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IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday 9th May 2019

B e f o r e:

LORD JUSTICE GREEN

MR JUSTICE SPENCER

MR JUSTICE MORRIS

R E G I N A

v

LEE ALAN TURNER

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Ms Rachael Hedworthappeared on behalf of the **Appellant**

J U D G M E N T

(Approved)

1. **MR JUSTICE MORRIS**: This is an appeal against sentence brought with the leave of the Single Judge.

2. On 1st October 2018, in the Crown Court at Newcastle-upon Tyne, the appellant pleaded guilty to five offences. On 9th October 2018 he was sentenced as follows:

3. In respect of indictment T20187512 ('the first indictment'): on count 1, for an offence of domestic burglary contrary to section 9(1)(b) Theft Act 1968, 30 months' imprisonment; and on count 2, for an offence of theft contrary to section 1(1) Theft Act 1968, 12 months' imprisonment to be served concurrently.

4. In respect of indictment T20187363 ('the second indictment'): on count 1, for an offence of domestic burglary contrary to section 9(1)(b) of the Theft Act 1968, 42 months' imprisonment; on count 2, for an offence of theft contrary to section 1(1) Theft Act 1968, 12 months' imprisonment; and on count 3, for an offence of aggravated vehicle taking contrary to section 12A Theft Act 1968, 12 months' imprisonment.

5. The sentence on counts 2 and 3 of the second indictment are to be served concurrently with the sentence on count 1 of that indictment. However, the sentence on count 1 on the second indictment is to be served consecutively with the sentences on the first indictment. The total sentence was therefore a sentence of six years'

imprisonment. In addition, the appellant was disqualified from driving for a period of five years in accordance with section 34 Road Traffic Offenders Act 1988.

6. The facts of the case

7. As regards the first indictment, at about 7.20 am on Thursday 7th June 2018 the complainant, Steven Hamill, left his house by the rear patio doors to retrieve a birthday present which he had left in his car. He activated the central locking of his car from inside the house and then left the keys on the dining room table. Once he had collected the present from the car he returned indoors, closing but not locking the patio doors. He went upstairs to give his partner the birthday present and then came back downstairs. At that point he became aware that the patio doors, previously unlocked, were now locked and that his car keys and his car were missing. Inside the car had been some sunglasses. His partner's handbag and contents had also been taken from the back of the dining room chair.

8. The appellant had entered the property via the unlocked patio doors, removed the car key and handbag, and had taken the car, a Mercedes C200. He had then driven the car to his girlfriend's and caused a disturbance. There was a short police chase which resulted in damage to the vehicle. The appellant abandoned the car and was at that point able to avoid apprehension. Subsequently he was identified from CCTV footage and DNA recovered from a jacket he had discarded. The car and the handbag and contents were recovered. The appellant was arrested and interviewed. He was granted conditional bail by the police. Whilst subject to that bail the appellant went on to commit a second burglary on 26th August 2018.

9. That burglary is the subject of the second indictment. The complainant was Karan Mehta. She was at home on that day when she answered the door to the appellant. He offered to clean the driveway. The complainant offered to show the appellant the extent of the driveway that needed to be cleaned, and walked around the side of the house expecting him to follow. She had left her keys in the rear of the door. The appellant, however, had not followed. Ms Mehta returned to the front of the house and saw the appellant in front of the garage. There was a further discussion regarding the driveway. The appellant then left, stating that he would return on the following day. She returned to the front door and stepped inside the porch. Being suspicious, she realised she had left the door open when the appellant had been standing alone. She went back outside and up the driveway. At that point she could see that the rear lights of her car (a Volvo) were illuminated and the engine was running. She ran towards the car, banging on the window, shouting to the appellant to stop and get out. Instead, he started the engine again and the vehicle took off at speed. Less than an hour later the appellant was seen driving the car. He had crashed into a metal fence at a local school causing damage.

10. There were victim personal statements before the Crown Court for each of the two complainants.

11. In his sentencing remarks the judge started by indicating that in respect of the second indictment the appellant was entitled to 25% credit for plea. In relation to the first indictment, having pleaded not guilty at the PTPH, the level of credit to be awarded was 15%. He said there was certainly a degree of planning in respect of the second of the two burglaries. In the case of both burglaries he targeted people's homes which were occupied. The items targeted were car keys in order to steal cars. Those were high value items. The judge pointed out that attacks on people's homes and their vehicle are attacks on the two most valuable things that most people own. He said there was a degree of planning with the second burglary because it was a distraction burglary, which involved thinking what he was going to do and then carrying that plan into activation. He concluded that he would be entitled to treat both of these cases as category 1 cases under the guidelines, were it necessary for him to categorise them in this way. However, the overwhelming aggravating feature in the case was the appellant's previous convictions. Whilst it was recognised that the appellant had made some effort since his last sentence, the reality was that

when he had problems, he turned to drugs and offending. Only imprisonment protected the public from him.

12. In relation to the first indictment, it was the appellant's fourth time as a three-strike burglar. In isolation and after trial the sentence would have been four years' imprisonment. Reduced by 15%, the judge said that the sentence would be three years and two months. We note, however, that that figure of three years two months represented a reduction of closer to 20%.

13. In relation to the second indictment, the offences were committed whilst on bail and whilst the appellant was subject to an electronically monitored curfew. The judge went on to say that there was the aggravated vehicle taking and driving away from the police, which he treated as part of the substantive offence. The appropriate sentence would have been five years' imprisonment after a trial. That was reduced by 25% to three years and eight months - again, on our calculation, a slightly greater reduction than 25%.

14. The total sentence of six years and ten months was then further reduced to reflect totality. In relation to the burglary on the first indictment the sentence would be 30 months and in relation to the burglary on the second indictment the sentence would be 42 months. The thefts and aggravated vehicle taking were taken into account and a sentence of 12 months concurrent was imposed in respect of each. Then in relation to the aggravated vehicle taking the disqualification would be for a minimum of two years, with an extension period of three years to take account of the period that he would be in prison.

15. Following the sentence, counsel for the appellant who appears before us today addressed the judge in relation to the categorisation of the burglaries. She sought to persuade the judge to review the sentence on the basis that it had been agreed by the parties that both burglaries fell into category 2 rather than category 1. In his further ruling the judge observed that in respect of the first indictment the overwhelming aggravating feature was his previous convictions and that the two burglaries represented his fourth and fifth third-strike burglary. The first burglary was clearly "greater harm".

16. He went on to say that as regards culpability and whether there was a significant degree of planning, in relation to the first burglary the judge agreed that the degree of planning must have been somewhat less than significant, but he did not accept that it was purely an impulsive offence. The appellant had no doubt been trying doors in order to find one that was open. As regards the second burglary, it was a distraction burglary which required the appellant to work out what he was going to do and how he was going to do it, and it was not done on impulse.

17. He concluded that, even if he had been wrong about the categorisation of the offences and that one should start on the premise that they were top of category 2 rather than category 1, nevertheless the overwhelming aggravating feature was the appellant's previous convictions. He concluded that if he was wrong in terms of categorisation of category 1, or wrong to move them up from category 2 to category 1 because there were factors indicating greater harm, nevertheless because of the overwhelming aggravating feature of the appellant's record he did not propose to interfere with the sentence which he had passed.

18. As regards the appellant's antecedents, the appellant was aged 32 at sentence. He had 32 convictions for 75 offences in the period between April 1999 and December 2015. His relevant convictions included convictions for two dwelling burglaries in 2005, a dwelling burglary in each of 2006, 2007, 2012 and 2015. The offences in 2007, 2012 and 2015 were all third-strike burglaries which qualified for the minimum sentence of three years' imprisonment. He also had convictions for attempted robbery (for which he received a sentence of four years'

imprisonment) dishonesty and motoring offences, including aggravated vehicle taking in 2008, 2009 and 2011.

