IN THE COURT OF APPEAL

CRIMINAL DIVISION

NCN: [2024] EWCA Crim 47
Case No: 202303393 A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 19 January 2024

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE CAVANAGH
THE RECORDER OF CARDIFF
HER HONOUR JUDGE TRACEY LLOYD-CLARKE
(Sitting as a Judge of the CACD)

REX
V
LOUISE CUDWORTH

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MISS H WEBB appeared on behalf of the Appellant

A P P R O V E D J U D G M E N T

LORD JUSTICE STUART-SMITH:

1. On 11 July 2023, having pleaded guilty before the North London Magistrates' Court, the appellant was committed for sentence pursuant to section 14 of the Sentencing Act 2020 in respect of an offence of burglary. On 15 September 2023 in the Crown Court at Wood Green, Mr Recorder Hillam sentenced the appellant to 14 months' imprisonment for that offence. Other orders were made with which we do not need to be concerned.

2. The facts are not disputed and may be shortly stated. On the evening of 7 February 2023 the complainant Miss Pendlebury returned to her property having left it secure in the morning. She found that her patio window had been smashed and broken glass was on the floor. The police were called and found that the house had been subjected to an untidy search and footwear marks were observed on the sofa. Breeze blocks had been stacked against the complainant's fence to enable the appellant and her co-offender access to the property. Bizarrely, a pair of the complainant's knickers were found at the bottom of the garden near to the point where the burglars had left.

3. Forensics were taken at the scene and a match for the appellant was found. The items stolen from the house included an amount of jewellery valued at £5,000. Among those items were many heirlooms which had been passed down to the complainant from her mother and grandmother. None of these were ever recovered.

4. The appellant was arrested on 18 June 2023 after she phoned the police to report a burglary of her own home. It was flagged on the police system that the appellant was wanted for burglary and she was arrested at her home address. In interview she answered no comment to all questions that were asked of her.

5. By the time of the sentencing hearing it was the appellant's case that she had stood on the sofa acting as lookout. Her case as recounted to the probation officer who prepared the pre-sentence report was that her current partner had introduced her to class A drugs and that they had agreed to go and burgle a house in order to finance their habit. She said that this had been her partner's idea but she had gone along with it. To that extent it was submitted that the partner was the more responsible for what had happened.

6. The appellant had three previous convictions for three offences spanning from October 2013 to August 2018. These included one offence of theft for which the appellant received a 12-month referral order in 2014. She had therefore managed to steer clear of the courts and further convictions for almost five years.

7. There was a short but eloquent victim personal statement from the victim who described the effect on her as a woman living alone in that area on finding that she had been burgled. She felt that her home had been invaded and she felt very threatened by the fact that someone had been in her house. To her it felt personal and well-orchestrated. As a result she felt insecure and took to sleeping with a knife or a bat beside her bed for protection. She said that the property had "huge sentimental value" as many items of

jewellery had been passed down from her grandmother and mother and were irreplaceable.

8. There was a pre-sentence report of which the Recorder had the benefit. It is plain that the Recorder read the pre-sentence report carefully and took it into account. We too have read all the materials with care. We note in particular the difficult and often traumatic features of the Appellant's background, including relationship difficulties. At the time of sentencing she had the benefit of local authority housing though she was not living there because of having been abducted and herself being burgled. She was therefore living with her mother who was supporting her. There was a risk that she would lose her local authority home if sentenced to immediate imprisonment. One of the complicating features of the case was that although she expressed remorse, she demonstrated no real understanding of the impact of what she had done. A second feature was that she had failed to attend two appointments for her PSR interview before finally attending a third. She then missed another appointment that had been arranged for signing paperwork. In addition she had not attended two appointments that she had been given for assessment by the women's mental health treatment service. As a result, the writer of the report said that she held "some concerns about her motivation to comply which inevitably requires regular attendance to one on one group sessions." She had attempted to follow up with telephone contact but the appellant's phone had consistently been turned off. The Recorder was told that this was because her phone had been taken.

9. Despite these reservations, the writer of the PSR noted that the appellant had been assessed as being suitable for a drug rehabilitation program. That was supported by a report from Islington's drug and alcohol service, despite that report also commenting that the appellant did not appear highly motivated, although she said she wished to make changes in her life.

