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IN THE COURT OF APPEAL  
CRIMINAL DIVISION

[2023] EWCA Crim 1709



Case No: 2023/02186/A4

Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Thursday 7<sup>th</sup> December 2023

**B e f o r e:**

**LORD JUSTICE DINGEMANS**

**MRS JUSTICE STACEY DBE**

**HIS HONOUR JUDGE DREW KC**

**(Sitting as a Judge of the Court of Appeal Criminal Division)**

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**R E X**

**- v -**

**ANTHONY DOUGLAS**

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Computer Aided Transcription 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)

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**Miss F Rolfe** appeared on behalf of the Appellant

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**J U D G M E N T**  
**(Approved)**

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Thursday 7<sup>th</sup> December 2023

**LORD JUSTICE DINGEMANS:** I shall ask Mrs Justice Stacey to give the judgment of the court.

**MRS JUSTICE STACEY:**

1. This is an appeal against sentence by leave of the single judge.
2. At a committal for sentence hearing on 6<sup>th</sup> June 2023 in the Crown Court at Swansea (sitting at Carmarthen), before Mr Geraint Recorder Jones KC, the appellant (then aged 42) was sentenced to a total term of 21 months' imprisonment, consisting of: 21 months for going equipped for burglary (offence 1); six months for possession of a bladed article (offence 2); and one month for possession of amphetamine, a controlled drug of Class B (offence 3). All of the sentences were ordered to run concurrently with each other.

**A Summary of the Facts**

3. The appellant was stopped by the police on 11<sup>th</sup> April 2023 on Roman Road, London E2. A search by police officers found that he was in possession of a small quantity of amphetamine for personal use, a Stanley knife blade (but not the knife itself), and a number of keys, one of which was a drop key which would give access to communal areas within a number of buildings.
4. A number of police officers had been on patrol in full uniform in an unmarked police vehicle when they noticed a group of drug users by Holman House, where the appellant was trying to gain entry to the building with the fireman drop key. Holman House is a residential building, and the key provided entry to the communal areas.

5. The appellant resisted arrest. It required four police officers to detain him and effect the arrest. He declined to comment when he was interviewed at the police station, but pleaded guilty at the earliest opportunity in the magistrates' court on the following day, 12<sup>th</sup> April 2023.

6. The matter was committed for sentence to the Crown Court at Snaresbrook and then transferred to Swansea for a remote hearing.

7. The appellant has a total of 44 convictions for 85 offences. He has 14 convictions for non-dwelling burglary, seven for attempted burglary, three for going equipped, and a total of 56 theft and kindred offences from 2001 to 2022. He has seven drug offence convictions for simple possession. He has been non-compliant with drug rehabilitation orders and drug treatment and testing orders which have been unsuccessful in assisting him to address his long-standing problems with crack cocaine and heroin. He had one previous conviction for possession of a bladed article. He was street homeless at the time of the commission of these offences and underwent withdrawal symptoms whilst in police custody. His most recent convictions were for three offences of non-dwelling burglary and theft, and non-dwelling burglary with intent to steal on 26<sup>th</sup> July, 18<sup>th</sup> August and 20<sup>th</sup> August 2022, for which he received concurrent sentences of 18 weeks' imprisonment; and two offences of burglary of a non-dwelling property with intent to steal and going equipped on 9<sup>th</sup> September 2022, for which he received a sentence of eight weeks' imprisonment for the burglary; and, a consecutive sentence of eight weeks' imprisonment for going equipped. Thus, the total sentence on that occasion was one of 26 weeks' imprisonment.

8. A decision had been made on 22<sup>nd</sup> December 2022 to recall him from licence for non-compliance, but he was not returned to custody to serve that period of recall until he was arrested for these offences. No remand time therefore accrued prior to his sentence on 6<sup>th</sup>

June 2023.

9. The prosecution submitted that under the Sentencing Council's guidelines the offence of going equipped was category A high culpability, as the appellant was going equipped for a domestic burglary with a sophisticated set of keys, but that there was "lesser harm" under the guidelines. The offence therefore had a starting point of 26 weeks, with a range of 12 to 36 weeks' custody.

