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**IN THE COURT OF APPEAL**

**CRIMINAL DIVISION**

Royal Courts of Justice

Strand

London, WC2A 2LL

Friday 24 May 2019

**B e f o r e:**

**MR JUSTICE PICKEN**

**THE RECORDER OF NOTTINGHAM**

**HIS HONOUR JUDGE DICKINSON QC**

(Sitting as a Judge of the CACD)

**R E G I N A**

v

**TONY McNEIL**

**LEIGHTON LEWIS**

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**Mr C Knox** appeared on behalf of **McNeil**

**Mr R Kelly** appeared on behalf of **Lewis**

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

(As Approved)

1. MR JUSTICE PICKEN: The appellants Tony McNeil and Leighton Lewis appeal against sentence with leave given by the single judge. On 3 December 2018 at Carlisle Crown Court before His Honour Judge Davies, the appellants each pleaded guilty to an offence of burglary, involving a non-dwelling, contrary to section 9 of the Theft Act 1968, in response to an indictment which at that stage alleged aggravated burglary. Those pleas having been accepted on 11 February 2019, the appellant McNeil was sentenced by the judge to one year and 10 months' imprisonment and the appellant Lewis was sentenced to two years and four months' imprisonment.

2. The background is able to be shortly stated. Lewis invited McNeil to assist him with stealing five kilograms of cannabis. The arrangement was that Lewis would pay McNeil once the cannabis had been sold.

3. On 31 October 2018, the appellants travelled in McNeil's car to an address in Petteril Street in Carlisle, which it was understood would be unattended and where it was understood the cannabis would be. At around 12 noon that day, the appellants gained access to the rear yard of the premises, one of them scaling a perimeter wall, entering the garage's back door and then opening the front door of the garage to allow the other one in. Both appellants then went to the rear door of the house itself but found it to be locked. McNeil had an axe with him. A witness who had seen the appellant's movements informed the police, who arrived shortly thereafter. The appellants, having fled the scene empty handed as they heard police sirens, were then detained and arrested by the police close by.

4. In interview, McNeil made admissions to the police. Lewis also admitted burglary but denied knowing that McNeil had an axe with him. McNeil indicated at the magistrates' court that the matter would not be contested. Lewis pleaded guilty at a PTPH which took place in the Crown Court on 3 December 2018. Both appellants submitted a basis of plea. In his McNeil stated amongst other things that he did not believe there to be anybody inside the garage or the house to which the garage belonged. He added in a supplementary basis of plea that whilst he accepted that he had an axe with him this was for protection as he was concerned that somebody might return to the property. He stated that he had no intention to use the axe to hurt anybody. He added that the axe would have been used to gain access to the garage but that did not prove necessary.

5. As for Lewis, in his basis of plea he denied that he was himself in possession of the axe at any stage and also that he was aware that McNeil was going to bring the axe with him. He added that it was his understanding that the occupant of the premises would not be at home. In the case of Lewis, a Newton hearing took place on 11 February 2019, the day that the appellants were both sentenced. Having heard evidence from Lewis and a neighbour who saw what the appellants were doing, the judge concluded that he could not be sure that Lewis was in possession of the axe himself, but that he was sure that Lewis "must have become aware as events unfolded" that McNeil had the axe. He made it clear that he did not find that the axe "was there to be used to injure anyone" but that the axe would have acted as severe intimidation and a deterrent to the occupier.

6. At the time of sentence McNeil was aged 27. He had convictions on 28th July for three offences, including a theft offence. As for Lewis he was aged 26 and had no previous convictions.

7. In sentencing the appellants the judge described the offence as having been “a serious planned offence”, the intention having been to take a substantial amount of cannabis and to sell it on the street. He went on to address the question of categorisation by reference to the sentencing council’s burglary offences definitive guideline dealing with non-domestic burglary. He rejected a defence submission that the offence came within Category 2, based on there being lesser harm and higher culpability. Specifically he recorded the submission that there was lesser harm because nothing was in fact stolen from the garage, there was no ransacking, there was no victim on the premises and there was no victim trauma. He observed that “if I was to follow that particular logic” there was indeed lesser harm. He then went on immediately to address the issue of culpability, explaining that in his view this was a higher culpability case given that the offence involved the deliberate targeting for the selling and distribution of cannabis onto the street. He considered also that there was a significant degree of planning and referred in addition to the fact that an implement was carried, as he put it.

