

Neutral Citation Number: [2018] EWCA 2637 (Crim)
2018/02170/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 2nd November 2018

B e f o r e:

LORD JUSTICE GROSS

MR JUSTICE MARTIN SPENCER

and

HIS HONOUR JUDGE KATZ QC

(Sitting as a Judge of the Court of Appeal Criminal Division)

REGINA

- v -

GERRY DAY

Computer Aided Transcript of Epiq Europe Ltd, 165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr C Durrant appeared on behalf of the Applicant

J U D G M E N T
(Approved)

Friday 2nd November 2018

LORD JUSTICE GROSS: I shall ask Mr Justice Martin Spencer to give the judgment of the court.

MR JUSTICE MARTIN SPENCER:

1. This application for leave to appeal against sentence has been referred to the full court by the Registrar. We grant leave.

2. On 2nd May 2018, in the Crown Court at Wood Green before His Honour Judge Ader, the appellant, who was born on 9th May 1979 and is aged 39, was sentenced to a total of 21 months' imprisonment, comprising the following: burglary of a non-dwelling, twelve months' imprisonment; theft from a shop, three months' imprisonment consecutive; a further theft, three months' imprisonment concurrent; and attempted theft, three months' imprisonment concurrent. Having committed an offence during the operational period of a suspended sentence of six months' imprisonment for an offence of burglary (non-dwelling) imposed on 27th October 2017, the suspended sentence was activated in full and was ordered to run consecutively.

3. Unfortunately, the sentence of twelve months' imprisonment imposed for the offence of burglary was not a lawful sentence. Offenders may be committed to the Crown Court for sentence from the magistrates' court by two different routes. First, where an offender pleads guilty in the magistrates' court to an offence which is triable either way, he may be committed for sentence to the Crown Court where the magistrates' court considers its powers of sentence are insufficient. The powers of the magistrates' court for a single offence are limited to a maximum of six months' imprisonment.

4. Secondly, an offender may be committed to the Crown Court for sentence in circumstances where he is to be dealt with in the Crown Court for another offence or offences which are not suitable for trial in the magistrates' court or otherwise need to be dealt with in the Crown Court so that the Crown Court is dealing with all the offences and can consider them together. This route of committal is pursuant to section 6 of the Powers of Criminal Courts (Sentencing) Act 2000. Where an offender is committed pursuant to this provision, the Crown Court must observe all limits which would apply in the magistrates' court when passing sentence for the offence, including the maximum term of imprisonment which the magistrates court may pass for individual offences: see section 7(1) of the Powers of Criminal Courts (Sentencing) Act 2000.

5. In the present case, both prosecuting and defence counsel and the learned judge thought that the appellant had been committed for sentence pursuant to the first route, namely because the magistrates believed that their powers of sentencing were insufficient. Thus, in his sentencing remarks the learned judge said:

"The magistrates considered that their powers of sentence were insufficient when you appeared at that court and committed you for sentence to this court."

6. In fact, the appellant had been committed for sentence pursuant to section 6 of the 2000 Act because he was in breach of a suspended sentence which had been imposed in the Crown Court, which was the appropriate forum for that breach to be dealt with. In the circumstances, the maximum sentence which the Crown Court could impose for the burglary was one of six months' imprisonment. It is, therefore, clear that the sentence of twelve months was unlawful and the appeal must be allowed. This is fortuitous for the appellant. As the sentence of twelve

months imprisonment which was imposed indicates, the sentencing powers of the magistrates were indeed inadequate, in the view of the sentencing judge, and it is perhaps surprising that they committed the appellant pursuant to section 6, rather than because they considered their powers of sentence to be inadequate.

7. Accordingly, we approach the issue of sentence anew. The circumstances of the burglary were that on 29th March 2018 the appellant entered Park View School shortly before 7pm. The school was closed for the Easter holidays and a cleaner was present cleaning on the third floor. She had left her handbag and purse in one of the classrooms. When she saw the appellant on the third floor, she challenged him. He looked angry and replied, "Don't talk to me, I'm on the phone". The cleaner ran away, found the school receptionist and the operations manager and together they approached the appellant. By that time he was going through the cleaner's handbag and purse. When he was challenged, it emerged that he had stolen £5 from the purse, which he later returned. He was arrested and bailed.

8. On 17th April 2018 the appellant committed the offences of theft and attempted theft, which formed the other tranche of offences for which he was committed to the Crown Court for sentence. He targeted St Pancras International Station and stole three headphones from WH Smith to a total value of £270. He was not detained at that time, but the following day, back at St Pancras, he was recognised by the manager of WH Smith as the person who had stolen the headphones. He was escorted to the station reception and handed over to police officers to whom he admitted the theft of the headphones. He was also found to be in possession of a bank card in the name of another person, which he attempted to hide down the side of the sofa. When questioned about that card, he said "I hid the card because I thought if you found it, I would be in trouble". In that regard he was correct.

9. As he was being escorted through the station by the police, an assistant manager from Boots approached the police and informed them that about 15 to 20 minutes earlier the appellant had attempted to steal three or four bottles of fragrance from their store but had dropped them when he became aware that he was being watched. That was the offence of attempted theft.

10. These offences (the two thefts and the attempted theft) were all committed during the period of a suspended sentence, as indeed was the original burglary. This sentence had been imposed at the Wood Green Crown Court on 27th October 2017 for an offence of burglary committed on 12th May 2017, for which the appellant had been sentenced to a term of six months' imprisonment suspended for eighteen months, with an alcohol treatment requirement and a rehabilitation activity requirement. The appellant was in breach of the suspended sentence. As that sentence had been imposed by the Crown Court, it was this which necessitated the committal of the appellant to the Crown Court for sentence.

11. Unfortunately, in relation to the activation of the suspended sentence, another matter was overlooked. Under section 240 of the Criminal Justice Act 2003, the court has the power to reduce the activated term of imprisonment in the light of qualifying curfew days completed before the suspended sentence order is imposed. In the case of the appellant, he had in fact completed 168 days of qualifying curfew before the suspended sentence order was imposed. That entitled him under that provision to credit for one-half of those days, namely 84. We are accordingly asked to reduce the activated term by 84 days.

12. The appellant has an unenviable record of offending. His record shows no fewer than 81 previous convictions for a total of 144 offences. These include convictions for burglary, theft, harassment (including racially and religiously aggravated harassment) and battery. Given the circumstances of the offences for which the appellant was committed for sentence, the fact that

he was in breach of a suspended sentence order, and his record, it is quite clear to us that the custody threshold was passed and that a sentence of imprisonment was both justified and necessary.

13. For the sentence of twelve months' imprisonment imposed for the burglary, we substitute a sentence of six months' imprisonment. The concurrent terms of three months' imprisonment for the offences of theft and attempted theft will remain in place to be served consecutively to the sentence for the burglary; they were committed whilst the appellant was on bail. That makes nine months' imprisonment. The suspended sentence of six months' imprisonment is activated consecutively to the sentences for the burglary and thefts, making a total period of fifteen months' imprisonment. But the suspended sentence of six months' imprisonment will be reduced by 84 days, to reflect the qualifying period of the curfew before the suspended sentence order was imposed.

14. Accordingly, and to that extent, this appeal against sentence is allowed.

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

165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk
