No: 201900587/A4
IN THE COURT OF APPEAL CRIMINAL DIVISION)
ON APPEAL FROM His Honour Judge Berlin
Neutral Citation Number: [2019] EWCA Crim 848

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 2 May 2019

B e f o r e:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)

MR JUSTICE JAY

MR JUSTICE FREEDMAN

R E G I N A

Appellant

v

ROBERT HOUGHTON GEORGE DAWES

Respondent

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Mr T Williams appeared on behalf of the **Applicant**

J U D G M E N T

MR JUSTICE FREEDMAN:

1. This is an appeal against a sentence of three weeks imprisonment, suspended for two years, for a breach of a non-molestation order by the Appellant in relation to his former partner on 9 October 2018 whom we shall call ("W"). The Appellant was remanded in custody for 83 days prior to sentence from 27 October 2018 to 18 January 2019. The Appellant submits that he has served the approximate equivalent of a 24-week sentence which was, he says, far in excess of an appropriate custodial term. He therefore submits that it was wrong in law and in principle to impose a sentence in its place because he had already a suspended sentence in this case, because he had already more than served the entirety of the custodial sentence on remand.

2. He also says that the effect of section 240 ZA(7) of the Criminal Justice Act 2003 ("CJA 2003") is that if a suspended sentence is activated, all this time on remand in custody will automatically count towards the sentence and thereby extinguish any custodial term.

3. The Appellant had been the subject of a non-molestation order on 3 July 2018 which was renewed on 17 July 2018. He was prohibited from going to W's home or within 100 metres of that address. However, on 9 October 2018, he knocked on the door and walked into the kitchen looking for W. He spoke to a social worker who was there and, despite being asked to leave several times, he refused to do so. He only left when he was told that the Police would be called. He said that he believed that the order had been stopped a few weeks earlier. There is a further alleged breach on 10 October 2018, the allegation

being that the appellant shouted abuse at W.

4. There was a further alleged breach on 10 October 2018, the allegation being that the Appellant shouted abuse at W. On his first appearance at Dudley Magistrates' Court on 27 October 2018, the Appellant

   (1) indicated a guilty plea to the 9 October 2018 breach;

   (2) indicated a not guilty plea to the 10 October 2018 breach, electing trial in the Crown Court;

   (3) was remanded in custody.

5. Subsequently the Appellant was granted bail on 18 January 2019, by which time the non-molestation order had been allowed to expire. Further, the prosecution indicated, by a letter on 24 January 2019, that it would accept the account of the Appellant in respect of the 9 October 2018 breach and offer no evidence in respect of the 10 October 2018 breach.

6. At the sentencing hearing before His Honour Judge Berlin on 4 February 2019, the prosecution offered no evidence in respect of the 10 October 2018 breach and the judge entered a not guilty verdict in accordance with Section 17 of the Criminal Justice Act 1967. In respect of the 9 October 2018 breach, the found that this offending fell into Category 2B of the guideline on "breach of a protective order". He took as his starting point 12 weeks imprisonment. He then said that:

> *"…bearing in mind your time in custody, I am going to reduce that starting point [of 12 weeks] to one of 6 weeks. So, I am going to effectively half the*

> *starting point to take into account the time that you have spent in custody. I will reduce that further because of your plea to 3 weeks in custody which will be suspended for a period of 2 years."*

7. The Judge said that he would do this so that this offence would hang over the Appellant for the 2-year period, saying:

> *"It seems to me only right and proper that I do not send you back to prison but make sure that you keep out of trouble for the foreseeable future*."

He also imposed an order that the Appellant pay £200 towards the prosecution costs and a victim surcharge of £115. When the Appellant indicated that this would cause him some difficulties, since he was about to receive Universal Credit, the Judge said that if he had problems, he should raise it with the Magistrates' Court.

