offence. This was a central plank of the appeal as emphasised by Mr Radley today. We have watched the video. We agree with the sentencing judge that the distress caused to the complainant was very significant. Because of the words and demeanour of the appellant, the complainant clearly thought that if he was unable to remove the drugs from his body, the appellant would cause him really serious harm with the Rambo knife, potentially resulting in his death. The judge plainly considered the basis of plea and the vulnerabilities of the appellant and was right to balance that when considering the correct categorisation. The judge, in our view, was not just entitled to, but absolutely correct to, conclude on the video evidence that both the presence of the knife justified higher culpability and the distress caused was such that, even without the added humiliation caused by the appellant's conduct, the harm fell into category 1. As to ground (2) specifically, judges are entitled to conclude that the offending lies outside of the categorisation submitted as appropriate by the prosecution, or indeed one agreed by both prosecution and defence. Providing that the categorisation the judge arrives at is justified, the mere fact that it departed from the Crown's assertion is irrelevant and does not constitute a ground of appeal.

16. In this case, we are therefore of the view that the judge was not just justified, but correct, in determining that this offending should be categorised as A1. We also note that, after the judge and counsel had watched the video, prosecuting counsel did not in fact submit the correct categorisation of harm was level 2 and appeared to agree with the judge. In any event, ground B falls away.

17. As to ground 4, in his oral submissions today, Mr Radley elaborated on the ground of

totality. He identified that the appellant was serving at the time a sentence for a drugs offence. The drugs offence was not directly related to the offences that were being sentenced by the sentencing judge. Mr Radley submitted that nevertheless, this should have been taken account of notwithstanding the fact that the cases were not directly linked.

18. The application of the principle of totality is not of course directly relevant where, as here, the appellant was being sentenced for a single offence. Nevertheless, we are satisfied that all of the circumstances of the appellant's situation, including his being in detention at the time of sentences, were taken account of in the overall sentence. Ground 4 therefore does not assist the appellant.
19. Turning finally to the observations of the single judge when granting leave. We consider that the sentencing judge gave proper consideration both to the contents of the pre-sentence report and to the youth of the appellant. She did so first, when the combined effect of the aggravation and mitigation led her to not increasing the 4-year starting point for the appellant's previous conviction. She did so secondly, when applying a 20% reduction to the sentence prior to credit in order to reflect the youth of the appellant who only just fell within the 15 to 17-year old bracket to which the guidance applies. As the guidance states, the reduction to the half to two-thirds of the adult sentence should not be applied mechanically and determining that the appropriate reduction was one of around 20 per cent when the appellant was 10 days short of his 18th birthday was entirely justified. Whilst the judge did not explicitly take account of the delay in sentencing, we regard the ultimate sentence of 26 months to be neither wrong in principle nor manifestly excessive. Accordingly, the appeal is dismissed.