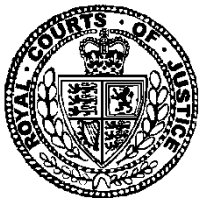
IN THE COURT OF APPEAL

CRIMINAL DIVISION



No. 202202863 A1
Neutral Citation Number:
[2023] EWCA Crim 391

Royal Courts of Justice

Tuesday, 21 March 2023

Before:

LORD JUSTICE WARBY
MR JUSTICE GOOSE
HIS HONOUR JUDGE LOCKHART KC

REX
V
MARIO SALVATO

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Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

MS H FITZGERALD appeared on behalf of the Applicant.

THE CROWN were not represented.

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J U D G M E N T

LORD JUSTICE WARBY:

1 This is an appeal against a suspended sentence of imprisonment imposed after the appellant pleaded guilty to five offences of theft from a shop or, in one case, a restaurant.

2 The appellant is Mario Salvato, now aged 42. The offending involved the theft of cosmetics from the Holland and Barrett store in Oxford Street in London on four separate occasions in May and June 2021, and the theft of a tablet computer from the McDonald's restaurant on Oxford Street on 28 July 2021. The total value of the stolen cosmetics was some £340. The tablet computer was valued at £400.

The sentencing process

3 The appellant was a prolific offender, with 30 convictions for 53 offences between 2001 and 2021. His record included 22 previous offences of theft or kindred offences. He had been subject to a community order at the time of the offending with which we are concerned. It is, no doubt, those features of the case that explain why, when the appellant pleaded guilty to each of these offences before magistrates on 27 May 2022, he was committed to the crown court for sentence. The appellant's previous convictions must also be the explanation for the magistrates' decision to remand him in custody. We assume that they anticipated a substantial sentence of immediate imprisonment.

4 At the first hearing it was agreed that the lead offence, the McDonald's theft, was in Category 2B of the Sentencing Council's guidelines on theft from shop. The starting point for that category is a low level community order. The range is a band C fine to a medium level community order.

5 Sentence was adjourned so that when the appellant appeared again on 25 August 2022 the sentencing judge had the benefit of a Pre-sentence Report from probation. The appellant

had remained in custody throughout, accumulating a total of 92 days, or 13 weeks, the time that would be served under a six-month sentence of imprisonment.

6 The Pre-sentence Report explained that the offences in this case, like much of the appellant's previous offending, had been carried out to fund his class A drug habit. He was living in Kent but intentionally homeless. He was open in admitting that when this was so he gravitated towards London, where his criminal peers congregated and where he was most familiar.

7 The report identified immediate or suspended imprisonment as options, but proposed an 18-months' community order with a rehabilitation activity requirement of up to 30 days and what was called "trail monitoring" for up to six months. The report explained that this involves the wearing of a satellite monitored tag which enables the appellant's probation officer to monitor his movements at will. The purpose was to "assist in monitoring Mr Salvato's gravitation towards London from Kent and his whereabouts". The Criminal Appeal Office has identified this proposal as one authorised by paragraph 30 of Schedule 9 to the Sentencing Act 2020.

The sentencing decision

8 The sentencing judge concluded that the custody threshold was crossed. She said that whilst the McDonald's offence was in Category 2B, the accumulation of all the offences and the breach of the community order were aggravating features which justified a starting point of 12 weeks' imprisonment for that offence and each of the other offences. Giving a full one-third reduction for the guilty pleas, the judge sentenced the appellant to 8 weeks' imprisonment on each of the offences, each sentence to be consecutive, and then suspended each sentence for two years. The total sentence was, therefore, one of 40 weeks' imprisonment, suspended for those two years.

9 The judge suspended the sentence in this way on the basis of the mitigation offered. She acknowledged that the appellant had, as she put it, "done 26 weeks", but said that her 40-weeks sentence, "means that you know you will be going to prison for some of it if you commit any further offences".

10 The suspended sentence order contained three requirements: a rehabilitation activity requirement for 30 days; exclusion from the London Borough of Westminster for 2 years and a direction that the appellant be "trail monitored for two years." The duration of the monitoring requirement was queried by counsel, but the probation officer assured the judge that it was legitimate. After the hearing, the probation officer checked again and concluded that it could not be longer than six months. That change was made administratively, as a result.

11 The appellant has been subject to the restriction on his movement imposed by the judge and to the trail monitoring requirement ever since the sentence was passed.

Grounds of appeal

12 The appellant advances two grounds of appeal, which have been very ably argued on his behalf by Ms Honor Fitzgerald. The first is that the sentence was manifestly excessive because it failed to take totality into account in accordance with the Sentencing Council guideline. Secondly, it is said that the suspended sentence of imprisonment was wrong in principle, because given the time he had served on remand in custody, it punished the appellant twice. In support of this second ground Miss Fitzgerald has referred us to the case of *R v Maughan* [2011] EWCA Crim 787 where the court observed, in somewhat similar circumstances, that the sentence should have been one of immediate custody, treated as time served, resulting in the appellant's immediate release at the time of sentence.

Discussion

13 In our view, this was a series of similar offences and, although there is no rigid rule about the matter, we do think it would have been better to follow the usual practice of imposing a sentence on the lead offence to reflect the overall criminality, with concurrent sentences on the other offences. One advantage of that process is that it forces the sentencing judge to focus on the total sentence, and consequently, on the totality principle that the overall sentence should be no more than is just and proportionate to the offending as a whole. Had that been done, we think the sentencing judge would have concluded as we do, that her notional sentence of 60 weeks' imprisonment after a trial and before reduction for plea was manifestly excessive.

14 This was shoplifting to a total value of some £740 over five separate occasions. There is no challenge to the conclusion that this offending crossed the custody threshold in all the circumstances of the case. In our view, however, even allowing for the aggravating factors of the appellant's very poor record and the breach of the community order, the sentence that these offences collectively could merit after a trial was not more than nine months' imprisonment. Reduced to allow for the early guilty pleas, that leads to a sentence of 6 months' imprisonment, which is the period that the appellant had effectively served on remand.

15 The facts of this case do differ materially from those of *Maughan*, where the appellant had spent more time on remand than he would have served if the court had imposed the statutory maximum sentence. Any activation of the suspended sentence order in that case would have resulted in imprisonment for a period beyond that which Parliament had authorised for the offences in question. That is not this case. But in this case a suspended sentence of 6 months would have been pointless, or at best toothless, as the need to give credit for time served would have made it impossible in practice to activate any part of the custodial term

in the event of breach, even if the appellant had entirely failed to comply with the requirements of the order. It would, in our view, be wrong in principle to make an order which could not realistically have any practical effect.

Decision

16 For those reasons, we allow the appeal. We quash the suspended sentence of imprisonment and, accepting the submission of counsel, we substitute in its place a sentence of immediate imprisonment for 26 weeks, which is to be treated as time served as at the date of sentence. The effect is that none of the requirements imposed below continues to have any effect. We have, in arriving at this conclusion, taken account of the fact that those requirements did have effect during the period between the sentencing date and the date of this appeal.

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