Neutral Citation Number: [2021] EWCA Crim 960

CASE NO 202100946/A3

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Thursday 17 June 2021

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
LORD JUSTICE FULFORD
MRS JUSTICE EADY DBE
MRS JUSTICE STACEY DBE

Between

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REGINA
-v-
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(Official Shorthand Writers to the Court)

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MISS D AMANING appeared on behalf of the Appellant
MR I FOINETTE appeared on behalf of the Crown

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J U D G M E N T

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MRS JUSTICE EADY:

Introduction

1. The provisions of section 45 of the Youth Justice and Criminal Evidence Act 1999 are engaged in this case as the appellant was aged 17 at the time of the proceedings below and a reporting restriction order was made by the Medway Magistrates' Court on 29 September 2020.
2. Following his earlier guilty pleas to two counts of burglary of a domestic dwelling, on 5 March 2021 the appellant was sentenced on each count to a two-year youth rehabilitation order, with a supervision requirement, to run concurrently.
3. With the leave of the single judge the appellant appeals against that sentence on two grounds: (1) that the judge erred in refusing to remit the appellant's case to the youth court and/or to exercise his discretion to sit as a district judge so that a referral order could be imposed; alternatively (2) the length of the youth rehabilitation order was manifestly excessive.

The facts

4. Along with two others, one of whom was the appellant's father, the appellant participated in two burglaries on 26 September 2020.
5. Count 1 concerned a burglary at the house of Mr and Mrs Bull who had left their home address in Gillingham locked and secured so they could travel to Yorkshire. They had a Closed Circuit Television ("CCTV") system installed within the property, which sent alerts to their son if any intruders were detected. At around 7.30 pm their son started to receive alerts from different parts of the property. He looked at the CCTV video and could see there were three men inside. He called the police who subsequently attended the property. Entry had been gained via a rear patio window and the men had conducted a messy search of the property. It transpired that various items were stolen including a gold watch and a gold bracelet from the bedroom.
6. Count 2 related to another burglary in Gillingham. At around 4.00 pm on 27 September 2020, Mr and Mrs Mason returned home to discover that the French doors at the back of the premises had been smashed and various units and drawers pulled out in different rooms including the bedrooms. They discovered that the following items had been stolen: an antique gold wedding ring, a second gold wedding ring worth around £500, a diamond ring worth between £1,000 and £1,500, a gold chain, a bracelet and around £35 to £50 in cash. They noticed that some form of liquid had been sprayed over the bedsheets, over the television at the end of their bed and over the door handles; this appears to have been an attempt to try and remove any marks that may have been left. They also discovered that various items within the property had been damaged, such as

their jewellery boxes.

7. We should say that we have read the statements of the complainants and can well understand the distress that they felt as a result of these crimes. They no longer feel safe within their own homes and items that hold enormous sentimental value were stolen from them. This kind of crime is devastating for those who are the victims. Although we are today focused on the situation of the appellant, we do not lose sight of the impact upon those whose homes were burgled.

8. Returning to the history, at around 9.00 pm on 27 September, a vehicle with cloned number plates was stopped by the police on the A2 motorway travelling towards the Dartford Crossing. The appellant's father and co-accused Mr S (senior) was driving the vehicle. Another co-accused, Wesley Maughan, was sitting in the front passenger seat and the appellant was sitting in the rear of the vehicle. Officers searched the vehicle and found screwdrivers, torches and various items of clothing such as gloves, face coverings and hats. The officers also found a diamond ring in the rear of the vehicle which Mrs Mason subsequently confirmed had been stolen from her home. A spare set of cloned number plates were also found in the boot of the vehicle. Further enquiries revealed the same vehicle had been driven to Kent and was picked up by the Automated Number Plate Recognition ("ANPR") cameras shortly after 7.00 pm on the evening of 26 September. Thereafter the vehicle was picked up by ANPR cameras at around 9.30 that evening travelling back towards the Dartford Crossing.

The procedural history and the sentencing decision

9. The three defendants appeared before Medway Magistrates' Court on 29 September 2020. On that occasion the appellant pleaded not guilty. As Mr S (senior) qualified for the minimum sentence under section 111 of the Powers of Criminal Courts (Sentencing) Act 2000 (now section 314 of the Sentencing Act 2020), as a third striker, the matter was sent to Maidstone Crown Court under section 51 of the Crime and Disorder Act 1998.

10. At the Pre-Trial Preparation Hearing at Maidstone Crown Court, on 28 October 2020, both the appellant and Mr S (senior) entered guilty pleas. Mr Maughan pleaded not guilty and his trial was set for 11 February 2022. On that occasion the judge was invited to proceed to sentence the appellant either by using his powers under section 66 of the Criminal Courts Act 2003, that is to sit as a District Judge (Magistrates' Court) ("DJMC") or to remit the matter to the Youth Court. It was submitted that the appellant was a youth of previous good character and met the requirements for a mandatory referral order in accordance with (what is now) section 85(2) of the Sentencing Act 2020. The judge refused, but observed that the court would be assisted by a pre-sentence report ("PSR"). Meanwhile the appellant remained on conditional bail, one of the conditions being that he observed an electronically monitored curfew between the hours of 7 pm to 7 am.

11. The PSR in the appellant's case is dated 21 December 2020 but was updated for the hearing on 7 January 2021. The author, a member of the Basildon Youth Offending Team, had been able to carry out two interviews with the applicant (both by telephone due to constraints arising from the continuing Covid 19 pandemic) and she had held one telephone interview with the appellant's mother, with further text communications to gain additional information. A pre-court panel meeting was also held with the applicant and his mother via Skype on 4 January 2021.

12. The PSR explained that the appellant lived with his mother and younger siblings, his father having been absent for most of his life. Mr S (senior) had made contact with the appellant after he had been released from a term of imprisonment and it seems that it was this reunion that led to the appellant's involvement in the burglaries. The appellant had not been forthcoming in speaking about the burglaries and maintained he could not remember the details of the evening and did not recall getting out of the car. The author of the report considered that some difficulties may have arisen from the fact that she was unable to meet with the appellant in person. She further noted that, since the burglaries in October 2020, the appellant had been involved in a motor vehicle/mechanics course at Life Skills, Basildon. He had a good attendance record and had made a number of new friends. The appellant reported a desire to undertake a construction course in the future and his maternal uncles, who have their own roofing and construction businesses, had indicated a willingness to offer him work when he was ready. The author recorded that the appellant had the full support of his mother and older siblings and the Youth Offending Team felt able to support a proposal of a referral order.

13. The matter was next before the court remotely on 7 January 2021. On that occasion Mr Maughan failed to attend, although he was legally represented. A warrant not backed for bail was issued and we understand Mr Maughan remains at large. The appellant was himself unable to attend the hearing as he did not have access to a device capable of joining. As Mr Maughan was now at large an application was made to the judge to sentence Mr S (senior), who did not require a PSR, and to remit the appellant's case to the Youth Court. The judge again declined to adopt this course, stating it was a well-established principle for all defendants to be sentenced together.

14. When the matter was returned to court for sentence on 5 March 2021 (before His Honour Judge Smith), Mr S (senior) received a three-year custodial sentence for the burglary offences, including two further burglaries for which a TIC schedule had been prepared, plus a concurrent three-month term for driving whilst disqualified. He was also disqualified from driving for 27 months.

15. In respect of the appellant, the judge was once again invited to use his powers under section 66 of the Criminal Courts Act 2003 to sit as a DJMC and impose a referral order. This invitation was refused on the basis that referral orders are not available in the Crown Court. There then followed an application to remit the case to the Youth Court, but this was also refused, the judge commenting (according to the appellant's grounds of appeal) that if he were to allow that application he would be "*tying the hands of the Youth Court*". The judge made clear that he would not be sentencing the appellant to detention so the only option available would be that of a youth rehabilitation order, with supervision, for a sufficient period to allow for the requirements proposed within the PSR to be completed.

16. In subsequently proceeding to sentence, the judge rehearsed the facts of the offences, noting that they were planned and involved the theft of sentimental items. He noted that whilst an attempt had been made to disguise the culprits' fingerprints, by spraying liquid at the Mason property, the offences had been carried out in a clumsy manner. He acknowledged that a significant distinction had to be drawn between the appellant, a young man of previous good character, and his father, who had a lengthy antecedent history for numerous offences of dishonesty. The appellant's submissions in mitigation had highlighted his previous good character, the courses he had since undertaken, and a potential offer of employment, and also his compliance with the electronically monitored

curfew.

17. The judge sentenced the appellant to a youth rehabilitation order for a period of two years with supervision. In passing sentence the judge made the following remarks:

> "The application has been made that you be remitted to the youth court. I won't grant that application. It seems to me you've been here now. Twice that application has already been made. Perhaps in some ways you should have stayed there but you're here now.
>
> What I want to achieve is rehabilitation in your case. I want you to not do this again. I want you to reflect on what you've done. I want you to move away from it. There are prospects for you, I have no doubt. They don't and will not be achieved by you offending in this way in the future. Stay away from it and stay out of it. A youth rehabilitation in your case for two years. Two years in which you will be subject to supervision.
>
> Those requirements of supervision deemed to be appropriate and necessary by the officers responsible for your case will include, I hope, those features of rehabilitation which are discussed and considered in the referral order that was proposed in the pre-sentence report. In fact, that is not an order that is available to me but what was intended by it I endorse and hope and encourage – hope that it will be carried out and encourage you to comply with it ...
>
> I am imposing two years – and I want you to understand this – not as an additional punishment, not because I think this merits two years of a community youth rehabilitation order, I'm giving you two years' youth rehabilitation order because, at the moment, it's so difficult to do things. I want you to get it – get the opportunity to do these orders."

