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[2023] EWCA Crim 543

IN THE COURT OF APPEAL

CRIMINAL DIVISION



CASE NO 202203740/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 5 May 2023

Before:

LADY JUSTICE CARR DBE
MRS JUSTICE McGOWAN DBE
THE RECORDER OF SOUTHWARK
HER HONOUR JUDGE KARU
(Sitting as a Judge of the CACD)

REX
V
MURRAY THOMAS

Computer Aided Transcript 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)

MISS G LEWIS appeared on behalf of the Appellant

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1. On 6 April 2022 the appellant, now 47 years old, pleaded guilty to three counts of fraud, contrary to section 1 of the Fraud Act 2006. In November 2022 he was tried and convicted by a jury of a single count of dwelling burglary, contrary to section 9(1)(b) of the Theft Act 1968. On 1 December 2022 His Honour Judge Feest sentenced him as follows: for the burglary, six years' imprisonment; for each fraud, three months' imprisonment to run concurrently with each other and to the sentence for the burglary.
2. The judge also ordered the appellant to pay compensation of £190 to the victim of the burglary instead of a victim surcharge order which he reduced to nil under section 42(3) of the Sentencing Act 2020.
3. This is his appeal against the overall sentence of six years' imprisonment on the basis that it is manifestly excessive.

The facts

4. At around 7.30 pm on 7 February 2022 the appellant entered a dwelling in Lillie Road, London, SW6, equipped with a screwdriver. He had waited for the area to clear before entering, and the householder was not at home. He used a flower pot to break through a window, leaving dirt and earth in the property and spilling rubbish. He emptied wardrobes and drawers in the bedroom. He left the building with items and returned a second time. In total, he stole a bicycle, a bicycle helmet, an iPad, an iPhone, a card holder containing bank cards, a passport and some low value jewellery. The total value of the items taken from the flat was £2,460.
5. Very shortly afterwards the appellant used the bank cards in three local stores: Fulham Wood and Wine, Sainsbury's and the Co-op food store. In total he withdrew £305.74, buying predominantly alcohol and tobacco. A further attempted transaction of £48.40 was declined.
6. A victim personal statement revealed that the victim had now left the property, largely because she no longer felt safe there and no longer wanted to live alone. The burglary continued to have an impact on her feelings of safety as a single female. It had been a terrifying experience for her and she did not feel safe even walking down the street. She had had to stay home to give access to the police and glaziers. She had relied on her friends and her sister for alternative accommodation and had suffered financially as well,

not only having to carry out the repairs but also as a result of not being able to go about her normal work schedule.

7. The appellant had 38 convictions for 93 offences spanning from February 1986 to September 2018. His relevant convictions included 59 theft and kindred offences, and specifically two previous domestic burglary offences on 16 December 2016 and 17 December 2013.
8. In accordance with section 314 of the Sentencing Act 2020 the judge was thus obliged to impose an appropriate custodial sentence of at least three years unless he was of the opinion that there were particular circumstances which related to the offence or the offender that would make it unjust to do so in all the circumstances.
9. The judge had before him a psychiatric report dated 24 October 2020 from Dr Aamir Ehjaz, which recorded the appellant's troubled childhood against a background of domestic abuse. The appellant had experienced violence and special schooling and very limited education. He had a long history of drug abuse. Dr Ehjaz opined, however, that he did not have a history of any serious mental illness, although he did have ADHD.

Grounds of appeal

10. In succinct and effective submissions Miss Lewis argues that the judge passed an overall sentence that was manifestly excessive. He excessively aggravated the sentence, doubling the mandatory minimum term to account for the appellant's previous convictions. The judge had endorsed the parties' agreed categorisation of the burglary offence as B2 for the purpose of the relevant Sentencing Council Guideline. He placed too much weight on the appellant's antecedents.

Discussion

11. The judge sentenced the appellant without a pre-sentence report. We agree that a report was unnecessary and the contrary has not been suggested.
12. As we have already identified, the judge was obliged to impose a custodial term of at least three years, given that the appellant was a "third strike" burglar convicted following trial. There was rightly no suggestion that there were particular circumstances relating to any of the offences or the offender which would make it unjust to impose that minimum term.

