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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 6 June 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE LAVENDER

HIS HONOUR JUDGE EDMUNDS QC

R E G I N A
v
LEWIS CLIFORD IAN JEFFS

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Mr B V O'Toole appeared on behalf of the **Appellant**

J U D G M E N T

MR JUSTICE LAVENDER:

On 8 October 2018, in the Crown Court at Lewes, the appellant was sentenced for two offences. The first was an assault occasioning actual bodily harm committed on 11 June 2018, to which the appellant pleaded guilty in the Crown Court on 8 October 2018. The second was an attempted burglary committed on 1 April 2018, to which he pleaded guilty in the Magistrates' Court on 13 June 2018. The sentences imposed were 2 years' imprisonment for the assault occasioning actual bodily harm and 18 months' imprisonment for the attempted burglary. Those two sentences were consecutive, making a total sentence of three and a half years' imprisonment.

The appellant is now 34 years old. He has long-term significant alcohol and substance misuse issues. His first criminal offences were committed in March 1997, when he was 12 years old. Over the course of the next 20 years, ie until 11 June 2017, he was convicted of a total of 88 criminal offences. These included domestic burglaries in 1997, 1999 and 2006; non-domestic burglaries in 2009 and 2012; robbery in 2006 and twice in 2013; using threating, abusive words or behaviour with intent to cause fear or provocation of violence in 1999 and 2014; and assault or battery in 2009 and 2016.

At about 6.45 pm on 11 June 2017 the appellant was one of a group of six or seven people drinking together in Eastbourne town centre. One of them engaged Brian Comiskey in conversation. Without any reason, the appellant punched Mr Comiskey. It was a single punch, but it knocked Mr Comiskey to the ground, rendered him unconscious and fractured his left eye socket.

The effects on Mr Comiskey were profound. He had ongoing double vision and headaches, which prevented him from working. He lost his job and, unable to pay the rent, was evicted from his flat. He was diagnosed with PTSD and severe depression. He took several

overdoses with the intention of ending his life. The effect on his mental health was such that he was twice detained under section 2 of the Mental Health Act 1983. By the time of trial, he was not fit to give evidence and struggled even to leave his flat. There was no prospect of any improvement in his condition.

The appellant was charged with inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861. He pleaded not guilty. In his defence case statement, dated 29 July 2018, he made the false claim that he was not present when Mr Comiskey was assaulted. He did not offer to plead guilty to the lesser charge of assault occasioning actual bodily harm until the day of trial, 8 October 2018.

Meanwhile, the appellant committed several more offences, for which he was sentenced on 31 January 2018. These were: battery, committed on 24 October 2017; theft, committed on 28 October 2017; battery again, committed on 8 November 2017; and possessing a knife in a public place, committed on 28 November 2017. He received a total sentence of 7 months' imprisonment, from which he was released on 21 March 2018.

Then, 10 days later, at around 1.30 am on 1 April 2018, the appellant smashed a bathroom window at the rear of a bungalow in St Leonards-on-Sea, which was the home of a 78-year-old widow, Beryl Castle, who fortunately was away for the night. He used a rock which he had taken from the front garden. He appears to have tried to break other windows before breaking this one. The rock was thrown with such force that after smashing through the double glazed window it broke a laundry basket and made a hole in the plasterboard wall opposite the window.

The appellant's blood was found on the net curtains inside the window. Nothing was taken. However, Mrs Castle had to contribute £200 to the costs of repairs and spent over £2,500 on improved security measures at her home. She described in her statement her anxiety and

the resulting insomnia and referred to herself as someone who was not happy in her own home.

Turning to the relevant sentencing guidelines, the first step is to determine the offence category. In the case of the assault occasioning actual bodily harm, this was clearly a case of greater harm, but none of the factors indicating greater culpability were present. It follows that this was a category 2 offence, for which the starting point is 26 weeks' custody and the range is from a low-level community order to 51 weeks' custody. The starting point for a category 1 offence is 1 year and 6 months' custody and the range is from 1 to 3 years' imprisonment.

The judge said that category 1 had a particular definition which arguably was not met, but then said that category 2 imposed a range of sentences which most people would regard as entirely inappropriate to this case. His reason for saying that was, of course, that the harm caused to Mr Comiskey was so extreme in the context of a case of assault occasioning actual bodily harm. The fracture itself was sufficient to make this a case of serious harm in the context of such a charge, but the continuing impact on Mr Comiskey was a considerable additional aggravating factor. In effect, the judge was saying that the unusual facts of this case justified a sentence outside the range specified for category 2 offences.

