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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday 9th May 2019

B e f o r e:

LORD JUSTICE GREEN

MR JUSTICE SPENCER

MR JUSTICE MORRIS

R E G I N A

v

LEE ROBERT WALKER

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Mr Andrew D Smith appeared on behalf of the **Appellant**

J U D G M E N T
(Approved)

1. **MR JUSTICE SPENCER**: On 15th November 2018, in the Crown Court at Sheffield, the appellant (now 31 years of age) was sentenced by His Honour Judge Robert Moore to a total of five-and-a-half years' imprisonment. The appellant had been convicted after a trial of robbery in a dwelling (count 1). The sentence on that count was four-and-a-half years. On the day of trial he had pleaded guilty to burglary of that dwelling (count 2), for which there was a concurrent sentence of four years. At an earlier hearing he had pleaded guilty to theft of a vehicle which had been parked outside the house in question using keys stolen in the robbery (count 3). On that count there was a consecutive sentence of ten months' imprisonment after full credit for plea. For driving whilst disqualified, to which he also pleaded guilty (count 4), there was a further consecutive sentence of two months with full credit for plea. No separate penalty was imposed for using a vehicle without insurance. The total sentence was therefore five-and-a-half years. The appeal is brought by leave of the Single Judge.

2. The principal ground of appeal is that the sentence for theft of the vehicle should have been made concurrent with, rather than consecutive to, the sentence for the robbery. It is also submitted that, although the appellant was a "three-strikes" burglar for whom a minimum sentence of three years was mandatory, the level of sentence for the robbery and the burglary was too high, rendering the whole sentence manifestly excessive.

3. The offences were committed at a house in Worsbrough, Barnsley, on 2nd June 2018. It was the home of Louise Evans and her partner. They lived there with their son, but he was away at the time. They had a Volkswagen Caddymaxi van which was parked on the main road outside the house. At about 6.30 that Saturday morning Louise Evans' partner left the house to go and play golf. Some fifteen minutes later there was a knock at the front door. Miss Evans got up and went downstairs to answer the door, wrapped only in a towel. She assumed it must be the postman. In fact it was the appellant. He lived nearby, it would seem. From what he told the jury in his evidence at the trial, he had noticed this van parked outside the house when he passed every day and had decided that he was going to take the van and sell it.

4. Ms Evans opened the door cautiously, and, as she did so, the appellant pushed the door open. She asked what he was doing. He pushed her backwards and demanded the keys, in foul and aggressive terms, speaking right into her face. She managed to stay on her feet. She was very frightened. She was vulnerable because she was wearing only a towel and was alone in the house. She knew that if she shouted for help no one would hear.

5. The keys for the van were attached to a much larger bunch of keys, one of which was in the lock of the front door. There were about twenty keys on the bunch for the homes of customers of her dog walking business. The appellant reached round and pulled the whole bunch of keys out of the front door. Ms Evans had her hand on them but he wrested the keys from her grasp. The appellant then calmly walked away from the house, got into the van and drove off. Ms Evans immediately phoned her partner to tell him what had happened and called the police.

6. The vehicle was valued at approximately £8,000. The appellant admitted that he had sold it soon afterwards for £1,200. The vehicle was subsequently recovered.

7. As a result of the episode Ms Evans was understandably left feeling nervous and lacking in confidence when alone in the house.

8. The appellant had a very bad record indeed, with 24 previous court appearances for a total of 95 offences between 2003 and 2017, including robbery, domestic and other burglaries, aggravated burglary and assault. Most of his offending was for dishonesty, much of it vehicle related. In 2003, as a juvenile, he was sentenced to six months' detention for robbery and assault. There were several further custodial sentences for vehicle-related theft and driving offences in his teens. Then in December 2006, aged 19, he was sentenced to two years' detention for burglary of a dwelling. That was the first of the three-strikes burglaries. In October 2006 he was sentenced to 18 weeks consecutive for assault occasioning actual bodily harm. In February 2009 for aggravated burglary of a dwelling he was sentenced to four-and-a-half years' imprisonment on a guilty plea. He was also sentenced to 12 months consecutive for a separate domestic burglary where the householder was subjected to violence or the fear of violence. We note from his record that he has served custodial sentences nearly every year. His most recent sentence prior to this offending was 11 months' imprisonment imposed at Sheffield Crown Court on 4th October 2017 for escape, criminal damage and two offences of assaulting prison security officers. The present offences were therefore committed only a matter of a few months after his release, although it is unclear whether he was actually still on licence.

