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IN THE COURT OF APPEAL  
CRIMINAL DIVISION



CASE NO 202002617/A1  
NCN: [2020] EWCA Crim 1693

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Thursday 3 December 2020

Before:

LORD JUSTICE DAVIS

MR JUSTICE JAY

MR JUSTICE FOXTON

**REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 OF THE CRIMINAL JUSTICE ACT**  
**1988**

REGINA

V

DAVID GEORGE GRAHAM

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Mr B LLOYD appeared on behalf of the Solicitor General.

MR M GOOLD appeared on behalf of the Respondent.

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**J U D G M E N T**

## **LORD JUSTICE DAVIS:**

### Introduction

1. On 17 September 2020 the offender, David Graham (a man now aged 35) was, following a trial in the Leicester Crown Court, acquitted by a jury of one count of doing an act intending and intended to pervert the course of justice but was convicted by the jury of another such count on the indictment. He was sentenced by the trial judge to a term of 12 months' imprisonment suspended for 2 years, with an unpaid work requirement of 100 hours. A restraining order was also imposed.
2. The Solicitor General now seeks leave to challenge that sentence as unduly lenient. It should be stated at the outset that the Solicitor General does not seek to say that the custodial element of the sentence was of itself unduly lenient. The complaint is directed, and directed solely, at the judge's decision to suspend that sentence.

### Background Facts

3. The background position is this. Matters relate back to as long ago as March 2016. On 5 March 2016 a hunt was taking place in the area of Newton Burgoland in Leicestershire, the hunt being the Atherstone Hunt. The offender was monitoring the hunt as a member of an anti-hunting group. He was to complain to the police that he had been assaulted and kicked on the ground after he and another (unnamed) member of the anti-hunt group had trespassed onto farmland being used by the hunt. The offender stated that he had been wearing a body-worn camera which had captured the assault. The making of this complaint of assault was in due course to form the basis of count 1 on the indictment. At all events on 8 March 2016 the offender made a witness statement to the police. In addition, he produced a disc with video images from the camera to support his case.
4. When the police officer taking the statement looked at those images he recognised them from a Facebook page of an anti-hunt group he had seen which had been posted on the day of the hunt. The officer challenged the offender about whether the images had been edited and showed the images to him. The offender however denied that the images had been altered or "looped" in any way.
5. In due course, the offender was in fact to go on to make a formal complaint against that officer, claiming that the officer had made him feel that he was not being believed as a victim of crime. That complaint against the officer, we add, was not subsequently upheld.
6. On 9 March 2016 the offender was to call the NHS complaining of sore ribs. He attended Accident & Emergency at a local hospital in Coventry. He was noted to have bruising to his left chest. Another officer took over the investigation. She realised,

amongst other things, that further details were necessary in order to identify the alleged assailant on the footage. She asked the offender to make a further statement. She also asked if he had a copy of the video images. On 20 March 2016 the offender made a further statement to that officer. He produced a further disc, which he said was the entire footage from the body worn camera from which he had started recording when he had entered the field in question.

7. The alleged assailant (a farmer) was identified. He gave a voluntary interview under caution to the police. When he was shown the footage he denied any assault and stated that the footage had been edited. He was not charged with any offence. He and his brother, who also had been present at the altercation, subsequently gave witness statements to the police as part of the investigation into the offender for perverting the course of justice.
8. The discs provided by the offender were analysed. It was ascertained that they had been manipulated, mainly by looping a short section which purported to show a leg coming forward repeatedly with a shout of "now", as if kicks were being delivered whilst the offender was on the ground.
9. Eventually, on 18 October 2017 the offender was arrested and interviewed about the discs. On that occasion he made "no comment" to all questions asked of him. On 2 January 2018 he was charged with perverting the course of justice.
10. The first count related to an allegation that he intended to pervert the course of justice in making a false complaint of assault and in making a false witness statement in respect of that complaint. The second count related to an intention to pervert the course of justice in providing two copies of video-recorded evidence, which he knew had been altered.
11. At trial, there was expert evidence to the effect that the imagery on the discs had indeed been manipulated. It seems, in fact, that that was not in issue at the trial.
12. The two farmers said that, when the offender and other man had continued to walk further onto their land, ignoring their requests to leave, there had been some physical contact and the offender had fallen onto the wet and muddy ground. But he had not there been kicked. They maintained that they had only used reasonable force to eject trespassers who refused to go back the way they had entered.
13. In relation to count 1, the offender maintained that the complaint of assault was genuine. He and his associate had been making their way to the nearest exit from the land where they were assaulted by the two brothers; and he said that he had been pushed to the

ground, hit and kicked in the ribs. At all events, as we have said, he was acquitted on count 1 on the indictment.

14. So far as count 2 is concerned, the offender was to say that he had been given the camera by the group of anti-hunt supporters. He said that he had returned it to them after the alleged assault. He believed the footage had then been uploaded to a Cloud storage facility, which was the normal procedure. He had not seen the footage on Facebook. He had not himself edited the footage and said that he had no reason to believe anyone else had done so. Before making his witness statement, he had located the footage on the Cloud storage facility and downloaded it. He had only skimmed it before bringing it with him with a view to making his first statement. He saw nothing to alert him that it was edited when he was shown it by the officer in the police station. He also said that he had made the complaint against the police officer because he was upset that the police officer had not believed him. Similarly, when he produced the second copy, he said that he had not really viewed it; although he agreed that he had not told the police in interview about handing the camera to his group. At all events, on count 2 the jury clearly had not accepted the offender's explanations: because they convicted on that particular count.

#### The sentencing process

15. The offender had no previous convictions of any kind. There was no pre-sentence report sought by the judge but there was before the judge a report from a Dr Martin Pearson dated 2 April 2018. That, amongst other things, stated that the offender suffered from Asperger's Syndrome, meeting the relevant criteria for Autism Spectrum Disorder diagnosis, albeit there was no intellectual or educational impairment. A further report was submitted which also addressed the impact which the delays in the case had had on the offender. It was said that such delays had had a very significant detrimental impact on his daily life and mental well-being, not least because of his own mental health issues. It was said that testing indicated severe difficulties, with symptoms of anxiety and depression and indeed with overall functioning. That report was to say that he was to be regarded as a vulnerable adult.
16. The judge, His Honour Judge Mooncey, was informed that the police officer against whom the offender had made a complaint had somehow been cleared of any wrongdoing. Unfortunately, however, during the investigation of that complaint the officer's home address had somehow been inadvertently disclosed and shortly thereafter windows at the officer's house were broken. There was no evidence however that the offender himself had been aware that that might happen or that he had been involved, as was accepted below and Mr Lloyd, appearing on behalf of the Solicitor General before us today, accepts.
17. At the sentence hearing Mr Goold, counsel then as now appearing for the offender, conceded that the offence crossed the custody threshold. That was clearly right; it did.

However, it was argued that there were exceptional circumstances justifying the sentence being suspended. Amongst other points made was the fact that the offender had been acquitted on count 1. That, we accept, is relevant although, as Mr Lloyd pointed out, that in effect meant that his offending was not so serious as it might have been had he also been convicted on count 1.

18. The judge, in his sentencing remarks, went through the background. He noted that the offender had been 30 at the time, was of previous good character and had been active in the anti-hunt movement since at least 2012. The judge accepted that the offender may not himself have altered the tape, but he produced it being aware that it had been altered. In the course of discussions the judge had indicated that, if the case had come to court within a reasonable time of the events occurring in March 2016, then he would have imposed an immediate custodial sentence. However, given in particular the very great delays that had occurred and the effect of those delays on the offender, and given the fact that the offence was now very old, and given also the general observations made by the Court of Appeal in the case of R v Manning [2020] EWCA Crim 592 as to the effect of the Covid-19 situation on prison conditions, the judge overall concluded that it was possible to suspend the sentence. The judge, in sentencing, noted the medical report and also noted the impact on the loss of character which the conviction would have.
19. In so deciding to sentence the offender to a suspended sentence, the judge made it clear that he bore in mind that offences of perverting the course of justice ordinarily attract an immediate custodial sentence. Overall, however, the judge concluded that the combination of factors here was such that he could properly suspend the sentence; and that is what he did.

### Submissions and Discussion

20. Mr Lloyd identified the following significant features aggravating this offending. First, the offending must have required a degree of planning; and Mr Goold concedes that is so. Second, the offender had persisted in his conduct by submitting a second copy of the disc. Third, the offender's complaint about the police officer who initially had pointed out the alterations to the video had been shown to have been unjustified.
21. As to authorities, we were referred to a number. It is sufficient for our purposes to mention only to the case of R v Abdulwahab [2018] EWCA Crim 1399. Overall, the general trend of the authorities is that in cases of perverting the course of justice an immediate custodial sentence is almost invariably to be imposed. Although the language varies somewhat from case to case, that is the gist of all the authorities. Accordingly, there needs to be a high degree of exceptionality if an immediate custodial sentence is not to be imposed for such offending.

