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IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202203151/A3
[2023] EWCA Crim 713



Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 24 May 2023

Before:

LORD JUSTICE COULSON

MRS JUSTICE FARBEY DBE

MR JUSTICE CONSTABLE

REX

V
FRANK SINES

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MR G PITT appeared on behalf of the Appellant.

J U D G M E N T

MRS JUSTICE FARBEY:

1. The appellant appeals against sentence by leave of the single judge. On 11 August 2022 he pleaded guilty before Magistrates to the assault of an emergency worker ("the index offence"). He was committed for sentence to the Crown Court. The index offence took place during the operational period of two suspended sentence orders ("SSOs"). On 16 July 2021 the appellant had been sentenced by Magistrates for one offence of criminal damage, one offence of affray, one offence of assault of an emergency worker by beating, a second offence of criminal damage and one offence of threatening words or behaviour with intent to cause fear.
2. Although the procedural history is not straightforward, the sentence for these offences was on 21 April 2022 amended in the Crown Court to 18 weeks' imprisonment suspended for 2 years ("the first SSO"). By a second amended order, made on 26 April 2022, the appellant was sentenced in the Crown Court for one offence of robbery, one offence of assault occasioning actual bodily harm, one offence of assault by beating and one offence of assault of an emergency worker. For these offences the court imposed 18 months' imprisonment suspended for 2 years ("the second SSO").
3. On 25 October 2022, in the Crown Court at Winchester before HHJ Evans, the appellant (then aged 28) was sentenced to 4 weeks' imprisonment for the index offence. The judge activated both the SSOs. The first SSO was activated with a reduced term of 1 month's imprisonment; the second SSO was activated with a reduced term of 14 months' imprisonment. Each was to run consecutively with the other. The sentence for the index offence was also consecutive. The total sentence was therefore 15 months and 4 weeks' imprisonment.

The Facts

4. We turn to the facts of the index offence. On 10 August 2022 police officers were conducting enquiries in Farnborough. As PC Atwood spoke to a member of the public a black BMW pulled into the road. The appellant got out of the front passenger seat and approached the police officers. He was bare chested and drinking from a glass cider bottle. The appellant shouted at the officers and demanded they leave. He was aggressive and appeared intoxicated. The appellant approached PC Hill and was verbally abusive towards him. PC Hill told him to go away. The appellant threw the content of the cider bottle over PC Hill's face and chest. He then gestured in a manner that suggested that he might throw the glass bottle at the officers. In response PC Atwood used a Taser against him. The appellant dropped the bottle and was arrested. He resisted and was taken to the ground and detained. At the police station the appellant provided a prepared statement in which he referred to his mental health issues and anxiety. He accepted throwing the content of the bottle over the officer and apologised.

Sentencing Remarks

5. In sentencing the appellant for the index offence, the judge was provided with the report of an independent psychiatrist, Dr Gauruv K Malhan, dated 25 March 2022. The report

had been considered by the Crown Court in relation to the first and second SSOs. Dr Malhan records that the appellant had been admitted to hospital on psychiatric grounds on three or four occasions, with the longest admission lasting 3 months. All his admissions were precipitated by self-harm or attempted suicide. At around the time of the offences covered by the second SSO the appellant had attempted suicide. When remanded in custody he had spent three nights on the healthcare wing and then three weeks under psychiatric assessment on the main wing. Dr Malhan's opinion was that the appellant suffers from Emotionally Unstable Personality Disorder. He also suffers from ADHD, depression and alcohol addiction.

6. The judge had the benefit of considering the pre-sentence report that had been produced in relation to the offences underlying the second SSO. The pre-sentence report concluded that the appellant had severe mental health difficulties which were a significant contributing factor to his offending. The judge considered a more recent written "Response to Supervision Report" by a probation officer. The Response dealt to some degree with the appellant's ongoing mental health problems.
7. In sentencing the appellant for the index offence, the judge considered the Sentencing Guideline relating to Assault on an Emergency Worker. She was of the view that the index offence was one of high culpability (level A) because the appellant had threatened to use the bottle as a weapon. As for harm, it was a category 3 offence because the appellant's actions had fortunately caused little physical harm or distress. The starting point for a category 3A offence was a low level community order; the range was a Band C fine to a high level community order. However, the judge concluded that, given the appellant's history of assaulting emergency workers and other aggravating factors, the offence was so serious that the appellant fell to be sentenced outside the category range and that the threshold for a custodial sentence was met.
8. The judge took into consideration the appellant's mental health difficulties and cited the Overarching Guideline on Sentencing Offenders with Mental Disorders. She took account of the appellant's personal mitigation. She concluded however that the appellant had deliberately taken alcohol before the offence, despite knowing of the risks of doing so. Balancing the aggravating and mitigating factors, she imposed a notional sentence of 6 weeks' imprisonment which she reduced to 4 weeks for the appellant's early guilty plea. She decided that it was not unjust to activate the SSOs in the terms we have already set out above.
9. A few hours later, Mr Pitt applied to re-open the sentence and invited the judge to adjourn the sentence pending an up-to-date psychiatric report. Mr Pitt told the judge that she had been misled because the reports before her did not refer to a recent and serious decline in the appellant's mental health, which had led to him being detained in hospital under the Mental Health Act 1983 following a suicide attempt. He had been prescribed a powerful dose of antipsychotic medication administered by monthly injection.
10. Mr Pitt said to the judge that, if he had known of these developments, he would have sought an adjournment under section 232 of the Sentencing Act 2020. By virtue of that

section, the court must obtain and consider a medical report if an offender appears to be suffering from a mental disorder unless the court considers it unnecessary to obtain a report. The judge refused to re-open the sentence and refused to grant an adjournment. Given that she had a full report from March 2022, she considered that a fresh report was unnecessary. The information provided by Mr Pitt did not represent any new development as the appellant's problems were longstanding. Custody was the only option.

