

Neutral Citation Number: [2019] EWCA Crim 2177

Case No: 201903297/A3 & 201903306/A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Southwark Crown Court
HHJ Bartle QC
T20197010 & T20197009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2019

Before :

LORD JUSTICE GREEN
MR JUSTICE NICOL
and
HER HONOUR JUDGE WALDEN-SMITH

Between :

REGINA
- and -
Niah GEORGE
Darius Everett INGRAM

(Transcript of the Handed Down Judgment.
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Mr Daniel Wright (instructed by **Crown Prosecution Service**) for the **Crown**
Mr Richard Craven (instructed by **Kingsbury Ellis LLP**) for the **Applicants**

Hearing date: Tuesday 3rd December 2019

Judgment
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Lord Justice Green :

A. Introduction: The scope of the slip rule

1. The Registrar of Criminal Appeals has referred to this Court applications for leave to appeal against sentence in a case in which the judge, having passed sentence, reflected and concluded that he had committed an error of principle. He immediately notified the parties of his change of view and permitted skeleton arguments to be submitted. He heard oral argument at a fresh sentencing hearing and in the light of this increased the sentences hitherto imposed.
2. This was not a case where it could be argued that the sentence initially imposed were at risk of a reference by the Attorney General to the Court of Appeal upon the basis that the sentence was “*unduly lenient*”. Nor was this a case where the Judge considered that he needed to address a statutory obligation or requirement that he had failed to address first time around. Here the Judge came to the conclusion that he had misapplied the Guidelines on Burglary and had therefore applied the wrong approach to the weight that he should attach to aggravating factors. There is a power to correct sentences conferred by section 155(1) Powers of Criminal Court (Sentencing) Act 2000. The question arising is whether the judge erred in his exercise of this “slip rule” power to increase the sentence.
3. In the course of helpful written and oral submissions to this court, reference has been made to a series of cases upon the scope of the power of a judge to rectify, within the statutory period of 56 days, a sentence. These comprise: *R v Nodjoumi* [1985] Cr App R(S) 183 (“*Nodjoumi*”); *R v Reynolds* [2007] EWCA Crim 538 (“*Reynolds*”); *R v Jama* [2009] EWCA Crim 2109 (“*Jama*”); *R v Scott* [2013] EWCA Crim 2651 (“*Scott*”) *R v Grieves* [2014] EWCA Crim 540 (“*Grieves*”); *R v Goss* [2016] EWCA Crim 541 (“*Goss*”) ; *R v Warren* [2017] EWCA Crim 226 (“*Warren*”); and, *R v O’Connor* [2018] EWCA Crim 1417 (“*O’Connor*”).

B. Facts

4. It is sufficient to summarise the facts of the present case briefly.
5. In the early hours of 3rd October 2018, at around 3.25am, the two applicants (George and Ingram) and Jake Maunders committed a burglary at Soumer Jewellers in Westbourne Grove, London. The central events were followed on CCTV. A Jeep and several mopeds arrived at the same time. The defendants covered their faces wearing full face helmets to avoid identification. An initial unsuccessful attempt was made to force entry. They then used the Jeep to ram the door open. Two of the defendants ran inside, smashed cases with hammers and other tools, and stole approximately £30,000 worth of jewellery. This has never been recovered. They caused upwards of £20,000 worth of damage to the premises. The burglary took less than five minutes. The Jeep was subsequently abandoned and the defendants left on mopeds. Police witnessing the mopeds leaving the scene of the crime gave chase but ultimately were forced to abandon the pursuit when the defendants diverted into areas where police cars could not follow. Eventually all three defendants were arrested. Maunders pleaded guilty but George and Ingram pleaded not guilty. They were convicted by a jury who rejected their defences that they were not involved.

