Neutral Citation Number: [2019] EWCA Crim 1085

Case No 201603723 B3

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT ISLEWORTH**
**HIS HONOUR JUDGE FERRIS**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/19

**Before :**

**LORD JUSTICE HICKINBOTTOM**

**MRS JUSTICE ANDREWS**
and
**THE RECORDER OF NORTHAMPTON**
**HIS HONOUR JUDGE MAYO**
**(sitting as a Judge of the Court of Appeal (Criminal Division))**

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**Between :**

**R** — **Respondent**

**- and -**

**(1) SHARMARKE AHMED**
**(2) MURIDI ABDELKADIR MOHAMED BAHDON**
**(3) R**
**(4) G**

**Appellants**

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**Laura Jane Miller** (instructed by **Lloyds PR Solicitors**) for the **Appellant Ahmed**
**Matheos Lefteris** (instructed by **Kingsbury Ellis Solicitors**) for the **Appellant Bahdon**
**Neena Crinnion** (instructed by **Vickers & Co**) for the **Appellant R**
**Nick Wells** (instructed by **ALH Solicitors**) for the **Appellant G**
**Sara Ellis** (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 11 June 2019

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# Approved Judgment

**Lord Justice Hickinbottom :**

## Introduction

1. Through contact made on the internet, Lipton Russell arranged to meet a woman in West London. In the early hours of 15 April 2018, whilst he was driving to the address she had given him, he became lost on the White City Estate, Shepherds Bush; and he parked and got out of his vehicle with a view to telephoning her for directions.

2. A man asked him for a light, but Mr Russell said that he did not smoke and the man walked away. The man then approached a second time, accompanied by eight other young men who proceeded to rob Mr Russell. Seven of those men were charged with robbing him of a mobile phone, cash, a chain, a watch and a jacket contrary to section 8(1) of the Theft Act 1968, namely Yahya Hagi, Job Bullard, Sharmarke Ahmed, Muridi Abdulkadir Mohamed Bahdon, and three young men aged under 17 who we will call R, G and X. It was the prosecution case that Bullard was armed with a bat, and each of Hagi and R with a metal pole; and those three men each faced a discrete charge of having an offensive weapon in a public place contrary to section 1(1) of the Prevention of Crime Act 1953.

3. Hagi pleaded guilty to the robbery charge on the second day of the trial, and the offensive weapon charge against him was not pursued but left on the file. After a two-week trial at Isleworth Crown Court before his Honour Judge Ferris and a jury, on 1 October 2018, Ahmed, Bahdon, Bullard, R and G were found guilty of robbery, a charge in respect of which X was acquitted. Bullard was also found guilty of the offensive weapon count against him; but R was acquitted of having an offensive weapon namely a metal pole.

4. At the time of the offence, Ahmed was 19 years old, Hagi and Bahdon were 18, Bullard was 17, R and G were 16, and X was 15. By the date of conviction and sentence, Ahmed was still 19 as was Bahdon by that time, Bullard was 18, and R, G and X were each 16. Hagi was 18 when he was convicted on the basis of his guilty plea, and 19 when he was sentenced.

5. In terms of the sentence, Judge Ferris placed the robbery in category 1A of the Robbery Sentencing Guidelines ("the Adult Guidelines"), i.e. high culpability and serious physical harm with a starting point of 8 years. As we shall describe in more detail in due course, he then increased that figure to reflect relevant previous convictions, and discounted it for personal mitigation, youth and, in Hagi's case, his late plea.

6. Sentencing these young men took place over three hearings. On 26 October 2018, Judge Ferris sentenced Ahmed and Bahdon for the robbery to 7 years 11 months' detention in a Young Offenders' Institution. He sentenced Bullard for that offence to 4 years 11 months, with concurrent sentences of 18 months each for the offensive weapon charge and an unrelated matter of supplying cocaine. He sentenced G to 3 years. On 2 November 2018, the same judge sentenced Hagi to 2 years' detention suspended for 2 years with 200 hours unpaid work and a 6 month curfew. Finally, on 23 November 2018, he sentenced R to 3 years.

7. Before us, with leave of the single judge (Sir Alistair MacDuff sitting as a judge of this court), R appeals against conviction and sentence, and Ahmed, Bahdon and G against sentence alone.

8. As at the trial, before us, Laura Jane Miller appeared for Ahmed, Matheos Lefteris for Bahdon, Neena Crinnion for R, Nick Wells for G, and Sara Ellis for the Crown. At the outset, we thank them for their written and oral submissions.

**The Facts**

9. It was the prosecution case that Mr Russell was robbed by the seven defendants together with an Ibrahim Mohammed (who was charged but not prosecuted because he could not readily be found – it turns out that he was in custody in relation to another matter) and a ninth man referred to at the trial as simply "the unnamed man". The evidence against the defendants comprised evidence from Mr Russell and about two minutes of CCTV footage which showed the relevant men, but, because of the position of Mr Russell's car, not the actual attack itself, Mr Russell being off camera for the whole time. In terms of evidence, two metal poles and a bat were also recovered from the scene.

10. Mr Russell said that he recalled that all of the men he saw wore black rain jackets and hoodies, and one of them asked whether he wanted to buy weed. He said he didn't smoke; but he was told that he had to buy something, and, fearing he would be attacked if he did not do so, he gave them £30 cash but said he did not want the drugs. The men surrounded him, three or four of them being within a metre of him. He said that he did not see any weapons, but the attitude of the group suggested they had weapons; and one man appeared to be holding something behind his back, which Mr Russell thought might be a knife. After Mr Russell had given them his cash, they grabbed his phone and asked him for the chain he was wearing, threatening him with "a stab". They took his chain, and then his watch which was worth about £500. They asked him for his car keys, which he reluctantly handed over. As he did so, he was knocked to the ground, where he was kicked by a number of people and hit with something that felt like a stick. The back window of his car was smashed. He briefly lost consciousness, but woke quickly to see the group walking away. Mr Russell denied that he was aggressive towards anyone that night, and he denied being called a paedophile by his attackers. He could not identify any of his attackers, nor could he say precisely what part any particular individual played in the attack on him.

