

[2019] EWCA Crim 1838

No: 201900581/A3

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Wednesday, 23 October 2019

B e f o r e:

VICE PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)

LORD JUSTICE FULFORD

MRS JUSTICE MOULDER DBE

SIR KENNETH PARKER

R E G I N A

v

SIOBHAN PERRY

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office or take legal advice.

Mr E Seller appeared on behalf of the **Appellant**

J U D G M E N T

(Approved)

1. MRS JUSTICE MOULDER: This is an appeal against sentence with leave of the single judge. On 28 September 2018, having been convicted in her absence after summary trial before magistrates in respect of a burglary offence on committal S20180657 and having pleaded guilty before magistrates to the offences on the remaining committal for sentence documents, the appellant was committed for sentence pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000, save for the offence of failing to attend for an assessment on drugs on committal S20180662, which was committed for sentence pursuant to section 6 of the Powers of Criminal Courts (Sentencing) Act 2000.

2. On 15 January 2019 in the Crown Court at Lewes the appellant pleaded guilty to the offences on indictment T20180578 and was sentenced to a total for the offending of six years' imprisonment. This was comprised as follows. In relation to three domestic burglaries against the same victim, Mrs Lowcock in April 2018, indictment T20180578, on count 1, dwelling-house burglary, she was sentenced to six years' imprisonment and six years' imprisonment concurrent on counts 2 and 3. For the offence on committal of a domestic burglary against Mrs Mary Spillane in May 2018, committal S20180657, count 1, domestic burglary, the appellant was sentenced to six years' imprisonment concurrent. On S20180662, failing to attend an initial drugs assessment, no separate penalty was imposed. On possession of a class A drug, count 2 of that committal, the appellant was sentenced to one year's imprisonment concurrent. On S20180661, an incident where a laptop and bank cards were stolen on 17 December 2017 from the Joe and Juice Café and then the bank cards were used, on counts 1 and 2, non-dwelling burglary, the appellant was sentenced to two years' imprisonment concurrent, and on counts 3, 4 and 5, fraud by false representations, contrary to section 1 and 2 of the Fraud Act, the appellant was sentenced to one year's imprisonment concurrent. On committal S20180660, an offence committed in October 2017 at the Cricketer's Pub in Richmond where a rucksack containing bank cards was stolen and then the bank cards were subsequently used, the appellant was subject to no separate penalty for failing to attend the initial drugs assessment, but one year's imprisonment concurrent for the fraud by false representation (counts 2 to 5).

3. The facts in relation to the three dwelling burglaries against Mrs Lowcock were as follows. They were what is termed distraction burglaries of an elderly 87-year-old lady who lived alone in Bexhill. On 5 April 2018 the appellant approached Mrs Lowcock as she was walking home with her shopping. The appellant told her she needed money to get home to London and was having relationship problems with her boyfriend. Mrs Lowcock invited her into her home and into the kitchen and offered her a cup of tea. The appellant then walked into the living room without permission, during the course of which she made a telephone call. Mrs Lowcock gave her £50 for the train fare to London on the understanding the appellant would pay it back. The appellant left the flat.

4. Two days later Mrs Lowcock noticed that there was no money in her purse, there should have been £50. The appellant had left an envelope at Mrs Lowcock's flat with supposedly her mother's address written on it.

5. On 8 April at 6.30 pm the appellant returned to the flat. Mrs Lowcock said she could not come in. The appellant apologised and told Mrs Lowcock she wanted to return her money, which she said was in an envelope that she was waving around in her hand. Mrs Lowcock let her into the living room. When the envelope was opened the appellant said there was no money in it, only a card. She told Mrs Lowcock she could get the money back as her mother lived in Bexhill. The appellant followed her into the kitchen and living room and then left the flat. Mrs Lowcock checked her purse about an hour later and saw that £100 and her HSBC bank card had been taken. Nothing was used on the bank card and it was cancelled.