C. The initial sentencing exercise

6. The applicants came to be sentenced on 28th July 2019. It was common ground that there were significant aggravating features including: (i) that this was a group action; (ii) that it was pre-planned; (iii) that there was the use of tools to both break into the premises and to smash open display cases to enable jewellery to be removed; (iv) that considerable damage was caused; and (v), that mopeds were used to evade capture. There was no dispute that this was a Category 1 burglary within the Guidelines. This involved a starting point of 2 years custody with a category range of 1 – 5 years custody. Both applicants had significant previous convictions.
7. In the course of argument, counsel for Ingram contended that the Judge was required to avoid double counting and that to avoid this risk the identified aggravating factors (save with regard to previous convictions) could, in principle, do no more than neutralise the mitigating factors such that the effect was that the judge should apply the starting point and then apply previous convictions as the only factors which could increase the sentence beyond that starting point.
8. In his sentencing remarks, the judge reflecting this submission stated as follows:

“I accept entirely the point made by Mr Craven, which applies to defendants, that I must not double count in relation to the factors which lead me to the conclusion that there is greater harm and higher culpability. As such, the starting point according to the Guidelines is 2 years imprisonment with a range of 1 to 5 years, and there are aggravating factors to which I have referred.”
9. The judge therefore concluded that taking account of aggravating factors he should adopt the starting point. He then increased the sentence by 6 months to take account of previous convictions. He concluded that the role of the defendants was the same and no distinction should be drawn between them. He imposed a total determinate sentence of 2 years and 6 months imprisonment on each defendant.
10. On 29th July 2019, the judge sent an email to the parties in which he explained, having reflected overnight, that he had come to the conclusion that on the facts of the case it had been wrong to impose a sentence of 2 years 6 months imprisonment and that the sentences should have been 3 years 6 months imprisonment. He attached two cases (*Grieves* (ibid) and *Scott* (ibid)) which were said by the judge to “*appear to me to be of assistance*”. It is evident from the facts of these cases that where aggravating factors exist these can push a sentence towards the top of the sentencing range, i.e. beyond the starting point. He invited written and oral submissions from the parties and relisted the case to be heard.

D. The second sentencing exercise

11. The matter came back before the judge for reconsideration of sentence under the slip rule on 7th August 2019. In the course of the hearing the judge set out the issue of principle which he considered he had misapplied at the previous hearing. In his sentencing remarks, the judge articulated the issue in the following way:

“In arriving at the sentence I considered that at step 2 I could not increase the starting point of 2 years by taking account of any factors relating to the offence as that would be double counting and that I could only increase that starting point of the aggravating factor of the defendants’ previous convictions outweighed their personal mitigation. I considered that the aggravating factors did outweigh the personal mitigation and that an increase of 6 months properly reflected the aggravating factors for both defendants.

That approach was wrong in principle and was a material error as it failed to take account of that part of the guidelines at page 12 dealing with Step 2, named and I quote “a case of particular gravity reflected by multiple features of culpability or harm in Step 1 could merit upward adjustment from a starting point before further adjustment for aggravating or mitigating factors set out on the next page”.”

12. Put shortly, the judge had initially considered that under the Guidelines the net effect of aggravating factors was to do no more than neutralise mitigating factors such that the court should apply the starting point. The exception to this was previous convictions which could properly result in an increase of sentence beyond the starting point.
13. In his new sentencing remarks the judge, now seeking to remedy his previous error, re-applied the Guidelines and found that there were four factors from within the Guidelines which were present and which indicated higher culpability namely: (i) the deliberate targeting of premises; (ii) the existence of a significant degree of planning or organisation; (iii) the going equipped for burglary by the carrying of implements and/or the use of vehicles; and (iv), membership of a group or gang. The judge then proceeded to analyse each of the factors. He concluded that this should have resulted in an initial sentence of 3 years and 6 months imprisonment for both defendants. He then applied a modest discount of 3 months to take account of the “... *appearance of justice and the impact of the change upon a defendant where an error has not been induced by anything he has said or done*”. This left ultimate sentences of 3 years and 3 months imprisonment for each defendant.

E. The Applicant’s submissions: The Judge misapplied the slip rule

14. It is now submitted that the Judge erred in his use of the slip rule to increase the sentence. It is accepted that had the judge imposed the sentence of 3 years and 3 months imprisonment (or indeed 3 years 6 months) in the first place, this could not have been criticised as either wrong in principle or manifestly excessive. The starting point of 2 years imprisonment relates to individuals of good character which the applicants were not. Their previous records would have justified a starting point of 3 years imprisonment or more. It is, nonetheless, submitted that the judge erred. The arguments may be summarised as follows.
15. First, the Judge chose to increase a sentence which was neither unduly lenient or unlawful and even though it would have erred upon the side of generosity it could not be said to be wrong in and of itself.

