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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 23rd January 2019

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE KNOWLES

and

SIR WYN WILLIAMS

R E G I N A

- v -

RODNEY COX

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Mr J W B Waller appeared on behalf of the Appellant

Mr B Heptonstall appeared on behalf of the Crown

J U D G M E N T
(Approved)

Wednesday 23rd January 2019

LORD JUSTICE DAVIS:

Introduction

1. On 13th August 2018, the appellant pleaded guilty before the magistrates to a charge of possession of cannabis, a charge of using a vehicle without insurance and a charge of driving without a licence. Thereafter, he pleaded guilty in the Crown Court to a count of criminal damage (count 1 on the indictment). He was tried in the Crown Court at Aylesbury on two other counts. He was acquitted by the jury on count 2 (going equipped for theft) but convicted on count 3 (assault with intent to resist arrest, contrary to section 38 of the Offences against the Person Act 1861). On 23rd November 2018, he was sentenced by the Recorder who had had the conduct of the trial to a term of seven months' imprisonment on count 3. No separate penalty was imposed on the other matters, save that his licence was to be endorsed with six penalty points. That last (on its face, unremarkable) matter has indirectly given rise to one of the issues arising on this appeal and involves considering the correct practice to be followed where a sentence is varied.

2. By subsequent variation, on 18th December 2018, and following written communications between and submissions from both parties, time spent on a qualifying curfew for the purposes of section 240A of the Criminal Justice Act 2003 was by agreement specified by the Recorder on the papers as eighteen days. That was then placed on the court record. At the time of passing the original sentence the Recorder had not actually specified the relevant number of days, as required by section 240A(8), although she had made a broad statement in her sentencing remarks to the effect that any qualifying curfew period was to be deducted.

3. In addition, the appellant's driving licence having been endorsed with six penalty points and it

having subsequently (after the sentencing hearing) been noticed that he had already had points endorsed on his licence for other matters, under the totting-up procedure he was disqualified from driving for a period of ten months. This also was directed by the Recorder administratively on the papers. All this was done within the 56 day period specified in section 155(1) of the Powers of Criminal Courts (Sentencing) Act 2000.

4. The appellant now appeals against the sentence of seven months' imprisonment by leave of the single judge.

The Background Facts

5. The facts are these. On 10th August 2018, a police constable was on duty on his own in a police car. He was looking for a Vauxhall Corsa with false registration plates which he found. The appellant was inside. The officer illuminated his lights but the appellant drove off. The appellant reversed his vehicle but was obstructed. He then moved forward and rammed into the police vehicle twice, causing damage to the car. As he was unable to escape, the appellant got out of the vehicle and tried to hide. He was found by the police officer crouching at the back. Initially, the appellant was compliant and put his hands behind his back. The officer managed to put one handcuff on him but then the appellant lunged forwards towards the officer. He pushed the officer onto the bonnet of the vehicle and at one point got the officer to the ground. The officer landed on his knee. The officer managed to get up and pushed the appellant onto his car. A struggle ensued. The officer tried to handcuff the appellant to a nearby gate, but the appellant refused to let go and resisted all attempts of the officer to place the other handcuff on him. The officer then felt it necessary to use his captor spray on the appellant. When even this did not get the appellant under control, the officer hit him four or five times on the head with the canister.

6. The officer suffered some injuries to his elbow, knee, lower back and wrist. These were said

not to be significant, albeit he was unable to carry out his work for a short time thereafter.

7. Regrettably, the appellant has a very poor record. He has a number of convictions for 49 offences in total, starting in 2008. His convictions include burglary, theft and handling. In 2009, there were two offences of assault of a constable. In addition, there are offences of aggravated vehicle taking, non-compliance with court orders and also a public order offence. On several previous occasions he has received custodial sentences. It appears that he has had problems with drugs and he has had significant personal problems in his family life also. Further, it is said, and as was accepted, that there had been significant psychiatric issues. However, it was thought by the Recorder that a pre-sentence report was unnecessary. That is one topic of complaint on this appeal.