Submissions on appeal

18. For the appellant it is contended that the judge imposed a sentence that was wrong in principle. The appellant was a young person of good character who had entered guilty pleas for imprisonable offences; as such, he should have been made subject to a referral order. The judge had wrongly refused to exercise his discretion to sit as a DJMC and impose such an order. In the alternative, the term of the youth rehabilitation order was manifestly excessive given that the view taken by the Youth Offending Team (made clear by the PSR) was that the rehabilitation work in the appellant's case could be successfully completed under a 12-month referral order.

19. For the prosecution, it is submitted that, given that he was dealing with an adult co-defendant at the same time, and was fully aware of all relevant circumstances, the judge properly exercised his powers of discretion in determining not to remit the appellant's case for sentence to the Youth Court, not least as to do so would have caused further delay, duplication and unnecessary expense. The judge was equally entitled to

decline to use his section 66 powers to sit as a DJMC. This had been a well-planned and organised enterprise and the appellant had told the author of the PSR that he could not recall having left the car whereas three people had been seen on CCTV in one of the burglaries.

20. As for the length of the youth rehabilitation order, that was both necessary and proportionate. The appellant had not been forthcoming about his offending behaviour and the judge was entitled to take the view that the appellant would benefit from an extended two year period complete with suggested courses. The Sentencing Council's Overarching Principles on Sentencing Children and Young People made clear that the approach to sentencing should be individualistic and focused on the child or young person (paragraph 1.2), the principal aim being to "*prevent offending by children and young people*" (paragraph 1.1).

Discussion and conclusions

21. As the appellant had been jointly charged with an adult who was sent to the Crown Court for indictable offences, there was no error in the Magistrates' Court's decision to send him to the Crown Court for trial: see section 51(7) of the Crime and Disorder Act 1998, which provides that in such circumstances a child or young person shall be sent to the Crown Court for trial if the court considers it necessary in the interests of justice to do so.

22. Once convicted, section 25(2) Sentencing Act 2020 provides that the court shall remit the case to the Youth Court for sentence unless satisfied that it would be undesirable to do so. It is the appellant's case that the judge erred in failing to remit him to the Youth Court for sentence, alternatively in failing to himself exercise the powers of the Youth Court, such that the relevant disposal should have been the making of a referral order.

23. A referral order is defined at section 83(1) of the Sentencing Act as follows:

> "(1) In this Code 'referral order' means an order—
>
> (a) which requires an offender to attend each of the meetings of a youth offender panel established for the offender by a youth offending team, and
>
> (b) by virtue of which the offender is required to comply, for a particular period, with a programme of behaviour to be agreed between the offender and the panel in accordance with this Part (which takes effect as a youth offender contract)."

24. The availability of a referral order is explained by section 84 of the Sentencing Act, which (relevantly) provides:

> "(1) A referral order is available to a court dealing with an offender for an offence where—
>
> (a) the court is a youth court or other magistrates' court

(b) the offender is aged under 18 when convicted

(c) neither the offence nor any connected offence is an offence the sentence for which is fixed by law

(d) the court is not proposing to—

impose a custodial sentence, or

make a hospital order (within the meaning of the Mental Health Act 1983),in respect of the offence or any connected offence

(e) the court is not proposing to make—

an order for absolute discharge, or

an order for conditional discharge,

in respect of the offence, and

(f) the offender pleaded guilty to the offence or to any connected offence."

25. Section 85 then provides (relevantly):

"(1) Where a referral order is available—

(a) the court must make a referral order if the compulsory referral conditions are met;

(b) otherwise, the court may make a referral order.

(2) The compulsory referral conditions are met where—

(a) the offence is an imprisonable offence

(b) the offender pleaded guilty to the offence and to any connected offence, and

(c) the offender has never been—

convicted by or before a court in the United Kingdom of any offence other than the offence and any connected offence, or

convicted by or before a court in another Member State of any offence.

…"

26. Thus, as observed at paragraph 6.19, Sentencing Council's Overarching Principles on Sentencing Children and Young People ("the Overarching Principles"):

> "A referral order is the mandatory order in a youth court or magistrates' court for most children and young people who have committed an offence for the first time and have pleaded guilty to an imprisonable offence. Exceptions are for offences where a sentence is fixed by law or if the court deems a custodial sentence, an absolute or conditional discharge or a hospital order to be more appropriate."

