Neutral Citation Number: [2020] EWCA Crim 516

Case No: 201903520 A2; 201902283 A1; 201904181 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM IPSWICH, TAUNTON & MANCHESTER CROWN COURTS
HHJ PUGH, HHJ TICEHURST & HHJ D HERNANDEZ
T20190272, S20190092 & T20187164

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8th April 2020

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTCE FULFORD
MRS JUSTICE CHEEMA-GRUBB DBE
and
SIR NICHOLAS BLAKE

- -

Between :

Scott ABBOTT	**1st Appellant**
Graham Michael HAWKER	**2nd Appellant**
Craig Karl HARRISON	**3rd Appellant**
- and -	
The Queen	**Respondent**
- and -	
The Secretary of State for Justice	**Intervener**

- -

Mr Robert Pollington (instructed by Breydons Solicitors) for the **1st Appellant**
Mr Will Rose (instructed by Alletsons Solicitors) for the **2nd Appellant**
Mr Brendan O'Leary (instructed by Jon Mail Solicitors) for the **3rd Appellant**
Ms Victoria Ailes (instructed by Government Legal Department) for the **Intervener**
(The **Respondent** was not represented)

Hearing dates : 26th March 2020

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Approved Judgment

Lord Justice Fulford :

The Issues of Principle

1. These conjoined appeals raise issues of principle relating to the calculation of surcharge orders. The principal questions that have been posed by the court in this context are:

i) If a sentencing court is dealing with more than one offence and the disposals are the same (*i.e.* a fine or a period of imprisonment), is the amount of the surcharge calculated by reference to the total sentence imposed (*i.e.* the aggregate of the individual fines or the total imprisonment as indicated in the judgment of this court in *Phelan-Sykes* [2015] EWCA Crim 1094) or is the amount of the surcharge calculated by reference to the highest of the individual sentences imposed (as per the Sentencing Council's calculator). If there is a difference between fines and custody, what is the rationale for this?

ii) If there is a mixed disposal (*i.e.* a fine and a period of imprisonment), how is the surcharge calculated?

iii) If the sentencing court is dealing with the activation of a suspended sentence, or breach of a community order, would any further sentence attract another surcharge, and how would the surcharge be calculated in relation to other new offences.

2. We have first addressed the individual sentence appeals, dealing with all issues save for the respective surcharge orders, which are considered in the second part of this judgment.

The Individual Cases

Craig Karl Harrison

3. On 9 November 2018 in the Crown Court in Manchester the appellant (now aged 32) pleaded guilty to producing a controlled drug of class B (cannabis), contrary to section 4 (2) (a) Misuse of Drugs Act 1971 (count 1 on indictment T20187164). On 23 October 2019 he was sentenced to 22 months' imprisonment. Having committed this offence during the 18-month operational period of a suspended sentence of 18 months' imprisonment imposed on 18 April 2018 at the same court for a like offence, the suspended sentence was activated with a reduced term of 8 months' imprisonment, to be served consecutively. This earlier offence of cannabis production was the appellant's sole previous conviction. The overall period of incarceration, therefore, was 2 ½ years' imprisonment. He appeals against this sentence by

leave of the single judge. The court additionally imposed a surcharge order in the sum of £170.

4. The appellant had two co-accused. Anthony Nash pleaded guilty to three counts on the same indictment (1,2 and 3) which all related to producing cannabis). He was sentenced to 20 months' imprisonment. Paul Dale pleaded guilty to counts 1 and 2 and was sentenced to 20 months' imprisonment.

5. The cannabis relevant to the indictment was produced at three separate venues: 38b Rutland Street, Swinton (count 1); Units 1 and 3b Hattons Yard, Swinton (count 2) and 966 Manchester Road, Rochdale (count 3). The appellant pleaded guilty on the basis that his involvement was limited to 16 cannabis plants found at 38b Rutland Street (out of a total of 46 at that address). Anthony Nash lived at 966 Manchester Road Rochdale, and was the tenant of the units at 38b Rutland Street and Hattons Yard. Between 31 January 2017 and 7 March 2017, the three defendants were under observation by police officers. On 31 January 2017 they were seen visiting various hardware and hydroponic stores, where they purchased items which are necessary for running a cannabis farm. These were transported using the appellant's motor car and Nash's van, and the three men spent time at 38b Rutland Street. Later enquiries with the relevant store or stores revealed that the purchases for equipment began on 19 April 2016, with the majority taking place between December and March 2017. On 3 February 2017 the three men apparently moved items into 38b Rutland Street, once more using Nash's van. The appellant was seen at the premises again on 3 March 2017.

6. On 7 March 2017 the appellant was arrested at 38b Rutland Street, along with Nash. The police discovered a tent in which 46 plants were being grown, in two cycles (30 plants in one room and 16 in another). The potential yield was 6.9 kilograms with a value of between £37,950 and £51,750. Cultivation equipment was found at the site and the electricity meter had been bypassed. The other two relevant premises were searched with similar results (54 plants were found at Hattons Yard and 16 at Manchester Road). £4,100 in cash was recovered at the appellant's home, along with receipts for, first, equipment used in cannabis cultivation and, second, luxury items including designer shoes and a handbag. The receipts totalled £7,460. A notepad contained a travel itinerary for a cruise around the Bahamas, as well as a list of debtors, amounting to £82,750. The appellant in interview provided a false account in which he claimed he had simply gone to 38b Rutland street to deliver an item, and he sought to provide the officers with a lawful explanation for the cash that had been found.

