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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday 27 November 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MRS JUSTICE LAMBERT DBE

HER HONOUR JUDGE MUNRO QC

(Sitting as a Judge of the CACD)

R E G I N A

v

PETER CLARKE

MATHEW BOWERS

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Miss K Beswick appeared on behalf of **Clarke**

Mr S Nikolich appeared on behalf of **Bowers**

J U D G M E N T

(Approved)

1. LORD JUSTICE HOLROYDE: Peter Clarke and Mathew Bowers appeal by leave of the single judge against sentences of four years' imprisonment imposed following their guilty pleas to burglary of commercial premises.
2. On the night of 8 January 2019 the appellants and two others travelled across the Pennines from Oldham to Hebden Bridge in order to carry out what was clearly a well-planned burglary. They travelled in a car which had been taken without the owner's consent. They also had a van which they parked some distance from the scene of the burglary for later use in removing the stolen goods. They were equipped with sledgehammers and crowbars and were wearing masks to conceal their identities. They broke into a Co-Op store and stole cigarettes valued at £12,000. In doing so they caused damage which would cost £5,000 to repair and which prevented the shop from opening for business for a time, with a consequent loss of takings estimated at £11,000. Passers-by saw and heard what was going on: they were not directly threatened by the burglars, but it must have been a disquieting sight and sound.
3. The police were alerted and, with the aid of the police helicopter, the car was pursued as it left the scene at high speed. Bowers, who was disqualified, was the driver. After about 15 miles the burglars abandoned the car and fled on foot. All were arrested.
4. Interviewed under caution, the appellants made no comment. However, they both pleaded guilty at early stages of the proceedings in a magistrates' court. They were committed for sentence to the Crown Court. Clarke was charged with the burglary alone. Bowers was charged with the burglary and also with aggravated taking of the vehicle, dangerous driving and driving whilst disqualified.
5. All four men came before the Crown Court for sentence on 11 February 2019. No pre-sentence reports were thought to be necessary in the appellants' cases and none are necessary now.
6. Both the appellants have long criminal records starting when they were teenagers. Clarke, now aged 32, had been sentenced on 28 previous occasions for a total of 55 offences. Offences of dishonesty and driving offences feature prominently in his antecedents, together with a number of offences of criminal damage and repeated breaches of court orders. He first committed burglary of non-dwelling premises in 2004. In 2015 he was sentenced to two years' imprisonment for house burglary. His longest previous sentence of imprisonment (three years eight months) was imposed in 2015 for conspiracy to burgle houses. His most recent appearance had been on 6 March 2018, when he was sentenced to 15 months' imprisonment for two offences of handling stolen goods and driving offences.
7. Bowers' previous convictions were equally numerous. They included many driving

offences, together with offences of damage, disorder, violence and breaches of court orders. He first burgled non-dwelling premises when he was a juvenile. His longest previous sentence was three-and-a-half years' imprisonment imposed in 2008 for house burglary. He received a short prison sentence for burglary in 2014 and in April 2018 he had been sentenced to 12 weeks' imprisonment for an offence of battery.

8. The judge observed, justifiably, that all four defendants before him were hardened criminals who understood the score. He indicated that he would treat all four the same and would therefore pass concurrent sentences for all the offences. He also allowed the same credit for the guilty pleas, notwithstanding that they were entered at somewhat different times.
9. The judge placed the offence of burglary into Category 1 of the relevant definitive sentencing guideline. The offence involved greater harm because significant loss was caused. A number of higher culpability factors identified in the guideline were present: the premises were targeted, there was a significant degree of planning and premeditation, the offenders were equipped for burglary and they were operating as members of a group. The judge said at page 2A of the sentencing remarks:
 - i. "So those are all features which put this at the very top of the most serious category of commercial burglary; there is not really any other way around that. That is without taking into account the aggravation of each of you having a very bad record for burglary. So obviously from that point of view that is further aggravation in relation to the sentence; I have to take that into account as well."
10. The judge accepted that there were some mitigating features, that each of the offenders had some redeeming features and that for each of them there was a possibility of rehabilitation in the future. There was however no alternative to immediate imprisonment for this offence.
11. The judge concluded that the appropriate sentence after trial for the offence of burglary would have been six years' imprisonment. Giving full credit for the guilty pleas, he therefore sentenced as follows. In Clarke's case, four years' imprisonment for the burglary. In Bowers' case, four years' imprisonment for the burglary, a concurrent sentence of 12 months' imprisonment for the aggravated vehicle taking, a further concurrent sentence of 12 months' imprisonment for the offence of dangerous driving, and licence endorsement but no separate penalty for driving whilst disqualified. Thus the total sentence of imprisonment in Bowers' case was four years and he was ordered to be disqualified from driving for three years and until he passed an extended retest.
12. Each of the appellants submits that those sentences were manifestly excessive in length. Miss Beswick for Clarke and Mr Nikolich for Bowers have assisted the court with their

