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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 662



No. 202100218 A4

Royal Courts of Justice

Thursday, 15 April 2021

Before:

LORD JUSTIS EDIS  
MRS JUSTICE FARBEY  
HIS HONOUR JUDGE FLEWITT QC

REGINA  
V  
KIRSTEN SHADBOLT

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MS H. CHENERY appeared on behalf of the Appellant.  
The Crown were not represented.

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

MRS JUSTICE FARBEY:

- 1 On 30 November 2020, having pleaded guilty before magistrates, the appellant, who is now 32 years old, was committed for sentence in relation to a number of offences. On 14 January 2021 in the Crown Court at Aylesbury before HHJ Rochford, she was sentenced as follows. For one charge of going equipped for theft, contrary to s.25 of the Theft Act 1968, two weeks' imprisonment. For one charge of assault by beating, contrary to s.39 of the Criminal Justice Act 1988, ten weeks' imprisonment, consecutive. For a further charge of assault by beating, ten weeks' imprisonment, consecutive. For one charge of assault occasioning actual bodily harm, contrary to s.47 of the Offences Against the Person Act, 20 weeks' imprisonment, consecutive. For one charge of theft, contrary to s.1 of the Theft Act 1968, two weeks' imprisonment, consecutive. For a further charge of theft, four weeks' imprisonment, consecutive. Having passed this series of consecutive sentences, the total sentence was 48 weeks' imprisonment. The appellant appeals against sentence by leave of the single judge.
- 2 The facts may be summarised as follows. On 29 October 2020 the appellant was in a Sainsbury's store in Aylesbury, when she was seen putting five bottles of alcohol in a basket but then transferring bottles to her rucksack. She made her way towards an exit, and as she did so she also picked up a flask from a shelf. She then saw that the exit was staffed by a security guard, Mr Malik Ali, and so she turned and made her way to an exit at the rear of the store. Mr Ali followed her, and as she left the exit, he caught up and blocked her path. He challenged her about the flask and she immediately pushed him to the chest with both hands. Mr Ali stumbled backwards and collided with 82-year-old Peter Garner and 94-year-old Doris Garner, who are cousins. They were knocked to the ground. The appellant ran off and Mr Ali followed her. She discarded the rucksack. Mr Ali handed it to police officers when they attended, and it contained the bottles of alcohol and the flask. The goods were valued at £157. The rucksack itself was found to be foil lined. The appellant was arrested on the following day, and in her possession was found a Waitrose bag lined with tinfoil. Ms Garner, who had mobility problems and used a stick, suffered a right shoulder fracture and had to spend a week in hospital.
- 3 On 28 November 2020 a security guard at a Waitrose store in Aylesbury noticed that the alcohol aisle appeared to be emptier than usual. He checked CCTV and saw the appellant loading up bags with bottles of alcohol. She was then seen to leave the store without attempting to pay. The stolen items were valued at £324.50. Later that day, the appellant returned to the store and tried to steal more bottles of alcohol. She was stopped as she attempted to leave. She resisted, and the security guard had to be assisted by an off-duty police officer to detain her before the police arrived.
- 4 In sentencing the appellant, the judge had regard to her numerous previous convictions for shoplifting and assault. We note that she has previous convictions for ten offences of theft and four offences of assault. The judge observed that the offences took place in the context of the current COVID-19 pandemic when people need to be particularly careful in shops. Released on bail for the offences of 29 October, the appellant had nevertheless gone on to reoffend a month later, which was an aggravating factor.
- 5 In considering mitigation, the judge had regard to a Pre-sentence Report and a letter to him from the appellant. He observed that she had had a number of challenges and difficulties in her life. He took into consideration that she was seeking to re-establish contact with her young daughter.
- 6 Dealing with the assault on Doris Garner, the judge applied the sentencing guideline for assault occasioning actual bodily harm. He held that the offence was one of greater harm,

as the fracture to the shoulder of a 94-year-old was a serious matter. He said the culpability was neither raised nor lowered, but placed the offence in category 2, which has a starting point of 26 weeks' custody. He said that he was bound to move up from the starting point in light of Ms Garner's vulnerability. He imposed a sentence of 30 weeks, reduced to 20 weeks to reflect the early guilty plea.