The sentencing remarks

10. The Recorder's sentencing remarks were well-structured and demonstrate that he took significant care in coming to the sentence that he passed. Put shortly, he categorised the case as falling within Category B medium culpability and harm Category 1. That gave him a starting point of two years' imprisonment with a range of one to four years. He rejected a submission that a drug or community order may be appropriate because the appellant had become dependent on drugs because, he said, that applied in relation to moderate custodial sentences and where there is a sufficient prospect of success in relation to the relevant rehabilitation requirements, none of which he considered to be satisfied in the present case.

11. Turning to aggravating and mitigating features, he identified as the single aggravating feature that the appellant had been intoxicated with both crack cocaine and cannabis at the time of the offending.

12. Turning to mitigating features, he said that he took into account the appellant's difficult background and that he regarded the appellant's lack of recent convictions to be a mitigating feature. He considered that the appellant was an important and willing participant in the burglary even if she had to some extent taken the lesser role and he pointed to the fact that acting as one of a group was a potentially aggravating feature.

13. Bearing all these features in mind he adjusted his notional sentence down from the two year starting point to 21 months, which he then reduced by one-third for the appellant's plea, thereby reaching the sentence duration of 14 months.

14. The Recorder then considered the Sentencing Guideline on the Imposition of Community Orders and Custodial Sentences giving express attention to the various features identified in the guideline. In an important passage he said:

> "First, this is an offence where appropriate punishment can only be achieved by immediate custody. I assess seriousness in the usual way and consider the same or similar factors as I have referred to in categorisation. Domestic burglary, as your counsel accepted is always a serious offence. It involves a violation of the home, which is meant to be a person's safest refuge. In this case in particular the level of financial and emotional harm caused to the victim means that anything but an immediate term of imprisonment would clearly be, in my view, inappropriate.
>
> That, on its own, would, in my view, be enough not to suspend a sentence. But in addition to that, I do not, in any event, consider that there is a realistic prospect of rehabilitation in this case. That has, in my view, been shown with your engagement with Probation in preparation for this hearing, as detailed in the PSR. In relation to your DRR assessment, you missed two appointments before attending one, then failed to attend another, offered for the purpose of signing the paperwork. In relation to your referral to women's NHTR, you again failed to attend two appointments and made no reply to emails from a psychologist. Probation notes that your phone is consistently been turned off.
>
> I have heard from your representative that you have lost your phone but that does not, as I said during the hearing, explain the missed appointments or failure to respond to emails.
>
> Ultimately, I can have no confidence that, if I did suspend a sentence, there would be a realistic prospect of you complying with its requirements and rehabilitating.
>
> I have also taken account of your personal circumstances and addiction to Class A drugs. That does not change my conclusion. I have also taken into account the support of your mother today as well as the recent events in your life and your injury recently. But those do not reach, I am afraid, the level of strong personal mitigation, in my view, required by the guideline on the suspension of custodial sentences and certainly do not outweigh what I have said about the seriousness of this offence."

The grounds of appeal

15. Both in writing and orally before us, Miss Webb has advanced submissions that are clear, concise and coherent and which have shown considerable commitment to her client's case. We are grateful to Miss Webb, as should her client be.

Ground 1: Incorrect categorisation on guidelines for harm and culpability

16. Dealing first with culpability, Miss Webb points to the fact that the prosecution had placed the case between Categories B medium and C lower culpability. She submits that although the appellant went along with the plan, the leader both in formulating the plan and choosing the house to be burgled was her partner. She submits that there are clear elements of coercion, intimidation or exploitation in the context of an abusive relationship. The features of that relationship that are referred to in the PSR include that (a) she had stopped taking her anti-depressant medication at her partner's request which had led to a deterioration in her mental health; (b) her partner had introduced her to class A drugs within weeks of their relationship starting; (c) her partner played the leading role in the burglary, it being his idea to commit a residential burglary, he chose the house, smashed the window and ransacked the house with the appellant acting as lookout; and (d) it was her partner who arranged the sale of the stolen goods. Miss Webb also relies upon a subsequent incident where her partner tried to run her over as evidencing the abusive nature of the relationship.

17. The Recorder explained why he selected Category B. In his view none of the elements indicating a lesser culpability case applied. There was a degree of planning involved, the offence was not committed on impulse, he rejected the suggestion that the appellant was involved through coercion. The intrusion into the victim's home was more than limited, with drawers and cupboards being opened and possessions being found all over the place.

18. In our judgment the Recorder was entitled to conclude that this was a case with some degree of planning or organisation. He was also entitled to form the view that the appellant was not simply involved through coercion. It is clear from her account to the writer of the PSR that the appellant went along with the plan willingly and took an important, if lesser, role.

