NCN: [2021] EWCA Crim 1248

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202002889/A1

Royal Courts of Justice

Strand

London

WC2A 2LL

Wednesday 4 August 2021

Before:

LADY JUSTICE CARR DBE

MR JUSTICE GOSS

MR JUSTICE KNOWLES

REGINA

V

TERRY KEVIN PATRICK WATSON

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MS N HARFORD-BELL appeared on behalf of the Applicant.

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J U D G M E N T

(Approved)

LADY JUSTICE CARR:

Introduction

1. This is an application for leave to appeal against sentence and for an extension of time of 59 days, both applications having been referred to the Full Court by the Single Judge. They are unusual applications. Their basis is not that the sentences imposed below were wrong in principle or manifestly excessive at the time; rather it is submitted that the applicant's physical health has degenerated subsequently and suddenly to such a degree that, as an act of mercy, this Court should quash them.

2. The applicant is now 46 years old. On 14 August 2020 in the Crown Court at Wood Green the applicant pleaded guilty to three offences of dwelling burglary, contrary to section 9(1)(b) of the Theft Act 1968 (counts 1, 4 and 10) and five offences of theft, contrary to section 1(1) of the Theft Act 1968 (counts 2, 7, 11, 12 and 13) and unlawful wounding contrary to section 20 of the Offences Against the Person Act 1861 (count 6). On 21 August 2020, in the Crown Court at Wood Green before HHJ Mathieson ("the Judge"), the applicant was sentenced to a total of 4 years and 4 months' imprisonment as follows: on counts 1 and 10, 876 days' imprisonment; on counts 2, 7, 11, 12 and 13, 3 months' imprisonment; on count 4, 40 months' imprisonment; on count 6, 12 months' imprisonment. The sentences on counts 1, 2, 4, 7, 11, 12 and 13 were to run concurrently with each other; the sentence on count 6 was to run consecutively.

The Facts

3. Given the basis of the applications it is not necessary for us to set out the facts in any detail. The offending related to a spate of thefts and burglaries of cycle stores, garages or

communal areas of blocks of flats carried out in January, May and June 2020. Items stolen included bicycles, passports, bankcards, a car charger, perfume bottles, Amazon packages and IT equipment.

4. Count 4 related to the most serious of the burglaries. The applicant gained access to a garage and was seen by a resident, a Mr Miles, exiting the garage carrying bottles of perfume valued at over £600. Mr Miles confronted the applicant and knocked the stolen items out of the applicant's hands. Mr Miles tried to detain the applicant whilst shouting to neighbours to call the police. The applicant subsequently crouched down and Mr Miles felt a scratching sensation. The applicant ran off. Mr Miles then realised that he had a slash wound to his arm and two wounds to his right leg. He was taken to hospital for treatment. The applicant had been caught on CCTV and a blade used to inflict Mr Miles' injuries was recovered near the scene.

5. The applicant had 28 previous convictions for 71 offences, spanning from January 1995 to August 2017, those convictions included an offence against the person and 48 theft and kindred offences.

The Sentence

6. The Judge commented on the applicant's offending history and his addiction to Class A drugs. This offending took place whilst the applicant had been on licence. He took the most serious offences as being counts 4 and 6, imposing consecutive sentences on those two counts. He gave the applicant full one-third credit for his guilty pleas before arriving at the final custodial terms to which we have previously referred.

Medical events subsequent to sentence

7. Two days after sentence, on 23 August 2020, the applicant suffered an aneurysm which led to two major strokes. He had emergency brain surgery to stem the bleeding. He suffered a number of complications requiring, amongst other things, further surgery and the insertion of an extra ventricular drain. The drain was removed in September 2020. As at November 2020 he had no speech and was wheelchair bound. He was moved from the National Hospital for Neurology and Neurosurgery at Queen's Square to the Whittington Hospital, then to St Pancras Rehabilitation Centre and then the Rehabilitation Ward at Queen's Square. He currently undergoes extensive physical and cognitive rehabilitation therapy. The current position appears to be that he can now transfer himself independently and can mobilise with a tripod stick with supervision in therapy, although not with a nursing team. He is able to carry out simple tasks such as making a hot drink under supervision but struggles with combined tasks. He continues to have apraxia of speech with severe expressive aphasia.

8. Dr Ajina, a consultant in rehabilitation medicine wrote in February and April 2021 that the applicant had significant care and therapy needs as a result of his "very severe" brain haemorrhage and that his needs were very unlikely to be met in HMP Pentonville. This position was unlikely to change in the next 12 to 24 months. The applicant's severe physical communication and cognitive impairment make him extremely vulnerable and dependent on care from others. The position is heightened by the absent skull flap protecting the left side of his brain; it appears that cranioplasty surgery is planned for the future. He requires ongoing multi-disciplinary input. It was felt by Dr Ajina and others

that he posed no risk to the public. There had been no instances of aggression, behavioural outbursts or attempts to abscond. It was believed that his custodial sentence could be managed in balance with his healthcare needs in a non-secure care home setting.

9. Mr Noel Young, head of Reducing Re-offending at HMP Pentonville, echoes these sentiments. He sets out how the applicant no longer has any prison staff escort. He has been categorised as a category D prisoner, but no category D establishment has 24-hour healthcare facilities to hold and care for someone in the applicant's position. HMP Pentonville would not be able to cater for his needs. In Mr Young's view the applicant would be best served in a care home setting, given his condition and compliance whilst on temporary release without supervision.

Grounds of Appeal

10. Ms Harford-Bell, for the applicant, invites us to quash the applicant's sentence of 4 years and 4 months' imprisonment, as an act of clemency due to the applicant's recent medical emergency, his current disability and prognosis. She emphasises the practical impact of the sentence: for example, the applicant is not entitled to benefits and thus his mother has to pay for his toiletries. He still requires 24-hour care. He is subject to the normal restrictions and thus, for example, cannot leave the grounds of whatever institution he is in.

Discussion

11. In conventional terms there is nothing to justify the granting of permission to appeal on the basis of the applicant's offending, the facts and his antecedents; nor is it suggested

that there is. The applicant's conditional release date is 21 October 2022 and his sentence expiry date is 20 December 2024.

12. The applications are based exclusively on the applicant's current physical health. As summarised above, he suffered an aneurysm very shortly after sentence which led to two major strokes. He has required brain surgery and has been left with serious cognitive speech and physical difficulties. He has all but lost his speech and now uses a wheelchair, albeit that he has some limited ability to mobilise with a tripod stick. It is expected that the applicant's condition will continue to improve but there is significant impairment, on any view, for the foreseeable future.

13. By section 11 of the Criminal Appeal Act 1968, we have power to quash any sentence and in its place pass such sentence or order as we think appropriate and as the court below had power to make. This power is fettered only by the proviso that, taking the case as a whole, the applicant must not be more severely dealt with (see section 11(3)). The test that the sentence must be "manifestly excessive or wrong in principle" does not appear in the legislation but for many years has been the principle upon which this Court acts.

14. However, and fundamentally for present purposes, this Court is a court of review - see R v Roberts & Ors [2016] EWCA Crim 71; [2016] 1 WLR 3249; [2016] Cr App R(S) 14 and R v ZTR [2015] EWCA Crim 1427. In Roberts, Lord Thomas CJ stated:

> "19. It is well established that this court is a court of review. In *R v A&B* [1999] 1 Cr App R (S) 52 Lord Bingham CJ made this clear at page 56:

> 'the Court of Appeal Criminal Division is a court of review; its function is to review sentences imposed by courts at first instance, not to conduct a sentencing exercise of its own from the beginning.'
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> 20. There is no basis for departing from the principle so clearly expressed by Lord Bingham..."

15. Thus the court considers the material before the sentencing court and any fresh material properly admitted under section 23 of the Criminal Appeal Act 1968, by reference to the well-established principles thereunder. It considers whether the sentence was wrong in principle or manifestly excessive. It does not, in the light of something that has happened since sentence, consider whether an offender should be sentenced in an entirely new way because, for example, of what has happened in the penal system or because the offender has supplied fresh information long after the event.

16. That is not to say that this court will not entertain updated information about an offender, such as updated pre-sentence and prison reports on conduct in prison. It does this under the limited exception identified by Lord Thomas CJ in R v Rogers [2016] EWCA Crim 801; [2016] 2 Cr App R(S) 36, a judgment delivered some 3 months after the judgment in Roberts. At [8] in Rogers, Lord Thomas referred in particular to the decision of Lord Judge CJ in R v Caines; R v Roberts [2006] EWCA Crim 2915; [2007] 1 WLR 1109, at [44]: in short, post-sentence information, such as a positive response by a young offender to his custodial sentence. may impact on and produce a reduction in sentence.

17. Here we have a situation where information about the offender is not being updated in the sense envisaged in Rogers, namely by way of building on or undermining what was seen

below as matters material to the seriousness of the offending or by way of aggravating or mitigating factors. Rather what the applicant seeks is a wholesale revision of the sentencing exercise by reference to entirely separate events which occurred only after sentence and of which the Judge was wholly unaware. No application under section 23 of the Criminal Appeal Act 1968 has been made, nor would one have succeeded. Amongst other things the new material could not afford a ground for allowing the appeal.

18. We recognise that, unlike the position in Roberts and ZTR, the events relied upon here took place very shortly after sentence. However, that makes no difference to the correct approach as a matter of principle. It is not for us to re-open and effectively restart the sentencing process on a completely fresh basis.

19. This is a result consistent with the case law that has considered the question of the impact of serious medical conditions on the sentencing process. It is well established that an offender's serious medical condition may enable a court, as an act of mercy, in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence that would otherwise be appropriate (see R v Stevenson; R v Minhas [2018] EWCA Crim 318; [2018] 2 Cr App R(S) 6 at [10], referring to R v Bernard [1997] 1 Cr App R(S) 135. However, as can be seen from the discussion in Stevenson at [10] to [20], appellate interference on the basis of a significant deterioration in a medical condition may be appropriate if the condition was known at the date of sentencing. Although the general principle is that this Court will only interfere with a sentence if persuaded that it was wrong in principle or manifestly excessive in length at the time when it was passed, the case law shows that a more flexible approach

may properly be taken in cases of significant deterioration in a known medical condition. Whilst the appellate court may have regard to such deterioration, the cases in which it would be appropriate to do so are nevertheless rare. In the case of serious and worsening ill health, the combination of what have been described as the "Bernard principles" and the criteria for fresh evidence in section 23(2)(b) of the Criminal Appeal Act 1968 "is one which will present a substantial obstacle to success in all but the most compelling cases" (see Stevenson at [20]).

20. The short point here is that the applicant's medical condition in this case was not known at the date of sentencing. In Stevenson (at [17]), and again in the later case of R v McMeekin [2018] EWCA Crim 2373 (at [27]), the court was at pains to emphasise the importance of this distinction.

21. This was the approach taken by the court in the similar although not identical circumstances in R v Shaw [2010] EWCA Crim 982. In that case, whilst on remand before sentence, the applicant was taken ill in prison. He went blind in his left eye and weak on the right side and was taken in a wheelchair to hospital. Tests were undertaken but failed to reveal any serious problem and he was returned to prison. He was brought from there to court to be sentenced on 18 August. Two days later, on 20 August, he had a stroke in prison and was taken to hospital where it was confirmed that he was in an extremely serious condition and there was a high risk of death. He received emergency treatment followed by a period of rehabilitation on the ward. The court was there invited (as we have been here) to exercise clemency in revisiting the sentences passed in the Crown Court. The court resisted that invitation:

> "11. The function of this court in relation to sentences passed in the Crown Court is, by contrast, to review the sentencing process which took place there. The general rule is that this court will only interfere with a sentence if persuaded that at the time it was passed it was unlawful or wrong in principle or manifestly excessive. None of those things can be said of the sentences passed in this case.
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> 12. It is true that on occasions this court will have regard to matters arising since the sentence was passed, for example an appellant's good progress in prison. Generally speaking it is likely to do so only where it has already concluded that the sentence passed in the Crown Court was either manifestly excessive or unduly lenient and where it is considering what sentence to impose in its place. We consider that in a situation such as has arisen in this case it will normally be appropriate for this court to leave it to the Secretary of State to decide whether to exercise his powers under section 248..."

22. We agree with those remarks. It is not for this court to intervene on the present facts. It may be that the appropriate course is, as the authorities suggest, for the Home Secretary to consider exercise of the royal prerogative of mercy or her powers of release on compassionate grounds under section 248 of the Criminal Justice Act 2003 which provides:

> "(1)The Secretary of State may at any time release a fixed-term prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds."

This provision and the related legislation and regulations were considered in some helpful detail in Stevenson at [6] to [9].

Conclusion

23. This is not a case where we can or should intervene as an act of mercy with what was an entirely lawful and appropriate sentence. Ms Harford-Bell informed us that there is a widely-held perception that in circumstances such as these, where an offender suffers a

grave but wholly unforeshadowed medical emergency post-sentence, the appropriate course is to appeal to this court on grounds of clemency. If there is such a perception, it is misconceived: this court is a court of review. As set out above, there may be appropriate avenues for the applicant to explore in the light of his current predicament; an application to this court, however, is not one of them.

24. For these reasons, the sentences imposed must stand. The application for leave will be refused. In the absence of any merit in the substantive application, we also refuse the application for an extension of time.

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