

Neutral Citation Number: [2019] EWCA Crim 879

No: 201804510/A2

**IN THE COURT OF APPEAL**

**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Tuesday, 22 January 2019

**B e f o r e:**

**LADY JUSTICE SHARP DBE**

**MRS JUSTICE ELISABETH LAING DBE**

**HER HONOUR JUDGE WENDY JOSEPH QC**

**(Sitting as a Judge of the CACD)**

**REFERENCE BY THE ATTORNEY GENERAL UNDER**  
**S.36 OF THE CRIMINAL JUSTICE ACT 1988**

**R E G I N A**

**v**

**DAMIEN JOHN ROY DAVIES**

**Ms C Pattison** appeared on behalf of the **Attorney General**

**Mr A Sharp** appeared on behalf of the **Offender**

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd 165 Fleet Street, London EC4A 2DY Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

*This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.*

*WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.*

**J U D G M E N T**

(Approved)

1. LADY JUSTICE SHARP: On 5 October 2018, in the Crown Court sitting at Cardiff, the offender, Damien Davies, pleaded guilty on a full-facts basis to a dwelling-house burglary, contrary to section 9(1)(b) of the Theft Act 1968, to four offences of fraud, contrary to section 1 of the Fraud Act 2006 and to one offence of possession of a class A drug (diamorphine), contrary to section 5(2) of the Misuse of Drugs Act 1971. The offender was sentenced on the same occasion to a total of 876 days' imprisonment, that is approximately 2 years and 4 months. This comprised 876 days' imprisonment for burglary and 28 days' imprisonment for each of the fraud offences and the drugs offence, those being made concurrent. The judge directed forfeiture and destruction of the drugs and a victim surcharge of £170 was applied.
2. Her Majesty's Attorney General now applies to refer this sentence as one that is unduly lenient. We give leave.
3. The relevant facts can be shortly stated. In the early hours of Sunday 2 September 2018 the offender entered a home in Bridgend through a front door that may have been left unlocked and stole a total of £1300 in cash, a purse containing two bank cards and a passport from drawers of a cabinet in the living room. The owners were asleep inside the property at the time. They had been due to go on holiday that day. They did not realise that they had been burgled until they were about to leave their house with their suitcases and discovered their cash and a passport were missing.
4. The burglary caused some considerable disruption and upset. They lost two days of their holiday and incurred costs of about £700 to obtain replacement flights and the passport.
5. The offender had left his fingerprints in one of the drawers and he used one of the bankcards to make a number of contactless payments under £30, to a total of £110 the morning of the burglary.
6. He was identified from CCTV footage and arrested a few days later. On arrest he was in possession of a small wrap of diamorphine concealed on his person and £210 in cash.
7. The stolen property has not been recovered. In interview the offender admitted using the bankcard but claimed that he had found the purse. He denied committing the burglary though he had been told that his fingerprints had been found on the drawer.
8. The offender was 39 years old when arrested. He had 20 previous convictions for 38 offences committed between 21 August 1996, when he was 17 years of age and 24 November 2016, when he was 37 years of age, receiving a range of sentences including non-custodial and custodial sentences. Twenty-three of the previous offences were for theft and kindred offences. Before the instant offending he had committed nine offences of dwelling house burglary for which he had been sentenced to six separate occasions as well as offences of attempted burglary. Materially, for present purposes, he was subject to the minimum sentencing regime pursuant to section 111 of the Powers of Criminal Courts (Sentencing) Act 2000. He was sentenced for his third qualifying offence under those statutory provisions to 3 years' imprisonment on 11

January 2007. Thereafter, on 19 November 2013, for an attempted dwelling house burglary, he received a community order of 12 months with a drug rehabilitation order of 9 months. On 21 April 2015, for a dwelling-house burglary, he was sentenced to 876 days' imprisonment (this was strike 4) and on 24 November 2016, for a dwelling-house burglary, he was sentenced to 42 months' imprisonment (this was strike 5). It followed that both this offence and the one with which this court is concerned (strikes 5 and 6) were committed while the offender was on licence for dwelling-house burglary offences. The offender indicated a plea to the burglary offence was probable when appearing at the Magistrates' Court on 7 September 2018 and a plea of guilty to all other offences. He then pleaded guilty, as we have already said, on 5 October 2018 at the plea and trial preparation hearing.

9. It is unnecessary to say anything about the judge's approach to the sentences for the drugs and fraud offences as the focus of this application, which is made on the Attorney's behalf by Ms Pattison, has been on the sentence for the burglary offence.
10. The judge's approach was in effect to look at this as a standalone offence under the guidelines and then to elevate the sentence to reflect the fact that it was subject to a minimum term of 3 years subject to any discount for plea. This discount was limited by virtue of section 144(2) and (3) of the Criminal Justice Act 2003 to any sentence in accordance with the guideline which is not less than 80% of the appropriate or prescribed custodial period under section 111 of the Powers of Criminal Courts (Sentencing) Act 2000. Thus, the judge said he regarded this as a category 2 offence within the Burglary Offences Definitive Guideline, that is one of greater harm and lesser culpability, with a starting point of 1 year's imprisonment and a range of a high level community order and 2 years' imprisonment, but one to the upper end of category 2 to reflect the offender's previous convictions. He said that the starting point was however one of 3 years' imprisonment, as the minimum sentencing provisions applied and there was no reason to find that it would be unjust to apply that provision. He arrived at the sentence of 876 days by giving the offender 20% credit for his guilty plea.
11. Ms Pattison submits that the sentence was unduly lenient and we agree. It is not suggested for the reasons that the judge identified that taken on its own this was not a category 2 offence, albeit there is nothing about the facts of the offence or the offender's antecedents to suggest it was an offence committed on impulse, as the judge appeared to think. The offender may have taken advantage of the fact that the occupants had not locked their door but in order to have discovered this was the case he would have to tried it some time after 1.00 am, that is after they had gone to bed.
12. Be that as it may, there were guideline factors indicating greater and lesser harm, as the judge identified: the occupiers were at home; the offence was committed at night and the property stolen caused economic loss and inconvenience to the owners, albeit there was limited intrusion into the property. However, the offender was a recidivist burglar with a substantial record for previous like offences. Further, this offence was committed when the offender was on licence for a previous dwelling-house burglary. At the stage when the latest offence was committed he still had about 18 months of his previous sentence to serve.

13. In our judgment, these aggravating features were insufficiently factored into the eventual sentence. Indeed there is no mention of the fact at the sentencing hearing that the offender was on licence at all.

14. We have been referred to a number of decisions of this court dealing with offending and offenders of this nature, that is persistent burglars of dwelling houses who continued to offend often, as in the offender's case, in breach of the license conditions, on which they have been released for a previous similar offence and after they have become subject to the minimum sentencing regime. These indicate that for prolific burglars, undeterred by and apparently indifferent to previous sentences passed on them, the usual sentencing brackets have little if any application (per Hallett LJ (Vice-President of the CACD) R v Michael Brooke [2012] EWCA Crim 1642) and that sentences can be elevated to 5 to 6 years before giving credit for plea. See, for example, R v Fellows [2014] EWCA Crim 2265, where a sentence of 4 years' imprisonment concurrent reduced from 6 years after giving full credit for plea was upheld for an offender 33 years old, for two offences of burglary, with 20 previous convictions for 51 offences including nine convictions of dwelling-house burglary subject to the minimum sentencing regime. See also R v Jones [2015] EWCA Crim 1258, where the appellant stole a laptop, a notebook computer and between £100 to £110 cash. The owners were not present at the time of the burglary. The appellant in that case, with a dependency on drugs, had 53 convictions on 18 occasions, of which 25 were burglaries or attempted burglaries as well as a number of such offences being taken into consideration and had committed the offence which the court in that case was considering whilst on licence. He had pleaded guilty to what was considered to be a category 2 offence. In that case, Davis LJ said at as follows at paragraph 11:

15.

"The guidelines indicate for such a burglary a sentencing range of a community order up to 26 weeks' imprisonment. But that, of course, is in effect an irrelevance in the circumstances of

this case, given the appellant's antecedent history. Indeed, on this occasion, as on previous occasions, the appellant faced the automatic minimum term provisions set out by Parliament in section 111 of the Powers of the Criminal Courts (Sentencing) Act 2000...

13. When offenders persist in such offending, then ever-increasing sentences are to be expected. But an invariable exponential increase on each succeeding occasion cannot be allowed to give rise to an end result which ultimately bears no true relation to the actual offence..., we do think that the sentence ultimately imposed, which connotes a starting point in the region of eight years' custody had there been a trial, was not sufficiently related to the circumstances of the offence...

a starting point approaching six years would have been appropriate to the circumstances of this case, had there been a trial, bearing in mind the antecedent history of the appellant."

16. In R v O'Neill [2015] EWCA Crim 1181; 2 Cr App R(S) 71, the appellant, a drug addict, broke into a building and stole car keys, an iPhone and another mobile. He was aged 34 with over 20 burglaries and attempted burglary convictions between 1996 and 2012. The court in that case considered 5 years' imprisonment, not 6 would have been the appropriate before allowance for the guilty plea.
17. Mr Sharp, who appeared for the offender below, concedes that an uplift is warranted to the 3-year minimum term in this case but submits that this case is distinguishable from those to which we have just referred because there was, in this case, one offence and not two and the offenders in those cases had significantly worse antecedents than this offender, amassed over a shorter period of time. We obviously bear those submissions in mind.
18. Coming back to this case, the offender had received a range of sentences from a non-custodial disposal to one of 42 months' imprisonment, that is three-and-a-half years for the offences of burglary committed by him and this was his fourth sentence under the minimum sentencing provisions. For this latest offence, in our judgment, a starting point of 5 years before reduction for plea was appropriate, that is a starting point of 2 years above that taken by the judge. This means however that the offender is entitled to a third discount rather than the 20% discount afforded to him by the judge for his guilty plea.
19. Accordingly, we quash the sentence of 876 days on the burglary count and substitute for it one of 3 years and 4 months' imprisonment. The sentences for the fraud and drugs offences remain the same.

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

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk