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No: 2019 00931 A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday 26th March 2019

B e f o r e:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
LADY JUSTICE HALLETT DBE

MR JUSTICE WARBY

SIR JOHN ROYCE

R E G I N A
v
SHAUN JAMES McGARRICK

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd Lower Ground, 18-22 Furnival Street, London EC4A 1JS Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr S Hamblett (a solicitor advocate) appeared on behalf of the **Applicant**
Mr P Spratt (a solicitor advocate) appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

MR JUSTICE WARBY:

1. This is an application for leave to appeal against sentence on behalf of Shaun James McGarrick. It has been referred to the Full Court by the Registrar in the interests of speed as the case involves a very short sentence. As it happens, Mr McGarrick has since been released on home detention curfew.
2. In January 2019, he pleaded guilty in the Crown Court at Wolverhampton to one count of fraud by false representation, contrary to section 1 of the Fraud Act 2006, and one count of assault by beating of an emergency worker contrary to section 1(1) of the Assaults on Emergency Workers (Offences) Act 2018.
3. On 13th February 2019 the applicant was sentenced by His Honour Judge Nawaz to nine months' imprisonment for the fraud offence and four months' imprisonment consecutive for the offence of beating. The total sentence was therefore one of thirteen months' imprisonment.

Facts

4. The fraud offence involved a complainant named Kenneth Wells, 97 years of age at the time but living independently. The applicant had done some work for him in the past to Mr Wells' satisfaction, but on 28th November 2018 the applicant sought to defraud Mr Wells. There was a problem with a bit of Mr Wells' guttering. An end piece had come loose and needed re-fixing to stop the gutter leaking when it rained. This was a simple job which could have been done in minutes, but the applicant spent two hours pretending to do much more significant work, none of which he had been asked to do, and then tried to get £200 from Mr Wells. There was a disagreement, the police were called, and it was at this point that the assault occurred.
5. A police officer named Cavell approached the applicant with a colleague, PC Brown, as

the applicant walked away from Mr Wells' home. After a brief conversation, the officers made clear to the applicant that he was going to be arrested, and PC Brown produced handcuffs. The applicant struggled and pushed and pulled away, resisting arrest. Incapacitant spray was used to try to calm him. As PC Cavell tried to take hold of the applicant's clothing, the applicant used his right hand and arm to strike the officer to the side of his face. This caused the officer's radio earpiece to become dislodged and to fall. The officer later, after the shock had worn off, suffered pain to his left cheek, and to his upper and lower teeth and gums. As the officer struggled with the applicant, they fell to the ground and the officer sustained some marks to his arms from the fall.

Ancedents

6. McGarrick, aged 34 at the time, had an extensive criminal record. He had appeared before the courts on 33 previous occasions for 60 offences between 2001 and 2017. Thirty-two of these offences (more than half) were for theft and kindred offences, including theft, non-dwelling burglary, dwelling burglary and handling stolen goods. On 7th June 2017 he was sentenced to sixteen months' imprisonment for one offence of dwelling burglary - a sentence which concluded about six weeks before the offending in question here. He also had a significant record of offences against the person, including a conviction in 2006 and another in 2012 for offences of assault occasioning actual bodily harm, for which on both occasions he received non-custodial sentences. He also had a conviction from 2013, when he was sentenced to a total of sixteen weeks' imprisonment for theft, common assault and breach of a suspended sentence order. Other offences for which he had received short custodial or non-custodial sentences included having an article with a blade, disorderly behaviour, failing to surrender, multiple breaches of

court orders and criminal damage.

7. There was no pre-sentence report. We are satisfied that in all the circumstances it was unnecessary to obtain one before sentencing the applicant.

Sentencing remarks

8. The Judge said that he would look at both matters in the round, bearing in mind totality. He described the fraud as a "mean, despicable offence" on somebody the applicant knew and had worked for and whose frailties he knew about. Having considered the guidelines, the Judge placed this offending in Category 2 and arrived at a notional sentence after a trial of twelve months' imprisonment. He then reduced this by 25 per cent for the plea of guilty, which was not of the earliest reasonable opportunity.
9. Turning to the assault, the Judge recognised that no serious injury was occasioned, but noted what PC Cavell had pointed out in his statement - that he did not take this job to be treated in this way. The Judge pointed out that the victim had been in uniform and that it was apparent that he was only doing what he was duty-bound to do. The applicant, no stranger to arrest, knew exactly what was happening. Police officers and other workers in uniform did not deserve to be treated in this way.
10. The Judge observed that there was little mitigation other than the guilty plea, for which full credit was given. He noted that the maximum sentence for such an offence had been six months' imprisonment but was now twelve months. He concluded that the appropriate sentence after a trial would have been six months' imprisonment. Allowing full credit for the plea he arrived at the sentence of four months, which was made consecutive to the sentence for fraud.

Grounds

11. The nine-month sentence for fraud is not criticised. The application now before the court relates only to the sentence for the beating offence.

12. The single ground of appeal is that the Judge's notional sentence after a trial for the assault was much too high, and that this led to an overall sentence which was manifestly excessive.

13. Mr Hamblett, who has appeared before us today as he did below, submits that this was an offence involving the infliction of very low-level injury on a police officer which caused pain and nothing else for which a six-month sentence after a trial would be excessive. He points out that as yet there are no sentencing guidelines for this offence, but he invites us to have regard to the Definitive Guideline for Assault, arguing that the offence could properly be regarded as one of common assault involving higher culpability or as an offence of assaulting a police constable in the execution of his duty. In either case he submits the offence would fall within Category 2, with a starting point of a medium level community order and the range would not go beyond a high-level community order. An uplift would be required he accepts, but not, he says, to the level adopted by the sentencing Judge.

Discussion and conclusion

14. We do not accept these submissions, for five main reasons.

15. First, just as the sentencing Judge looked at the offending in the round so should this Court. As is pointed out by Mr Spratt, who has made helpful submissions for the prosecution in writing, the task of this Court is to review the sentence as a whole. An applicant cannot "bank" one aspect of a sentence and appeal against a discrete part of

it without regard to the whole (see R v Hyde [2016] EWCA Crim 1031 at [15]). Here, Mr Spratt fairly submits that the notional sentence after a trial for fraud could have been higher, but for considerations of totality.

16. Secondly, in our view Mr Hamblett's reliance on the Assault Guidelines for sentencing other offences is not apt.

17. The 2018 Act was enacted to improve protection for emergency workers. Under section 39 of the Criminal Justice Act 1988 the offences of common assault or battery are 'summary only' offences with a maximum sentence of six months' imprisonment. Section 1 of the 2018 Act provides by way of exception to that general rule that a person who commits an offence of assault or battery against an emergency worker acting in the exercise of functions of such a worker is liable to a maximum sentence of twelve months' imprisonment. The Act came into force on 13th November 2018, some two weeks before this offence was committed.

18. The guidelines to which Mr Hamblett has referred us came into force in 2011, based, of course, on the law as it stood then. Like common assault and battery, the offence of assaulting a police officer in the execution of his duty contrary to section 89 of the Police Act 1996 carries a maximum sentence of 26 weeks' custody. The guidelines for sentencing those offences clearly cannot be read across and applied to offences as sentenced under the regime introduced by the 2018 Act. It is perfectly clear that Parliament intended the sentencing regime for such offences to be more severe. An approach which simply looks to an uplift from sentences for other offences is not helpful, in our view.

19. A better analogy perhaps would be the guidelines for assault with intent to resist arrest, an offence to which the facts of this case come closer. But the maximum sentence for that

offence is two years' imprisonment.

20. In our view, there are no existing guidelines to which resort can usefully be had by analogy. We must review the sentencing in this case by reference to the overarching requirements that any sentence must be just and proportionate and no more than commensurate with the seriousness of the offending. We must also bear in mind the clear legislative intent that assaults on public servants doing their work as part of the emergency services should be sentenced more severely than hitherto.

21. The third reason for rejecting Mr Hamblett's submissions is our conclusion that, on the approach we have identified, the offending in this case comfortably crossed the custody threshold. This was an offender in his early thirties with a string of convictions for acquisitive offences and violence who knew that he was about to be arrested for a despicable offence of fraud. It was in that context that, having been approached in a peaceable way, he first used force against two officers in an attempt to resist lawful arrest and escape. When an attempt was made to calm him, he responded with renewed violence, striking a deliberate blow to the face of an emergency worker and bringing him to the ground in the course of the ensuing struggle, causing pain and some actual injury.

22. Fourthly, it was plainly right in principle to impose a consecutive sentence for this offending, which was separate and distinct from the fraud.

23. Fifth and finally, we do not consider that the Judge's notional sentence after a trial was excessive. We agree with Mr Hamblett's approach to this extent: it may be helpful to adopt the decision-making structure that characterises Sentencing Council's Guidelines. We accept that the harm caused in this instance was not especially serious, but nor was it at the trivial end of the scale. In the context of the offence in question it could properly be regarded as *greater harm*; and this was, in our judgment, a case of *higher* culpability - the

offending was deliberate, determined and premeditated, and it was sustained. This, therefore, would be offending at the lower end of Category 1 or the upper end of Category 2, if there were guidelines for the 2018 Act. The starting point before consideration of aggravating and mitigating features might not be as high as six months, but there was no mitigation; and when regard is had to the aggravating feature of the applicant's very bad record, a period of six months is a proper notional sentence after a trial.

24. We have reached that conclusion without regard to one further aggravating feature of the case, to which the Judge did not refer: the offending was committed just six weeks after the end of the applicant's previous custodial sentence. He was thus subject to post-sentence supervision and inevitably in breach of the requirements.

25. For these reasons we are not persuaded that the Judge erred in relation to the sentence for assault, and we certainly do not consider that it is arguable that the overall sentence should be characterised as manifestly excessive. Accordingly, leave to appeal is refused.

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