

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.



IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT CANTERBURY

HIS HONOUR JUDGE SIMON JAMES 46ZY1348424

CASE NO 202402373/A1

NCN: [2024] EWCA Crim 1252

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 6 September 2024

Before:

LORD JUSTICE MALES
MRS JUSTICE MAY DBE
MR JUSTICE BRYAN

REX
V
GERARD McGUINNESS

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MISS E MITCHELL appeared on behalf of the Appellant
MISS M MILLAR appeared on behalf of the Crown

JUDGMENT

MRS JUSTICE MAY:

Introduction

1. This appeal began as a simple challenge to the length of sentence imposed in respect of an offence of assault on an emergency worker for which the single judge has given leave. However in the course of preparing the case the ever-watchful lawyers in the Criminal Appeal Office have picked up a number of irregularities in the sending of various associated matters dealt with in the Crown Court at the same time which will also require our attention.

Facts of the offending

2. At around 4.00 pm on 26 January 2024 the appellant stole four bottles of lager and a newspaper valued at £10 from Sainsbury's petrol station in Whitstable. The same day he was made subject to a Community Protection Notice ("CPN") which included two conditions prohibiting him from (1) entering Whitstable Town Centre and (2) having open vessels of alcohol on his person.
3. At around 4.00 pm on Tuesday 30 April 2024, PC Marin and PC Kennett attended the high street in Whitstable following reports that the appellant had been seen in the town centre in breach of the CPN. When the officers stopped the appellant he was carrying a bottle of beer which PC Marin observed he was trying to open. PC Marin subsequently arrested him for failing to comply with the CPN.
4. Following the arrest, PC Marin conducted a search of the appellant and found an open Stanley knife in his pocket. He further arrested the appellant for being in possession of a bladed article. As the officer continued the search, the appellant informed him that he had taken an overdose and a decision was made to take him to hospital. Due to the long wait time for an ambulance the officers decided to take him to hospital in their patrol

vehicle. On the way to hospital the appellant became agitated and started to act unpredictably. As the patrol vehicle travelled along the A2990 he removed his seatbelt and started shouting in PC Kennett's face. Due to the appellant's behaviour, PC Marin took the view that it was unsafe to continue in a patrol vehicle and pulled over to wait for a police van. Whilst waiting for the van, PC Marin got out of the vehicle and stood next to the appellant in an attempt to engage with him and calm him down. The appellant repeatedly tried to exit the vehicle and kicked out at PC Marin as he did so. When the officer told him to stop the appellant threatened him and pushed him. As a result, PC Marin had to restrain the appellant who continued to lash out at him. Once the appellant relaxed PC Marin released him. However the appellant became agitated again and proceeded to kick the officer repeatedly and headbutted him in the chest. As PC Marin restrained him again the appellant tried to bite his fingers. Shortly thereafter the police van arrived and the appellant was taken to hospital for treatment.

5. The appellant refused to be interviewed but provided a prepared statement dated 1 May 2024. First, he accepted having the knife in his possession to harm himself but said that he was unaware he would be committing an offence by doing so; second, he admitted opening an alcoholic beverage in breach of the CPN; third, in relation to the assault he could not remember what he had done and said that he did not intend to cause the officer harm. He explained that he had not been taking his medication for schizophrenia at the time.
6. On 2 May 2024 the appellant appeared at Folkestone Magistrates' Court for his first appearance charged with the following offences: one count of theft (classed as low level shoplifting) on 26 January 2024 contrary to section 1(1) of the Theft Act 1968; one count of assault on an emergency worker on 30 April 2024, contrary to section 29 of the

Criminal Justice Act 1988 and section 1 of the Assaults on Emergency Workers (Offences) Act 2018; one count of possession of a bladed article on 30 April 2024, contrary to section 139(1) of the Criminal Justice Act 2018 and two offences of failing to comply with a Community Protection Notice on 30 April 2024, contrary to section 48 of the Anti-social Behaviour (Crime And Policing) Act 2014.