Submissions of the Appellant

8. The Appellant's Counsel, Mr Williams, submits that it was wrong in law and in principle to impose a suspended sentence in these circumstances because:

> *"(1) the purpose of a suspended sentence is to enable a compliant offender who commits no further offences not to serve the custodial term that would otherwise be required, a rationale that disappears when the term in question has already been served in full.*
>
> *(2) a sentencing judge should not seek to impose a suspended sentence more severe in its custodial impact than the maximum appropriate sentence of immediate custody: Hewitt [2011] EWCA Crim 885, at [24];*

(3) the effect of s. 240ZA(7) CJA 2003 is that an offender's time on remand is credited (in full) at the time of activation of a suspended sentence, not at the time of its imposition: Collier [2013] EWCA Crim 1132, at [5];

(4) the automatic operation of s. 240ZA(3) CJA 2003 does not leave the sentencing judge with a discretion to reduce the proportion of the time spent on remand in custody which should be credited to the offender: Blackstone's Criminal Practice (2019 edn), E6.4."

9. In amplification, in *R v Williams* at [9]-[10] Phillips J accepted a submission that:

"... it was wrong in principle to impose a suspended sentence order in circumstances where the custodial element of the suspended sentence was considerably less than the period to which the Appellant would be entitled to credit in relation to the qualifying curfew."

Phillips J said:

"Given the credit against his sentence to which the Appellant was entitled, there was no point or purpose in imposing a custodial term to be suspended and we consider that that was wrong in principle."

10. Likewise, in *R v Hewitt* [2011] EWCA Crim 885 at [23], Hickinbottom J (as he then was) said that

"if the defendant has already been in custody on remand for a period longer than that which he would serve in prison in respect of a custodial sentence of a length merited by the offence, then the judge must consider whether it would be appropriate to impose a suspended sentence at all. It is important that he does not impose a suspended sentence that may either be more

> *severe in its custodial impact than the maximum appropriate sentence of immediate custody, or alternatively be of no practical effect on activation (and hence no incentive to comply) because of the effect of s.240 . The imposition of a suspended sentence in these circumstances would, in our view, usually be wrong as a matter of principle (see McCabe* (1988) 10 Cr. App. R. (S.) 134 , *Peppard* (1990-91) 12 Cr. App. R. (S.) 88 and *Barrett* [2009] EWCA Crim 2213; [2010] 1 Cr. App. R. (S.) 87 (p.572); [2010] Crim. L.R. 159)). *The judge should look elsewhere for an appropriate sentence, which might for example take the form of an immediate term of imprisonment (with a s.240 direction), a community order, or a conditional or absolute discharge. The appropriate sentence in a specific case will of course depend upon the particular circumstances of that case."*

11. The Appellant therefore submitted that the suspended sentence order should be quashed in his written submissions he submitted it should replace with an immediate term of imprisonment which the Appellant will already have served by reason of his time on remand. However, Mr Williams now submits in his oral submissions that it should be a conditional discharge due to a point of principle is one to which we shall turn later in this judgment.

Submissions of the Crown

12. The Crown submits that the sentence was not wrong in law or in principle. It submits that *R v Hewitt* (supra) is no longer good law since the introduction of post-sentence supervision orders under section 256AA Criminal Justice Act 2003. This is said to be because at the end of the sentence of imprisonment there will be in addition a period of

post sentence supervision. The combined length of the licence and post-sentence supervision period will always be 12 months for any offender sentenced to a custodial sentence of less than 12 years.

13. Section 256AB of the Criminal Justice Act 2003 provides eight requirements that may be imposed during post-sentence supervision. A breach of such an order may result in a range of penalties including a fine, unpaid work and 14 days' committal to custody. That committal does not take into account any time spent on remand. It is therefore said that the imposition of a suspended sentence for a custodial term, less or equal to a period of time on remand is not rendered pointless.

14. It is said by the Crown that the learned judge was seeking to protect the court's orders, referring to section 142(1) of the Criminal Justice Act 2003.

Discussion

15. At the heart of this appeal there is, in our judgment, a stark point. It is that the Appellant has served by way of remand, a period of remand in custody which is the equivalent of double the starting point which the Judge had in mind. Even if the Appellant had served the equivalent of what the Judge had in mind there are no circumstances in this case which justify in effect a further additional sentence.

16. The Judge had in mind that in addition to the time spent in custody there should hang over the Appellant a further sentence, however small, to act as a check against further misconduct over the next two years. There was, in our judgment, no justification for in effect punishing the Appellant twice, that is by more than the appropriate custodial

sentence followed by a suspended sentence thereafter.

