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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1628



CASE NO 202002599/A4

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Wednesday 13 October 2021

LADY JUSTICE SIMLER DBE  
MR JUSTICE SPENCER  
THE RECORDER OF LIVERPOOL  
HIS HONOUR JUDGE MENARY QC  
(Sitting as a Judge of the CACD)

REGINA  
V  
PATRICK SYMES

Computer Aided Transcript of Epiq Europe Ltd,  
Lower Ground, 18-22 Furnival Street, London EC4A 1JS  
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR P KILTY appeared on behalf of the Appellant

J U D G M E N T

1. MR JUSTICE SPENCER: This is an appeal against sentence brought by leave of the single judge. We grant the necessary short extension of time.
2. On 20 August 2020 in the Crown Court at Liverpool, the appellant, who is now 32 years of age, was sentenced by His Honour Judge Byrne to a term of 10 years' imprisonment for an offence of conspiracy to commit domestic burglaries. He had pleaded guilty to that offence on 28 February 2020 and was afforded credit of 25 per cent for his guilty plea. It follows that the sentence of 10 years after plea represented a sentence of 13 years four months after trial. The maximum sentence for domestic burglary, and for this offence of conspiracy to commit domestic burglary, is 14 years.
3. By his basis of plea, the appellant admitted responsibility for a total of 41 domestic burglaries over a period of some four-and-a-half months. His co-defendant Lewis Smith also pleaded guilty to the same conspiracy but admitted involvement in only four burglaries. He was sentenced to 27 months' imprisonment.
4. The grounds of appeal are, first, that there was an unfair disparity between the appellant's sentence and that of his co-accused; and second, that the sentence of 10 years was manifestly excessive, in particular given that the appellant had previously been sentenced to a term of 15 months' imprisonment for two of the very burglaries within the conspiracy. In effect it is contended the total sentence the appellant received was in excess of the 14-year maximum for the offences, before credit for plea.
5. We are grateful to Mr Kilty for his written and oral submissions.
6. At the sentencing hearing the facts of the individual burglaries within the conspiracy were opened in some detail. For present purposes we adopt the judge's summary of the overall picture set out in his sentencing remarks.
7. These 41 domestic burglaries were committed during the period of four-and-a-half months between 15 October 2018 and 28 February 2019. They were committed on 19 separate dates throughout Liverpool and surrounding areas in the North West. For the most part the burglaries were committed after dark. Properties were selected because it was likely they were unoccupied at the time, but on some occasions the occupant was in fact at home and the appellant ran off when he discovered this. There was no confrontation with any householder.
8. The appellant was by far the most active of the two defendants. It was the appellant who entered through the rear of the properties, by breaking glass in the back doors. Having gained entry, the appellant conducted untidy searches, looking specifically for cash and jewellery. Most of the searches were in the bedrooms.
9. The appellant's conduct caused a very high degree of distress and expense to a great many people. A great deal of loss was caused to many householders, not only in significant monetary value but also in sentimental value. For example, several wedding and engagement rings were stolen; jewellery belonging to householders' parents was stolen and in one burglary military service medals were stolen. A great deal of damage was caused to rear patio doors and to windows and alarm boxes, running into thousands of pounds.
10. Most importantly, the burglaries caused significant fear and anxiety for the householders whose homes were invaded. The judge gave examples in his sentencing remarks. One mother of two young children returned home to discover the burglary and now felt unsafe and anxious in her own home, describing it as a "living nightmare". Another was greatly distressed by the theft of her late husband's wedding ring and signet ring. Another spoke

of the loss of the safe feeling in her own home. Another spoke of feeling like a nervous wreck. A ring which her son had bought for her was stolen "valueless to anyone else" (as she put it) but priceless to her. Another spoke of the horror of seeing her bedroom trashed and feeling violated.