### **The Sentence**

10. There was no pre-sentence report. None was necessary in light of the appellant's antecedents and history of poor compliance with community order. In brief sentence remarks, the Recorder acknowledged that the appellant had pleaded guilty at the earliest opportunity. He treated the offence of going equipped as the lead offence. He considered that the appellant had been equipped with a sophisticated system of multi key sets which were capable of giving him access to numerous areas of commercial business premises, including emergency service override or drop keys. He considered the offending in the context of the appellant's many previous convictions for like offences and concluded:

"In my judgment, the guidelines in this case are but guidelines, they are not a straitjacket, and in circumstances where the only way to protect the public is by having you in prison, it is appropriate for me to depart from the guidelines. One only does so if it is justifiable to do so and proper to depart from them. In my judgment, it is entirely justified in your situation because the numerous offences that you have committed in the past indicate to me that you pay no regard to the property of others and are prepared to go on burgling and going equipped for burglary whenever you feel inclined to do so.

I take the view that this was a determined and sophisticated exercise of carrying these keys so that at any opportunity you could burgle premises and take other people's property for yourself. The only way in which the public is protected from that proclivity on your part is when you are not at liberty and, in my judgment, this sentencing exercise is about protecting the

public, and rehabilitation in the classic sense has very little part to play because you have displayed, by your previous convictions, that you are not interested in rehabilitation."

11. The Recorder did not state whether he accepted the prosecution's submission as to where the offence fell under the guidelines. He noted that the maximum sentence available was three years' custody. It appears that he considered that it was in the interests of justice to ignore the guidelines in light of the appellant's previous convictions. After taking account of a one third deduction for the early guilty plea, he imposed a sentence of 21 months' imprisonment.

12. The offence of possession of a bladed article was the appellant's second offence and carried a mandatory sentence of six months' imprisonment, which was ordered to run concurrently. The Recorder imposed a concurrent term of one month's imprisonment for possession of the Class B drug. The Recorder did not refer to the totality guideline.

13. The sentence was not explained to the appellant in accordance with the Crown Court Compendium, Part 2; and nor was there any mention of how the time spent in custody awaiting sentence would be treated.

### **The Appeal**

14. In clear and helpful written and oral submissions, Miss Rolfe argued that the Recorder did not fully set out his process for arriving at the final sentence for going equipped; that it was apparent that he must have taken a starting point of 31½ months in order to have reached a finishing point of 21 months; and that, however the sentence was reached, it was manifestly excessive in light of the Sentencing Council guidelines, when the maximum available sentence by law is three years' custody.

15. Even if, contrary to the prosecution's submissions, the Recorder had concluded that the offence fell into the category of both greater harm and greater culpability, the top of the range for that category under the guidelines would be 18 months' custody before a reduction for a guilty plea, which was considerably less than the sentence actually imposed.

16. Miss Rofe referred us to the authorities of *R v Remblance* [2022] EWCA Crim 105, *R v Ofori and Fejzolli* [2017] EWCA Crim 1563, and *R v Canning* [2017] EWCA Crim 55, which she submitted were cases of going equipped with items of considerably greater sophistication with capacity for much greater harm than the facts in the appellant's case which attracted sentences of between eight and 12 months' imprisonment after trial. There was no challenge to the sentence for either subsidiary offence.

### **Analysis and Conclusions**

17. The Recorder was required by section 52 of the Sentencing Act 2020 to give an explanation for both the reasons for passing the sentence at which he arrived and its effect. It was necessary to identify the category in which he placed the offence. If he was considering a category higher than proposed by the prosecution, it was incumbent upon him to alert defence counsel so that she could make submissions and put the appellant's case. There is useful guidance in the Crown Court Compendium, Part 2, at section S1.7, which explains the approach to sentencing.

18. Miss Rolfe has been diligent in her research of the authorities. It was helpful for us to read them all, but it is not necessary to refer to them in any detail as the best and primary source of guidance are the guidelines themselves.