7. According to the Sending Sheet, at this first appearance the appellant entered a guilty plea to one of the offences of failing to comply with the CPN and indicated not guilty pleas in respect of the remaining four offences. The Magistrates' Court purported to send all of the matters to the Crown Court for trial, including both failing to comply offences (despite a guilty plea already having been entered to one of them). The purported sending was made pursuant to section 51(1) of the Crime and Disorder Act 1988 in respect of the offences of assault of an emergency worker and possession of a bladed article, and pursuant to section 51(3) of the same Act in respect of the offence of theft and two offences of failing to comply with a CPN.
8. On 4 June 2024 at Canterbury Crown Court before the Recorder of Canterbury the appellant entered guilty pleas to the offences of theft, assault against an emergency worker and possession of a bladed article. The prosecution purported to offer no evidence on the second of the two offences of failing to comply with a CPN. The bladed article offence was a second qualifying offence engaging a minimum term of six months in respect of which the maximum discount for plea is 20 per cent.
9. On the same day the appellant was sentenced as follows: 146 days' imprisonment in respect of the bladed article offence (being 80 per cent of six months), 30 days concurrent for the theft and a consecutive sentence of 182 days' imprisonment for the assault against an emergency worker, resulting in a total sentence of 328 days, or just under 11 months.

No separate penalty was ordered for the offence of failing to comply with a CPN to which the appellant had pleaded guilty at his first appearance before the magistrates.

10. The appellant sought to appeal his sentence on the assault offence for which he was given leave by the single judge on 25 July 2024. On 5 August 2024, a commendably short time after leave had been given, particularly as it fell within the summer vacation, a lawyer in the Registrar's Office sent out a note to the parties notifying them of serious irregularities in the sending of the theft and failure to comply offences affecting the lawfulness of the Recorder's disposal of those matters.

Appeal against length of sentence

11. Against the complexity of these irregularities the appeal against the sentence of 182 days imposed for assault of an emergency worker is straightforward and it is that to which we turn first. In his concise sentencing remarks the Recorder dealt with the assault offence shortly, saying this:

"... I consider that the assault of the police officer was a particularly unpleasant use of unlawful violence which necessitates a further and consecutive sentence of imprisonment.

In my judgment, had you not had the good sense to plead guilty, I consider that you might not have been able to expect to receive a sentence of less than eight months had you been convicted after trial. I, therefore, reduce that by just over 25 per cent, to a sentence of 182 days."

12. Miss Mitchell in her advice and grounds, expanded on in submissions today, submits that the offence was not so serious as to warrant any custodial sentence and that even if it was, the notional sentence of eight months taken by the Recorder was excessive. When presenting the case the prosecution had not addressed culpability or harm nor made any submission as to where this offence fell in the applicable Sentencing Council guideline,

neither had the judge done so in his sentencing remarks. Miss Mitchell accepts that because the appellant used a shod foot culpability falls into Category A. However it is apparent from the statements of the police officer that he sustained no harm, or at most very minor harm, accordingly harm fell into the lowest category. For a basic assault offence Category A3 has a starting point of a low level community order with a range of band C fine to a high level community order. The direction given in a table later in the guideline for the uplift to be applied to the aggravated offence of assault on an emergency worker is "consider a more onerous penalty of the same type identified for the basic offence". Miss Mitchell draws attention also to the considerable mitigating factors: the appellant's deprived and disadvantaged background, with parents who involved him when a child in their drink and drug taking, resulting in his being taken into care aged 10; thereafter his own struggles with mental health and his diagnosis of paranoid schizophrenia. The Stanley knife, she points out, was for the appellant to cut himself with, as he had done many times over the previous weeks. She points out that none of these matters were addressed by the learned judge in sentencing.

13. Whilst accepting that the basic offence was no more than an A3 offence, Miss Millar, appearing for the Crown, argued in the Respondent's Notice that there were a number of very weighty aggravating features which justified the judge in uplifting the sentence very considerably above the A3 range for the basic offence before applying the further uplift for the aggravated offence. There was no medical or pre-sentence report before the judge and no request to adjourn for them. Moreover, the appellant on his own account had stopped taking his medication. Accordingly the judge could not be criticised for not having given great weight to the factors to which Miss Mitchell has referred in mitigation.

