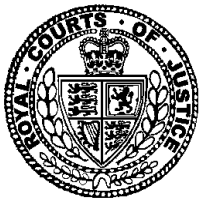

Neutral Citation Number: [2020] EWCA Civ 470

Case No: A2/2020/0400

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (QUEENS BENCH DIVISION)
Ms Rowena Collins-Rice (sitting as a Deputy Judge of the High Court)
QB-2019-000558

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 March 2020

Before :

LORD JUSTICE McCOMBE
and
LORD JUSTICE PETER JACKSON

- -

Between :

Gary Nichols	**Appellant**
- and –	
Chelsea Football Club Limited	**Respondent**

- -
- -

Hafsah Masood (instructed by **Scott-Moncrieff & Associates Ltd**) for the **Appellant**
Edward Rowntree (instructed by **Kerman & Co**) for the **Respondent**

Hearing date : 26 March 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2pm on Friday, 27 March 2020.

Lord Justice Peter Jackson:

1. On 26 March 2020, we heard an appeal from a sentence passed for contempt of court. At the end of the hearing, we dismissed the appeal and said that we would give our reasons in writing. These are my reasons for concurring in that decision.

2. The appeal hearing was conducted remotely. We are grateful to the parties' representatives and to the court staff for making the necessary arrangements. We particularly thank Ms Masood, counsel for the appellant, from whom most was required during the hearing. The very clear outcome of the appeal is no reflection on her well-judged advocacy.

3. Turning to the facts: on 25 February 2020, the appellant Gary Nichols was committed to prison for 21 weeks for contempt of court. The contempt consisted of a breach of an order made on 19 February 2019 by Dove J by which the appellant was prohibited from dealing in Chelsea Football Club tickets. The breach occurred on 4 December 2019 when the appellant was filmed selling a ticket to an agent of the club near Stamford Bridge stadium on a match day. The appellant admitted the breach and on 14 January 2020 Ms Margaret Obi, sitting as a deputy Judge, found him to be in contempt of court and adjourned sentencing. On 25 February 2020, Ms Rowena Collins-Rice imposed the sentence of imprisonment and suspended it for 72 hours to allow an application for a stay to be made to this court. That application was refused by Coulson LJ on 28 February 2020, since when the appellant has been in custody.

4. The appellant was at the time of the breach also subject to a suspended sentence for contempt of court for a similar breach of a High Court order. In July 2018 he sold four Wimbledon tickets in breach of an order made by Lindblom J on 26 September 2011. On 7 September 2018, Lane J sentenced the appellant to six months imprisonment, suspended for two years.,

5. In her careful sentencing remarks, the deputy Judge directed herself as to the principles in respect of sentencing for contempt and as to the nature of the contempt with which she was dealing.

> "5. I am required to pass the minimum sentence which I consider to be effective to punish the behaviour which has occurred, deter others from doing likewise and secure future respect for court orders from the person having been found to be in contempt. I am directed by the guidelines and the authorities to look at the culpability of the breach, that is how seriously blameworthy it is, and at the harm done.
>
> 6. As to culpability, in this case I note that the fact of the breach is undisputed. Mr Nichols says in the statement I have before me that the act of trafficking constituting the contempt was impulsive and made under a degree of personal stress. But however planned or unplanned the act of trafficking may have been, Mr Nichols had a choice. He chose to breach the order. He did so deliberately and for personal gain (albeit modest). I have no evidence that the order itself or the suspended sentence to which he was subject acted as a material restraint on his

> behaviour. He acted in disregard or defiance of the decision of the court, in a way which inevitably defeated the objectives of the court, contrary to the interests of justice. The apology briefly noted in Mr Nichols' statement before me today does not persuade me that the gravity of this conduct is fully understood, or that an unambiguous attempt has been made to purge the contempt adjudged by Ms Obi in January and give confidence of restored respect for court decisions. All of this points to a high degree of culpability.
>
> 7. As to harm, I have noted what decided cases emphasise about the perniciousness of ticket touting: the harm it does to the business model of sports organisations, the exposure of purchasers to having the tickets rejected or, conversely, the risks posed to public order and public safety by unauthorised and uncontrolled access to sports grounds. Mr Nichols was party to an inherently harmful activity. On the other hand, I also remind myself that there is a single incident before me today with no evidence as to any particular consequences, and that the harm in this case is therefore of a general rather than a specific nature. I consider the degree of harm on the facts before me to be no more than moderate."

