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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 268



No. 202001749 A2

Royal Courts of Justice

Thursday, 4 February 2021

Before:

LADY JUSTICE ANDREWS
MR JUSTICE SPENCER
HER HONOUR JUDGE AUBREY QC

REGINA
V
MARTIN JOHN McLATCHIE

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MR S. ROBINSON appeared on behalf of the Appellant.

The Crown were not represented.

J U D G M E N T

MR JUSTICE SPENCER:

- 1 This is an appeal against sentence brought by leave of the single judge.
- 2 On 5 June 2020 in the Crown Court at Kingston-upon-Hull the appellant, who is now 64 years of age, pleaded guilty to an offence of domestic burglary (Count 1), and two offences of fraud (Counts 2 and 3). He was sentenced by HHJ Thackray QC to a term of four years' imprisonment for the burglary with concurrent sentences of six months' imprisonment for the two offences of fraud.
- 3 It was the third time that the appellant had been liable to be sentenced to a minimum term of three years' imprisonment as a "three strikes" burglar, pursuant to s.111 of the Powers of Criminal Courts (Sentencing) Act 2000. The judge took six years as his starting point and allowed full credit of one-third for the appellant's early guilty pleas. The additional criminality of the fraud offences was reflected in the lead sentence for the burglary.
- 4 The grounds of appeal are that the judge's starting point of six years was too high, resulting in a sentence which was manifestly excessive having regard to the overall circumstances of the offending and the appellant's personal mitigation.
- 5 The facts can be very shortly stated. The burglary took place in the early hours of 2 May 2020 at a house in Hull occupied by a university student, Daniel Bouabida. He shared the accommodation with three other students, but at the time he was living there alone because the others had moved out when the university closed as a result of the pandemic.
- 6 Mr Bouabida stayed up late studying that night and retired to bed at 4.00 a.m, having first checked that the back door was locked. Some time thereafter and before 5.15 a.m., the appellant broke into the house by forcing the back door with a screwdriver. He stole Mr Bouabida's wallet from the pocket of his jacket which was in the kitchen. Fortunately, Mr Bouabida slept through it all, so there was no confrontation. It was only when he woke up around midday that he discovered he had been burgled and that his wallet was missing. There had been no cash in the wallet, but his bank card was stolen and his driving licence and student card. He discovered that the bank card had been used twice, first at 5.15 a.m. and again at 6.12 a.m., when the appellant twice put £20 credit on his mobile phone, first at a nearby supermarket and then at a petrol station. These withdrawals gave rise to the counts of fraud.
- 7 The burglary took its toll on Mr Bouabida. In his impact statement he said it had made him feel very nervous living at the property, thinking what would have happened if the burglar had come into his bedroom. No doubt this anxiety was increased by the fact that he was living alone in the house during the pandemic. There was CCTV evidence showing the appellant arriving at the property on a pushbike sometime after 5.00 a.m.. He was wearing a hat and carrying a plastic bag. He forced the lock on the back door with a screwdriver which he brought with him, damaging the wooden frame.
- 8 The appellant was arrested later the same day. In interview he initially denied the burglary, claiming that someone had given him the bank card. When confronted with the CCTV footage, he admitted the offence. He said he had used a screwdriver to get in; he had found the jacket, taken the wallet and left. He expressed remorse, saying that he had made a stupid mistake.
- 9 The appellant had a very bad record for dishonesty generally and for domestic burglary

in particular. His first sentence for burglary of a dwelling was in 1979, twelve months' imprisonment. 1984 he received a suspended sentence for a domestic burglary. In 1988 he received a sentence of three years' imprisonment for two offences of domestic burglary with thirteen offences taken into consideration. In 1996 he was sentenced to two years' imprisonment for a domestic burglary. In 2004 he received a sentence of three years' imprisonment for a domestic burglary. In 2006 he was sentenced to 12 months' imprisonment for attempted burglary of a dwelling. In 2012 he received his first minimum sentence of three years for burglary of a dwelling, reduced by 20 per cent for his guilty plea. In 2015 he received his second minimum sentence for burglary of a dwelling, 33 months' imprisonment after credit for plea. In between these sentences for domestic burglary he had also served several terms of imprisonment for a variety of offences, including non-domestic burglary, handling stolen goods and possession of drugs. His most recent sentence before the current offending was four months' imprisonment imposed in February 2018 for going equipped for theft.

