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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 27 June 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE WARBY

MR JUSTICE JULIAN KNOWLES

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 OF THE CRIMINAL JUSTICE ACT 1988

R E G I N A
v
ANTHONY HENRY WILLIAM FEARN

Ms D Heer appeared on behalf of the **Attorney General**

Mr R H English appeared on behalf of the offender **Anthony Fearn**

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J U D G M E N T
(Approved)

1. MR JUSTICE HOLROYDE: On 30 January 2019, in the Crown Court at Bolton, Anthony Fearn pleaded guilty to an offence of burglary, contrary to Section 9(1)(b) of Theft Act 1968, the particulars of that offence being that he had entered as a trespasser a dwelling, the address of which was given, and inflicted grievous bodily harm on one John Edwards. On 25 April 2019 he was sentenced to a community order of two years, with a drug rehabilitation requirement for six months, a rehabilitation activity requirement of 20 days and a requirement of performing 150 hours of unpaid work. Her Majesty's Solicitor General believes that sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.

2. The relevant facts can be briefly summarised. Mr Fearn had an on-off relationship with a woman called Laura Ord. Miss Ord at times worked as a prostitute. Mr Edwards was one of her clients. In the early hours of 6 August 2018 he was woken by Miss Ord shouting outside the house which he shared with his elderly mother, claiming that he owed her money. He refused to give her any money. Miss Ord left, threatening to return and break his windows. It seems that she returned to her home and told Mr Fearn that she was owed £90.

3. An hour or so later Mr Edwards again heard shouting outside his home. This time it was Mr Fearn demanding money. Another man was with him who has not been identified. Mr Edwards went outside and refused to give Mr Fearn any money. Mr Fearn and the other man then pushed their way into the house. Mr Fearn went upstairs where he found and took £90. The other man took the television. Mr Fearn came downstairs and punched Mr Edwards in the face, causing a depressed fracture of the right cheek bone. The two men then left. A neighbour heard Mr Fearn encouraging the other man to hurry up because the police would soon be there.

4. Police officers were indeed quickly on the scene. The other man was seen carrying the television. He dropped it and ran away, successfully avoiding arrest. Mr Fearn was arrested at his home. In interview he denied that he had been at Mr Edwards' home and denied punching him. As his pleas later confirmed, that was untrue. He was identified at a subsequent VIPER procedure.

5. Mr Fearn was originally charged with offences of robbery and attempting to cause grievous bodily harm with intent. He pleaded not guilty to both those charges at a plea and trial preparation hearing on 3 September 2018. He did, however, through his representatives indicate to the Crown Prosecution Service a willingness to plead guilty to an offence of assault occasioning actual bodily harm. Unsurprisingly, that proposal was not accepted.

6. On the day fixed for the trial, 30 January 2019, Mr Fearn pleaded guilty to the offence of burglary, which we have described, on the basis that he had not used any weapon, as Mr Edwards had at one stage alleged, that he had taken the £90 in the belief that it was owed to Miss Ord and that he had told the other man not to steal the television set.

Sentencing was adjourned so that a Pre-Sentence Report could be obtained.

7. The case came back before the court on 15 February 2019, but it was not possible to proceed on that day and it was further adjourned. The judge granted bail to Mr Fearn, subject to conditions, thus ending a period of remand in custody which had extended to a little over six months. Mr Fearn was then to spend the next 68 days subject, as we understand it, to a qualifying curfew before his eventual sentencing on 25 April 2019.

8. Mr Fearn is now aged 34. He has been sentenced on 27 separate occasions for a total of 47 offences, principally offences of dishonesty, but including offences of robbery, battery and disorder. It is relevant to note a few of those convictions. In February 2004 he was sentenced to a community rehabilitation order for an offence of burglary in a dwelling, with intent to steal, and a separate offence of theft from a dwelling. He was aged 18 when he committed those offences. In July 2013 he received a suspended sentence of ten months' imprisonment for an offence of burglary and theft in a dwelling, committed when he was aged 28. Two years later in 2015 he received a short, suspended sentence for an offence of burglary and theft in a non-dwelling. He subsequently committed a number of offences stealing from shops. His most recent sentence was a total of six months' imprisonment, suspended, which had been imposed in January 2016 for offences of theft and battery committed the previous month. As a result of the two previous dwelling burglary offences, Mr Fearn was liable to the minimum sentencing provisions of section 111 of the Powers of Criminal Courts (Sentencing) Act 2000.

9. The judge was assisted at the sentencing hearing by a Pre-sentence Report. This indicated that the offender had been using class A drugs since a very young age, albeit that there had been periods of abstinence, and Mr Fearn had described his substance misuse to the probation officer as "out of control". From the account which he gave of the offence, the probation officer inferred that Mr Fearn had been financially motivated because his girlfriend wanted money with which to buy class A drugs. The report noted that at the time of the offence Mr Fearn had taken heroin, and it seems, benzodiazepine tablets, and toxicology results also showed the presence of cocaine. He told the author that he paid his regular bills from his benefits but spent the remainder of his limited income on maintaining his substance misuse.

10. Since being remanded in custody he had engaged with drugs services and was on a methadone reduction programme. He was assessed as being suitable for a drug rehabilitation requirement and it was noted that he had complied with the suspended sentence imposed in 2016. Mr Fearn acknowledged to the author of the report the impact of drugs on his life and health and said that he wanted to address this. As to his health, the report noted that Mr Fearn was suffering mobility issues as a result of injecting into his groin, and also had been diagnosed in the past with depression and anxiety.

11. The author of the report recognised that the minimum sentencing provisions applied but indicated that if the court was able to consider an alternative, Mr Fearn would be suitable for a drug rehabilitation requirement and for a rehabilitation activity requirement, but not for unpaid work because of “his health, mental health and substance misuse issues".

12. In addition, the court had a letter written to the court by Mr Fearn himself in which he apologised for his behaviour. He indicated that Miss Ord had told him that Mr Edwards had strangled her, and feeling that he had to defend her, that information had sent him into a rage.

13. It is apparent that the learned judge took great care over the sentencing process in this case. He requested and received helpful written submissions from both prosecution and defence, and oral submissions were made at the sentencing hearing. In particular, detailed submissions were made as to whether the judge should consider not only the sentencing guideline relating to domestic burglary offences but also the guideline relating to offences of inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861. Those issues have not featured at all in the oral submissions made to this court today and we therefore do not think it necessary to rehearse them. It suffices for present purposes to note that it is not submitted on Mr Fearn's behalf that this was a case in which an application of the Sentencing Guidelines would result in a sentence very much below the minimum level of sentencing prescribed by section 111.

14. In his detailed sentencing remarks the judge noted that allegations had originally been made by Mr Edwards to the effect that he had been struck with a weapon but that those allegations were no longer maintained by the prosecution and that Mr Fearn was to be sentenced on the basis of his plea to the burglary offence. The judge indicated that although the guideline for dwelling house burglary was relevant, the focus of that guideline was on offences of burglary with intent to steal or burglary and theft. He rejected a submission by the prosecution that under the burglary guideline this was an offence falling into category one. The judge said that factors which the prosecution submitted indicated greater harm, namely that the occupier was at home and violence was used were, in effect, part and parcel of the offence. The suggested higher culpability factor of the offender being a member of a group was, said the judge, not present, because although the other man was in the premises, he took no part in the attack on Mr Edwards.

15. The judge referred to the decision of this court in the Attorney General's Reference R v Shallcross [2017] EWCA Crim 2080, [2018] 1 Cr App R (S) 29. He relied on this as indicating that it was permissible for him to look at the Guidelines for section 20 offences, and in accordance with that guideline, he placed the case into category three. He concluded that having regard to the fact that Mr Fearn had barged into Mr Edwards' home and had there assaulted him, and having regard to the previous convictions, the appropriate sentence before consideration of any reduction for a guilty plea would have been one of two years' imprisonment. He allowed a reduction of 25 per cent for the guilty plea on the basis that, although it came at a late stage, there had been an earlier indication of a willingness to plead guilty to an offence of assault occasioning actual bodily harm.

16. The judge then turned to consider the impact on the case of section 111 of the 2000 Act. He noted that if the provisions of that Act applied, the minimum sentence to be imposed, having regard to the guilty plea, would be one which is conventionally expressed as imprisonment for 876 days. He concluded that it would be unjust to apply the minimum sentencing provisions, having regard to the cumulative effect of a number

of factors: first, the unusual circumstances of the offence; secondly, the substantial period of time for which Mr Fearn had kept out of trouble before committing this offence; thirdly, the efforts which Mr Fearn had been making to conquer his drug problem; and fourthly, the time span of the qualifying burglary offences.

17. The judge accepted the expression of remorse in Mr Fearn's letter as genuine and summarised the content of the Pre-Sentence Report as indicating that there was now an opportunity for Mr Fearn "to potentially turn away from drug misuse and offending". It was in those circumstances that he imposed the sentence to which we have referred.

18. In addition to the Pre-Sentence Report which was before the judge, this court has the advantage of a supplementary report dated 29 May 2019. It indicates that since the community order was made, Mr Fearn has attended a total of four appointments, as instructed, and has complied and engaged with his supervision sessions. His ongoing health problems prevent him from currently performing unpaid work and the author of the up-dating report thinks it "highly unlikely" that Mr Fearn will be able to complete his unpaid work in the near future.

19. The report goes on to note that Mr Fearn is now residing with a new partner, who is something of a stabilising factor, but the author was not sure as to whether that relationship would continue and felt that overall, "there are not many protective factors in place". The report notes that Mr Fearn had started to address his drug use by being prescribed methadone but had admitted that he is still using drugs, namely cocaine and heroin.

20. We are very grateful to Miss Heer for the Solicitor General and Mr English on behalf of Mr Fearn for their helpfully focused submissions in this hearing. Miss Heer submits that the sentence was unduly lenient. The previous convictions have the effect that section 111 imposes a presumption of a minimum sentence unless that presumption is displaced by particular circumstances relating to the offence or to the offender which would make it unjust to impose the minimum sentence. Miss Heer submits that there were in reality no particular circumstances relating either to the offence or to the offender which made it unjust. She acknowledges in the light of the case law that a sentencer in such circumstances has a fairly wide discretion, but she submits, there must be a realistic assessment of the evidence as the foundation for any favourable exercise of the discretion.

21. She submits that of the four factors specifically mentioned by the judge, the only one which in principle might be capable of justifying a departure from the provisions of section 111 would be a realistic prospect that a non-custodial sentence might successfully promote the rehabilitation of the offender. But, she argues, there was here no sufficient evidence to justify any finding of such a realistic prospect. She points out that Mr Fearn had made no apparent attempts to address his drug use before his arrest for this offence. He committed this offence under the influence of heroin, and notwithstanding his expressed wish to conquer his drug misuse, he is still taking drugs. The four factors, even if viewed collectively, did not justify a departure from the minimum sentence.

22. Mr English in response acknowledged that the sentence was lenient but submits that it was

not unduly lenient. As to the fact that the offender is still taking drugs, Mr English points out that Mr Fearn has been using class A drugs since adolescence and could not realistically be expected to turn away from them overnight. His good intentions should be recognised as having a realistic prospect of success. Mr English also points to the fact that the period preceding this offence was the longest period which Mr Fearn has completed without being convicted of any criminal offence since he became an adult. He argues that the judge, after the most careful consideration was satisfied that it would be unjust to apply the minimum sentencing provisions, and Mr English submits that the judge was entitled to reach that conclusion.

23. We have considered those submissions. There is, of course, no doubt that by reason of the relevant previous convictions for offences of domestic burglary, Mr Fearn was liable to the prescribed minimum term in accordance with the provisions of section 111. The object of that statutory provision is to require courts to impose a sentence of not less than the prescribed minimum term in circumstances where but for the section the courts would not or might not do so: see R v McInerney and Keating [2002] EWCA Crim 3003, [2003] 2 Cr App R (S) 39 at [16]. The correct approach is to apply the Definitive Guideline for burglary offences in the usual way and then to check that the resulting provisional sentence does not infringe the minimum term provisions. If it does, the court must then consider whether there are particular circumstances relating to the offence or to the offender which make it unjust to impose the minimum sentence: see Leonard [2018] EWCA Crim 870. The length of time which has elapsed between the qualifying offences is a matter to be taken into account but is not in itself a factor which makes it unjust to impose the minimum sentence: see Attorney General's Reference, R v Marland [2018] EWCA Crim 1770, [2018] 2 Cr App R (S) 51 at [24]. Although the effect of applying the minimum term provisions may in some circumstances seem harsh, the courts must not treat perfectly normal circumstances as being "particular circumstances" in order to circumvent the statute: see Lucas [2011] EWCA Crim 2806, [2012] 2 Cr App R (S) 14 at [14] and Marland at [24].

24. As we have indicated, we do not think it necessary to give detailed consideration to the application of the Sentencing Guidelines to the circumstances of this offence. In our view, this case falls at the top of category 2 or the bottom of category 1 in the domestic burglary guideline, before taking into account the serious aggravating features of previous convictions, intoxication by drugs, offending at night and the participation of a second offender. The proper application of the Guideline would lead to a sentence which, but for section 111, would be somewhat shorter than the minimum term prescribes. It would, however, in our judgment, be somewhat longer than the judge felt appropriate. Moreover, without thinking it necessary to go into the details, we are bound to observe that Mr Fearn can think himself very fortunate that the judge gave as much credit as he did for the late guilty plea, bearing in mind that all that Mr Fearn had done before entering the plea to the burglary was to indicate willingness to plead to a less serious offence which did not involve any element of intrusion in his victim's home.

25. As to the application of section 111, we agree that this was a type of burglary which is less familiar than most examples of that offence, but we do not see how the fact that this was an

offence of burglary followed by the commission of grievous bodily harm, rather than burglary followed by theft, is capable of assisting Mr Fearn. The crime is certainly no less serious than the more familiar form of burglary involving stealing or an intention to steal. Accepting, as did the court below, that Mr Fearn was not acting dishonestly in taking the £90, because he thought it was properly owing to Miss Ord, the fact remains that he inflicted grievous bodily harm on a man in his own home. He did so in anger as a form of revenge, when he had already accomplished his purpose of collecting the £90. True it is that many years had passed since the commission of the first qualifying domestic burglary, but there had not been a long period since the commission of the second qualifying offence and it is relevant to note that a succession of other criminal offences had been committed throughout the overall period. We are, therefore, unable to find any particular circumstance relating to the offence which would arguably render it unjust to impose the minimum term.

26. As to the circumstances relating to the offender, we acknowledge the point well made by Mr English as to the elapse of a little over two and a half years between the imposition of a suspended sentence in January 2016 and the commission of this offence, and we also acknowledge that the judge accepted Mr Fearn's letter expressing remorse as genuine. It is to the credit of Mr Fearn that he has shown a willingness to address his drug habit. We do not, however, regard these matters, either individually or collectively, as amounting to particular circumstances relating to the offender which would make it unjust to impose the minimum term. It is, we think, important to note that notwithstanding his present expressions of intent, Mr Fearn does not appear to have made any attempt to address his drug problem before he was arrested for this offence and was, as we have noted, under the influence of drugs when he committed it. We accept the submission of Miss Heer that there was no evidence capable of providing a solid foundation for saying that there was a realistic prospect of successful rehabilitation.

27. In those circumstances, with all respect for the judge who clearly did take considerable care over this sentencing process, we think it clear that there were no particular circumstances, relating to the offence or to the offender, making it unjust to apply the minimum sentencing provisions. We reach that conclusion having stepped back from an analysis of the individual factors mentioned by the judge and viewed them collectively and in the round. We reach the conclusion, moreover, having looked to see whether there is anything in the supplementary probation report which might encourage us to take a more optimistic view as to the prospects of rehabilitation, or otherwise merit favourable consideration.

28. For those reasons we grant leave to refer. We are satisfied that the sentence was unduly lenient because this was a case in which the minimum sentence should have been imposed and there was no sufficient reason for taking any other course.

29. We quash the community order imposed below. We substitute for it a sentence which we shall express as 876 days' imprisonment. It will be understood that the time which Mr Fearn spent remanded in custody will count towards that sentence.

30. In addition, we give a direction pursuant to section 240A of the Criminal Justice Act 2003 that he will receive full credit for half of the time which he has spent under curfew if the curfew qualified under the provisions of section 240A. On the information before the court the relevant period subject to curfew was 68 days, and accordingly, Mr Fearn is entitled to credit for 34 days; but if that period is mistaken this court will order an amendment of the record for the correct period to be recorded.

31. It follows that the offender must surrender to custody at a police station which will be identified shortly. He must do so by 4.00pm today.

32. MS HEER: I understand that the police station that he should surrender to is Bolton Police Station.

33. MR JUSTICE HOLROYDE: Mr English, is that correct, as far as you know?

34. MR ENGLISH: My Lord, yes. Thank you. That is right.

35. MR JUSTICE HOLROYDE: Mr Fearn must surrender to Bolton Police Station by 4.00 pm

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

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