

No: 201902715/A3

**IN THE COURT OF APPEAL**

**CRIMINAL DIVISION**

*[2019] EWCA Crim 1752*

Royal Courts of Justice

Strand

London, WC2A 2LL

Friday, 20 September 2019

**B e f o r e:**

**LORD JUSTICE FLAUX**

**MRS JUSTICE WHIPPLE DBE**

**MR JUSTICE SOOLE**

**R E G I N A**

v

**IMTHIAR KHAN**

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**Ms N Csengeri** appeared on behalf of the **Appellant**

## JUDGMENT

(Approved)

1. MR JUSTICE SOOLE: This is an appeal against the sentences imposed on the appellant by the Crown Court at Snaresbrook on 12 July 2019. On one count of fraud, contrary to section 1 of the Fraud Act 2006, he was sentenced to 9 months' imprisonment. For failure to surrender to bail, contrary to section 6 of the Bail Act 1976, 4 weeks' imprisonment consecutive. For possession of a bladed article (a lock-knife) in a public place, contrary to section 139 of the Criminal Justice Act 1988, 4 months consecutive. This produced a total sentence described by the judge as 14 months but which was strictly 13 months and 4 weeks. The appeal against the sentence for the Bail Act offence is as of right. Leave to appeal for the other offences was given by the single judge.

2. The appellant is aged 31. The fraud offence was committed on 7 July 2018. On that date he entered a Metrobank in Hemel Hempstead. He sought to open a bank account in the name of another person. In order to do so he produced a genuine driving licence in that person's name and said that he was a managing director of a company. The staff member did not think that the photograph on the driving licence was that of the appellant and the police were called. The appellant remained in the bank. The police attended and established that he was not the person shown on the licence.

3. He was arrested and in interview said that he wanted to open a bank account in order to obtain money by overdraft to pay for his drug habit. He said that he had found the driving licence on the street and had obtained information about the company of which he purported to be managing director.

4. On first appearance at the Hatfield Magistrates' Court the appellant indicated on the Better ICase Management Form that he was likely to plead guilty. The matter was sent to the Crown Court at Luton. In due course he was indicted, the particulars being that he had dishonestly and intending thereby to make a gain for himself or to cause another risk of loss, made a false representation which he knew to be untrue or misleading, namely used a false identity document in order to open an account with the bank. He was bailed to attend the PTPH which was ultimately listed a year later on 17 June 2019. He failed to attend and a bench warrant was issued. On 4 July 2019 he was brought before the Crown Court. He admitted the breach of bail, entered a plea of guilty to the fraud offence and was remanded in custody.

5. In between these events, on 15 January 2019, the appellant had been stopped and searched for unconnected reasons. He was found to be in possession of a lock-knife and arrested. Upon interview he said that the knife was not his but he had found it three or four days earlier and intended to take it to an amnesty bin. On the following day he pleaded guilty at Thames Magistrates' Court to the offence under section 139 of the Criminal Justice Act 1988 and was committed for sentence at Snaresbrook Crown Court. All three matters were then listed for sentence at that Crown Court on 12 July 2019.

6. The appellant's previous convictions included non-dwelling burglary, affray, common assault, criminal damage, theft by shoplifting, failure to comply with a community order and two offences in 2015 and 2017 of failure to surrender to bail.

7. Before the judge, prosecution counsel submitted that the fraud offence fell within medium culpability B of the Sentencing Guideline. This was because it neither constituted "sophisticated nature of offence/significant planning" nor "opportunistic one-off offence; very little or no planning".

8. On behalf of the appellant Ms Csengeri submitted that there was little or no planning and it fell within lesser culpability category C. There was no dispute that in the circumstances the harm A "loss caused or intended" was in category 5, ie less than £5,000, and that harm B was "lesser impact". The judge

concluded that, in circumstances where the appellant had obtained a driving licence of another person with the intent of deceiving the bank, this was a case of significant planning and high culpability. Accordingly the starting point was 36 weeks' custody and the category range high level community order to 1 year's custody. The judge imposed a sentence of 9 months' imprisonment. She did not indicate the extent of credit for plea.

9. As to the bail offence, Counsel for the prosecution suggested that the offence fell within culpability B and harm category 3 of the relevant guideline but also pointed to the aggravating features of the two previous convictions for failure to surrender to bail.

10. On behalf of the appellant it was submitted that his failure to answer his bail was that he had been sleeping rough in East London and did not have the funds to travel to the Crown Court. Furthermore he had a chaotic life-style as a homeless individual and drug addict. He had not intended disrespect to the court nor to evade justice. This brought the case within the lowest guideline category 3C.

11. The judge concluded that it fell within culpability A, as a deliberate attempt to evade or delay justice; and harm category 1 as a failure to attend the Crown Court hearing resulted in substantial delay and/or interference with the administration of justice. This gave a starting point of 6 weeks and category range of 28 days to 26 weeks' custody. The judge imposed a sentence of 4 weeks consecutive.

12. As to the knife offence, the prosecution submitted that this was culpability A, ie possession of a bladed article, and category 2 harm. This produced a starting point of 6 months' custody and a category range of 3 months to 1 years' custody.

13. Ms Csengeri submitted that the culpability was D, ie "possession of weapon falls just short of reasonable excuse", so that the highest point of the category range was a medium level community order. The judge evidently rejected that contention. After credit for plea at the first opportunity she imposed a sentence of 4 months' imprisonment consecutive.

14. In imposing the overall sentence the judge expressly took account of totality.

15. Ms Csengeri renews her arguments in the appeal. As to the fraud offence, her primary submission is that the judge was wrong to place the offence in culpability category A and should have placed it in category C, alternatively B. As was apparent from the basic facts, it was neither sophisticated nor the product of significant planning. On the contrary it had little or no prospect of success. In any event, even if it could be so categorised it was necessary under the guideline to blend that feature with the characteristics of lesser culpability, ie the one-off nature of the offence, in order to reach an overall fair assessment on culpability.

16. As to harm A, there was no more than the risk of category 5 financial harm. Thus in accordance with the guideline it was necessary to "move down the range within the category". In any event, since the starting point of this category was based on actual or intended loss of £2,500, there should have been a significant downward adjustment. As to harm B (victim impact) a case of lesser impact required no further adjustment. This was all subject to the personal mitigation to which we will return.

17. As to credit, in the light of the indication on the Better Case Management Form at the Magistrates' Court, full credit should have been given. In all the circumstances the sentence of 9 months was manifestly excessive.

18. As to the bail offence, Ms Csengeri submits that in the circumstances of the explanation for failure to surrender the judge had been wrong to treat it as an offence in culpability category A or harm category 1. As prosecution Counsel had in effect accepted in his submission to the judge, this was not a deliberate attempt to evade or delay justice. On the contrary, the reason for failure to surrender fell just short of reasonable cause and was thus in culpability category C.

19. As to harm, two weeks between 17 June and 4 July did not constitute substantial delay-particularly when set against the passage of 1 year between the date of fraud offence and the listing of the PTPH - nor an interference with the administration of justice. If, as the judge had appeared to find, failure to

attend or the need to issue a warrant for arrest constituted interference with the administration of justice, this would apply in every case and culpability would always be high.

20. Whilst acknowledging the aggravating factors, in particular the two previous convictions for failure to surrender, these were not sufficient to justify the sentence of 4 weeks. In addition there was the personal mitigation.

21. As to the knife, the blade was broken and approximately 1 cm. long. On the appellant's account, the reason for possession of the knife fell just short of reasonable excuse. The judge should have balanced that culpability D factor against the culpability A factor of possession of a bladed article. He had no previous convictions for weapons offences.

22. 4 months' imprisonment, with full credit for plea, was again manifestly excessive.

23. As to the personal mitigation, Ms Csengeri points in particular to the absence of any previous term of imprisonment, his problems with drug addiction and depression, his fundraising work for charities and his progress whilst in prison. We have considered and borne in mind the supporting material. Finally, it is submitted that insufficient account was taken of totality.

24. In our judgment the fraud offence was placed in the wrong category with the consequence that the sentence was manifestly excessive. We cannot accept Ms Csengeri's submission that culpability falls within or is to be balanced by category C. Evidently there was some planning. However, and with due respect to the judge's assessment, we consider that the prosecution was right to place it in category B. This was neither a sophisticated offence nor did it involve significant planning. The prospects of success were evidently very limited. As to harm A, there was an intended loss within category 5. We do not accept it should be placed lower down the category range on the basis that there was simply a risk of category 5 harm. Combined category B5 provides a starting point of a medium level community order and a range of Band B fine to 26 weeks' custody.

25. In all the circumstances, including the previous convictions for offences of dishonesty and with full weight to the mitigating factors, we conclude that the custody threshold was crossed. In our judgment the appropriate sentence before credit for plea was 5 months. We do not accept that the indication on the Better Case Management Form justifies full credit. For the reasons given by this court in *R v Davis [2019] EWCA Crim 553* [2019] 2 Cr App R(S) 33; , the statement that a plea is "likely" is not an indication of a plea of guilty. We consider that a reduction of 20% is appropriate which produces a sentence of 4 months' imprisonment.

26. As to the bail offence, we do not accept the submission that this is a case where the reason for failure to surrender "was just short of reasonable excuse". However the offence is categorised, and there is always flexibility in the categories which are set out in the guideline, the critical feature here was the two previous offences of failing to surrender. That constituted a serious aggravating factor which justified the sentence that was imposed. After full credit for plea the sentence of 4 weeks' imprisonment was entirely appropriate.

27. As to the knife offence, we do not accept that the explanation given by the appellant, even if accepted, brings the offence within the category of possession which falls just short of reasonable excuse. The judge rightly placed the offence within category 2A. Giving full weight to the mitigating factors and with full credit for plea, the sentence of 4 months' imprisonment was entirely appropriate.

28. There is every reason for the sentences for these distinct offences to be consecutive. For greater ease of calculation, we vary the sentence for the bail offence from 4 weeks to 1 month. This produces an appropriate overall total of 9 months for the overall offending. The appeal is allowed to this extent.

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