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Neutral Citation No. [2023] EWCA Crim 673

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/01287/A3



Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 9th June 2023

B e f o r e:

LORD JUSTICE DINGEMANS

MRS JUSTICE STACEY DBE

MR JUSTICE SWEETING

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E X

- v -

MICHAEL WILSON

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Miss C Pattison appeared on behalf of the Attorney General

Mr C Myatt appeared on behalf of Mr Wilson

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction

1. This is an application by His Majesty's Attorney General, under section 36 of the Criminal Justice Act 1988, for leave to refer to this court a sentence which she considers to be unduly lenient. We grant leave.

2. On 3rd February 2023, in the Crown Court at Cambridge, the respondent, Michael Wilson (now aged 35), pleaded guilty to doing acts tending and intended to pervert the course of justice, dangerous driving and causing criminal damage.

3. Before the incident with which we are concerned, Mr Wilson had one conviction when aged 28 for battery, for which he was sentenced to a community order, and one conviction when aged 29 for breach of the community order, which was ordered to continue, and he was fined.

4. On 24th March 2023, in the Crown Court at Huntingdon, Mr Wilson was sentenced to a suspended sentence order, comprising a total custodial term of 24 months' imprisonment, suspended for two years, with an unpaid work requirement of 200 hours. That was made up as follows: on the count of perverting the course of justice, 16 months' imprisonment, suspended for two years, with 200 hours of unpaid work; on the count of dangerous driving, a consecutive term of eight months' imprisonment, again suspended for two years, and he was disqualified from driving for two years and ordered to take a compulsory, extended re-test; and for the count of damaging property, a concurrent term of four months' imprisonment, suspended for two years. Mr Wilson was also ordered to pay £12,000 compensation at the rate of £500 per calendar month. The forfeiture and destruction of drugs was ordered and a victim surcharge of £156 was made.

5. On behalf of the Attorney General the submission is made that the sentence should have exceeded 24 months' imprisonment, which meant that suspension could not be ordered because the court has jurisdiction only to suspend sentences of two years or under. Accordingly, it is said that the sentence was unduly lenient. Further, it is said that even if the Recorder had been entitled to come to a sentence of 24 months, having regard to issues of totality, the overall sentence of two years' imprisonment should not have been suspended because it is an established principle of law that for an offence of perverting the course of justice, a sentence of imprisonment will only be suspended in exceptional circumstances. That is because the offence of perverting the course of justice strikes at the heart of the criminal justice system.

6. On behalf of Mr Wilson, it is submitted that the total sentence imposed by the Recorder was appropriate and proportionate; it reflected all of the offending which was before her. Secondly, it is submitted that the Recorder was entitled to find that there were exceptional circumstances in this case and to suspend the sentence. Finally, it is submitted that if the sentence is considered to be unduly lenient, given developments since the imposition of the sentence, this court should exercise its discretion not to impose a sentence of immediate custody.

7. We are very grateful to Miss Pattison on behalf of the Attorney General and to Mr Myatt on behalf of Mr Wilson for their helpful submissions.

The Factual Background

8. On 21st August 2021, at around 2 am, Mr Wilson drove his Audi A3 sports car from his home address to a nearby property in Cambridgeshire. The journey took around two minutes. He drove his vehicle in Mount Pleasant Road across a grass verge, through a garden fence and into the front wall and bay window of a residential property located at 61 Mount Pleasant

Road. CCTV footage from inside the property captured the impact and gave an indication of speed at which Mr Wilson was driving at the time. It is common ground that the manner of his driving was dangerous. Mr Wilson immediately abandoned his vehicle and left the scene on foot.

9. Ms Ward lives at the property with her daughter. She was upstairs and asleep at the time of the incident. She awoke at the sound of the impact, looked out of the bedroom window and saw a male (which inferentially must have been Mr Wilson) hobbling up the road. It appeared to Ms Ward that the male had a girl with him. No further details have been obtained about the girl, notwithstanding all proper enquiries having been made by the police. A member of the public telephoned for police assistance.

10. The emergency services attended and found the Audi A3 vehicle embedded in the front wall of the property. The driver's side airbag was visible, having been deployed on impact.

