[2019] EWCA Crim 2357

No: 201903875/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 17 December 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE CAVANAGH

HIS HONOUR JUDGE PICTON

(Sitting as a Judge of the CACD)

R E G I N A
v

ANDREW PAUL GARTHWAITE

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Mr L Kerr appeared on behalf of the **Applicant** **Mr P Sabiston** appeared on behalf of the **Crown**

J U D G M E N T

1. LORD JUSTICE HOLROYDE: The Registrar has wisely referred to the Full Court this application for an extension of time to apply for leave to appeal against sentence. Regrettably the proceedings in the courts below have involved a number of legal and procedural errors. Like counsel, we are very grateful to the lawyers in the Criminal Appeal Office who have helped to identify and focus attention upon the issues which arise.

2. The facts are straightforward. They involve three groups of offences committed on 25 September 2018, 23 February 2019 and 2 May 2019 respectively. We shall refer to them for convenience as the A, B and C groups of offences.

3. The appellant is now aged 24. He has never held a valid driving licence; he has nonetheless repeatedly driven motor vehicles on the public highway and has shown a complete disregard for the law.

4. We summarise the relevant facts starting with the offences in group A. These were committed on the afternoon of 25 September 2018, when the applicant was seen driving a vehicle which was uninsured. Police officers tried to stop him, he failed to stop and there was a pursuit. Through areas subject to a 30-mile per hour speed limit the applicant drove at up to 70 miles per hour. Two other vehicles had to swerve onto a grass verge to get out of the way. He drove through a residential area at speeds of up to 45 miles per hour passing over speed bumps. He pulled out at a junction without stopping causing another vehicle to brake heavily to avoid a collision. The applicant then abandoned the car and successfully fled from the scene. He was however arrested shortly afterwards. He had already changed his clothing but was positively identified by an officer involved in the pursuit. When his home was searched the key to the vehicle in question and the clothing which he had been wearing were found.

5. A roadside drugs test gave a positive indication for cannabis. Later testing showed that he had 7 micrograms of THC per litre of blood in his system, the prescribed limit being 2 micrograms.

6. The appellant pleaded guilty to these offences before a Magistrates' Court on 23 February 2019. A few hours before making that court appearance however, he had committed the group B offences. Those were committed in the early hours of 23 February when police were called to assist ambulance staff who were dealing with the aftermath of a collision between a car and a wall. The applicant was the person being treated by the ambulance team. He appeared to be intoxicated in some way but when asked if he had been driving, he indicated that he was due to go to court anyway, he had not got a licence but: "I was only doing less than 40 and it just went". He refused to provide either a roadside breath test or later a specimen of blood for analysis.

7. Later that day, as we have said, the applicant pleaded guilty to the group A offences. It follows that he was on bail for the group A offences and also for the group B offences, when on 2 May 2019 he committed the group C offences. He was again seen driving. Because of the manner of his driving police officers tried to stop him but he failed to stop and accelerated away. He was stopped after a short distance, admitted that he had been driving when he knew he was disqualified, did not have a full licence and that he had no insurance. He again refused to provide either a sample of saliva or a specimen of blood for drug analysis.

8. The appellant pleaded guilty to the group B and C offences on 4 May 2019. Up to this point all matters were proceeding in the Magistrates' Court. With hindsight it is unfortunate that no steps were taken to ensure that all three groups of offences proceeded together from this point onwards. What happened instead was that on 21 May 2019 a Magistrates' Court committed the A group of offences to the Crown Court for sentence. This group comprised offences of using a motor vehicle without insurance, driving a motor vehicle without a licence, driving with excess drugs and driving dangerously. The offence of driving dangerously, which is triable either way, was committed for sentence pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000. The other three offences were committed pursuant to section 6 of that Act.

9. The appellant appeared before the Crown Court to be sentenced for these four offences on Friday 7 June 2019. The court was informed that the group B and C offences were due before the Magistrates' Court on the following Monday. Sentence for the A offences was therefore adjourned to enable all the offences to be dealt with together. Then on 11 June 2019 a Magistrates' Court purported to commit the B and C groups of offences for sentence. Group B comprised offences of using a motor vehicle without insurance, driving a motor vehicle without a licence, failing to provide a specimen and failing to surrender to bail. Group C comprised offences of using a motor vehicle without insurance, driving whilst disqualified, failing to provide a specimen and failing to stop when required. All of those are summary offences. The magistrates purported to commit them all for sentence pursuant to section 6 of the 2000 Act. Understandably they wanted to ensure that the Crown Court would be in a position to deal with all matters together.

