No: 03/5892/A5

Neutral Citation Number: [2004] EWCA Crim 231
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2

Wednesday 28 January 2004

B E F O R E:

LORD JUSTICE KAY

MR JUSTICE DAVID CLARKE

and

HIS HONOUR JUDGE BRODRICK
(Sitting as a Judge of the Court of Appeal Criminal Division)

- - - - - - -
R E G I N A

-v-

ANDREW PETER DALE

- - - - - - -
Computer Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)
- - - - - - -
MR ANDREW BAKER appeared on behalf of the APPLICANT
- - - - - - -
J U D G M E N T
(As Approved by the Court)

1. JUDGE BRODRICK: On 1st September 2003 this appellant appeared at the Crown Court at Stafford. He admitted being in breach of the requirements of a two-year community rehabilitation order and on 29th September 2003 he appeared before His Honour Judge Shand, who sentenced him as follows: for the original offences for which the community rehabilitation order was passed on 30th May 2003, he sentenced him to six months for affray and six months concurrent for failing to surrender to bail - a total term, therefore, of six months' imprisonment. The appeal in one sense is academic because on 14th November 2003 the appellant was released on home detention curfew. Nevertheless, he appeals against that sentence by leave of the single judge.

2. The facts of the matter were these. Over the weekend of 15th/16th February the appellant had custody of his three children, aged 7, 6 and 4. His relationship with their mother, his former partner, had terminated some time before. On the evening of 17th February he telephoned the former partner, told her that he had contacted Social Services and had made allegations that she had been physically abusing the children. She was understandably upset. She too tried to contact Social Services and then made contact with her father. A decision was taken to go to the appellant's flat with a view to retrieving the children. They were due to stay with their father until 20th February.

3. On arriving at the flat, Miss Smith and her father found the appellant beside his car. She told him the purpose of the visit. There was an argument. She went upstairs to the flat, pursued by the appellant. He told her that the children were not leaving and struck her two or three times to the head. She then saw that he had a substantial knife in a sheath with him. She told him to stop, but he began to remove the knife from the sheath, at which point her father intervened, grabbed hold of the appellant, restrained him and, after a struggle, disarmed him. The police were summoned. When they arrived, they recovered the knife, which turned out to be a machete with a 13-inch blade.

4. The appellant was arrested. In interview, he said that he had got the knife down by the side of the settee. He had picked it up and turned towards his former partner, who had screamed for her father. The father had run up behind him and had assaulted him. He accepted that what he had done was wrong, and although he also accepted that he hit his former partner, he did not admit that he had struck her two or three times to the head.

5. The appellant is now 39 years of age. He has nineteen court appearances going back to 1989, mainly for offences of dishonesty, but there are a significant number of convictions for failing to surrender to bail and some earlier convictions for assault or possessing an offensive weapon. The breach report in relation to the breach of the community rehabilitation order indicated that if the appellant was prepared to show the necessary commitment the order could continue: hence the fact that, when he appeared initially before the Crown Court, there was an adjournment to see whether he could demonstrate the necessary commitment. But an addendum report indicated that, while he had attended four appointments immediately following the appearance on 1st September 2003, he had then arrived late for an appointment on 19th September and had failed to attend at all on 26th September. His inconsistent response made it difficult for the order to succeed.

6. In the Crown Court the learned judge indicated on at least two occasions that, in his view, the appropriate sentence for both these offences was a term of twelve months' imprisonment. He then dealt with the matter in this way in passing sentence. He referred to the fact that the appellant had been given two opportunities to comply with the order. On both occasions he had made a good start, but his enthusiasm had faded, as was perfectly obvious from the most recent report. He put it colloquially that the appellant had 'blown' his opportunity. Despite

the submissions made before sentence was passed, he could see no reason to impose anything other than the six-month sentence which is now the subject of the appeal.

7. The single judge, in granting leave, said this:

> "This appeal raises the question as to how paragraph 5(1A) of Schedule 3 to Part II of the Powers of Criminal Courts (Sentencing) Act 2000 is to be applied in a case where the defendant has already served time on remand which exceeds what would have been the 'requisite period' for the sentence of imprisonment which would have been given for the underlying offence, having regard to section 34A of the Criminal Justice Act 1991 as amended."

8. Mr Baker, who appears on behalf of the appellant, effectively raises one point, namely that the home detention curfew provisions should have been taken into account by the learned judge when passing sentence and that, if that had been done, he would either have passed a shorter sentence or no sentence of imprisonment at all.

9. There can, in our view, be no doubt at all that this appellant not only breached the terms of the community rehabilitation order, but that in addition he wholly failed to take advantage of the opportunity to earn himself another chance, which was given when the matter was adjourned on 1st September 2003. Against that background it is not in the least surprising to find that the appellant was sentenced to a term of imprisonment, because there is a clear public interest in demonstrating that unpleasant consequences follow if community orders are breached.

10. The argument advanced before the learned judge and repeated before us was this. When the community rehabilitation order was originally made, the defendant was in custody and had been in custody for some three months. That period of custody does not count towards the sentence which the learned judge passed. Accordingly, it is submitted that allowance should have been made when the learned judge came to resentence the appellant for the original offences. On two occasions, as we have indicated, when the appellant appeared before Judge McEvoy in the course of the breach proceedings the learned judge indicated that he had in mind a term of twelve months as being the appropriate sentence for the totality of the original offences. At first sight therefore the learned judge would appear to have made full allowance for the time spent in custody. He began with a figure of twelve months. The sentence which he actually passed was six months, so it follows that he made allowance for the whole of the three months which the appellant had already spent in custody.

11. But Mr Baker says that the learned judge then failed to take into account the provisions which allow for early release under home detention curfew. He submits that if those provisions are taken into account, the result is that the appellant had already served on remand the equivalent of a twelve-month sentence, so that the judge was in effect not entitled to pass a sentence having the effect of returning the appellant to custody.

12. We do not agree with that submission. In our judgment it is most important that the public in general and those subject to community orders in particular know that the court has an effective power to resentence following a breach of the original order.

13. In the present case the learned judge made the appropriate reduction in sentence to allow for the time spent in custody. In addition, in our view, he was correct to avoid precise calculations founded on the current scheme for early release on home detention curfew. That is a discretionary scheme. The details change from time to time. It is a matter of action by the Executive and the courts ought not to interfere either to increase sentences in order to frustrate the scheme or to reduce sentences in respect of something which may be

discretionary and may in fact not apply in the case in question. In addition, the consequences of attempting to tailor a sentence so that it precisely reflects the consequences of the scheme at any given moment are likely to be even more arbitrary than the consequences of ignoring it. As we understand the position, the scheme is intended to operate on the basis that the level of sentencing remains the same, rather than sentencing being altered to take account of the possibility of earlier release by Executive action. In those circumstances, in our view, the learned judge was entirely right and the appeal must accordingly be dismissed.

14. We would simply add that the appellant in some respects may have been fortunate that the sentence for failure to surrender was made concurrent in the light of his record.