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IN THE COURT OF APPEAL  
CRIMINAL DIVISION



CASE NO 202102083/A1

Neutral Citation Number: [2021] EWCA Crim 1441

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Wednesday 22 September 2021

LORD JUSTICE HADDON-CAVE  
MR JUSTICE BRYAN  
MR JUSTICE CHOUDHURY

REGINA  
V  
SAM MURRAY

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NON-COUNSEL APPEAL

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

MR JUSTICE CHOUDHURY:

1. On 16 February 2021 in Chelmsford Crown Court, the appellant, then aged 28, pleaded guilty to two counts of assault occasioning actual bodily harm (ABH). These offences were committed during the currency of a two-year community order imposed in October and November 2020 for two offences of common assault and one offence of assault by beating of an emergency worker.
2. The appellant was sentenced on 22 March 2021 by Mr Recorder Sherrard QC. For the two counts of ABH the appellant was sentenced to 13 months' imprisonment and 11 months' imprisonment respectively, which were to run consecutively. The appellant was also sentenced for breaching the community orders. Each community order was revoked and the appellant was re-sentenced to three months' imprisonment for each of the two offences of common assault and a further six months' imprisonment for the assault on the emergency worker. All sentences were ordered to run consecutively. The appellant was therefore sentenced to a total of three years' imprisonment.
3. The two principal sentences for ABH arose out of the following facts. On 25 October 2020 the appellant's then partner, Katy Towsey told the appellant that she had cheated on him whilst four months pregnant with his child. The appellant reacted by beating Miss Towsey to the point of unconsciousness, dragging her across the floor and subjecting her to further repeated kicks and punches. The attack left Miss Towsey with numerous injuries to her face, hands and across her torso and limbs. The appellant was arrested and bailed.
4. On 20 December 2020, the appellant was at Miss Towsey's address. After going through her mobile phone, he grabbed her by the hair, threw her against a wall and punched her in the face. He then continued to kick Miss Towsey to the back of her head, her ribs and her legs. This attack, which lasted for around one hour, was carried out in the presence of a child.
5. The earlier offence for which the appellant had received a community order had also involved an assault on Miss Towsey. The police had been called and the appellant proceeded to assault the arresting officer.
6. The appellant appeals only against the sentences for breach. He makes the short point that the Crown Court had exceeded its powers in that it was required to sentence him in the way that he could have been dealt with by the court which made the original order. Paragraph 23 of Schedule 8 to the Criminal Justice Act 2003 provides:

"Powers of Crown Court following subsequent conviction

23(1) This paragraph applies where—

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

is convicted of an offence by the Crown Court ...

(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 —

revoke the order, and

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 ...

7. It should be noted that these provisions have been replaced by new provisions contained in the Sentencing Act 2020 (“the Sentencing Code”). Section 402 of the Sentencing Code provides:

"Powers to re-sentence

(1) Where under this Code a court has power to re-sentence an offender for an offence, the court may deal with the offender in any way in which it could deal with the offender—

(a) if the offender had just been convicted by or before it of the offence,  
and

(b) in a case where the offender was aged under 18 when in fact convicted of the offence, as if the offender were the same age as when in fact convicted.

(2) But where under this Code the Crown Court has power to re-sentence an offender for an offence and subsection (3) applies, the power of the Crown Court is power to deal with the offender in any way in which a magistrates' court could deal with the offender for the offence if—

(a) the offender had just been convicted by the magistrates' court of the offence, and

(b) in a case where the offender was aged under 18 when in fact convicted of the offence, the offender were the same age as when in fact convicted.

(3) This subsection applies where—

- (a) the Crown Court's power to re-sentence the offender for the offence is exercisable—

where the Crown Court revokes another order previously made in respect of the offence, or

where an order for conditional discharge has previously been made in respect of the offence, by virtue of a further offence committed during the period of conditional discharge, and

- (b) the previous order was made—

by a magistrates' court, or

by the Crown Court in circumstances where its powers to deal with the offender for the offence were those (however expressed) which would have been exercisable by a magistrates' court on convicting the offender of the offence."

8. It is clear from these new provisions that when exercising a power to re-sentence in respect of a previous order made by the Magistrates' Court, the Crown Court's powers mirror those that are available to the magistrates on the day of re-sentencing, rather than at the date of the original imposition of the community order, as was the case pursuant to paragraph 23 of Schedule 8 to the 2003 Act.
9. However, the new provisions do not apply in respect of convictions predating the coming into force of the Code which was on 1 December 2020: see section 2(1) of the Sentencing Code. Accordingly, the Crown Court is limited to dealing with the offence in any way which the Magistrates' Court could have dealt with it as at the time of the original sentence. In the present case that difference is not material as it is not in dispute that the maximum sentence that the Magistrates' Court could have applied, whether on 23 November 2020 or on the date of re-sentence, was a sentence of six months' imprisonment: see section 244 of the Sentencing Code. That would be the case even though the convictions occurred on two separate dates. As explained in the case of R v Palmer [2019] EWCA Crim 2231, the fact that the Crown Court would be imposing a sentence of imprisonment for the first time in respect of the earlier offences meant that they were constrained by an order of six months maximum in common with the Magistrates' Court.
10. Accordingly, the appellant was correct to say that the sentences imposed by the Crown Court in respect of the breaches of the community order were unlawful. The Crown concedes that that is the position. Indeed, it was a matter which was brought to the attention of the Learned Recorder in an attempt to rectify the sentence under the slip rule within a period of 56 days from the original sentence in accordance with section 155 of the Powers of Criminal Courts (Sentencing) Act 2000. However, due to listing difficulties, it was not possible to amend the sentences before the expiry of the slip rule period and the matter was referred to the Court of Appeal, Criminal Division.
11. The Learned Recorder has produced a very helpful note setting out the background to the

sentences and the attempts made to remedy the position. He has also indicated that had he been able to do so he would have varied the sentences for the common assaults to three months concurrent with one another and varied the sentence on the assault on an emergency worker to three months consecutive, thus making a total sentence in respect of the earlier offences of six months.

12. In the circumstances, we have concluded that there is no option but to amend the sentence so as to apply the limit of six months to the re-sentenced offences. The sentences of three months for each of the common assaults and six months for the assault on an emergency worker are therefore revoked. They are replaced by the sentences that the Learned Recorder indicated he would have imposed, namely three months for each of the two common assault convictions to run concurrently with each other and a further three months for the assault on an emergency worker to run consecutively to those. The overall sentence for the offences on the indictment and breaches is therefore reduced from three years to two years six months.
13. We emphasise that this reduction is made solely because of the legal constraints on such sentences and should not be read as if the original sentences were considered excessive for the appellant's appalling conduct.

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

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