22. What, then, were the circumstances which, as the judge found and as Mr Goold had advanced, were sufficient to justify the judge as a matter of judicial evaluation and discretion in suspending the sentence in this particular case?
23. In our view, there were a significant number of factors to be borne in mind. First, it was at least to be taken into account that the offender had been acquitted on count 1. Second, the underlying offence alleged in count 1 related to common assault, which is by no means the most serious kind of criminality; nor had the acts of perverting the course of justice resulted in any charge being brought. Third, the offender had no previous convictions of any kind. Fourth, the offender had not misbehaved himself in any identified way since March 2016. Fifth, the respondent has the autism and other characteristics revealed in the reports, even if he was entirely cognisant of what he was doing; and such considerations are capable of being relevant both in deciding on the length of the custodial term and indeed deciding on whether or not a sentence can properly be suspended - see R v Dahir [2019] EWCA Crim 2286. Yet further, sixth, the offender had not himself been shown to have altered the video, albeit he thereafter knowingly used it as altered. Moreover, it is to be stressed that it could not in any way be shown that the offender had been responsible for the subsequent disgraceful attack on the officer's home when that officer's identity had been inadvertently revealed. Seventh, and clearly a most important factor in the judge's eyes, there was the very great delay (and the consequential significant impact upon the offender himself) before his case came on to trial. It came on to trial over 4 years since the events in question. In fact we were told by Mr Goold that, quite remarkably, previous fixtures or floating dates for trial had been adjourned on no fewer than nine other occasions. Finally, there was the impact of the current Covid restrictions. That will not ordinarily in itself be a decisive consideration in a sentencing exercise. But a number of the decisions of this Court, not least in the Manning case, now supported by a Guidance direction, have held that such conditions can properly be a factor taken into account, not just in deciding the length of an appropriate custodial term but also in deciding whether to suspend a sentence. Consequently, the judge was entitled to take such a consideration into account in the way that he did as part of the overall evaluation.
24. In the Sentencing Guidelines relating to the Imposition of Community and Custodial Sentences, factors indicating that it would not be appropriate to suspend a custodial sentence include: offender presenting a risk or danger to the public (clearly that is not a factor here); appropriate punishment can only be achieved by immediate custody (that is the point pressed by Mr Lloyd); and history of poor compliance with court orders (that is not a factor relevant here). On the other hand, factors indicating that it may be appropriate to suspend a custodial sentence include realistic prospect of rehabilitation (and that to an extent is a factor present here); and strong personal mitigation (which is also a factor present in this case). The third identified matter in the Guidelines does not arise in the present case.

25. We should also refer to a very recently provided supplementary report from the National Probation Service. That indicates that the offender seems reluctant still to come to terms with his conviction or accept his guilt, although it is pointed out that he is unable to differentiate his view of his victimisation from the issue of false evidence. It is also pointed out that whilst the offence had passed the custodial threshold, a custodial sentence would be likely to have a negative impact on his mental and emotional well-being and that he has additional complex needs and would be likely to struggle with a prison regime. The prospect of his re-offending is assessed as low.

### Conclusion

26. In the result, we of course endorse the general approach of the courts to the effect that almost invariably an immediate custodial sentence should and will be imposed in cases of perverting the course of justice. The question in this particular case, however, ultimately is whether, in deciding to suspend the sentence, this judge in the particular circumstances of this case went beyond the range of sentencing options reasonably open to a Crown Court judge. That, indeed, was Mr Lloyd's submission, in a nutshell: the only proper course, he said, was to impose an immediate custodial sentence.
27. We do not agree. There were a number of factors here. No doubt if taken individually they could not have justified a suspended sentence. But when taken cumulatively they did, in our judgment, entitle this judge, exceptionally, to suspend sentence as he did. It may be that some judges would not have suspended the sentence. That matters not. The question is whether this judge was entitled, acting reasonably, to suspend this sentence in the way that he did. He gave full reasons for his doing so. In our judgment, his reasoning and conclusion were open to him. In such circumstances we refuse leave on this application.

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