

NCN: [2020] EWCA (Crim) 596  
No: 202000821 A3  
**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Friday, 24 April 2020

**VIRTUAL HEARING**

**B e f o r e:**

**LORD JUSTICE SIMON**

**MR JUSTICE WILLIAM DAVIS**

**MRS JUSTICE TIPPLES DBE**

**REFERENCE BY THE ATTORNEY GENERAL UNDER**  
**S.36 OF THE CRIMINAL JUSTICE ACT 1988**

**R E G I N A**

v

**ANTHONY CALLUM-SMITH**

**Ms C Pattison** appeared on behalf of the **Attorney General**  
**Ms D Becker** appeared on behalf of the **Offender**

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**J U D G M E N T**

**LORD JUSTICE SIMON:**

1. The Attorney General seeks leave to refer a sentence passed on Anthony Callum-Smith in the Crown Court at Luton on 5 February 2020 under section 36 of the Criminal Justice Act 1988 as being unduly lenient.
2. On 20 January 2020, the offender, aged 32, pleaded guilty to two offences of robbery, contrary to section 8(1) of the Theft Act 1968. He also invited the court to take into consideration two further offences of robbery and a single offence of attempted robbery, reflected in a schedule signed by him on 3 February. Two days later he was sentenced by His Honour Judge Stephen Evans to what was an overall term of five years and three months' imprisonment on count 1, with a concurrent term of three years and four months on count 2. A victim surcharge was also imposed.
3. The offence charged under count 1 occurred on Thursday 5 December 2019 at about 6.00 pm, when the offender and another man entered the Co-operative store in Hemel Hempstead. The offender armed with a knife. The accomplice was armed with a hammer. They wore hooded tops with the hoods up, and their faces were covered. Miss Kenny, who was working in the store, heard a male voice say, "Get the cash out of the till". She turned around and saw the offender standing with a large knife in his right hand. He raised his hand, leaving Miss Kenny sure that the knife was real. He told her to go and open the till. He kept repeating this; and then approached her and held the knife towards her. It was only a few inches away and she was petrified. She did as she was ordered. The offender said, "Don't push any buttons. Don't you dare push any buttons." She thought he was referring to an emergency button behind the till. The offender kept

brandishing the knife in her direction. He and his accomplice removed the cassette containing money from the till. He left the knife, a large black-handled kitchen knife, on the counter when he left the store. His DNA was subsequently recovered from it. Police officers were called, and CCTV footage was seized. A total of £444.34 in cash, approximately 15 to 20 packets of cigarettes (valued at about £150) and the cassette from the till valued at £100 were stolen.

4. Count 2 related to a further robbery two days later on Saturday 7 December 2019. At about 8.00 pm, the offender and another man entered Express Wine, in Hemel Hempstead. They demanded money. Tharmalingam Thiyalingham was working there that night. The offender approached him and told him to sit down, before dragging him to the store cupboard. The offender asked Mr Thiyalingham where the safe was. Mr Thiyalingham told him there wasn't one. The offender then dragged him behind the counter. The offender's accomplice walked to the back of the till and took cash and alcohol. The offender and his accomplice then left. Police officers were called, and CCTV footage was recovered. A total of £1,047 in value was taken: £462 in cash and alcohol to the value of £585.
5. On 11 December the offender was arrested at his home in Hemel Hempstead. In interview he gave 'no comment' answers to most of the questions asked. However, he also told the police that they would not find anything that would link him to the robberies and that he occasionally smoked crack cocaine but did not have a problem with the drug. He was told a knife with his DNA had been recovered from the Co-operative store following the robbery on 5 December. He said it must have been a knife from his friend's

house and recognised it as a knife from his friend's kitchen.

6. On 16 December he was arrested again and interviewed the following day. Again, he answered 'no comment' to questions asked. He was subsequently charged.
7. On 3 February 2020, he was interviewed again and admitted involvement in both the index offences, as well as two further offences of robbery and one offence of attempted robbery. These offences were added to a schedule of offences to take into consideration.
8. The facts were as follows. On 6 December 2019 at about 8.20 am, he and another man entered the One Stop Store in Hemel Hempstead. The offender took a pair of gloves from a shelf, removed the tag and put them on. He was armed with a knife and threatened a member of staff with it. He removed packets of cigarettes and tobacco, and put them in a carrier bag, leaving his accomplice to empty cash from a till. He demanded the safe be opened, but the member of staff said he did not have a key. The offender and his accomplice then left the store. They had stolen £207 in cash and tobacco and cigarettes valued at £885.
9. Later on the same day, shortly after 8 pm, the offender and another man entered Nisa in Longlands. The offender was armed with a hammer. He approached the till area and jumped over the counter. A member of staff initially tried to stop him; but withdrew on seeing the hammer. The offender repeatedly struck the till with the hammer in an attempt to steal from it. His accomplice put packets of cigarettes and tobacco into a white carrier bag. Both then left the store. They stole £688 in cash and £1,356 worth of tobacco and

cigarettes valued. They also caused £199 worth of damage to the till.

