[2022] EWCA Crim 542

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202102829/A3

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 12 April 2022

Before:

LADY JUSTICE CARR DBE
MR JUSTICE WALL
HIS HONOUR JUDGE PATRICK FIELD QC
(Sitting as a Judge of the CACD)

REGINA
V
PAUL CAMARA

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR J LLOYD-RICHARDS appeared on behalf of the Appellant
MR P JARVIS appeared on behalf of the Crown

J U D G M E N T

LADY JUSTICE CARR: Unless otherwise stated, all references in this judgment to sections are references to sections in the Sentencing Act 2020.

Introduction

1. This appeal against sentence raises the question of whether or not an extended sentence under s. 279 can be passed on an offence that is specified for the purpose of s. 306 in circumstances where the four-year term condition prescribed in s. 280 is met only by taking into account offending on associated offences that are not so specified. It is an issue on which there appears to be conflicting appellate authority. The point is one of real significance. Many cases involve offending arising out of a combination of specified and unspecified offences. Judges need to know what offences can and cannot be taken into account for the purpose of identifying whether or not the appropriate custodial term would be at least four years long.

2. The appellant, now 43 years of age, was convicted upon his guilty pleas entered at a plea and trial preparation hearing on 7 June 2021 to the following offences: assault occasioning actual bodily harm, contrary to s. 47 of the Offences Against the Person Act 1861 (count 1), taking a motor vehicle without consent, contrary to s. 12 of the Theft Act 1968 (count 2) and two breaches of a restraining order, contrary to ss. 363(1) and (2), (counts 3 and 4).

3. On 2 August 2021 he was sentenced by Recorder Wright ("the judge") sitting at Aylesbury Crown Court as follows. On count 1, an extended sentence of five years, comprising a custodial term of four years and a licence period of one year. On count 2, a sentence of three months' imprisonment. On count 3, a sentence of two years' imprisonment. On count 4, a sentence of two-and-a-half years' imprisonment. The sentences on counts 2 to 4 were all to run concurrently with the sentence on count 1.

4. None of the offences the subject of counts 2 to 4 were specified offences. The question is whether in those circumstances the judge was nevertheless entitled to take them into account in arriving at the "appropriate custodial term" as defined in s. 281 of four years on count 1.

The facts

5. The offending took place in the context of the appellant's former relationship with Kirsty Clark. That relationship had broken down in late 2019. Ms Clark subsequently obtained a non-molestation order, the terms of which the appellant went on to breach.

6. On 18 December 2020 he was sentenced to a community order for those breaches ("the 2020 CO") and also for battery on Ms Clark and dangerous driving. He was also made the subject of a three-year restraining order preventing him from contacting Ms Clark or going to her address ("the 2020 RO").

7. In breach of the 2020 RO, the appellant contacted Ms Clark during the course of March 2021. These breaches were the subject of count 4. The offending in counts 1 to 3 arose out of an incident on 29 April 2021. On that day Ms Clark saw the appellant after having just dropped her children off at school. He was in an argument with someone else but when he saw her in her car he turned his anger on her, blocking her way and shouting and screaming. As Ms Clark attempted to drive off, the appellant got in the rear seat. He shouted abuse at her and told her to drive, threatening to run her over and indeed to kill her if she refused. She was understandably terrified and did as she was told. She tried to call the police on her mobile telephone but the appellant snatched the telephone from her. She then pulled up in a built-up area, sounding the car horn in an attempt to attract assistance.

8. The appellant got out of the car and dragged Ms Clark out of the vehicle by her hair. He shut the car door on her hand a number of times in order to make her let go. He then grabbed her by the hair and punched her repeatedly to the right side and jaw. The punching continued whilst Ms Clark was on the ground trying to protect her head. The appellant also stamped on her ribs and kicked her, calling her a "slut" and a "cunt". He put her in a strangle hold and lifted her up. He then pushed her away, kicking and punching her more. This was the basis of the offending in counts 1 and 3.

9. Ms Clark suffered soreness and extensive bruising, and was hardly able to move for a time. She was scared of going out at all initially and then only went out with her mother. She was afraid for herself and her children. She suffered nightmares from the incident. It was hard to rebuild her life, although that was something she was determined to do.

10. When members of the public arrived to assist, the appellant got into Miss Clark's car and drove away. That was the basis of the offending in count 2.

