

Neutral Citation Number: [2020] EWCA Crim 764

Case No: 202001198/A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Cardiff Crown Court
Mr Recorder D Bould
S20200206

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2020

Before :

LORD JUSTICE GREEN
MRS JUSTICE MCGOWAN DBE
and
MR JUSTICE HENSHAW

Between :

REGINA
- and -
Paul Anthony JONES

(Transcript of the Handed Down Judgment.
Copies of this transcript are available from:
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7414 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Darren Bishop (instructed by **DGJ Solicitors**) for the **Appellant**
The Crown was not present or represented

Hearing date: Friday 12th June 2020

Judgment
As Approved by the Court
Crown copyright ©

Lord Justice Green :

1. This application has been referred to the full Court by the Registrar given the shortness of the sentence. On 17 March 2020, just 6 days before the Covid-19 lockdown, in the Crown Court at Cardiff the applicant was sentenced on count one (attempted burglary) to 8 months imprisonment and on count 2 (possession of Class A drug) to no separate penalty.
2. In setting the sentence the applicant asked for 6 separate offences to be taken into account. These consisted of six thefts or attempted thefts from shops between 12 March and 26 June 2019. The applicant broke into six different shops and stole items such as razors, a tool bag, four home cordless phone sets, alcohol and protein shakes. In one (attempted) theft he broke into the store but nothing was stolen. The total value of the stolen goods was approximately £485.
3. On 27 June 2019, the applicant broke into The Open Hearth public house in Pontypool. He smashed a window on the ground floor by kicking it through whilst the landlady and her partner were asleep upstairs. The landlady was woken by the intruder alarm which sent off at around five o'clock in the morning. Upon looking at the CCTV she saw a male making away from the pub on a white bicycle.
4. She contacted the police and said the male had a holdall. She also said that in order for the intruder alarm to activate the applicant would have had to walk midway up the stairs. The police made their way to the area and they found the applicant on a white bike, with a holdall.
5. He had blood on his hands. He was identified as the male in the CCTV which had been provided earlier. Following arrest, the applicant was searched.
6. There was a snap bag which contained a full wrap of heroin located in his jacket pocket and later, on being taken to his cell, a further packet of heroin was found. They weighed 0.162 grams and 0.814 grams. Subsequently blood found at the window entry point at the pub was matched to the applicant's DNA. In his initial interview, he made no comment.
7. In a further interview on 6 December he said he had smashed the window and had climbed in with the intention of having a drink.
8. In sentencing the judge made the following points.
9. The applicant was aged 41. This was a case of attempted burglary committed at night whilst the applicant was under the heavy influence of drugs. It was appropriate with this offending under the guidelines for non-domestic burglaries, even though the premises were domestic so far as the landlady and her partner were concerned. But notwithstanding even if the premises were non-domestic it remains an aggravating factor that the premises were occupied and that the applicant had proceeded at least half way up the stairs and was under the influence of drugs. The impact upon the victim was significant as set out in the victim impact statement.

10. Looking at antecedents and the other offences to be taken into account during the period of the instant offending, the applicant was engaged in a series of criminal acts of varying degrees of seriousness all of which were offences of dishonesty.
11. As to antecedents the applicant had a very poor record of previous convictions for acquisitive offences. He had appeared before the courts on 66 previous occasions for 178 offences between 1990 and 2019. He had convictions for 105 theft and kindred offences. He had served terms of imprisonment in relation to such offences. His most recent sentence in July 2019 was for offences of non-dwelling burglary and criminal damage for which he was sentenced to 12 months' imprisonment.
12. The judge accepted the submission that this was not a Category 1 case but fell into Category 2. The circumstances of the offending however pushed this towards the top end of the range.
13. The best mitigation open to the applicant was his plea and the applicant was given full credit.
14. The appropriate starting point was a sentence of 12 months' imprisonment reduced to 8 months to take account of credit for plea.
15. Mr Bishop, for the applicant, has framed his arguments under two broad headings. First arguments relating to whether the sentence was manifestly excessive; second, arguments relating to the fact that the applicant was sentenced during the period immediately prior to the Covid-19 pandemic lock-down when the sentencing judge would have been unaware that in sentencing the applicant to custody he would be detained in conditions which would involve a greater degree of privation than would be the case but for the lock-down.
16. We will deal with each set of arguments separately. It is argued that the sentence was manifestly excessive because: the starting point was too high and that certain mitigating features such as the fact that the applicant had served a custodial sentence in the meantime (for separate offending committed during the time of these offences) and delay were not considered adequately in sentence. It was wrong to place this offending at the top of the Category 2 range. We can address this briefly. When viewed in terms of totality and taking into account all relevant possible mitigation an immediate determinate sentence of 12 months before credit was within the Guidelines and cannot be said to be excessive or manifestly so, not least because of the applicant's very poor antecedent record. We reject this submission.
17. We turn to the second argument which concerns the impact of the pandemic upon the conditions under which the applicant is serving his sentence. We are informed by counsel that the applicant spends the entirety of each day, save for 30 minutes, locked in his cell and that he is unable to have any social visits.
18. In *R v Manning* [2020] EWCA Crim 592 at paragraphs [41] and [42] the Lord Chief Justice observed as follows:

“41. We would mention one other factor of relevance. We are hearing this Reference at the end of April 2020, when the nation remains in lock-down as a result of the Covid-19 emergency. The impact of that emergency on prisons is

well-known. We are being invited in this Reference to order a man to prison nine weeks after he was given a suspended sentence, when he has complied with his curfew and has engaged successfully with the Probation Service. The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19.

42. Applying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended. Moreover, sentencers can and should also bear in mind the Reduction in Sentence Guideline. That makes clear that a guilty plea may result in a different type of sentence or enable a Magistrates' Court to retain jurisdiction, rather than committing for sentence.”

19. We of the view that in the present, exceptional, circumstances it is appropriate to take the conditions under which the applicant is presently held in custody into account. We do not of course criticise the judge for the sentence imposed because the judge was wholly unaware of the change in prison conditions that would arise just days after the sentence was imposed.
20. In these circumstances we have decided that the application for permission to appeal should be granted; that the sentence of 8 months should be quashed; and, in its place a sentence of 6 months substituted. To this extent we allow the appeal.