IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202202326/A4

[2023] EWCA Crim 203

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 10 February 2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE

SIR NIGEL DAVIS

REX
v
ISHMALE HANSON

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MISS F ARSHAD appeared on behalf of the Appellant
MR D BARRY appeared on behalf of the Crown

J U D G M E N T
(Approved)

1. THE VICE-PRESIDENT: The appellant Ishmale Hanson was born on 19 September 1991 and so is now 31 years old. On 24 September 2007, a few days after his 16th birthday, he was sentenced to detention for public protection for five offences of robbery to which he had pleaded guilty at an earlier hearing, when he was still aged 15. He now appeals against that sentence with the leave of the single judge, who also granted the necessary extension of time.
2. The offences were committed in May 2007, when the appellant was aged about 15 years and eight months. The facts so far as they are now known can be summarised as follows. On 10 May 2007 he and two others robbed a 14-year-old boy who was pushed, searched and robbed of his house keys. The robbers then accompanied the victim to his home, where they stole two mobile phones and other items before being told to leave by the victim's mother. The victim of that offence said that one of the robbers had something which looked like a gun in the waistband of his trousers, but did not suggest that it was produced. The appellant was not charged with any firearms offence.
3. On the following day the appellant robbed two 16-year-old boys who were passengers on a bus. He demanded that they give him their property and threatened to punch one who refused. In fear the two victims surrendered a bracelet and a mobile phone.
4. On 13 May the appellant and three others robbed a 19-year-old man of his phone, MP3 player and cash. One of the robbers said he had a knife, though none was produced. The victim was kicked in the leg by one of the group.
5. Finally, on 14 May the appellant robbed a man of his mobile phone and required the victim to withdraw cash from a cash machine, which the appellant stole.
6. Before committing those offences, the appellant, despite his young age, had already been convicted of a total of 25 offences, mostly involving theft or violence. In January 2003,

when he was aged 11, he was made subject to a supervision order for 12 months which he completed successfully. A later supervision order was not completed successfully, and just after his 13th birthday the appellant received his first custodial sentence, detention and training orders totalling six months for offences committed when he was aged 12. When aged 14 he was sentenced to a detention and training order of 12 months for robbery. That was followed some months later by a detention and training order of four months for offences of theft or attempted theft from the person which had been committed when he was 14. He then received the sentences which are the subject of this appeal.

7. We note for completeness that he has subsequently been convicted of two further offences. In May 2019 he received a short prison sentence for possessing a specified item, namely a mobile phone, in prison. Finally, in January 2022 he received a total of six months' imprisonment for a further offence of possessing a mobile phone in prison and an offence of escaping from the open prison at which he was serving his indeterminate sentence.

8. The appellant was sentenced for the present offences by Butterfield J sitting in the Crown Court at Birmingham. The judge had the assistance of a pre-sentence report. The appellant had told the author of that report that he was sorry for the offences and for the harm he had caused. The report indicated that the appellant was polite and respectful towards prison staff and referred to his having been "to a degree ... socially excluded in terms of lack of education and no consistent boundaries." The author assessed the appellant as posing a high risk to the public, which would increase if the appellant did not respond to intervention. The author went on to say, however:

> "Hopefully the current dissonant [sic] that he is feeling within his

> present environment and the desire not to return there may be the motivating factor to encourage Ishmale to break the patterns of offending that he has developed and deter him from further offending."

9. The report recommended a further detention and training order, which would punish the appellant for his offending and allow the Youth Offending Service to work with him during his period of supervision in the community.

10. There were at the time no sentencing guidelines either in relation to the offence of robbery or in relation to the sentencing of young offenders. In the latter regard, however, there were well-established principles to which we shall refer shortly.

11. The judge in his sentencing remarks referred to the appellant's previous convictions and sentences, none of which had stopped him from committing very serious offences of robbery. He said that the appellant and others had terrorised and threatened their victims, sometimes with the suggestion that a weapon may be involved. He took into account the pattern of behaviour of which the present offences formed a part. The judge acknowledged that previous robberies had not in fact resulted in serious physical harm to others, but found that there was a significant risk to the public of serious personal injury caused by the appellant committing further specified offences. He did not regard the offending as sufficiently serious to justify a life sentence but said that in his judgment "an extended sentence of detention would not adequately protect the public." He was therefore required to, and did, impose sentences of detention for public protection on each of the charges.

12. As to the minimum term, the judge said that if it had not been necessary to impose a sentence for public protection he would have imposed sentences of detention for three-and-a-half years. He therefore specified a minimum term of 21 months' detention,

less the period of 151 days which the appellant had spent remanded in custody.

13. Before coming to the grounds of appeal, it is convenient to refer to the framework of the statutory provisions then in force in relation to the sentencing of a young offender who was convicted of one or more serious specified offences and found to be dangerous.

14. The test of dangerousness contained in section 229 of the Criminal Justice Act 2003 required the court to be satisfied that there was a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences. The statutory assumption of such a risk, which section 229(3) required to be made in certain circumstances, did not apply to an offender aged under 18.