7. The appellant admitted to the author of the pre-sentence report that his motivation had been financial. He expressed remorse and showed concern for his family. There was a basis of plea in which the appellant admitted participating in the cultivation at Rutland Street, but restricted to the room where the 16 plants were growing. He contended that he was uninvolved in the cultivation in the second room.

8. The judge sentenced on the basis that this was a commercially driven farming operation, producing cannabis at a large scale. The judge did not attempt to resolve the dispute as to the valuation of the cannabis (there was no disagreement over the number of plants), and instead determined that substantial profits were anticipated. He remarked, in our view correctly, that cannabis has a corrosive effect on local communities. It fuels crime and violence and it can have seriously deleterious consequences for the mental health of consumers.

9. The judge afforded the appellant 25% credit for his guilty plea. He took into account that in the 2 ½ years it had taken for the case to come on for trial the appellant had not committed any other offences. He had a 28-month-old daughter and had taken up work as a personal trainer. He had a mortgage and his partner, a paediatric nurse, was studying as part of her professional training. The appellant assisted with the care of his disabled brother and he had completed the community element of the suspended sentence. The judge identified 30 months as the starting point, reduced to 22 months for the guilty plea. As set out above, he activated the suspended sentence with a reduced term of 8 months, resulting in a total custodial term of 30 months.

10. The central arguments in support of this appeal are that the sentence of 22 months' imprisonment is manifestly excessive and the judge failed to reflect the basis of plea, which had been accepted. By way of detail, it is suggested, first, that the judge appeared in his sentencing remarks to deal with the three defendants as being jointly responsible for the entirety of the activity at the three addresses. Second, it is argued that the judge appeared to "double-count" the offence for which the appellant had received a suspended sentence, in that he treated it as an aggravating feature for the present offence whilst he activated it in part. Furthermore, it is suggested that the overall custodial term of 30 months' imprisonment demonstrated that the judge had failed to give proper regard to the principle of totality.

11. In our judgment, the judge failed to sentence in accordance with the appellant's agreed basis of plea, which was reflected in the prosecution's opening. Prosecuting counsel, Ms Chestnutt, stated as follows:

> "[…] I make it completely plain at this point that this was not charged as a conspiracy so I stress that Mr Harrison's involvement for the purposes of this sentencing exercise can be limited only to the 16 plants which he has pleaded to. […] given his involvement is limited to 16 plants only it is difficult to sustain the submission that in the context of this operation he is any higher than a significant role. […] I do concede that Category 3 bites here given the number of plants. So Category 3 significant role has a starting point of 1 year in custody with a range of 26 weeks to 3 years in custody."

12. The appellant submits that the judge critically misdescribed Ms Chestnutt's submission in the following passage during the sentencing remarks:

> "The prosecution submit on the guidelines that I could look at this as a leading role that each of you played. I have had my attention drawn to the decision of *R v Collier* where it was said that a leading role is characterised by direction and organisation or production on a commercial scale so where does this fit within the guidelines?
>
> It certainly has the features of a leading role in terms of culpability. There was an expectation of substantial financial gain but there are also features of significant role motivated by financial gain and involving others for reward.
>
> In terms of harm in respect of Category 2, notwithstanding the dispute over the anticipated quantity it is likely that the plants would have been capable of producing a significant quantity for commercial use. There is the aggravating feature of the electricity being bypassed as I have indicated.
>
> But I step back and look at this case in the round and I have come to the conclusion that it falls on the cusp of Category 2 and Category 3. Aggravating features where relevant will be previous convictions and the abstracting of electricity; significant role, it also falls within that and it could be Category 2 or 3 but when one looks at the sentencing that would follow it does not make a great deal of difference. I am looking at the top end of 26 weeks to 3 years or at the bottom end of 2 ½ years to 5 years. Dealing with you individually […]"

13. The Crown had expressly accepted that given the appellant's involvement was limited to 16 cannabis plants, relating solely to the contents of one of the rooms at 38b Rutland Street, he came within Category 3 (which, as set out above, gives a starting point of 1 year and a range of 26 weeks to 3 years). The

judge appeared during the prosecution's opening to accept this contention. Furthermore, again as rehearsed above, the prosecution highlighted this was not a conspiracy charge. By contrast Dale was being sentenced for 100 plants at two premises and Nash for 116 plants at the three addresses that he owned or rented. Despite these differences in culpability, the judge took a starting point for both the appellant and Nash of 30 months' imprisonment, whereas for Dale it was 24 months.

14. It is for the judge to determine the correct sentencing bracket, but if the court intends to pass sentence outside the range clearly indicated by the guideline, an explanation should be provided for the approach that is to be taken. In this instance the judge misdescribed the prosecution's case against the appellant as to his involvement; he failed to reflect the appellant's agreed basis of plea without holding a Newton hearing; and he identified the same starting point for Nash and the appellant when Nash had pleaded guilty to three offences relating to 116 plants and the appellant had pleaded guilty to one offence relating to 16 plants.

15. We are of the view that the judge placed this appellant in the wrong bracket, given his basis of plea. Applying the guidelines, the starting point should have been 10 months (applying a reduction to the 12 months indicated in the Guideline to reflect the fact that there were 16 not 28 plants). The previous conviction for a like offence and the breach of a suspended sentence are serious aggravating factors that could elevate the sentence to between 18 months and 22 months, subject to the question of totality.

