IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 906

No. 202300663 A4

Royal Courts of Justice

Wednesday, 19 July 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE MARTIN SPENCER
HIS HONOUR JUDGE LICKLEY KC

REX
V
DEAN ANTHONY SWINBOURNE

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Mr. J. Turner appeared on behalf of the Appellant.
Mr J. Polnay and Mr. Sullivan appeared on behalf of the Crown.

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J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

1 Dean Anthony Swinbourne is now aged 34. He has a significant criminal history. In particular, he has frequently been convicted of domestic burglary. He was so convicted in March 2010, January 2012, February 2014 and December 2016, albeit that was for attempted burglary. In 2014 the sentence was 4 years' imprisonment; in 2016, 57 months' imprisonment. He was convicted in August 2022 of assault on an emergency worker. On 17 November 2022 he pleaded guilty to a single offence of domestic burglary, a plea he had indicated at the point of sending from the magistrates' court.

2 The offence for which he was to be sentenced fell within the provisions of section 314 of the Sentencing Act 2020. The court was obliged to impose an appropriate custodial sentence of 3 years unless the court was of the opinion that there were exceptional circumstances relating either to the offence or the offender. Any credit for a guilty plea could not reduce the appropriate sentence below 80 per cent of 3 years. The requirement of exceptional circumstances was introduced by section 124 of the Police Crime Sentencing and Courts Act 2022.

3 Mr Swinbourne appeared for sentence on 7 February 2023. He was sentenced to 3 years, 2 months' imprisonment. He was represented by Mr James Turner, who has appeared before us. The prosecution has been represented today by Mr Polnay and Mr Sullivan. We are grateful to all counsel for their written and oral submissions.

4 The offence to which Mr Swinbourne pleaded guilty was straightforward. During the afternoon of 10 August 2022 he burgled the Birmingham home of a 74-year-old retired lady called Doreen Behan. She was out at the time of the burglary. The appellant had been able to get into her home through a window that had been left slightly open. He stole a variety of items, including a large quantity of jewellery of considerable sentimental value. He also stole a credit card. His use of that card in a shop nearby is how he came to be traced.

5 He was arrested on 19 October 2022. His home was searched. A telephone from Miss Behan's home was found there. In the first interview with the police he denied burgling her home, but in a subsequent interview he admitted the offence. Apart from the phone, he said he had disposed of everything he had stolen either by selling the items or throwing them away. He also admitted another day time domestic burglary the day before he had been arrested.

6 At the sentencing hearing he asked for a total of seven other domestic burglaries to be taken consideration. These were all day time burglaries of unoccupied houses in various suburbs of Birmingham. One of those offences had been committed in 2019 when he was on licence from the sentence imposed in 2016. Another had been committed when he was on bail for the offence of assault against an emergency worker.

7 There were victim personal statements from Doreen Behan and from one of the victims of the burglaries reflected in the offences to be taken into consideration. Miss Behan said that the burglary had made her angry and upset. The stolen items were priceless. They were sentimental items which hold a very special meaning in her life. She was extremely angry and upset at the thought of never seeing them again. She also said she could not feel safe in her own home because of the violation of her privacy.

8 The other victim personal statement came from a Mr Friend. His house had been burgled. He felt angry and upset, feeling that he could not leave his house unoccupied, so he had stopped his job which involved him working away. That left him unemployed and hard-up

financially. The burglary had also affected him psychologically. However, he took some comfort from the fact that some of the items that had been stolen from him, particularly those of sentimental value, had been recovered because of the appellant's efforts.

9 When the appellant pleaded guilty on 17 November 2022, there was a prospect of him entering a project known as C3 (the Crime Free Community Desistance Programme), a programme designed to rehabilitate offenders. It was a programme directed particularly at those who repeatedly committed domestic burglary.

10 The judge at the plea hearing adjourned sentence to allow full investigation of the appellant's suitability for participation in the project, which was administered by the police. The judge made clear that the adjournment did not amount to any kind of promise as to the eventual outcome. It was during the adjournment that the appellant identified further burglaries he had committed which formed the list of other offences taken into consideration. Without his admissions those offences would have remained unsolved.

11 On 7 February 2023 the sentencing judge (not the judge who had sat in November 2022), had a detailed report from a police officer recommending the appellant for participation in the C3 project. The proposal in that report was that sentence should be deferred for a period. It would appear the proposed period of deferment was four months. During that time the appellant would be subject to strict conditions. In particular, it was intended that had he should be tested for drugs at least three times a week, that he should wear a GPS tag at all times, that he should attend all appointments, whether organised by the National Probation Service or other organisations, and should take part in restorative justice meetings if appropriate. There was also a Pre-sentence Report. That supported the appellant's engagement in the C3 Programme. However, it did not suggest deferment of sentence. Rather, it recommended the imposition of a community order for three years. One part of the order would reflect the conditions required by the C3 Programme. However, the order would also contain a mental health treatment requirement and a rehabilitation activity requirement of 30 days.