19. The prosecution's stance, namely that the case fell between Categories B and C, may be thought to have shown a reasonable appreciation of the true level of the appellant's culpability once her lesser role and the impact of the relationship with her then partner, albeit falling short of frank coercion or intimidation, was taken into account. But it was not in any way binding on the Recorder who was required to and did make his own assessment.

20. Turning to the categorisation of harm, the prosecution agreed with the defence that Category 2 was appropriate. The Recorder disagreed, largely because of the "huge sentimental value" of the items that were stolen. In his judgment the threshold of substantial degree of loss to the victim had been crossed.

21. Miss Webb submits that the emotional impact and loss of sentimental items is part and

parcel of domestic burglary, so that "moderate loss" should be seen in that context. We see some force in that submission given that "a substantial degree of loss" is a descriptor that can cover even the most serious of cases. However, we consider that it was open to the Recorder to treat this as a Category 1 case given the value in economic and more importantly personal terms to this victim. That said, we also consider that if the case was to be treated as involving Category 1 harm, it could reasonably be described as coming towards the lower end of that categorisation.

22. It follows that although the Recorder was entitled to treat the case as falling within Category B1, the indicators leading to that conclusion were not particularly strong and could reasonably have led to a modest adjustment down from the category starting point of two years. By way of sanity check, we note that the starting point for a Category B2 case or a Category C1 case would have been one year and six months rather than the two years adopted by the Recorder.

23. In our judgment these features suggest that the Recorder could have made a modest adjustment to the starting point before coming to address aggravating and mitigating features. It is to be noted however that he did adjust his notional sentence down from two years to take into account the matters on which Miss Webb relies, even after making allowance for the aggravating feature that he identified.

24. No separate criticism is made of the Recorder's other adjustments for aggravating and mitigating features. It follows however that if he had made an initial adjustment such as that to which we have just referred, he is likely to have made similar adjustments for aggravating and mitigating features and would have ended up with a notional sentence before reduction for guilty plea of about one year and five months and after reduction for guilty plea a final sentence of just over 12 months, as opposed to 14 months on which he settled.

25. On any view this is a modest adjustment, although obviously not unimportant for a person serving a sentence of imprisonment. We would not consider that such an adjustment on its own justified interfering with the sentence passed by the Recorder.

Ground 2: Incorrect finding that the pre-conditions for the imposition of a community order with a DRR as an alternative to a short or moderate custodial sentence were not met

26. Step 2 of the Domestic Burglary Guideline states:

> "Where the offender is dependent on or has a propensity to misuse drugs or alcohol and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under part 10, or an alcohol treatment requirement under part 11, of Schedule 9 of the Sentencing Code may be a proper alternative to a short or moderate custodial sentence."

27. Miss Webb first submits that the Recorder was wrong to reject the possibility of a community sentence on the basis that the proposed sentence was not a short or moderate

sentence within the meaning of Step 2 of the guideline. We agree with that submission. Although there is no determinative guidance on what constitutes "short or moderate" sentences in this context, we are confident that a sentence of between 12 and 14 months may properly be regarded as moderate (even if not as short) within the meaning of this passage of the guideline. Miss Webb then submits that the Recorder was wrong to conclude that there was no sufficient prospect of success for the guidance to be relevant to this case. She points to the fact that despite clearly expressed reservations about the appellant's commitment, both the author of the PSR and the author of the "Better Lives" DRR report assessed the appellant as being suitable for a DRR and recommended a six month DRR. That recommendation was clearly not binding on the Recorder but equally clearly the report writers had assessed the prospects of rehabilitation and considered that they merited being pursued. However as we have set out, the Recorder explained why he reached the conclusion that the prospects of rehabilitation were poor. On the face of things those reasons were cogent.

28. However, both before the Recorder and again in this court Miss Webb has provided detailed submissions that in our judgment go a long way towards explaining the apparent lack of commitment on the part of the appellant:

    (a) First, she says, and we have no reason to doubt, that the lack of phone contact was a consequence of her having lost her phone on multiple occasions, including having it taken. She tried to contact the probation office to re-establish contact after the assessment meeting but found that the publicly available number was not available.

    (b) She failed to re-attend at the Islington Probation Officer to sign paperwork that should understood she should have been asked to sign on her last visit because of the significant distance and journey time from Morden, her limited mobility because of an injury she had suffered and her anxiety about returning to Islington (which is where she had recently been effectively kidnapped by a group of men who were trying to cuckoo her accommodation, to which reference is made in the DRR Assessment Report).

