IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CENTRAL CRIMINAL COURT

HIS HONOUR JUDGE DUGDALE

T20227444

CASE NO 202304190/A5

[2024] EWCA Crim 829

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 16 July 2024

Before:

LORD JUSTICE WARBY
LORD JUSTICE WILLIAM DAVIS
HIS HONOUR JUDGE TIMOTHY SPENCER KC
(Sitting as a Judge of the CACD)

REX
V
MATTHEW MCKENNON

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MR A ROSE appeared on behalf of the Applicant

J U D G M E N T
(Approved)

LORD JUSTICE WARBY:

1. This is a renewed application for leave to appeal against sentence in a case of gang violence.
2. The applicant is Matthew McKennon, who is now aged 25. On 30 August 2023 in the Central Criminal Court he pleaded guilty to two counts of conspiracy to cause grievous bodily harm with intent (counts 2 and 6), one count of causing grievous bodily harm with intent (count 10), three counts of arson (counts 4, 8 and 12) and one count of possessing a firearm with intent to commit an indictable offence (count 16).
3. On 6 November 2023 the applicant was sentenced by His Honour Judge Dugdale to an extended determinate sentence of 22 years, comprising a custodial term of 18 years and an extended licence period of four years. Nine other counts were ordered to lie on the file on the usual terms.

The Facts

4. The charges we have listed reflected the applicant's role in organised drive-by shootings on three separate occasions in the summer of 2022. On each occasion a group of people went out late at night in a stolen car with false number plates, in disguise and armed, with the aim of finding members of the so-called N-Gang and causing them really serious harm. On each occasion targets were identified and they were shot at repeatedly before the gang drove away and set fire to the stolen cars. On the first two occasions the bullets missed their target. On the third the victim was seriously wounded.
5. The first episode took place on 7 June 2022 in the Northolt area of West London. The stolen car was a grey Land Rover. It was driven towards Islip Manor Road with a group of five or six people inside looking for targets to shoot. Four individuals got out,

apparently seeking targets. Having failed to find any, they got back in and drove off. They soon identified a group of three. Three people got out of the car: one with a sawn-off shotgun, one with a pistol and a third with a knife. The shotgun and the pistol were fired with the intention of causing very serious harm but in the event nobody was injured. The group drove off and the car was later burned. These events were reflected in the charges of conspiracy and arson in counts 2 and 4.

6. The applicant pleaded guilty to those counts on the basis that he was involved in the shooting and knew what was going on but he was not actually in the car, nor was he present when the shootings took place. He accepted that he was involved in the aftermath and was involved in the burning of the car.

7. The second shooting occurred on 11 June 2022 in the same area. On this occasion the stolen car was a Mercedes. Two shots were fired at a group. Again the intention was to cause very serious harm but nobody was injured. The car drove away and was later burned. These events were reflected in the charges of conspiracy and arson in counts 6 and 8. The applicant's guilty plea to those counts was entered on the same basis as his plea to counts 2 and 4.

8. Counts 10, 12 and 16 reflected the facts of the third shooting on 5 July 2022. The victim was Jerwayne Grant. At about 1.00 am he was driving his Mercedes on King's Hill Avenue when a stolen white Mazda pulled up alongside. Shots were fired and hit Mr Grant. As he tried to get away the Mazda drew near again and further shots were fired and hit their target again. It was later established that at least 16 shots had been fired from a 16mm handgun, of which at least five or six struck Mr Grant. He had gunshot wounds to the nose, jaw, forearm, right shoulder, neck and upper back, with an extensive contusion within the right lung, as well as a fractured rib. Mr Grant was not a

gang member. The attack was based on mistaken identity.

9. The shooters drove away, abandoned and set light to the car, as before. On this occasion it set fire to other nearby cars and some vegetation. Fire officers called to the scene concluded that if they had not attended the fire would have spread to a nearby residential address.
10. Hours later the applicant recorded himself performing drill music, apparently describing and glorifying the shootings. The lyrics made reference to using firearms for head shots, not shots to the arms and legs.
11. The applicant admitted being one of those who was in the Mazda throughout these events. His guilty plea was entered on the basis that he did not have hold of the firearm when it was discharged but, as the judge put it, he accepted having sufficient custody and control over it to make him guilty of possession. He said that whilst in the vehicle he was aware that a firearm was present and that it had been discharged but that he was not aware that the complainant had been injured.
12. The basis of plea also gave an account of the lyrics that were said to reflect what had happened. He claimed that they were written as "ghost writing", meaning that although they appeared to be written in the first person they did not reflect his personal experience or actions.

Sentencing

13. The applicant had 12 convictions for 26 offences including numerous robberies, drug offences and possession of offensive weapons. He was serving a sentence on licence at the time of the offending with which we are concerned.
14. The judge concluded that he was dangerous within the statutory definition and that an extended determinate sentence was required for the protection of the public. There has

been no challenge to either of those conclusions nor to the licence period. Issue is taken with the length of the custodial term.

15. To arrive at that term the judge took count 10 as the lead offence on which to pass a sentence to reflect the overall criminality. It was common ground that the offending was in Category 1A of the Sentencing Guidelines for Causing Grievous Bodily Harm with Intent and Category 1A of the guidelines for possession of a firearm with intent. In each case the starting point is 12 years' custody and the range is between 10 and 16 years for a single offence. The judge also had regard to the sentencing guideline for arson but said that he would treat the arson as one of the aggravating features of the principal offending.
16. The judge acknowledged that the applicant's role in the two conspiracies was a lesser one than that of others but he said that the nature of the offending meant that there would be no reason to come down below the category starting point if he was sentencing for these offences alone. When it came to count 10 the sentence, after taking account of the aggravating and mitigating features, would go above the starting point, said the judge.
17. Reviewing the seriousness of the offending and the aggravating features the judge referred to the use of stolen cars, false number plates, masks, the destruction of the cars, the fact that a group was involved and the gang-related nature of the offending. He identified the applicant's previous convictions and the fact that the offences were committed when on licence as aggravating features. He referred to the drill music lyrics which he said demonstrated the applicant's state of mind about the events that had happened. But overall, he said, the most significant aggravating feature was the significant risk of death or serious injury to members of the public.
18. The judge also reviewed the personal mitigation set out in the pre-sentence report which explained the applicant's troubled background and a psychological report which

concluded that the applicant was easily influenced. He said however that having taken the journey to get involved in gang culture the applicant had to take the consequences.

19. The judge concluded that if there had been a trial the custodial element of the sentence on count 10, taking account of all the offending, would have been 21 years. He reduced that by about 12 to 13 per cent to reflect the guilty pleas, thus arriving at 18 years.

20. For the other counts the judge imposed concurrent sentences. For the firearms offence the sentence was 14 years. For each of the conspiracies the sentence was 10 years and for each of the three arson offences the sentence was one of two years.

Grounds of Appeal

21. The written grounds of appeal focus on what is described as the "starting point" of 21 years' imprisonment on count 10, that is to say the notional sentence after a trial. The ground of appeal is that "this was manifestly excessive for the overall criminality because an increase of five years beyond the upper limit of the category range was unjust, disproportionate and offended the principle of totality."

22. In support of that ground of appeal, Miss Crimmins KC and Mr Rose in their written grounds invited us to interpret the judge's remarks as reflecting the following reasoning process.

    (1) First, that the appropriate sentence after a trial for the two conspiracies taken together would have been a little more than 13 years and six months, which should then be reduced for the pleas of guilty and totality to 10 years concurrent.

    (2) Secondly, that the appropriate sentence after a trial for the completed section 18 offence would not go beyond the top of the category range, namely 16 years. Applying a 12 per cent reduction for the guilty plea, the argument ran, the appropriate sentence on count 10, if it stood alone, would have been one of 14 years.