9. There was no pre-sentence report, nor was any report required. It was inevitable that there would be a substantial sentence of immediate custody.

10. The judge took the view that the offence of robbery fell into category 2C of the Sentencing Council guideline for robbery in a dwelling, for which the starting point under the guideline is three years' custody and the range up to five years. He observed that on the verdict of the jury the appellant had decided that he was going to get the keys for this van regardless of whether someone was at home or not. The sentence for the robbery was four-and-a-half years.

11. The judge took the view that the burglary fell within the upper half of category 1 in the Sentencing Council guideline for domestic burglary, but he allowed modest credit for the late guilty plea. The sentence for the burglary was four years concurrent.

12. The judge afforded full credit for the pleas of guilty to theft and driving whilst disqualified, and said in terms that he needed to watch the overall total. In respect of the theft of the vehicle he noted that the appellant had sold it for £1,200 within two days. The sentence was ten months consecutive; and for driving whilst disqualified two months consecutive.

13. On behalf of the appellant, Mr Smith, in his most able and succinct submissions, says first that the judge erred in principle in imposing a consecutive sentence for theft because the value of the vehicle which was stolen had been taken into account in determining the level of sentence for the robbery. In his written argument Mr Smith said that the Crown had submitted that this was category 2 harm because of the high value of the vehicle stolen, and although the robbery was of the keys alone, the defence

had agreed that the value of the car stolen two minutes later was the appropriate valuation for the purpose of the guideline. Mr Smith also said in his written argument:

> "It is of note that the learned judge used the fact that the property stolen was a valuable car in coming to his conclusion on the appropriate sentencing guideline ..."

14. We have examined the transcripts carefully. We do not think that submission is borne out by the transcript. In the course of the prosecution opening the judge invited the Crown's submissions on where the offences fell in the guideline. Prosecuting counsel suggested that the robbery was category 2:

> "... because clearly the value of the goods which were taken were significant to the victim - not only the vehicle keys, but also the keys from clients in her business."

The judge agreed. In other words, the prosecution were not suggesting that the value of the vehicle should be taken into account in identifying the correct category for the robbery. It was the keys alone.

15. Prosecuting counsel went on to identify as aggravating factors of the robbery the vulnerability of the victim at the time of the offence - a lady on her own in her own home with only a towel wrapped around her; the fact that the offence took place early in the morning when there was no one around to whom she could shout for help; the fact that the offence was committed under the influence of alcohol; and finally, the appellant's very bad record.

16. In his oral submissions this morning Mr Smith very fairly and properly confirmed, when we enquired, that there had been no subsequent exchange between himself and the judge during the course of mitigation in which the question of the category had been considered further. There is no suggestion that the judge ever said in terms during the course of exchanges with counsel that he was taking into account the value of the car in putting the robbery into category 2.

17. Regrettably, the judge's sentencing remarks were excessively brief. Although he clearly identified the categories in which he placed the offences of robbery and burglary, he did not set out the reasoning by which he arrived at those conclusions. In fairness, it may be that as there was no dispute that the robbery was category 2C he felt it unnecessary to do so. Nor, however, did he spell out that he treated the theft as separate and distinct offending from the robbery and the burglary, thereby meriting a consecutive sentence.

