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2018/01911/A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 2nd April 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE SWEENEY

and

MR JUSTICE WARBY

R E G I N A

- v -

MARLON DWIGHT SAMUEL

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)

Miss P Rose appeared on behalf of the Applicant

Mr R L Rowley appeared on behalf of the Crown

J U D G M E N T
(Approved)

Tuesday 2nd April 2019

LORD JUSTICE SIMON: I shall ask Mr Justice Warby to give the judgment of the court.

MR JUSTICE WARBY:

1. This is the adjourned hearing of a renewed application for leave to appeal against sentence, after refusal by the Single Judge. It gives rise to an issue about the Magistrates' jurisdiction to commit for sentence to the Crown Court, as well as the questions of whether the sentences imposed in the Crown Court were wrong in principle, or manifestly excessive.

2. The applicant, Marlon Samuel, is 43 years of age. He is an experienced criminal who has used fourteen aliases and seven alias birth dates in the course of a history of offending which spans a 30-year period, beginning in 1989.

3. His record includes three convictions for possessing cannabis in 1999, 2001 and 2011; and two convictions in 2002 for possessing a controlled with intent to supply. He has a large number of convictions for driving offences. These include eleven offences of driving without insurance between 1997 and 2008. Between 1998 and 2012 he accumulated eleven convictions for driving whilst disqualified, and four for driving with excess alcohol, the last of which was in 2008. There is also one offence of failing to provide a specimen for analysis. In addition, he has convictions for offences of violence: an assault on a constable in 2006, assault occasioning actual bodily harm in 2012, and in 2013, four counts of common assault.

4. The present application arises from more recent offending.

5. On 6th April 2017, following guilty pleas, the applicant was sentenced in the Crown Court at Southwark for three offences of supplying Class A drugs, namely,crack cocaine and heroin, committed on 17th and 30th March 2016. The applicant had been observed dealing in Coldharbour Lane, Brixton, South London in the course of a covert operation by the Trident Central Gangs Unit. It is clear that he had played a significant role in street dealing of Class A drugs, for which he showed no remorse. Indeed, he continued to deny his guilt, despite overwhelming evidence and his pleas.

6. The sentencing guidelines would indicate a substantial immediate custodial sentence for those offences, aggravated as they were by the applicant's record of relevant prior offending. However, the Recorder imposed a sentence of 24 months' imprisonment, suspended for 24 months, with stringent requirements. The applicant was subjected to an electronically monitored curfew for twelve months, and required to carry out 300 hours of unpaid work.

7. The explanation for this sentence lies in the comprehensive pre-sentence report provided by the Probation Service to the Recorder. This acknowledged that an immediate custodial sentence of some length was "highly likely", but the court was invited to depart from the guidelines by way of exception. The report recommended, as a suitable punishment, the imposition of a suspended sentence order with the requirements we have identified. The reasoning was that the person who would suffer most was the applicant's wife.

8. The report stated that Mrs Samuel was severely disabled following a CVA

cerebrovascular accident in 1998. She was a wheelchair user who had been housebound since 2012. She had a range of health issues, including type 2 diabetes mellitus, anaemia, pulmonary sarcoidosis, pulmonary embolus and dysphasia. She suffered from various speech impairments. She was not able to self-propel in her wheelchair due to muscle weakness, and required assistance from carers with all aspects of her personal care and daily living. The local authority provided a package of care for 68 hours a week, but the applicant provided 48 hours a week of personal care in addition. The report said that the Local Authority had stated that they were not in a position to provide additional care. It was suggested that in the event that the applicant was sent to prison, the impact on his wife would be "extremely detrimental and dangerous".

9. This was, therefore, a merciful sentence, outside the guidelines, motivated by considerations of compassion which had everything to do with the potential effects of the sentence on the applicant's wife and nothing to do with the applicant himself, his culpability, or the harm caused by his criminal activities.

10. On 26th December 2017, at about 1.20am, the applicant accosted a man by the name of Richard Valapinee, who was buying drinks in an off-licence. He pushed him a number of times. He spoke abusively to Mr Valapinee and, as Mr Valapinee went to leave, the applicant struck him with an open hand to the side of the face. Officers were called to the scene, but the applicant had left. A short time later, however, the officers saw a black Range Rover drive past them at speed. On stopping the vehicle, they discovered that the applicant was driving and that he appeared to be intoxicated. At the police station a breath test showed a reading of 77mg in breath – over twice the legal limit.