17. In any event, the Judge does not appear to have grappled with the fact that automatic credit would be given against the suspended sentence for the time served on remand. Accordingly, there was no possibility of activating even the 3 weeks of the suspended sentence. The Crown now submits that this was not pointless because of the impact of a post-sentence supervision order. This has, in our judgment, all the hallmarks of an artificial and retrospective attempt to save the suspended sentenced. It does not grapple with the point about the double penalty. Further, if there is no prospect of the suspended sentence being activated, then it begs the question as to whether the post-sentence supervision order will ever take effect.

18. We now return to the original solution of the Appellant of an immediate sentence of imprisonment instead of a suspended sentence. Mr Williams having thought again about the matter, rightly recognises that it Counsel for the Appellant may itself come with a difficulty. It is possible that such a course would offend against section 11(3) of the Criminal Appeal Act 1968 which requires this Court, on appeal against sentence, to exercise its powers such that *"taking the case as a whole, the Appellant is not more severely dealt with on appeal than he was dealt with by the* below". Mr Williams referred us to the case of *R v Barrett* [2010] EWCA 2 Cr App R(S) 86 per Keith J at [8-9], that the Court may not have power to order an immediate sentence of imprisonment, when the court below had ordered that the imprisonment should be suspended.

19. These concerns have been taken further by this court in the case of *R v Thompson* [2018]

EWCA Crim 639, where this Court considered the effect of imposing an immediate custodial sentence instead of a suspended sentence in circumstances where the equivalent of the immediate sentence had been served on remand - see paragraphs 9 - 13. There is authority to support this on the basis that *"no ordinary person would consider that the Appellant's are now being dealt with more severely than in the Court below"*. see *R v Walters* [2008] EWCA Crim 2538. However, in *R v Thompson* this Court said at paragraph 13

> *"that those decisions would have to be considered with care in the light of the introduction of post sentence supervision and automatic credit for time spent on remand, and whether a proposed sentence is more severe than that imposed in the Crown Court."*

20. We are satisfied that Mr Williams is right not to pursue the submission that there should be an immediate sentence of imprisonment. We have to be satisfied that, in accordance with section 11(3) of the Criminal Appeal Act 1968, that a conditional discharge will not be more severe than a suspended sentence.

21. In the case of R v *Barrett* the view of Underhill J, cited from the case of *R v Hemmings*, was as follows at paragraph 7:

> *"We do not see how a sentence of conditional discharge can be described as more severe than a community order."*

Although Underhill J then followed a suggestion of counsel as to how the sentence would be formulated, we agree with the view of Underhill J that the sentence of conditional discharge is not more severe than a community order and is therefore a sentence which is available to this court on an appeal.

22. In our judgment, the overriding point in this case is that it is disproportionate for a suspended sentence to have to hang over the Appellant when he has already been the subject of a long period of remand in custody.

23. We are sufficiently concerned about the application of the issues in *R v Thompson* and the application of section 11(3) of the Criminal Appeal Act 1968, not to impose an immediate sentence of imprisonment. In our judgment, this will be avoided by imposing a conditional discharge for 12 months. Section 12 of the Powers of Criminal Courts (Sentencing) Act 2000 enables the Court to impose a conditional discharge if, having regard to the circumstances, including the nature of the offence and the character of the offender, it is inexpedient to inflict punishment.

24. Given the unusual circumstances of this case, this exceptional course of a conditional discharge is open to the Court. We emphasise that the Court takes a serious view of a non-molestation order being broken in the manner which occurred place in the instant case. The conditional discharge does not indicate a leniency in respect of the breach because it is only imposed in the context of the long period served by the Appellant on remand relative to the starting point of the Judge. It is also a sentence which does not offend against the principle in section 11(3) of the Criminal Appeal Act 1968 for the reasons given.as elucidated in given above. It also has the advantage of fulfilling to an extent the objective of the Judge in seeking to have something hanging over the Appellant. Accordingly, we allow the appeal by discharging the suspended sentence of imprisonment and instead ordering that the Defendant has a conditional discharge.

25. We note that this was one of the solutions cited above in the passage in *R v Hewitt.* In the context only of the 83 days which the Appellant has served on remand, it seems to us to be an appropriate sentence.

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

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