12 With all of that in mind the judge turned to sentence. He said at the outset that he had given anxious consideration to the invitation to defer sentence, and he said, "I shall explain why I cannot do that a little later." Having said that, he set out the circumstances of the offence and the other offences that the appellant had asked to be taken into consideration in summary form. He went on to say that the appellant had a very substantial record for a broad range of offences, but with a particular emphasis on dwelling house burglary. He did note that there were features of the appellant's life which amounted to significant mitigation.

13 He said this:

> "It is part of those which have formed the basis of a powerful submission that coupled with what has been put in place for you, a programme, which is designed and structured to rehabilitate you in order to reduce the risk of reoffending, all of which, as I have said, amounts to strong mitigation".

14 But the judge said that the invitation to defer sentence faced the overwhelming obstacle that the offence of burglary required the imposition of a mandatory minimum term of three years' imprisonment. The judge identified deferral of sentence as being predominantly applied in cases which were either at the custody threshold or the community sentence threshold and that this was not such a case. Deferment, he said, could only occur if there were a proper and realistic prospect of a non-custodial sentence at the end of the deferral

period.

15 He then analysed what the position was in this particular case. To avoid an immediate custodial sentence of three years less any appropriate credit for plea would require there to be exceptional circumstances relating to the offence or the offender. It was accepted that there were no exceptional circumstances relating to the offence. Rather, it was said that there were exceptional circumstances relating to the offender. Remorse was identified, that being in our view, shorthand for the co-operation that the appellant had shown in his dealings with the police.

16 The judge went on to say:

> "Is the fact that there is a package, a programme being made available to you exceptional? It may be exceptional as it is unusual; rare cases when such a programme is being made available to an offender. I cannot regard it as justifying not applying section 314 of the sentencing code" (i.e. the minimum term).

17 The judge then turned to where the offence lay in the guideline. He concluded that this was an offence of medium culpability and category 1 harm. In the guideline that gave a starting point of two years, with a range of one to four years. There were statutory aggravating factors, in particular the previous convictions. He also noted seven other offences to be taken into consideration. He said that those features moved the appropriate starting point towards the top of the category range, the range being one to four years. The judge identified the mitigation: the genuine remorse; the steps taken to assist recovery of items; the admissions made to offences which otherwise would not have been identified as his responsibility. The judge also accepted what had been said about the appellant in the Pre-sentence Report, in particular, the fact that he was gripped by an addiction to class A drugs, an addiction he was making major efforts to deal with. Therefore, he concluded, there were "substantial mitigating factors". He said that after credit for plea, the nature of which he did not identify, and having regard to the minimum term, the overall sentence would be 38 months' imprisonment.

18 How then is the appeal put? It is accepted that the offence was appropriately categorised as a 1B offence within the guideline with the starting point and category range identified by the judge. The judge referred to the aggravating factors moving it towards the top of the range. That is not a matter of contention, but there was substantial mitigation. Thereafter, the reduction for plea should have been one third, the appellant having indicated his plea at the point of sending. The sentence imposed was 38 months. Working back, that represented a term of 57 months before reduction for plea. Given that there was substantial personal mitigation, the term prior to account being taken for mitigation must have been significantly more than 57 months. It is argued that the judge must have erred in setting the level of sentence before mitigation by at least a year or if not more, outside the category range. Thereby, the eventual sentence was manifestly excessive.

19 The second limb of the appeal concerns the judge's refusal to defer sentence. Two submissions are made. First, a sentence may be deferred, even though the offender is given no indication that the final sentence will be non-custodial should they abide by the conditions of the deferral. Second, in this case, it would be for the sentencing judge at the end of the deferral period to decide whether exceptional circumstances applied at that point. Compliance with the conditions of the C3 Programme might constitute exceptional circumstances, but not necessarily so. The judge, it is argued, disqualified himself from even considering deferral when he was not required to do so.

20 The third point made is that, at the date of sentence in February 2023 there were exceptional circumstances relating to the appellant. They are identified as follows: the high level of co-operation with the police; the frank admissions of further offences; the assistance given in recovering stolen items; the support of one of the victims for the appellant's inclusion in the C3 Programme; the fact that the police had approved the appellant's participation in the programme, which of itself was unusual. Thus, it is said, application of the minimum term provisions could have been avoided.