11. Damage to the front wall of the property was valued at £19,930. The garden fence was damaged. So too were several items inside the living room.

12. Later that morning, at about 10.30, Mr Wilson commenced his attempt to pervert the course of justice. He telephoned the police and reported that he had been the victim of a burglary. He told police that he had woken up after a night drinking to find that the front door of his home was open. He remembered locking the front door, but may not have closed it fully. He said that his watch, earring and £200 in cash had been stolen from inside his address, and that his motorcar had been stolen from the drive. He subsequently made a false statement to that effect, which he ended by requesting compensation if criminal proceedings were pursued against any individual.

13. Mr Wilson was advised by police not to touch the front door or the hallway or surrounding area where he lived in order to preserve the forensic evidence. He later told the forensic officers that the areas had been touched by other residents.

14. The Audi motorcar was searched and forensically examined. Police found a total of 8.35 grams of herbal cannabis inside the vehicle.

15. DNA with a strong match probability to Mr Wilson was recovered from saliva which had been deposited on the driver's side airbag. An expert concluded that the presence of Mr Wilson's saliva on the airbag provided very strong support for the proposition that he had been the driver of the Audi motorcar at the time of the incident.

16. On 28th September 2021 (about one month after the incident), Mr Wilson attended a voluntary interview with police. He was shown a copy of his witness statement and the declaration of truth was read out to him. He confirmed that he had read it and understood it. He was asked about the finding of the DNA with a strong match probability to him on the airbag. He did not provide an explanation, but continued to deny being the driver of the Audi at the relevant time. He said that one of his lodgers and his brother would be able to confirm that he had been at home that night and that he had not been driving his Audi A3 at the relevant time. Police contacted the brother and lodger, but they did not support Mr Wilson's account.

The proceedings and sentence

17. Mr Wilson attended Peterborough Magistrates' Court on 5th April 2022 charged with the offences of dangerous driving, damaging property, perverting the course of justice and possession of Class B drugs (cannabis). He indicated not guilty pleas and the case was sent to the Crown Court at Cambridge. Mr Wilson was remanded on unconditional bail.

18. On 2nd September 2022 the case was listed for a plea and trial preparation hearing. Mr Wilson pleaded not guilty to dangerous driving, damaging property, perverting the course of justice and possession of Class B drugs . A provisional trial date was identified for the week beginning 9th January 2023.

19. In November 2022 those acting on behalf of Mr Wilson then contacted the prosecution. Following discussions between the parties, it was agreed that if Mr Wilson pleaded guilty to dangerous driving, damaging property and perverting the course of justice, the prosecution would not pursue the offence of possession of cannabis. This meant that the perverting the course of justice lasted some 15 months.

20. On 3rd February 2023 the case was listed and Mr Wilson pleaded guilty as previously agreed. An interim disqualification from driving was imposed and a pre-sentence report was ordered. Mr Wilson was given the usual warnings about custody. The discount for the guilty plea was 20 per cent. There is no issue about that discount for the guilty pleas at the time that they were made.

21. On 10th March 2023 the case was listed for sentence. A pre-sentence report had not been completed and the case had again to be adjourned. The sentencing hearing took place on 24th March 2023.

22. There were Victim Personal Statements from Ms Ward (the tenant), who set out the significant emotional and psychological impact that the offending had had upon her. She described the damage to the property and to the sentimental items that had been destroyed. Ms Ward had struggled to sleep at night and had to take time off work.

23. The owner of the property also provided a Victim Personal Statement in which he set out the financial impact and inconvenience caused to him. He had had to pay for repairs to be carried out to the property, through his insurance company. That affected his no claims bonus, and his insurance premiums had accordingly risen. He had also had to spend a lot of time going back and forth to the address to oversee the repairs. He described the whole process as "a nightmare".

24. The pre-sentence report which was prepared stated that Mr Wilson was no longer in a relationship with the mother of his daughter, in relation to whom there had been access issues. His daughter, who had been diagnosed with a medical condition, now lives with her mother and Mr Wilson on a 50:50 basis. He had been with his new partner for 12 months. She is a double amputee and is registered disabled. Mr Wilson is her carer.

25. Mr Wilson told the author of the pre-sentence report that on the night of the incident he had drunk two cans of lager and was in an emotional state because of issues over access to his daughter. He had made the decision to end his life. He therefore drove a short distance. His intention was to gain some speed and to drive directly towards a telegraph pole. There is a telegraph pole shown in the photographs that we have seen. He somehow missed the telegraph pole, drove through the fence and into the bay window of the house. He said that he ran away from the scene out of panic and upset. The following morning he had the idea to try to evade responsibility by suggesting that his car had been stolen. He said that he used cannabis each week and that the small quantity found in the car was his. He was employed.

26. The author of the pre-sentence report assessed Mr Wilson to be relatively mature and intelligent. He was not said to have significant learning difficulties. He had reported a history of mental health issues, namely depression and anxiety, but he had stopped taking medication approximately two years ago. The offence arose at a time when he was feeling

suicidal; it was a failed and misguided attempt to take his own life. He was assessed as being a low likelihood of general reoffending, but a risk of serious emotional and physical harm to known adults. There was said to be no risk to children, to staff in the criminal justice system, or to himself.

27. Character references from partners, friends and colleagues set out Mr Wilson's qualities as a father, partner, carer, friend, neighbour and employee. There was also a letter from his ex-partner and the mother of his child about the effect of imprisonment on their sharing arrangements for the care of their daughter and the effect of the loss of what was the family house, which was a property which Mr Wilson rents. We have been told that the property might be in jeopardy if he were to be sent to prison and lose his employment, which would be an inevitable consequence of his imprisonment.

28. The Recorder identified that the appropriate sentences after trial, having regard to all the aggravating and mitigating factors, would be 20 months' imprisonment for the offence of perverting the course of justice, and reduced that to 16 months to take account of the guilty plea. There was a sentence of ten months' imprisonment for the offence of dangerous driving, reduced to eight months for the guilty plea, which was ordered to run consecutively. The five months' imprisonment for the offence of criminal damage was reduced to four months and ordered to run concurrently.

29. The Recorder referred to a number of cases in relation to perverting the course of justice, including *R v Davies* [2013] EWCA Crim 671, in which a sentence of 12 months' imprisonment was upheld for an offender who had persuaded his girlfriend to report a car as having been stolen, and where the offence of perverting the course of justice had lasted for a similar period of time, but there was much less damage caused in that incident and there was less of an impact on other victims.

30. In passing sentence the Recorder said:

"These offences are serious and it is highly unusual to suspend a sentence involving perverting the course of justice unless there are exceptional circumstances."

The Recorder referred to the pre-sentence report and then continued:

"I am just persuaded that on balance there are exceptional circumstances in this case. This was a suicide attempt at a time when you were having significant difficulties in your family life. I also bear in mind your substantial caring responsibilities for both your daughter and your partner, and I bear in mind the recent Court of Appeal case in *Ali*. I consider there is a realistic prospect of rehabilitation and I consider that appropriate punishment can be achieved by means other than immediate custody."

The Recorder then imposed the suspended sentence order to which we have referred.

31. We have information from an updated report from the National Probation Service showing that since the imposition of the sentence Mr Wilson has completed 110 hours of the 200 hours of community service work that he was directed to perform, and that he has been paying the compensation at the rate of £500 per calendar month as ordered. The probation officer assessed his compliance with the suspended sentence order as excellent.

The Relevant Principles of Law

32. There are currently no sentencing guidelines for the offence of perverting the course of justice. There are draft guidelines, but it is common ground that the court should not consider them.

33. In *Attorney General's Reference No 93 of 2009* [2009] EWCA Crim 1375, it was stated that there is a longstanding principle that perverting the course of justice is so serious an offence that it is almost always necessary to impose an immediate custodial sentence, unless there are exceptional circumstances. That is because such actions as giving a false account of events to investigating authorities undermines the very system of criminal justice which is thereby impeded in its function. Therefore, even in cases relating to driving offences, immediate custody, albeit sometimes of short duration, can be expected for providing false information about the driver's identity.

34. Previous guidance shows that when sentencing for the offence of perverting the course of justice it is necessary for the court to consider: (1) the seriousness of the substantive offence; (2) the degree of persistence in the conduct; and (3) the effect of the attempt to pervert the course of justice. It has been pointed out that conduct which tends and is intended to pervert the course of justice strikes at the heart of the administration of justice and almost invariably calls for a custodial sentence, although any immediate sentence does not have to be very long in order to achieve the important aim of deterrence: see *R v Tunney* [2006] EWCA Crim 2066 at [10], and *R v Abdulwahab* [2018] EWCA Crim 1399, [2018] 2 Cr App R(S) 46 at [14].

35. There is a sentencing guideline for the offence of causing criminal damage. It was common ground that this was a category B1 offence, with a starting point of six months' custody.

36. There is no directly applicable guideline for dangerous driving, but there are relevant authorities and comparable guidelines which provide some guidance.

37. There is an overarching guideline on the imposition of community and custodial sentences. It identifies factors to be weighed when considering whether a sentence of

imprisonment should be suspended. A factor indicating that it would be appropriate to suspend a sentence is that “appropriate punishment can only be achieved by immediate custody”.

38. In the recent decision in *R v Ali* [2023] EWCA Crim 232, the Court of Appeal quashed a sentence of six months' imprisonment and substituted for it a suspended sentence order for 18 months. It was said that currently there was a very high prison population which is an additional factor that a sentencing court should take into account. Such a principle will apply to shorter sentences until prison conditions have returned to a more normal state.

39. The only other relevant guideline is that for sentencing offenders with mental disorders, developmental disorders or neurological impairments, which applies when sentencing offenders who at the time of the offence have any mental disorder, which includes depression and anxiety.

The appropriate sentence

40. We turn to the first submission of the Attorney General, which was to the effect that the overall sentence was too short. The offence of dangerous driving was the underlying offence for the offence of perverting the course of justice. It was serious and caused real harm to both the tenant and the landlord of the property into which Mr Wilson crashed. We note that Mr Wilson persisted in his conduct for 15 months, and we also note that this meant that the police had to investigate the theft of the car and carry out a substantial investigation, which included the obtaining of DNA from the saliva on the airbag.

41. However, the purpose of an Attorney General's Reference is to avoid gross error. Having considered the relevant comparable authorities, the guidelines and other authorities for both dangerous driving and criminal damage, we are unable to say that the Recorder erred in

identifying 24 months' imprisonment, after discount for the guilty plea, as the appropriate sentence. Therefore, we do not accept the first submission advanced on behalf of the Attorney General that the sentence itself was unduly lenient in terms of its length.

42. We turn, therefore, to the real issue which is whether the Recorder was entitled to find exceptional circumstances in this case to suspend the sentence where the offence was perverting the course of justice or whether her decision to suspend the term of imprisonment made the sentence unduly lenient.

43. The Recorder found, as we have already indicated, that there were exceptional circumstances: the offending arose out of a suicide attempt; Mr Wilson was the carer for his partner; and he shared the care of his autistic ten year old daughter. The Recorder had also referred to *Ali*. We consider that it was not only lenient, but that it was unduly lenient not to impose an immediate custodial sentence for the offence of perverting the course of justice. The jurisprudence is clear. An immediate custodial sentence should be imposed for the offence of perverting the course of justice. That is because of the damage that is caused to the justice system by those who lie and deceive the investigating and other authorities, including the courts. This offending continued for fifteen months.

44. That, however, is not the end of the matter, because we do have a discretion whether or not now to increase the effect of the sentence by ordering the sentence of imprisonment to be served immediately, so that it does not remain unduly lenient. If we were now to order a sentence of immediate imprisonment, we would have to reflect the unpaid work that has been carried out by Mr Wilson under the suspended sentence order and the part-payment of compensation made by Mr Wilson pursuant to the order, by reducing any period of custody. In the particular circumstances of this case, in the light of the recent report from the National Probation Service, and in light of the other information that we have, together with all those

factors which existed before, we consider that it is appropriate to exercise our discretion not to order that the immediate custodial sentence, which should have been imposed below, take effect.

45. In those circumstances, although we grant the application for leave to make the Reference and although we find the sentence to be unduly lenient, we exercise our discretion not to interfere with the sentence.

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

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