6. In her approach to penalty, the Judge was equally careful:

> "9. Applying the guidance given by the authorities, it is difficult to see that I can commensurately pass any sentence short of immediate custody. I note that that was the expectation of Ms Obi, having tried the case and adjourned sentencing for the purpose of enabling personal mitigations to be put forward. I am satisfied that nothing less than immediate custody addresses the culpability of this conduct, or is likely to deter others or constrain Mr Nichols' future behaviour. I am reinforced in this view by the fact that the contempt was committed during the currency of a suspended sentence also for contempt, involving ticket touting in breach of an order of the High Court. I consider that to be a seriously aggravating factor. It demonstrates a sustained and apparently undeterred lack of respect for orders of the court and for the administration of justice.
>
> 10. When I come to consider personal circumstances I therefore start with the fact that Mr Nichols is not entitled to be treated as a person of good character because this is not the first occasion on which a sentence of imprisonment for contempt of court is being passed on him."

7. The Judge then considered personal mitigation, being matters related to the appellant's health, and his financial and family circumstances. She did not find much of relevance in the appellant's medical conditions but she gave some weight to his family circumstances:

> "13. … He has provided no specific evidence as to his finances, or indeed as to the potential impact of a period of imprisonment on his family. But I give what he and his son say as much mitigating weight as I am able to. I have particular regard to what is said about the impact on his family. His family are the innocent victims of his conduct and I am sorry for the consequences which they are set to face as a result of it."

8. The Judge noted the two year maximum sentence for contempt. She took as a starting point a six month sentence. She took account of the admission of breach, but said that she considered it late and "at the door of the court". She passed a sentence of five months imprisonment, expressed in her order as one of 21 weeks.

9. There are two grounds of appeal. The first is that in assessing culpability and mitigation the Judge failed to take account of the fact that the appellant said he had breached the order because of the activities of the club's agents and would not have done so otherwise. The second is that the Judge gave too little credit for the appellant's admission. A third ground of appeal as originally pleaded, namely that that the judge should have taken as her starting point the Sentencing Guidelines for breach of a criminal behaviour order in the context of the offence of ticket touting (s.166 Criminal Justice and Public Order Act 1994), has wisely been abandoned. As the Judge expressly stated, she was sentencing for contempt of court not ticket touting.

10. As to the first ground of appeal, Ms Masood argued that the appellant had accepted the breach on the basis of his account, which was in effect that he had gone to the area intending to try to sell scarves and had only sold the ticket (which he had had to get from what he described in his statement as "another tout") in a moment of weakness. Ms Masood argues that the Judge should have regarded the circumstances as akin to entrapment, which can be a mitigating factor in criminal proceedings. If not, she should have held a *Newton* hearing to establish the basis of plea.

11. In relation to entrapment, Ms Masood relied upon a passage at Archbold (2020 ed.) at 5A-68 for the proposition that if a court takes the view that but for the activities of an informer an offence would not have been committed, it may think it right to mitigate the penalty. However, the same paragraph also states that the use of test letters to establish that mail is being stolen or test purchases to gather evidence of drug dealing will not be a mitigating factor. At all events, Ms Masood suggested that a proper starting point to reflect the nature of the appellant's breach should have been in the order of 3 months.

12. As to the second ground, Ms Masood submits that the appellant's admission of breach entitled him to a discount of a third or a quarter of the starting point of six months imprisonment, whilst the Judge's discount amounted only to 17% for all mitigating features. She refers to the decision of this court in *Liverpool Victoria Insurance Co. Ltd. v Zafar* [2019] EWCA Civ 392; [2019] 1 WLR 3833 at [68]:

> "Having reached a conclusion that a term of committal is inevitable, and having decided the appropriate length of that term, the court must consider what reduction should be made to reflect any admission of the contempt. In this regard, the timing of the admission is important: the earlier an admission is made

> in the proceedings, the greater the reduction which will be appropriate. Consistently with the approach taken in criminal cases pursuant to the Sentencing Council's definitive guideline, we think that a maximum reduction of one-third (from the term reached after consideration of all relevant aggravating and mitigating features, including any admissions made before the commencement of proceedings) will only be appropriate where conduct constituting the contempt of court has been admitted as soon as proceedings are commenced. Thereafter, any reduction should be on a sliding scale down to about 10% where an admission is made at trial."

13. In this case, says Ms Masood, the committal summons was served on the Appellant on Christmas Eve and he did not get legal representation or see the film until 9 January. On 10 January his solicitor indicated to the club's solicitor that he might admit the breach. He should have received a substantial discount for a plea at the earliest opportunity.

14. Despite Ms Masood's able submissions, I unhesitatingly reject both of these submissions for the following reasons.

15. First, this court is reluctant to interfere with sentencing decisions of this kind: *McKendrick v Financial Conduct Authority* [2019] EWCA Civ 524 at [37].

16. Second, as to the argument that the Judge was bound to assume that the appellant was entrapped, I note what Coulson LJ said when refusing a stay:

> "The argument about what was or was not admitted at the earlier hearing should not arise at all: if it was important to limit the extent of the appellant's admission, he should have signed a written basis of plea."

As to substance, it was immaterial that the sale was to an agent. The use of agents is a necessary element in combatting touting and, as Mr Rowntree notes, passed without comment in *Corrigan v Chelsea FC Ltd.* [2019] EWCA 1964. The appellant did not know he was dealing with an agent and the evidence does not gainsay the deputy Judge's conclusion that he made a deliberate choice to sell the ticket. The sentence was entirely appropriate, even on the appellant's own chosen basis of plea. The concept of entrapment had no part to play in this case. Had the club's agent's turned up on the appellant's doorstep in Surrey and asked him for a ticket, that might be one thing, but for it to happen when the appellant was standing on the Fulham Road on a match day is another.

17. Third, the submission that the Judge selected the wrong starting point of six months is misconceived. This appellant had already received a six month sentence for a similar breach and, as My Lord said in argument, he might think himself lucky that the starting point this time was not higher. The suggestion that a lower starting point should have been chosen for a repeated breach – a reverse ladder – is obviously unsound.

18. Fourth, the Judge took into account by way of mitigation the appellant's admission and, to some extent, the impact on his family. She made a distinct reduction for those factors

and, even if she might have characterised such admissions as were made as being at an earlier stage than the door of the court, she was not obliged to do more than that.

19. Finally, since the starting point was proper, the submission that the appellant was entitled to a discount of a third or a quarter must be seen for what it is. A discount of a quarter would have reduced the sentence to one of 4½ months, and a discount of a third would have made a sentence of four months. Unless the overall sentence is manifestly excessive, it is not the role of this court to engage in fine-tuning of this kind. On an appeal against sentence in a contempt case it will look at the matter in the round. It will ask, was this sentence a proper one for this contempt by this contemnor? By that standard, the appellant's sentence was entirely proper. He has shown what the Judge rightly described as a sustained and apparently undeterred lack of respect for orders of the court and for the administration of justice. She considered the matter with care and imposed a sentence that was well within the appropriate range for this breach by this contemnor. Had permission to appeal been required, it would surely not have been granted.

20. For those reasons, I agree with the dismissal of the appeal.

Lord Justice McCombe:

21. I agree.

22. With respect to Ms Masood, I would simply wish to add the following on two aspects of her able submissions on behalf of the Appellant.

23. First, she objects that the breach of the order admitted by Mr Nichols only occurred because of the action of the claimant's agents. That, to my mind is not a material feature in this case. In the criminal courts, as my Lord has noted, many offences of drug dealing are committed by the dealers when they sell drugs to police officers making "test purchases". That is the way in which drug dealers are caught and the knowledge, in that "trade", that such officers are active serves as a useful element of deterrence of such activity. The fact that the offences are committed in that way will not readily amount to a factor in mitigation of the offences committed. It will depend upon the circumstances. In this case, where the sale was willingly made, with the assistance (as the Appellant put it himself in a recent statement) of "another tout", the point has no force in mitigation.

24. Secondly, Ms Masood's argument by-passes the fact of this appellant's very poor record. He committed this breach within the active period of the suspended sentence passed by Lane J on 12 September 2018. While there were no specific conditions of suspension identified in that judge's order and while it would not have been open to the judge in the present case to activate the sentence imposed by Lane J, the fact of that order is a very material consideration in assessing the seriousness of the present breach. In the criminal courts, if an offender commits an offence during the currency of a suspended sentence, he is liable to have the earlier sentence activated and an additional sentence imposed for the more recent offence. That course of action was not, of course, open to the judge in the present case, but she would have been fully entitled to bear the analogy in mind in considering what sentence to pass, having regard to all the facts. The earlier suspended custodial sentence passed by Lane J was one of 6 months imprisonment.

25. The starting point for sentence in this case could well have been higher than that taken by the judge in this case and, even if (which I do not accept) a greater discount might have been afforded for the admission made, the overall sentence was in no way excessive.