19. As far as the grounds of appeal are concerned, the written grounds of appeal are, first, that in all the circumstances the totality of the sentence was manifestly excessive. Secondly, the offences for which the appellant fell to be sentenced were not the worst of the kind. Neither burglary would have fallen into category 1. Whilst the occupiers were present, there were arguably no other factors of greater harm or higher culpability. The cumulative effect was that the offences would have attracted a sentence in the region of eight years after a trial. That is too long even taking account of the previous convictions. Thirdly, a higher discount should have been applied to reflect the true extent of the offending behaviour in line with the principle of totality.

20. In her admirably succinct and cogent oral submissions today, Ms Hedworth expanded on these points. She submitted that the essence of the appeal is that both of these offences were category 2 offences and that, even if they were at the top end of category 2 and accepting the appellant's unenviable record, nevertheless they should each have stayed within category 2, even at the top end of the range, to take account of the record of previous offending. She submitted that six years nevertheless was manifestly excessive. It is when you combine the two sentences for each of the burglaries together that gives rise to a sentence which is beyond the bounds of proportionality and is manifestly excessive. However she accepted that this is a case where the 'minimum term' provisions of the 2000 Act (to which I shall turn in a moment) apply separately to each of the two burglaries, and thus that the minimum term for each was three years less any appropriate amount for discounting for guilty plea.

21. Looking at these sentences overall the appellant has an appalling record of previous convictions, particularly for offences of domestic burglary. This was the fourth and the fifth time effectively that he fell to be sentenced as a three-strike burglar, and thus, subject to discount for plea and subject to the statutory exception for unjustness, the sentence for each of the two burglaries was to be a minimum of three years subject to a maximum discount of 20% for plea. Having said this, the correct approach to sentencing in such circumstances where there is a third strike burglar is to consider, first, the appropriate sentences for each of the index offences by reference to the Sentencing Guidelines and only then to consider the application of the minimum sentence provisions of section 111 Powers of Criminal Courts (Sentencing) Act 2000.

22. In respect of the burglary on the first indictment there were two factors indicating greater harm: significant loss and occupier being home. As regards culpability, whilst we agree with the sentencing judge that the degree of planning might not be classified as *significant*, as that term is used in the Guidelines, we further agree that this was far from an offence being committed on impulse, given the appellant's expertise and record in relation to such offences and given the facts as described by the sentencing judge.

23. Even assuming that the offence of burglary on the first indictment fell within category 2, the top end of the range is two years' imprisonment. The appellant's record of previous relevant offending was so substantial as to warrant, in accordance with the express terms of the Guidelines, a sentence going beyond the end of that category range. Further, when adjusted upwards to take account of the concurrent sentence of twelve months for the theft on the first indictment and further taking account of the fact that, as we have pointed out, mathematically the judge in fact gave more than the 15% discount for plea which he had intended to give, we do not consider that a sentence of three years and two months, prior to reduction for totality, was manifestly excessive.

24. In relation to the second burglary under the second indictment, this was committed whilst on bail for the first burglary and a consecutive sentence was appropriate. There was greater harm. As to culpability, we consider that, based on the sentencing judge's findings in his sentencing remarks, there was "a significant degree of planning" within the meaning of the Guidelines and thus the offence fell within category 1. In view of the appellant's record and the fact of the concurrent sentences for the other two counts on this indictment, the judge was entitled to

sentence towards the top end of the range for a category 1 offence, and on this basis a sentence of five years after a trial was not manifestly excessive.

25. Finally, the sentencing judge carefully and properly took into account totality by reducing the combined consecutive sentences for the two burglaries effectively from six years and ten months to six years. Applying the cross-check of the minimum sentencing provisions of the 2000 Act, each sentence as passed is greater than the minimum which must be imposed following a guilty plea.

26. Lastly, we say something about the sentence for the aggravated vehicle taking. There was a question mark as to whether or not this sentence of 12 months was a lawful sentence on the basis that it exceeded the maximum that could have been imposed by the magistrates. However, in oral submissions, Ms Hedworth very fairly explained to us that this had been sent to the Crown Court as an 'either way' offence and, further, that the value of the damage to the fence was not in fact known. So she accepted that, on that basis, the sentence of 12 months' imprisonment imposed on count 3 on the second indictment was after all, a lawful sentence.

27. In those circumstances we conclude that there are no grounds for overturning this sentence and this appeal is dismissed.