No: 201904588/B3-201903463/B3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2019] EWCA Crim 2460

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 20 December 2019

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE JOHNSON

HIS HONOUR JUDGE PICTON QC

(Sitting as a Judge of the CACD)

R E G I N A
v

BENJAMIN YEO

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(Official Shorthand Writers to the Court)

Mr W Parkhill (Solicitor Advocate) appeared on behalf of the **Applicant**

Mr S Heptonstall & Ms H Hope appeared on behalf of the **Crown**

J U D G M E N T
(Draft for approval)

LORD JUSTICE DAVIS: We think the least unsatisfactory way of proceedings is as follows - we will give our reasons later this morning. In the case of Mr Yeo, we will quash the convictions on those particular counts of theft and of course quash the sentence. My Lord, Judge Picton, will then constitute himself as a judge of the Crown Court and will put those particular counts to him and it may well be and we gather he will then plead guilty to those and then Judge Picton can give him appropriate sentence, which I anticipate will be no separate penalty.

In the case of Mr Lowther, given the circumstances, we simply quash on the same basis and do more than that.

MR HEPTONSTALL: I am grateful my Lord.

LORD JUSTICE DAVIS: Judge Picton is now constituted as a judge of the Crown Court.

HIS HONOUR JUDGE PICTON: Mr Yeo, can you hear me?

THE DEFENDANT: Yes, sir.

HIS HONOUR JUDGE PICTON: You have been sent to the Crown Court in respect of some charges of theft. There is a charge of theft on 2 March 2019, meat from the Co-op in Whitleigh, Plymouth, theft on 3 March, ice cream from the same shop; 9 March, meat from the same shop; 10 March, theft of confectionary sweets from Tamerton Post Office in Plymouth and theft on 19 March, some meat again from the Co-op in Whitleigh and some more meat on 20 March from the Co-op in Whitleigh. Do you plead guilty to each of those charges?

THE DEFENDANT: Yes.

HIS HONOUR JUDGE PICTON: Or not guilty?

LORD JUSTICE DAVIS: Do you plead guilty?

THE DEFENDANT: Yes, sir.

HIS HONOUR JUDGE PICTON: Thank you. In relation to those there will be no separate penalty as you have already been sentenced for the other matter that came to the Crown Court legitimately on the indictment. Thank you very much.

(Submissions re: sentence)

LORD JUSTICE DAVIS: The appellant in this case is a man now aged 26.

His appeal started out as an appeal against sentence and the single judge had granted leave in that regard. However, it was subsequently noted within the Criminal Appeal Office, on behalf of the Registrar, that a technical issue arose relating to the validity of the convictions on his plea, and accordingly on sentence, on certain counts of theft.

In consequence of that being drawn to the parties' attention an application for an extension of time and for leave to appeal against conviction has since been lodged in respect of those counts of theft which are counts 1, 2, 3, 4, 5 and 6 on the particular indictment in question. We have earlier this morning indicated that we grant the extension of time sought and we grant leave to appeal against conviction in respect of those matters.

The factual background is this. The appellant pleaded guilty to the offences contained in indictment 7031 and in due course was committed to sentence to the Crown Court by the Plymouth District Magistrates' Court. On 21 August 2019, in the Crown Court at Plymouth, he was sentenced by the Recorder as follows: on the six counts of theft (counts 1, 2, 3, 4, 5 and 6) he was sentenced to 4 months' imprisonment to run concurrently inter se; on a count of robbery (count 7) he was sentenced to 56 months' imprisonment and on a further count of having an article with a blade or point he was sentenced to 12 months' imprisonment concurrent. He was also sentenced to 4 months' imprisonment concurrent on other matters of theft which were before the court and as to which no technical

objection arises.

The facts, shortly put, are these. So far as counts 1, 2, 3, 4, 5 and 6 are concerned, on various occasions between 2 March 2019 and 20 March 2019, the appellant had stolen various low value products from various stores in the Plymouth area. He had been caught on CCTV committing the offences.

The altogether more serious matters were counts 7 and 8 on the indictment. The position was this. On 11 April 2019 a young woman called Chelsea Tucker was working in a store in Southway in Plymouth. This was a family run shop. She was on her own on that particular occasion. At around 11.55 am the appellant entered the shop and enquired about the cost of tobacco. He subsequently left. A short time later she was aware of him being back in the store but he now had some kind of mask or disguise across his face. He also had a large kitchen knife (around 6-inches long) in his right hand and said something about the till money. She told him to get out but he walked towards her. He tried to grab the till but she valiantly resisted. He then started to jab towards her with the knife and then grabbed several packets of tobacco before walking out of the store. She immediately called the police. CCTV images of the appellant from some of the offences were analysed and he was subsequently arrested. He answered "no comment" to questions asked in interview.

Two victim personal statements from Chelsea Tucker were before the Crown Court at sentence. It is plain that the incident has had a profound impact on her and, amongst other things, she had been unable to complete her degree course at university that year in terms of doing the exams required.

Regrettably the appellant has a poor antecedent history, having convictions for a number of matters over the years. It is fair to say that in most instances those offences have been of

much lesser order than the offences constituted by counts 7 and 8 on the indictment. He has not received any substantial custodial sentence before at all. At the same time it is demonstrable that various community orders and the like imposed in the past have not worked.

Nevertheless there were undoubted psychological and psychiatric issues relating to this appellant which needed careful consideration. It is right to say that he has had a somewhat troubled background. A confidential psychological report, prepared by Dr Anderson for the purposes of the sentencing hearing, reviewed his history in great detail. He has significant learning difficulties and, as it is put, "has suffered from pervasive development disorders and a learning disability for many years". He has a combination of low IQ, autism and ADHD which has impacted upon his "consequential thinking skills". He is expressly described as being, by reason of his ADHD and mild autism, a "vulnerable young adult".

A psychiatric report, obtained for the purpose of the sentencing hearing, is of similar tenor. In that the appellant is, amongst other things, described as "very vulnerable. He is suggestible and has limited coping skills". It was recommended that he needed treatment for his vulnerability to exploitation and other matters although no recommendation of a hospital order was made.

In addition, a pre-sentence report commented on the appellant in corresponding terms.

For the purpose of the robbery count, which plainly appropriately fell to be taken as the lead count for sentencing purposes, there was some debate before the Recorder. Clearly this was high culpability category A because of the production of the knife. In terms of harm, there was further discussion. The Recorder decided that this was properly to be categorised as category 2A offending and there can, in our judgment, be no criticism of that conclusion, given the circumstances. Furthermore, there were a number of

aggravating factors to be taken into account here including, amongst other things, that he had worn a mask and that the bladed article in question was a large knife. Further, there clearly had been some element of targeting because he had initially gone into the shop, clearly observed there was a lone female shop assistant in charge and then returned.

The mitigation principally lay first, in his early plea for which he was entitled to one-third credit and then of course in his various psychiatric and psychological issues.

In passing sentence the Recorder dealt with the matter concisely. He referred to the background facts. He understandably referred to the effect on Ms Tucker of what had happened. Having referred to those matters the Recorder then said this:

> "I have, on the other hand, to take into account the fact that you are 25 years of age and undoubtedly do have difficulties, both psychological and other difficulties. But there is no doubt in my mind that this is an extremely grave offence."

The Recorder then proceeded to categorise the matter as we have indicated. He rightly noted that so far as the count of the bladed article was concerned, that in effect was subsumed by the robbery. He then proceeded to pass the sentences that we have indicated, stating that had there not been a plea of guilty, he would have imposed a sentence of 7 years' imprisonment on the robbery count. But with the deduction of one-third by way of credit for plea the ultimate sentence was one of 4 years 8 months' imprisonment.

The first point with which this court has had to deal relates to the convictions on the appellant's plea to the counts of theft being counts 1, 2, 3, 4, 5 and 6 on the indictment. These all related to the shoplifting offences and it is expressly agreed that these offences were low value shoplifting offences for the purposes of section 22 of the Magistrates' Court Act 1980. As such, they were triable as summary offences only unless the appellant had elected for a Crown Court trial in this regard; and this never happened.

Nevertheless, those matters could still properly be sent up to the Crown Court along with the robbery count and the possession of a bladed article count, if those shoplifting offences could be treated as "related" - see section 51(3) of the Crime and Disorder Act 1998.

Given that it was accepted that all these offences in effect involved a pattern of offending by way of a campaign, in our judgment, they could properly be described as "related".

Nevertheless as summary offences sent up to the Crown Court, they could only be added to the indictment if they met the requirements of section 40 of the Criminal Justice Act 1988. Low value shoplifting cases are not within such provisions. Consequently, they could not lawfully be added as counts of theft to the indictment in this case; there simply was no legal power to do so. The only way they could properly have been dealt with in the Crown Court was by following the procedure set out in paragraph 6 of schedule 3 to the Crime and Disorder Act 1998; but that did not happen either.

In those circumstances, this court has no option but to quash the convictions, albeit convictions following a plea, and quash the sentences on those particular counts of theft. It may be noted that they were concurrent with each other and with the other sentence and that has no immediate impact upon the overall sentence. But clearly it is right that the matter be corrected.

There was some discussion between this court and counsel as to what procedure should then be followed. The appellant has attended today over the video link and in the circumstances and with the effective agreement of all concerned, what happened was that one member of this court (Judge Picton) was constituted as a judge of the Crown Court today. He then put those charges of theft to the appellant, who has pleaded guilty to them, and a sentence of no separate penalty on those counts was then indicated; and that is endorsed. Accordingly, that should be the end of that particular technical hitch. Nevertheless, we

must stress that it is most unfortunate that such an issue has arisen in this particular matter. It has necessarily occupied court time, it has meant that counsel has had to prepare and be paid for attending on an application for leave to appeal against conviction out of time and, generally speaking, resources have had to be devoted to sorting out a matter which should never have been allowed to arise. One of course understands that mishaps and oversights do occur. It must be pointed out, however, that in recent years there have been a number of decisions, some of which have been reported, in which precisely this issue has arisen - see for example R v Maxwell [2017] EWCA Crim 1233; [2018] 1 Cr App R 5; R v McDermott-Mullane [2016] EWCA Crim 2239; [2017] 4 WLR 127 and most recently R v Burrows [2019] EWCA Crim 889. In fact, it is just because those various decisions have dealt with the position by reference to the statutory provisions so fully and extensively that it has not been necessary for this court to set out yet again the full statutory provisions in this particular judgment.

Nevertheless in R v Maxwell, at paragraph 47, Treacy LJ, giving the judgment of the court, did stress the inconvenience, delay and expense occasioned by such oversights: oversights which occurred both in the Magistrates' Court and then in the Crown Court and "greater vigilance" on the part of all those involved was urged. It is regrettable that this message with regard to low value shoplifting offences still does not seem to have entirely penetrated into the lower courts. We can only endorse and repeat Treacy LJ's remarks. We should also add that due apologies have been tendered to this court and we do, of course, accept them.

That being the position with regard to conviction, we now turn to what, in reality, is the substantive matter before this court which relates to sentence. Mr Parkhill, on behalf of the appellant, argues that a sentence of 4 years and 8 months' imprisonment, with full

credit for plea, is excessive. He accepts that the Recorder was entitled to treat this as a category 2A case. For category 2A robbery cases the starting point is 5 years' custody with a range of 4 to 8 years' custody. Mr Parkhill's essential submission is that the Recorder was not justified in indicating a figure of 7 years, towards the top of the range, before giving credit for plea.

Mr Parkhill suggests that the Recorder had given rather too much weight to the impact upon the unfortunate shop assistant, even though, of course, he does not seek to minimise the effect of the offending upon her. But Mr Parkhill's particular point is that the Recorder failed to have sufficient regard to the various reports relating to this offender, which stress his significant psychological and psychiatric issues and which, Mr Parkhill submits, greatly reduce his culpability. Mr Parkhill submits that overall the Recorder was not justified in going so significantly up from the starting point of 5 years set out in the guideline.

This clearly was a bad offence of robbery of its type. The victim was a lone female and there had been a degree of targeting. As we have said, the offender wore some kind of disguise. There has indeed been a significant impact upon her. Moreover, the bladed article in question was a large kitchen knife. Furthermore, it is an aggravating factor that the appellant has a poor record, even if containing nothing of this kind of severity of offending.

Nevertheless, it was an important feature of this case that there were these psychological and psychiatric reports which undoubtedly do go to the overall culpability of the appellant. Mr Parkhill of course accepted that a significant immediate term of custody was inevitable. But we do think with all respect that the Recorder failed to have sufficient regard to these reports and erred in setting himself a figure of 7 years before giving full credit for the plea.

In all the circumstances of this particular case, having regard both to the circumstances of the

offending and to the circumstances of the offender, this court takes the view that an appropriate figure, before giving credit for plea, would have been in the region of five-and-a-half years' imprisonment. Giving then full one-third credit for the plea, as the Recorder did, that gives rise to a sentence of 3 years and 8 months' imprisonment. In our view, that is the appropriate sentence in this particular case.

Accordingly, we will quash the sentence on count 7 and substitute for that sentence a sentence of 3 years and 8 months' imprisonment. The other sentences will stand save of course with regard to those relating to theft, where the outcome is as we have already indicated.

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

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