well-focused submissions. They realistically accept that the burglary falls into Category 1 of the guideline and that there were a number of aggravating features. They submit however that the offence was not so serious as to justify a sentence at the top of the range before considering the aggravating feature of the appellants' respective previous convictions. It is further suggested that the previous convictions should not in any event have increased the sentence by as much as they did.

13. We have reflected on these submissions. Under the Sentencing Council's Definitive Guideline, Category 1 has a starting point of two years' custody and a range from one to five years. The guideline provides, as the judge rightly pointed out, that "a case of particular gravity reflected by multiple features of culpability or harm in Step 1 could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features."
14. It must however also be noted that five years' custody is the top not only of the category range, but also of the offence range for non-domestic burglary. By section 125 of the Coroners and Justice Act 2009, a sentencer must follow a relevant guideline unless satisfied that it would be contrary to the interests of justice to do so.
15. For the reasons which the judge identified, this was clearly a serious case of non-domestic burglary. The judge was fully entitled to reflect the presence of multiple features of high culpability by moving upwards from the starting point, before then making a further increase to reflect the serious aggravating feature of the appellant's respective previous convictions. Such limited mitigation as was available could carry only very limited weight. The judge was therefore entitled to impose in each of these cases a sentence which was high in the category range. But with respect to him, we cannot agree that the offence could properly be regarded as lying "at the very top of the most serious category" before considering the previous convictions. Serious though this offence of burglary undoubtedly was, it fell short of that level. The judge did not specifically address in his sentencing remarks the requirement to sentence within the offence range unless it would be contrary to the interests of justice to do so. In our view, it was not properly open to him to say that it would be contrary to the interests of justice to impose a sentence within the offence range.
16. In our judgment, the appropriate sentence for the burglary after a trial would have been four-and-a-half years. We see no reason to differ from the judge's approach of treating both these appellants the same, and we see no reason to differ from his allowing of full credit for their respective guilty pleas. Thus, in our judgment the appropriate sentence for the offence of burglary should in each case be one of three years' imprisonment.
17. In relation to Bowers, we see no reason to alter the concurrent sentences for the related offences. The reduction in the total sentence does however necessitate a reduction in the length of the disqualification having regard to the provisions of section 35A and 35B of

the Road Traffic Offenders Act 1988 and to the decision in Needham [2016] EWCA Crim 455.

18. We therefore allow these appeals to the following extent. In Clarke's case, we quash the sentence of four years' imprisonment for burglary and substitute a term of three years' imprisonment. In Bowers' case, we quash the sentence of four years' imprisonment for burglary and substitute a sentence of three years' imprisonment. The prison sentences imposed for two other offences remain unaltered, as does the order that there be no separate penalty but licence endorsement in respect of the disqualified driving. However in respect of the offence of aggravated vehicle taking, we quash the order for disqualification for three years and substitute an order that Bowers be disqualified from driving for a period of two-and-a-half years and until an extended retest is passed. The period of disqualification comprises a disqualification of 12 months for the offence itself, with an extension of six months under section 35A and an uplift of 12 months under section 35B.

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