11. The appellant was 42 years old at the date of conviction and had 34 previous convictions for 120 offences, including for 14 offences of violence against a person, the breaches in 2020 of the non-molestation order then in place and earlier breaches of other restraining orders.

The sentence below

12. The judge placed the offending on count 1 in Category 1A of the Sentencing Council Guideline for Assault which carries a starting point of two-and-a-half years' imprisonment. Aggravating factors were the appellant's previous convictions including for assault, harassment and breach of a restraining order involving other former partners. There was a history of violence towards Ms Clark and the offences were committed when the appellant was the subject of the 2020 CO. The judge placed the offending in counts 3 and 4, namely the breaches of the 2020 RO, in Category 1A of the Sentencing Council Guideline for Breach Offences, carrying a starting point for each offence of two years' imprisonment. Again there were aggravating features. The judge took into account the available mitigation, prison conditions in the pandemic and totality. He granted 25% credit in respect of the appellant's guilty pleas.

13. In terms of structure, the judge's approach was to pass concurrent sentences on all counts with the totality of the offending to be reflected in the sentence on count 1. The sentence on count 1 alone after credit for guilty plea would have been three years but, allowing for totality, would be four years in order to reflect the overall gravity of the offending on the other three counts.

14. The judge also concluded that the appellant posed a significant risk to members of the public, specifically but not exclusively current or former partners, of serious harm through the commission of further specified offences. In his judgment a standard determinate sentence would be insufficient to protect the public. He thus imposed an extended sentence of four years' imprisonment and one year's extended licence on count 1. The 2020 CO was revoked. The 2020 RO was continued for an indefinite period of time.

Grounds of appeal

15. For the appellant, Mr Lloyd-Richards submits, first, that the judge erred in imposing a sentence of four years' imprisonment on count 1; secondly, the judge wrongly applied his mind to a finding of dangerousness in uplifting the sentence on count 1; thirdly, the judge failed to apply the principle of totality.

16. In his oral submissions, Mr Lloyd-Richards has emphasised the decision of this court in *R v Casbolt* [2016] EWCA Crim 1377 ("*Casbolt*"): where none of the other offences in counts 2 to 4 were specified, it was impermissible to use them to elevate the sentence on count 1. Even if the maximum sentence of five years' imprisonment had been taken as the starting point, he submits, it would have been reduced to three years and nine months' custody after 25% credit for guilty plea. Five years' custody would not have been an appropriate starting point in any event. Four years' custody would have been the highest

appropriate starting point after trial. After credit for guilty plea, the sentence would be brought substantially below the four-year trigger point for the imposition of an extended sentence.

17. It is conceded by Mr Lloyd-Richards that in such circumstances adjustment to the balance of the sentencing exercise would be necessary. Consecutive sentences on the restraining order breaches in counts 2 and 3 could be justified, reduced for totality, with the sentence on count 4 to run concurrently with the sentence on count 1.

18. When challenged by reference to the wording of the legislation, which Mr Lloyd-Richards was bound to accept does not support his position, Mr Lloyd-Richards falls back on a point of principle. He argues that, because the dangerousness provisions are only engaged by reference to specified offences, only specified offences ought as a matter of principle to play a part in reaching or exceeding the four-year term condition.

19. Mr Jarvis has appeared before us on behalf of the Crown. He submits that, in line with the reasoning of this court in *R v Pinnell; R v Joyce* [2010] EWCA Crim 2848, [2012] 1 WLR 17 ("*Pinnell/Joyce*"), the judge was fully entitled to take the course that he did, namely, to treat the offending on counts 2 to 4 as aggravating the sentence on count 1. There is nothing in the legislation to prevent the aggregation of sentences on specified and non-specified offences. Even if the longest permissible sentence on count 1, had it stood alone, would have been three years and nine months' imprisonment, the judge was entitled to increase it to one of four years to aggregate the seriousness of the other offending. The sentence thus imposed was neither wrong in law nor manifestly excessive. An extended sentence was on the facts entirely appropriate.

The relevant legislative provisions

20. S. 279 defines an extended sentence as a sentence of imprisonment the term of which is equal to the aggregate of the "appropriate custodial term" and a further period for which the offender is to be subject to a licence. S. 280 identifies the circumstances in which an extended sentence will be available. It provides materially as follows:

> "(1) An extended sentence of imprisonment is available in respect of an offence where—
>
> (a) the offence is a specified offence (see section 306(1)),
>
> (b) the offender is aged 21 or over when convicted of the offence,
>
> (c) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences (see section 308),

(d) the court is not required by section 283 or 285 to impose a sentence of imprisonment for life, and

(e) the earlier offence condition or the 4-year term condition is met...