8. On this basis he took the view that the appropriate categorisation was not Category 2, as had been submitted by the defence, but Category 1. The judge proceeded accordingly to have regard to Category 1’s two-year starting point and sentencing range of one to five years’ imprisonment in arriving at the sentences which he did. In McNeil’s case the judge afforded him the full one-third credit for his guilty plea, so reducing what would have been a sentence of 33 months, reduced from 36 months to reflect other mitigation, to 22 months or one year and 10 months’ imprisonment.

9. In the case of Lewis, lesser credit for guilty plea, namely 20 per cent, was given on the basis that a Newton hearing had had to take place resulting in a sentence of 28 months’ custody, or two years and four months’ imprisonment.

10. A number of points are made on the appellant’s behalf by Mr Knox on behalf of McNeil and Mr Kelly on behalf of Lewis. We pay tribute to both Mr Knox and Mr Kelly for the economy of their submissions and the assistance which they have provided to us today.

11. First, it is submitted by both Mr Knox and Mr Kelly that the judge erred in principle in categorising the offence as Category 1 as opposed to Category 2. They point out in this connection that the prosecution were not themselves suggesting that there was greater harm in this case. Secondly, both Mr Knox and Mr Kelly submit that even if the offence were properly to be categorised as in the higher category, taking a three-year sentence as the starting point was still too high, given that the starting point for a Category 1 offence is two years’ imprisonment as set out in the guideline.

12. Thirdly, Mr Knox submits, as regards McNeil, that the judge failed to have sufficient regard to the character references which were before the court at the time of sentence. Fourthly, Mr Knox points out that McNeil had already served whilst on remand the equivalent of a 12 month sentence by the time he was being sentenced by the judge. On that basis he suggests a more appropriate sentence would have been one which entailed his immediate release after taking account of the full one-third credit to which he was entitled.

13. Lastly, Mr Kelly, who we should observe has inherited this case in recent days from Mr Khawam, the solicitor advocate who prepared the appeal documentation and who appeared for Lewis in the hearing before the judge, submits that the judge afforded Lewis too little credit since the result of the Newton hearing was that even though the judge decided that Lewis was aware that McNeil had the axe, he also decided that Lewis did not himself have it in his possession. On that basis, since Lewis had made admissions in interview, it was Mr Kelly’s submission, echoing that made by Mr Khawam in the appeal documentation, that more than 20 per cent credit ought to have been afforded to Lewis.

14. We have considered these various points. We consider that there is substance in the first of the points, so making it unnecessary indeed to deal with the second point. It seems to us that the judge did indeed fall into error when he categorised the burglary offence in this case as a Category 1 offence. We note specifically that at no point in his sentencing remarks did the judge explain why he disagreed with the submission which was made that this was a lesser harm case. On the contrary, having recorded the

submission and acknowledged that if he was “to follow that particular logic ... there was lesser harm”, the judge then said nothing more on the topic of harm and instead proceeded to address the question of culpability, as to which there was and is still no issue, since it is accepted that this is a higher culpability case.

15. We are clear that none of the greater harm factors set out in the guideline is applicable. As was submitted to the judge, this is not a case in which there was any theft or damage to property, still less causing a significant degree of loss to any victim. Nor is this a case in which there was any soiling, ransacking or vandalism. Nor is it a case in which there was a victim on the premises whilst the appellants were present. Nor was any trauma caused to any victim. Nor was any violence used or threatened. Nor lastly did the burglary take place in the context of general public disorder. It follows that this cannot be a greater harm case. Indeed, although it is not strictly necessary in the circumstances to refer to the factors indicating lesser harm as set out in the guideline, it should perhaps be noted, if only for completeness, that both of the factors identified there apply to this case in that nothing was stolen and there was at most only limited damage or disturbance to property. In fact, there was no damage at all.

16. It further follows that even though the offence involved higher culpability it cannot have been right to approach the matter of sentence on the premise that the right categorisation is Category 1, since that categorisation requires there to be both greater harm and higher culpability. As a result, we are satisfied that the judge was wrong to have sentenced the appellants by reference to a category which has a sentencing range of between one and five years’ custody, with a two year starting point.

17. As to the sentencing range for the Category 2 offence, the guideline makes it clear that this is between a low level community order and 51 weeks’ custody. The starting point is stated to be 18 weeks’ custody. It is apparent in the circumstances that the sentences arrived at by the judge cannot stand. Specifically, the starting point, to use the judge’s terminology identified by the judge, namely three years’ custody, is substantially longer than the 51 weeks identified as the upper end of the appropriate sentencing range for a Category 2 offence. Nonetheless, in our view, given the particular and serious features of the case identified by the judge when dealing with the factors indicating higher culpability, the judge would have been justified in any event in going outside the sentencing range for a Category 2 offence. A more appropriate sentence prior to consideration of aggravating factors and factors reducing seriousness or reflecting personal mitigation would have been 24 months. We have in mind here the targeting of the premises at least to an extent, but more particularly the significant degree of planning or organisation involved in the appellants deciding to go to the garage with the intention of obtaining a not insubstantial quantity of drugs. This was in effect a raid on a location known to have cannabis there, not by the police but by people looking to profit from obtaining the cannabis and selling it on. This, in our assessment, substantially heightens the culpability. In addition we have in mind the carrying of a weapon in the shape of an axe which might also be described, although we are astute to the need to avoid double-counting, as being equipped for burglary.

18. For completeness we would observe that there is otherwise no reason in this case by reference to the guideline to increase the starting point since none of the factors increasing seriousness set out in the guideline appears to us to be applicable. We note in this connection in view of the reference in the guideline to previous convictions as one of those factors increasing seriousness that McNeil’s previous convictions did not include any conviction for burglary.

19. As for factors reducing seriousness or reflecting personal mitigation, we note that Lewis has no previous convictions and that despite his previous convictions, as Mr Knox points out, McNeil appears to be well regarded. There seems also to be remorse on the part of both appellants. These are matters which justify a modest reduction in each of their cases, so bringing the 24 months down to 21 months.

20. There is then the issue of credit for guilty plea. In the case of McNeil there is in fact no issue since the judge gave him full one-third credit. His sentence is therefore appropriately reduced to 14 months. As for Lewis, and the submission made by Mr Kelly concerning the judge’s decision to give only 20 per cent

credit in respect of his guilty plea, we are not persuaded that it is appropriate to alter the judge's approach since we agree with him when he made the point that the consequence of Lewis' continued denial that he was aware that McNeil had the axe was that the Newton hearing had to take place. The fact that at that hearing a neighbour gave evidence on an issue which Lewis won, namely whether he himself had the axe, is not the important point. What matters is that there had to be a Newton hearing at all in relation to the awareness issue which Lewis lost. The fact that the judge accepted that Lewis did not himself have the axe does not therefore mean that the Newton hearing was unnecessary, given his continued denial on the awareness issue.

21. The judge had a discretion on the amount of credit to be afforded to Lewis. We are satisfied that he exercised that discretion appropriately. In Lewis' case the 21 months to which we have referred is appropriately reduced to 16 months' imprisonment, which through rounding down in fact represents slightly more than the 20 per cent reduction which the judge considered appropriate.

22. The appeals are allowed accordingly. In the case of McNeil we quash the sentence of one year and 10 months' imprisonment and substitute for that a sentence of 14 months' imprisonment. In the case of Lewis we quash the sentence of two years and four months' imprisonment and substitute for that a sentence of 16 months' imprisonment. We should record, as has been recorded in the court records, that days spent on remand or on a qualifying curfew in the case of Lewis should be taken into account when it comes to dates for release.

23. Lastly, we should address a more minor matter. We note that the judge mentioned a victim surcharge order in the sum of £170 in relation to McNeil. The Registrar has noted that the correct amount is actually £140. That indeed is the amount which has been reported on the Crown Court record sheet. We confirm for the avoidance of any doubt that the requirement is to pay the lesser sum, namely £140 rather than the £170 to which the judge, mistakenly it would appear, referred.

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