11. One of the houses that was burgled was the home of a disabled woman in her eighties who was in hospital at the time awaiting open heart surgery. A friend was looking after the house for her. The presence of equipment for a disabled person would have been obvious, but the house was still ransacked.
12. The appellant had previous convictions for burglary, theft and handling stolen goods but none for domestic burglary. On several occasions he had been made the subject of community orders.
13. On 9 August 2019 he was sentenced to 15 months' imprisonment for two offences of domestic burglary committed on 27 February 2019 within the period of this conspiracy. That was his first sentence of immediate custody. We have been supplied with the sentencing remarks of the judge on that occasion, His Honour Judge Cummins QC. The two burglaries were assessed as Category 2 offences under the Sentencing Council Guideline, each with a starting point of 12 months after trial and a range up to two years. The judge considered that the sentence after trial would have been 20 months. With 25 per cent credit for his guilty pleas the sentence was 15 months concurrent for each burglary.
14. We note that the appellant had been on bail before sentence. It follows that he would have started to serve that sentence on 9 August 2019, the day it was imposed, and would have been eligible for release on licence at the halfway point towards the end of March 2020. In fact, however by then the police had completed the investigation of all the other burglaries in the conspiracy. The appellant was sent for trial on the charge of conspiracy on 11 December 2019 and formally remanded in custody, although at that stage he was serving the previous sentence. We also note that at that stage, as the Better Case Management Form records, the appellant was denying conspiracy to commit burglaries. The position changed at the PTPH hearing on 28 February 2020 when the appellant pleaded guilty.
15. It follows from this chronology that from about a month after that PTPH, when the appellant had finished serving the 15-month sentence, he was remanded in custody for the conspiracy only and therefore time served from that date onwards will count towards his present sentence.
16. The co-accused Lewis Smith was of similar age to the appellant. By his basis of plea, he accepted acting as a driver for the appellant in relation to four burglaries only, which had been committed on four separate occasions. He did not enter any of the properties. His involvement spanned a period of only one month. He had convictions for dishonesty, including burglary, but no domestic burglaries.
17. There was no pre-sentence report in the case of the appellant, nor was any report necessary then or now. A lengthy custodial sentence was inevitable.
18. The judge accepted that the appellant was now remorseful. He and his partner had three children and the appellant had also been a carer for his aunt who had mental and physical disabilities. In mitigation it was explained that the appellant had become addicted to cocaine with a drug debt spiralling out of control. The money he made from the burglaries had all gone on drugs.

19. In his sentencing remarks, the judge said that the appropriate sentence for each of the individual burglaries in the conspiracy would have been three years after trial. However, he had to sentence him for a large number of burglaries committed pursuant to the conspiracy. The judge said a conspiracy was always more serious than a substantive offence because it demonstrated a high degree of planning and each conspirator lent active encouragement and participated in the overall aim of the conspiracy. The sentence had to reflect that.
20. The judge noted in his sentencing remarks that the appellant had received a 15-month sentence on 9 August 2019 for two domestic burglaries which fell within the period of the conspiracy. He said he would make a downward adjustment to the sentence so that there was no double-counting. Taking into account all the mitigation and aggravating features, the judge passed the sentence of 10 years' imprisonment.
21. Mr Kilty submits first that there was an unfair disparity between the sentence of 10 years imposed on the appellant and the sentence of only 27 months' imprisonment for the co-accused Lewis Smith, although they had both pleaded guilty to the same conspiracy. Mr Kilty realistically acknowledges that because the appellant was admitting involvement in 41 burglaries and the co-accused only four, the different scale of culpability between the two defendants did justify "quite different sentences", as he put it in his written submissions. He contends however that the level of that difference was excessive and wrong.
22. Second, Mr Kilty submits that despite the scale of this offending the burglaries lacked some of the more serious aggravating features often present. He enlarged upon this submission in his focused and attractive oral submissions. For example, there was never any real confrontation with a householder; there was no violence; there was no particular targeting. We also note, as Mr Kilty confirmed, that a fair number of these burglaries would not have been proved against the appellant had it not been for his eventual frank admission of all 41 offences in his basis of plea.
23. In particular, however, Mr Kilty points out that because the two burglaries for which the appellant was sentenced separately on an earlier occasion were in fact part of a conspiracy, the appellant had in effect received a sentence before credit for plea of 13 years four months on the present indictment, plus 20 months consecutive for the previous offences, a total of 15 years' imprisonment, whereas the maximum sentence for domestic burglary is 14 years. He submits that although the judge said he would make a downward adjustment to reflect the fact that the earlier burglaries were part of the same conspiracy, in fact he failed to do so. The reduction from the maximum of 14 years' imprisonment before credit for plea was only eight months rather than 20 months.
24. We have considered these submissions carefully. Dealing with disparity, plainly there was an enormous difference between the involvement of the two defendants in this conspiracy. The appellant admitted 41 burglaries; the co-accused only four. The period of the co-accused's involvement was only one month, whereas that of the appellant was four-and-a-half months. It was the appellant who entered the properties on each occasion and stole and caused the damage. The co-accused was merely the driver. Whilst they were equally guilty of the offence of conspiracy in law, there was a very significant difference in their culpability. In these circumstances we are quite satisfied that there was no unfair disparity such as would cause an informed member of the public to think that something had gone wrong in the sentencing process.