27. We do not have a transcript of the judge's explanation for refusing the application to remit when it was made at the sentencing hearing and his sentencing remarks only make a brief reference to the point (see as set out above). He was not bound to remit the appellant's case for sentence, although, as we have already observed, section 25(2) of the Sentencing Act provides that the court shall remit the case to the Youth Court for sentence unless satisfied that it would be undesirable to do so. In considering the potential exercise of this discretion under an earlier iteration of the provision in R v Lewis (1984) 79 Cr.App.R 94, at page 99, Lord Lane LCJ reflected on the circumstances in which a remission might be considered undesirable, observing:

> "Possible reasons that it would be undesirable to do so are as follows – these of course are by no means comprehensive: that the Judge who presided over the trial will be better informed as to the facts and circumstances; that there is, in the sad and frequent experience of this Court, a risk of unacceptable disparity if co-defendants are to be sentenced in different courts on different occasions; thirdly, that as a result of the remission there will be delay, duplication of proceedings and fruitless expense; ... "

28. In considering these matters, although referral orders are only available in the Youth or Magistrates' Court, the Crown Court judge in these circumstances would also need to reflect on the likely disposal in the case before them. In our judgment, where, as here, a referral order would be the mandatory sentence in the Youth or Magistrates' Court, then, bearing all the relevant factors in mind, that must act as a powerful consideration when a Crown Court Judge is determining whether to exercise the power to remit and/or to sit as a DJMC themselves. As is observed in the Overarching Principles, at paragraph 2.16:

> "Particular attention should be given to children and young people who are appearing before the Crown Court only because they have been charged with an adult offender; referral orders are generally not available in the Crown Court but may be the most appropriate sentence."

29. In this case, the judge was entitled to have regard to the possible disparity that might arise given that both an adult and a person under 18 fell to be sentenced in relation to the same offences, and it was permissible for him to seek to avoid further delay, unnecessary duplication of proceedings and extra expense. To the extent that such matters informed his decision, however, they would have been addressed by the judge using the powers afforded to him by section 66 of the Courts Act 2003, to sit as a DJMC in the Youth Court. As explained by the Court of Appeal in R v Gould and others [2021] EWCA Crim 447, judges of the Crown Court have the power to sit as District Judges (see Gould paragraph 81) but when dealing with children and young persons will be sitting in the Youth Court (see Gould paragraphs 72 to 76).

30. Accordingly, the judge had the power to remit the appellant to the Youth Court for sentence, pursuant to section 25(2) Sentencing Act, and to then himself exercise the powers of a DJMC sitting as a Youth Court to impose a referral order.

31. It is apparent, however, that this is not a power that the judge considered he possessed in this instance: "*that is not an order that is available to me*". As he was sentencing without the benefit of the guidance provided in Gould, that error is perhaps forgivable. The judge may well have had in mind the approach adopted in R v Dillon [2019] 1 Cr.App.R (S) 22, where it was held that the Youth Court had exclusive competence to make a referral order and a Crown Court judge could not acquire jurisdiction by exercising the general jurisdiction of a DJMC (and also see R v Koffi [2019] 2 Cr.App.R (S) 17, to like effect). Following Gould, however, it is apparent that the view taken in those cases was incorrect and the judge was therefore wrong in concluding that no route was open to him to make a referral order in this case.

32. Given that, duly exercising his powers as a DJMC sitting as the Youth Court, a referral order would have been the mandatory sentence in the appellant's case, there would have had to have been a truly persuasive reason not to remit this matter and then to proceed to sentence differently from the obligatory disposal that would otherwise be imposed in the court where someone of this age group would usually be sentenced. As questions of consistency and of potential delay would have been answered by the judge's exercise of his section 66 powers, and, as there was nothing to suggest that any of the exceptions to the mandatory sentence arose, we consider that it was wrong in principle for the judge to have failed to impose a referral order in this case.

33. Our view in this regard is reinforced by the content of the PSR available to the judge. The appellant was previously of good character and had taken commendable steps to move on from the lapse apparently encouraged by his father, who made contact after being absent for most of the appellant's life. With support from the other members of his family, the relevant Youth Offending Team was confident of the appellant's rehabilitation within the 12-month term of a referral order. All the material before the judge pointed strongly in favour of a referral order and we are satisfied that the failure to adopt the means whereby this could be achieved resulted in a sentence that was wrong in principle and manifestly excessive.

Disposal

34. For the reasons we have given we therefore allow the appeal and quash the order made. We remit this matter to the Medway Youth Court. The only condition of bail will be that

the appellant lives at an address which counsel shall provide to the court by 4.00 pm today. We further observe that it would be desirable for this matter to be dealt with as expeditiously as possible.