21 We shall deal first with the second argument relating to deferred sentences. It is based on a literal interpretation of the relevant statutory provisions. It fails to reflect the proper sentencing practice. There is no Sentencing Council Guideline currently in relation to deferred sentences, though that may change shortly with the introduction of the new Imposition guideline. However, the Sentencing Guidelines Council New Sentences Definitive Guideline still applies. As the judge noted, that provides that sentence should be deferred in a small group of cases, at either the custody threshold or the community sentence threshold, where the court may be prepared to impose a lesser sentence provided the defendant is prepared to adapt his behaviour in a way clearly specified by the court. When passing sentence, the court should indicate the type of sentence it would be minded to impose if the defendant does not comply. Deferment can only be appropriate if a sentence other than one of immediate custody will follow in the event of compliance.

22 In those circumstances, we reject the submission that sentence may be deferred without an indication that a non-custodial sentence will be imposed in the event of compliance with specified conditions. That would be wholly contrary to the purpose of deferring sentence. Deferment of sentence is not to be used where the court cannot state in clear terms what the sentence will be if the defendant complies. That is not to say that deferment of sentence will never be appropriate in a case to which the minimum term provisions apply. So long as the court is able to say that exceptional circumstances apply either at the date of deferment or will apply if the defendant meets the conditions of the deferment, then it is perfectly possible to defer sentence. Having said that, we consider that in those circumstances the proper course would be for the court to grasp the nettle there and then.

23 On the facts of this case it was open to the court to impose a community order with very stringent conditions rather than defer sentence. It may be that the argument about deferment rather distracted both the parties in the case and the judge. The argument is that the judge disqualified himself from deferring the sentence. That is not how we read his sentencing remarks. His remarks were intended to indicate that, on the facts of the case, this was not an appropriate case for deferment. He was not saying as a matter of principle that deferment can never occur in a minimum term case. Were he to have said so, he would have been wrong. However, we repeat the warning that deferment is an option that is to be sparingly used. In most cases the court should consider a community order other non-custodial disposal is appropriate rather than deferment of sentence. That applies generally and not just to cases where minimum sentence provisions apply.

24 That leads on to the appellant's third proposition, namely that there were exceptional circumstances relating to him. That test as introduced by the 2022 Act is the same as that which applies to firearms offences attracting a minimum term. The principles applicable to those offences are best summarised in *R v Nancarrow* [2019] EWCA Crim 470.

25 The core principles are follows:
(1) The purpose of the mandatory minimum term is to act as a deterrent.
(2) Circumstances are exceptional if imposition of the minimum term would lead to an arbitrary and disproportionate sentence.

(3) In order to disapply the minimum sentence the circumstances must be truly exceptional.
(4) There can be cases where the collective impact of all relevant circumstances makes the case exceptional.

26 The same principles will apply to the case of a defendant subject to the minimum term provisions relating to burglary. We have set out the exceptional circumstances relied on by the appellant. The judge was fully aware of those circumstances. He set them out at an early stage of his sentencing remarks. He accepted that they were unusual. He did not regard them as exceptional. For this court to interfere, we would have to conclude that the judge was wrong in his assessment before we could take a contrary view. In our judgment, we cannot do so. His conclusion was one reasonably open to him applying the relevant principles to the circumstances of the appellant. The appellant's co-operation with the police of itself could not be regarded as exceptional. His inclusion in the C3 Programme was greatly to his credit, but we cannot say that it fell outside the reasonable range of judicial responses for this judge to find that it did not amount to exceptional circumstances. Some judges may have taken a different view, but that is not the test for this court. In our judgment, the test that has to be satisfied for us to interfere is not met here.

27 In our view, the appellant's most compelling argument arises from the structure of the sentence announced by the judge. The judge was entitled to find that there had to be an uplift from the starting point of two years to allow for the aggravating factors. He expressed his view that the uplift took the sentence towards the upper end of the category range, namely towards four years' custody. Allowance then had to be made for what the judge properly described as substantial mitigating factors. That required a downward adjustment. That could not possibly have been less than six months. Very probably, it ought to have been more. If the sentence before reduction for plea would have been 38 months, a reduction of one third would lead to sentence of a little over two years. It is accepted that, where the minimum term provisions in relation to burglary apply, the court cannot impose a sentence less than 80 per cent of the minimum term. That amounts to 876 days, namely longer than one third of 38 months.

28 We are satisfied that the judge was not justified in going beyond the category range before applying the reduction for the plea. Indeed, in what he said he did not purport to do so. What has occurred is either an error in calculation or an error in arithmetic. In either event, the error has led to a sentence that was manifestly excessive. We reach that conclusion simply by following the reasoning of the judge.

29 The outcome is that we quash the sentence of three years, two months as imposed by the judge and substitute for it a sentence of 876 days' imprisonment, that being 80 per cent of the minimum term of three years required by section 314 of the sentencing code.

30 To that extent this appeal is allowed.

CERTIFICATE

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This transcript has been approved by the Judge.