16. We do not accept Mr O'Leary's submission that it was impermissible for the court to treat the breach of the suspended sentence as an aggravating feature if it was going to be activated, on the basis that this would involve "double counting". The court must activate the custodial sentence unless it would be unjust in all the circumstances to do so. The predominant factor in determining whether activation is unjust relates to the level of compliance with the suspended sentence order and the facts or nature of any new offence. The previous conviction and the breach of the suspended sentence will frequently aggravate the offending, particularly when it is identical or similar in nature, regardless of whether the court activates the suspended sentence, in whole or in part.

17. There was positive mitigation available to the appellant, most notably the delay before the commencement of the trial and the change in his personal circumstances since his arrest. He had completed the 250 hours unpaid work requirement under the suspended sentence within 2 months of sentence being

passed. This merited, along with the principle of totality, the reduction in the term activated (8 months instead of 18 months).

18. We are of the view that the appropriate sentence after trial would have been 18 months, which when reduced by 25% for his plea results, after rounding it down, to a term of 13 months, to which should be added 8 months for the breach of the suspended sentence. We quash the sentence, therefore, and substitute a term of 21 months' imprisonment.

Graham Michael Hawker

19. On 27 April 2019 the appellant (now aged 30), having pleaded guilty before the Avon and Somerset Magistrates' Court to two offences of Breach of a Sexual Harm Prevention Order, contrary to section 103I (1) Sexual Offences Act 2003 and one offence of Failing to Comply with Notification Requirements contrary to section 91 (1) (a) and (2) Sexual Offences Act 2003, was committed for sentence pursuant to section 3 Powers of the Criminal Courts (Sentencing) Act 2000. On 24 May 2019, at the Crown Court at Taunton for the two breach offences under section 103I (1) he was sentenced to consecutive sentences of 6 months' imprisonment and for failing to comply with the notification requirements under section 91 (1) and (2) to a concurrent term of 3 months' imprisonment. Additionally, having committed an offence during the 2-year operational period of a suspended sentence totalling 2 years' imprisonment imposed on 6 July 2018 in the Crown Court at Taunton for 5 offences of sexual activity with a child, the suspended sentence was activated in full, to be served consecutively to the 12 months' imprisonment for the instant offences. The overall sentence of imprisonment, therefore, was three years' imprisonment. The appellant appeals his sentence by leave of the single judge. The judge additionally imposed a surcharge order of £140.

20. The provisions of the Sexual Offences (Amendment) Act 1992 apply to the victims of these offences and no matter relating to them shall be published during their lifetime that might lead members of the public to identify them as the victims of these offences.

21. As regards the suspended sentence, the appellant had been convicted of five penetrative sexual offences with "C", who was under 16 years of age (she was 15 years old at the time). A Sexual Harm Prevention Order was imposed, preventing the appellant from having contact or communication with any female whom he knew or believed to be under the age of 16, other than inadvertent contact or with the consent of a parent or guardian who had knowledge of the Sexual Harm Prevention Order. The appellant was prohibited from direct or indirect contact with "C". He was ordered to undertake 100 hours unpaid work.

22. He breached the Sexual Harm Prevention Order for the first time when he commenced a relationship with a woman who was the mother of young children. He disclosed his convictions to her but he did not notify the relevant authorities of this development. On 7 November 2018, at the Taunton Magistrates' Court he was sentenced for two charges of breaching the order and for a breach of the notification requirements to 12-month Community Order and 80 hours of unpaid work and 10 hours of Rehabilitation Activity Requirement.

23. He joined a bible study group in March 2019 at the Riverside Church in Taunton. His offender manager told him he needed to disclose his conviction and the fact that he was a registered sex offender. The appellant indicated he had taken these steps. On 24 April 2019, PC Norman attended the Riverside Church to ensure that full disclosure had been made. There were numerous pre-school age children present. The appellant was observed clearing away chairs from where a mother and toddler group had been held. He had served drinks and snacks to the adults and toddlers. The police officer ascertained that his conviction and his registration as a sex offender had not been disclosed.

24. "M", aged 14, attended the Riverside Church on a Sunday, along with a bible study group on Wednesday evenings at which the appellant was present. He spoke with her. He asked "M" to add him as friend on Facebook and to meet him in the library. She refused the latter request. The appellant indicated that it was a shame "M" was not slightly older as they could then have gone out for a drink. The appellant sent "M" messages, sometimes ending in XX, representing virtual kisses. The appellant persuaded "M" to attend a "pursuit" group. In due course "M's" mother found the Facebook messages.

25. The appellant was arrested on 27 April 2019. A search of his address revealed a recently issued bank card, which constituted a contravention of the notification requirements as he had opened an account without notifying the police.

26. The author of the pre-sentence report noted that the appellant had been dishonest with the professionals managing him. He resents being on the Sex Offenders Register and refuses to accept that he is a sex offender. He was assessed as posing a high risk of harm to female children.

27. In passing sentence, the judge – rightly in our view – indicated the appellant represents a significant risk to young girls. He was fully aware of this and he had chosen to ignore the orders of the court. The judge identified a starting

point of 12 months' imprisonment for the instant offences and he afforded full credit for the appellant's guilty pleas.

28. It was originally submitted that the judge should not have imposed consecutive sentences, given the offences arose out of events that were closely interrelated or connected. This ground was abandoned during the course of submissions. Instead, Mr Rose focussed on the single argument that the judge should not have imposed the suspended sentence in full, given he had completed 156 hours unpaid work (24 hours were outstanding). By way of background, Mr Rose reminds the court of the appellant's low IQ and mental age (assessed at 17 years 9 months). He went into care at the age of 3 and was with foster parents until he was 14 or 15 years of age. These matters were addressed in a helpful report prepared by the forensic psychologist, Dr Indoe.

29. We are of the view that for the two offences contrary to section 103I (1), the judge correctly identified 12 months as the appropriate starting point under the Guideline, which for a single offence would be reduced to 8 months taking into account his guilty plea. These were separate offences, committed in different ways albeit within the same overall context, and they merited consecutive sentences. In those circumstances passing two consecutive terms of 6 months clearly reflected the competing considerations of the need for consecutive terms and the principle of totality. The judge was entirely correct, therefore, to pass an overall term of 12 months' imprisonment for these offences and we consider that Mr Rose was realistic in not pursuing the written ground of appeal in this regard.

30. We share, however, the concern expressed by the single judge as to the activation of the suspended sentence in full, given the appellant had completed the greater part of the unpaid work requirement. We bear in mind, however, that this offending occurred only 8 months after the suspended sentence was imposed. We therefore intend to reflect the extent to which the unpaid work requirement had been completed by a modest reduction to the activation of the suspended sentence. We reduce this by 6 months to 18 months. Accordingly, we quash the full activation of the suspended sentence and substitute a term of 18 month's imprisonment. The overall period of imprisonment is reduced to 2 ½ years. To that extent this appeal is allowed.

Scott Abbott

31. On 27 August 2019 the appellant, now aged 30, was committed for sentence by the Ipswich Magistrates' Court for using threatening, abusive or insulting words or behaviour contrary to section 4 (1) Public Order Act 1986 and for assaulting PC Allan Dallas, an emergency worker contrary to section 39

Criminal Justice Act 1988 and section 1 Assaults on Emergency Workers (Offences) Act 2018.

32. On the following day, 28 August 2019, at the Crown Court at Ipswich, the appellant pleaded guilty to assaulting DC Hayley Coleman and DC Matthew Rogers, both emergency workers, contrary to section 39 Criminal Justice Act 1988 and section 1 of the Assaults on Emergency Workers (Offences) Act 2018 and a breach of a non-molestation order contrary to section 42A Family Law Act 1996 and assault by beating contrary to section 39 Criminal Justice Act 1988.

33. For the offences concerning DC Hayley Coleman and DC Matthew Rogers, the appellant received concurrent terms of 3 months' imprisonment. For the breach of a non-molestation order he received a consecutive term of 6 months' imprisonment and a further consecutive term of 3 month's imprisonment for the offence of assault by beating. For the offence of using threatening, abusive or insulting words or behaviour and for assaulting PC Allan Douglas he received two further consecutive terms of 3 months' imprisonment. The total sentence, therefore, was 18 months' imprisonment. The appellant appeals against sentence by leave of the single judge. The judge additionally imposed a surcharge order of £149.

34. As regards the public order offence and the assault on PC Dallas, during the afternoon of 21 July 2019 the appellant stormed into the Accident and Emergency Department of the West Suffolk Hospital and shouted loudly "someone give me some fucking pain relief. I've been left at home for days". He approached a doctor and persisted in his demand for pain relief. He used foul and abusive language towards hospital staff which continued as he was escorted through the building for "triage". Despite warnings, the appellant persisted in this behaviour and he was generally intimidating. Having behaved in this way for about 15 minutes, he was escorted from building, whereupon he was arrested. At the police car he refused to get in, stating "If I go in the back of the car, I'll end up killing somebody". Whilst waiting for a police van, he became argumentative and was swearing. Members of the public, including an elderly lady, overheard his utterances. Once the police van arrived, he was obstructive and uncooperative and banged his head on the van door.

35. At the police station, his behaviour deteriorated still further. In addition to being argumentative and uncooperative, he became increasingly abusive to the officers, using foul language and making unpleasant personal remarks. He started banging his head on the cell wall. Two officers who were concerned for his safety took hold of him – these were Police Constables

Dallas and Gedney – and the appellant said "I've got HIV and Hep C". He then spat on the floor. He snorted twice through his nose and spat towards PC Dallas. A mixture of nasal fluid and saliva landed on the officers' right arm.

36. Turning to the breach of a non-molestation order and assault by beating, on 19 November 2018 the Family Court imposed a non-molestation order which prohibited the appellant from contacting his former partner, Ms Chatten-Berry or going to any property where he knew she was living.

37. On 27 July 2019 at midnight, Ms Chatten-Berry's partner, Luke Fairman, went to her address at 8 Ashfield Drive. She was not there at the time, as she was staying with her parents. The appellant burst in on Mr Fairman, in breach of the order. Mr Fairman decided to warn Ms Chatten-Berry, but the appellant followed him to her parent's address. The appellant entered the premises, where he was spoken to by her father, Mr Chatten-Berry, who told him to leave and prevented him for gaining further access to the house. The appellant grabbed Mr Chatten-Berry's throat and pushed him, making him fall to the ground. The latter rapidly got to his feet and pushed the appellant out of the house. The appellant then punched him in the face with a closed fist.

38. The appellant was arrested and was interviewed on 29 July 2019. He became agitated and angry. He made a guttural noise in his throat and he spat at across the table, the fluid hitting DC Coleman on the right side of her nose, as well as landing on DC Roger's shirt.

39. The appellant has 43 previous convictions spanning 2005 to 2018. These have included multiple instances of assault and public order offences.

40. In passing sentence the judge afforded full credit for the matters committed for sentence from the Magistrates' Court and 25 % for the other offences.

41. It is argued in support of this appeal that the individual starting points for the individual sentences were too high and the overall term, as a result of the consecutive sentences, was manifestly excessive. We have considered various other submissions by Mr Pollington on behalf of the appellant during the course of the analysis that follows.

