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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 9 May 2019

B e f o r e:

LADY JUSTICE HALLETT DBE
VICE PRESIDENT OF THE CACD

MRS JUSTICE SIMLER

MR JUSTICE ANDREW BAKER

R E G I N A
v
LEE ROY BRINDLE

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Mr B O'Toole appeared on behalf of the **Applicant**

Mr S Heptonstall appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

MR JUSTICE ANDREW BAKER:

1. This applicant, Lee Roy Brindle, seeks to appeal against a sentence imposed by HHJ Williams in the Crown Court at Maidstone in August 2018. His application has been referred directly to the full court by the Registrar because of concern identified as to the propriety of the way in which the sentencing judge constructed the sentence she articulated, whatever the single judge or in due course the full court might or might not make of the submissions of counsel as to whether that sentence was, overall, manifestly excessive. In the circumstances, a respondent's notice has also been provided to the court in relation to that aspect of the matter and we are most grateful for the assistance we have been given by Mr O'Toole, who appears for the applicant, and to Mr Heptonstall, who appears for the Crown.
2. We grant permission to appeal and as part of that we grant the very short extension of time of 3 days required, Mr O'Toole having accepted that the deadline for lodging the appeal papers was missed by those few days entirely on account of his other commitments and through no fault of the applicant.
3. The applicant, now therefore the appellant, is 45 years of age. He faced trial in June 2018 in the Crown Court at Maidstone on a nine-count indictment alleging a series of offences in, broadly stated, a domestic violence context. He pleaded guilty in the event at the start of the trial to one count and on what was the second day of his trial to three further counts. That set of guilty pleas was acceptable to the Crown and as a result no evidence was offered against the appellant on the remaining counts and not guilty verdicts were entered.
4. The offences for which in those circumstances the appellant came to be sentenced

in August were a single offence of criminal damage committed in the course of an assault on his former partner, that assault and a further assault on her, and then finally an offence of breaching a non-molestation order granted in the Family Court. That order was obtained by the complainant, the appellant's former partner, in response to and in order to seek protection from the violence now constituting and represented by the criminal damage and assault offences.

5. The sentence passed by HHJ Williams, who was clear in her judgment that the matter as a whole crossed the custody threshold but in a case in which sentence could be suspended, was a suspended sentence of 12 months. It was suspended for 2 years with both a rehabilitation activity requirement and an unpaid work requirement. We are pleased to be informed, and commend the appellant to this extent, that in the interim he has completed that unpaid work requirement and all but completed the rehabilitation activity requirement, and that there have been no difficulties in relation to his compliance with the sentence.

6. A sentence of 12 months suspended in that way was plainly well within the sentencing powers of the Crown Court in respect of the four offences to which the appellant had pleaded guilty. However, the judge articulated her construction of the sentence as being 2 months in respect of the criminal damage, 5 months each in respect of each of the two assaults, all consecutive, and 5 months in respect of the breach of the non-molestation order, concurrent. That articulation of a basis for or justification of a 12-month suspended term was not a lawful basis for that sentence. That is because the criminal damage offence was a lower value offence, below the £5,000 threshold, such that it required to be treated as summary only. In those circumstances, the two common assaults (batteries) and the criminal damage offence as sentenced together in the Crown

Court required in aggregate to be limited by way of sentence to a term of 6 months' imprisonment. That is agreed to be the ultimate impact of s.133 of the Magistrates' Courts Act 1980 applied to the offences before the court in this case.

7. That said, Mr Heptonstall, in his helpful respondent's notice, reminds the court, and Mr O'Toole accepts, that any appeal against sentence is an appeal against the entire sentence passed. In particular, an appellant may not, as it has been put, "bank" a favourable constituent part of the sentence whilst challenging some other part. That is, it seems to us, particularly important in a case where the valid basis of challenge is, as in this case, to one element of the way a multiple offence sentence has been constructed or articulated but where the overall sentence in fact passed is within the powers of the court and may be justifiable as a reflection of the overall offending behaviour involved. If authority were needed for that proposition as to not banking constituent parts of sentence, Mr Heptonstall reminds us that it can be found in the case of R v Hyde [2016] EWCA Crim 1031; [2016] 2 Cr App R (S) 39, in particular at [15].

8. In the present case, that principle most obviously applies to the decision by HHJ Williams to impose a concurrent sentence for the breach of the non-molestation order. We shall briefly summarise in a moment the facts of these offences, but suffice it to say that, as will appear from those facts, if anything the most natural construction for a sentence in this case, the custody threshold having been crossed, would have been to articulate what was felt to be the appropriate term of imprisonment to be suspended in respect of the summary only matters and then, to reflect the separate nature and circumstances of the breach of the non-molestation order, to impose that term as a consecutive term.

9. It seems to us inevitable that in this case it will only have been because the judge

imposed consecutive terms in respect of each of the summary only matters, so as already to have reached a term of 12 months, that it will then have occurred to her to impose a concurrent term for the breach of the non-molestation order.