8. In passing sentence the Recorder reviewed the facts fully and carefully. For the purposes of the relevant guideline, the Recorder found that this was a sustained assault. However, the Recorder found that the offending was not of higher culpability and placed it initially within category 2 for the purposes of the relevant guideline: which would connote a starting point of a medium level community order, with a range of a low level community order to a high level community order. Having so indicated, however, the Recorder went on to say this:

> "At this time, I start off at a community bracket but I am also going to say this. Whilst I have regards to the Council guidelines, I am also entitled to move away from them. On this occasion, I do not feel that those guidelines reflect the ferociousness, the violent struggle that this officer had to deal with while he was trying to carry out his job. It is aggravated by the fact where this offence took place. It was in a very quiet place, he was on his own, he had no crew to turn for assistance, and your previous convictions do not help you either …"

The Recorder then referred to the appellant's antecedent history and indicated the view that this

was an escalation of offending. The Recorder also accepted that the appellant had problems in his background and accepted that there had been a diagnosis of schizophrenia. Nevertheless, the Recorder found that this did not justify what had been done. She said this:

> "Police officers have a very difficult job to do trying to protect the community, without having to deal with your type of behaviour that this officer had to deal with and endure while he was carrying out his duty. No one expects to go to work to be expected to deal with that type of violence, even police constables who have to face a risk on a day to day basis. …"

The Recorder proceeded at that time to impose the sentence we have indicated.

9. At the end of her sentencing remarks the Recorder said this:

> "You will serve half of that sentence, bearing in mind you have already served a substantial amount of time while you have been subject to a qualifying curfew. That will come off your sentence."

As we have said, the Recorder did not specify the relevant period of days for the purposes of section 240A(8). Nor did she follow (nor was she reminded to follow) the precise procedure approved in *R v Hoggard* [2014] 1 Cr App R(S) 42; *R v Marshall* [2016] 1 Cr App R(S) 45.

The Appeal against the Custodial Term

10. For the appellant, Mr Waller submits that this sentence of seven months' imprisonment was excessive. He says that there was no justification for the Recorder departing from the sentencing guideline appropriate to category 2 offending and, at all events, no justification for departing from it to the degree which the Recorder did. He further submits that the Recorder overstated matters by describing the assault as "ferocious". He asserted before us this morning that this, in

truth, was no more than "pushing and shoving" (in his words). Further, he points out that, with regard to previous violent offending, the appellant was relatively lightly convicted, notwithstanding all his other convictions. In addition, there were all the mental health problems and personal difficulties to which reference had been made; and he complains that the Recorder would have been assisted in this regard by obtaining a pre-sentence report.

11. In our judgment, this sentence cannot be said to be excessive. The Recorder had had the benefit of conducting the trial. She was fully entitled to find this attack to be "ferocious". Further, the Recorder fully explained just why she was departing from the initial guideline range appropriate at first sight to this offending. That included the ferocity of the assault (as found) and the antecedent history of the appellant. The Recorder was entitled to move up as she did and, in our view, was entitled to impose a sentence of immediate custody of the order of seven months, as she did. Furthermore, it is to be borne in mind that the sentence had to reflect the totality of the offending, which not only included the matters of driving without insurance and so on but also included the criminal damage to the police car. It was a matter for the Recorder as to whether she would be assisted by a pre-sentence report. We therefore dismiss this appeal against sentence on the grounds on which it has been based.

The Subsequent Variation of the Sentence

12. However, we ought to add that we have also been addressed as to the subsequent variation of the sentence by the administrative procedures here adopted and when there was no public court hearing. We are grateful to Mr Heptonstall, who has appeared on behalf of the Crown for this purpose, for his helpful submissions, both written and oral, to us.

13. As we have said, the Recorder had not specified the actual number of days representing the qualifying curfew period at the time she pronounced sentence: albeit she had in effect in broad

terms specifically said that whatever those qualifying days were, they would come off the sentence. It is perhaps particularly important that the correct deduction for time spent on qualifying curfew be made and announced in court at the time of sentence, as the statute requires, where a short custodial term is imposed. Otherwise the prison warrant may not be correctly completed at the time and subsequent correction runs the risk of not occurring before the release date. It remains in *all* cases, however, most important that counsel for the prosecution and counsel for the defence ascertain the true figure of qualifying curfew time by the time of the sentencing hearing itself and inform the court accordingly.