13. The correct approach in these circumstances is to have regard to the relevant Sentencing Council Guideline, whilst always ultimately ensuring that the term finally imposed is not less than the mandatory minimum term. That mandatory minimum term is not the starting point. The judge needs to go through the proper sentencing exercise by reference to the Guideline and then cross-check to ensure that the sentence is not less than the minimum term required. It may of course be significantly more: see *R v Andrews* [2012] EWCA Crim 2332 at [7] and *R v Grady* [2017] EWCA Crim 702 at [15].
14. The judge accepted the parties' common position that the burglary offending fell within Category 2B of the Sentencing Council Guideline for Domestic Burglary, which carries a starting point of 18 months' imprisonment with a range of six months to three years. There were multiple aggravating features requiring a significant uplift. First and foremost was the appellant's extensive record of previous offending. This was the last of a very long line of dwelling-house burglary convictions. He had 30 previous dwelling-house burglary convictions going back to 1992 and five previous attempted dwelling-house burglaries. His previous convictions also included convictions for drug, violence and firearm offences. Beyond that, this offence was committed at night and, whilst the victim was not compelled to leave the property as a result only of the incident, the burglary was a strong factor in her decision to leave. The sentence also had to reflect the appellant's overall criminality. There was then some mitigation in the shape of the appellant's drug addiction and difficulties with ADHD.
15. Even taking account of the appellant's offending record, we have, standing back, reached the conclusion that there was no proper justification for an increase of the custodial term to the six-year period arrived at by the judge. In our judgment a term of four years' imprisonment by reference to the relevant Sentencing Council Guideline was appropriate. A cross-check with the mandatory minimum term reveals that that sentence needs not alteration by way of upward adjustment or otherwise.
16. We recognise that there are cases where a particularly appalling record can be such an aggravating feature that the court can impose a substantial sentence which falls radically outside the ranges in the relevant Sentencing Council Guideline: see for example *R v Marcantonio* [2012] EWCA Crim 1279 and *R v Brooke* [2012] EWCA Crim 1642. Each case will turn on its own facts. By way of example only, in *Marcantonio* the offender had received a previous sentence from this court of seven years' custody for what was similar subsequent offending. In *Brooke* the offender had received previous custodial sentences of up to six and 12 years in length.
17. In this case the judge gave no indication that he was relying on the approach identified in those cases when it came to sentencing. Miss Lewis has confirmed that there was no discussion along those lines. Rather, the judge's sentencing remarks suggest that, having having started originally with consideration of the appropriate custodial terms by reference to the relevant Sentencing Council Guideline, then to have moved onto the

mandatory minimum term of three years as a starting point, which he then doubled because of the appellant's offending record.

18. As the court remarked in *Grady* at [15], even when deterrence of a prolific recidivist makes it necessary to increase substantially the sentence which would normally be appropriate under the relevant Sentencing Council Guideline, it is always necessary to keep in mind the nature and circumstances of the particular instant offence. In this case the appellant's last previous conviction was in September 2018, from which he must have been released during the course of 2020. There had therefore been a significant period without conviction. There was no targeting of a particularly vulnerable victim. Without in any way minimising the gravity of the effect of the offending on the victim, no items of sentimental value were taken. In our judgment, the aggravating feature, significant as it is, of the appellant's offending record, could be reflected properly in an uplift to four years' imprisonment, as we have reasoned. We recognise that in reaching this term we are going outside the range for Category 2B offending, but as Miss Lewis has realistically conceded, there was very significant aggravation in play here because of the extensive nature of the appellant's offending record.

Conclusion

19. For these reasons, we will allow the appeal. The sentence of six years' imprisonment will be quashed. A sentence of four years' imprisonment will be substituted in its place. All other elements of the sentence will remain unaltered, subject to what we now hear from Miss Lewis on the question of the victim surcharge order. We are obviously familiar with section 42(3) of the Sentencing Act 2020. It was open to the judge to do what he did but only if he was satisfied that there were insufficient means to pay.

[After further submission]

20. There is no appeal against the compensation order and I do not think we are inclined to interfere with that. But we prepared on the back of what Miss Lewis has told us on instruction about the appellant's means, to leave the judge's decision to treat the victim surcharge order as reduced to nil.

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

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk