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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 21 May2019

B e f o r e:

LORD JUSTICE HOLROYDE
MR JUSTICE PICKEN
SIR DAVID FOSKETT

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

R E G I N A
v
DESMOND PAUL ANTHONY SAGE

Ms D Heer appeared on behalf of the **Attorney General**
Mr U Ali appeared on behalf of the **Offender**

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J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: After a trial before a recorder and a jury in the Crown Court at Chelmsford, Desmond Sage (to whom we will refer as "the offender") was convicted of offences of aggravated burglary, wounding with intent and having an offensive weapon. On 13 March 2019, he was sentenced to concurrent terms of imprisonment amounting in total to 6 years 6 months.

2. Her Majesty's Attorney General believes that total sentence to be unduly lenient. Application is accordingly made by her Majesty's Solicitor General, 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.

3. The victim of the offences was David Webb. At the time of the offences Mr Webb was living with his mother, then aged 90; his son Mark; and Mark Webb's friend, Jodie Collins.

4. It appears that about 2 weeks before the offences were committed, some jewellery had been stolen from the offender's partner. She told the offender that Jodie Collins and Mark Webb were the thieves. She also told him not to get involved. The offender nonetheless went out looking for them and eventually learned their address.

5. On 26 June 2018, the offender drove to Mr Webb's house. It should be noted that he did not hold a valid driving licence and was not insured to drive. He had with him in the pocket of his trousers an extendable baton. He knocked at the front door. Mr Webb, who can be seen on the relevant CCTV footage to be appreciably smaller than the offender and who at the time was only wearing a pair of shorts, opened the door. The offender demanded to know whether either Jodie Collins or Mark Webb was in the house. Mr Webb said that they were not. The offender demanded to know where they were. Mr Webb said he did not know. The offender said that Jodie Collins had stolen something from him and insisted that Mr Webb must know where they were. He then grabbed Mr Webb around the throat and pushed him backwards into a glass cabinet which stood in the hallway. As Mr Webb struggled to breathe, the offender pushed him back and forth into the cabinet two or three times, causing the glass to break.

6. The offender then began to reach into his trousers, causing Mr Webb to fear, rightly, that he had a weapon. Mr Webb ran out of the house in his bare feet, pursued by the offender, who was by now carrying the extended baton. The offender struck Mr Webb several times about the body with the baton, pushed him backwards into a bush and kicked him in the legs. This attack came to an end when a neighbour, an off-duty police officer, intervened and pulled the offender away. The offender shouted at Mr Webb that he would "come back and burn your house down" and then drove away.

7. Mr Webb was taken to hospital, where he was found to have suffered multiple lacerations to his scalp, his back, his right upper arm, his right leg and one of his toes. He could not move his right elbow without pain. There was a deep wound to his right forearm with skin loss and associated tendon damage. Initially this wound was sutured

under local anaesthetic but Mr Webb later required plastic surgery and a skin graft to replace the lost skin.

8. In a victim personal statement recorded about 10 weeks later, Mr Webb indicated that he had had to take 6 or 7 weeks off work so that he could attend the necessary hospital appointments and allow his wounds to heel. The injury to his elbow still gave him pain, he had lost strength in his right arm and there was permanent scarring on the right forearm. He said he had initially found it difficult to sleep and was very worried when he heard any noise. He remained scared if someone knocked at his front door.

9. The offender was arrested on 6 July 2018. In interview under caution he admitted that he had gone to Mr Webb's house, but denied that he had been armed and claimed that he had only intended to ask for the return of the stolen jewellery. He falsely alleged that Mr Webb had become aggressive towards him, that Mr Webb had fallen into the glass cabinet during the ensuing struggle and that Mr Webb had then tried to attack him with part of an umbrella. The offender said he had not known there was an elderly lady in the house at the time and that he would not have gone there if he had known.

10. At we have indicated, the attack upon Mr Webb gave rise to three charges. On count 1 of the indictment, the offender was charged with aggravated burglary, contrary to section 10(1) of the Theft Act 1968, the particulars being that he had entered Mr Webb's house as a trespasser with intent to inflict grievous bodily harm on Mr Webb, a person therein, and at the time of committing that burglary he had with him a weapon of offence, namely an extendable baton.

11. Count 2 charged him with wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861.

12. Count 3 charged him with an offence contrary to section 1 of the Prevention of Crime Act 1953 of having an offensive weapon, the extendable baton, in a public place, namely the road on which Mr Webb's house is situate.

13. The offender is now 52 years of age. He had 32 previous convictions, a number of which were for offences involving violence, public disorder and the possession of offensive weapons. His first offence of violence was an assault occasioning actual bodily harm in 1998, for which he was sentenced to 12 months' imprisonment. He received a short prison sentence in 2000 for possession of an offensive weapon. He was sentenced to 6 months' imprisonment in 2003 for offences of assaulting a police constable and threatening behaviour. In February 2007, he was made subject to a community order for possessing a bladed article in a public place. In September 2007, he was sentenced to 8 months' imprisonment for possessing an offensive weapon, namely an extendable baton in a public place. In 2009, he was sentenced to 6 months' imprisonment for offences of threatening behaviour and possession of an offensive weapon, the circumstances being that he threatened his victim with an extendable baton. In 2011, he was sentenced to 6 months' imprisonment for possession of a prohibited weapon, namely a CS gas canister. In 2013, he was sentenced to 12 months' imprisonment for an offence of assault occasioning actual bodily harm, the

circumstances being that he had punched his victim in the head, grabbed him by the throat and thrown him down a flight of stairs.

14. No pre-sentence report was thought to be necessary and none is necessary at this stage. The recorder was provided with evidence confirming that the offender was the main, though not the sole, carer for his mother, who at the age of 85 has the misfortune to suffer from vascular dementia following a stroke. The remanding in custody of the offender had had an adverse effect upon his mother, who had lost the benefit of his management of her daily routine, felt frightened on her own and had difficulty understanding that she might not see her son again. Evidence from the offender's sister, who also assists in the care of their mother, indicated the practical difficulties of providing the level of daily care which the offender had provided.

15. Submissions were made about the appropriate categorisation of the offences under the relevant sentencing guidelines. The recorder concluded that the offence charged in count 1 was a category 2 offence. He rejected a submission by prosecuting counsel that the offence fell within category 1 and in particular he rejected a submission that the offence involved higher culpability because a weapon was present on entry into the house. Although that was factually correct, said the recorder, it was in any event a necessary ingredient of the offence. The recorder concluded that the offence charged in count 2 was a category 3 offence, rejecting a prosecution submission that it fell into category 2. In relation to count 3, the recorder and counsel all agreed that the offence fell into category B1.

16. In his sentencing remarks, the recorder noted that the offender had taken the weapon away from the scene with him and it had never been recovered. He rightly described the incident as a "completely unprovoked and violent assault on a man inside his own home". He referred to the physical and psychological injuries sustained by Mr Webb. He described the offender's criminal record as "appalling", although the last conviction for any offence had been in late 2013, and he particularly noted the four most recent offences involving violence and the possession of weapons. He noted that the offender had been in work since 2013 and had been living with and caring for his elderly mother, who was affected by the imprisonment of the offender.

17. The recorder then turned to the sentencing guidelines and in particular to the Sentencing Council's definitive guideline on burglary offences. He indicated that although there had been a degree of planning, he did not accept the prosecution submission that the aggravated burglary offence involved the higher culpability factor of "a significant degree of planning and organisation". Although the weapon had been present when the offender entered Mr Webb's house, the recorder viewed that as an essential ingredient of the offence and therefore declined to place the offence into higher culpability on the basis of the factor "weapon present on entry".

18. He added that in terms of weapons he regarded this case as falling at the lower end of the range of weapons of offence, and he noted that in any event the weapon had not been brandished within the house at the time the burglary was committed. He went on to say:

> "And so on the facts of this case I don't regard this as comfortably fitting within the category of higher culpability. There are no factors indicating lower culpability. It's not a straightforward case applying the guidelines on the facts of this case but I treat it as being effectively within category 2, with a starting point of 6 years and a range of 4 to 9 years."

19. In relation to count 2, the recorder accepted that Mr Webb had been pushed into the glass cabinet several times, but was not convinced that the offence therefore came within the description of "a sustained or repeated assault". He therefore regarded the offence as falling within the higher end of category 3 in the relevant guideline.

20. As to count 3, he said that there was no dispute that it fell within category B1.

21. In relation to each of the offences, he noted the aggravating factor of the relevant previous convictions. He did not find the offender to be dangerous for sentencing purposes.

22. In the result, the Recorder imposed a sentence of 6 years 6 months' imprisonment on count 1 with concurrent sentences of 5 years' imprisonment and 30 months' imprisonment on counts 2 to 3 respectively.

23. A number of summary motoring matters were also to be dealt with. The Recorder imposed no separate penalty for these, other than to order licence endorsement with 3 points for driving without a licence and 6 points for using a vehicle without insurance.

24. Finally, one summary matter which the offender had denied was remitted to the magistrates' court.

25. Ms Heer, for the Solicitor General, submits that the judge misapplied the sentencing guidelines and passed a total sentence which was unduly lenient. As to count 1, she submits that the offence involved three factors indicating greater harm: the victim was at home, significant physical or psychological injury was caused to him and violence was used against him. She submitted that two factors indicating higher culpability were present: a significant degree of planning and a weapon present on entry. There were no factors indicating either lesser harm or lower culpability. The case was therefore one of greater harm and higher culpability and so fell within category 1 of the guideline with a starting point of 10 years' custody and a range from 9 to 13 years.

26. Ms Heer submits in particular that the judge fell into error in failing to treat the undoubted fact that the baton was present when the offender entered Mr Webb's house as a higher culpability factor on the basis that it was an essential element of the offence. She further argues that the judge failed to recognise the element of significant planning involved in the offender's searching for Mark Webb and Jodie Collins and attending Mr Webb's house armed with a weapon, and in concluding that the use of the weapon could not be taken into account in respect of count 1 as the baton was not used until after Mr Webb had fled from the house.

27. By way of alternative submission, Ms Heer argues that even if one or more of the factors on which she relies was properly left out of account at step 1 of the sentencing process, it should have been regarded as a significant aggravating factor at step 2.

28. As to the offence charged in count 2, Ms Heer submits that the offence involved higher culpability because there was a significant degree of premeditation and a weapon was used. It did not involve greater harm. Accordingly, it was a category 2 offence with a starting point of 6 years' custody and a range from 5 to 9 years. The recorder, she submits, was wrong to think that the factor relating to the use of a weapon was not present.

29. As to count 3, Ms Heer accepts that this was correctly placed into category B1: it involved the use of a weapon which was not a bladed article or highly dangerous weapon to threaten or to cause fear and the offence actually caused serious alarm or distress. The starting point was therefore 9 months' custody and the range from 6 to 18 months.

30. Ms Heer acknowledges that recorder was correct to impose concurrent sentences and she accepts that the offender's role as the main carer for his mother was a mitigating factor to be taken into account. But, she submits, a total sentence of 6 years 6 months' imprisonment following a trial failed to impose proper punishment for the overall offending and was unduly lenient.

31. For the offender, Mr Ali submits that whilst the total sentence might be regarded as lenient, it was not unduly lenient. He emphasises that the recorder had heard all the evidence over the course of a 3-day trial and had therefore had a good opportunity to make an assessment of the overall criminality of the offender. Mr Ali argues that the recorder had taken into account all of the violence, both inside and outside the house, but he points out that the principal injuries were sustained inside the house and there was no clear evidence as to what, if any, further injury was caused by the use of the baton outside.

32. Mr Ali goes on to submit that the recorder correctly rejected the allegation of a significant degree of planning. He points out that the offender arrived at the house alone, knocked at the door and made no attempt to conceal his identity.

33. Mr Ali further relies in relation to count 1 on a number of matters of mitigation, including the fact that the offender had only gone to Mr Webb's house because of the theft from his partner of items of jewellery which had a sentimental value for her, and the offender's important role in caring for his elderly mother.

34. Mr Ali also points out that the offender has turned his life around since late 2013. He has held responsible employment since then and has avoided any offending. He adds that the offender was extremely remorseful, though it may be difficult to reconcile that submission with the unsuccessful contesting of a trial.

35. As to count 2, Mr Ali repeats the submission that it was difficult to identify what, if any, injuries had been caused outside the house and he submits that the injuries as a whole were less serious than is often found in cases involving this offence.

36. We are grateful to both counsel for their written and oral submissions. Before coming to our conclusions about them, we should refer to one other aspect of the sentencing. Section 28(4) of the Road Traffic Offenders Act 1988 provides that:

> "Where a person is convicted (whether on the same occasion or not) of two or more offences committed on the same occasion and involving obligatory endorsement, the total number of penalty points to be attributed to them is the number or highest number that will be attributed on a conviction of one of them (so that if the convictions are on different occasions the number of penalty points to be attributed on the offences on the later occasion or occasions shall be restricted accordingly)."