19. The appellant is a prolific non-dwelling burglar who, as the Recorder pointed out, has not responded to previous sentences. Even though he was not on licence at the time of these

offences, they had occurred within six months of his most recent previous offence and he was therefore subject to post-sentence supervision at the time. Although he had a number of keys in his possession, including emergency service override keys for a number of buildings, it is apparent from the police officers' body-worn camera footage, that there was a lack of sophistication in the carrying out of the offence. He was seen in broad daylight with a small group of other street dwellers and long-term drug users who were all trying to access the communal area of Holman House on what appeared to be a cold day.

20. Whilst the Recorder was entitled to conclude that the offence of going equipped for burglary fell within category A higher culpability, it is towards the bottom of category A. It is dissimilar, for example, to the sophisticated and professional car key cloning devices and the use of electronic and computer equipment which courts sometimes see. Nor was the appellant part of a larger organised crime gang involving the onward sale or dismantling of stolen vehicles, the onward sale of stolen credit or debit cards, or identity fraud that might follow, for example, the control of hundreds of letter boxes. He may be a repeat offender, but he is something of an amateur.

21. As to harm, we have noted that the Recorder should have alerted defence counsel to the fact that he was minded to move above the categorisation advanced by the prosecution. We have given Miss Rolfe the opportunity to argue the matter *de novo* today. It is implicit from the final sentence in the transcript that the Recorder must have concluded that there was greater harm, although it is not readily apparent from his sentencing remarks.

22. "Greater harm" is defined in the guidelines as involving possession of items which have potential to facilitate an offence affecting a large number of victims, or items which have the potential to facilitate an offence involving high value items.

23. Given the number of keys in the possession of the appellant, we agree with the Recorder's conclusion that this was a case of greater harm, notwithstanding the prosecution's position on the matter. There was sufficient evidential basis to reach such a conclusion.

24. In our judgment the Recorder was justified in placing the offending in the higher category of harm, with a starting point of one year's custody with a range of 26 weeks to 18 months. However it was not in the interests of justice to depart from the guidelines in the way that the Recorder sought to do.

25. To arrive at a sentence of 31 months' imprisonment, (prior to a downward adjustment for a guilty plea), involves an upward adjustment from the starting point for the highest available category of 19 months which, on the facts of this case, is a startling conclusion. Although the appellant has an unenviable record, the Recorder was not justified in departing so significantly, or at all from the guidelines. Accordingly, we consider that the sentence was manifestly excessive.

26. As to totality, we have noted that the minimum term for possession of a bladed article (six months' custody) was ordered to run concurrently. However, as is made clear in the totality guidelines, consecutive sentences will ordinarily be appropriate where one or more offences qualifies for the statutory minimum sentence, and where concurrent sentences would improperly undermine that minimum. The consequence of the imposition of the concurrent sentence in this case had the effect that it undermined the minimum term appropriate for the possession of a bladed article, as provided by statute.

27. Having regard to these conclusions, we consider that from the starting point of 12 months' imprisonment, for greater harm and culpability A, there should have been an upward adjustment which, having regard to the totality principle, should have been 15 months'



imprisonment to account for the appellant's unenviable previous convictions and his behaviour on arrest. After the application of the necessary downward adjustment of one third for his early guilty plea, the final appropriate sentence which should have been imposed is one of ten months' imprisonment.

28. However, the sentence for the offence of possession of a bladed article should have been imposed consecutively to and not concurrently with the sentence for the offence of going equipped for burglary.

29. We therefore allow the appeal to this extent only. We quash the sentence of 21 months' imprisonment for going equipped for burglary and substitute a sentence of ten months' imprisonment, to be served consecutively to the sentence of six months' imprisonment for the offence of possession of a bladed article making a total sentence of 16 months. We leave undisturbed the concurrent sentence of one month's imprisonment for the offence of possession of the amphetamine.

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Lower Ground, 18-22 Fumival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk