

Neutral Citation No. [2019] EWCA Crim 2231

No: 201900569/A3

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 16 May 2019

B e f o r e:

LADY JUSTICE RAFFERTY DBE

MR JUSTICE JEREMY BAKER

SIR KENNETH PARKER

R E G I N A

v

CRAIG EDWARD PALMER

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Mr W Rose appeared on behalf of the **Appellant**

A P P R O V E D J U D G M E N T

MR JUSTICE JEREMY BAKER:

1. On 23 January 2019 Craig Palmer, having previously entered pleas of guilty at the Magistrates' Court and been committed for sentence, appeared in the Crown Court at Taunton where he was sentenced as follows:
 - i. Assault occasioning actual bodily harm - 8 months' imprisonment;
 - ii. Criminal damage - 2 months' concurrent imprisonment;
 - iii. Two offences of common assault - 4 months' imprisonment on each offence, those periods to run concurrently with one another but consecutively to the other periods of imprisonment.
 - iv. Affray - 2 months consecutive imprisonment.
2. These offences had been committed during the currency of a 6 months' community order imposed by the Magistrates' Court on 8 November 2018 for two offences of driving with a drug level above the limit and an offence of driving whilst disqualified to which the appellant had pleaded guilty, the judge revoked the community order and at a subsequent sentencing hearing on 8 March 2019, imposed sentences of 2 months' imprisonment on each of the drug driving offences and 4 months' imprisonment in respect of the offence of driving whilst disqualified. He ordered these sentences to run concurrently with each other but consecutively to the sentences for which he had been committed for sentence, resulting in a total sentence of 18 months' imprisonment. A restraining order has also been imposed.
3. He now appeals against sentence with the permission of the single judge.
4. The provisions of section 45 of the Youth Justice and Criminal Evidence Act 1999 apply to the offences which are the subject matter of the committal for sentence and no matter

relating to any individual, who is under the age of 18 and was either a complainant or a witness to incidents giving rise to those offences, shall be published which will identify them as being involved in those proceedings, including their name, address, educational establishment or workplace which they attend and any picture of them.

Circumstances of the offences

5. The offences which were the subject of the original committal for sentence all took place on the evening of 29 December 2019, whilst the appellant was at the home of his domestic partner who was the mother of her four children aged between 10 and 17. The appellant had been drinking alcohol that evening and there came a time when an argument broke out between the appellant and his partner in the presence of the two youngest children.
6. In the course of the argument the appellant grabbed his partner by the hair and used it to pull her to the floor, where her head impacted with the floor on two separate occasions. The appellant then took hold of the 10-year-old child by the throat and held him over the kitchen side before walking out of the house. This enabled his partner to lock the door. Unfortunately, this did not deter the appellant, who proceeded to pick up a railway sleeper and throw it through the sitting room shattering the glass. The appellant then pulled the window open and climbed back into the house. Once inside he ripped the curtains and entered the kitchen where his partner was on the phone to his mother. The appellant picked his partner up by her throat and threw her onto the kitchen floor. He then ripped the fridge door off its hinges and threw it at his partner, hitting her with it on the legs. The two youngest children shouted at the appellant to stop what he was doing. By this time the mother had got up off the floor and she ushered the children into the sitting room. However, the appellant intervened and pushed his partner backwards so that she fell into the sitting room and on top of the 12-year-old child causing him to fall into the door frame.

7. The appellant left the property and texted his partner with the word "dead" after the name of her eldest child. After the police arrived at the premises the appellant returned still in an intoxicated and agitated state. He tried to barge past the officers in order to gain entry into the property. By then the eldest child had already arrived at the property and the appellant started shouting at him telling him to "get out of here you little prick". The police intervened and arrested the appellant. Whilst doing so the appellant started to struggle and continued to shout at the eldest child, telling him that he was dead, that he would fuck him up and that he should not sleep at night as he was going to get him.

Circumstances of the appellant

8. The appellant is 41 years of age and has a number of previous convictions including offences of assault, harassment, producing cannabis and motoring offences. The pre-sentence report noted that the appellant had difficulties controlling his temper especially when combined with excessive alcohol consumption and concluded that the appellant posed a high risk of harm to domestic partners and their children. On the other hand, there were a number of character references available to the court which attested to a more positive side of the appellant's character including his ability to work.