10. We turn to the relevant statutory provisions relating to these committals and purported committals. Section 3 of the 2000 Act provides that where an adult is convicted on the summary trial of an offence triable either way, and the court is of the opinion that "the offence or the combination of the offence and one or more offences associated with it was so serious that the Crown Court should, in the court's opinion, have the power to deal with the offender in any way it could deal with him if he had been convicted on indictment" then the court may commit him for sentence to the Crown Court.

11. Where the court does so, section 3(3) provides that:

i. "... section 6 below (which enables a magistrates' court, where it commits a person under this section in respect of an offence, also to commit him to the Crown Court to be dealt with in respect of certain other offences) shall apply accordingly."

12. Section 6 is headed:

i. "Committal for sentence in certain cases where offender committed in respect of another offence."

13. We must quote it in full. It provides as follows:

i. "(1) This section applies where a magistrates' court ('the committing court') commits a person in custody or on bail to the Crown Court under any enactment mentioned in subsection (4) below to be sentenced or otherwise dealt with in respect of an offence ('the relevant offence').

ii. (2) Where this section applies and the relevant offence is an indictable offence, the committing court may also commit the offender, in custody or on bail as the case may require, to the Crown Court to be dealt with in respect of any other offence whatsoever in respect of which the committing court has power to deal with him (being an offence of which he has been convicted by that or any other court).

iii. (3) Where this section applies and the relevant offence is a summary offence, the committing court may commit the offender, in custody or on bail as the case may require, to the Crown Court to be dealt with in respect of—

(b) any other offence of which the committing court has convicted him, being either—

(i) an offence punishable with imprisonment; or

i. (ii) an offence in respect of which the committing court has a power or duty to order him to be disqualified under section 34, 35 or 36 of the M1Road Traffic Offenders Act 1988 (disqualification for certain motoring offences); or

(c) any suspended sentence in respect of which the committing court has under paragraph 11(1) of Schedule 12 to the Criminal Justice Act 2003 power to deal with him.

i. (4) The enactments referred to in subsection (1) above are—

(a) the Vagrancy Act 1824 (incorrigible rogues);

(b) sections 3 to 4A above (committal for sentence for offences triable either way);

(c) section 13(5) below (conditionally discharged person convicted of further offence);

ii. ...

iii. (e)paragraph 11(2) of Schedule 12 to the Criminal Justice Act 2003 (committal to Crown Court where offender convicted during operational period of suspended sentence)."

14. As its title makes clear section 6 is a power which is necessarily ancillary to the Magistrates' Court committing "the relevant offence" to the Crown Court for sentence. No problem arose in this regard in relation to the committal for sentence on 21 May 2019. The Magistrates' Court on that occasion committed the appellant for sentence pursuant to section 3 on the indictable offence of dangerous driving and properly exercised its power under section 6 also to commit for sentence for the other offences which were before the court that day.

15. On 11 June 2019 however there was no "relevant offence". None of the offences in groups B and C was being committed for sentence under any of the enactments mentioned in section 6(4) of the 2000 Act. It follows that none of the offences could be committed for sentence. If they had all been before the Magistrates' Court on the same occasion as the group A offences the position would have been different but they were not. The prospect that all the offences might conveniently be dealt with together in the Crown Court was not in itself sufficient to give the Magistrates' Court any power under section 6. It follows that the Magistrates' Court had no power to commit for sentence any of the offences in groups B and C. The purported committals were nullities and the Crown Court had no power to sentence for those offences.

16. Unfortunately that error had not been appreciated by anyone by the time the offences all came before the Crown Court on 21 June 2019. It is unnecessary to go into the details of that hearing. It suffices to say that after hearing submissions the deputy judge imposed sentences totalling 25 months' imprisonment, together with an order that the appellant be disqualified from driving for a period of 4 years.