(3) The earlier offence condition is that, when the offence was committed, the offender had been convicted of an offence listed in Schedule 14.

(4) The 4 year term condition is that, if the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term (see section 281) would be at least 4 years."

21. The “appropriate custodial term” is defined in section 281(2) as:

"... the term of imprisonment that would be imposed in respect of the offence in compliance with section 231(2) (length of discretionary custodial sentences: general provision) if the court did not impose an extended sentence of imprisonment."

22. S. 231(2) provides:

"The custodial sentence must be for the shortest term (not exceeding the permitted maximum) that in the opinion of the court is commensurate with the seriousness of—

(a) the offence, or

(b) the combination of the offence and one or more offences associated with it."

23. Section 400 states, so far as material, that for the purpose of the Sentencing Code

an offence is associated with another if:

"(a) the offender—

(i) is convicted of it in the proceedings in which the offender is convicted of the other offence ... "

Discussion

23. The maximum sentence on count 1 was five years' imprisonment. Assuming for the moment that the maximum term was justified, after 25% credit for guilty plea, the term

would be three years and nine months. The judge in fact took a term of four years before credit for guilty plea, producing a term of three years after 25% credit. On either basis, without more, the four year term condition would not have been met. However, taking into account the totality of the offending, the judge increased the custodial sentence on count 1 from three years to four years.

24. The question is whether the judge was entitled to reach that term as the appropriate custodial term by reference to offences that were not specified for the purpose of s. 306.

25. In *Pinnell/Joyce* the court (at [15] to [36]) carried out a comprehensive review of the legislative framework and the relevant authorities. Cranston J, giving the judgment of the court, addressed the four year term condition then to be found in s. 227(2B) of the Criminal Justice Act 2003 (as amended by the Criminal Justice and Immigration Act 2008) ("the 2003 Act"), the definition of appropriate custodial term then to be found in s. 227(3) of the 2003 Act, the general provision as to the length of the discretionary custodial sentences then to be found in s. 153 of the 2003 Act and the meaning of associated offences then to be found in s. 161 of the Powers of Criminal Courts (Sentencing) Act 2000.

26. Those provisions are materially the same as the provisions relevant for present purposes, namely ss. 280, 281, 231 and 400. At [20], Cranston J said:

> "The result is that the legislation enables a court in passing a sentence in relation to offence A to take into account in specifying the appropriate custodial term for that offence an associated offence B. Seriousness when sentencing offence A can have added complexion from an associated offence. The principle can be applied to extended sentences. Even though specified offence A by itself may not justify an appropriate custodial term of 4 years, when aggregated with associated offence B the totality of offending does. Aggregation in this way is subject to the custodial term for offence A not exceeding the statutory maximum and not infringing the principle of totality. Importantly, in the context of extended sentences the aggregate of the custodial term and the extension period for offence A must not exceed the maximum sentence for the offence ... "

27. At [22] he went on:

> "Thus the statutory language of section 153 points to the court being able to aggregate with a specified offence non specified associated offences, to consider the totality of offending, when fixing the custodial term of an extended sentence under section 227 ... the language of section 227(2B) is such that the appropriate custodial term in relation to each extended sentence must be at least 4 years. Separate consecutive sentences, each

shorter than 4 years, cannot be extended even if their total is more than 4 years."

28. Cranston J further examined a long line of authorities, concluding (at [36]) that none of them was inconsistent with the court's interpretation of the legislation. In conclusion, the court confirmed:

> "46. The guidance which the Registrar invites us to give regarding extended sentences is as follows. It assumes that the offender is convicted of offences at least one of which is specified in Schedule 15; that he is dangerous; that a life sentence is not required; and that he has not previously committed one of the grave offences spelt out in Schedule 15A. It also assumes that the offences are associated offences, which will be the case if he is convicted of them at the same time, sentenced for them at the same time, or admits them when sentenced for other offences and asks for them to be taken into account. In other words, the key issue on these assumptions is whether the condition for imposing an extended sentence ... is met, namely, whether the appropriate custodial term is four years.
>
> 47. If no one offence would justify a four year custodial term on ordinary principles, the seriousness of the aggregate offending must be considered. If a four year custodial term results from aggregating the shortest terms commensurate with the seriousness of each offence, then that four year term can be imposed in relation to the specified offence ... "