16. Second, the approach to application of the slip rule has become more tailored and nuanced since the restrictive decision of the Court of Appeal in *Nodjoumi* (ibid), which focused upon whether there would be an affront to the appearance of justice for a sentence to be increased. The modern approach was to adopt a “flexible approach” whereby fairness to the defendant and to the public interest in the passing of appropriate lawful sentences had to be weighed one against the other: see for example, per Sir Brian Leveson PQBD in *Jama* (ibid) at paragraph [13]; and per Irwin LJ in *O’Connor* (ibid) at paragraph [36]. The mere fact, therefore, that the judge made an error of principle did not trigger by itself an obligation to remedy that error. A broader assessment was required.
17. Third, case law demonstrated that (applying the flexible approach) even otherwise perfectly valid adjustments to sentence could be outwith the scope of the slip rule. For example, in *Goss* (ibid) the defendant had been sentenced for three historical rapes and other sexual offences to a term of sentence of 16 years imprisonment. He had been given a full discount for plea. The judge brought the defendant back to court and increased the sentence to 18 years imprisonment upon the basis that it was inappropriate to have accorded him a full credit for plea. Had the judge adopted this position at the first hearing, no criticism could have been levelled at him for reducing credit for plea due to the lateness of it having been tendered. On appeal the Court held that the judge was wrong to reduce the discount for plea and to increase the sentence. It is said that the present case is analogous to that in *Goss*. Properly analysed the present case was one where the judge concluded that his earlier sentence was lenient albeit lawful. This was, as in *Goss*, insufficient to trigger exercise of the power. It was wrong therefore to bring a defendant back in order to increase a lenient but perfectly proper sentence.
18. Fourth, in *Reynolds* (ibid) the judge brought the defendant back to court in order to apply a statutory obligation that he had, hitherto, overlooked. It was held in that case that it was a proper exercise of the power if the mistake to be rectified was that the court had earlier failed to appreciate that the “specified offence” was a “serious offence” so that the mandatory provisions of Sections 225 or 227 CJA 2003, requiring an indeterminate sentence as opposed to an extended sentence, were applicable. There could be no inhibition on increasing a sentence where that was done in order to comply with a statutory obligation. However, in the present case all that had occurred was that the judge had misconstrued the Guidelines, which were not statutory obligations, and now wished to give greater weight to matters of fact (the aggravating features) than he had earlier attributed to them.
19. Fifth, in general terms, the judge simply had a “change of mind” about the nature and length of the sentence and sought to reflect this change in a new sentence.
20. Before this Court the Crown submits, in summary, as follows.
21. First, the judge was permitted to use the slip rule to increase the sentence in circumstances where he was persuaded that he had made material error in the sentencing process of fact and law: *Warren* (ibid) at paragraph [22]. There was no requirement that a sentence had to be “unduly lenient” before the judge was empowered to adjust the sentence: *Warren* (ibid) at paragraph [22]. It was made clear there that a judge who considered that the sentence imposed might be corrected upon appeal upon an application by the Attorney General could seek to revisit the sentence.

However, such an assessment was not exhaustive of the circumstances where there is an error requiring correction under the slip rule.

22. Second, the modern approach is reflected in the dictum of the Court of Appeal in *O'Connor* (ibid) at paragraph [34] where the Court stated:

“Where a judge concludes on reflection not merely that he wishes to be more punitive or lenient, but that the approach taken in a sentence was wrong in principle, indeed wrong as to an important aspect of sentence, such as the protection of the public, we see no difficulty in the judge seeking to correct such an error, as speedily as possible and with the offender present and represented. No sword of Damocles hung over Judge Devaux in this case, in the sense he was not under the pressure of any prospect of an Attorney General’s Reference of his sentence.”

The Crown argues that whilst the present case was not a case of an arguably unduly lenient sentence, it was a case where the judge properly recognised that he had erred as a matter of law, namely in his construction of the Guidelines, and that the error was material.