23. Based on these twin propositions counsel argued that the notional sentence after a trial of 21 years on count 10 could not be justified on grounds of totality.

24. Today, Mr Rose has laid emphasis on the applicant's basis of plea and invited us to conclude that the applicant's participation in the offending under count 10 did not include awareness in advance that a firearm was going to be discharged. He has also drawn particular attention to the mitigation that was placed before the sentencing judge and contended that this was insufficiently taken into account. Thirdly, he has reminded us of the applicant's letter to the court advancing mitigating features for the purposes of this renewed application.

Assessment

25. We are grateful to counsel, leading and junior, for their submissions. However we have not been persuaded that this applicant has any reasonable or arguable grounds to complain about his sentence.

26. First, with respect, we do not believe the judge's sentencing remarks can support the analysis set out in the written grounds of appeal. Our clear understanding of what the judge said is that he considered that each of the conspiracies, viewed separately and in isolation, would have merited a sentence after a trial of 12 years. He did not express any view about what might have been the sentence if there had been a trial involving both those conspiracies but no other offending. That was not a necessary or relevant aspect of the sentencing process. Further, on our reading the judge's remarks about the appropriate sentence for count 10 were also concerned with the sentence for that count viewed in isolation. It is on that basis only that the judge evidently took the view that the sentence after a trial for that count would not exceed the category range of 16 years.

27. Secondly, the line of reasoning advanced appears to us to be wrong in principle for at

least two reasons. It involves two separate allowances for totality, one when considering the appropriate sentence for counts 2 and 6 in combination, but in isolation from count 10, and then a further allowance when considering the combined sentence for counts 2, 6 and 10 together. Further, the argument focuses, as we understand it, exclusively on the grievous bodily harm offences, ignoring the four other counts to which the applicant pleaded guilty.

28. Thirdly, an analytical arithmetical approach of the kind that was urged upon the court in the written grounds is, in our view, entirely inappropriate. The applicant pleaded guilty to seven serious offences. Viewed in isolation each merited a substantial custodial term. Four would each have justified a term of 10 years or more. The imposition of consecutive sentences of a length appropriate to each offence would have resulted in a custodial term of well over 40 years, even after reduction for the guilty pleas. That of course would not have complied with the overriding principle of totality. This requires the court to ensure that when sentence is passed for more than one offence the overall sentence should not only reflect all the offending and all relevant factors, including personal mitigation, but also that it should be just and proportionate.

29. In this case the judge took a standard approach to this issue, namely to select a lead count on which to pass a sentence reflecting the overall criminality with concurrent sentences on the other counts. It is common ground that he was right to do so and that count 10 was a suitable lead count. In such a case the court has to identify the appropriate sentence on the lead count and then apply its judgment to determine how far that sentence should be adjusted to reflect the principle of totality. In this case on any view that would require a substantial upward adjustment beyond the top of the category range for a single section 18 offence. Even on the analysis presented in the written grounds, the uplift

which the judge applied for the entirety of the other offending in this case was a mere five years when the two conspiracies merited a total of 10.

30. We have taken full account of the further submissions that Mr Rose has added today. We find ourselves unable to accept his interpretation of the basis of plea to count 10 which appears to us to be at odds with the guilty plea. We are satisfied that the sentencing judge took full account of all the personal mitigation. The applicant's letter to this court can carry no additional weight. In any event, bearing in mind the gravity of all the other offences we consider it to be wholly unarguable that the five-year increase was excessive.
31. The renewed application is therefore refused.
32. There is one point that we must deal with relating to the surcharge order in the amount of £190 that is set out on the Crown Court record sheet.
33. It does not appear from the transcript of the sentencing hearing that the judge specifically imposed such an order. There is no power to do so administratively and the effect of section 11(3) of the Criminal Appeal Act is that this court has no power to impose the surcharge itself: see R v Jones [2018] EWCA Crim 2994 at [15]. In that case the court directed that the Crown Court record be corrected to remove the surcharge order and we find ourselves obliged to take the same course in this case.

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

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