Decision on length of sentence for the assault

14. We agree with Miss Millar to this extent, that the aggravating factors, in particular the number of relevant previous convictions, aggravated the sentence considerably. But even if this were to move the basic offence up into Category A2, the starting point then is a medium level community order with a range of up to 16 weeks' custody. Applying an uplift for the aggravated A2 offence (“consider a significantly more onerous penalty of the same type or consider a more severe type of sentence than for the basic offence”) could not in our view justify a sentence of eight months, particularly not after allowing some reduction for mitigation. As to that, we note that although recommended by the single judge, a medical report has not been able to be obtained in the time available. It appears further that the appellant was released on home detention curfew in mid-August but has since been recalled to prison for reasons of which we are unaware.
15. In our view the appropriate notional sentence after trial for the assault was one of no more than eight weeks. Applying a 25 per cent reduction results in a sentence of six weeks or 42 days. Adding that to the sentence of 146 days, about which no complaint is or could be made in respect of the bladed article offence, results in a total sentence of 188 days.

The other offences

16. We now turn to the other offences, namely the theft/shoplifting and the two failure to comply offences. These were all purportedly sent up for trial in the Crown Court by the Magistrates' Court. According to the Magistrates' Sending Sheet, one of the failure to comply offences was sent "for trial" notwithstanding that the appellant had already pleaded guilty to it. For this, and the further reasons which follow, these purported sendings were all unlawful with the result that the Crown Court had no jurisdiction to

deal with the appellant in respect of them. It is unfortunate that the propriety of sending what were obviously minor summary offences was not more closely checked by the CPS or the Magistrates' Court at the time.

The applicable law

Low-value shoplifting

17. Section 22A of the Magistrates' Court Act provides that in circumstances where a person purporting to be a customer steals goods from a shop, the value of which does not exceed £200, the offence is triable only summarily unless the offender elects to be tried in the Crown Court:

"(1) Low-value shoplifting is triable only summarily

(2) But where a person accused of low-value shoplifting is aged 18 or over, and appears or is brought before the court before the summary trial of the offence begins, the court must give the person the opportunity of electing to be tried by the Crown Court for the offence and, if the person elects to be so tried—

(a) subsection (1) does not apply, and

(b) the court must proceed in relation to the offence in accordance with section 51(1) of the Crime and Disorder Act 1998.

(3) 'Low-value shoplifting' means an offence under section 1 of the Theft Act 1968 in circumstances where—

(a) the value of the stolen goods does not exceed £200

(b) the goods were being offered for sale in a shop or any other premises, stall, vehicle or place from which there is carried on a trade or business, and

(c) at the time of the offence, the person accused of low-value shoplifting was, or was purporting to be, a customer or potential customer of the person offering the goods for sale."

Sending cases to the Crown Court for trial

18. The procedure for sending cases to the Crown Court for trial is set out in section 51 of the Crime and Disorder Act 1998 (“CDA 1988”). This section relevantly provides:

"(1) Where an adult appears or is brought before a magistrates' court ('the court') charged with an offence and any of the conditions mentioned in subsection (2) below is satisfied, the court shall send him forthwith to the Crown Court for trial for the offence.

(2) Those conditions are—

- (a) that the offence is an offence triable only on indictment other than one in respect of which notice has been given under section 51B or 51C below;
- (b) that the offence is an either-way offence and the court is required under section 20(9)(b) 21, 22A(2)(b), 23(4)(b) or (5) or 25(2D) of the Magistrates' Courts Act 1980 to proceed in relation to the offence in accordance with subsection (1) above;
- (c) that notice is given to the court under section 51B or 51C below in respect of the offence.

(3) Where the court sends an adult for trial under subsection (1) above, it shall at the same time send him to the Crown Court for trial for any either-way or summary offence with which he is charged and which—

- (c) (if it is an either-way offence) appears to the court to be related to the offence mentioned in subsection (1) above; or
- (d) (if it is a summary offence) appears to the court to be related to the offence mentioned in subsection (1) above or to the either-way offence, and which fulfils the requisite condition (as defined in subsection (11) below).

[...]

(11) A summary offence fulfils the requisite condition if it is punishable with imprisonment or involves obligatory or discretionary disqualification from driving.

[...]"

19. A summary offence is related to an indictable offence “if it arises out of circumstances which are the same as or connected with those giving rise to the indictable offence” (s.51E(d) CDA 1988).

Committal for sentence of non-imprisonable and non-disqualifiable offences

20. Section 20 of the Sentencing Act 2020 allows a magistrates court, when sending an offender to the Crown Court to be sentenced or dealt with under specified circumstances in respect of an indictable offence, also to send another offence. The relevant parts of section 20 are as follows:

"(1) This section applies where a magistrates' court ('the committing court') commits an offender to the Crown Court under—

- (e) sections 14 to 19 (committal for sentence for indictable offences)
- (f) paragraph 5(4) of Schedule 2 (further offence committed by offender given conditional discharge order)
- (g) paragraph 24(2) of Schedule 10 (committal to Crown Court where offender convicted of further offence while community order is in force)
- (h) paragraph 11(2) of Schedule 16 (committal to Crown Court where offender commits further offence during operational period of suspended sentence order)
- (i) section 43 of the Mental Health Act 1980 (power of magistrates' courts to commit for restriction order)
- (j) section 6(6) or 9(3) of the Bail Act 1976 (committal to Crown Court for offences of absconding by person released on bail or agreeing to indemnify sureties in criminal proceedings), or
- (k) the Vagrancy Act 1824 (incorrigible rogues), to be

sentenced or otherwise dealt with in respect of an offence ('the relevant offence').

(2) Where—

- (a) the relevant offence is an indictable offence, and
- (b) the committing court has power to deal with the offender in respect of another offence the committing court may also commit the offender to the Crown Court to be dealt with in respect of the other offence in accordance with section 23."

Application to this case

21. The assault offence and the bladed article offence were properly sent in accordance with the provisions of section 51(1).

22. The low level shoplifting offence was not related to the indictable offence, namely assault on an emergency worker, as the prosecution now accept. Nor did the appellant elect for trial in the Crown Court. It follows that the magistrates had no power to send the offence to the Crown Court and the sending was unlawful. As discussed in the case of *Butt* [2023] EWCA Crim 1131 the effect is that the offence never left the Magistrates' Court and must be dealt with there. We return to this below.

23. Failing to comply with a CPN is a summary only offence with a maximum sentence of a level 4 fine. As such this offence cannot be sent for trial to the Crown Court as it does not fulfil the requisite conditions of section 51(11) of the Crime and Disorder Act, being neither punishable with imprisonment nor attracting a disqualification from driving. Nor could the Magistrates' Court commit it for sentence as there was no related indictable offence alongside which it could be committed pursuant to section 20 of the Sentencing Act. Again, it follows that the magistrates had no power to send for trial or to commit for sentence the two offences of failing to comply with a CPN. Both offences are

accordingly to be treated as having stayed in the Magistrates' Court and are to be dealt with there.

Procedure for correcting these errors

24. In *Butt* the court confirmed the correct approach where there may have been an error in sending a case, posing the questions which may arise as follows, at paragraph 64:

"(i) What power was exercised by the magistrates' court when sending or committing a case to the Crown Court?

(ii) Was the power was exercised erroneously?

(iii) If so, what are the consequences of the procedural error?

(iv) What steps can or should be taken to correct the error?"

25. As to the last of these questions, Edis LJ giving the judgment of the court observed as follows at paragraph 83:

"This depends on the answer to the third question. If the consequence of the error is that the Crown Court has no jurisdiction, then the matter can be remedied by the magistrates' court using the power under section 142 of the 1980 Act. Alternatively, a judge sitting in the Crown Court could use section 66 of the 1980 Act to exercise the power of a District Judge (Magistrates' Court) under section 142. However, although there is power to do that, it may not be appropriate to do so for the reasons explained in *Gould* at [87] – [93]."

26. The case of *Gould* [2021] EWCA Crim 447 considered the circumstances under which it would be appropriate for judges of the Crown Court and the Court of Appeal to sit as DJ(MC)s under section 66 of the Courts Act 2003 when the circumstances of the case appear to require it. Edis LJ, again giving the judgment of the court, emphasised that it will not always be appropriate to proceed in that way, outlining at paragraphs 87 to 93 a

number of matters which a court should consider before deciding to do so.