11. Of the defendants, only R, who had given a no comment interview, gave evidence at trial. He said he lived near the incident. He had gone outside to smoke a joint with X. The two of them bumped into G, and then the other defendants. He knew Mohammed, was an acquaintance of Bahdon, and had met Bullard a couple of times before. There was some talk that evening about someone pretending to be a 14 year old girl on the internet, to lure and then confront a paedophile. He heard Hagi shout "Paedo" at Mr Russell, so he (R) went over to have a look but he could not see very well as other taller men were in front of him. Hagi and the unnamed man were shouting at Mr Russell, and he heard the latter shout at him, "You're a liar. You've come to meet a 14 year old girl". He did not hear anyone ask about drugs, nor see money change hands, nor see the chain, watch, car keys or jacket being taken – although he said he did see Ahmed searching through the jacket pockets. He did not see anyone holding a metal pole; and there had been no talk about beating up Mr Russell or taking his property. He said that

he never intended to take part in a robbery: he had simply gone over out of curiosity to look at what he believed was a confrontation with a paedophile.

12. On the CCTV footage, R is seen a little behind the most forward group, apparently the furthest away from the victim Mr Russell and the last to follow his co-defendants towards him; and he is not seen taking or handling anything that was stolen. However, he can be seen holding something. It was the prosecution case that it was a metal pole, which is why the offensive weapon count against R alone was in the terms that it was, expressly referring to a metal pole. The prosecution case against R in respect of the robbery was, at least in large part, reliant upon him carrying this as a weapon for use or threat as part of the joint enterprise. At trial, R accepted he was holding something; but he said it was a piece of black soft bendable plastic tubing which he picked out of a bush just before he met the others. He thought it would be a good idea to have this, because there were tensions on the estate, and it was an agreed fact that on an earlier occasion he had faced a man with a knife there. He intended to use it for the purposes of defence only, he said; and he had no intention to hit anyone or threaten to hit anyone with it. Although it was never found, he said he had thrown the tubing away before moving away from the scene. He never went close to Mr Russell, although he saw him being beaten by Mohammed and the unnamed man. He saw a bat being produced, but did not see who had it. He accepted that he had not moved away when the bat came out.

13. As we have said, no other defendant gave evidence; although, in his interview, Hagi had said that he was with Mohammed and they met the unnamed man who told them that he was meeting a paedophile who believed him to be a 14 year old girl and he showed them messages he and the man had exchanged. Similarly, Mohammed had said in interview that they had met the unnamed man who said he was going to meet a male who had been texting a 14 year old girl.

14. The prosecution case against the seven defendants was that this was a joint enterprise robbery, in which the participants played different roles. At page 5 of his written directions, the judge gave a conventional joint enterprise direction, telling the jury that the prosecution did not have to prove that the defendants did the same things to achieve the robbery – some may have taken items from Mr Russell, others may have carried weapons to threaten the victim, others may have encouraged the robbery by standing shoulder-to-shoulder with the defendants whilst the robbery was being committed – but, the judge said, a defendant could not be guilty of robbery unless he at least did something to encourage or assist the robbery, and that at the time he intended the robbery to be carried out.

15. In respect of the offensive weapon counts, the judge gave the definition of "offensive weapon", i.e. something which is either made or adapted for causing injury, or something which the defendant intended to be used by himself or another for causing injury to a person in a public place and at the time he was carrying it. He emphasised that it was the prosecution case that R had a metal pole with him with that specific intent.

16. The jury returned verdicts as we have already described, notably (so far as these appeals are concerned) finding Ahmed, Bahdon, R and G guilty of robbery, and R not guilty of the offensive weapon count; and Judge Ferris imposed the sentences we have already set out.

## The Grounds of Appeal: Conviction

17. Before us, R alone, with the leave of the single judge, appeals against his conviction, on essentially three grounds pursued by Ms Crinnion.

18. First, she submits that Judge Ferris erred in law by giving a direction under section 34 of the Criminal Justice and Public Order Act 1994 in relation to facts that were never part of the R's defence; and, in any event, a direction in inappropriate terms.

19. So far as relevant to this appeal, section 34 provides that:

> "(1) Where, in any proceedings against a person for an offence, evidence is given that the accused—
>
> (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
>
> (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact
>
> (c) …
>
> being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.
>
> (2) Where this subsection applies—
>
> …
>
> (d) the court or jury, in determining whether the accused is guilty of the offence charged,…
>
> may draw such inferences from the failure as appear proper."

20. As we have indicated, R gave a no comment interview. In the summing up (27 September 2018 transcript, pages 12B-13D), the judge gave a section 34 direction in relation to two matters which R did not mention to the police in interview, and did not mention until trial, namely (i) that he was carrying a piece of bendable plastic tubing and why he was carrying it, and (ii) that he understood that Hagi and Mohammed thought the victim of the attack was a paedophile and that is why he stayed with the group to look on. Having referred to those two matters, the judge said (at page 12E-13D):

> "[Y]ou are entitled, subject to certain conditions, to draw the conclusion that these things are not true and have since been invented by him to support his defence.

> The conditions which must be satisfied before you're entitled to draw that conclusion are that, first, the Crown's case, the prosecution's case being put to [R] in interview, was such that it called for an answer by him, and secondly, he could reasonably have been expected to mention the matters on which he now relies when he was interviewed and thirdly, that the only sensible reason that he did not do so is that he'd not yet thought of them or he didn't think they would stand up to scrutiny.
>
> The defence ask you not to draw these conclusions, from the fact that he did not mention these things in interview because he was and is aged 16 and he was acting on his solicitor's advice to go no comment during the interview, and that advice was given having viewed the CCTV, but without lengthy consideration of what might be admitted or explained at that early point in the investigations.
>
> If you decide that [R] may not have mentioned these things, carrying a plastic bendable pipe, on the account of the victim being said to be a piece of iron, for a good reason, you should not hold it against him. If, on the other hand, you're sure there was no good reason for him not to put forward these matters in interview on which he now relies, you are entitled to use this as some support for the Crown's case, but you mustn't convict him wholly or mainly on the strength of it."

Ms Crinnion submits that such a direction ought not to have been given, and certainly ought not to have been given in the terms that it was.

21. The issue of whether a direction was appropriate was first raised when the judge produced a first draft of his written legal directions for the jury. The issue having been raised, the prosecution pursued it. Ms Crinnion made submissions to the judge as to why she considered it was inappropriate. As she did before us, she submitted that no questions were asked of R that laid any evidential basis for the direction. If the Crown was going to rely a section 34 adverse inference direction, then specific challenges ought to have been made to R who ought to have been given a proper opportunity to explain so that the jury could have assessed his explanation. In particular, in this case, it was never specifically put to R that these two matters were late inventions by him.

22. In addition:

    i) Ms Crinnion submits that the judge erred by not allowing the defence to ask questions of the police officers to elicit that there had been early lines of enquiry about a paedophile coming to the estate to meet a man whom he thought was a 14 year old girl. The source of these lines of enquiry was irrelevant, she submitted – although they in fact emanated from the interviews of Hagi and Mohammed, both of whom referred to these matters. The important evidential point was simply that there were those early lines of enquiry, which indicated that R's reference to them at trial was not a late invention on his part.

ii) Even if it was not wrong in principle to give a section 34 direction, Ms Crinnion submitted that the form of direction given was inadequate, because (i) it omitted from the full standard section 34 direction where a defendant was advised to go no comment, that the jury might draw an adverse inference if they came to the conclusion that the defendant had no answer and merely decided to hide behind the legal advice that he had been given; and (ii) it did not mention, or emphasise, that an inference could not be drawn if the jury concluded that, in all the circumstances (including R's age), that he acted or may have acted reasonably in not mentioning the facts having received advice to go no comment.

23. However, we are unpersuaded by these submissions.

i) When the judge raised the issue of a failure to mention facts in interview at the time he produced the first draft of the directions, contrary to Ms Crinnion's suggestion, this was not the first time that the reference to a paedophile had been made at the trial. Ms Crinnion had put to Mr Russell he had attended "in order to meet a male in respect of a message about a 14 year old girl" and that people had shouted "paedo" at him during the assault, both of which he (Mr Russell) had denied.

ii) More importantly, as Ms Crinnion readily accepted, at page 28E and following of the 25 September 2018 transcript of his cross-examination, Ms Ellis for the Crown did put to R that his given reason for being there (i.e. that he thought the group were confronting a paedophile and he was curious) had been made up and, if it were true, then he would have given that reason in interview – to which he responded that he had been advised by his solicitor to give a no comment interview.

iii) In our view, it was clearly not necessary for the precise point to be put to R in terms that his mentioning these matters at trial was a "late invention". From the tenor of the questions, it was clear that Ms Ellis was putting to him that these were inventions; and she properly put the matters to him in straightforward terms which he, as a 16 year old, could understand and to which he could respond. It is clear from the transcript that he did understand the question, and he did respond clearly, to the effect that he did not mention the reference to a paedophile because he had been advised to go "no comment".

iv) It is true that no similar specific question was put to him about why he did not mention that he was holding a soft plastic pipe and why he was doing so – but (a) picking up a piece of plastic tubing for defensive purposes was clearly a fact upon which he relied in defence of both counts he faced, (b) given their verdicts, the jury clearly accepted that R might have been holding a plastic pipe (rather than a metal pole), although not the intention he expressed to have had in holding it (as the judge confirmed in his sentencing observations: see 23 November 2018 transcript, page 4A); and (b) given the general tenor of his interview (which was entirely "no comment" which was, as he emphasised several times during his evidence, upon the advice of his solicitor), there is no sensible doubt as to what his response would have been to any questions as to why he did not mention these matters in interview, i.e. because he had been advised by his solicitor to go "no comment".

v) In the passage of the summing up we have quoted, the judge made clear that it was R's evidence that he was holding a piece of bendable plastic, and not a metal pole; and that he understood that the victim was a paedophile, and this was why he stayed with the group (page 22F). That was a true summary of R's evidence.

vi) In that same passage, the judge directed the jury that they could draw an inference adverse to R if they concluded that, in the context of him being just 16 and had been advised to make no comment at an early stage of the investigation when there had not been lengthy consideration of it, he could reasonably have been expected to have mentioned those matters at the interview, and the only sensible reason that he did not do so was that he had not yet thought of them or did not think that they would withstand scrutiny. In our view, no further direction was required; and, as my Lord the Recorder of Northampton indicated during the course of the submissions, had the judge gone on expressly to refer to the possibility of R simply hiding behind legal advice, that may have harmed R's case rather than improving it.

24. In all the circumstances, in our view the direction given was appropriate. We consider that R had an adequate opportunity to say in his oral evidence why he had not referred to these matters; but, insofar as he was not given such an opportunity, it was not a material defect in the trial, because we know what answer he would have given had any more specific question been put to him on these matters, namely that he had been advised to go "no comment". We are quite sure that none of this undermines the safety of the verdict in any way.

25. Second, Ms Crinnion submits that the judge acted unfairly to R and unlawfully in not ensuring that, during R's cross-examination, there was not close adherence to the Inns of Court College of Advocacy Advocate's Gateway Toolkit 8: Effective Participation of Young Defendants. The toolkit was uploaded onto the Digital Case System for the purposes of the trial, and the judge was specifically referred to it. It emphasises the need to tailor questions to a young defendant's needs and abilities, enabling him to understand the questions and give answers that he believes are correct (paragraph 9.7); and the advantage of asking short, simple questions, and avoiding "question types which carry a high risk of being misunderstood or producing unreliable answers such as leading/"tag" questions which make a statement and then add a short question inviting confirmation (see, e.g., paragraph 9.8).

26. One example upon which Ms Crinnion focused was the way in which R was questioned about who was wielding the bat (pages 13B-16C). He was, Ms Crinnion submitted, questioned as an adult, with over-rigorous, quickfire and multiple questions. As a result, R became frustrated – he was described by the judge as "truculent" and "rude" – and, after his evidence, he broke down in the dock and was unable to continue to engage with the trial that day. Had he been questioned in accordance with the toolkit, he would not have been frustrated; he would not have run the risk of being considered truculent or rude; and he would not have run the risk of alienating the jury. These defects in the trial were, Ms Crinnion submits, incurable.

27. Allied to this ground, Ms Crinnion made complaint about two particular aspects of the trial. First, during the cross-examination of R (25 September 2018 transcript, page 18B and following), Ms Crinnion rose to object about the accuracy of what was being repeatedly put to R, namely that he had said that he had hurled the plastic tubing that

he had at Mr Russell, which recitation was (she considered) inaccurate. The judge, in the presence of the jury, confirmed that that was indeed what he had said, and he asked her to: "Sit down, please, it was an unnecessary intervention and it was inappropriate". The reference to the intervention being "inappropriate", she submitted, undermined her as Counsel in the eyes of the jury, and consequently reflected adversely on R's case. Immediately, Ms Crinnion asked the judge to deal with a point of law in the absence of the jury; but the judge said that no matter of law arose, and she was "just making another unnecessary point". Ms Ellis then continued with her cross-examination.

28. Second, the following day, after submissions and discussion as to the judge's proposed legal directions (including the section 34 direction), Ms Crinnion made an application to discharge the jury based on the way in which R had been questioned. The judge only allowed a limited time for the application, and did not allow her to supplement it with written submissions overnight. She submitted that the judge had erred in not allowing her to make her application properly and fully.

29. Underlying all of these submissions is the contention that the cross-examination of R was conducted in such an unfair manner that the guilty verdict is or may be compromised.

30. We agree that making the Toolkit readily available to parties and the judge was a sensible step in this trial. However, we note that there was no Ground Rules Hearing, and none was sought by those representing R. There was also no suggestion from them that there should be an assessment to see whether R required an intermediary. We are quite satisfied that neither measure was called for here.

31. In the light of the submissions made, we have of course read the transcript of the cross-examination of R with particular care. However, even taking into account the fact that a transcript does not always give the full flavour of cross-examination, we are unable to conclude that the cross-examination – or the manner in which the judge dealt with issues arising from it – was in any way improper or unfair to R. For example, R said that he saw the bat as soon as it was pulled out, but, despite admittedly persistent questioning, he refused to accept that it was Bullard who wielded it, firmly saying that he did not know who held it. When he did not understand a question, he said so (see page 13G). When he thought Ms Ellis was trying to put words into his mouth, he said so (page 14D). During this passage, if anyone comes over as becoming frustrated, it is not R but Ms Ellis. In our view, R clearly only too well understood the questions that were being put to him, and he made his responses very clear. The cross-examination only lasted for 45 minutes. Ms Crinnion submitted that that reflected the fact that the questions were being asked too rapidly; but that is not a point which emerges from the grounds of appeal, and in any event the judge was best placed to decide if the speed of questioning caused any disadvantage or unfairness to R. In our view, there is nothing in the transcript to suggest that it did.

32. In the application to discharge the jury, the judge took the view that, young as he was, R was an intelligent and emotionally mature young man in respect of whom there was no concern that he was not coping with the questioning as it was put. As we have indicated, there was no Ground Rules Hearing, and none was requested. There was no suggestion that an intermediary might be required. The judge had no concern about R understanding the questions, which were "clear and short". The judge did not in terms call him rude: he merely said that, "[R's] rudeness (which was not serious in any event)

was ignored by prosecuting counsel and me". That was in a ruling, not before the jury. He referred to R being "truculent" in the submissions after his cross-examination, again in the absence of the jury. In the light of the transcript, we are anything but convinced that the judge was wrong to consider R "truculent"; but, even if it might have been preferable for the judge not to have expressed a view on R's behaviour as he did, he said nothing pejorative about him in front of the jury. Further, in his summing up, he expressly warned the jury about any negative impression any defendant may have given during the trial, whether out of boredom or bravado (27 September transcript, page 5G-6C). He also made it clear that the jury should ignore any view of the facts he gave (page 4B-C). In fact, he gave a full and fair summary of the R's evidence (page 24E and following). No arguable unfairness arose.

33. As we have indicated, at page 18B-E of the 25 September transcript, Ms Crinnion interrupted the cross-examination to say that she considered the basis of a question as to where R had said he had hurled the plastic tubing – in an earlier answer he had given – was incorrect. The judge disagreed, and said that he considered the intervention unnecessary and inappropriate – and he asked Ms Ellis to continue her cross-examination. Ms Crinnion then said she would like to raise a matter of law in the absence of the jury, which the judge did not allow her to do – saying that she was "just making yet another unnecessary point". The cross-examination then proceeded. We accept that the judge appears to have been unnecessarily tetchy; but we are firmly of the view that such an exchange, even before the jury, would not have diminished Ms Crinnion in the eyes of the jury, or been in any way unfair or prejudicial to R.

34. The following day, Ms Crinnion returned to her theme. She said that she was concerned about the nature of the cross-examination, and wished to see her client – and that she might wish to make an application to discharge the jury. The judge allowed her that time, and the jury did not come into court until 12.50pm. The remaining defendants in the event did not give evidence, and the afternoon was taken up with consideration of the legal directions for the summing up, Ms Crinnion then making her application to discharge the jury on the basis that the judge's comments had undermined her position, the judge had refused to hear her application during cross-examination and the nature of the cross-examination. She complains that the judge did not allow her full time to expand on those submissions orally.

35. It is clear from the transcript that during the course of the trial, unfortunately, the judge and Ms Crinnion did not have the good relationship that is the usual hallmark of the bench and bar. We consider that the judge might have handled matters better than he did during cross-examination. However, that is far from saying that the conviction is or even may be unsafe. The judge clearly well-understood the nature of Ms Crinnion's complaints – they were clear – and he was unimpressed by them. We consider that he was entitled to – and, indeed, right – to conclude that the cross-examination was not unfair, his interventions did not render it unfair and he ought not to discharge the jury. The cross-examination of R was not long. As we have said, despite his age, R well-understood the questions he was asked, and put across his substantive answers with clarity. We do not consider that the judge's comments or the way in which he dealt with the application to discharge the jury rendered the trial arguably unfair: even if they might have been better phrased or more temperate, the interventions were few in number and have to be seen in their full context. That is how the jury would undoubtedly have viewed them. Any errors by the judge were clearly not material: he

was not only entitled but right not to discharge the jury, and none of this arguably renders the conviction unsafe.

36. Third and finally, Ms Crinnion submitted that the guilty verdict in respect of R on the robbery "may have been inconsistent" with the not guilty verdict in relation to the offensive weapon, given that the prosecution case against R was strongly based on the fact that he had a weapon.

37. Ms Crinnion did not press this ground before us in her oral submissions, and she was right not to do so. There is nothing in it. The offensive weapon count was particularly based on R having a metal pole. He claimed that what he had in his hand was plastic. The jury could easily have concluded that the pole was or may have been plastic – and so the offensive weapon ground was not made out – but R intended to use whatever he had in his hand in more than an entirely defensive way, i.e. for the purposes of threatening or even causing actual violence to Mr Russell in order at least to encourage the robbery. Indeed, that is what they appear to have thought. In any event, there is simply no logical inconsistency in the verdicts.

38. For those reasons, we do not consider that any ground in relation to R's conviction to have been made good. We are not persuaded that the conviction is, in any way, unsafe. The appeal in respect of R's conviction is therefore dismissed.

## The Sentencing Guidelines

39. We now turn to appeals against sentence.

40. The judge (at least so far as the adult defendants were concerned, rightly) considered that the Street Robbery section of the Adult Guideline applied. Given the group nature of the robbery in this case and the use of weapons, it was common ground that culpability fell in the high category, category A. That is clearly right. So far as harm is concerned, the Crown and defendants agreed that it fell within category 2, because some harm was inflicted on Mr Russell but neither of the identified hallmarks of serious harm was present. The Adult Guideline starting point for category 2A is 5 years, with a range of 4-8 years.

41. However, the judge disagreed as to the categorisation of harm. In respect of physical harm, Mr Russell was rendered momentarily unconscious – he was knocked out in the attack, but woke to see the group walking away from him – he had bruising to his face and head, and, several months after the attack, was still having headaches, blurry vision and tingling in his fingers. He hurt his finger, and, as that impeded his work as a self-employed carpenter, he was off work for six days. The judge concluded that that physical harm to Mr Russell was "serious", and in addition he suffered a "real degree of psychological harm" in the form of a continuing unwillingness to go out, fright at groups in the street and nightmares. The judge therefore found that this was a category 1A case. The starting point for a category 1A robbery is 8 years, with a range of 7-12 years.

42. Without descending into detail, Judge Ferris said that he also took into account the relevant youth guidelines. For offenders under 18 years of age, the Sentencing Council Definitive Guideline for Sentencing Children and Young People for Robbery ("the Youth Guideline") expressly replaces the Adult Guideline to which we have referred.

It sets out overarching principles and specific guidelines for robbery by someone who is not an adult. It emphasises that, in sentencing young persons, consideration of the welfare of the offender is a statutory requirement; sentencing should be particularly individualistic, not over offence-centred, and should always be focused on rehabilitation. The court should also take into account the fact that young persons may not fully appreciate the effect of their actions, and that sanctions will have a more profound effect on a young person. The guideline expressly says that a non-custodial Youth Rehabilitation Order ("YRO") with Intensive Supervision and Surveillance ("ISS") may be justified even where there has been very significant force or threat of a firearm or significant harm caused to the victim.

43. Paragraphs 6.42-6.49 deal with "Custodial sentences". The overarching principle provides:

> "A custodial sentence should always be used as a last resort. If offence specific guidelines for children and young people are available then the court should consult them in the first instance to assess whether custody is the most appropriate disposal."

44. The guideline goes on to say (all emphasis in the original):

> "6.45 Only is a court is satisfied that the offence crosses the custody threshold, and that no other sentence is appropriate, the court may, as a preliminary consideration, consult the equivalent adult guideline in order to decide upon the appropriate length of sentence.
>
> 6.46 When considering the relevant adult guideline, the court **may** feel it appropriate to apply a sentence broadly within the region of half to two-thirds of the adult sentence for those aged 15-17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence **the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age**.
>
> …
>
> 6.49 The welfare of the child or young person must be considered when imposing any sentence but is especially important when a custodial sentence is being considered. A custodial sentence could have a significant effect on the prospects and opportunities of the child or young person and a child or young person is more likely to be more susceptible than an adult to the contaminating influences that can be expected with a custodial setting…".

**The Sentences Imposed**

45. As we have described, Judge Ferris concluded that this was a category 1A street robbery, with an Adult Guideline starting point of 8 years, and a range of 7-12 years. In respect of each offender, the judge then took into account their aggravating factors notably previous convictions, as well personal mitigation excluding youth, fixing an intermediate sentence prior to applying a discount for youth.

46. In respect of Ahmed, the judge noted that he had ten previous convictions for 23 offences including eight convictions for robbery or attempted robbery. His first two convictions for robbery were in May 2014, when he was 15 years old, for which he was sentenced on guilty pleas to a detention and training order ("DTO") of six months. In June 2014, he was given a similar concurrent sentence for possessing an offensive weapon. In May 2015, again on guilty pleas, he was convicted of a single robbery and sentenced to a 12 month DTO; but, on the following day, he was convicted of a further four robberies and an attempt, possessing a blade and possessing an imitation firearm with intent to cause fear, and sentenced to an aggregate sentence of 4 years' detention. In September 2016, shorter concurrent sentences were imposed for two assaults of a constable and a further common assault. In October 2017, he was sentenced to 26 weeks for possession of cannabis with intent to supply and failure to surrender to bail. For a young man of 19, that was a substantial record, for which the judge increased the sentence to 11 years, from which he deducted 30% to reflect his youth, giving a sentence of 7 years 11 months' detention.

47. He imposed a similar sentence – similarly calculated – on Bahdon. Bahdon had 11 previous convictions for 19 offences including seven for robbery. Following a referral order for possessing a blade on school premises in April 2014 (when he was 14 years old) and a further referral order for going equipped in June 2014, he was sentenced to an 18 month DTO in October 2014 for six robberies and a theft, with a further concurrent DTO imposed for a further robbery two days later. There were various breaches of those orders, for which no additional penalty was added but the primary DTO was simply ordered to continue. In October 2016, a YRO was imposed for criminal damage, which was subsequently breached, with again the order simply continued. There were no other previous convictions of any note.

48. R had no previous convictions for robbery, but had been convicted for possessing an offensive weapon in 2015 and again in 2016, as well as convictions for common assault (twice), simple possession of cannabis (four times) handling, shoplifting and aggravated vehicle taking. Several of these resulted in YRO, but he had a history of persistent non-compliance with the result that they were revoked and replaced with DTOs, the longest of which were for 4 months.

49. The judge expressly "[paid] attention to the guidelines for young people". However, given R's record of failing to respect rehabilitation and other community orders – and his disruptive behaviour during the trial – the judge concluded that he had a "current inability to cooperate in any more progressive sentence of supervision, in anything which requires [his] cooperation and enthusiasm for the time being" (23 November 2018 transcript, page 5E-F). He therefore considered that only a custodial sentence was appropriate (page 5G). He took an intermediate sentence of 7 years, which he discounted by 55% to reflect his youth, giving a sentence of 3 years' detention.

50. Like R, G was sentenced to 3 years' detention. His previous convictions were light, just three convictions for five offences; and, although three of those were for assaulting

a police officer, they were all committed on the same occasion which involved the arrest of his mother to which he took exception. The judge said that he took the Youth Guideline into account, and particularly took into account the impact of custody on a young person. However, he said he had a duty to protect the public; and, as with R, he took an intermediate sentence of 7 years which he discounted by 55% to give a sentence of 3 years' detention. The judge made no express reference to days on remand or curfew counting towards that sentence.

51. For completeness, we should say that the judge imposed a sentence of 4 years 11 months on Bullard, i.e. an intermediate sentence of 9 years (given that he was convicted of possessing the bat, and had other offences which received concurrent sentences) which he discounted by 45% on account of his youth. Hagi, who was sentenced on a separate occasion between the main sentencing exercise and the sentence of R, was sentenced to two years' detention suspended for two years, with a 200 unpaid work requirement and a 6 month curfew. We do not have the judge's sentencing observations for that hearing.

**Sentencing Appeal: Ahmed**

52. In respect of Ahmed's sentence, in attractively focused submissions, Ms Miller relied upon a single ground – adopted by each of the other Appellants – namely that the judge erred in considering the physical harm to Mr Russell "serious" so as to place this crime in category 1A of the Adult Guideline. Whilst accepting that a group robbery with weapons such as this fell within the high culpability level, she submitted that the consequences for Mr Russell, unpleasant as they were, fortunately fell considerably short of serious physical harm. Being momentarily knocked out did not in itself put it into that category; and, otherwise, no bone was broken, no wounds inflicted and, although he had to have a few days off work due to an injury to his finger which meant that he could not do his job, there was no period of hospitalisation, Mr Russell being discharged from hospital the same day as he was admitted with painkillers and head injury advice. There is no evidence that he had cause to return to seek further medical advice. Ms Miller submitted with force that, if these injuries had been the result of a simple assault, they would be categorised as actual bodily harm, falling far short of the grievous bodily harm threshold.

53. It was submitted that this offence was properly categorised – as the Crown and Appellants had agreed at the main sentencing hearing – as a medium harm case, i.e. category 2A, with a starting point of 5 years (not 8 years) and a range of 4-8 years (not 7-12 years).

54. We consider there is considerable force in this submission. Although this attack was undoubtedly serious, it is important that the consequences are considered objectively and dispassionately. Whilst (i) "serious" harm for the purposes of the Adult Guideline is of course not necessarily the same as the really serious harm required for an offence under section 18 or section 20 of the Offences Against the Persons Act 1863, (ii) "seriousness" of harm is a continuum, and whether harm is "serious" for the purposes of the Adult Guideline requires an assessment by the sentencing judge with which this court will not interfere unless the conclusion is clearly wrong and (iii) there was momentary loss of consciousness and bruising to the head and finger, and Mr Russell's injuries were undoubtedly unpleasant and uncomfortable, there were no wounds or broken bones, no lasting physical sequelae of any severity nor any other hallmark of

the harm being of sufficient severity to enable a finding that it was "serious" to be made. As for the psychological symptoms, unpleasant though they were, they were again not of the severity to justify such a finding. The judge did not suggest otherwise, making the seriousness finding on the basis of the physical harm suffered.

55. Thus, we consider the judge was wrong to categorise the harm in this case as "serious". This was a category 2A case, and the judge erred into putting it into category 1A. The starting point was therefore 5 years (not 7 years) with a range of 4-8 years (not 7-12 years).

56. However, in calculating the appropriate sentence, we consider the judge also erred in the discounts for youth that he applied. As we have said, the Youth Guideline indicates that, where a custodial sentence is inevitable for an offender aged 15-17 years, the appropriate sentence is half to two-thirds of the adult sentence, i.e. it should generally attract a discount of 33%-50%. The judge applied a 30% discount for youth in respect of Ahmed, who was 19 at the time of the offence; and 55% for R and G who were each 16. In our view, the highest discount for youth that could have been applied to Ahmed – there being no special circumstances in his case, such as particular immaturity – would have been 15-20%.

57. We accept that, given the injuries to Mr Russell, a slight increase from the medium harm starting point might have been appropriate; and we agree that Ahmed's appalling record and the fact that he committed the offence whilst in licence were particularly aggravating features, and warranted a very significant increase from the starting point of 5 years, namely to 7½ years. With the appropriate discount for youth, we would reduce that to 6 years.

58. Therefore, in the case of Ahmed who was sentenced to 7 years 11 months, we allow the appeal, and substitute a sentence of 6 years' detention. As we understand it, there are no days to credit against that sentence.

## **Sentencing Appeal: Bahdon**

59. For Bahdon, Mr Lefteris relied upon the same submission in relation to the categorisation of the offence.

60. In addition, he submitted that (i) Bahdon was seven months younger than Ahmed, (ii) he had a (slightly) less serious criminal record and, most importantly, (iii) he has an established diagnosis of Attention Deficit Hyperactivity Disorder since 2015. That condition was the subject of two reports. First, a report by Ms Afsha Shan, a Specialist Liaison and Diversion Practitioner in Intellectual Disabilities dated 20 April 2018. That recounted symptoms of inattentiveness and hyperactivity/impulsiveness, including "acting without thinking". Second, there is a report dated 27 June 2018 by Dr Simon Claridge, an Educational and Child Psychologist, which assessed his Full Scale IQ at 67, i.e. within the mild range of learning disability. Other than in verbal communication (low average), in all areas of mental functioning Bahdon was found to be in "the extremely low range". Dr Claridge concluded that Bahdon was "a very vulnerable young man who presents as highly suggestible".

61. As we have already made clear, we consider the judge did err in categorising this robbery; and, in addition, we consider there is some force in Mr Lefteris's submissions

that the judge failed sufficiently to take into account the mitigation available to Bahdon, and particularly his psychological condition. In the circumstances, we consider that the appropriate sentence in his case is one of 5½ years' detention.

62. We shall therefore allow his appeal and substitute a sentence of 5½ years detention for the sentence imposed of 7 years 11 months. 192 days he spent on remand shall be taken into account in respect of the time he actually serves.

**Sentencing Appeal: R**

63. Ms Crinnion for R submitted that, insofar as the Adult Guideline applied to R, then she adopted the argument of Ms Miller in relation to the mis-categorisation which we have found to be made good.

64. However, Ms Crinnion submitted that, in relation to R, the judge erred in relying on the Adult Guideline at all: he ought to have applied the Youth Guideline. Although he referred in general terms to this guideline, he did not apply it in substance. Had he approached the sentencing exercise properly, taking into account all relevant circumstances, he would not have imposed a custodial sentence on R: he would have imposed a YRO.

65. Given R's age (16 at the time of the offence, trial and sentence), that has superficial force. However:

i) The judge said that he had paid "careful attention to the guidelines for young people", i.e. the Youth Guideline to which he had been referred. We accept that his reference to his "duty to protect citizens" was perhaps not very apposite, as the Youth Guideline makes clear that, as a purpose of sentencing, even before section 142A of the Criminal Justice Act 2003 has been brought into effect, the reduction of crime "can, and often will, be outweighed by considerations of the… young person's welfare". The protection of the public is therefore not to the forefront here. However, there is nothing to suggest that the judge did not generally have the Youth Guideline well in mind.

ii) That guideline requires the court to consider possible non-custodial sentences first. However, the judge did. He took into account R's previous convictions which we have described, and R's response to sentences imposed for them. On three separate occasions, youth rehabilitation orders were imposed; but without any great success in the sense that he breached the orders regularly including breaches by committing further offences. Judge Ferris concluded (23 November 2018, at page 5F-G) that it was unlikely that R would comply with any order involving supervision as he was simply unable to comply with the relevant requirements; and so only a custodial sentence was appropriate. In our view, on the evidence, the offending warranted a custodial sentence, and in all the circumstances that was a conclusion open to the judge to make. Indeed, we consider it to have been correct.

iii) Under the Youth Guideline, it was then properly open to the judge to consider the Adult Guideline, and assess the sentence that would be appropriate for an adult before applying a discount to reflect the youth of the offender. That is what the judge did.

66. The judge however did wrongly take the "starting point" of 7 years, on the basis that this was a category 1A robbery. It was a category 2A robbery, and the appropriate starting point was 5 years. We accept that R was not at the forefront of things during the incident: but, although he was not heavily convicted, this offence was committed during the currency of a YRO. That is an aggravating factor. The judge then applied a discount of 55% to reflect R's youth. As we have already indicated, that was an error: the guideline suggests a discount of up to 50% for those who are 15-17 years of age, and there is nothing here to require a higher than usual discount for chronological age, e.g. R was not immature for his age. An appropriate discount for this 16 year old was therefore, say, 40%.

67. Therefore, although we do not agree with the judge's analysis, we do not consider that 3 years was manifestly excessive – or, indeed, excessive at all. However:

    i) R spent 36 days on remand in local authority accommodation subject to a monitored curfew under section 91(3) of the Legal Aid Sentencing and Punishment of Offenders Act 2012. There is no automatic credit given for such time spent on remand (R v A [2019] EWCA Crim 106; [2019] 4 WLR 65). In accordance with R v D and H [2016] EWCA Crim 1807, 18 days credit ought to have been given by way of a deduction from the substantive sentence. For those reasons, we shall allow the appeal to this limited extent; and substitute a sentence of 2 years 11 months 12 days' detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 for that of 3 years.

    ii) R also spent 298 days on remand in youth detention under section 91(4) of the 2012 Act, and 92 days on bail with a qualifying curfew. As against the sentence of 2 years 11 months 12 days, a total of 344 days (298 days plus 46 days) shall be automatically credited.

