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IN THE COURT OF APPEAL
CRIMINAL DIVISION

NCN: [2021] EWCA Crim 1895
No. 202101536 A1

Royal Courts of Justice

Thursday, 28 October 2021

Before:

LORD JUSTICE POPPLEWELL

MR JUSTICE DOVE

HIS HONOUR JUDGE POTTER

REGINA

V

CRAIG PETER NEWITT

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5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737

CACD.ACO@opus2.digital

MS N. STEERS appeared on behalf of the Appellant.

MR S BURCH appeared on behalf of the Respondent.

JUDGMENT

LORD JUSTICE POPPLEWELL:

1

The applicant seeks leave to appeal against a total sentence of 57 months for two burglaries and associated offences of theft and fraud. His application was referred by the single judge.

2

The first burglary occurred on 19 July 2019 at a property in Wednesbury, West Midlands, which was the home of Mr and Mrs Taylor. The burglary took place at night whilst Mr and Mrs Taylor were in their home. The applicant had entered the property through a conservatory window which had been left ajar by using a ladder found in the garden. The conservatory window was not visible from the road. Once inside the property the applicant stole a car key to a Land Rover Discovery; two purses containing bank and store cards and £190 in cash; a leather wallet containing store and bank cards and £400 in cash; two driver's licences; a television; a PlayStation 3; two mobile phones; and a rucksack containing £15 in cash. He used the car keys to steal the Land Rover, which was worth approximately £31,500 and was never recovered. He used cards stolen in the burglary to purchase goods at Premier Store for £56 and unsuccessfully attempted to use them to buy eight bottles of alcohol at Asda.

3

The second burglary occurred at another house in Wednesbury on 2 August 2019 at about 4.00 a.m. when the 69-year-old owner, Mrs Colbourne, was alone in bed. The applicant entered by the unlocked front door and shouted at Mrs Colbourne "Where's your money?" When the applicant was told there was no money he began searching the property and found £900 in cash. The applicant then accused the victim of lying and threatened to hit her dog which had been barking. The victim pretended to have a heart attack but the applicant told her she was having a panic attack and got her a drink of water before continuing his search of the house. The applicant stole two holdalls; £900 in cash; a gold watch; a mobile phone; alcohol; and a car key to a Suzuki motor vehicle. The applicant subsequently left the property, taking the Suzuki. As a result of a press release, the Suzuki was seen on CCTV and the applicant was identified as the driver. He was thereafter arrested and the Suzuki was recovered by the police.

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The applicant pleaded guilty to the offences involving use of the cars at the PTPH, and to the burglary and theft offences three months later.

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Close in time to these burglaries, the applicant committed other burglaries and thefts on 23 July 2019, and on or shortly after 25 July 2019, for which he had been separately sentenced on 29 January 2020 to 43 months' imprisonment, together with a consecutive sentence of seven months' imprisonment for dangerous driving. He was serving that 50 month sentence at the time when the Recorder imposed the sentences with which we are concerned some 15 months later. The Recorder determined that the

57 months sentence which he imposed should commence immediately, with the effect that it ran concurrently with the 50 month sentence which the applicant was already serving.

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The applicant was 41 at the date of sentence and had a very bad record. He had 24 convictions for 62 offences. They included convictions on eight separate occasions for a total of 12 burglaries, as well as other offences of dishonesty, offences of violence, and driving offences. He therefore attracted the minimum three year sentence required by s.314 of the Sentencing Act 2020.

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In sentencing the Recorder outlined the facts of the index offending. He noted the awful effects that the burglaries had had upon both families, as was revealed in the victim impact statements. He referred to the applicant's previous convictions. He noted that the applicant had been sentenced to a total of 50 months' imprisonment on 29 January 2020 for the offences which on the information before him appeared to include three counts of dwelling house burglary. He observed that those had occurred at around the same time as the index offences for which he was now sentencing the applicant. He was told that the applicant was now remorseful and accepted his guilt. He was told that the index offences he was concerned with had occurred when the applicant had slipped back into drug use. He was told that in a relation to the burglary of Mrs Colbourne's property the applicant had seen the door ajar and entered the property. The applicant apologised for the trauma caused and said he was now drug-free in custody. The Recorder had read a letter regarding the applicant's conduct in custody. We also have received a recent further letter from the prison suggesting that he has been behaving as a model prisoner.

8

The Recorder remarked that both burglaries fell into category 1 of the Sentencing Council Guideline with greater harm as the occupiers had been at home when the applicant was there. There had been theft and damage to the property. There had been significant loss to the victims and there had been untidy searches. In the Recorder's view there had been higher culpability. It had been suggested that the offending had not been planned, but the Recorder did not accept that. The applicant had clearly been looking at houses with cars on the driveway and in one of the burglaries the entry point had not been visible from the front of the house. The offending therefore had the hallmarks of both greater harm and higher culpability. Aggravating features included the fact that one of the occupiers had come into contact with the applicant. The offences had been committed at night and there had been significant loss of sentimental items. In the Recorder's view the most serious offence was the burglary of Mrs Colbourne's house, which was the subject matter of Count 5. He therefore said he would pass a sentence on that count which reflected the overall offending and pass concurrent sentences on the remaining counts. The sentence on Count 5, reflecting the fact that the applicant was a professional burglar, would have been a sentence of six years' imprisonment after trial. The Recorder reduced that sentence by 20 per cent to reflect the applicant's guilty plea, which gave a sentence of 57 months' imprisonment on Count 5. The sentence on Count 1 for the Taylor burglary was the minimum three years less the discount of 20 per cent for plea, with a sentence of 12 months for the theft of the Land Rover and one month each for the offences of using or attempting to use the stolen cars. All sentences were ordered to run concurrently with the each other. The Recorder remarked that he would have been justified in making the sentence run consecutively to the 50 months sentence which the applicant was currently serving. However, he said that having regard to the principle of totality the total sentence of 57 months' imprisonment would run from the date of sentence, so as in effect to run concurrently with the remainder of the 50 months sentence.

The grounds of appeal for which leave is sought are that:

- (1) the starting point of six years for the Colbourne burglary offence on Count 5 was too high;
- (2) the overall sentence gave insufficient consideration to the principle of totality;
- (3) the sentence of 57 months' imprisonment was manifestly excessive;
- (4) insufficient credit was given for the applicant's guilty pleas and other mitigating factors;
- (5) the total sentence passed outweighed the applicant's criminality in this case and was unnecessarily in excess of the sentencing guidelines.

In her submissions before us, Ms Steers has focused on the ground of totality. In relation to the other grounds we entirely agree with the single judge who said this:

"Your first criticism of your sentence is that the notional after trial sentence of 6 years for count 5 is too high. This, however, ignores the fact that the Recorder expressly stated that the sentence on that count was to reflect the totality of the offending he had to deal with which included two very serious dwelling house burglaries committed when the occupiers were at home and the theft of two cars one of which was never recovered. A 6 year total term after trial for the offences on this indictment was by no means manifestly excessive in light of all the aggravating features present and the relatively restricted mitigation available to you. From this sentence you were given appropriate credit for your plea."

The single judge went on to say that the real issue was whether the sentences imposed on 29 January 2020 and 22 April 2021, when taken together, were manifestly excessive for the totality of the offending dealt with on those dates. He referred the matter to this court because it was unclear how long the applicant had been on qualifying remand before the sentence on 29 January 2020, and therefore how much of a reduction for totality was reflected in the Recorder's decision to make the sentences run concurrently.

We now have the benefit of the prosecution opening of facts and the sentencing remarks on the occasion of the sentencing on 29 January 2020, which were not available to the Recorder in April of this year. It is apparent from that material that the applicant had been on remand in custody for the offences for which he was sentenced on 29 January 2020 since 6 August 2019 and on qualifying curfew for nine days before that.

