Regina
v
John Whitehouse

Court of Appeal Criminal Division

[2019] EWCA Crim 970

Before: Lord Justice Holroyde Mr Justice Popplewell Sir Kenneth Parker

Tuesday 14th May 2019

Representation

Mr Stephen Hamblett appeared on behalf of the Appellant.

Judgment

Sir Kenneth Parker:

1. On 3rd October 2018, in the Crown Court at Wolverhampton before Mr Recorder Watson, the appellant John Whitehouse (now aged 40) was convicted of burglary and on 13th November 2018, before the same Recorder, he was sentenced to four years' imprisonment. He was acquitted on a second count of attempted robbery. He appeals against sentence by leave of the Single Judge.

2. The facts, briefly, were as follows. At approximately 1.30 am on 26th November 2016 Jamie Yendell, who lived above the Old Priory public house in Dudley town centre, left his room and was confronted by a male. Behind the male were two other men holding crowbars. Mr Yendell was asked where the key to the safe was, but he told the men that he did not have it. One of the group threatened to assault Mr Yendell by smashing his head in. Mr Yendell immediately ran back into his room and telephoned the police.

3. A check of CCTV footage showed that four males had broken into the public house, two with crowbars. The CCTV images were placed on police systems and the appellant was identified as one of the culprits.

4. The appellant was interviewed by police on 31st December 2016 and answered 'no comment' to all questions.

5. In sentencing, the judge observed that the appellant was now 40 years of age and had a poor record for dishonesty which included a number of non.dwelling burglaries. Those offences had similarities to this one, including the burglary of a public house and the use of crowbars on two occasions. His last offence was in 2013 and resulted in a 27.month prison sentence.

6. The burglary offence fell within *greater harm* of the Sentencing Guidelines because the victim was on the premises; the appellant had not been party to the threat of violence made to Mr Yendell. The culpability was

high because they had been equipped and operated as part of a group. The starting point for a category 1 offence was two years, with a range of one to five years. Both defendants' positions were significantly aggravated by their previous convictions. The guidelines permitted the court to go outside that bracket, if appropriate, because of the extent of their previous convictions. The offence was also aggravated by the timing.

7. The court had read two references submitted on behalf of the appellant. It was a shame that after having a break from being a career burglar the appellant had started again. He had suffered a bereavement in 2016 and began drinking, which led to poor choices. The appellant's references spoke well of his work ethic. The court had been asked to take into account the delay between the commission of the offence and sentence. It was open to the appellant to plead guilty much earlier but he had contested the matter. The appellant had been married for eleven years and had a 9.year.old daughter. The court accepted that he had now taken steps to address his offending behaviour. Only an immediate custodial sentence was appropriate. In the appellant's case, the offence fell towards the top end of the bracket because of the aggravating features and his previous convictions. The least sentence that could be imposed was four years' imprisonment.

8. As to his previous offending, he was aged 40 at sentence. He had 34 convictions for 68 offences, spanning 3rd August 1993 to 25th June 2013. His relevant convictions included offences of theft of a vehicle, handling stolen goods, theft of a bicycle and so on. There were also offences relating to non.dwelling burglary in 2003, 2011 and 2013; being found on enclosed premises for unlawful purpose in 2003 and 2008; again non.dwelling burglary with intent to steal in 2003, 2004 and 2013; and attempted non.dwelling burglary with intent to steal in 2012.

9. Turning to the grounds of appeal, on behalf of the appellant Mr Stephen Hamblett submits that the sentence of four years' imprisonment was manifestly excessive on the grounds that the offence did not fall at the top end of the range of category 1 in the Sentencing Guidelines and that the two identified aggravating features were outweighed by the mitigating features present in this case.

10. There is no doubt, in our judgment, that the offence fell within category 1 of the relevant guideline. The victim was on the premises while the appellant was present.

11. As to culpability, there was plainly a significant degree of planning or organisation, the burglars were equipped for burglary and they operated as a group. We agree with the Single Judge that this combination of relevant factors would indicate a starting point significantly in excess of two years' imprisonment, even before consideration of further aggravating factors. The most serious of those further factors in the appellant's case was clearly his multiple previous convictions for offences of dishonesty, in particular his previous convictions for burglary or for burglary.related offences. The aggregate of all those aggravating factors indisputably took the present offence towards the top of the range in category 1.

12. The learned Recorder concluded that there were no factors specifically within the guideline that reduced seriousness or reflected personal mitigation.

13. Mr Hamblett submits that was incorrect. The Recorder had specifically recognised that the appellant had demonstrated steps taken to address his offending behaviour a factor reducing seriousness. Further, there was a significant lapse of time since the offence which was not the fault of the appellant. He had pleaded not guilty to the offence of attempted robbery arising out of the same events. He had not caused or contributed to the

delay in bringing that alleged offence to trial and in the event he was acquitted by the jury of attempted robbery.

14. Mr Hamblett also contended that the appellant had "a subordinate role in the group". As to this, however, the Recorder conducted the trial and was well placed to determine whether in truth all the offenders were involved together in the burglary each playing his respective part and to reject the contention that this appellant had a *subordinate role* within the meaning of the guideline. In our view we have no proper basis for rejecting the conclusion reached by the trial judge on that matter.

15. Looking at these matters in the round, therefore, we would not conclude that the judge had carried out an improper balance between the gravity of the offence in terms of harm and culpability and the mitigating features to which we have referred. The term of four years that was reached by the learned Recorder might appropriately be described as tough but, in our view, could not properly be described as manifestly excessive.

16. However, there is one further matter that does not seem to have been explicitly considered by the learned judge. The appellant, as has been recited, was on bail and from January 2017 was subject to a number of highly restrictive conditions: he was to reside at a given address; he was to abide by a curfew between the hours of 7 pm and 5 am daily, where the appellant was required to present himself to a police officer upon request; he had to report to a police station every Saturday and Sunday between the hours of 5 pm and 7 pm; not to contact any of the prosecution witnesses and not to go to the public house in question.

17. We note that the terms of the curfew would ordinarily, if there had been a tag, have entitled the appellant to have the sentencing judge take into account the curfew and to reduce the final sentence by half the time that was spent on the restrictive conditions. That period was in excess of 20 months, towards 21 months. In these circumstances, the learned judge did have a discretion to take that matter into account, and we believe that that matter should have been taken into account and that it is open to this Court to do so. There is no statutory obligatory period in respect of the actual curfew that was imposed and therefore there is no precise quantitive time that can be taken.

18. Nonetheless, in all the circumstances, we believe that a period of nine months is fair and reasonable to reflect that additional factor. The sentence, therefore, should not be one of four years' imprisonment but three years and three months to reflect that factor and that factor alone. For those reasons, the sentence imposed by the judge of four years is quashed and a sentence of three years and three months is substituted. The appeal is allowed to that extent alone.