42. As regards the events on 21 July 2019 concerning events at the hospital and the assault on an emergency worker (PC Dallas), it is urged on us that this was a low-level public order offence which should have been met with a fine or a low-level community order. We disagree. The appellant's behaviour

would have caused the multiple individuals who witnessed this incident both inside and outside the hospital to fear it would descend into unpredictable violence, and it was a sustained incident. A custodial sentence of 3 months following full credit for plea was entirely sustainable in these circumstances. For the assault on PC Dallas, the appellant's actions, which coincided with the threat that he was HIV positive and had Hepatitis C, equally merited a sentence following discount for plea of 3 months given particularly the officer's status as an emergency worker.

43. For the breach of the non-molestation order, it is argued that this was not a serious or persistent breach and that the appellant did not manage to confront Ms Chatten-Berry. It is conceded that the assault on Mr Chatten-Berry came within higher culpability but it is contended that it was a category 2 offence which should have attracted a community sentence. We consider that the breach was deliberate and planned and it would have caused significant distress; indeed, Ms Chatten-Berry describes having been scared. The assault on Mr Chatten-Berry was equally serious, given his age, poor health and vulnerability. He was injured during this incident. The appellant's offending was aggravated by his appalling criminal record. This was a category 1 offence, bearing in mind the injury and the significant element of premeditation. A custodial sentence of the length imposed, allowing for the guilty plea, was not outside the guideline. Finally, notwithstanding the appellant's submission that they should have been met with a non-custodial penalty, the assaults on DC Coleman and DC Rogers merit broadly the same considerations as the assault on PC Dallas. Given the risk of spreading dangerous infections, this was a potentially dangerous form of assault, which was clearly intended to make the officers fear that their health was being put at risk. Sentences of 3 months' imprisonment, following adjustment for guilty pleas, were not manifestly excessive.

44. We consider, furthermore, there is no merit in the submission that the total sentence was disproportionate, given the overall circumstances of this highly offensive behaviour. In three instances the appellant deliberately put the health of police officers at risk or, at the least, he sought to instil that fear. Otherwise this offending was characterised by bullying and violence directed at those who are entitled to the protection of the law because of their health and public service responsibilities, along with those protected, directly or indirectly, by a non-molestation order. This appeal against sentence is dismissed.

The Surcharge Orders

45. The court invited the Secretary of State to intervene in this case in order to make submissions on the proper approach to surcharge orders in the context

of the questions set out at the beginning of this judgment. We are grateful to counsel, Victoria Ailes, for a well researched and carefully constructed written argument, supplemented by oral submissions, that have been of significant assistance to the court.

46. The summary of the submissions of the Secretary of State is as follows:

The First Submission

(i) The amount of the surcharge should be calculated by reference to the total sentence imposed (i.e. the total period of imprisonment ordered, or the total amount of any fine).

The Second Submission

(ii) If there is a mixed disposal (for example, a fine and a period of imprisonment), the surcharge which would be applicable to each (i.e. if the total fine or total period of imprisonment were the only order) should be calculated. The higher value is the amount of the surcharge.

The Third Submission

(iii) Where a surcharge has already been imposed, no further surcharge should be imposed on any future occasion. Where the court makes orders activating any suspended sentence of imprisonment, or taking action upon breach of a community or other order, and at the same time sentences an offender for new offences, the surcharge should be calculated only by reference to the new offences.

The Framework

47. The duty to make surcharge order is set out in section 161A(1) of the Criminal Justice Act 2003 ('the 2003 Act'). It was added by section 14(1) of the Domestic Violence, Crime and Victims Act 2004, and came into force on 1 April 2007. It provides:

> "A court when dealing with a person for one or more offences must also (subject to subsections (2) and (3)) order him to pay a surcharge."

48. Sections 161B(1) and 161A(2) respectively provide for the Secretary of State by order to specify the amount of the surcharge.

49. The Criminal Justice Act 2003 (Surcharge) (No 2) Order 2007 (SI 2007/1079) ('the 2007 Order') was the first of these orders, effective from 1 April 2007. The provisions were straightforward. If the court imposed a fine in respect of

one or more offences, the surcharge was £15 (irrespective of the amount of the fine).

50. The 2007 Order was replaced by the Criminal Justice Act 2003 (Surcharge) Order 2012 (SI 2012/1696) ('the 2012 Order'), effective from 1 October 2012.

51. The 2012 Order has subsequently been amended, but the structure of the material provisions has remained, in essence, unchanged. The order deals variously with individuals whose offences were committed under the age of 18 (paragraph 3), those whose offences were all committed when they were aged 18 or over (paragraph 4), those whose offending occurred both before and after they reached the age of 18 (paragraph 5), and with persons who are not individuals (paragraph 6). The operative wording, however, is essentially the same for each case as set out below (but it is to be noted an individual can only fall within paragraph 5 if they are being dealt with for more than one offence):

> "(1) Where a court deals with [a person] for one or more offences by way of a single disposal described in column 1 of [the relevant table in the Order]... the surcharge payable under section 161A of the 2003 Act is the amount specified in the corresponding entry in column 2 of that table.
>
> (2) Where a court deals with [a person] for one or more offences by way of more than one disposal described in column 1 of [the relevant table in the Order]... the surcharge payable under section 161A of the 2003 Act is –
>
> (a) where the amount in column 2 of that table corresponding to each of those disposals is the same, that amount;
>
> (b) where the amount in column 2 of that table corresponding to each of these disposals is not the same, the highest such amount."