10. The following day on 7 December, the offender committed the offence of attempted robbery. At about 7.15 pm he and another man entered Cox's Pond store in Hemel Hempstead. The offender was in possession of a knife. He approached a member of staff who was behind the till area and demanded cash. The member of staff tried to wrestle the offender away from the till area and another member of staff threw bottles of wine at the offender's accomplice. The two men left the store without taking any items from it.

11. There were a number of victim statements before the sentencing court. Vicky Kenny described how her enjoyment at working at the Co-op store had been taken from her. She had thought about leaving the job and had trouble sleeping after the attack as she kept thinking about what had happened. She dreaded something similar happening again:

Even though I am starting to get better, it is always in the back of my mind. I even struggle now with customers coming in with their hoods up as I worry about them turning on me. You never know what they have on them or how dangerous they are.

12. Other victim statements from Noel Macado, Tharmalingham Thiyagalingham, Kay Jarvis, Margaret Leatherland and Kethan Mathi were to similar effect. Those who were working in these local stores were left frightened and the effect of the offences remained with them. They all felt differently about working in their places of employment as a result of the offender's crimes.

13. The offender had 27 previous convictions for 60 offences. The offending began when he was 14 and continued up to age of 31. Twenty-seven of the convictions were for

offences of dishonesty.

14. So far as material, on 15 November 2013, when 26, he was sentenced for two offences of conspiracy to commit non-dwelling burglary in May and June 2013, to a term of seven years' imprisonment for a former offence and four years' imprisonment concurrent for the latter. The offender and two others had used stolen motor vehicles to ram-raid small commercial premises. Three of the burglaries were committed at convenience stores where cash and tobacco products were stolen. A fourth burglary was committed at a hair salon. The offender was on licence from this sentence when he committed the present. On 29 November 2018, when he was 31, he was convicted of burglary (non-dwelling) and was sentenced to a term of 11 months' imprisonment.

15. The offender pleaded guilty to counts 1 and 2 at the plea and trial preparation hearing on 20 January. At the sentencing hearing on 5 February the judge had letters from the offender and his partner Sabrina Bullen. The former expressed remorse for his actions and for the impact on his victims. He explained the circumstances, the suicide of his best friend, which led to him coming off his prescription and going on a drug and alcohol binge leading to the commission of these offences. Ms Bullen's letter described the offender as a "brilliant" father of five children. The youngest is the child of both of them. She is particularly vulnerable due to circumstances which we need not elaborate. The letter also described the offender's mental health issues for which he had never sought help.

16. In passing sentence, the judge noted that the offender and an unidentified accomplice had gone into local convenience stores intending to frighten employees into handing over

cash and goods that could be conveniently converted into cash on 5, 6 and 7 December 2019. It was common ground that the offence charged under count 1 fell within Category 2A of the Definitive Guidelines for Robbery of small local stores. It was intermediate harm Category 2 because the impact on the staff and the business was neither serious on the one hand, nor minimal on the other. It was Culpability A because a knife and hammer were used to threaten staff. Count 2 fell into a lesser category. The guidelines provide that for a Category 2A offence, count 1, the starting point was a term of five years and a range of four to eight years' custody.

17. The judge referred to the aggravating factors to be taken into account: the offender's previous convictions, the offences being committed as part of a group that targeted convenience stores, the impact on the staff at those stores, his joint leading role, the attempts to conceal his identity, a degree of force in the second robbery, his previous convictions, the fact that he was on licence at the time of the offences and the further offences to be taken into consideration.

18. The judge also referred to the mitigation of the offender's mental health issues, the contents of Ms Bullen's letter and the offender's remorse. He also took into account the issue of totality. On this basis he took a starting point of five years, increased this to seven years and applied a 25 per cent credit for the guilty pleas, leading to the sentence on count 1.

19. For the Attorney General, Ms Pattison accepted that the judge adopted the right categorisation (category 2A) for the reasons he gave. However, she submitted there were

a number of additional aggravating factors. First, there was planning: it was a campaign of commercial robberies albeit of short duration between 5 and 7 December. Second, there was group activity in which the offender took a leading role with others. Third, there was an attempt to conceal identity: his hood was up and his face was covered. Fourth, he had a number of previous convictions for dishonesty offences in which the consumption of alcohol and/or drugs had often been a factor. This was a statutorily aggravating factor (see section 143(2) of the Criminal Justice Act 2003). Fifth, he had failed to respond to earlier sentences and this offending had been committed while on licence. Sixth, he had asked the court to take three further offences into consideration. The Sentencing Council Definitive Guidelines on Offences Taken into Consideration and Totality indicated that the offences taken into consideration should generally be treated as an aggravating factor, justifying an upward adjustment from the starting point.

20. Ms Pattison submitted that uplifting the starting point from five to seven years before reducing the sentence to give 25 per cent credit for the plea did not sufficiently reflect these aggravating factors. An appropriate upward adjustment from the starting point of five years would have taken the appropriate sentence on count 1 to above the upper range of eight years. The starting point of seven years and the final sentence of five years and three months was unduly lenient.

21. For the offender, Ms Becker commended the judge's approach: the focus on count 1; the categorisation as Category 2A; what she described as the agreed architecture of the sentence; the uplift to take into account the aggravating factors balanced against the mitigating factors and the credit for the plea. She drew attention to the features of

mitigation accepted by the judge. First, the offender's remorse for his crimes and particularly their impact on his victims. In his sentencing remarks the learned judge accepted that the offender was "genuinely remorseful". He had noted his reaction in court when the victims' statements were being read out:

They are generally not very well paid and extremely vulnerable. The impact is considerable, and you have heard about it and I know you took it seriously as I saw your reaction.

Second, the offender accepted that he was responsible for his decision to become involved and admitted that the motivation was financial: to be able to purchase more drugs. Although there was no forensic or identification evidence linking him to the three further offences taken into consideration, he had attended a voluntary interview and admitted responsibility for his actions in relation to those offences. Third, the existence of mental health issues with which he had struggled with for years without seeking help. Fourth, his drug addiction: he had become addicted to drugs whilst serving a prison sentence. Eight months before the commission of the offences he was stable and taking his daily prescription of Subutex. However, following the suicide of his best friend he failed to collect his daily prescription for two days and thereafter was not allowed it under the strict pharmacy rules that applied. He was told he must get a new prescription from his GP but was not able to obtain an appointment for two weeks. These circumstances led to a spiralling out of control, which involved a suicide attempt, the binge of Class A drugs and, along with others, agreeing to take part in the offences. The offender described the 72-hour period when the offences were committed as "one long day" where he was in a drug-induced haze. Fifth, there was his family circumstances, his efforts since leaving prison to rebuild his life with his childhood sweetheart Ms Bullen

with care for her five children. His care and concern for his daughter and sense of guilt that he had not been able to care for her in her time of need. Sixth, his access while in custody to counselling for his mental health issues and his successful efforts to remain drug free while on remand. In relation to this last point we should observe that the most recent prison report is not to the offender's credit, which is strange bearing in mind the current application.

22. We have taken account of these submissions.

23. The two offences to which the offender had pleaded guilty and the three that he asked to be taken into consideration comprised sustained offending directed at small convenience stores and their employees. The experience of those employees was clear: they were frightened by the actual and threatened violence and that sense of fear has remained with them. It has to a greater or lesser extent profoundly affected their lives. The offence under count 1 was a Category 2A offence with a starting point of five years and a range of up to eight years. There were a number of aggravating factors which took the offending above the starting point. It is unnecessary to repeat them since we have already described Ms Pattison's submissions in relation to those factors; Ms Becker does not dispute them; and, importantly, the judge referred to them and plainly had them in mind. We would only add that we are doubtful whether when two individuals have similar roles in a joint enterprise robbery it is helpful to refer to them as having joint leading roles.

24. The issue on this reference is whether, despite the common ground as to the aggravating factors and the judge's assessment of the aggravating and mitigating factors, the term of seven years' imprisonment before credit for the plea was unduly lenient. This is not a

case in which it can be said that the judge overlooked relevant matters of aggravation; he plainly did not. His sentencing remarks were clear and admirably concise. In our view, the aggravating circumstances took the seriousness of this offending at least to the top of the category range. However, there was the mitigation to which Ms Becker drew our attention. The judge accepted that the offender had made efforts to "wipe the slate clean". That was because, as Ms Becker submitted, not only was there no forensic evidence in relation to the three offences taken into consideration, it appears that the prosecution had indicated that the pursuit of anyone for these crimes would not be taken further. He was also someone who had taken on responsibility for other children and cared for his daughter. The judge told the offender that he appreciated the significant impact on his family and expressed the hope that he made good his genuine intentions. As the judge put it: "When free of drink and drugs you generally want to be better."

25. The sentence of seven years on count 1 took this mitigation into account. The judge must therefore have had in mind a sentence in excess of seven years before taking the mitigation into account.

26. We accept that the sentence on count 1 can properly be described as at the lower end of the range of appropriate sentences. However, the power under section 36 is not to be exercised as a general power of review. This court does not have the advantages of the sentencing court; and it is not for this court simply to substitute its own view of a sentence unless the sentence is not just lenient, but unduly so. The power is to be directed to what is sometimes referred to as the avoidance of gross error and the allaying of public concern where a judge appears to have departed by a substantial extent from

sentencing norms. It will be exercised where the sentence is plainly outside the range of appropriate sentences.

27. For the reasons we have given, we do not consider that the sentences for these offences did fall into this category. Accordingly, we refuse leave to refer.