29. Six years later the judgment in *Casbolt*, in which this court appears to have taken a different view, was delivered. The context of its observations is material. The appellant in *Casbolt* had pleaded guilty to four counts. He received a determinate sentence of five years' imprisonment on count 1 (blackmail), an extended sentence of five years' imprisonment on count 2 (stalking), comprising a custodial period of four years and an extended licence of one year, a determinate sentence of three years' imprisonment on count 3 (harassment) and one year's imprisonment on count 4 (also harassment). The determinate sentence on count 3 was ordered to run consecutively to the determinate sentence on count 1, bringing the sentence up to eight years' imprisonment. The extended sentence on count 2 was also ordered to run consecutively, bringing the sentence up to 12 years' imprisonment as a whole, with one year of extended licence. The sentence on count 4 was ordered to run concurrently.

30. It appeared therefore that the sentencing judge in *Casbolt* had sought to increase the sentence on the specified offence of stalking simply in order to enable him to pass an extended sentence. Counsel for the Crown there submitted, in reliance on *Pinnell/Joyce*, that the judge was entitled so to do. The court however said:

> "41. We disagree. Such an approach might have been legitimate ... if all or any of the other offences had been specified offences. But, in the absence

> of other such offences, before considering dangerousness, the judge had to conclude that a sentence for the one specified offence of not less than four years was appropriate. We can distil no principle from the authorities which entitles a judge to uplift a sentence for a stand-alone specified offence in order to justify the imposition of an extended sentence ... "

31. At face value, *Casbolt* might therefore suggest that, as a matter of principle in this case, the judge could not have imposed a term of more than three years and nine months, i.e. 75% of five years, on count 1, in which case the four-year term condition was not met and an extended sentence was not available.

32. However, we have no hesitation in preferring the reasoning in *Pinnell/Joyce*. The court in *Casbolt* did not refer to or analyse the wording of the relevant legislation and in particular the definition of an "associated offence" now to be found in s. 400. There is no requirement for an "associated offence" to be a specified offence. The legislation could have said to the contrary, but it clearly does not. There is no proper basis as a matter of construction or otherwise for importing into the legislation any additional requirement to such effect. The position can be tested thus. Had the judge decided to pass a determinate sentence, he would have been justified in aggregating the offending on the specified offence with the offending on the non-specified offences, using count 1 as the lead. The situation cannot, as a matter of logic or principle, be any different had he then gone on, as he did, to make a determination of dangerousness.

33. On the other hand, we agree that to artificially inflate a sentence on a specified offence simply for the purpose of meeting the four-year term condition is impermissible. This appears to have been the vice in purview in *Casbolt*. There the sentence imposed on the stalking offence was not intended to reflect the seriousness of any of the other offences on the indictment in respect of which consecutive sentences were being passed. But that is not what the judge here was doing. He was arriving at a global sentence on count 1 to reflect the appellant's overall offending with concurrent sentences on all offences. There was thus no error of principle in the sentencing process.

34. Beyond that, there is no basis for impugning the length of the overall sentence as being manifestly excessive. The judge was entitled to take the view that four years' imprisonment was the shortest term commensurate with the seriousness of the combination of the offence on count 1 and one or more offences associated with it, namely the offences on counts 2 to 4.

35. The judge paid express regard to the principle of totality. This was very grave offending by a defendant who had previously offended not only in the same or similar way on the same victim, but in the same or similar way on other multiple female victims in a domestic context. He clearly posed a risk of serious harm to current or former partners. Five years' imprisonment made up of a custodial term of four years and a one-year

extended licence was not disproportionate. That is borne out, amongst other things, by the fact that the alternative approach proposed on behalf of the appellant, namely the passing of consecutive sentences on counts 2 and 3 to a determinate sentence of three years' custody on count 1, does not produce a markedly different result.

Conclusion

36. For these reasons we dismiss the appeal. In so far as *Casbolt* is to be understood as suggesting that a court, when passing a sentence on a specified offence, cannot take into account by way of aggregation an associated (though unspecified) offence for the purpose of identifying the appropriate custodial term in s. 280, it is wrong. *Pinnell/Joyce* remains good law. The court when arriving at the appropriate custodial term can aggregate with a specified offence non-specified associated offences so as to reflect the defendant's overall offending, subject always to the custodial term imposed on the specified offence not exceeding the statutory maximum and not infringing the principle of totality.