We agree, and indeed Mr O'Toole did not contend otherwise. The question is whether the judge was entitled to go as far outside the range as he did.

As for other aggravating factors, the judge correctly identified the appellant's previous convictions, the timing and location of the offence, the ongoing effect on Mr Comiskey and the presence of others. As for mitigating factors, the judge acknowledged that this was a single blow and the appellant had expressed remorse through his counsel. Lack of premeditation was another mitigating factor, although not specifically mentioned by the judge. In addition, the judge said that he would give 10 per cent credit for the appellant's

guilty plea.

Mr O'Toole submits that the credit given should have been greater, but the guidelines on reduction in sentence for a guilty plea state that the reduction shall be decreased to a maximum of one-tenth on the first day of trial. Mr O'Toole submitted that a greater discount was appropriate because the indictment was not amended so as to add the lesser charge until the day of trial. But that submission misses the point. There is an exception in the guidelines for an offender convicted of a lesser offence. It states as follows:

> "If an offender is convicted of a lesser or different offence from that originally charged, and has earlier made an unequivocal indication of a guilty plea to this lesser or different offence to the prosecution and the court, the court should give the level of reduction that is appropriate to the stage in the proceedings at which this indication of plea (to the lesser or different offence) was made taking into account any other of these exceptions that apply."

What matters is when the appellant first indicated that he would plead guilty to the lesser offence. In the present case that was on the first day of trial. The judge imposed a sentence of 2 years' imprisonment. That was equivalent to 2 years and 3 months before the discount for the appellant's guilty plea.

Mr O'Toole submitted that this was too high. It was 15 months longer than the top of the range for a category 2 offence. It was 9 months longer than the starting point for a category 1 offence.

Whilst some judges might have imposed a shorter sentence, we do not consider that this sentence was manifestly excessive when viewed on its own. We will come back to the issue of totality. The continuing effect on Mr Comiskey was such a striking and unusual feature as to justify a sentence of this length.

In the case of the attempted burglary, it is accepted that this was a category 2 offence. The trauma caused to Mrs Castle made it a case of greater harm. The starting point for a category 2

offence is 1 year's custody and the range is from a high-level community order to 2 years' custody.

The appellant's previous convictions were an aggravating factor. Indeed, had his previous domestic burglaries been more recent, he would have qualified for the minimum sentence of 3 years' imprisonment. Another significant aggravating factor, which was not mentioned by the judge, was that the appellant committed this offence while on licence, only 10 days after being released from prison. It was also an aggravating factor that the offence was committed in the middle of the night.

None of the mitigating factors listed in the guidelines applied. This was an attempted burglary, but, as the judge noted, the appellant did substantial damage within the property.

The judge imposed a sentence of 18 months' imprisonment. The judge did not say what discount he had allowed for the appellant's guilty plea. That plea had been indicated at the first stage of the proceedings, so a discount of one-third was appropriate. On that basis, the sentence of 18 months' imprisonment was equivalent to a sentence of 27 months' imprisonment before discount. That was outside the range set out in the guidelines.

Mr O'Toole submitted that the judge ought to have remained within the guidelines and that the aggravating factors did not justify a sentence before discount for guilty plea of more than 18 months' imprisonment.

We agree that the judge ought not to have gone outside the range, but we consider that if he had been sentencing for the attempted burglary alone he would have been justified in going to the top of the range, ie 2 years before discount, giving a sentence of 16 months.

Finally, we turn to the issue of totality. The judge did not refer to this in his sentencing remarks. Consequently, it was not clear from his judgment how he intended to give effect to it. It is accepted that consecutive sentences were appropriate. However, the second element of the

principle of totality states that it is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences.

The first element of that principle requires the court, whether it imposes consecutive or concurrent sentences, to pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. It is relevant that the judge was sentencing the appellant for two entirely unrelated and very different offences committed almost 16 months apart. The requirements of the principle of totality are different in such a case from a case where two offences arise out of the same incident. Nevertheless, we consider that there ought to have been some reduction from the total which would be arrived at by simply adding together the sentences which would otherwise have been appropriate for the two individual offences if viewed in isolation.

For the reasons which we have given, we consider that the judge would have been entitled to impose sentences of 2 years' imprisonment for the assault occasioning actual bodily harm and 16 months' imprisonment for the attempted burglary if each of them were viewed in isolation, but simply adding them together and imposing a total sentence of 3 years and 4 months would not have been appropriate.

We consider that a total of sentence of 2 years and 9 months would be appropriate. We achieve that result by quashing the sentence of 18 months for the attempted burglary and imposing a sentence of 9 months' imprisonment.

To that extent, this appeal is allowed.

proceedings or part thereof.

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