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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 599

CASE NO 202300043/A2



Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 12 May 2023

Before:

LADY JUSTICE WHIPPLE DBE
MR JUSTICE GRIFFITHS
HIS HONOUR JUDGE FLEWITT KC
(Sitting as a Judge of the CACD)

REX
V
WARREN HEATLEY

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MR M McMinn appeared on behalf of the Applicant

J U D G M E N T

LADY JUSTICE WHIPPLE:

Introduction

1. This application has been referred to the full court by the Registrar. We grant leave to appeal and a representation order for counsel.
2. The appellant is now 32 years old. On 8 December 2022 he pleaded guilty to one count of non-domestic burglary. He was sentenced by His Honour Judge Falk at Snaresbrook Crown Court on the same day to 21 months' imprisonment. He had committed that burglary during the operational period of a suspended sentence of eight months' imprisonment which had been suspended for 18 months for breaking into a bicycle store in a residential block and stealing two bicycles worth £400 in total. The suspended sentence was activated with a reduced term of seven months' imprisonment to be served consecutively to the burglary sentence.
3. The appellant now appeals against the 21-month sentence for the burglary on the grounds that it was manifestly excessive, either because there was disparity with the co-defendant Kiely or because the judge took too high a start point to arrive at a sentence that was, as a result, manifestly excessive.
4. Given the argument about disparity it is necessary to detail the outcome of the appellant's two co-accused. The first was Dominic Kiely who was then aged 20. He pleaded guilty to burglary at the first opportunity in the Magistrates' Court and was sentenced by the magistrates to three months' custody for the burglary. He committed that offence during the 12-month operational period of a suspended sentence of 120 days' custody for possession of a bladed article, a Rambo knife, which sentence was activated in full by the magistrates to run consecutively to the burglary sentence.
5. The second co-defendant was Martin Mahoney, who was then aged 48. He pleaded

guilty on re-arraignment to burglary on 24 April 2023, just a few weeks before trial. He was sentenced by His Honour Judge Falk on the same day to 12 months' imprisonment. He committed the burglary during the 12-month operational period of a suspended sentence of eight weeks' imprisonment for an offence of driving whilst disqualified, which sentence was activated with a reduced term of one month consecutive to the burglary sentence.

The facts

6. At around 10.15 pm on 4 November 2022 an off-duty police officer was on the balcony of her home when she heard metallic grinding. She saw a silver pickup truck by the metal gates of Elite Landscapes, a nearby building site on Blackhorse View Road, London E17. The noise was coming from the actions of two men in hi-visibility jackets who were cutting through metal chains with an angle grinder. Once the chains were cut through the pair returned to the vehicle and reversed into the building site. The officer called 999. As the vehicle emerged several minutes later, with a number of newly-acquired tools in its truck bed, police pulled around the corner. The vehicle made off but stopped in a dead end. Two men, identified as the appellant and Kiely, attempted to make off on foot but were detained whilst hiding in nearby bushes. The third, Mahoney, remained in the vehicle and was also detained. The vehicle was searched and found to contain bolt cutters and an angle grinder. Two tools were also found in the back of the vehicle, a cement mixer which was valued at £600 and a Wacker plate which was valued at £1,200 bringing the total value of the goods stolen to £1,800. Both items were confirmed as belonging to Elite Landscapes. The pickup truck was also found to be bearing false number plates. The appellant gave no comment interview.

Sentence

7. In passing sentence, the judge recounted the facts. He said he would give credit of 25 per cent for the guilty plea. He noted the appellant's extensive previous convictions: 23 convictions for 22 offences of which 17 were for theft and dishonesty. He reminded himself of the bicycle theft which gave rise to the suspended sentence which he himself had imposed. He noted that he had given this appellant a chance by that suspended sentence. He also noted that the appellant had been ordered to pay compensation and comply with various requirements as part of that sentence but the appellant had not, by the time of this sentencing hearing, paid any compensation. Further, the appellant had breached the suspended sentence order, which breach had come before the same judge who had allowed that order to continue with the appellant serving one day's detention. Then on 4 November 2022 the appellant had committed this offence of burglary which was a second breach of the suspended sentence order.
8. The judge made reference to the Sentencing Council's Guidelines for Non-Domestic Burglary and concluded that this was a high culpability case given the extensive planning evidenced by the angle grinder and bolt cutters found in the back of the vehicle, as well as the use of Hi-Viz jackets, gloves and a vehicle with false plates. That put it in culpability Category A. The judge turned to harm and said that this was "not quite Category 1 harm", although he did not explain that comment. The judge acknowledged that the goods stolen were of medium value and were in the event returned to their legal owner. He concluded that the harm was within Category 2. That put the sentence within Category 2A of the guideline. The judge recorded that the starting point for Category 2A was a year, with a range of high level community order to two years' imprisonment.
9. The judge rejected defence counsel's submission that the burglary should be sentenced in Category 2B, which was the category applied by the magistrates when sentencing the

co-defendant Kiely. The judge said that the magistrates' view did not bind him and anyway he considered Category 2B was "completely out of kilter with what the right sentence should be".

