IN THE COURT OF APPEAL
CRIMINAL DIVISION

On appeal from Manchester Crown Cout
(His Honour Judge Macadam)
Case No:202402347/A5
NCN:[2024] EWCA Crim 1193

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 31st July 2024

B e f o r e:

LADY JUSTICE WHIPPLE DBE

MR JUSTICE GOOSE

THE RECORDER OF WOLVERHAMPTON
(His Honour Judge Michael Chambers KC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

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Mr S R Neale appeared on behalf of the Applicant

Miss H Squire appeared on behalf of the Crown

J U D G M E N T

Wednesday 31st July 2024

LADY JUSTICE WHIPPLE: I shall ask Mr Justice Goose to give the judgment of the court.

MR JUSTICE GOOSE:

Introduction

1. This application for leave to appeal against sentence has been referred to the Full Court by the Registrar, together with an application for an extension of time of 43 days.

2. On 20 February 2024, in the Crown Court at Manchester Minshull Street, the applicant pleaded guilty to the offence of affray, contrary to section 3 of the Public Order Act 1986.

3. On 16 April 2024, he was sentenced by His Honour Judge Macadam to 13 months' imprisonment, suspended for 18 months, with a Rehabilitation Activity Requirement of ten days. A Compensation Order of £500 was also made.

4. On 24 June 2024, outside the 56 day time limit permitted under section 385 of the Sentencing Act 2020 for reconsideration of sentence, an application was made to vary the sentence, to take into account time served by the applicant under a qualifying curfew whilst awaiting sentence in the Crown Court. The applicant had been under a qualifying curfew from 1 June 2021 until 16 April 2024, which, under section 240A of the Criminal Justice Act 2003, entitled the applicant to have it taken into account in respect of any sentence of imprisonment imposed. Given the lateness of the application, the judge correctly refused to grant the application which has necessitated the hearing before this court.

5. The issue that arises for us to determine is whether it was wrong in principle for the

judge to have imposed a suspended sentence when the custodial element was less than the credit to which the applicant was entitled for the time served under a qualifying curfew. Unfortunately, this issue was not raised before the judge at the sentencing hearing.

The Offence

6. It is unnecessary for the purposes of this application to repeat the facts of the offence, other than in short summary. On 14 April 2021, at about 9.25 pm, the complainant was in her home in Davyhulme, Manchester with her young children. She heard a disturbance outside her front door, where three people, including the applicant, were present. They demanded to see the complainant's eldest, adult child who did not live in the house. The three offenders refused to accept the complainant's denial of his presence. There followed a violent incident in which the group kicked at the front door and smashed the glass pane. Further, a gunshot was fired, although the applicant was not prosecuted for any participation in relation to the weapon or its possession.

7. The police were called. The complainant's CCTV system was examined in order to identify the assailants.

8. Following his arrest, the applicant denied being one of the three who had attended the property.

9. The applicant had previously been convicted on nine occasions for 19 offences, the most recent of which was in 2012 when the applicant committed a further offence during the operational period of a suspended sentence order.

Sentencing

10. The judge concluded that the offence of affray had crossed the custody threshold and

required therefore a sentence of imprisonment, which, after a late guilty plea, was determined at 13 months. That sentence was then ordered to be suspended for a period of 18 months, with a ten day Rehabilitation Activity Requirement. The compensation order was also made. The co-accused were sentenced differently, because their circumstances merited it.

The Grounds of Appeal

11. In admirably attractive and concise grounds of appeal, Mr Neale argues that a suspended sentence of imprisonment for a defendant who has served a custodial term on remand in excess of that which is the term within the suspended sentence is wrong in principle. It is argued that the purpose of a suspended sentence is to create an incentive for an offender not to commit further offending during the suspension period. Where the offender has already served more than the suspended sentence upon remand in custody or upon qualifying curfew, there is no incentive to comply with the order. Further, should there be a breach of the suspended sentence and the court decides to activate the custodial term, the offender would be entitled to credit for the time served on remand or qualifying curfew, rendering the sentence nugatory.

12. It is also argued that the imposition of the Rehabilitation Activity Requirement condition is wrong in principle because it acts as a double penalty. The applicant, who has served his effective sentence, is now required to undertake ten days of prescribed activity.

Discussion and Conclusion

13. We are satisfied that both the application for an extension of time and the application for leave to appeal must be granted. It is not necessary for this court to repeat the careful analysis of earlier decision which have been made. However, it is clear from such decisions as *R v Williams* [2018] EWCA Crim 2396, *R v Dawes* [2019] EWCA Crim 848, *R v Blaine Latta* [2023] EWCA Crim 1171 and *R v Leitch* [2024] EWCA Crim 563 that the court when

sentencing must be reminded of the terms and effect of any time served either on remand in custody or subject to a qualifying curfew in order for the sentencer to identify the correct sentence.

14. It is clear in this case that the judge was neither informed, nor reminded of the time served by the applicant under a qualifying curfew. We are satisfied that a sentence of 13 months' imprisonment, suspended for 18 months, with a Rehabilitation Activity Requirement was wrong in principle for the appellant who had been subject at the very least to a qualifying curfew which exceeded the custodial term of the suspended sentence order. For the reasons identified by Mr Neale in the Grounds of Appeal such a sentence should not have been imposed and we quash the order made.

15. It would be equally wrong in principle for this Court now to impose an alternative sentence with a Community Order. In *R v Dawes*, this court concluded that such a course would involve the imposition of a sentence which offends section 11(3) of the Criminal Appeal Act 1968, which requires a court 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 court below".

16. In the circumstances of this case, the appellant having served a custodial term in excess of 13 months' imprisonment, then to be required to be the subject of a community order would be to treat the appellant more severely than he as in the court below.

17. Accordingly, we shall impose a Conditional Discharge for a period of 12 months, which means that if the appellant were to commit further offences during the term of the conditional discharge, then he may be re-sentenced for this offence.

17. The Compensation Order of £500 will remain.

18. We allow the appeal against sentence. We quash the suspended sentence of imprisonment with the Rehabilitation Activity Requirements and impose in its place a Conditional Discharge for 12 months.

19. Accordingly, and to that extent, the appeal is allowed.