37. The two offences which the offender admitted were driving without a licence, which has a range of between 3 and 6 points; and using a vehicle without insurance, which has a range of between 6 and 8 points. Thus, the maximum number of penalty points which it was open to the Recorder to impose was 8, from which it follows that the imposition of a total of 9 penalty points was unlawful. We understand that a belated attempt was made to correct this error under the slip rule, but the criteria for the use of that procedure were not met and the attempt was accordingly without legal effect. Thus, as things stand, the order imposed in relation to penalty points is unlawful.

38. We consider first the issue raised as to the application of the higher culpability factor "weapon present on entry" in the aggravated burglary guideline. Section 9 of the Theft Act 1968 provides:

> "(1)A person is guilty of burglary if—
>
> (a)he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below; or
>
> (b)having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.
>
> (2)The offences referred to in subsection (1)(a) above are offences of stealing anything in the building or part of a building in question, of inflicting on any person therein any grievous bodily harm and of doing unlawful damage to the building or anything therein."

39. By section 10 of the 1968 Act:

> "(1)A person is guilty of aggravated burglary if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon

of offence, or any explosive ... "

It is unnecessary for present purposes to set out the precise definition of "any weapon of offence": it clearly applies to the extendable baton carried and used by the offender in this case.

40. Ms Heer has helpfully invited our attention to the cases of R v O'Leary [1986] 82 Cr App R 341 and Attorney General's Reference (R v Powell) [2018] 1 Cr App R (S) 40. In O'Leary, the court held that the phrase "at the time" in section 10 of the 1968 Act relates to the time when the relevant offence of burglary is committed. It is therefore necessary to consider which limb of section 9 of the Act applies in a particular case. The circumstances in O'Leary were that the appellant had been unarmed when he trespassed in a private house but had then picked up a knife from the kitchen and had used it to injure the occupants when confronted by them. The particulars of the charge of aggravated burglary in that case identified the relevant burglary as a section 9(1)(b) offence, the allegation being that the offender had entered as a trespasser and stolen various items. That offence was complete in law when the appellant, having entered the house as a trespasser, stole property within it. The court said at page 343:

> "It follows that under this particular charge, the time at which the defendant must be proved to have had with him a weapon of offence to make him guilty of aggravated burglary was the time at which he actually stole."

41. In Powell, the appellant was charged with aggravated burglary, the particulars of the charge being that he had entered the relevant premises as a trespasser and had inflicted grievous bodily harm on his victim and that at the time of committing that offence he had with him a knife. The underlying offence of burglary was therefore one contrary to section 9(1)(b) of the Act. The circumstances were that the appellant had gone to his victim's home armed with a knife, he had forced his way into the property and there attacked his victim using the knife. It was submitted on his behalf that the only potential higher culpability factor was that there was a weapon present on entry but that should be disregarded as a form of double counting because it was inherent in the commission of the offence. On that basis, it was successfully submitted on behalf of the appellant that the case was not one of higher culpability and the offence fell into category 2 rather than category 1 of the sentencing guideline.

42. Upon a reference to this court by the Attorney General, it was held that the judge below had been in error. At paragraph 12 of the judgment of the court given by Treacy LJ, it was said:

> "That analysis might apply to the form of aggravated burglary where a person enters a property as a trespasser intending inter alia to commit grievous bodily harm and had a weapon with him at the time of entry. The form of offence alleged in this case is complete when grievous bodily harm is inflicted and all that the Crown has to prove is that the offender had the weapon with him at the time of infliction of the injuries. Accordingly the presence of the knife at the time of entry was open for consideration as a higher culpability factor since its presence on entry is

not inherent in the offence."

43. We respectfully agree with the decision in Powell on the facts of that case. It is, however, important to note that the court was there concerned specifically with a section 9(1)(b) offence, which required proof that the appellant had the weapon with him at the time when he inflicted the injuries and not necessarily at the earlier time when he had entered the premises as a trespasser. The court did not decide that the higher culpability factor of "weapon present on entry" would inevitably apply also to a case such as the present, where the underlying offence of burglary is a section 9(1)(a) offence and the offender has the weapon with him at the point when he enters the relevant premises. Indeed, it seems to us to be implicit in the language used at the end of the paragraph which we have quoted that in a section 9(1)(a) case the presence of the weapon on entry would not necessarily be "open for consideration as a higher culpability factor".

44. We see the force of the point made by Ms Heer that a burglar who goes to the premises already armed commits an inherently more serious offence than one who goes to the premises unarmed but later picks up a weapon whilst inside the premises. On the other hand, it must be borne in mind that the sentencing levels in the aggravated burglary guideline are substantially higher than the levels for corresponding offences in the burglary guideline.

45. We have concluded that in cases such as the present, that is a section 9(1(a) offence of burglary with intent to commit grievous bodily harm by an offender who is armed with the relevant weapon at the time of entry, there be will a substantial level of double counting if that factor alone is relied upon as elevating the case to one of higher culpability. There may be circumstances in which no improper double counting would be involved, though no such circumstances have been suggested in the course of argument today. In the circumstances of the present case, however, we are not persuaded that the recorder was wrong to reject the submission that the factor of "weapon present on entry" would alone be sufficient to make this a case of higher culpability contributing to an overall finding of a category 1 offence with a starting point of 10 years' custody.

46. Nor are we persuaded that the recorder was wrong in deciding that the circumstances here did not involve the higher culpability factor of a significant degree of planning or organisation. Certainly the offender had devoted time and energy to finding out where the suspected thieves lived and had armed himself before going to that address. Nonetheless, we agree with the recorder that it is difficult to regard the offence of aggravated burglary as involving a significant degree of planning or organisation.

47. In our judgment, accordingly, the aggravated burglary offence charged in count 1 was a category 2 offence involving greater harm but not higher culpability. Given the presence of a number of factors indicating greater harm and the serious aggravating feature of the offender's previous convictions, a sentence high in the category 2 range was called for.

48. As to count 2, this, in our judgment, was plainly a category 2 offence involving higher culpability because of the use of a weapon. With respect to the recorder, it seems to us that the result of his approach was that in the end no weight at all was given to the undoubted and serious fact that the offender had used an extendable baton to strike a number of blows.

49. Although count 3 may be said to have added comparatively little to the overall criminality, the feature of having an offensive weapon in a public place was significant in the light of the offender's previous convictions.

50. It was of course necessary for the recorder to have regard to the important principle of totality. The three offences were three aspects of what could fairly be regarded as a single incident, and it was important to avoid double counting. We are nonetheless satisfied that the sentence imposed failed to impose just and proportionate punishment for the overall offending. It is, we think, relevant to consider what the position would have been if Mr Webb's attempts to run out of the house had been unsuccessful and the offender had caught him and set about him with the baton just before he left the hallway. In such circumstances, it is difficult to resist the conclusion that it would have been a category 1 offence of aggravated burglary with a starting point of 10 years' custody before consideration of the aggravating feature of previous convictions. Whilst we have concluded that the aggravated burglary was properly regarded as falling within category 2, it is difficult to see why the overall criminality should be regarded as substantially less serious merely because Mr Webb managed to escape and run a few yards before being caught. Whilst the feature of being attacked with a baton inside his own home is absent, the added feature of pursuing and further attacking an already injured man is present.

51. We sympathise with the position of the offender's mother and sister, who suffer as a result of his crime. However, in the circumstances of this case, there is a limit as to how far that mitigating factor can assist the offender, who was of course aware of his mother's position when he chose to drive to Mr Webb's home with an extendable baton. It is also relevant to note that although the offender did not know it, and she did not witness the attack on her son, there was in fact an elderly woman present in the house when the offender entered it and attacked Mr Webb.

52. We accept that the other points of mitigation advanced by Mr Ali are factors which must be taken into account and which go some little way to reduce the overall sentence.

53. In all the circumstances of this case, we do not see that an overall sentence of less than 9 years' imprisonment can be justified. We therefore grant leave to refer. We quash the sentence on count 1 below as being unduly lenient and we substitute for it a sentence of 9 years' imprisonment. Thus, the total term of imprisonment is increased to 9 years.

54. We quash the 3 penalty points imposed for the offence of driving without a licence. We quash the 6 penalty points imposed for the offence of using a vehicle without insurance, and substitute 8 penalty points. Thus, the total number of penalty points is reduced from 9 to 8.

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

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