14. In this case, the number of days to be deducted was subsequently, and after the sentencing hearing, the subject of agreement between the parties once the true position had been identified. We can see no objection to such a matter then being dealt with administratively on the papers (if agreed): although we suggest that good practice should mean that, in such circumstances as occurred here, the actual pronouncement of that period of qualifying time to be deducted from sentence should be made in open court – it should take a matter of seconds. Further, we can see no real objection in such circumstances for that pronouncement to be made by some judge other than the original sentencing judge if that judge is not available for that very limited purpose, provided of course that the original sentencing judge has approved the matter.

15. However, the other variation which was made administratively on the papers in this particular case, namely the adoption of the totting-up procedure and the consequent imposition of a period of disqualification from driving of ten months pursuant to that totting-up procedure, is altogether a different matter. In our view, such a matter should not have been done "administratively" on the papers. It is clear that all concerned were trying to avoid the expense and inconvenience involved in a further court hearing. Further, both sides were afforded the opportunity to put in written representations and did so: the appellant by his counsel opposing

the making of a disqualification order. Both sides were content to proceed on such a footing. Nevertheless, potential disqualification from driving in itself is a serious matter. It will also potentially involve an increase in the overall sentence. Accordingly, such matter should in our judgment have been dealt with in the ordinary way in open court, with the appellant having the opportunity to be present, if need be by video-link.

16. In this regard, we should nevertheless stress that the erstwhile requirement that *all* matters relating to an adjustment to sentence should be dealt with in open court, as articulated in older cases such as *R v Kent* (1983) 77 Cr App R 120, has to an extent, for the purposes of proceedings in the Crown Court, been overtaken by the Criminal Procedure Rules: in particular, Criminal Procedure Rule 28.4. That, in general terms, empowers the court to direct variations of sentence which can be made at a hearing or without a hearing: see Criminal Procedure Rule 28.4(2).

17. However, sub-rule (4) provides restrictions on the power to make variations in a defendant's absence. In particular, for present purposes, that may not be done by a court if the proposed variation will operate so as to increase the sentence.

18. It is for that reason alone in the present case that, even though the procedure followed was with the agreement of all concerned, the variation relating to disqualification should, as we have said, have been debated and decided in open court and in the appellant's presence. There is a further consideration. Such a sentence variation is also in principle required to be done in open court just so that the public can be aware of what has occurred. As stated in cases such as *R v Pinkerton* [2017] 1 Cr App R(S) 47 at [8] (a case where there in fact was a downward adjustment of a concurrent custodial sentence which did not impact on the overall sentence) such alterations should be done openly "so that justice may be seen to be done". Likewise, in *R*

v Warren [2017] 2 Cr App R(S) 5, the general desirability of re-sentencing taking place in the presence of the defendant and in court was stressed.

19. Accordingly, whilst it is easy to understand the attractions of administrative convenience such as occurred here, and particularly perhaps where the sentencing judge is not a full-time judge based at a particular court centre, those administrative attractions should not be permitted routinely to prevail over the delivery of open justice.

20. In the present case, nevertheless, the failure to make the disqualification order following a hearing in public in the presence of the appellant does not have the consequence that that aspect of the sentence is a nullity. It is not. It remains a valid sentence, albeit subject to any alteration by the Court of Appeal. Mr Waller accepted as much. In the circumstances of this case Mr Waller has also pragmatically accepted that all the arguments which he wished to raise were raised below in writing and that the result reached by the Recorder was justified and would have been the same even had there been a public court hearing. Sensibly, therefore, he pursues no challenge to this aspect of the sentence: which accordingly stands.

21. That was a very fair stance to be taken. But we should nevertheless add that disqualification can often have its difficulties, not least sometimes in the context of *Needham* considerations. That yet further reinforces the general need for such aspects of a sentence to be debated in open court and in the presence of the defendant.

22. Finally, we would mention that Mr Heptonstall has suggested that the Criminal Procedure Rules Committee might wish to consider issues of this particular kind, perhaps with a view to promulgating a Practice Direction to supplement Criminal Procedure Rule 28.4. We record that suggestion. We express no view on it, one way or the other.

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

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