    (c) Contrary to what is said in the PSR, she had been open with her family about her drugs and her mother had attended court to support her in full knowledge of it. Her mother had helped her to self-refer to Viaoreg Merton, a local drug charity. In addition, she had now rid herself of the partner who had led her into a life of drugs and crime and, we are told, is now clean.

29. In the light of these and other matters advanced in mitigation, we consider that it is and was possible to take a more benign view of her failures to attend meetings. Rather than seeing them as indicative of a lack of commitment, it is in our judgment possible and preferable to see them as the consequences of a chaotic lifestyle into which she had been led by her partner and of the traumatic events surrounding the effective loss of her Islington accommodation.

Ground 3: Failure to impose a suspended sentence

30. We have set out the Recorder's assessment of the features that tended to support or contraindicate the suspending of the sentence he had reached. Miss Webb attacks the Recorder's conclusion on three grounds. First, she submits that he overstated the seriousness of the offending. We have already accepted in relation to ground 1 that a further modest reduction could have been made but that does not meet the substance of the Recorder's reasoning which was that the impact on the victim was so severe that only an immediate custodial sentence was appropriate. That assessment however had to be bound up with his assessment of the prospects of rehabilitation. For the reasons we have given we would take a less pessimistic view of her prospects based on our view of the reasons for her failure to attend appointments. In addition to the features we have already outlined, Miss Webb points to the acceptance by the writer of the PSR that many of her difficulties were linked to the poor influences around her so that her decision to commit the offence "was inextricably influenced by the company she was keeping at the time." As we have said, she has now shed her partner of that time and, we are told, is clean.

31. Third, Miss Webb submits that the Recorder failed to give proper weight to the appellant's personal mitigation. Had he done so, she submits, it should have tipped the balance in favour of a sentence that did not involve immediate custody. The difficulty with this submission is that it is evident that the Recorder gave careful consideration to all the matters advanced as personal mitigation, yet he still came to the conclusion that immediate custody was necessary. However, as we have indicated, we consider that it is possible and right to take a more benign view of her mitigation and the prospects of rehabilitation for the reasons persuasively advanced by Miss Webb.

32. In advance of the hearing, we requested further information from the Probation Service and a prison report. We are grateful to all concerned for the speed with which they have responded and the information which they have provided.

33. A brief prison report reports that the appellant has responded well. However at the date of the report there was no approved address for her release and there was a suggestion in the report that some rehabilitative work may be better done in a custodial setting. We were also greatly assisted by Jessica Stephen of the Probation Service, who on enquiry has informed us that Better Lives would, because of the passage of time, need to re-assess the appellant's suitability for DRR, which could take several weeks. Therefore at this stage the DRR is not still available for her. However she remains suitable for the rehabilitation activity requirement days which were recommended in the PSR.

34. Having adjourned the case for 48 hours to today, the position as it now appears is that there is no approved address for the appellant to be released to. She has an address in Islington (although the locks have been changed). However she is considered to be unsafe there following the incident to which we have peripherally referred, but she cannot move or transfer through the council because she is in rent arrears and any change would of course take time. The appellant put forward her mother's address in Morden for the purposes of Home Detention Curfew but this was found to be unsuitable following checks. There is a child at the address. We take that fully into account but we bear in mind that her mother was the person who supported her, even after knowing of her involvement with drugs and, we understand, is available to do so still. In short however, there is no formal

accommodation plan in place at this time.

35. Furthermore, although we can and would increase the number of days of RAR, there is no obvious mechanism by which we can set Miss Cudworth on the route to a DRR assessment and program.

36. As we suspect our remarks have made clear, we regard this as a borderline case as to whether or not we can properly interfere with the sentence imposed carefully by the Recorder. However, we are persuaded by Miss Webb that we can properly allow this appeal and impose what would now be a suspended sentence, given all that has happened, including the fact that the appellant has spent some time in custody.

37. In the light of the submissions, what we have decided to do is to quash the sentence imposed by the Recorder and substitute a sentence of 14 months' imprisonment suspended for two years. The appellant is to report to Islington Probation Service at 2.00 pm on Monday and we impose an RAR of 30 days. The other ancillary orders remain unchanged.

38. That is the determination and the judgment of the court. Miss Cudworth, you need to understand that you are very lucky in having had Miss Webb to look after you and that you will not get another chance. So whatever happens, please take it.

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

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