

Neutral Citation Number: [2019] EWCA Crim 433
No. 2018/03682/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 15th February 2019

B e f o r e:

MR JUSTICE HOLGATE

and

THE RECORDER OF LIVERPOOL
(His Honour Judge Goldstone QC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

REGINA

- v -

MARK PAIN

Computer Aided Transcript 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.

Mr A Turton appeared on behalf of the Appellant

JUDGMENT
(Approved)

Friday 15th February 2019

MR JUSTICE HOLGATE: I will ask the Recorder of Liverpool to give the judgment of the court.

THE RECORDER OF LIVERPOOL:

1. On 9th August 2018, in the Crown Court at Teesside, the appellant was sentenced by Mr Recorder Jackson QC to a total of four years' imprisonment for a single offence of burglary and two related offences of fraud, for which no separate penalty was imposed, to which he had earlier (but on separate occasions and mostly on the day of trial) pleaded guilty.

2. The appellant appeals against sentence by leave of the single judge.

3. The facts of these offences are as follows. On 23rd December 2017, the complainant, Keith Ellison, began to serve a term of imprisonment. He had given his sister the key to a flat which he rented from the Coast and Country Housing Association so that she could look after it in his absence.

4. The appellant was a long-term friend of the complainant and, knowing that the complainant was in custody, he contacted the Housing Association purporting to be the complainant and claiming to have mislaid his flat keys. He requested that the Housing Association change the locks on the complainant's flat and the locks were duly changed.

5. Having obtained the new keys by impersonating the complainant, the appellant gained access to the flat and stole a television, some clothing and a bank card. On 13th January 2018, the

appellant attended a pawn shop in Middlesbrough, where he sold the complainant's television for £60. His actions came to light when the complainant's sister was unable to access the flat because the locks had been changed and contacted the Housing Association to enquire what had happened.

6. The appellant was duly arrested. When he was interviewed, he stated that he had the complainant's permission to enter the flat to obtain money to send to the complainant. This was a stance which he maintained until the day of trial.

7. We pause there to observe that, whereas the first offence of fraud was the means by which the burglary could be committed and could be said to be an aggravating feature of it, albeit a very aggravating feature of it, the second of offence of fraud was totally separate. It was committed two weeks later and could have been the subject of a consecutive sentence. Accordingly, our task is not to look at the burglary sentence in isolation, but to consider whether for the series of offending, the sentence of four years' imprisonment, after giving appropriate credit for the guilty plea, infringed the principles of totality.

8. In passing sentence, the learned and experienced Recorder noted that the appellant had a significant number of previous convictions and was a "third strike" burglar. His qualifying convictions for domestic burglary were in June 2006 and February 2009. He also had a number of convictions for robbery and other offences of dishonesty. His offending was driven by drug addiction. The Recorder concluded that this was a category 2 domestic burglary offence and he correctly identified the aggravating features as the appellant's record, premeditation and the abuse of position, in that the complainant was a friend of the appellant. Putting it another way, the premises were targeted for the burglary.

9. Thus it was that, having regard to the relevant sentencing guideline, section 111 of the Powers of Criminal Courts (Sentencing) Act 2000, and with the mitigation advanced on behalf of the appellant, the starting point would be four and a half years' imprisonment. The appellant would receive and was given ten per cent credit for his plea of guilty, which resulted in a sentence of four years' imprisonment.

10. By his grounds of appeal, Mr Turton, who appears before us today as he did in the court below, submits that in passing sentence the Recorder should have taken as his starting point the three years, which by virtue of section 111 of the Powers of Criminal Courts (Sentencing) Act 2000 was the minimum term, and gone no higher because this was a category 2 burglary which, standing alone, would not have attracted a starting point greater than two years. He does not take issue with the discount for the guilty plea of approximately ten per cent. He submits, succinctly, that none of the aggravating features, which were correctly identified as such, entitled the Recorder to achieve a starting point of four and a half years.

11. In our view, that is an unrealistic submission. The definitive guideline makes it clear that recent relevant convictions are likely to result in an upward adjustment and, further, that in some cases, having considered these and other factors which increase seriousness, it may be appropriate to move outside the identified category range. In this case, quite apart from the circumstances of the offence in which culpability was of the highest order, the fact that the appellant was a "third strike" burglar told barely half the story. Over and above his previous convictions for dwelling house burglary and offences of dishonesty in general committed over a prolonged period, he had numerous previous convictions for non-dwelling house burglary and two convictions in 2013 and 2015 for attempted dwelling house burglaries. In addition, he committed the instant offences whilst on licence following his release from a sentence of ten months' imprisonment imposed in August 2017 for several offences of fraud and theft and in

consequence of the partial activation of a suspended sentence order.

12. In our judgment, the Recorder was entitled to depart from the guidelines to the extent of elevating this burglary to a category 1 offence. For such an offence, the starting point is three years' custody, with a range of two to six years. Having regard to the principles of totality, it is quite impossible for us to say that a starting point of four and a half years was manifestly excessive. There neither is nor can be any criticism of the discount afforded for the appellant's belated pleas of guilty to the most serious of the offences.

13. Accordingly, in those circumstances, despite Mr Turton's cogent submissions, this appeal is dismissed.

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