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No: 20190997/A2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday 5 July 2019

B e f o r e:

LORD JUSTICE GROSS

MRS JUSTICE McGOWAN DBE

MR JUSTICE BUTCHER

R E G I N A
v
JACOB UTTON

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Mr A Abell appeared on behalf of the **Appellant**

J U D G M E N T
(Draft for approval)

MR JUSTICE BUTCHER: The appellant Jacob Lee Utton appeals against sentence with the leave of the single judge.

On 31 January 2019 in the Crown Court at Basildon, before Her Honour Judge Leigh, the appellant pleaded guilty to an assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861. On 13 February 2019 in front of the same judge, the appellant pleaded guilty on re-arraignment to two counts of burglary and a count of assault by beating. For those offences the appellant was sentenced as follows. For the two burglary counts, 53 months' imprisonment, those terms to run concurrently; for the assault occasioning actual bodily harm, two months' imprisonment concurrent; and for the assault by beating, four months' imprisonment concurrent.

The facts of the offending were these. The assault occasioning actual bodily harm occurred on 7 July 2018. The appellant was staying at a flat in Westcliff that overlooked the garden of Mr and Mrs Whitfield. In the evening Mrs Whitfield was in the garden talking to a friend. The appellant mimicked what she was saying and Mrs Whitfield told him in clear terms to mind his own business. The appellant in reply asked her what she was going to do about it. Mr Whitfield became involved in the argument. There followed a confrontation between the appellant and Mr Whitfield at the door of the Whitfields' home. Mr Whitfield told the appellant to go away, at which point the appellant punched him, causing some reddening to the neck and chips to his bottom teeth. The appellant carried on making offers to fight. Mr Whitfield retreated and the police were called. The appellant was arrested and released under investigation.

The first of the burglary offences occurred on the afternoon of 9 November 2018. On that date Raj Metha, the occupier of an address in Lonsdale Road, Southend returned home to find

that during the day his patio door had been smashed and three bedrooms searched and left in a messy state; £22,800 worth of gold jewellery which also had sentimental value was stolen. None of it has been recovered. The appellant was later identified as the burglar by CCTV.

The second burglary occurred on 11 December 2018. On that date Susan Tollworthy was at home at her property in Southborne Grove, Westcliff when there was a knock on the door. She did not answer, as she was upstairs at the time. When she came downstairs there was nobody at the door but she saw a man going down the side of the property. She ran upstairs to get her telephone and fled to a neighbour's property. The appellant gained access by smashing a conservatory door. Shortly afterwards Mrs Tollworthy returned to the address with police officers to see the appellant coming down the stairs. He sought to make off. Police Constable Stone grabbed at him but he pushed her to the ground and then kicked her twice before making good his escape. His DNA was recovered from a hat and gloves which he had left behind.

On 31 January 2019 the appellant appeared at the Basildon Crown Court for a plea and trial preparation hearing on the indictment containing the two burglary counts. On that occasion the appellant sought a Goodyear indication from Her Honour Judge Leigh in relation to the burglary counts, and the actual bodily harm and the assault upon the police officer on the occasion of the second burglary. She gave an indication which was in the following terms:

> "The starting point would be 57 months, less 25 per cent for plea, plus consideration of totality. Indication is 42 months before mitigation."

It is apparent that following a conference in the cells the appellant then decided to dispense with

the services of his counsel and later that day, when the PTPH was called on again, he pleaded not guilty to the two burglary counts and the assault on the police officer. The trial date was set for the trial of the burglaries for 25 May 2019.

It appears that the day after the PTPH the appellant telephoned his solicitor stating that he had reflected and wished to plead guilty to the offences of domestic burglary and the associated assault on the officer. The court was informed. The case was relisted before Her Honour Judge Leigh on 13 February 2019, when the appellant was re-arraigned. The judge told the appellant that the Goodyear indication which she had given had lapsed. After she did so, the appellant then pleaded guilty to the burglary counts and the associated assault. Upon his having done so, the judge proceeded to pass sentence. She referred to the facts of the offences. She noted the appellant's previous convictions - a record which she said could only be described as appalling. She said that she considered the burglary offending to be a Category 1 offence looking at the offending as a whole. She said that the Goodyear indication which she had previously given did not stand and she said that the starting point for the burglary counts would have been 63 months with 15 per cent credit for plea. Accordingly, she imposed the sentences of 53 months concurrent for those offences and as we have said she also imposed concurrent sentences of two months for the actual bodily harm and four months for the assault on the officer.

The grounds on which Mr Abell has argued that the sentence was manifestly excessive or wrong in principle were effectively threefold. In the first place he argues that the judge was wrong to take a starting point of 63 months for the burglary offences, given her Goodyear indication of 57 months where there had been no change of circumstances in relation to either offence. The second is that the judge erred in reducing the discount to 15 per cent for pleas of guilty entered 14 days after the Goodyear indication, given that she had said on

that date that the discount would have been 25 per cent and given that the judge had accepted that the appellant had communicated his intention to plead guilty the day after the Goodyear indication. The third is that the judge was wrong in regarding the burglary offences as Category 1.

