

Neutral Citation No. [2019] EWCA Crim 2232

No: 201901283/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**

**JACK MICHAEL ROBERT UPTON**

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**Mr K Joshua** appeared on behalf of the **Applicant**

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

MR JUSTICE JEREMY BAKER:

1. On 7 March 2019 Jack Upton, having previously pleaded guilty before the Magistrates and been committed for sentence to the Crown at Kingston-upon-Thames, was sentenced as follows:
  - i. Common assault - 3 months' imprisonment;
  - ii. Using threatening, abusive or insulting words or behaviour with intent to cause fear or to provoke violence, contrary to section 4(1) and (4) of the Public Order Act 1986 - 3 months consecutive imprisonment.
  - iii. Criminal damage - 1 month concurrent imprisonment.
2. These offences had been committed during the 2-year operational period of a suspended of 4 months and 4 weeks' imprisonment, imposed on 31 January 2018 in the Crown Court at St Albans, for offences common assault and criminal damage, the suspended sentence was activated with a reduced term of 4 months' imprisonment.
3. The offences had also been committed during the currency of a 12 month community order imposed by the Magistrates on 20 August 2018 for an offence of common assault. The community order was revoked and the applicant was re-sentenced to a consecutive period of 3 months' imprisonment.
4. Therefore the total sentence imposed at Kingston upon Thames Crown Court was 13 months' imprisonment. A licenced premises exclusion order was also made for a period of 2 years.
5. Jack Upton's application for permission to appeal against sentence, having been referred to the full court by the Registrar, we grant permission.

**Circumstances of the offences**

6. The offences giving rise to the committal for sentence took place at about 11.30 pm on

1 December 2018 at the Castle public house in Tooting High Street. The appellant started to shout at the bar staff, complaining about not being served promptly. The staff sought to calm the appellant who then walked behind the bar and slapped one of the bar staff in the face. Another staff member sought to intervene and a large disturbance then took place in the course of which the appellant attempted to head butt one of them, as a result of which two of the security staff removed the appellant from the premises. Once outside the appellant continued his aggressive behaviour; he took his shirt off and placed his hands around the throat of one of the security staff for a minute shouting: "Do you know who I am bruv?". The police having been summoned attended and were eventually able to arrest the appellant. Whilst being taken to the police station the appellant continued to act aggressively and was continually spitting inside the police van with blood coming from his mouth, as a result of which the van had to be professionally cleaned.

### **Circumstances of the appellant**

7. The appellant, who is 24 years of age, has amassed a significant history of offending over the previous 10 years, including convictions for robbery on five separate occasions and convictions for common assault on four separate occasions. As a result he has a significant custodial history, the longest period of which was a sentence of 3 years in a young offender institution.
8. In relation to the offences of common assault and criminal damage, for which he received the suspended sentence of imprisonment, the appellant and others had been involved in a dispute with a taxi, late at night, as a result of which the taxi driver was grabbed around the throat, punched to the head and sought to be pulled out of his vehicle as a result of which the vehicle was damaged.

### **Sentencing remarks**

9. In his sentencing remarks the judge determined that the offence of common assault, for which the appellant had been committed for sentence, was a category 2 offence, as although there was greater harm due to the seriousness of the degree of fear which his actions had caused, there were no factors indicating higher culpability. However, the judge pointed out that there were a number of aggravating factors including his record of previous similar offending, the commission of the offence during the operational period of the suspended sentence and during the currency of the community order, the location of the offence (being in public) and his state of intoxication through alcohol. Therefore, the judge determined that this had the effect of removing the offence into category 1, with a category range for sentence of up to 26 weeks' custody. Furthermore, he determined that the section 4 offence was a category 2 offence within the sentencing guidelines, due to the appellant having threatened medium level unlawful violence, resulting in the category range for sentence of up to 12 weeks' custody.

10. So far as the breach of the suspended sentence order was concerned, the judge took into account the relevant breach offence guideline. He considered that in view of the multiplicity of the further offending, this was a category 1 breach, with a guideline penalty of full activation of the original custodial term. Although it would appear that under the guidelines, as a category 1 breach, he was not required to do so, he did take into account that the appellant had completed his curfew requirement and therefore reduced the activation of the term by a period of 4 weeks.

### **Grounds of appeal**

11. This morning Joshua Kern, who appears on behalf of the appellant as he did in the court below, submits that the parties, having agreed that the common assault for which the appellant had been committed for sentence was a category 2 offence, there was no

justification for the judge's determination that the aggravating factors were sufficient to move it into category 1. Secondly, that the sentence in relation to the section 4 offence failed to sufficiently take into account the mitigation available to the appellant, including the fact that he was an alcoholic and that a previous sentencing hearing had been adjourned to enable the appellant to be assessed as to his suitability for specialist treatment and the written report was not yet available. Thirdly, the re-sentencing of the appellant for the common assault for which a community order had been imposed failed to take into account the principle of totality and resulted in a manifestly excessive sentence.

### **Discussion**

12. The appellant, who at 24 years of age has an unenviable history of previous similar offending, was involved in a serious and prolonged episode of public disorder on the 1 December 2018, in the course of which he assaulted two individuals and sought to assault a third; all of which took place late at night, in public, when the appellant was intoxicated with alcohol, highly abusive and potentially dangerous to all those with whom he came into contact.
13. In these circumstances we consider that, for the reasons he explained, the judge was entitled to determine that the offence of common assault was a category 1 offence, whilst the section 4 offence was a category 2 offence within the relevant Sentencing Guidelines. Indeed, given the degree of violence he was exhibiting throughout this incident we consider that the judge would have been entitled to have elevated the public order offences into category 1 with a resulting category range for sentence of up to 26 weeks' custody.
14. Although we understand that at a previous hearing the court had specifically adjourned sentence to allow for the preparation of a written report about the appellant's suitability for treatment for his alcoholism, which was not available in written form at the hearing on

7 March 2019, it is apparent that an oral report was available which concluded that such treatment was available for the appellant. Moreover, at the previous court hearing the Recorder had specifically warned the appellant that all sentencing options would be open to the judge at the eventual sentencing hearing. In these circumstances the judge on the latter occasion was neither obliged to await the written report, nor was he obliged to impose a non-custodial sentence to enable such treatment to be provided. It is apparent that the judge accepted that the appellant was suitable for such treatment and that it was available. However, due to the seriousness of his offending, he considered that only an immediate custodial sentence would provide adequate punishment to reflect his criminality; a conclusion which is not open to justifiable criticism and no question of legitimate expectation arises otherwise. Likewise, bearing in mind the circumstances giving rise to the public order offence, we do not consider that such mitigation as arose from the fact that the appellant may suffer from alcoholism or any of the other matters alluded to in the pre-sentence report required the sentence for this offence to be reduced below the term which the judge imposed.

15. In so far as the breach of the suspended sentence is concerned, unless the court considered it unjust to do so, the judge was obliged to activate the suspended period of custody either in whole or in part, pursuant to paragraphs 8(2) and (3) of schedule 12 to the Criminal Justice Act 2003. There was nothing here that should have caused the judge to determine that it was unjust to activate the suspended term and indeed, as we have already observed, the judge having determined that the multiplicity of the offending which caused the appellant to be in breach of the suspended sentence order placed this into category 1 of the breach offences guideline. The guideline penalty was before the activation the original custodial term. Instead the judge reduced the term by 4 weeks to take into account the completion

of the curfew condition. This was generous and we note from a recent report that although the appellant had completed the curfew condition, he had in fact accumulated over 17 hours of time violations prior to its completion.

16. In relation to the judge's decision to revoke the community order and to re-sentence the appellant for the original offence of common assault, the judge undoubtedly had power to do so, pursuant to paragraph 23 of schedule 8 to the Criminal Justice Act 2003.

17. However, in view of the fact that all of the offences which were the subject of the committal for sentence were summary only, as were those in respect of which the appellant had been made the subject of a suspended sentence order and a community order, the Registrar has asked us to consider the provisions of the Magistrates' Court Act 1980 which at section 133(1) 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."

18. In so far as the sentences imposed by the judge in relation to the offences which were the subject matter of the committal for sentence, as these did not exceed 6 months in total, they were not rendered unlawful by section 133(1).

19. Moreover, for the reasons set out *R v Chamberlain* (1992) 13 Cr App R(S) 525, and *R v Hester* [2016] 2 Cr App R(S) 43, section 133(1) does not have the effect of rendering unlawful the activation of a suspended sentence originally imposed for a summary-only offence and ordered to run consecutively to a term of imprisonment for another summary-only offence, where the resulting total sentence is in excess of 6 months'

imprisonment. This is because the activation of a suspended sentence does not involve the imposition of a sentence of imprisonment, as the sentence of imprisonment is imposed when the original court imposes a suspended sentence order. In these circumstances, the activation of the suspended sentence amounts to no more than the court dealing with the offender in accordance with paragraph 8(2) of schedule 12 to the Criminal Justice Act 2003.

20. However, where a court imposes a community order axiomatically it is not imposing a sentence of imprisonment. Therefore, when a subsequent court revokes such an order and deals with the appellant under paragraph 23 of schedule 8 to the Criminal Justice Act 2003, if it imposes a sentence of imprisonment, then it is imposing the sentence of imprisonment for the first time.
21. Furthermore, under paragraph 23(2)(b)(ii) of schedule 8 to the Criminal Justice Act 2003, the Crown Court is constrained to deal with the offender for the offence in respect of which the community order was imposed: "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."
22. 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 power of the Crown Court to deal with offenders who commit summary-only offences, during the currency of the community order which was originally imposed for another summary-only offence, to a total period of 6 months' imprisonment.
23. In these circumstances, as the judge in the present case had already imposed a total of 6 months' imprisonment for the summary-only offences for which the appellant had been made the subject of the committal for sentence, it was not, in our view, open to the judge to impose any sentence of imprisonment, for the summary-only offence of common assault,

for which the revoked community order had originally been imposed which had the effect of extending the appellant's total term of imprisonment. Therefore, whilst we consider it was open to the judge to revoke the community order, and instead impose a sentence of 3 months' imprisonment in respect of the offence of common assault, we consider that it was not open to the judge to order that it run consecutively to the period of 6 months' imprisonment which he had already imposed on the offences which were the subject matter of the committal for sentence.

### **Conclusion**

24. In order to remedy the situation, whilst we will leave intact all of the periods of imprisonment which were imposed in the lower court, we will order that the sentence of 3 months' imprisonment imposed upon the offence of common assault, which was originally the subject matter of the community order, will be ordered to run concurrently rather than consecutively to the other periods of imprisonment. Thus, the total sentence will now be one of 10 months' imprisonment rather than 13 months. 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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