Regina v James Robert Leonard

Court of Appeal Criminal Division

12 April 2018

[2018] EWCA Crim 870

Before: Lord Justice Davis Mr Justice King Mr Justice Haddon-Cave

Thursday, 12 April 2018

Representation

Mr S Hamblett appeared on behalf of the Appellant.

Judgment

Mr Justice King:

1 This appellant is aged 31 years. On 17 November 2017, in the Crown Court at Wolverhampton, before Mr Recorder Mainds, the appellant was convicted after trial of two offences: count 1, a dwelling house burglary, contrary to section 9(1)(b) of the Theft Act 1968 ; count 2, theft, contrary to section 1(1) of the Theft Act 1968 .

2 The particulars on count 1 were that the appellant on 11 June 2017, having entered a building, namely a dwelling at an address in Walsall, stole therein car keys. The particulars on count 2 reflected what was done with those car keys, namely the theft of the occupant's motor car parked outside.

3 The appellant was sentenced on the same day following his conviction as follows. On count 1, the dwelling house burglary, three and a half years' imprisonment. On count 2, the theft, one and a half years' imprisonment consecutively. The total sentence passed accordingly was one of 5 years' imprisonment.

4 He now appeals against this sentence with the leave of the single judge.

5 The facts in a little more detail were that between 2.00 am and 3.00 am, in the early hours therefore, on Sunday, 11 July 2017, the appellant and two others entered an address in Bloxwith, Walsall, gaining access through an insecure door, a door we are told which had been left open, while the occupant, Mr Willey, was asleep upstairs, as were members of his family, including three young children. They searched the premises and found a set of car keys for the Seat Leon Turbo parked outside. They used the key to steal the Seat. The vehicle was valued in the region £1,000 and was not recovered. CCTV at the address showed the appellant approaching the house and stealing the car with others. He was well

known to the police and positively identified.

6 An hour after the burglary the appellant was seen driving the Seat into the forecourt of a service station which also had the benefit of CCTV. A viewing police officer identified the appellant as being the driver of the car and filling the same with petrol, paid for by one of the two passengers, before then leaving the forecourt.

7 The appellant was arrested on 21 June 2017. He refused to be interviewed.

8 There was a victim personal statement from Mr Willey before the court which amongst other matters set out the adverse impact which the loss of his motor car had had on himself and his family. His family included a son in need of specialist care and many hospital appointments for whom the vehicle was, as he put it, a massive aid. As Mr Willey was unfortunately of limited means he had had to borrow £1,000 from his family to buy another car because "we cannot do without", causing with the consequential pressure on his finances. He was not in a position to pay the £500 excess payable under his car insurance. His statement further set out the continuing stress and anxiety caused to all his family brought about by the burglary committed when they were asleep in the house.

9 The appellant has a very bad record for this type of offending. He has previous convictions for some 40 offences, including 14 for theft and kindred offences, which include eight for burglary offences, some dwelling house, some non-dwelling house.

10 His conviction on count 1 triggered the 3-year minimum sentence provisions of section 111 of the Powers of Criminal Courts(Sentencing) Act 2000 , this being a third qualifying domestic burglary committed after 30 November 1999. In fact, it was the second time that he had been before the courts with section 111 having been triggered. On the previous occasion, at the Shrewsbury Crown Court, on 25 January 2013, for a dwelling house section 9(1)(a) burglary with intent to steal, he had received a prison sentence of 29 months which took into account the statutory allowance for what was then a guilty plea.

11 This court has previously stated that the correct approach where section 111 applies is not for the court to adopt the 3-year prescribed minimum as the sentencing starting point, but rather it is to apply the Sentencing Council Definitive Guideline in the usual way but then to cross-check that the resulting sentence does not infringe the rule in section 111 or, if it does, to consider whether there are any particular circumstances relating to any of the offences or the offender which would make the imposition of the minimum sentence unjust and hence bring the case within the exception provided for in section 111 - see *R v Andrews [2013] 2 Cr App R (S) 26 (5)* and *R v Silvera [2013] EWCA Crim 1764* .

12 From his sentencing remarks it is unclear whether the Recorder adopted this approach. He made clear that absent any evidence of hardship he did not

consider the exception to section 111 could apply but he did not in terms explain how he arrived at the three and a half years on count 1 by reference to the definitive guideline. What he did say was that it was clear from the victim impact statement that he would be failing in his public duty if he did not sentence the appellant to "condign punishment" for "your behaviour that night and the way you have behaved over the last umpteen number of years by being a burglar over and over again".

13 As regards the theft of the motor car, the Recorder said he was satisfied from what he had heard that the car had vanished from the streets in such a way that probably its identity had been changed and it had been sold and others had benefited and the appellant was a "party to all that". The Recorder said he was making the sentence for the theft a consecutive one, and for the length it was, notwithstanding what had been submitted to him, "bearing in mind particularly the victim impact statement".