17. The total prison term of 25 months, comprised the following: group A, 8 months for dangerous driving plus 4 months consecutive for driving with excess drugs; group B, 4 months consecutive for failing to provide a specimen, plus 1 month consecutive for failing to surrender to bail; group C, 4 months consecutive for disqualified driving plus 4 months consecutive for failing to provide a specimen. No separate penalty, save for licence endorsement as appropriate, was imposed for any of the offences which have not just been mentioned.

18. The matter came back before the Crown Court on the 15 August 2019 on a hearing under the slip rule. It was submitted in writing by Mr Kerr, on behalf of the applicant, that two errors had been made at the earlier hearing. First, the Crown Court had had no power to sentence for the group B and C offences because Magistrates' Court had no power to commit those offences for sentence, and secondly, the effect of section 133 of the Magistrates' Courts Act 1980 was that the Crown Court was limited to imposing an aggregate of 6 months' imprisonment for all the summary offences which were before it.

19. The transcript of the proceedings shows that the oral submissions and argument quickly became focused on the second of those points, with very little being said about the first. By inference the first point, which went to the jurisdiction of the court, was rejected by the judge. As to the second point, the judge concluded that the court's powers were limited to a maximum of 6 months' imprisonment for all the summary offences which were committed to the Crown Court on a particular occasion. Thus, a maximum of 6 months' imprisonment for the summary offences in group A and a maximum of 6 months' imprisonment for all of the offences in groups B and C. The judge recognised that he could restructure his original sentences so as to achieve the same result as before by a different route but he decided that it would be unfair to the applicant so to do. He therefore varied his earlier decision and sentenced as follows. For the group A offences, 8 months' imprisonment plus 4 months' imprisonment consecutively as before, with licence endorsement but no separate penalty on the other charges. Disqualification from driving for 4 years, pursuant to section 35 of the Road Traffic Offenders Act for the offence of driving dangerously and disqualification for 2 years for the offence of driving with excess drugs. For the group B offences, 4 months' imprisonment for failing to provide a specimen with 1 month consecutive for failing to surrender to bail. Again, no separate penalty but licence endorsement in relation to the other offences. For the group C offences concurrent terms of 4 months' imprisonment for driving while disqualified and failing to provide a specimen with no separate penalty but licence endorsement for the other offences. Thus, the total term of imprisonment was reduced to one of 17 months.

20. The grounds of appeal to this court are again, that the committal for sentence of the offences in groups B and C were nullities and in the alternative that the total sentence of 17 months' imprisonment was excessive because the court was limited to a maximum of 6 months' imprisonment for all of the summary offence, including the summary offence in group A for which the judge imposed a term of 4 months' imprisonment. Thus, it is submitted by Mr Kerr, the summary offences in groups B and C, if the judge had power to sentence for them at all, could not result in an aggregate of more than 2 months' imprisonment consecutive to the 4 months. Further issues arise as to the length of the disqualification and as to the amount of the statutory surcharge which was imposed.

21. For the respondent Mr Sabiston provided helpful written submissions opposing Mr Kerr's arguments and we have heard oral submissions from both counsel. We consider the issues in turn.

22. As to the first ground of appeal, we have already indicated that we agree with Mr Kerr that the Magistrates' Court on 11 June 2019 had no power to commit the offences in groups B and C for sentence and that accordingly the Crown Court acted without jurisdiction when it purported to sentence for those offences. It is very regrettable that no one appreciated that point at the hearing before the Crown Court on 21 June 2019, and that the judge did not accept it when it was raised at the hearing on 15 August 2019.

23. Mr Kerr submits that if the validity of the point had been recognised in the court below, the judge could have proceeded to sentence for the offences in group A and could have taken one of two courses in relation to the offences in groups B and C. Those offences could have been remitted to the Magistrates' Court for them to pass sentence or, alternatively, the judge could have exercised his power under section 66 of the Courts Act 2003 to exercise the powers of a District Judge Magistrates' Court and pass sentence himself. A similar choice is available to this court.

24. As to the second ground of appeal, it seems to us that Mr Kerr's argument is with respect misconceived. By section 78 of the Powers of Criminal Courts (Sentencing) Act 2000 a Magistrates' Court does not have power to impose imprisonment or detention in a young offender institution for more than 6 months in respect of any one offence. That provision is stated to be without prejudice to section 133 of the Magistrates' Courts Acts 1980. Section 103(1), in material part provides:

    i. "... a magistrates' court imposing imprisonment ... on any person may order that the term of imprisonment ... shall commence on the expiration of any other term of imprisonment ... imposed by that or any other court, but where a magistrates' court imposes two or more terms of imprisonment ... to run consecutively the aggregate of such terms shall not, subject to the provisions of this section,

exceed 6 months."

25. Subsection (2) provides that if one of the offences for which the Magistrates' Court passes the sentence is triable either way, then the aggregate of the terms imposed shall not exceed 12 months.

26. In our judgment, the effect of section 133(1) is that a Magistrates' Court, sentencing a person to two or more terms of imprisonment for summary offences, can only pass an aggregate term not exceeding 6 months. It can however order that aggregate term to run consecutively to another sentence imposed by another court. In that situation it is not limited to a maximum of 6 months' imprisonment including the earlier sentence imposed by another court.

27. We have been invited to consider whether we can provide some general guidance on the position of a judge of the Crown Court who exercises his or her power, under section 66 of the Courts Act 2003, to sit as a District Judge Magistrates' Court and pass sentence for summary offences. The question which it is suggested arises and would benefit from some general guidance is this: if the judge also sits as a judge of the Crown Court and imposes a sentence of imprisonment for summary offences which have been lawfully committed for sentence pursuant to section 6 of the 1980 Act, is he or she limited to an aggregate of 6 months' imprisonment for all the summary offences, including those sentenced in the Crown Court? Our provisional answer to that question is in the negative. What seems to us to be of importance is that the sentence passed by the judge as a judge of the Crown Court, and the sentence passed by him or her exercising the powers of a District Judge Magistrates' Courts, have different routes of appeal. We do not however find it necessary to reach a final decision on this issue because for reasons which will become apparent, any practicable importance it may have had in this case has been overtaken by events.

28. We are conscious, and counsel have addressed us, about an apparent tension between the decisions in R v X [2012] EWCA Crim 1610 and R v Frimpong [2015] EWCA Crim 1933. In our judgment, any conflict between those decisions should be resolved by a court considering a case in which there is a live issue which makes it necessary and appropriate to do so.

29. Returning to the present case, we have already noted that the series of offences committed by the appellant shows a disregard for the law. The later offences were aggravated by being committed whilst on bail for the initial offences. A further aggravating feature was that the appellant has a number of previous convictions albeit that none involved any driving offences. In those circumstances, if all matters had been properly dealt with, it seems to us that the appellant could have had no complaint if the end result of all proceedings in the Magistrates' Court and the Crown Court had been a total term of 17 months' imprisonment. However, as a further consequence of the regrettable confusion and muddle which has occurred, a considerable amount of time has

passed and the applicant has been released from serving his sentence on home detention curfew. Moreover he has, in any event, served the custodial part of the 12-month sentence of imprisonment which was imposed for the offences in group A.

30. So far as the disqualification from driving is concerned, the judge made clear that he intended the appellant to be off the road for 4 years in total. He did not spell out, as he should have done in accordance with R v Needham [2016] EWCA Crim 455, how that period of 4 years was made up, but his intention was clear. We see no reason why any lesser period of disqualification should be imposed.

31. As to the statutory surcharge, the court record shows a statutory surcharge of £170. Subject to the issues about jurisdiction, that was an appropriate surcharge after the hearing of 21 June 2018, because the total sentence of imprisonment imposed on that occasion exceeded 24 months. Following the variation on 15 August 2019 however, the total sentence fell into the range between 6 months and 24 months for which the appropriate surcharge is £140.

32. Drawing these threads together, we reach the following conclusions. First, the offences in group A were validity committed for sentence to the Crown Court. The sentences imposed by the judge for those offences were perfectly proper. In so far as there is any application for leave to appeal against them on the merits, it must fail. Secondly, it is however necessary to correct the unlawful surcharge which has been imposed. We therefore grant the extension of time, grant leave to appeal and allow the appeal to this very limited extent: we quash the surcharge of £170 and substitute for it a surcharge of £140.