18. As to the robbery, Mr Smith submits that as a robbery of the keys alone this was a category 3C offence, not category 2C, with the result that the starting point would have been 18 months and the range only up to three years. He submits that it could not be category 2 because that covers (to quote the guideline) "other cases where characteristics of category 1 or 3 are not present". He submitted in writing that characteristics for category 3 *were* present here because there was no or only minimal

physical or psychological harm caused to the victim; the offence targeted and obtained low value goods, if confined to the keys; and there was limited damage or disturbance to property.

19. He further submits that the judge was wrong to put the burglary into category 1 of the guideline. Although there was greater harm because the occupier was at home, he submits there was no higher culpability factor made out: there was no weapon used and there was no significant degree of planning or organisation. He submits that the offence was committed on impulse, with limited intrusion into property, which would indicate lower culpability.

20. Mr Smith has not taken issue as such with the sentence of 10 months' imprisonment for the theft of the vehicle, representing a sentence of 15 months before full credit for plea. He simply submits that the sentence should have been made concurrent because the ultimate goal of the robbery and the burglary was theft of the vehicle, and this was reflected in the level of sentence for those offences.

21. We have considered these submissions very carefully. As we have said, it is regrettable that the judge did not spell out his reasoning more clearly. In the end, however, the sole question we have to answer is whether the total sentence of five-and-a-half years was manifestly excessive for the overall criminality represented by all the offences, having regard in particular to the appellant's record.

22. It is helpful, we think, to test the proposition in this way: for the burglary alone, even if there had been no element of force to make it robbery and even if nothing at all had actually been stolen, the appellant was bound to receive at the very least a minimum sentence of three years, with 10% credit for his very late plea, because he was a three-strikes burglar. The consecutive sentence of two months whilst driving was disqualified (as to which there is no dispute) would bring that back to around the three-year mark. On top of that three years, the appellant received in effect an additional 18 months for the fact that the offence was robbery. That cannot in itself be regarded as excessive. It was a nasty offence. In addition, the appellant received ten months for the theft of the vehicle, which again cannot be regarded as excessive in itself. Putting it another way, if nothing had been stolen in the burglary, because the keys could not be found for example, and instead the appellant had broken into and jump started the vehicle to steal it, there could have been no complaint at a consecutive sentence for the theft.

23. Tested in this way, we are far from persuaded that the overall sentence of five-and-a-half years was manifestly excessive. We should say that the example we have just given was put to Mr Smith during the course of argument and he maintained that even on those facts there would still have had to be a concurrent sentence for the theft because it was all part and parcel of the attempted robbery or burglary.

24. In any event, however, we think the judge was entitled to put the robbery of the keys alone into category 2C. It cannot be said that there was only minimal psychological harm caused to the victim. It cannot be said that low value goods or sums were targeted: the keys and what they represented were valuable to the victim as part of her

business. Nor can it be said that there was only limited disturbance to property: he forced open the door and stole the keys. On this basis it was a category 2C offence, with a starting point of three years' custody. The aggravating factors were the vulnerability of the victim, the timing of the offence and the fact that he committed the offence under the influence of alcohol. The most serious aggravating factor of all, however, was his previous record, which included not only domestic burglary but aggravated domestic burglary and robbery. All these factors amply justified increasing the sentence for the robbery to four-and-a-half years.

25. As to the burglary offence, the judge had heard the trial. It was plain that the appellant had not simply decided on the spur of the moment to steal the vehicle and burgle the house in order to obtain the keys; there was a significant degree of forethought and planning.

26. Analysing the robbery and the burglary in this way, the stealing of the vehicle was properly to be regarded as separate criminality meriting a consecutive sentence, subject to the principle of totality, which the judge specifically had in mind, as is clear from his sentencing remarks. Standing back, we are therefore quite unable to say that the appellant's total sentence of five-and-a-half years' imprisonment was other than just and proportionate to reflect the totality of this serious offending against the background of such a bad record for similar offences. The sentence was severe, but properly and appropriately severe.

27. Accordingly, and despite Mr Smith's attractive and well-argued submissions, the appeal is dismissed.