27. The recent cases of *Butt* and *Gould* provide a detailed review of the legislation and the powers of judges in the Crown Court and Court of Appeal to sit as DJ(MC)s under section 66 of the Courts Act 2003. Courts facing issues such as those arising in this case will want to acquaint themselves very thoroughly with the principles and the correct approach set out in those authorities. In the present case the Recorder, no doubt facing a busy list and having had none of the sending issues drawn to his attention (counsel themselves being unaware of them) proceeded to get on and deal with all matters before him. He is not to be criticised for doing so. Nevertheless, we must now determine what is to be done with the offences which were wrongly sent.

Sitting as a Divisional Court

28. We propose to address the unlawfulness of sending by sitting as a Divisional Court. With the agreement of counsel we will dispense with the formalities regarding time for service and service of a claim form and quash the sending of the theft offence and the two failing to comply offences. The result of this is that the plea of guilty to, and the sentence of 30 days for, the theft offence, together with the order for no separate penalty on the first of the two offences of failing to comply with a CPN, can no longer stand and must be quashed. The prosecution offering of no evidence to the Crown Court on the second of the failure to comply offences is also a nullity.

Sitting as a DJ(MC)

29. Immediately following the giving of this judgment, and having satisfied ourselves that it is appropriate to do so in accordance with the principles discussed in *Gould*, May J will sit as a DJ(MC) for the purposes of dealing with the three offences remaining in the Magistrates' Court. Since the appellant's plea of guilty to theft before the Crown Court

was ineffective, it will be necessary for the offence to be put once more and for May J to take the appellant's plea to that offence sitting as a DJ(MC). As discussed with counsel, since sentence can only take effect when pronounced, that is to say from today, and since it is now well over 30 days since the appellant appeared at Canterbury Crown Court where he was purportedly sentenced to 30 days concurrent for the shoplifting offence, if there is a plea of guilty and the appellant is sentenced then the sentence pronounced by May J today will be one of absolute discharge. May J will make an order for no separate penalty on the first of the failing to comply offences on which the appellant had already pleaded guilty at the Magistrates' Court. In relation to the second of the failing to comply offences and upon the prosecution formally offering no evidence, May J will dismiss the case pursuant to section 9 of the Magistrates' Courts Act 1980.

Conclusion

30. Sitting as a Divisional Court we dispense with the formalities of timing and claim form.

The purported sendings to the Crown Court of the theft offence and the two offences of failing to comply with a CPN are quashed.

31. Sitting as a Court of Appeal, we quash the sentence of 182 days on count 2 (assault on an emergency worker) replacing it with a sentence of 42 days. The sentence of 146 days consecutive passed on count 3 (bladed article offence) remains unchanged. The total sentence is accordingly one of 188 days.

32. Following on from the order we have made sitting as a Divisional Court, the appellant's plea of guilty to theft entered at the Crown Court is vacated and the sentence of 30 days' imprisonment ordered to run concurrently for the offence of theft is quashed. The order for no separate penalty on the offence of failing to comply with a CPN is likewise quashed.

33. May J will now proceed to sit as a DJ(MC). We will start by putting the theft offence.

(To the defendant): Mr McGuinness, it is said that on 26 January 2024 you committed the offence of theft when you stole four cans of Heineken lager and a newspaper from a Sainsbury's petrol station in Whitstable. Do you plead guilty or not guilty to that offence?

34. MR McGUINNESS: Guilty.

35. MRS JUSTICE MAY: Thank you. The record of the Magistrates' Court will need to record a plea of guilty to that offence of theft.

36. As you will have heard us discuss just before, Mr McGuinness, the sentence which I pass for that offence of theft is one of an absolute discharge.

37. As to the first of the failing to comply offences which you entered a plea of guilty to at the Magistrates' Court what must seem like a long time ago now, I pass a sentence of no separate penalty for that.

Miss Millar, can we move to the second of those offences?

38. MISS MILLAR: Yes, thank you very much. In respect of the second failure to comply with the CPN, which just for clarity is in respect of Mr McGuinness having an open vessel of alcohol, the prosecution would formally offer no evidence in respect of that offence.

39. MRS JUSTICE MAY: Thank you. In that event, sitting as a DJ(MC) I will dismiss the case pursuant to section 9 of the Magistrates Courts Act 1980.

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

Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk