No: 201901866 A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2019] EWCA Crim 1511

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 30 July 2019

B e f o r e:

LORD JUSTICE GROSS

MRS JUSTICE McGOWAN DBE

MR JUSTICE BUTCHER

R E G I N A
v
STEPHEN ANTHONY STOCKDALE

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Mr K Heckle (Solicitor Advocate) appeared on behalf of the **Appellant**

J U D G M E N T
(As approved)

1 MRS JUSTICE McGOWAN:
2 Steven Anthony Stockdale appeals against sentence by leave of the Single Judge.

3 On 29 April 2019 at the Crown Court sitting at Liverpool, he pleaded guilty to one offence of burglary contrary to section 9(1)(a) of the Theft Act 1968.

4 On 9 May, following an adjournment for a report, he was sentenced by Mr Recorder Jones QC to a term of 22 months and 14 days' imprisonment. There has been considerable confusion over the number of days that should have counted by virtue of time served on a curfew towards that sentence under section 240A of the Criminal Justice Act 2013. It appears that the matter has now finally been clarified and there are 28 days that qualify and should be deducted from any sentence to be served.

5 The facts of the offence are that the complainant in this case lived at an address in Merseyside with her husband and son. She was at home alone when at about 3.30 in the morning of 19 February 2019 she was awoken by the sound of her burglar alarm. She went downstairs to investigate and saw that the front door to the property was slightly ajar. She thought that may have been her mistake, closed it and went back to bed.

6 At some later stage she was aware of a draught coming through the house and, when she went to investigate that, she found that a small window had been smashed. She contacted the police. It was clear that the house had been broken into and that somebody had gained entry. There was blood at the door where the window had been smashed and, when it was analysed, it was found to contain the DNA of this appellant.

7 There were three separate areas of damage to the house (to the front door, to a rear door and to the kitchen window), on one of the doors the marks were described as tool marks. It was not possible to identify what particular implement

had been used but some sort of tool had left the marks.

8 The appellant was arrested and made no comment in interview.

9 In passing sentence, the learned Recorder observed that there had been an attempt to enter the property using a tool or implement but he found as an additional aggravating feature that this was a sustained or repeated attempt to enter; three separate areas of damage being caused to the property.

10 The prosecution had contended that this was a category 1 case by reference to the definitive guideline of the Sentencing Council for burglary offences. They said that a factor indicating greater harm was the presence in the home of the occupier and that a factor indicating higher culpability was the use of an implement in the course of the attempt to gain entry to the property. Both those factors were present and each in combination entitled the learned Recorder to reach the conclusion that that this was a category 1 case, although it was accepted that there was an element of carelessness and a lack of sophistication about the attempts to enter the property. That being said, the learned Recorder put the case into category 1 and found as a consequence that it had a three year starting point.

11 In addition, the learned Recorder took the view that the sentence ought to be increased by the fact that there were three separate attempts to gain access to the property. That, in his view argued against what might have been said about this being a spontaneous attack, because, however it started, it clearly became a sustained and determined attempt to gain entry to the property.

12 That is a factor with which Mr Heckle takes issue this morning. In the view of this court the learned Recorder was entitled to take that factor into account. He used it to increase the starting point from three years to 40 months and then went on to afford substantial mitigation for the combination of personal circumstances and the effect on others by reducing the sentence from 40 months to 30 months. Whether one increased it by four and then reduced it by ten

or not, the resultant effect was that he reached a figure of 30 months which was not manifestly excessive. He then afforded the appellant the appropriate measure of credit of 25 per cent, because, although he pleaded guilty, it was not a plea indicated at the very earliest opportunity.

13 The real substance of this appeal rests, in the view of this court, as to whether or not the sentence, having been reached, should then have been suspended. The appellant was 34 at the time at which he was being sentenced. He had a number of old previous convictions which we put out of mind. There was only one recent matter on 5 March 2018. He had been convicted of an offence of theft by shoplifting.

14 There is a history of abuse of alcohol and that may explain that previous conviction and on the appellant's case it explained this matter. In the view of the author of the report, the appellant appeared genuine in his remorse and in particular for the impact on the occupier of property. He was assessed by the author of that report of posing a low risk of re-offending, although much obviously would depend on whether he was able to keep his drinking within moderate bounds.

15 The author of the report recommended a community- based sanction; an order of 12 months with various activities attached. In the view of this court the learned Recorder was entitled to say that only custody was appropriate for an offence of this sort. Breaking into somebody's house in the middle of the night clearly crosses the custody threshold. However, in dealing with the question of whether or not the sentence should have been suspended, the learned Recorder went on to say that he thought that the mitigating factors in this case, namely the effect on the appellant's partner, the effect on those whom he employed, either directly or on a contractual basis in his business, were such that, whilst it reduced the sentence of 40 months to 30 months, it could not additionally be used as extra mitigation to justify suspension of the sentence. That, with respect to the learned Recorder, was not the proper approach.

16 Having assessed the correct length of sentence to be applied for this particular offence, the learned Recorder was then required separately to consider whether or not the relevant factors that affect whether or not a sentence should be suspended applied in this case.

17 The definitive guideline dealing with the imposition of community and custodial sentences says that factors indicating that it may be appropriate to suspend a custodial sentence include the realistic prospect of rehabilitation; strong personal mitigation and the fact that immediate custody will result in a significant harmful impact upon others. A prison sentence was entirely merited in this case but there were factors above and beyond those which reduced the term by way of mitigation. There were factors that would have justified the court below in suspending the term imposed, namely the direct impact upon the appellant's immediate family but also, and of significant importance, the loss of employment; the loss of the business that appears on all that we have been told to have been working relatively well, providing direct employment to some and indirect employment to others.

18 For that, and in combination with the prospect of rehabilitation being as good as we are led to believe it is, we think the correct view in this case would have been to suspend the term imposed. Accordingly, we substitute for a term of immediate imprisonment of 22 months and 14 days a suspended term of that duration and that is suspended for two years. To that extent this appeal is allowed.