Accordingly, by 21 April 2021 when he was sentenced for the index offences, the applicant had effectively served some 20 ½ months of his 50 month sentence, from which he would otherwise have been released on licence four and a half months later. He had served the custodial element equivalent to a sentence of approximately 41 months. The sentence passed by the Recorder was therefore equivalent to a total sentence of approximately 98 months (that is 41 months plus 57 months) for all of the offending. This, it is submitted, would have been manifestly excessive for the totality of the offending had it all been sentenced at the same time.

The Sentencing Council Guideline on totality provides that where an offender is serving a determinate sentence for offences and the court is considering sentence for offences committed before the original sentence was imposed, it should consider what the sentence length would have been if the court had dealt with all the offences at the same time and ensure that the totality of the offences is just and proportionate in all of the circumstances. If it is not, an adjustment needs to be made to the sentence imposed on the second occasion. This approach does not undermine the legislative policy behind minimum sentences for three strike burglaries even where it results in a sentence of less than three years on the second occasion: see *R v Sparkes* [2011] EWCA Crim 880; [2011] 2 Crim App R (S) 107.

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Had the Recorder taken this approach, he would clearly have been justified in concluding that in addition to the 57 months for the offences which he was considering, there would have had to have been added a consecutive sentence of seven months for the dangerous driving offence which was distinct from the burglaries. He would then have had to consider what additional sentence would be appropriate for the burglaries which he was not considering, taking into account totality.

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Before the Recorder it appeared from the PNC record and a West Midlands Police summary that there had been three dwelling burglaries which had previously been sentenced on 29 January 2020, about which he was given relatively sparse information. As we have said, as a result of the direction of the single judge, we now have the benefit of the prosecution opening of the facts and sentencing remarks on that occasion, from which it is apparent that there were only two burglaries sentenced on that occasion which gave rise to concurrent sentences of three years and 43 months respectively. It was those concurrent sentences of 43 months, together with the consecutive sentence of seven months for dangerous driving, which gave rise to the total 50 month sentence imposed on 29 January 2020.

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Details of the two burglaries sentenced on that occasion are as follows. There was a burglary on 23 July 2019 which involved a forced entry during the course of the day. The house had been “trashed”. Items stolen included two televisions, an Xbox, a PlayStation, two laptops, a handbag and some jewellery of limited value. The applicant left with some of the stolen goods and returned by car 40 minutes later in order to collect the rest of the items which he stole from the property. The victim personal statements showed that it had had a dramatic adverse impact on the couple who were living there.

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The second burglary occurred in a secured detached dwelling while the owner and his wife were away on holiday. They had left on holiday on 25 July and the burglary was discovered by their son who was asked to go to the property to collect some things. The applicant made a forced entry by a sophisticated operation of carefully removing a pane of glass. He made an untidy search in many of the rooms. He stole items of jewellery, including rings, necklaces and a gold choker, some of which had been handed down by late family members and were of high sentimental value. He also took a number of watches, £200 in cash, two handbags and the keys to the Audi V8 motorcar which was parked on the drive. He drove the Audi V8 away. The car was later recovered. He also took the keys to a second car parked on the drive, a Mercedes, which necessitated the owner getting the locks changed when he returned from holiday.

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If sentenced together with the index offences, these additional burglaries would in our view have justified additional consecutive sentences of at least 18 months each after giving credit for discount for plea and taking account of totality. That would have resulted in a total sentence, had all the offences been sentenced at the same time, of at least 100 months (that is to say 57 months, plus seven months for the dangerous driving, plus 18 months each for the two other burglaries).

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It follows that the sentence passed by the Recorder which had the same effect as a total sentence for all the offending of approximately 98 months took sufficient account of the principle of totality and was not manifestly excessive.

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The application is therefore dismissed.