25. We accept that at first sight there is greater force in Mr Kilty's second submission having regard to the earlier sentence served by the appellant. It is a question of totality. We think the judge would have been entitled here to start at or close to the maximum of 14 years for the conspiracy, before credit for plea. The fact that it is possible to envisage a more serious case of conspiracy to burgle-for example with even more individual burglaries- is no reason not to pass the maximum sentence. The true principle in the authorities is that the maximum sentence permitted by statute is reserved not for the worst possible case that can realistically be conceived, but for cases which in their statutory context are truly identified as cases of the utmost gravity: see R v Bright [2008] EWCA Crim 462; [2008] 2 Cr App R (S)102.
26. The judge said that he would make a downward adjustment to avoid double-counting. However, if he started at 14 years it appears that before credit for plea he allowed a reduction of only eight months from the 14-year maximum to reflect the earlier sentence the appellant had served, whereas that sentence he had served was 20 months before credit for plea. We think that the judge should have deducted from the maximum sentence for the conspiracy the full sentence of 20 months (before credit for plea) passed by the judge for the previous offences within the conspiracy. The notional maximum for the conspiracy before credit for plea would then have been 12 years four months. Applying 25 per cent credit for plea this would produce a sentence of nine years and three months.
27. That is only nine months less than the sentence of 10 years that the judge imposed and normally that would not be a sufficient difference to render the sentence manifestly excessive. However, in the unusual circumstances of this case and in view of the judge's professed intention to avoid double-counting, we think that the principle of totality does require that the sentence be reduced in order to achieve a just and proportionate outcome. We therefore propose to round the sentence down to nine years, which represents an overall sentence of 13 years eight months before credit for plea.
28. We should say that in his oral submissions Mr Kilty told us that the appellant has been making good use of his time in custody; certainly the early weeks and months of his sentence have been served in very difficult conditions because of the impact of the pandemic. That has restricted, for example, the extent to which he has been able to have family visits. We do bear that in mind, but it cannot reduce the sentence any further. This court has made it quite clear that the longer the sentence which is imposed the less the impact of the pandemic is likely to be as time goes on, and the less relevance it has as a separate mitigating factor. Nevertheless we are grateful to Mr Kilty for informing us of the good progress the appellant has made and we trust that will continue.
29. Accordingly, we allow the appeal. We quash the sentence of 10 years' imprisonment and we substitute a sentence of nine years.

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS  
Tel No: 020 7404 1400  
Email: rcj@epiqglobal.co.uk