52. The tables are contained in a schedule to the order. The three tables deal with different situations, as described in paragraphs 3 to 6 (table 1 is applicable to under 18s, table 2 to adults and table 3 to companies and other legal persons), subject to the applicable transitional provisions. Each table lists, in column 1, a range of orders that can be made when dealing with an offender and, in column 2, a surcharge amount. The tables have been updated from time to time by further order, although the essential structure is unchanged.

53. The table applicable to Mr Hawker's and Mr Harrison's cases (offences committed in around March 2019 and between 1 December 2016 and 8 March 2017 respectively, by adult offenders) is the version of table 2 substituted by the Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2016 ('the 2016 Order'), which came into force on 8 April 2016. The table applicable to Mr Abbott's case is the subsequent and current version of table 2, which was substituted by the Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2019 ('the 2019 Order'), which came into force on 28 June 2019. Since the only relevant difference between the two versions is that different amounts appear in the two tables, the two versions are consolidated below:

Table 2

Column 1	*Column 2* *(2016 Order – Hawker and Harrison)*	*Column 2* *(2019 Order – Abbott / current position)*
An order under section 12(1)(b) of the Powers of Criminal Courts (Sentencing) Act 2000 (conditional discharge)	£20	£21
A fine	10 per cent of the value of the fine, rounded up or down to the nearest pound, which must be no less than £30 and no more than £170.	10 per cent of the value of the fine, rounded up or down to the nearest pound, which must be no less than £32 and no more than £181.
An order under section 177(1) of the Criminal Justice Act 2003 (community orders)	£85	£90
An order under section 189(1) of the Criminal Justice Act 2003 (suspended sentences of imprisonment) where the sentence of imprisonment or detention in a young offender institution is for a period of 6	£115	£122

months or less		
An order under section 189(1) of the Criminal Justice Act 2003 (suspended sentences of imprisonment) where the sentence of imprisonment or detention in a young offender institution is for a determinate period of more than 6 months	£140	£149
A sentence of imprisonment or detention in a young offender institution for a determinate period of up to and including 6 months	£115	£122
A sentence of imprisonment or detention in a young offender institution for a determinate period of more than 6 months and up to and including 24 months	£140	£149
A sentence of imprisonment or detention in a young offender institution for a determinate period exceeding 24 months	£170	£181
A sentence of imprisonment or custody for life	£170	£181

The First Submission

The amount of the surcharge should be calculated by reference to the total sentence imposed (i.e. the total period of imprisonment ordered, or the total amount of any fine).

54. Ms Ailes notes that this proposition does not reflect the original policy intention of the government. Indeed, guidance issued by the Secretary of State (see below) has consistently taken a different approach, to the effect that the

surcharge should be calculated by reference to the particular component of the sentence which attracts the highest surcharge. However, this court considered the issue in a largely overlooked decision, *R v Phelan-Sykes* [2015] EWCA Crim 1094, which resolved the matter in accordance with the Secretary of State's present submissions (as analysed below).

55. As Ms Ailes has identified, the critical question is what is meant by the expressions *"Where a court deals with [a person] for one or more offences by way of a single* ***disposal****…"* and *" Where a court deals with [a person] for one or more offences by way of more than one* ***disposal****…"* (our emphasis) which appear in the 2012 Order both as originally drafted and as successively amended.

56. There are two possible approaches to the word "disposal" in this context:

    i. For the "offence-based" interpretation, each type or class of order as regards each individual offence is treated as a separate disposal.

    ii. For the "aggregate" interpretation, each type or class of order under the overall sentence is treated as a separate disposal. Put otherwise, the surcharge is calculated by reference to the total or aggregate sentence imposed for the type or class of order. There would be more than one disposal under this second approach, if for instance, the offender receives a suspended sentence of imprisonment for the first offence and a fine for the second, or if the offender receives a sentence of imprisonment and a fine for the same offence.

57. As Ms Ailes highlights, under either option the level of the surcharge will depend on the length of the sentence or the amount of the fine. For example, a prisoner given a suspended sentence of imprisonment of 18 months together with a fine of £1500 would pay a surcharge of £150. This is because the applicable surcharge for a sentence of 18 months' imprisonment is £149, but the applicable surcharge for a fine of £1500 is £150, so the higher of the two amounts gives the value of the surcharge.

58. The Secretary of State's guidance has previously advocated the offence-based interpretation. Circular 2012/05 on the 2012 Order included the following passage under the heading "Points to note":

> *"The 2012 Order provides (see for example article 4(2)(b)) that where a court imposes more than one disposal for one or more offences, the Surcharge should*

> *be ordered against the individual disposal attracting the highest Surcharge amount. This principle applies whether the types of disposal ordered are the same (e.g. multiple fines) or different (e.g. a fine and a community sentence). So, for example, if, in relation to two offences, a person is fined £200 and £300, the Surcharge would be 10% of the higher amount (i.e. £30)."*

59. This reflected the Government response to consultation CP3/2012 ("Getting it Right for Victims and Witnesses: the Government Response" July 2012), carried out by the Ministry of Justice and in which the various approaches were considered, that *"Where an offender is convicted of multiple offences that result in concurrent or consecutive sentences of custody the Surcharge will be ordered only on the longest individual sentence."*

60. The Sentencing Council guidance on the surcharge understandably reflected this approach:

> *"Where an offender is dealt with in different ways only one surcharge (whichever attracts the higher sum) will be paid. Where there is more than one fine ordered, then the surcharge for the highest individual fine is assessed, NOT the total of all fines ordered. Where a custodial sentence is imposed the surcharge is based upon the longest individual sentence, NOT the aggregate term imposed."*

61. However, this method of calculation is inconsistent with the decision in *Phelan-Sykes*. In that case the defendant was sentenced in the Crown Court for an offence of robbery and an offence of theft. He was sentenced to a total term of 2 years nine months' imprisonment (2 years' imprisonment for the robbery and a consecutive term of 9 months' imprisonment for the theft), and although it is not material to the present issue, a suspended sentence that had been breached was activated, to be served consecutively. Whilst permission to appeal his sentence was refused by the single judge, the calculation of the surcharge was referred to the full court. Because the sentence was in excess of 24 months, the judge ordered a surcharge of £120.