6. On 9 April the appellant returned again. She stayed for about 30 minutes. Nothing untoward occurred.

7. On 16 April a male attended at Mrs Lowcock's flat. He was dressed in plain clothes and introduced himself as a police officer. He said he had a female detained in his car outside and that he needed Mrs Lowcock's HSBC PIN number as a matter of urgency for the purposes of charging the female. The man was allowed to walk around the flat freely. He was seen to search the sofa and the flat in general. Mrs Lowcock believed he was a police officer and did not question him. She locked herself in the bathroom at one point, feeling intimidated being inside the flat with a man who was badgering her for her PIN number. He was shouting through the door. When Mrs Lowcock emerged from the bathroom she saw the appellant with the male. They were speaking animatedly and the appellant was telling him to hurry up. She maintained that a female had called her into the flat as the male was looking around. A neighbour had observed the appellant outside. She had not been sitting in a car. The neighbour was concerned for Mrs Lowcock. Subsequently the male and the appellant ran from the flat.

8. The offence against Mary Spillane was committed on 11 May 2018 when police were called to the address in SW15 having received a call from Mrs Spillane. She said that the appellant had knocked at the door and said she was from the council and was checking for leaks. Mrs Spillane let her in to have a look around. The appellant gave her some forms from a blue folder to fill out while she was looking around the property. Mrs Spillane showed her around the property including the bedroom where she moved her handbag from the side of the bed and put it in the wardrobe. Mrs Spillane returned to the living room and the appellant continued to look around the property. Soon after, Mrs Spillane realised that the appellant had left and she discovered that her handbag had gone. The bag contained £160 cash, a house key and a bus pass. The blue folder was left behind. The appellant's fingerprints were on the folder.

9. In interview the appellant claimed she was a friend of Mrs Spillane's daughter and had been in the house on several occasions and handled or touched items. She was shown a picture of the folder and said it was Mrs Spillane's daughters' and she had touched it as she used it as a surface to take drugs. She said both Mrs Spillane and her daughter had known her for about nine months. Mrs Spillane said she did not know the appellant and had never seen her before.

10. The offence relating to the non-dwelling house burglary from a pub was in October 2017 at the Cricketer's Public House in Richmond. Mr Harcourt, who worked as a chef there, had his rucksack stolen which contained his wallet and various cards. On 17 October 2017 the card was used by the appellant for various contactless payments at Tesco Metro, Wholefoods Market, Waitrose and Tesco Express.

11. On 30 January 2018, the appellant attended at St. John's Therapy Centre where a sample was taken to establish whether a class A drug was in her system. She left before the assessment was completed.

12. The offence in December 2017 at the Joe and Juice Café occurred when the appellant engaged two members of staff, Mr Gallion and Mr Brooks in conversation, and whilst she did that her partner Mr Dundas went into a staff only area and stole a laptop bag containing a laptop belonging to Mr Gallion and a wallet containing £60 and bank cards belonging to Mr Brooks. The appellant and Dundas left the café and shortly afterwards Mr Brooks received a text alert from his bank. He noticed that there were multiple unauthorised transactions. Contactless transactions had taken place at two Sainsbury's local stores and at Waitrose. A number of other transactions had been declined. The police were able to identify the appellant and Dundas from CCTV.

13. The final offence was a drug assessment offence. On 5 July 2018 the appellant attended at St. John's Therapy Centre where a sample was taken to establish whether a class A drug was in her system. She left before the assessment was completed.

14. On 26 September 2018 the appellant was arrested for several matters. En route to the police station she told officers that there were wraps of bicarb in her pocket. She made allegations of having swallowed something so she was taken to hospital. On arrival she was searched. A small bag containing 20 small wraps, some containing white powder, were seized and when tested this was found to be cocaine.

15. The following victim personal statements were before the sentencing court: from Mrs Lowcock, Mrs Spillane and Mr Harcourt. In her victim personal statement, Mrs Lowcock states:

1. "I feel ashamed that I have been taken advantage of and I am out of pocket with the cash stolen. The money stolen was part of my pension money. I have had to leave my flat temporarily to stay with my daughter such is the effect the incident has had on me. I want to emphasise that when the female visited on the second occasion, I didn't invite her in, she pressurised me into letting her in as did the male on the third occasion. On all visits I have been deceived into letting these persons into my flat and deceiving me once I was with them also. I now realise the last visit was an elaborate scam. I feel nervous about going back to the flat."

16. In sentencing, the judge said he applied the totality principle. There was a risk that working out the correct sentence for each offence and then applying it might lead to too long an overall sentence. Credit for plea was given in all cases with the exception of the single count where the appellant was found guilty in her absence. The judge took account of her overall record. The judge said she was a third strike for domestic burglary and had a very substantial record which included one count of intimidating a witness. He said that the nature of distraction burglary of the elderly, apart from being a disgraceful and despicable crime, was one which left them profoundly anxious and could be seen in the representations made by the individuals concerned. With due respect he said to the observation made on behalf of the defendant it was nonsense to suggest that the absence of violence was a material consideration.

17. The idea of imposing a non-custodial or suspended sentence in circumstances where there was a minimum sentence argument was not an argument the judge would apply to the sentencing process. His primary duty was to protect the very elderly; individuals living on their own trying to go about their lives. The judge said it was his duty to try to put in place something which would protect them. Whilst the appellant might have certain personal difficulties, he said that looking at her record over a very long period of time it was clear that the truth was something that was almost unknown to her. She was prepared to try to manipulate every situation to her advantage. It may be that she was in a coercive relationship with the defendant who was currently serving a prison sentence but over the period of time of these offences and looking back at her past history she had chosen her course and must take the consequences.

18. In relation to her antecedents, the appellant is now aged 37. She had appeared before the courts on 15 previous occasions for 62 offences between 1998 and 2013. Most of her convictions were for fraud and kindred offences, and theft and kindred offences, mainly offences of shoplifting, obtaining property by deception, handling stolen goods and fraud. In 2012 she was sentenced to two years' imprisonment for multiple fraud offences. Her most recent sentence in 2013 she was sentenced to 15 months' imprisonment for perverting the course of justice.

19. The grounds of appeal are that the sentence in respect of the domestic burglaries was manifestly excessive. It is submitted that the judge was in error in sentencing significantly in excess of the sentencing guidelines; the judge was in error in sentencing under section 111 of the Powers of Criminal Courts (Sentencing) Act 2000; the judge failed to take into account the factors indicating lesser harm, such as the theft of items of low value and the limited damage to property; he also failed to consider issues of mitigation, her mental disorder and exploitation by another; the judge failed to state which tariff was appropriate for each residential burglary and then to state the overall sentence; the judge failed to consider properly the background of the appellant and the wish of probation to assess her further.

20. We accept that the judge was in error in sentencing under section 111 of the Powers of Criminal

Courts (Sentencing) Act 2000. However, the issue then for this court is whether the sentence imposed is manifestly excessive, notwithstanding this error.

21. Whilst it was submitted that no application was made to appeal other than the sentence in relation to the domestic burglaries, the court is concerned with whether or not the overall sentence for the totality of the offending is manifestly excessive and therefore the court has to consider all the offences which were before the sentencing judge.

22. Whilst we accept that the sentence of eight years before credit for the guilty plea was in excess of the sentencing guidelines for a single offence of domestic burglary, this does not of itself render the total sentence manifestly excessive.

23. It was submitted that the judge failed to take into account factors indicating lesser harm, such as theft of items of low value and limited damage to property. It was also submitted that he failed to consider matters of lower culpability, such as mental disorder and exploitation by the appellant's partner.

24. The sentencing guidelines for domestic burglary state that the court should determine culpability and harm caused or intended by reference to the factors listed. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting before making an overall assessment and determining the appropriate offence category. In the case of the dwelling-house burglaries, the factors indicating greater harm were that the occupier was at home whilst the offender was present. Factors indicating higher culpability are that the victim was deliberately targeted due to vulnerability: Mrs Lowcock was 87; Mary Spillane was 81. In relation to the third offence against Mrs Lowcock, the appellant was clearly acting as a member of a group.

25. As to whether or not this should be placed in the category of lesser harm due to the value of the property involved, it is not necessary for all the factors indicating greater harm to be satisfied in order for that category to be met. In addition, the test under the guidelines is the value to the victim. As Mrs Lowcock stated in her victim impact statement, this money was part of her pension money and it is therefore a reasonable inference that the value, whilst low in overall monetary terms, can be said to be significant to her. In all the circumstances this does not outweigh in our view the factors of greater harm.

26. As to culpability, it was submitted that the judge failed to consider matters of lower culpability such as mental disorder and exploitation by another. In the pre-sentence report the author noted that the appellant described escalating physical and emotionally abusive behaviour from Mr Dundas and she said that she committed the offences under significant duress from him, fearful of further physical assaults and/or a refusal to supply her with the drugs on which she was dependent. However, the author of the pre-sentence report observed at page 4 of the report that the court might form the view that that was an attempt on her part to minimise her culpability. As to her mental health, the pre-sentence report notes her longstanding history of mental health difficulties since the age of 15, but records the statement of Dr Patel, the consultant psychiatrist, that drug misuse rather than mental health difficulties appears to be the primary factor in her offending to date (page 6 of the pre-sentence report). Accordingly, neither of these matters in our view outweigh the high culpability of targeting elderly people in their own homes in this way.

27. It was also submitted in support of the appeal that the judge failed to state which tariff was appropriate for each residential burglary and then to state the overall sentence applying the totality principle. The guidelines for totality state that where concurrent sentences are to be passed, the sentence should reflect the overall criminality involved and the sentences should be appropriately aggregated by the presence of the associated offences.

28. Our approach therefore is to look at the overall sentences for the number of offences with which the court was concerned and consider whether this reflects all the offending which was before the court and whether in the light of that it was just and proportionate or could be said to be manifestly excessive.

29. Looking however at the individual offences under the burglary guidelines for domestic burglary, as has already been stated, the factor indicating greater harm was that the occupier was at home and the

factor indicating higher culpability was the fact that the victim was vulnerable and deliberately targeted, as well as in the case of the third offence against Mrs Lowcock that the appellant was acting as the member of a group.

30. Under the guidelines, for a single offence in Category 1, the category starting point is three years' custody with a range of two to six years. The statutory aggravating factors in this case are the previous convictions: 44 offences of fraud and kindred offences, 13 offences of theft and kindred offences. As to the mitigation, there was very little in this case. As has been indicated, the submissions as to the mitigation advanced was not supported by the pre-sentence report. Accordingly, whilst therefore for a single offence the starting point might have been in the range of three years, the judge was sentencing for three dwelling-house offences against Mrs Lowcock, the domestic dwelling-house burglary against Mrs Spillane, the non-dwelling-house burglary at the Joe and Juice Café and the fraud in the use of bank cards following the theft at the Cricketer's Public House.

31. In relation to guidelines for non-domestic burglaries, factors indicating greater harm are that the victim was on the premises. The factor indicating higher culpability is that the appellant was acting as a member of a group. For the offence therefore of non-domestic burglary, this was a Category 1 offence, a starting point of two years' custody and a range of one to five years. There are the same statutory aggravating factors in the appellant's previous convictions and the absence of any real mitigation.

32. Finally, in relation to the sentencing guidelines for fraud by false representation, this relates to the use of bank cards following the theft at the Cricketer's pub and then also the use of the bank cards following the theft at the Joe and Juice Café. There is medium culpability where the appellant had a significant role and the offending was part of a group activity. Based on the value it would be Category B5, which would give a range from a fine to 26 weeks' custody.

33. The principle of totality means that the court does not merely aggregate the individual sentences but looking at the overall offending in this case a sentence of eight years before credit for guilty plea is not in our view manifestly excessive. The authorities which were relied on by counsel in submissions to us this morning, Parsonage 2014 EWCA Crim 306 and Mendoza 2015 EWCA Crim 1834, are of little assistance: First, each case has to be assessed on its own facts, and secondly, those particular cases involved less offending than was before the court in this particular case. Finally, it was submitted that more time was required in order to assess the appellant. The Wandsworth Drug and Alcohol Service did indicate that they required further time to assess the appellant's suitability for a drug rehabilitation requirement, but in the circumstances where, as acknowledged in the pre-sentence report, immediate custody was inevitable, the judge was entitled to reject the requirement for further time for suitability for drug rehabilitation to be considered.

34. In relation to the domestic burglaries, these were very unpleasant offences in that they were targeted against elderly people in their own homes. The court then takes into account the additional offences, albeit committed in the context of non-dwelling offences. Taking the overall offending into account the court will not interfere if the total sentence is not manifestly excessive and in our view for the reasons given this sentence was not manifestly excessive. We therefore dismiss the appeal.

35. We note for the record that the incorrect provision was recorded in the Magistrates' Court in relation to the committal which was made pursuant to section 6 of the Powers of Criminal Courts (Sentencing) Act but this does not affect the validity of the committal and the appellant received no separate penalty in respect of this particular offence.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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