- 10 There was no pre-sentence report, nor was any report necessary. A substantial sentence of imprisonment was inevitable.
- 11 The mitigation advanced to the judge supported by a letter written by the appellant himself was that he had kept out of trouble for 21 months prior to these offences, which was quite an achievement in view of his record. The main personal mitigation was that in 2019 his partner had been rushed to hospital and diagnosed with cancer with only months to live. He had devoted himself to her care over the next few months. It must have been the stress of his partner's illness and the responsibility of looking after her which caused him to commit this burglary. He could not explain why he had done it. He had expressed remorse in interview and in his letter to the judge. The appellant also suffered from ill-health himself as a result of an abscess in his stomach which had burst during his time in prison in the past. He was required to use a stoma bag for the rest of his life.
- 12 It was common ground that the burglary was a Category 1 offence under the Sentencing Council Guideline. There was greater harm because the occupier was at home. There was higher culpability because the appellant had gone equipped for burglary with a screwdriver. The starting point under the guideline was, therefore, three years' custody with a range of two to six years. It was an aggravating factor that the offence was committed at night. By far the most serious aggravating factor, however, was the appellant's very bad record for domestic burglary. The judge also treated the offence of fraud as an aggravating feature of the burglary.
- 13 In passing sentence, the judge observed that some people never fully recover from being the victim of domestic burglary. This offence was particularly serious because it was a night-time burglary when the house was occupied and the appellant had gone equipped. The judge said that the appellant's previous convictions would have justified a "radical departure" from the guideline, and perhaps even a sentence outside the range of two to six years. However, he took into account the mitigation advanced in the appellant's letter, and in particular, his partner's illness. That begged the question, the judge said, of why the appellant was committing a night-time burglary when he should have been caring for his partner at home. For that reason, the judge said, the mitigation carried very little weight, although he did take the appellant's letter into account. The judge concluded that the least sentence he could have passed after trial was six years. With full credit for plea, the sentence was four years.
- 14 On behalf of the appellant, Mr Robinson, in very helpful, able and focused submissions, argues that although it was entirely appropriate to move up from the starting point of three

years, the aggravating features were not of such severity as to justify a sentence of six years, which was at the very top of the range under the guideline. He submits that the judge failed to give sufficient weight to the appellant's personal mitigation, including the serious illness of his partner. He submits that the judge gave insufficient weight to the appellant's own ill-health, particularly in the climate of the pandemic. He submits that this was an additional factor which should have been taken into account. Mr Robinson in his written submissions contended that the starting point should have been around four and a half years not six years.

- 15 In answer to questions from the court in the course of submissions, Mr Robinson explained that, sadly, the appellant's partner has died since the sentence was imposed. It also appears that the stoma bag which the appellant has had to wear is something which was fitted when he was last serving a sentence, over 21 months ago. It follows, we regret to say, that he was out burgling that night in that condition despite his disability.
- 16 We have considered all Mr Robinson's submissions very carefully. We are quite unable to accept that this sentence was manifestly excessive. The judge gave full weight to the appellant's mitigation by drawing back from taking a starting point above the category range. As the guideline makes clear, in some cases the seriousness of the aggravating factors may make it appropriate to move outside the identified category range, and for category 1 that means above six years. This was just such a case. It was the third time the appellant fell to be sentenced as a three strikes burglar. Nevertheless, the judge drew back from that.
- 17 We have every sympathy for the appellant now mourning the death of his partner and having to cope with his partner's ill-health at that time, but as the judge pointed out, the force of any mitigation arising from her ill-health was undermined by the very fact that the appellant chose to go out burgling that night, rather than staying at home to look after his partner. We also observe that although the pandemic was not at its height in June last year, the appellant was creating a further potential health risk for his partner by going into someone else's house in this way. The judge's starting point of six years also reflected the additional criminality of the two offences of fraud, which themselves would have merited a sentence of nine months' imprisonment after trial.
- 18 Therefore, despite Mr Robinson's valiant submissions, we are quite satisfied that the sentence the judge passed was neither wrong in principle, nor manifestly excessive, and the appeal must therefore be dismissed.
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CERTIFICATE

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This transcript has been approved by the Judge.