23. We turn now to our conclusions.

F. Analysis

24. In our conclusion the judge did not err. We start with some general observations.
25. First, we endorse the statement of earlier courts to the effect that in deciding whether to correct a previous error, the judge should apply a flexible test balancing the public with the private interest. The test is no longer the old affront to the appearance of justice test though, where such an affront exists, a Judge can still take this into account in deciding whether to use the slip rule. More broadly, there is a public interest in legal certainty and finality and a sentence should not be increased unless it would lead to a material change in the sentence. Otherwise, there will be a risk of a perception of needless tinkering for no discernible good reason. Equally, a defendant who has been sentenced might feel a sense of grievance if shortly thereafter he or she is brought back to court and handed a harsher sentence. On the other hand, there is a strong public interest in the imposition of appropriate sentences since it is relevant and important to the confidence that the public repose in the courts that judges will act in a deliberate, conscientious and correct manner and if needs be repair significant errors.
26. Second, the exercise of the power is not confined to those case where there is a risk of a reference by the Attorney General to increase an unduly lenient sentence. Nor is the exercise confined to cases where the judge makes an clear legal error such as the misapplication of a statute. In our judgment it also applies where there is a misapplication of relevant Guidelines, not least because under the CJA 2003 judges are required to apply those Guidelines. Case law makes clear that errors of fact can also serve to trigger the exercise of power.

27. Third, we endorse the emphasis in case law upon materiality. In this context “*material*” takes into account both the nature and extent of the error of fact or law which has been made and the impact of that error upon the increase in the sentence. There is an obvious connection between the two since not every error of law or fact (even if it *seems* prima facie serious) will lead to a material increase in sentence. If the error would not lead to a material increase in sentence, then the power should not be exercised. What amounts to “*material*” will vary from case to case, but it can apply to any aspect of a sentence. The applicant places considerable weight upon *Goss* (ibid). That case does not assist. There the Court concluded that the initial sentence was the correct sentence i.e. there was no “*slip*” to correct. Another way of looking at the case would be to say that any error made was not material. Neither of those analyses applies to the present case.
28. Fourth, case law indicates the sorts of (non-exhaustive) factors that a judge might consider. These include whether the desire to change the sentence is simply a change of heart about leniency. If it is then it might be inappropriate to use the slip rule. But if the error goes to an “*important*” component of the law or Guidelines relating to sentencing then this will militate in favour of using the slip rule. We would add that we are concerned in this case only with an increase in sentence. The power applies to a reduction in sentence also (see the citation from *Warren* at paragraphs [22] above). This is not the case to express any view on how materiality applies to the different position of a judge who decides that the sentence imposed was, wrongly, too severe.
29. Fifth, in balancing the strong public interest in the imposition of correct and appropriate sentences against a justifiable sense of grievance on the part of a defendant who is brought back to court to be re-sentenced, a court can substantially address the interest of that defendant by the conferral of an appropriate level of discount to the new sentence that the judge considers should be imposed.
30. We turn now to the present case.
31. Here the Judge acknowledged that he had made a significant error in his interpretation of the Guidelines. The error made was, at base, one of law. The judge had initially held that the aggravating factors could do no more, in principle, than negate the mitigating factors with the consequence that aggravating considerations served only to bring a sentence to the starting point. Upon mature reflection the judge concluded that on a proper construction of the Guidelines aggravating factors did not merely neutralise mitigating factors but could be of such a nature as to outstrip the mitigation and lead to an increase in sentence from the starting point. The authorities cited by the judge in his email reflect this. The judge was correct. Under the Guidelines when mitigation and aggravation both exist and are weighed the scales of justice do not necessarily simply sit in equilibrium; they may tilt one way or the other and, where there is serious aggravation and but modest mitigation, might tilt significantly in the direction of an increase of sentence beyond the starting point to reflect the gravity of the wrongdoing.
32. In his new sentencing remarks, the judge identified the substantial aggravating factors and explained why they more than outweighed the mitigating factors. The impact upon the sentence was plainly material. The judge took account of the interest of the Defendants by applying an appropriate discount to the sentence that he imposed.

33. In these circumstances we conclude that the judge properly applied the flexible balancing test and acted properly in the approach that he adopted to the application of the slip rule. For these reasons we dismiss the applications.