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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE Nos 202300497/B3 & 202300498/B3

[2023] EWCA Crim 236

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 21 February 2023

Before:

LORD JUSTICE MALES
MR JUSTICE CAVANAGH
HER HONOUR JUDGE DHIR KC
(Sitting as a Judge of the CACD)

REX
V
GEORGE WARD

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MR S FIDLER appeared on behalf of the Applicant

J U D G M E N T
(Approved)

1. LORD JUSTICE MALES: On 14 February 2023 in the Crown Court at Chelmsford before Mr Recorder Conley, the appellant, George Ward, now aged 27, admitted an offence of failure to surrender to bail as soon as reasonably practicable after 5 September 2022 pursuant to section 6(2) of the Bail Act 1976. He indicated that he would contest any charge under section 6(1) of the Act and that position appears to have been accepted by the court and in any event was not pursued.

2. The distinction between the two subsections is that section 6(1) provides:

> "(1) If a person who has been released on bail in criminal proceedings fails without reasonable cause to surrender to custody he shall be guilty of an offence."

3. Section 6(2) on the other hand provides:

> "(2) If a person who—
>
> (a) has been released on bail in criminal proceedings, and
>
> (b) having reasonable cause therefor, has failed to surrender to custody,
>
> fails to surrender to custody at the appointed place as soon after the appointed time as is reasonably practicable he shall be guilty of an offence."

4. The appellant's position was that he was unable to surrender to custody on 5 September 2022, the date on which he had been required to do so, due to lack of money to get himself to court but he accepted that he had failed to surrender thereafter during the months which followed until the day before his appearance in the Crown Court.

5. The background was that on 3 September 2021 the appellant was sentenced at Chelmsford Crown Court to a community order with a six week curfew requirement for

an offence of assault. There were then proceedings alleging that he had failed without reasonable excuse to comply with the requirements of the order in that he failed to make himself available for the installation of the monitoring equipment at his address.

6. It is unnecessary to trace the somewhat lengthy proceedings to which that led but we should say that eventually on 28 October 2022 Mr Recorder Conley dealt with that contested breach allegation in the appellant's absence and was not satisfied to the required standard that the breach was proved.

7. That finding was made, as we have said, in the absence of the appellant. For present purposes the relevant chronology is that the appellant had been required to appear at court on 5 September 2022 but failed to do so. A warrant was issued. On 14 October 2022 he failed to appear once again, although a prosecution representative did appear. Again on 28 October 2022 he failed to appear but a prosecution representative did and on 18 November 2022 also the appellant did not appear.

8. He did eventually surrender on 13 February 2023 and was brought before the court on 14 February following his arrest. He was represented by Mr Fidler, who has appeared before us. The Recorder indicated that although the underlying matter had been dealt with and the breach of the community order had not been proved, nonetheless the failure to surrender was a matter which should be proceeded with.

9. Mr Fidler submitted that before that proceeding could continue a prosecution representative needed to be appointed. The Probation Service, who were represented in court because of the failure to comply with the community service, were not in a position to prosecute the failure to surrender matter pursuant to the Bail Act and therefore so far as that matter was concerned there was no prosecution representative in court. The Recorder ruled against Mr Fidler's submission and required that the failure to surrender

should be put to the appellant.

10. As we have said the appellant denied the offence under section 6(1) of the Bail Act and that explanation appears to have been accepted; at any rate it was not taken any further. The offence under section 6(2) was then put and the appellant admitted it.

11. The Recorder then proceeded to sentence, after hearing from Mr Fidler in mitigation. In his sentencing remarks the Recorder said that he accepted that the appellant had now surrendered but it was very, very late. There had been a failure to attend on a number of separate occasions, and despite the appellant having been found not guilty of the underlying breach of the community order, the Recorder could not ignore the fact that the appellant had failed to attend on a number of separate occasions. He said:

> "... in the circumstances I can't see how I can treat this as anything other than a defendant giving the court the runaround and causing substantial delay to the administration of justice."

12. That being so, he said that he was prepared - just - to treat this as a Culpability B case within the applicable guideline although he thought that he could quite easily have treated it as Culpability A. He said that in terms of harm there had been a failure to attend the Crown Court hearing resulting in substantial delay and interference with the administration of justice. The prosecution had attended on four separate occasions expecting that the trial would take place and would proceed. On three of those occasions the prosecution witness had taken time out of her day to attend in order to give evidence, only to be frustrated on every occasion. That being so the Recorder said that he took the view that this was a Category 2B case with a starting point of 21 days' custody. That was clearly a slip of the tongue. What the Recorder plainly had in mind and meant to say was that it was a Category 1B case, not a 2B case - that is apparent from the reference to

substantial delay and interference with the administration of justice and the starting point of 21 days' custody.

13. The appellant now appeals against his conviction for which he does not need leave, this being a Bail Act offence, and also against the sentence on the grounds that it is manifestly excessive. Mr Fidler submits that there was a major procedural error by the judge by failing to appoint a prosecutor, that this caused prejudice to the appellant and that it led to an impression of partiality on the part of the Recorder taking a role in the proceedings where he was effectively acting as both prosecutor and judge.

