IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT ST ALBANS

MR RECORDER BLAKER KC T20237019

CASE NO 202402015/A2

[2024] EWCA Crim 971

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 13 August 2024

Before:

LORD JUSTICE WARBY
MR JUSTICE CAVANAGH
MR JUSTICE WALL

REX
V
MICHAEL FORBES

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MR M LAVERS appeared on behalf of the Appellant

J U D G M E N T
(Approved)

1. LORD JUSTICE WARBY: This is an appeal against sentence by Michael Forbes, now aged 37. On 10 May 2024, having earlier pleaded guilty, he was sentenced in the Crown Court at St. Albans to a total of 24 months' imprisonment for an offence of assault on an emergency worker, an offence of going equipped for theft, two offences of having a bladed article in a public place and one of possessing class B drugs.
2. The offending took place in Welwyn Garden City in the early hours of the morning of 17 November 2023. For several hours the appellant was travelling around the area on a bicycle equipped with two kitchen knives, two hammers, a chisel, a crowbar, a screwdriver, a pair of pliers and a small amount of cannabis. At the same time in the same area police officers were present in an unmarked police car. They were conducting an undercover operation prompted by a spate of thefts from cars.
3. At around 4.30 am the officers observed the appellant on his bicycle and called out to him to stay where he was. He rode off. The officers then noticed that several cars in the area had had the dew wiped off a window, as a person would do if checking to see what, if anything, was in the car. The appellant had been observed close to two of these vehicles. At around 6.30 am the officers saw the appellant on his bicycle again and on this occasion they recognised him from previous encounters. PC Martin Field got out of the car to try to accost the appellant, shouting to him again to stay where he was. Again the appellant rode off.
4. As PC Field approached an alleyway the appellant suddenly emerged, cycling at him at speed. Ignoring a shouted warning he crashed into PC Field's legs. Both men fell to the road and there was then an altercation as the appellant tried to run away and PC Field tried to restrain him. The officer used his PAVA spray on the appellant for a couple of seconds. The appellant nonetheless continued to resist, kicking out at the officer. He

then seized the spray can and used it to spray PC Field in the face. The officer managed nonetheless to keep the appellant on the floor, to retrieve the canister and throw it to the side of the road. He struck the appellant on more than one occasion to stop him. At that point other officers came along. The appellant was arrested and the items we have mentioned were found.

5. One of the knives was in a sheath strapped across the handlebars of the bicycle. The other was a large cleaver type item found in the pocket of the hoody which the appellant was wearing. The tools, together with some dark coloured gloves, were found in a black shoulder bag. The cannabis was found in his clothing.

6. The effects of the spray on PC Field included forced closing of the eyes, stinging to the face, eyes and right ear, and burning to the skin which lasted for a period of some hours, as well as some reddening of the face and to the knee.

7. The appellant was indicted on six counts. Count 1 alleged the use of a firearm, namely the spray, within intent to resist arrest, contrary to section 17 of the Firearms Act 1968. Count 2 was a charge of common assault on an emergency worker, contrary to section 39 of the Criminal Justice Act 1988 and section 1 of the Assaults on Emergency Workers (Offences) Act 2018. Count 3 alleged going equipped for theft, contrary to section 25 of the Theft Act 1968. Counts 4 and 5 were the two bladed article offences, contrary to section 139(1) of the Criminal Justice Act 1988, and count 6 was the class B offence contrary to section 5(2) of the Misuse of Drugs Act 1971.

8. The case went to trial in May 2024 at which the judge ruled that count 1 was legally unsustainable and directed the jury to acquit on that count. The appellant then pleaded guilty on re-arraignment to counts 2 to 5. He had earlier pleaded guilty to count 6. As he had made an early offer to plead guilty to all five of these counts, the sentencing judge

afforded him a reduction of 25 per cent on each.

9. He was sentenced the day after his guilty pleas. The judge had the benefit of his antecedents which reveal a long history of offending. Over more than 20 years he had accumulated 33 convictions for 85 offences. These included four offences of violence, two of possessing offensive weapons and 46 offences of theft and kindred offences. The offences of violence were over a decade old but did include wounding contrary to section 18 of the Offences Against the Person Act 1861. The theft offences included thefts from a motor vehicle or attempts to commit that offence in 2007, 2009, 2013 and 2023. There was also an offence of going equipped for theft in 2023, although not from a vehicle.

10. There was no pre-sentence report and we are satisfied that none was or is necessary. The judge accepted the defence submission that the appellant was a drug addict who was homeless and living in a tent and that he had spent a great deal of his life in custody. We have been given no reason to suppose that there was anything else that could have been said by way of mitigation.

11. The judge concluded that the assault was an offence in guideline category A2 with a starting point of a medium level community order and a range from a low level community order to 16 weeks' custody. He held that the case would ordinarily be near the top of the range but as the assault was on an emergency worker he had to consider a significantly more onerous penalty. He noted that the statutory maximum sentence was two years' imprisonment. Taking account of the whole course of events, including the riding of the bicycle into the officer's legs, the spraying of the PAVA spray, the altercation and the kicking, the judge concluded that the appropriate sentence after a trial would have been 16 months. With a 25 per cent reduction for the guilty plea that came

down to 12 months.

12. The judge turned to the Sentencing Council guideline for going equipped. He accepted the Crown's submission that there were elements of higher culpability so that the case fell into Category A1 with a starting point of one year's imprisonment and a range of 26 weeks to one year six months. He said that taking account of the significant number of tools, the established community impact of theft from cars, and the aggravation represented by the relevant previous convictions the appropriate sentence after a trial would have been one of 12 months' imprisonment, which was reduced to nine months for the guilty plea.

13. Sentencing for the knife offences, the judge observed that both involved large knives that would put significant fear into someone seeing them. He found that there was the risk of serious disorder and that if the knives had been used or seen they would have caused alarm or distress. The case was for those reasons in guideline category A1 but at the slightly lower end. The category starting point was one year and six months. In the present case the judge concluded that the appropriate sentence after trial would have been one of 16 months' imprisonment, which was reduced to 12 months for the guilty plea.

14. Having regard to the totality guideline of 2023, the judge concluded that the shortest sentence commensurate with the gravity of the offending was one of 24 months. He decided to impose the 12-month sentences for the assault and the knife offences consecutively, as this was separate offending, but to make the sentence for going equipped concurrent. The cannabis offence attracted no separate penalty. The judge considered the guideline on the imposition of custodial sentences and concluded that the sentence should not be suspended.

15. The grounds of appeal are that the overall sentence was manifestly excessive because (1)

in sentencing for the assault the judge misapplied the relevant sentencing guidelines for the facts and circumstances of the case; (2) he also misapplied the guideline for the offence of going equipped; (3) he mis-categorised the bladed article offences; and (4) he failed properly to apply the principle of totality. We take these points in turn.

16. The sentencing guideline for assault on an emergency worker stipulates that when sentencing for such an offence the court should first identify the appropriate guideline category: step 1. Then position the offending within that category for the basic offence: step 2. Next, the court should apply "an appropriate uplift": step 3. Guidance on step 3 is given according to the category of offence. For a Category A2 offence the sentencer is advised to consider "a significantly more onerous penalty of the same type or ... a more severe type of sentence than for the basic offence." Beyond this it is left to the judge to form a judgment about the extent of the uplift and to exercise a discretion.

17. All of this has been acknowledged by Mr Lavers, who appears for the appellant as he did below. He submits however that in this case the judge went much too far beyond the upper end of the guideline range. The uplift is described by Mr Lavers as one of over 400 per cent and simply too great. To illustrate his submission Mr Lavers has referred us to two decisions of this court on what he suggests are similar facts where the uplift applied was much less: Thornton [2022] EWCA Crim 1902 and Adam [2023] EWCA Crim 324. Counsel invites us to approach this case on the basis that the uplift is designed purely to reflect the status of the victim and to treat these previous decisions of this court as guidance on the extent to which the basic sentence ought to be uplifted in a case of the present kind. In the written grounds it was also submitted that the judge failed to give sufficient weight to the mitigating fact that the appellant's use of spray represented an excessive use of force to resist unlawful detention.