Sentencing remarks

9. In sentencing the appellant, the judge determined that the assault offences were category 2 offences with an appropriate starting point for the offence of assault occasioning actual bodily harm of 6 months' custody and a category range of between a community order and 12 months' imprisonment. He stated that in view of the aggravating factors of his partner's vulnerability within the domestic setting, the appellant's intoxication and the presence of her young children, prior to the reduction to reflect the timing of the appellant's early pleas of guilty, the offence of assault occasioning actual bodily harm justified a

period of 12 months' custody. Whilst the offence of common assault, bearing in mind the age of the complainants merited a period of 6 months' custody.

10. The judge indicated that whilst the sentences for common assault would be ordered to run concurrently with one another and the criminal damage would be ordered to run concurrently with the other sentences, in order to take into account the principle of totality, the sentence for the affray which reflected the further events which took place after the police attended at the property, merited a consecutive period of custody.

Grounds of appeal

11. On behalf of the appellant Mr Rose, who appears before us this morning as he did in the lower court, makes no criticism of the length of the individual sentences imposed by the judge in relation to the offences which were the subject of committal for sentence. However, he argues that the period of 2 months' custody imposed for the offence of affray ought to have been ordered to run concurrently with the other sentences because the criminality which it reflected was already encompassed by the other offences. Furthermore, in relation to sentences imposed in relation to the revoked community order he submits that the judge failed to take into account the progress which the appellant had already made under the community order and that the additional period of 4 months' custody resulted in a manifestly excessive sentence.

Discussion

12. On any view, the offences which were the subject matter of the committal for sentence reflected a frightening and harmful episode of domestic violence. It not only involved repeated assaults upon his domestic partner in the presence of her two youngest children, aged 10 and 12, but also involved the appellant assaulting both of them; one directly, by taking hold of him around his throat and the other indirectly as a result of the violence

which he was continuing to perpetrate upon their mother. All of this taking place whilst he was intoxicated and in the course of which he used violence to break into his partner's home after which he used the fridge door as a weapon with which to continue his assaultive behaviour.

13. In these circumstances we consider that the appellant was fortunate, given both the sustained nature of assaults on his partner and the use of the fridge door as a weapon, that the judge did not determine the offence of assault occasioning actual bodily harm as a category 1 offence with an appropriate starting point of 18 months' custody and a category range of between 1 and 3 years. Moreover, we also consider that the judge would have been justified in ordering periods of custody imposed in relation to each of the offences of common assault to run consecutively with one another, in order to reflect the separate assaults on the two young children. The fact that the judge chose to order those periods to run concurrently with one another was no doubt a reflection of his concern in relation to the principle of totality.
14. In these circumstances, not only do we consider that the judge was entitled to impose a consecutive period of custody in relation to the offence of affray reflecting, as it did, a separate episode of criminality after the appellant had returned to the premises following the attendance of the police, but the imposition of an additional period of 2 months' custody sufficiently reflected the principal of totality.
15. Turning to the second ground of appeal, the original community order provided for a single requirement, namely that the appellant comply with a tagged curfew for a period of 6 months. We understand that the tag was successfully fitted on 8 November 2018 and there had been no breach during the 7-week period prior to the appellant being remanded in custody following the incident on 29 December 2018. In these circumstances it is

submitted that the imposition of 4 months' custody for the offence of driving while disqualified, to which the appellant had pleaded guilty, failed to reflect any discount to take into account his compliance with the community order.

16. Where an offender is convicted of an offence during the currency of a community order, the powers of the Crown Court are set out at paragraph 23 of schedule 8 to the Criminal Justice Act 2003 which provides as follows:

"23(1) This paragraph applies where—

(a) an offender in respect of whom a community order is in force—

(i) is convicted of an offence by the Crown Court, or

(ii) is brought or appears before the Crown Court by virtue of paragraph 22 or having been committed by the magistrates' court to the Crown Court for sentence, and

(b) it appears to the Crown Court that it would be in the interests of justice to exercise its powers under this paragraph, having regard to circumstances which have arisen since the community order was made.

(2) The Crown Court may—

(a) revoke the order, or

(b) both—

(i) revoke the order, and

(ii) deal with the offender, for the offence in respect of which the order was made, in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made.

(3) In dealing with an offender under sub-paragraph (2)(b), the Crown Court must take into account the extent to which the offender has complied with the requirements of the community order."

17. Therefore it is apparent that if the Crown Court decides to revoke the community order and to deal with the offender for the original offence, it must take into account the extent to which the offender has complied with the requirements of the community order.

18. However, in the present case a more fundamental question arises from the fact that the two

offences of common assault in respect of which the judge imposed a total of 4 months' imprisonment were both summary-only offences, as was the offence of driving whilst disqualified for which the judge imposed a consecutive period of 4 months' imprisonment.

19. Section 133(1) of the Magistrates' Court Act 1980 provide that:

"Subject to section 265 of the Criminal Justice Act 2003, a magistrates' court imposing imprisonment [or youth custody] on any person may order that the term of imprisonment [or youth custody] shall commence on the expiration of any other term of imprisonment [or youth custody] imposed by that or any other court; but where a magistrates' court imposes two or more terms of imprisonment [or youth custody] to run consecutively the aggregate of such terms shall not, subject to the provisions of this section, exceed 6 months."

20. Therefore the question which arises is whether, if a Crown Court decides to revoke a community order which was made in respect of a summary-only offence and re-sentence the offender as sentencing him for another summary-only offence, the Crown Court is constrained by section 133(1) of the 1980 Act such that the sentences in respect of those summary-only offences is limited to a total period of 6 months' imprisonment.

21. A similar question has been answered in the negative by this court when dealing with a situation in which the Crown Court has before it an offender who has committed a further offence during the operational period of the suspended sentence, where both the original offence in respect of which the suspended sentence order was imposed and the breach offence are summary-only offences (see *R v Chamberlain* (1992) 13 Cr App R(S) 525 and *R v Hester* [2016] 2 Cr App R(S) 43.

22. As the court observed in *Chamberlain*, section 133(1) of the Magistrates' Court Act 1980 refers to the "imposition" of imprisonment and stated that:

"In our view the implementation of a suspended sentence does not involve the imposition of a sentence of imprisonment. The sentence was imposed when the original suspended sentence order was passed. When the

suspended sentences were activated in the present case the judge did not pass a sentence of imprisonment, he 'dealt with' the appellant' in accordance with section 24 of the Powers of Criminal Courts Act 1973 ..."

23. Indeed we note that the modern-day equivalent to this latter piece of legislation, namely paragraph 8(2) of schedule 12 to the Criminal Justice Act 2003, not only refers to the duty of the court to "deal with" the offender but also states that the suspended sentence "is to take effect".
24. In contrast, in the present case, the magistrates had not imposed any period of imprisonment on 8 November 2018, rather they had imposed a community order. Therefore, when the Crown Court revoked that order and came to "deal with" the appellant, under paragraph 23(2)(b)(ii) of schedule 8 to the Criminal Justice Act 2003, it was imposing a sentence of imprisonment for the first time for those summary offences and was constrained to deal with the appellant for the offence in respect of which the order was made "in any way in which he could have been dealt with for that offence by the court which made the order if the order had not been made."
25. In our judgment, the effect of these provisions, coupled with the terms of section 133(1) of the Magistrates' Court Act 1980 is to limit the Crown Court's powers to deal with offenders who commit a summary-only offence during the currency of the community order which was originally imposed for another summary-only offence to a total period of 6 months' imprisonment.

Conclusion

26. In order to reflect this constraint and the appellant's limited period of compliance with the requirements of the community order prior to his remand in custody, we intend to allow the appeal to the extent that we will reduce the period of imprisonment for the offence of driving while disqualified to one of 2 months' imprisonment. The original sentencing

structure will be retained but the period of 2 months' imprisonment will be ordered to be served concurrently with the periods of 2 months' imprisonment imposed for the two offences of driving with drug levels above the limit, but consecutively to the period imposed on the indictment of 14 months, such that the overall sentence will be reduced from one of 18 months' imprisonment, to one of 16 months' imprisonment. To that extent only the appeal succeeds.

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

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