62. The court referred to Circular 2012/05 (see above) and indicated:

> "Whatever the merits of that advice in relation to fines, it does not translate when considering sentences of imprisonment. When a defendant is sentenced to various consecutive terms of imprisonment, the warrant for his detention will specify the total term and that will be taken as the sentence imposed by the court. There is only one disposal in terms of the period of imprisonment. Thus, in respect of a defendant subject to a determinate sentence of imprisonment or detention

> exceeding 24 months, a surcharge of £120 will be payable irrespective of whether the sentence is made up of concurrent sentences or consecutive sentences."

63. Although the decision in *Phelan-Sykes* only relates to sentences of imprisonment, as the Secretary of State submits there is no sound basis for taking a different approach to fines. Ms Ailes accepts that the principles and the statutory language do not give rise to any point of distinction. It follows that when fines are imposed for more than one offence, the surcharge will be ten per cent of the total, rather than ten per cent of the highest individual fine, subject to an overall cap of £181 under the current scheme.

64. The decision in *Phelan-Sykes* reflects the language in the statutory framework. Paragraph 3(1), 4(1) and 6(1) of the 2012 Order stipulates:

> *"Where a court deals with [a person] for one or more offences by way of a single disposal described in column 1 of [the relevant table in the Order]…"*

65. This language plainly contemplates that a court may deal with an offender for more than one offence by way of a single disposal.

66. Furthermore, this approach will remove the self-evident anomalies that can arise depending on how the overall prison sentence imposed for a number of offences is structured (viz. whether the individual custodial sentences are to be served concurrently or consecutively).

The Second Submission

If there is a mixed disposal (for example, a fine and a period of imprisonment), the surcharge which would be applicable to each (i.e. if the total fine or total period of imprisonment were the only order) should be calculated. The higher value is the amount of the surcharge.

67. As Ms Ailes rightly observes, the answer to this second question follows from the answer to the first. In a case involving a fine and a period of imprisonment, the surcharge is the higher of the amount corresponding to the aggregate fine and the amount corresponding to the aggregate period of imprisonment.

68. The same principles apply to any other available combination of orders, and the position is the same whether there is a mixed disposal in relation to a single offence, or different disposals in relation to different offences.

The Third Submission

Where a surcharge has already been imposed, no further surcharge should be imposed on any future occasion. Where the court makes orders activating any suspended sentence of imprisonment, or taking action upon breach of a community or other order, and at the same time sentences an offender for new offences, the victim surcharge should be calculated only by reference to the new offences.

69. There are three potential options in this regard. The first is that upon activation of a suspended sentence or resentencing after breach of a community order, a surcharge is payable again as if the offender was being dealt with for the first time for the offence, irrespective of the payment already made. The second is that upon activation of a suspended sentence or resentencing after breach of a community order, a surcharge is payable in principle, but any earlier order should be revoked or varied, such that the offender is in practice liable only for any difference between the two amounts. The third is that the surcharge is imposed when an offender is first sentenced and no further order should be made, in any circumstances, on resentencing for a breach.

70. As set out above, the relevant provision when considering whether there is a duty to impose a surcharge is section 161A of the 2003 Act

> *"A court when dealing with a person for one or more offences must also (subject to subsections (2) and (3)) order him to pay a surcharge."*

71. The 2012 Order does not expressly refer to orders activating a suspended sentence of imprisonment, or to breach of community or similar orders.

72. The statutory language in each case provides that upon breach of an order, the court may *"deal with"* the offender again in relation to the original offence. This language is found at paragraph 8(2) of Schedule 12 to the 2003 Act (breach of suspended sentences), paragraphs 9 and 10 of Schedule 8 to the 2003 Act (breach of community orders), section 13(6) of the Powers of Criminal Courts (Sentencing) Act 2000 ('the 2000 Act') (breach of conditional discharge), paragraphs 6 and 8 of Schedule 2 to the Criminal Justice and Immigration Act 2008 (breach of youth rehabilitation orders) and paragraph 5 of Schedule 1 to the 2000 Act (breach of referral orders).

73. The Secretary of State submits that when an offender is resentenced (or a suspended sentence is activated) at the same time as other sentences are imposed for new offences, any sentence for which a surcharge has already been imposed should be disregarded when calculating any new surcharge which may fall to be made.

74. The first approach suggested above has the benefit of simplicity. However, a requirement that an offender pay two separate surcharges in relation to a single offence as a result of a breach of the original order should only be the result of a clear statutory requirement. This does not exist.

75. The second approach would give rise to considerable complexity in operation and is likely to result in widespread confusion as to the amounts actually that have been paid and which are payable.

76. The third approach has the benefit of simplicity. It is the course suggested in *R v George* [2015] EWCA Crim 1096, albeit the decision in *R v Bailey; R v Kirk* [2013] EWCA Crim 1551; [2014] 1 Cr App R (S) 59, at least to an extent, tends to indicate a different result. The third approach is consistent with the Secretary of State's current guidance and the approach of the Sentencing Council.

77. In *R v George*, the offender had been sentenced to a community order and a surcharge of £60 had been correctly imposed. The offender breached the order and was resentenced to fifteen months' imprisonment. The judge when resentencing the offender imposed a further surcharge, notwithstanding the existence of the original surcharge order. Macur LJ indicated (paragraphs 8 to 9):

> "[…] there is a further need to consider the second victim surcharge imposed in relation to the same offence. The victim surcharge order governed by the 2012 [Order…] does not make any provision for the imposition of a second victim surcharge order upon any re-sentencing after breach of community sentence for an original offence.
>
> The situation has not previously been addressed by this court. The only assistance that can be gained is from the guidance issued together with the surcharge order of 2012, which indicates that a second surcharge should not be made in the event of re-sentencing for breach. We consider this guidance to be rational and in the circumstances intend to quash the second victim surcharge order leaving in place that first made and therefore this is also quashed as indicated."

78. Although the court was dealing with a breach of a community order, the approach is equally applicable to any other case in which a court is dealing with a breach.

79. In *R v Bailey*, this court considered, in particular in the context of this case, the approach to the situation when the original offence was committed at a time when no surcharge was payable but a breach occurred when the relevant

order was in force. It is to be emphasised that the implications of the decision on the present issues were not explored in the judgment. The court quashed two of the surcharges in the cases then under consideration on the basis that the relevant offences were committed before the liability to pay a surcharge arose. During the judgment it was observed at [4] that:

> "First and foremost, the new victim surcharge does not apply where the court deals with a person for a single offence committed before 1 October 2012 or for more than one offence at least one of which was committed before 1 October 2012 (Article 7(2) of the Order). Thus, if sentencing an offender for breach of an order of the court subsequent to 1 October 2012 but imposed for offending prior to that date, the court is still "dealing" with the sentence for the original offence and the new victim surcharge regime will not apply."

80. Accordingly, the court indicated that activating a suspended sentence involved *"dealing with"* the offender again for the original offence when considering the surcharge (see [4], [20] and [29]). The cumulative effect of the remarks in these paragraphs appears to be that if the offence had been committed after the commencement of the order, the offender would have been ordered to pay a surcharge when sentenced, and a separate, further surcharge when the suspended sentence was activated.

81. To the extent that the reasoning in *Bailey* is inconsistent with *George*, we prefer the approach in *George*. Furthermore, the effect of the decision in *Bailey* in this context should be limited to the court's consideration of the position when the offence, or one of a number of offences, was committed before 1 October 2012. The court did not address the question of whether two surcharges may properly be imposed for the same offending.

82. We consider, therefore, that the duty to impose a surcharge under section 161A of the 2003 Act is discharged when the court first sentences the offender. Section 161A contains no duty or power to order an offender to pay a second surcharge and, accordingly, the provision is not engaged for a second time when the court *"deals with"* an offender on a second or subsequent occasion. It follows that when the court makes an order activating a suspended sentence of imprisonment, or taking action upon breach of a community or other order, and at the same time sentences an offender for new offences, the surcharge should be calculated only by reference to the new offences.

83. It is important to note that in all cases, but particularly if the court is dealing with a number of offences (including an offence that resulted in a suspended sentence or other order that has been breached), the court must be careful to

ensure that the correct charging regime applies. By Article 3 Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2020/310:

> **"Transitional provision**
> The amendments made by article 2 **do not apply** where, after the coming into force of this Order, a court deals with a person for—
> (a) a single offence committed before the coming into force of this Order, or
> (b) more than one offence, at least one of which was committed before the coming into force of this Order." (our emphasis)

84. It follows that if any offence being dealt with by the court, including an offence the sentence for which has been breached, was committed before the coming into force of the current surcharge Order, the surcharge will need to be calculated by reference to the charging regime applicable on the date of the commission of the earliest offence (see *Bailey* [4] in this regard). The fact that the disposal made when dealing with a suspended sentence or other order is disregarded when calculating the amount of the surcharge is irrelevant for these purposes.

85. If a suspended sentence order or a community order is breached and the court amends the terms of the order so as to impose more onerous requirements (see paragraphs 9 and 10 Schedule 8 Criminal Justice Act 2003), this constitutes "dealing" with the offence for the purposes of determining the charging regime as regards the other offences dealt with at the same time. The court will need to identify the date of the offence for which the suspended sentence order or community order was originally imposed. In contrast, if, having been breached, a conditional discharge is simply allowed to continue, this would not constitute "dealing" with the offence (section 13 of the Powers of Criminal Courts (Sentencing) Act 2000 is permissive in this rergard (*e.g.* section 13 (7A) "the court may deal with him, for the offence for which the order was made").

86. In the event, the surcharge is to be calculated in Harrison's case on the basis of the period of 13 months' imprisonment. The surcharge in his case in the sum of £170 is quashed and we substitute an order of £140. In Hawker's case, the surcharge in the sum of £140 is unaltered. In Abbot's case, the surcharge in the sum of £149 is similarly unaltered.

Postscript

87. We seek to emphasise two observations made by this court in *Bailey*. First that offences taken into consideration "should be ignored when considering the offences dealt with for the purpose of imposing a […] surcharge" (see *Bailey* [7] and [8]).

88. Second, to avoid the cost and time wasted in correcting errors, the form of words to be used when imposing the surcharge in the Crown Court should be as follows:

> "The surcharge provisions apply to this case and the order can be drawn up accordingly" (see *Bailey* [10]).