14. He referred to European authority concerned with Article 6 of the Convention on Human Rights and to a number of cases, the submission being encapsulated in a passage from a Digest of European court cases which we understand is provided by the European Court of Human Rights itself:

> "The European Court has examined the question of compliance with the principle of impartiality in a number of cases concerning alleged contempt by the applicant in court. Where the same Judge then took the decision to prosecute, tried the issues arising from the applicant's conduct determined his guilt and imposed the sanction. The court has emphasised that, in such a situation, confusion of roles between complainant, witness prosecutor and Judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a Judge in his or her own cause and consequently as to the impartiality of the Bench. The Authorities that the European Court has relied upon to establish this principle, are the following:-
> 1. *Kyprianou v Cyprus* (GC, 2005 126-128.
> 2. *Slomka v Poland* (2018, 44-51)
> 3. *Deli v The Republic of Moldova* (2019, 43)."

15. Mr Fidler accepts, however, as he accepted before the Recorder in the court below, that a judge does have power to initiate proceedings for failure to surrender.

16. In our judgment there was no procedural error arguably committed by the judge in this case. If we had considered that the appellant's case was arguable, we would have directed the attendance of a prosecution representative or possibly an *amicus curiae* to assist the court. In the event however we consider that not to be necessary. In our judgment the position is clear from the Criminal Practice Direction dealing with failure to surrender set out at page 207 of the current 2023 Edition of *Archbold*. Paragraph 14C.3 and 14C.4 deal with the initiation of proceedings where bail is granted by a court. 14C.4 says:

> "Given that bail was granted by a court, it is more appropriate that the court itself should initiate the proceedings by its own motion although the prosecutor may invite the court to take proceedings, if the prosecutor considers proceedings are appropriate."

17. Paragraph 14C.5 goes on to make clear that courts should not without good reason adjourn the disposal of a section 6(1) or (2) offence until the conclusion of the proceedings in respect of which bail was granted but should deal with defendants as soon as is practicable. In the present case the proceedings, in the course of which bail had been granted, had already been concluded but the instruction not without good reason to adjourn the disposal applied with equal force.

18. The Recorder was in our judgment entitled to require that the offence be put to the appellant for him to enter his plea. That is what happened. If the plea had been not guilty so that the failure to surrender was being contested and the question of whether there was a reasonable excuse for any delay had needed to be considered, we have no doubt that the Recorder would have sought the assistance of prosecution counsel. It is very difficult to see in those circumstances how the Recorder could himself have

investigated the matter without risking descending into the arena and giving the impression of lack of partiality to which Mr Fidler referred.

19. But the position is entirely different when the offence was admitted, as happened here. There was effectively in those circumstances no useful role for a prosecutor to play. The facts were known and were not in dispute. The only remaining matter was sentence in which it was not necessary for the prosecution, although in some cases providing useful assistance to the court for example as to the application of any applicable guidelines, to be involved.

20. We do not accept that the appellant was prejudiced by the failure of the judge to require prosecution counsel to be appointed. Mr Fidler submitted that if a prosecutor had been appointed he would have had an opportunity to seek to persuade the prosecutor that it was not in the public interest to proceed with a prosecution. In our judgment, however, it is inconceivable in a case such as this, which is an offence against the administration of justice and where the court plainly took the view, as indeed was to become clear from the sentencing remarks, that this was a case of high culpability and substantial harm to the administration of justice, that a prosecutor would have decided not to proceed. This was a matter in which the court having made the order for the appellant to surrender had a particular and legitimate interest in the matter.

21. The European authorities to which Mr Fidler referred have in our judgment no bearing on this matter. They are concerned with cases where guilt was contested. In those circumstances it is very easy to see that the appointment of a prosecutor would be necessary and that a judge would not be in a position to conduct effectively the prosecution while so remaining an impartial judge. But that was not this case. In this case there was no impression of impartiality. The role taken by the Recorder was

appropriate throughout and indeed it would have been in our judgment unnecessary and inappropriate to delay by adjourning until some other day when a prosecutor could have been instructed.

22. Accordingly the appeal against conviction is dismissed.

23. So far as the appeal against sentence is concerned, in our judgment for the reasons which he gave, the Recorder was entitled to regard this as a Category 1B case for which the applicable guideline provides a starting point of 21 days' custody. He gave the appellant full credit for his prompt plea and arrived at a sentence of 14 days.

24. As it happens, the appellant has now served half of that time and was released, we understand yesterday, although it was not possible to get this appeal heard any earlier than today.

25. Mr Fidler submitted that there was insufficient weight given by the Recorder to the fact that the underlying offence of breach of the community order had not been proved and to the fact that the appellant had eventually surrendered.

26. In our judgment, however, it is clear that the Recorder did have those matters in mind and we are not persuaded that he failed to give them appropriate weight. Mr Fidler submitted also that there was no distinction in the guidelines between a section 6(1) offence and a section 6(2) offence, but that a section 6(1) should be regarded as inherently more serious. In our judgment, however, the seriousness of the offence in each case is a matter for the judgment of the sentencing judge and the sentencing judge here was entitled to take the view that this was a case where the starting point in the guideline ought to be applied. At any rate the sentence which he imposed cannot be regarded as manifestly excessive and accordingly the sentence appeal is also dismissed.

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

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