11. The applicant was charged with one offence of assault by beating, contrary to section 39

of the Criminal Justice Act 1988, and one of driving a motor vehicle when over the alcohol limit, contrary to section 5(1)(a) of the Road Traffic Act 1988. He denied both offences. But on 21st March 2018, after a trial before the South London Magistrates sitting at Croydon, he was convicted of both offences. Thereupon, he admitted committing offences during the operational period of a suspended sentence order and was committed to the Crown Court on all matters.

12. On 30th April 2018, in the Crown Court at Croydon, the applicant was sentenced by Mr Recorder Persaud. The Recorder had the benefit of an oral report from a probation officer. The officer told the court that the applicant continued to deny the offending. He had carried out the unpaid work. His family circumstances were reported to remain as described in the written report of March 2017.

13. The Recorder imposed a fine of £100 for the assault and two months' imprisonment for the offence of driving with excess alcohol. Turning to the suspended sentence order, the Recorder explained that the first issue for decision was whether it would be unjust to activate the suspended sentence. He said:

> "There are no reasons that have been advanced to me today that in any circumstances can it be said that it would be unjust in all the circumstances for me not to implement that sentence in part or in full."

14. Taking account of the fact that the applicant had satisfied the requirements imposed in 2017, the Recorder activated eighteen months of the two-year term, and ordered that to be served consecutively to the sentence for the offence of driving with excess alcohol. The total sentence of imprisonment was, therefore, 20 months' imprisonment.

15. The Recorder also ordered that the applicant be disqualified from driving for four years.

16. Miss Rose, who appears on behalf of the applicant today as then, filed a Notice of Appeal challenging the Recorder's decisions on four grounds:

(1) first, that in all the circumstances it was unjust and wrong to activate the suspended sentence order;

(2) secondly, that it was excessive to activate as much as eighteen months, bearing in mind the applicant's hundred per cent compliance with the requirements;

(3) thirdly, that it was wrong in principle to impose a consecutive sentence of two months' imprisonment for driving with excess alcohol; and

(4) finally, that it was excessive to impose an additional year's driving disqualification above the statutory minimum of three years. It was said that the applicant used his car to take his wife to her medical appointments.

17. In the course of the appeal, the Registrar identified a flaw in the proceedings below with which we must deal before addressing the grounds of appeal. The Magistrates' Court register recorded that the applicant had been committed to the Crown Court for sentence in respect of the assault, and the offence of driving with excess alcohol, pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000. That section, however, confers power to commit an offender for sentence in respect of offences that are triable either way. The offences in question here were summary only. The power to commit for sentence in respect of summary only offences is to be found in section 6 of the 2000 Act. That is what has been called a "secondary power", exercisable only as an adjunct, where the Court has committed the offender to the Crown Court on another basis. In practice, the most common basis for committal under section 6 is as an adjunct to a committal under section 3 in respect of one or more either-way offences.

18. We have had the benefit of skeleton arguments from the applicant and the Crown on this issue.

19. A similar issue confronted the Court in *R v Ayhan (Murat)* [2011] EWCA Crim 3184. In that case, the applicant had pleaded guilty before magistrates to four offences, two of which (assault occasioning actual bodily harm and making threats to kill) were triable either way, but the other two (assault by beating and criminal damage) were summary only. He was committed to the Crown Court for Sentence on all four offences, purportedly under section 3 of the 2000 Act. He was then sentenced in the Crown Court at Blackfriars to a total of 23 months' imprisonment. The Single Judge saw no merit in the grounds of appeal against those sentences, but noticed the procedural issue and referred it to the full Court.

20. The judgment of the court was given by Lord Judge CJ. He noted that the two summary only offences could lawfully have been committed to the Crown Court for sentence pursuant to section 6 of the 2000 Act, as an adjunct to the committal for sentence in respect of the either-way offences. Having reviewed the relevant authorities, which go back to *R v Folkestone and Hythe Juvenile Court Justices, ex parte R* (1982) 74 Cr App R 58, Lord Judge set out the following conclusions at [22]:

> "In our judgment, provided the power of the magistrates' court to commit for sentence was properly exercised in respect of one or more either way offences in accordance with section 3 of the 2000 Act, a mistake in recording the statutory basis for a committal of summary only offences does not invalidate the committal. The principle is that thereafter the Crown Court must abide by the sentencing powers available to the magistrates' court in relation to the summary only offences. If that principle is not followed, then the sentences must be reduced to sentences that fall within the jurisdiction of the magistrates."

21. The decision in *Ayhan* has been applied on a number of subsequent occasions: see, for instance, *R v Williams (William)* [2017] EWCA Crim 1150.

22. The present case is to be distinguished from *Ayhan*, because in this case there was no committal in respect to of any offence that was triable either way. We are satisfied, however, that there was power to commit under section 6 of the 2000 Act, and that the same principles apply.

23. The provisions relevant to this case are to be found in section 6 of the Act of 2000, and in Schedule 12 to the Criminal Justice Act 2003. Paragraph 11(2) of Schedule 12 provides:

> "Where an offender is convicted by a magistrates' court of any offence and the court is satisfied that the offence was committed during the operational period of a suspended sentence passed by the Crown Court –
>
> a. the court may, if it thinks fit, commit him in custody or on bail to the Crown Court …"

24. The court register identifies this as the primary committal power exercised by the magistrates in the present case. As pointed out in *R v Burbridge* [2007] EWCA Crim 2968 at [10], paragraph 11(2) does not itself empower the Crown Court to deal with the offence which places the offender in breach of the suspended sentence. It is the means by which the offender is brought before the Crown Court to be dealt with for that breach. But when that is done, the secondary power to commit for sentence on other matters that is conferred by section 6 is available: see section 6(1) and (4)(e). Section 6(3) of the Act of 2000 empowers the magistrates to commit an offender for sentence in respect of a summary only offence of which they have convicted him.

25. It is clear from *Ayhan*, and from the earlier authorities cited by the Court in that decision,

that the critical issue is whether statute gave the magistrates the power to act as they did. On a committal of this kind, the Crown Court's sentencing powers will not go beyond those of the magistrates, but the sentences imposed here were well within those bounds.

26. Having thus disposed of the jurisdiction point, we can take the grounds of appeal relatively shortly. They have become largely academic, as the applicant was released in February 2019, but in deference to the able argument of Miss Rose we give leave and will deal with all the issues.

27. We are not persuaded by the criticisms of the custodial sentences.

28. As the Single Judge observed, the original suspended sentence order was very lenient. The conclusion that it would not be unjust to activate was a legitimate one. The appellant well knew of the consequences if he offended during the operational period. Just one third of the way into that period he committed the assault and the driving offence. He showed no remorse, but continued stubbornly – indeed irrationally – to deny his guilt of all the offending of which he had been convicted. Public confidence in suspended sentences is liable to be undermined if they are left in suspension under circumstances such as these.

29. In our view, there was no basis on which it could be said that activation would be unjust to the appellant himself. Looking at it more broadly, the appellant's main argument was that his wife was in need of his support and was at risk without it. But it was open to the Recorder to assess the evidence about Mrs Samuel's needs and the associated hazards, and to conclude that the factors we have mentioned outweighed these other considerations. We note that although Mrs Samuel's situation has remained a most unhappy one, she has received support from others, and the dire consequences envisaged in the original pre-

sentence report have not come to pass.

30. Miss Rose has also argued before us that society would have benefited if the appellant had instead been ordered to undertake a Thinking Skills Programme, which the Probation Service had identified as a possibility. But of all the Probation Service reports we have seen, which include one prepared for this appeal, none offers much optimism in that respect. Of course, the extent of compliance with the original suspended sentence order is relevant to whether, and if so the extent to which, a suspended sentence should be activated. But this is not a mechanistic exercise. Activation of eighteen months, rather than the full 24, adequately reflected the appellant's compliance with the requirements of the order in this case.

31. As for the sentence of two months' imprisonment for the offence of driving with excess alcohol, we accept that this could appear severe if considered in isolation, and that it is outside the guidelines. However, we do not regard it as manifestly excessive in all the circumstances. This is an offence which places others at risk of injury or death, and it was the appellant's fifth such offence in the context of a dreadful record of driving-related convictions.

32. It remains to deal with the disqualification from driving. There has in this respect been some misunderstanding. In the circumstances, the Recorder was obliged to disqualify the appellant from driving for a minimum period of three years. Having imposed a sentence of imprisonment, he was bound by sections 35A and 35B of the Road Traffic Offenders Act 1988 to increase that disqualification by half the custodial term of each sentence. That is to ensure that the disqualification is served when the driver is at liberty. The only truly discretionary element here was the Recorder's decision to add two months to the minimum

disqualification, which in our judgment was entirely reasonable.

33. All of this should, however, have been explicit in the structure of the sentence: see *R v Needham* [2016] EWCA Crim 455. The sentence should have been expressed as a discretionary period of disqualification of 38 months, plus a one-month extension period, to reflect the sentence for the driving offence, and a nine-month uplift, to reflect the activated sentence of eighteen months' imprisonment. In that respect, the Recorder erred. We direct that the record below be amended accordingly.

34. Otherwise, for the reasons we have given, although we give leave, we dismiss the appeal.