Grounds of Appeal

11. In his written and oral submissions, Mr Pitt submits on behalf of the appellant that the sentence was wrong in principle because the judge refused to accede to the defence application to adjourn sentence for the purpose of obtaining a psychiatric report as required by section 232 of the 2020 Act. He submits further that the sentence imposed for the committal for sentence was manifestly excessive because the judge placed too much weight on the appellant's previous convictions for assaults of emergency workers. The judge placed too much weight on the fact that the appellant "chose to drink" and had insufficient regard to the significant reduction in culpability that arose from the appellant's psychiatric disorders. Mr Pitt submits that the manifestly excessive sentence for the committal for sentence thereafter influenced the decision to activate the suspended sentences.

Discussion

12. We have considered an updated report from Dr Malhan obtained for the purposes of this appeal. The report confirms that, sadly, the appellant remained for many months in the same condition as when Dr Malhan first met him in March 2022. His mental health remained wholly unsettled in the remaining months of 2022. He attempted suicide on several occasions, deliberately self-harmed on a few occasions (including in custody) and was admitted to hospital in an attempt to stabilise his mental health. He was prescribed injectable antipsychotic medication while in hospital but his mental health stabilised in January 2023 when, to his credit, he obtained a job.
13. We do not underestimate the very serious problems that the appellant faced in the period between Dr Malhan's first report and the sentencing hearing before the judge. However, we agree with the judge that the longevity of the appellant's diagnoses and associated symptoms were such that she could fairly and justly proceed on the basis of the March 2022 report. She was entitled to refuse the adjournment application on the grounds that a further report was unnecessary.
14. We are fortified in this conclusion by our consideration of the updated report. In that report, Dr Malhan describes the appellant's problems after March 2022 in similar terms to the problems that he has suffered for a long time and that were captured in the earlier report. There is nothing in the updated report to suggest that the judge should not have imposed a custodial sentence for the index offence.
15. Mr Pitt submits that the judge failed to deal properly with the appellant's failure to adhere to a curfew requirement under the two SSOs when he interfered with his electronic tag.

We see no merit in that submission and do not accept that it demonstrates any additional vulnerability which the judge ought to have had in mind.

16. The judge was entitled to treat the appellant's previous convictions for assaulting emergency workers as a serious aggravating factor. She was entitled to conclude that the appellant had consumed alcohol before the index offence and that his intoxication was a further serious aggravating factor. She balanced the aggravating factors against the mitigating factors which included the appellant's mental health. She was entitled to conclude that the index offence was so serious that a custodial sentence was justified. We do not accept that the short custodial sentence for the index offence was either manifestly excessive or wrong in principle.
17. Nor do we regard the sentence for the index offence as unduly influencing the judge's decision to activate the SSOs. Although we are not aware of the full facts of all the offences covered by the first SSO, it was imposed after the appellant had at least smashed up the bar area of a pub. In the process of doing so he caused injury to a member of staff who was struck with a glass that he had pulled off the bar and he caused other customers to suffer fear.
18. The second SSO related to the robbery of a 16-year-old boy. The appellant punched him and took his phone and wireless headphones (Air Pods). The victim, his father and his brother tracked the appellant to his home. The appellant chased the father down the road, kicking him in the foot and causing him to fall to the ground. The appellant then punched the victim in the face for a second time causing his nose to fracture. At a later stage when the police were called to the Accident & Emergency Department of a hospital where the appellant had been treated, the appellant became agitated and assaulted an officer by spitting at him. The seriousness of these two sets of nasty offences should not be minimised.
19. The Overarching Guideline on Breach of a Suspended Sentence Order states that the court dealing with the breach should remember that the court imposing the original sentence determined that a custodial sentence was appropriate in the original case. Only new and exceptional factors, not present at the time the SSO was imposed, are to be taken into account in determining whether activation would be unjust. Given the longevity of the appellant's psychiatric problems and the availability of Dr Malhan's report to those who dealt with the appellant in the Crown Court earlier in 2022, the judge was not confronted with any real new circumstances. She was entitled to conclude that it was not unjust to activate the SSOs. The reduction to the terms of the sentences was in both cases reasonable and proportionate, adequately reflecting the appellant's level of compliance with each of the SSOs in accordance with the Overarching Guideline. We do not think that the judge's approach can be criticised.
20. In conclusion, the overall sentence of 15 months and 4 weeks was neither manifestly excessive nor wrong in principle. Despite Mr Pitt's helpful submissions, this appeal is 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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