- 7 The judge dealt with the other offences in shorter terms. It is right to note that he did not set out how he applied the relevant sentencing guideline for each offence, but he reached the sentences which we have mentioned above after a one-third deduction for guilty pleas. He noted in particular that the assault against Mr Ali was serious because he was a security guard. The judge stated that in imposing consecutive sentences he had regard to the principle of totality, saying that he had kept the overall sentence as short as he could.
- 8 In her written and oral submissions Ms Helen Chenery, on behalf of the appellant, submits that having decided that the assault on Doris Garner was a category 2 offence, the judge should not have raised the sentence within the category 2 range on grounds of Ms Garner's vulnerability, which had already formed at least part of the reason for placing the offence in category 2. This element of double counting contributed to a manifestly excessive sentence.
- 9 As for the assaults on Peter Garner and Mr Ali, Ms Chenery referred to the sentencing guideline for common assault. She submitted that the offences were properly categorised as category 3 offences (lesser harm and lower culpability) so that the starting point was a band A fine with a range of discharge to a band C fine. The custody threshold was not met in relation to either assault. Ms Chenery submitted that overall the sentence of 48 weeks' imprisonment was manifestly excessive.
- 10 We turn first to the events in Sainsbury's on 29 October 2020. We are in no doubt that the judge was entitled to impose an immediate custodial sentence for the assault on Doris Garner. At 94 years old, she was knocked to the ground suffering agonising pain. She had to spend a week in hospital for a broken shoulder. Although the appellant did not intend to assault Ms Garner, who happened to be caught up in the attempt to avoid the store's security guard, this was a serious offence for which a community sentence was not appropriate.
- 11 However, the appellant's various offences on that day were, in our judgment, part of a single course of conduct. While there is no inflexible rule governing whether sentences for more than one offence should be structured as concurrent or consecutive, we are persuaded that the series of consecutive sentences imposed for the other offences has resulted in the judge losing sight of the principle of totality. The assault on Peter Garner can only have been frightening, particularly given his age but fortunately he appears to have escaped any significant injury. Mr Ali also appears to have escaped injury, though it is an aggravating factor that he was assaulted at work. In a sentencing note provided to the judge the prosecution accepted that the theft from Sainsbury's did not reach the custody threshold. We agree. On their own, we do not regard any of these offences as reaching the custody threshold. We regard the judge as having fallen into error by imposing custodial sentences for each of them.
- 12 As for the remaining counts - the further theft from Sainsbury's on the following day and the offence of going equipped for theft - these offences are of a relatively minor nature. While they demonstrate some degree of persistence, we do not agree that the judge could regard them as reaching the custody threshold at all, still less as each requiring consecutive sentences of imprisonment. In short, the overall sentence of 48 months was manifestly excessive and must be quashed and a lower overall sentence substituted.

- 13 For the assault on Doris Garner, we apply the sentencing guideline for assault occasioning actual bodily harm. The offence is one of greater harm as there was serious injury and Ms Garner was particularly vulnerable owing to her age. Given the lack of premeditation, we treat the offence as one of lower culpability. It is, therefore, a category 2 offence, with a starting point of 26 weeks and a category range of a low level community order to 51 weeks' custody. There must inevitably be a significant upward adjustment from the starting point to represent the appellant's other offences which took place at the same time. That is not because they pass the custody threshold themselves, but because they represent the factual context in which the most serious assault was committed and are aggravating features of it. The theft was planned, as demonstrated by the use of foil. The assaults on Mr Garner and Mr Ali may not have caused injury but they must, in our judgment, be viewed in the context of the current COVID pandemic. Mr Ali was providing an essential service to the public in the pandemic through his work in a supermarket. Both Doris and Peter Garner were vulnerable to COVID-19 through close physical contact with others by reason of their age - which is an aggravating factor of both assaults.
- 14 While recognising the appellant's attempts to address drug addiction, any progress must be balanced against her numerous previous convictions for shoplifting and assault. In our judgment, when all these factors are taken into account, the seriousness of the offence of assault occasioning actual bodily harm is such that neither a fine alone nor a community order can be justified. The offence is so serious that only a custodial sentence can be justified. The least possible sentence we can impose, having regard to the aggravating and mitigating factors of the case, is one of nine months. Applying a discount of one third for the appellant's guilty plea, we substitute a sentence of six months. In relation to the other offences, we recognise the impact on the victims, which we do not belittle. Nevertheless, we take into consideration the principle of totality and, having already reflected the overall seriousness of the appellant's conduct in the six months' sentence, we impose no further penalty. To this extent this appeal is allowed.
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This transcript has been approved by the Judge.