15. Section 226(2) of the 2003 Act set out the circumstances in which the court would be required to impose a sentence of detention for life. Subsection (3) provided:

> "If, in a case not falling within subsection (2), the court considers that an extended sentence under section 228 would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender of further specified offences, the court must impose a sentence of detention for public protection."

16. Section 228(2) of the 2003 Act provided that if a sentence of detention for life was not required by section 226(2), the court must impose an extended sentence of detention comprising a custodial term of at least 12 months and an extension period which, in the case of a specified violent offence, could not exceed five years.

17. The effect of those provisions, in the circumstances of this case, was that the judge was required to impose an extended sentence of detention unless he considered in accordance with section 226(3) that an extended sentence would not be adequate for the purpose of protecting the public from the relevant risk. In that event he was required to impose a sentence of detention for public protection. Thus, as the court put it in R v Lang [2006]

2 Cr.App.R (S) 3 at [14]:

> "In considering sections 226 and 228 in conjunction, the fundamental question to be addressed by sentencers will be whether an extended sentence is adequate to protect the public."

18. Miss Arshad advances three grounds of appeal on behalf of the appellant. First, that the learned judge erred in not considering the appellant's youth in his assessment of dangerousness and did not consider that he may change and develop as he aged. Secondly, that the learned judge erred in not giving reasons for why an extended sentence would not adequately protect the public from the risk the appellant posed. Thirdly, that the sentence of detention for public protection was wrong in principle.

19. In support of those grounds of appeal, Miss Arshad begins with a reminder of the long-established principles that when sentencing those aged under 18 at the date of conviction, a court must have regard to the principal aim of the youth justice system, which is to prevent offending by children and young people, and to the welfare of the child or young person concerned: see section 37 of the Crime and Disorder Act 1998 and section 44 of the Children and Young Persons Act 1933.

20. Miss Arshad then relies on statements made by the court in Lang at [17] as to factors to be borne in mind by sentencers when assessing the question of significant risk. In particular she relies on points vi, vii and ix in that paragraph:

> "(vi) ... It is still necessary, when sentencing young offenders, to bear in mind that, within a shorter time than adults, they may change and develop. This and their level of maturity may be highly pertinent when assessing what their future conduct may be and whether it may give rise to significant risk of serious harm.
>
> (vii) In relation to a particularly young offender, an indeterminate sentence may be inappropriate even where a serious offence has

> been committed and there is a significant risk of serious harm from further offences ...
>
> ...
>
> (ix) Sentencers should usually, and in accordance with section 174(1)(a) of the Criminal Justice Act 2003 give reasons for all their conclusions: in particular, that there is or is not a significant risk of further offences or serious harm; where the assumption under section 229(3) arises, for making or not making the assumption which the statute requires unless this would be unreasonable; and for not imposing an extended sentence under sections 227 and 228."

21. Miss Arshad relies on a number of later cases in which those principles have been applied. We do not think it necessary to mention all of them. We note however that in R v JW [2009] 2 Cr.App.R (S) 94, the court referred to the need to bear in mind that, within a significantly shorter time than adults, young offenders may change and develop, that being a highly pertinent factor when considering risk in relation to future conduct. We note also the words of Lord Judge, CJ in Attorney General's Reference No 55 of 2008 (R v C) [2009] 2 Cr.App.R (S) 22 at [20]:

> "... If an extended sentence, with if required the additional support of other orders, can achieve appropriate public protection against the risk posed by the individual offender, the extended sentence rather than imprisonment for public protection should be ordered. That is a fact specific decision."

22. It is clear from the case law that even when an offender has been found to pose a significant risk of serious harm to members of the public from future offences, it has always been necessary for the court to go on to consider separately whether only an indeterminate sentence would be adequate to protect the public. In deciding that discrete issue in the case of a young offender, it has always been necessary for the court to bear in mind the likelihood of change which is inherent in youth.

23. Miss Arshad accepts that the judge was aware of the appellant's young age, but observes that the sentencing remarks refer neither to youth nor to the likelihood of the appellant moving away from offending behaviour as he grew older. She submits that it was clear from the pre-sentence report that the appellant had had a difficult start in life and that the area where he lived and his associates had contributed to his offending. She submits that the combination of a long period in custody, coupled with the effect of aging, should have been considered as part of the assessment of dangerousness. She submits that the judge was wrong to find that the appellant posed a significant risk of causing serious harm from further specified offences. In particular, she argues that whilst there was undoubtedly a risk of further robberies being committed, there was an insufficient basis to find that such robberies would result in serious harm.

24. Miss Arshad further notes that the judge did not state why an extended sentence would not in his judgment adequately manage the risk to the public. She submits that an extended sentence, which would have comprised a substantially longer custodial term than any the appellant had previously experienced, and would be followed by a lengthy period of supervision on licence, would have provided adequate protection. Having regard to the appellant's very young age, she submits that the judge was wrong not to impose an extended sentence.