In relation to the first of those grounds of appeal, it is helpful to review what the authorities establish as the effect and the duration of Goodyear indications. In the case of R v Patel [2009] EWCA Crim 67, the judge gave a Goodyear indication but the defendant did not plead guilty at that point or any point and the matter proceeded to trial. Accordingly, it is not a case involving the same factual situation as the present. However, certain guidance given by the Court of Appeal Criminal Division is of significance. Thus at paragraphs 20 to 21, Hughes LJ, who gave the judgment of the court, said this:

> "The import of Goodyear is very clear. If the judge accedes to the application to give an indication, he and any other judge is bound by it if, but only if, the defendant thereupon pleads guilty. If there is any doubt about that it needs to be laid to rest. That is apparent from paragraphs 54 and 61 of the report of Goodyear. In paragraph 54, Lord Woolf, LCJ, said this:
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> > ' ... any advance indication of sentence to be given by the judge should normally be confined to the maximum sentence if a plea of guilty were tendered at the stage at which the indication is sought.'
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> The Lord Chief Justice went on to say this:
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> > 'For the process to go further, and the judge to indicate his view of the maximum possible level of sentence following conviction by the jury ... would have two specific disadvantages.'
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> And he set them out, in effect that it would be very unwise indeed for the judge to give any such indication on what would then be a hypothetical basis. In paragraph 61 of the judgment the Lord Chief Justice returned to the point and said this:
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> > 'Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other

> judge who becomes responsible for the case ...'
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> Then this:
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> > 'If, after a reasonable opportunity to consider his position in the light of the indication, the defendant does not plead guilty, the indication will cease to have effect.'
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> > In so far as Mr Bhatia's submission is that the sentence passed of eight years was wrong because the judge had referred to a notional starting point after trial of seven years when he gave his indication, that submission cannot succeed. There is no injustice whatever in that. There would of course be if a defendant acted to his detriment in reliance upon the indication and the judge then changed his mind. But this defendant did not rely in acting to his detriment in any manner at all. He chose not to accept the indication. Nor, we emphasise, can that proposition be in any manner affected by any exchanges between the defendant and those who represent him.
> >
> > We wish to make it clear that Goodyear means what it says. If the indication is not accepted by pleading guilty it lapses and it is thereafter irrelevant. In particular the reasons why a judge may subsequently perfectly properly form the view that his hypothetical thoughts at the time of the indication about sentence after trial were too low certainly include the case where the evidence has worsened for the defendant, but also extend to the case where the judge has simply had time to apply his mind with greater care and having heard the evidence to the proper balance of sentence between defendants. There is an appreciable difference for a judge between a short outline of the evidence by counsel for the Crown, or for that matter an agreed basis of plea which is not then taken up, on the one hand, and on the other three weeks of evidence."

In the case of R v Shane Newman [2010] EWCA Crim 1566, the situation was rather different. There the judge had given a Goodyear indication. The defendant had acted upon that by pleading guilty - as far as we can see - immediately. The matter was then adjourned for sentencing. When it came back, the judge said that he had been wrong to give the Goodyear indication which he had. He gave his revised view and then he said that if in the light of this the defendant wished to withdraw his plea of guilty then leave would be given for him to do so. In fact, after an adjournment, the defendant's counsel came back and said that he did not want to vacate his plea.

In the course of dismissing the appeal against sentence, Gross J (as he then was) giving the judgment of the court said this:

> "The attractions of Goodyear [2005] 1 WLR 2532, summarised in Archbold para 5-79b and following, and its practical importance, are manifest. Goodyear indications will only serve their purpose if indications once given can be relied upon. Accordingly, and at least save exceptionally, indications thus given are binding in as far as they go, hence the need for circumspection before they are given. Particular caution is warranted where a Goodyear indication is sought in the case of a specified offence which might attract an extended sentence or a sentence of imprisonment for public protection...
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> Mr Williams submitted, as we have already recorded, that the indication was binding once acted upon. With respect, we are unable to agree in this sense: Mr Williams' submission is couched in terms of private rights, where such concepts are of course valid and will prevail. But we are not dealing with that situation here. The public interest in an appropriate sentence must trump any question of disappointment in the rare cases where such a situation might arise. It goes without saying, however, as we have already underlined, that revisions to Goodyear indications should be very much the exception, and, as it seems to us, they can only be made in a manner which is fair to the defendant: in other words, where the matter can be revised without the defendant sustaining any prejudice other than mere disappointment...
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> In the present case, the judge was plainly in error, as he himself acknowledged, with regard to the guidelines category in which he placed the offence. The judge was understandably anxious about the facts he had subsequently discovered in the pre-sentence report, and the questions which then arose as to whether the case merited a determinate or some other sentence. Had the judge left the matter as set out in the Goodyear indication, first there would have been the unfortunate consequence of an inadequate sentence being passed contrary to the public interest and, secondly, there would have been a risk of an Attorney General's Reference to the benefit of no one.
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> The course the judge adopted, namely offering the appellant the chance of vacating his plea, was one which was entirely fair to the appellant. The appellant realistically and prudently, if we may say so, chose not to vacate his plea - but he maintained his plea knowing full well that the judge would no longer be bound by the initial Goodyear indication. In these circumstances, we are not persuaded that any injustice resulted or that the appellant now has any legitimate grounds for complaint."