10. The judge said that the sentence was "heavily aggravated" by the appellant's previous convictions and because the offence was committed during the operative period of a suspended sentence order which the appellant had breached twice and in relation to which there had been precious little engagement with probation. Further, there was aggravation by acting as part of a group. The judge then said this:

"... the starting point for this burglary is 21 months but the aggravating features take it outside the guidelines at two years and four months. I do give you 25% credit for your plea, which reduces that sentence to 21 months ... "

11. The judge then went on to deal with the activation of the suspended sentence in relation to which no issue arises on this appeal.

Grounds of appeal

12. Mr McMinn represented the appellant at sentence and we are grateful for his helpful written and oral submissions today.
13. We address first of all the submission that the judge took a starting point that was too high. The judge was plainly entitled to put this offending in Category 2A, given the degree of planning he identified. The guideline states that culpability A is present where there is "a significant degree of planning or organisation", whereas culpability B extends to cases where there is "some degree of planning or organisation". It was open to the judge to conclude on these facts and this evidence that the higher level of "significant" planning was present in this case. The judge concluded that this was Category 2 harm.

That was common ground and no there is no challenge to that assessment.

14. Category 2A indicates a start point of 12 months. A judge may of course take a start point above the guideline start point where the seriousness of the offence requires that and to the extent that there are features in the offending which warrant an uplift which will not be reflected by any separate adjustment for aggravation. In this case, however, the judge did not say why he was taking a starting point of 21 months before taking account of aggravation and credit for plea. If he did so to reflect what he considered to be the high degree of harm involved in this case, then with respect we think he was in error because this was not a high harm case. The items stolen were of medium value and were, in the event, returned to their lawful owner. If he did so to reflect the multiple aggravating factors in the case then that raises a concern in our minds about double-counting, given that the judge next said in terms that he was taking account of the aggravating features to make a further uplift of seven months to arrive at a sentence before credit for plea of two years and four months (or 28 months).
15. The uplift in the starting point to 21 months before taking account of the aggravation and credit for guilty plea, which two features in the end cancelled each other out, is not fully explained. In our judgment it results in an overall sentence for the burglary which is manifestly excessive.
16. We consider the appropriate starting point in this case should have been 12 months as the guideline suggests. It was necessary as the judge observed to uplift the sentence significantly to reflect the aggravation in this case. The judge went up by seven months which was appropriate and we would do the same to arrive at 19 months. Like the judge we would then deduct 25 per cent to reflect the credit due for guilty plea. We consider that the appropriate sentence for the burglary, subject to the next ground of appeal, would

be 14 months' imprisonment.

17. The second ground of appeal proceeds on the basis of disparity between the appellant's sentence and the sentence passed on Kiely. That disparity is now the difference between our suggested sentence for the appellant of 14 months and the three months imposed on Kiely for his involvement in this burglary. We are not persuaded that such a difference would offend right-minded members of the public with full knowledge of all the relevant facts and circumstances, or cause them to think that something had gone wrong with the administration of justice: see R v Fawcett [1983] 5 Cr.App.R (S) 158. Rather, we think that this is a case where significant disparity between those two offenders was always to be expected and can be explained: see R v Berry [2016] 7 Cr.App.R (S) 392. The differences are these:

- (1) Kiely stayed in the vehicle when the police arrived at the scene of the crime, whereas the appellant ran away and tried to escape, being found hiding in a bush.
- (2) Kiely pleaded guilty at the first available opportunity and so earned maximum credit, which is not true of the appellant.
- (3) Kiely was 20 at the time of sentence and much more lightly convicted, whereas the appellant was 32 and heavily convicted, including for many offences of dishonesty and theft.
- (4) Kiely was also in breach of a suspended sentence order but that was a significantly less onerous order of eight weeks in custody suspended for 12 months, by contrast with the appellant who was in breach of a suspended sentence order of eight months in custody suspended for 18 months.

18. These are differences of significance which go a long way to explaining the disparity in sentences passed.

19. It is right however for Mr McMinn to point out that the magistrates sentenced Kiely on the basis that the offending fell within Category 2B of the guideline whereas the judge sentenced the appellant on the basis that Category 2A applied. The difference rests on the distinction between the words "significant degree of planning" in the guideline for Category 2A and "some degree of planning" in the guideline for Category 2B.

Determining which is the more appropriate descriptor in any case depends on the facts and the evidence. It is an evaluative judgment on which reasonable people might reasonably reach different views. Perhaps Mr Kiely was lucky on his day in front of the magistrates. We are not persuaded that the outcome in his case provides any reason to reduce the sentence imposed on the appellant.

Conclusion

20. In conclusion we allow this appeal to the extent of quashing the sentence of 21 months and substituting in its place a sentence of 14 months for the burglary. The sentence otherwise remains undisturbed with the effect that the appellant will serve the activated suspended sentence of seven months consecutively to the 14 months we have imposed for the index offence, making a total sentence of 21 months.

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

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