25. For the respondent, Mr Barry refers to R v Roberts [2016] 2 Cr.App.R (S) 14 and reminds us that the function of this court is to review sentences imposed in the court below, not to conduct a fresh sentencing exercise. Lord Thomas of Cwmgiedd, CJ said in Roberts at [20] that this court accordingly considers the material before the sentencing court, and any further material admitted under well-established principles, and considers whether on that basis the sentence was wrong in principle or manifestly excessive. At

[42], Lord Thomas went on to say that this court must consider whether the sentencing judge followed the provisions of the Criminal Justice Act 2003 as interpreted by the decisions of this court and passed a sentence of imprisonment for public protection in circumstances where it was properly open to him to do so.

26. Mr Barry further submits that the fact that a judge failed to give full reasons for the sentence does not provide a freestanding ground of appeal. This court must consider whether the judge was entitled to impose a sentence at the time it was passed and whether the sentence was justified: see Roberts at [26] and R v Downey [2016] EWCA Crim 1806 at [13]. In any event, Mr Barry reminds us that practice as to the length of sentencing remarks at the time when sentence was passed in this case differed significantly from current practice. Mr Barry suggests that this court should be very cautious before drawing any inferences from the brevity of the sentencing remarks.

27. Mr Barry has also, very properly, drawn our attention to R v Mariano [2019] EWCA Crim 1718. The appellant in that case had been aged 15 at the time of his offending. The court there referred to the passage which we have cited from paragraph 17(vi) of Lang and said at [19] that it behoves any judge sentencing somebody of that age to address specifically the issues of age and lack of maturity.

28. We are grateful to both counsel. Having reflected on their submissions we can state our conclusions quite briefly.

29. Although the judge did not specifically refer to the appellant's young age, we have no doubt that he had it well in mind. That is clear, we think, from the nature of the sentence which he imposed. We are unable to accept the submission that he lost sight of that important aspect of the case, and failed to consider the possibility of maturation, when deciding that the appellant was dangerous as defined in section 229 of the 2003 Act.

Despite his youth, the appellant had been convicted of a worrying number of offences, some of them serious, and had not been deterred from further offending by the comparatively short custodial sentences which he had received. The nature and circumstances of the five robberies justified the judge's statement that the fact that those robberies had not resulted in serious injury did not mean that future similar offences would not do so. There was a risk that a victim who sought to resist would be badly hurt, and a risk that the offending would become more serious. It would certainly have been open to the judge when assessing dangerousness to give greater weight to the prospect of maturation, and to find that the appellant did not meet the criteria contained in section 229. We are, however, unable to say that it was not open to the judge to make the finding of dangerousness, or to say that he made an error of principle in doing so.

30. We take a different view, however, of the judge's decision that an extended sentence would not adequately protect the public from serious harm. We have of course hesitated to overturn so long after the event the decision of such an experienced judge. We recognise moreover that the absence from the sentencing remarks of explicit reasons for his decision does not provide a freestanding ground of appeal. It is nonetheless a striking feature of the sentencing remarks that they contain no explanation of the reasons for that decision. More importantly, we are unable to find in the material which was before the judge any sufficient basis for concluding that the extended sentence which the judge would be required to pass, if he did not pass an indeterminate sentence, would not provide adequate protection for the public. Bad though the appellant's record was, it was the record of offending by a very young child. The present offences were committed when he was still only 15. The pre-sentence report identified at least the prospect that a period of custody followed by a period of supervision in the community would provide

the appellant with the motivation to break his pattern of offending. Moreover, notwithstanding the assessment of risk made in that report, the author said nothing to suggest that an indeterminate sentence might be necessary. The extended sentence would have ensured that the appellant served a very substantial period in custody for one so young and would have enabled him to be supervised in the community for some years after his normal licence would have expired.

31. Paragraph 17(vi) of Lang required the judge to bear in mind that the young appellant may change and develop more quickly than an adult would and to take into account his level of maturity. In the circumstances of this case, those considerations positively pointed away from any need for what Lord Judge in Attorney General Reference No 55 of 2008 (R v C) referred to as "the last but one resort when dealing with a dangerous offender". Yet the judge made no reference at all to those important factors when stating that an extended sentence would not adequately protect the public. In our judgment, there was no sufficient reason in the material before the judge for reaching that conclusion. With all respect to the judge, we cannot see any justification for imposing an indeterminate sentence for public protection in this case.

32. For those reasons, we allow the appeal and quash the sentences imposed below. We substitute for them, on each count concurrently, an extended sentence pursuant to section 228 of the Criminal Justice Act 2003 of five years and six months, comprising a custodial term of three years and six months' detention and an extended licence period of two years. Those sentences will take effect from the date of the original sentencing, that is to say 24 September 2007.

33. We have heard submissions from counsel as to the consequences so far as the extended licence period is concerned of this court making an order of that kind. It seems to us,

without finally deciding the point, that since the extended sentence is a single sentence, albeit one comprising two distinct elements, the whole of that sentence has long ago been served, with the result that it has been completed. If those responsible for the administration of prison release provisions and licence supervision have good reason to believe otherwise, they will no doubt inform the appellant accordingly.

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

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