33. Thirdly, we take the opportunity to clarify that the period of 4 years' disqualification from driving comprises a discretionary term of 3 years 6 months, with an extension, pursuant to section 35A of the Road Traffic Offenders Act 1988, of 4 months and an uplift, pursuant to section 35B of that Act, of 2 months. Fourthly, the committals for sentence of the offences in groups B and C were nullities and the judge had no power to sentence for those offences.

34. The appropriate course following R v Buisson [2011] EWCA Crim 1841, is for myself and my Lord, Cavanagh J, to reconstitute ourselves as a Divisional Court of the Queen's Bench Division (Administrative Court) and to quash the committals for sentence. This we shall shortly do. In consequence, the sentences imposed by the judge for the offences in groups B and C will fall away. The applicant's position in relation to those groups of offences will be that he has pleaded guilty to them but has not yet lawfully been sentenced.

35. Lastly, we conclude that it would be an unnecessary expenditure of time and money for the offences in groups B and C to be remitted to the Newton Aycliffe Magistrates' Court. The better course and the one which Cavanagh J and I will take, sitting as a Divisional Court, is to direct that those offences be remitted to my Lord, His Honour Judge Picton, sitting as a District Judge Magistrates' Court, pursuant to section 66 of the Courts Act 2003, for him to pass an appropriate sentence, which takes into account the decisions which we have collectively made sitting as a constitution of the Court of Appeal (Criminal Division) and which also takes into account the passage of time and the applicant's present position so far as his prison sentence is concerned.

36. Cavanagh J and I, sitting as a Divisional Court of the High Court of Justice (Queen's Bench Division), accordingly grant permission to the applicant to apply for judicial review. We dispense with the issue and service of the claim form and all other formalities, we abridge all relevant time limits. We quash the orders of the Magistrates' Court on 11 June 2019, committing the offences in groups B and C to the Crown Court for sentence, committals S20190242 and 20190241. We further quash the sentences imposed in the Crown Court on 15 August 2019 for those offences.

37. We direct that those offences be remitted to His Honour Judge Picton, for him to exercise his powers as a District Judge Magistrates' Court, pursuant to section 66 of the Courts Act 2003 and to determine the appropriate sentences. That concludes the judgment of this court sitting as a constitution of the Court of Appeal (Criminal Division) and the judgment of myself and Cavanagh J sitting as a Divisional Court of the High Court of Justice. I will ask my Lord, His Honour Judge Picton, to give his decision sitting as a District Judge Magistrates' Court sentencing the offences in groups B and C.

38. HIS HONOUR JUDGE PICTON: In relation to this appellant (as was) and defendant (as now is) it is my judgment that it is not expedient to inflict punishment in the context of the offences that have been described as "B" and "C" given the history of the proceedings that have taken place up to now. The appropriate manner of disposal is to impose in respect of each one of those offences a conditional discharge for 12 months. It seems to me that it is appropriate to do that notwithstanding that the defendant is not present in court as he is represented. This step has been positively encouraged by his counsel and if any issue arises hereafter there are methods by which the position can be revisited and although that is not anticipated as being in any way likely. So the sentence which I impose, as I say, in respect of all the offences that have been termed B and C is a conditional discharge for 12 months. The defendant must be told that if he were to commit an offence during the next 12 months then he would be in breach of the conditional discharge and any court dealing with him at that time could revisit the appropriate sentence for these matters although no doubt that court would have explained to it the history of these proceedings in assessing what, if any, steps might be taken at that stage. Two of the offences for which he has been conditionally discharged carry with them obligatory 12-month disqualifications - that is the failing to produce a specimen and failing to provide a specimen. In respect of those two offences, one under heading B and

one under heading C, there will be a 12-month disqualification. That is from today and will not add to the overall period of disqualification that has just been mentioned.

39. In relation to these offences the relevant surcharge for offences committed as at the date of these matters is £15. So it is that the overall sentence is a conditional discharge for 12 months on all matters, a surcharge of £15, disqualification for the two offences I have mentioned, licence endorsed in respect of all the motoring matters and in the circumstances I do not make any order for costs.

40. LORD JUSTICE HOLROYDE: Mr Kerr, Mr Sabiston, we hope that has covered everything. Is there anything either of you can identify that is outstanding?

41. MR KERR: My Lord, no.

42. LORD JUSTICE HOLROYDE: The conditional discharges will start from today.

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