10. Briefly then, and in summary, the matter arises out of the breakdown of the appellant's relationship with his long-term former partner. The relationship had lasted 19 years or so and there were four children in the family who are not or may not be the appellant's biological children but who nonetheless called him dad and treated him as the father of the family. However, the relationship broke down in 2015, at which point the appellant moved out of the family home. Matters came to a more unpleasant end when the appellant learned in around mid 2017 that his former partner had a new relationship.
11. On 30 July 2017, the appellant visited the children at the family home, no longer his home. The complainant, his former partner, was present. The appellant became verbally aggressive towards her, ripped off a gold chain, causing damage to it, and snatching a bag she was carrying off her shoulder, bruising her forearm. It was also alleged against him that he threw the bag to the floor and jumped on it, damaging mobile phones, but we were informed by Mr O'Toole that the basis upon which he pleaded guilty did not extend to accepting the damaging of the mobile phones and so consideration of sentence in relation to criminal damage is restricted to the damage to the gold chain.
12. That assault of a domestic violence nature, leading to some albeit not lasting injury, formed the first of the assault offences to which the appellant pleaded guilty and the damage to the necklace was the criminal damage.
13. Three days later, on 2 August 2017, the appellant went to the complainant's house in his car and asked the complainant to join him in the car, which, albeit reluctantly, she did. The appellant was angry and told the complainant that the children did not want to return

home; he was angry about the new partner and said he was going to hurt her. When she went to get out of the car, the appellant punched her on the arm, again causing bruising, and that was the second assault.

14. The response of the complainant, as we have already indicated, was to seek the assistance of the Family Court sitting at Dartford, which on 11 August 2017 issued a non-molestation order against the appellant under s.42 of the Family Law Act 1996, in the complainant's favour. Its prohibitions included that the appellant was not to communicate with the complainant by any means except through solicitors. It had a period of 1 year.

15. The appellant's immediate and wholly unjustified reaction to service upon him of the order was to breach it by getting a friend of his to telephone the complainant and put him, the appellant, onto the line, saying, as he then did, "*You have got the dates wrong and you have lied about everything in your statement. I am going to have a field day with all this*". Whatever precisely he meant by that, there could be no doubt that that was the most open and outrageous defiance of the authority and order of the court, to which in turn, as we have indicated, the complainant had in effect taken refuge as a means of dealing with the domestic violence she was suffering at the appellant's hands.

16. In helpful and focused submissions for the appellant, Mr O'Toole does not shrink from his acceptance that the appellant's behaviour has been entirely unjustified and unjustifiable. The broad gist of his submissions nonetheless was that, whether taken individually or in combination, all of this offending was at a relatively low level of severity such that the judge ought not to have concluded that it crossed the custody threshold. The submission thus is that a community order should have been imposed and, in any event, if it had to be a suspended sentence order, it was open to this court to

reconsider the term imposed.

17. Taking very briefly the applicable sentencing guidelines, bearing in mind, as we repeatedly find ourselves saying, that any such sentence starting point or range is for a single offence dealt with in isolation, as it seems to us these were common assaults that in and of themselves were within category 2 of the sentencing guideline, displaying greater harm in the context of a simple assault but without any higher culpability factors, however very substantially aggravated by the domestic violence context and the criminal damage, if that is not dealt with by way of consecutive sentence. To our mind, these offences undoubtedly did cross the custody threshold and certainly the judge's conclusion that they did could not be said to be wrong in principle or to result in a manifestly excessive sentence. Given the locations, the complainant's own home and the confined space of the car, parked outside her own home, the ongoing and serious effect of the offending, to which amongst other things the complainant herself spoke by way of victim personal statement, the fact that there was the repetition of the behaviour, all in a domestic violence context displaying the classic features of that context of a controlling abuse of power within a relationship or former relationship, coupled with the fact that, albeit of some significant age, this is an appellant with a substantial prior record of convictions, including convictions for violence, in our judgment a custodial term of 5 months' imprisonment was correct and appropriate to reflect the seriousness in combination of the two assaults and the criminal damage, even giving the appellant such very limited credit for plea as he could claim given the lateness of his pleas.

18. As regards the breach of a protective order, in our judgment under the guideline and again emphasising that this would apply if it were the only act of criminality involved, this was a category 2B offence attracting a starting point of 12 weeks' custody and

a category range from a medium level community order up to 1 year's custody. Given the aggravating features of this case, to which we have adverted, we cannot fault the judge's conclusion that a term of 5 months' imprisonment was appropriate. Reflecting, however, our opening observations as to the construction of the sentence, in our judgment that ought to have been and will now be expressed to be a term consecutive to the term imposed in relation to the summary only matters.

19. For all those reasons and in all the circumstances, and with thanks again to counsel for their assistance, we do allow this appeal and restructure the sentence, but to this extent only: in respect of count 2, 2 months and in respect of count 3 and count 6, 5 months each, all those sentences concurrent; in respect of count 7, 5 months consecutive to the terms on counts 3 and 6. Thus, the effect of this appeal is that the appellant remains subject to a suspended sentence order, suspended for 2 years with the requirements as imposed, but the term suspended is reduced to 10 months overall.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: Rcj@epiqglobal.co.uk