14 We turn to the grounds of appeal. There is no dispute in this appeal that the appellant fell to be sentenced as a third strike burglar. There has been no submission either to ourselves or the court below that there were here any circumstances relating to the offences or the offender which would make the imposition of the prescribed minimum sentence unjust. Nor has Mr Hamblett made any real challenge to the sentence imposed on count 1 albeit he submitted that looked at in isolation and without regard to section 111 , this burglary would have fallen within category 2 of the sentencing guideline albeit at the top end of the applicable sentencing range of a high level community order to 2 years' imprisonment. This submission was made on the basis that although there was here greater harm given the victim was at home, there was lower culpability given, as was put in the written submission, the limited intrusion to the property and the lack of any real planning.

15 The appeal concentrates upon the consecutive sentence for the theft of the motor car both as to its length and as to it having been made consecutive. Since the theft offence arose out of the same set of facts as the burglary - the keys taken in the burglary were immediately used to steal the car - the submission is made that the proper approach ought to have been for the sentence on count 1 to have reflected the overall offending, including the aggravated feature represented by the theft of the car, and a concurrent sentence passed on count 2. It is further submitted that the overall sentence of 5 years offends the principle of totality, being neither just nor proportionate.

16 In his written submissions, Mr Hamblett took us to the definitive sentencing guideline for theft offences. He there submitted that this offence looked at in isolation would have fallen with a "medium culpability" given there was arguably "some planning involved" and given the appellant's role as part of a group activity, and would have attracted a harm category of category 3, which is based on a value of £500 to £10,000. The sentencing range for medium culpability

category 3 is a low level community order to 36 weeks in custody. Given the vehicle's value at £1,000, Mr Hamblett submitted this theft offence in isolation would have attracted a sentence towards the bottom of this range.

17 We turn to our conclusions. We have been persuaded by these submissions but only to a degree. We accept that the theft of the motor car offence, was in reality part and parcel of the burglary and both offences arose out of the same incident. In these circumstances, the proper approach to sentence would have been to pass a sentence on count 1, the burglary, which reflected the totality of the appellant's offending; in other words, to make the sentence on count 1 reflect amongst other matters the aggravating feature of the theft of the motor car, and to make the sentence on count 2 to run concurrently.

18 Moreover, we agree that the sentence of 18 months on count 2 as an isolated offence is difficult to justify notwithstanding that we are not persuaded that this is a case which falls easily within the definitive guideline category contended for by Mr Hamblett, given the evidence of what might be considered significant additional harm suffered by Mr Willey and his family, be it described as a high level of inconvenience and/or as consequential financial harm.

19 Moreover, Mr Hamblett's submissions underplay the seriousness of this particular burglary. This was in truth a bad burglary committed at night by three men while the occupier and his family were asleep upstairs in bed. A seriously aggravating factor moreover was the very bad record of the appellant for burglary offences.

20 The Recorder himself did not expressly place this burglary within a particular category of the sentencing guideline. In our judgment, this offence can be said to fall within category 1 notwithstanding Mr Hamblett's submissions. It is conceded there was greater harm. The fact the appellant was a member of a group is an indicator of higher culpability. The starting point for a category 1 offence is 3 years. There are then the seriously aggravating factors of the extent of the appellant's previous convictions for this type of offence and it having been committed at night, which would, in our judgment, justify a considerable uplift in the starting point. The sentencing range is 2 years to 6 years custody. On any view, the Recorder's sentence on count 1, that of three and a half years, passed without taking into account the theft of the motor car, cannot, in our judgment, be criticised as manifestly excessive. A higher sentence could well have been justified.

21 Ultimately, in our judgment, the critical question here is whether the overall sentence passed, that of 5 years, fairly reflected the totality of the appellant's offending and did not offend the principle of totality. We have had to consider the propriety of the overall sentence for the overall offending taking into account the aggravating factor of the theft of the motor car and the principle of totality.

22 Looking at the appeal in this way, we are persuaded that the overall sentence

of 5 years was too long. The appropriate overall sentence to reflect the totality of the appellant's offending was in our view one of 4 years 3 months' imprisonment. Further, we consider the sentences passed should be restructured to reflect our judgment on the way the sentences should have been structured.

23 We therefore give effect to these conclusions by allowing this appeal to this extent. We quash the sentence of three and a half years on count 1 and substitute a sentence of 4 years 3 months' imprisonment on that count. We quash the sentence on 2 count and substitute on count a sentence of 9 months' imprisonment to run concurrently with the sentence on this count 1. The effect is that the overall sentence is now one of 4 years 3 months' imprisonment. Our restructuring of the sentences in this way does not in these circumstances offend the principle in section 11(3) of the Criminal Appeal Act 1968 .