**Sentencing Appeal: G**

68. Judge Ferris also imposed a sentence of 3 years' detention on G.

69. G was the youngest of the offenders: he was 16 years 2 months old at the time of the offence, and 16 years 8 months at the time of sentence. In terms of his role in the offending, unlike R, he did not have a weapon. He was not in the immediate group that surrounded Mr Russell. He appears to have handled the chain, having been given it by someone else to whom Mr Russell had handed it over during the course of the robbery. He then moved quickly away.

70. He had some previous convictions, but he was the most lightly convicted offender: shoplifting in January 2017 (6 month referral order and 6 month parenting order), assaults on police officers in April 2017 (three charges) during the course of the arrest of his mother (6 month referral order) and in the same month he was given a conditional discharge for refusing the leave the estate. However, after being sentenced or this robbery, in November 2018 he was sentenced to 18 months detention for the supply of one wrap of cocaine to an undercover police officer. He is currently serving that sentence.

71. Mr Wells relied upon two grounds with which we have already dealt with, namely that the judge wrongly categorised the offence – a ground we have found to have been made good – and he failed to take into account properly the Youth Guideline.

72. In G's case, the judge did not make an express finding that G would not comply with any requirements that required his cooperation, and, unlike R, G does not have a lengthy history of failing to respect such requirements. Indeed, he appears to have satisfactorily completed the 6 month YRO imposed in 2017. In those circumstances, Mr Wells submitted that the judge erred in failing to give G a chance to take advantage of a YRO with some form of intensive supervision. In respect of the intervening custodial sentence which has been imposed, he submitted that, if Judge Ferris had not imposed a custodial sentence, neither would such a sentence have been imposed for the drug offence. All of the offences would have been visited with a YRO. He urged us to allow this appeal; and, in a bold oral submission, he asked us to allow him to seek permission to appeal against the 18 month custodial sentence, and allow that appeal and replace that sentence also with a YRO. Mr Wells rightly abandoned reliance on the disparity of G's sentence with a sentence imposed upon his brother for an entirely different offence.

73. However, despite the eloquence of those submissions, the author of G's pre-sentence report (at paragraph 6.4) expressed the view that ISS would not be appropriate in G's case because he could not cope with its requirements (and there is in fact no ISS facility where he lives). Only relatively light requirements could therefore be proposed, as they were (paragraph 6.6).

74. In the circumstances, we do not consider the judge was wrong to conclude that a YRO (necessarily without ISS) would not be appropriate. We have considered whether a DTO would be appropriate; but we have again concluded that it would not, because of the seriousness of this offending and the circumstances in which it was committed. Even in G's case, as did the judge, we consider that it warranted – and required – a period of custody in excess of 2 years.

75. In terms of the length of that period, as with R, we consider the starting point 5 years. In G's case, he did not have a weapon at the scene, and there are no aggravating features. Everything else being equal, we would have considered a three year sentence appropriate. However, we accept that G played a lesser role in the offending and has more by way of mitigation than does R. For those reasons – and only those reasons – we propose to allow the appeal and reduce his term of detention from 3 years to 2½ years. In respect of that sentence, we understand G was on bail with a qualifying curfew for 193 days, and he should therefore be given 97 days credit towards that sentence. That sentence will continue to be concurrent with the sentence imposed for the drug offence.

## Disparity

76. Finally, it was contended on behalf of each Appellant that his sentence was out of kilter with the sentence imposed on their co-defendant, Hagi. It was the prosecution case that Hagi was at the heart of this robbery, and was certainly one of the offenders in the front group who hit Mr Russell and actually took his belongings from him. He was, at least, one of the ring leaders. Although he pleaded guilty, he did so only on the second day of the trial, which should have attracted no more than 10% guilty plea discount. In fact,

he was sentenced to 2 years' in detention which was suspended. In the circumstances, it is said that an informed member of the public would consider that the sentences imposed on the Appellants were, in comparison, unfairly severe.

77. We do not consider there is any independent force in this submission. We are hampered by not having the sentencing observations of the judge for Hagi, but he was sentenced by Judge Ferris who conducted the trial, and who had the best opportunity to assess the different roles in this robbery. Hagi did plead guilty, and, although late, it was open to the judge to take the view that, in this multi-handed case, the public interest required a greater than usual discount to be given for that plea. When the sentences we have now imposed or endorsed are considered alongside that of Hagi, we do not consider that an informed member of the public would consider the disparity in sentence was such that it required any reduction of the sentences imposed on the Appellants which are otherwise fully warranted.

## Conclusion

78. For those reasons, we refuse R's appeal against conviction; but we allow the appeals against sentence as follows:

   i) R: We substitute the sentence of 3 years with one of 2 years 11 months 12 days' detention.

   ii) Ahmed: We substitute the sentence of 7 years 11 months' detention with one of 6 years.

   iii) Bahdon: We substitute the sentence of 7 years 11 months with one of 5½ years.

   iv) G: We substitute the sentence of 3 years with one of 2½ years.

## Postscript

79. As R v A illustrates, the statutory provisions relating to the crediting against a substantive custodial sentence of days spent on remand or on bail with a qualifying curfew are far from straightforward, especially in the case of young persons. We reiterate what this court said in R v D and H (at 10]): those representing defendants have an obligation to the court to raise issues of credit with the sentencing judge (and, if appropriate, this court) and should be ready to assist, not only by referring to the relevant statutory provisions, but also with a calculation of the numbers of days that should be credited and how that credit should be effected. Such a calculation should be agreed with the Crown, and presented to the court as agreed.