18. In our judgement no reasonable criticism can be made of the judge's assessment of the offence category at step 1 or where this offending stood within the category range at step 2. This aspect of the appeal turns entirely on the merits of the judge's decision on the uplift to be applied at step 3. That is an exercise that calls for a judicial assessment of what is proportionate to the facts of the case. In the absence of an error of principle this court would only interfere if persuaded that the judge's decision fell outside the range that was reasonably open to him. We consider that the cases cited to us are illustrations of the application of the guideline to specific facts. They do not lay down any principle that applies to this case nor do they afford useful guidance for the present decision.
19. In this case there was no error of principle. Steps 1 and 2 of the guideline process are concerned with the basic offence of common assault for which the statutory maximum sentence is six months' imprisonment. The maximum sentence for an offence against an emergency worker is now four times higher at two years. The judge was right to bear that in mind when assessing the appropriate uplift and to seek to calibrate his decision with that in mind. The judge was entitled to conclude that on the facts of this case the appropriate sentence was proportionately higher.
20. The written grounds of appeal against the sentence for going equipped assert an error of principle. It is said that the judge incorrectly decided that the appellant had high culpability on the basis that he had been equipped to commit domestic burglary when no such allegation had been made nor had the appellant admitted as much. The charge to which he had pleaded guilty was one of going equipped for theft.
21. The force of this point is not clearly apparent on the face of the sentencing remarks but it does become plain when regard is had to the way the prosecution put its argument on culpability. The transcript shows that the submission at the sentencing hearing was that

the appellant had been "equipped for ... domestic burglary" within the meaning of the guideline because the tools he had with him were capable of being used for burglary and he had previous convictions for that offence. Whatever the merits of this line of reasoning might be in another case, we are quite satisfied that it was illegitimate in this case. That is because until the sentencing hearing the case against this appellant had been pleaded and argued squarely on the basis that his purpose and intention was to steal from cars. That is the way the case had been opened to the jury and it was on that basis that the appellant had pleaded guilty.

22. For these reasons this aspect of the prosecution argument should have been rejected. Mr Lavers conceded below that the case was one of greater harm given the number of potential victims. We are satisfied he was right to do so. Count 3 should therefore have been sentenced as a greater harm but medium culpability offence of going equipped to steal from cars with a category starting point of 18 weeks' custody and a range of up to 36 weeks. The aggravating factors mentioned by the judge required a substantial uplift but the appropriate sentence was not more than 28 weeks before reduction to reflect the guilty plea.

23. Turning to the bladed article offences, these were undoubtedly in culpability Category A, given the nature of the items. The prosecution submitted and the sentencing judge accepted that the offences were in harm Category 1. The prosecution argued that this was because the offence was committed "in circumstances where there is a risk of serious disorder" to quote the third bullet point in the guideline. In our judgment that is not sustainable. In one sense possession of a large knife that might be produced if confronted is always capable of giving rise to some disorder. But the guideline speaks of serious disorder. And this appellant was operating alone in deserted streets at night. We do not

consider this bullet point is intended to cover such a case.

24. That said, the judge's principal reason for placing this case in guideline Category A1 was that the appellant's possession of two frightening knives created a risk of serious alarm or distress if he was confronted. Mr Lavers has sought today to persuade us that if this point were applicable to this case, it would apply to every case of having a bladed article. There must be something more than the mere possession of knives, he submits. In our judgment the judge's conclusion was unimpeachable. He was entitled to conclude in all the circumstances of this case that this appellant's possession of those two knives – one of them being clearly on display on his bicycle - presented a real and appreciable risk of causing serious alarm or distress. On that basis the case did belong in Category A1. The category starting point being one year six months, and given that there were two knives and two counts, we consider the judge's conclusion that the appropriate total sentence after trial would be one of 16 months to be entirely fair and proper.

25. As for totality, we see no error of principle in the judge's approach. Not only did he impose the sentences on counts 4 and 5 concurrently with one another, he also made the sentence on count 3 concurrent. Although we have upheld the appeal in respect of that last-mentioned count, the principle of totality will be given its proper effect if we maintain the structure of the sentencing exercise.

26. In the result, we quash the sentence of nine months' imprisonment concurrent imposed on count 3 and substitute a sentence of five months concurrent. To that extent the appeal is allowed. The sentences imposed below are otherwise unaffected. The total sentence remains one of 24 months' imprisonment.

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

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