In R v Davies (Colin Trevor) [2015] EWCA Crim 930 the defendant had pleaded guilty immediately after the giving of a Goodyear indication. He then, almost immediately, absconded. The Court of Appeal held that when he ultimately came to be sentenced the judge had been bound by the Goodyear indication. His Honour Judge Rees giving the judgment of the court said this at paragraphs 13 to 15:

> "Chapter 7 of the Practice Direction deals under paragraph C with indications of sentence giving guidance in accordance with R v Goodyear [2005] EWCA Crim. 888. At C.6 the Criminal Practice Direction provides that an indication once given is, save in exceptional circumstances, (such as arose in R v Newman [2010] EWCA Crim. 1566, [2011] 1 Cr.App.R (S) 68) binding on the judge who gave it and any other judge, subject to overriding statutory obligations such as those following a finding of dangerousness. The circumstances where a judge proposes to depart from the Goodyear indication this must only be done in a way that does not give rise to unfairness (see Newman). However, if a defendant does not plead guilty the indication will not thereafter bind the court.
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> In Newman the judge on the occasion that he gave the Goodyear indication of sentence had erred in his interpretation of the guidelines. When it came to the actual day of sentence the judge acknowledged his error and his obligation to take a higher starting point within the guidelines. The judge then offered the defendant the opportunity to withdraw his guilty plea, which the defendant declined.
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> In the case before us the only change in circumstances was the appellant's absconding from the court after pleading guilty. The applicant was properly given a consecutive sentence for that offence. He had pleaded guilty following the Goodyear indication from the judge and nothing else had changed. In those circumstances we are of the view that the judge was bound by the indication he had given and there was no justification in taking a higher starting point."

Those authorities and Goodyear itself establish the following propositions.

(1) If the court gives a Goodyear indication, the defendant has a reasonable opportunity to consider his position in light of the indication. If he does not do so, within that period, the indication ceases to have effect.

(2) If the defendant does within that period plead guilty then the court will normally be bound to adhere to the indication.

(3) That however will not be the case in exceptional circumstance such as those which are raised in R v Newman.

(4) When there are to be additions to or departures from Goodyear indications which have been acted upon, this should only be done in a way which is fair for the defendant, in other words where he will not be prejudiced.

In the present case, we consider it clear that the appellant did not plead guilty in response to the Goodyear indication within a reasonable period. What is a reasonable period will depend on the circumstances. Here the Goodyear indication had been sought immediately prior to the hearing of the PTPH. The appellant was then given an opportunity to speak to his legal advisers about it, but then the indication was specifically not acted upon: the appellant pleaded not guilty at the PTPH to the burglary counts, and the PTPH accordingly went ahead to consider directions and arrangements for the trial. In the present case we consider it clear that a reasonable opportunity elapsed that day without the appellant having pleaded guilty. In those circumstances, the indication ceased to have effect. Furthermore, and in any event, there was clearly no unfairness to the appellant. The judge indicated that the Goodyear indication had lapsed before the re-arraignment and before the appellant pleaded guilty to the burglary offences and common assault. Realistically, Mr Abell accepted in this appeal that the Goodyear indication which the judge had given was not any longer binding upon her when she came to pass sentence.

However, once one accepts that the Goodyear indication was not binding, then, as it appears to us, it is irrelevant to this appeal. The question is simply whether the sentence which the judge passed was manifestly excessive or wrong in principle. The suggestion which is

made in this context that there was no good reason to alter the starting point which she had set out in the Goodyear indication essentially therefore raises exactly the same issue as the third ground.

In relation to the second ground of appeal, we consider that the judge was entitled to apply a reduction of 15 per cent for the guilty plea. By that stage the PTPH had passed and directions had been given for the trial. The pleas of guilty came after that.

In relation to the third ground, we should say that we do not consider that the sentence imposed by the judge was manifestly excessive or wrong in principle. The appellant has an appalling record of burglary offences: sentences for burglaries from dwellings in 2003, 2014 (two offences), 2016, and another in that year of attempted burglary, as well as another burglary of a non-dwelling in 2008, and various offences of robbery and theft. Because of the burglaries from dwellings he was the subject of the provisions of section 111 of the Powers of Criminal Courts (Sentencing) Act 2000. Here there were two offences of domestic burglary and they were serious given the high value of goods taken in one and the owner being present in the other. The sentence imposed was also intended to reflect the significant further offence of the assault on the officer which accompanied the second burglary offence. Given all these circumstances, the judge was entirely justified in not taking the sentencing range for a Category 2 burglary, for example. The Guideline applies to one offence and the range is not appropriate to two burglaries in which the mandatory minimum term applies.

Accordingly we do not consider that the sentence imposed was manifestly excessive or wrong in principle and the appeal is accordingly dismissed.

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

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