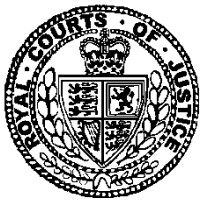

Neutral Citation Number: [2025] EWCA Crim 508

Case Nos: 202500866 B4
and 202401162 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE
CROWN COURT AT BOURNEMOUTH
HHJ William Mousley KC
URN 55CH0538123/URN 55CH0238823 /URN 55CH0415023/URN 55CH0540223/URN 55CH0531123/URN 55CH0542023

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 March 2025

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE BRYAN
and
HIS HONOUR JUDGE ANDREW LEES
(Sitting as a Judge of the CACD)

REX

-v-

RAYMOND CUMMINGS

MR A LLOYD appeared on behalf of the Appellant.
MS R BAILEY appeared on behalf of the Crown.

Approved Judgment

[With Postscript]

Lord Justice Stuart-Smith:

1. On 18 March 2024, in the Crown Court at Bournemouth before HHJ William Mousley KC, the appellant (then aged 42) pleaded guilty to offences on the following indictments, as we shall detail and was sentenced for all matters as follows. First of all, under URN55CH0238823:

    i) Count 1, an offence of theft, on his plea of guilty, he was sentenced to 6 months' imprisonment concurrent.

    ii) Count 2, an offence of fraud by false representation, on his plea of guilty he was sentenced to 6 months' imprisonment.

    Under indictment URN55CH0538123, where there was one count of theft, on his plea of guilty, he was sentenced to 4 months' imprisonment concurrent.

    Under indictment URN55CH0542023, which had one count of theft, on his plea of guilty, he was sentenced to 4 months' imprisonment.

    Those offences that we have outlined were offences on committal.

2. There were offences on indictment. First:

    i) URN55CH0415023, count 1 was an offence of handling stolen goods. On his plea of guilty, he was sentenced to 4 months' imprisonment concurrent.

    ii) Count 2 was an offence of theft. On his plea of guilty, he was sentenced to 6 months' imprisonment concurrent.

    iii) Count 3, was an offence of fraud, on his plea of guilty, he was sentenced to 4 months' imprisonment concurrent.

    iv) Count 4, was an offence of burglary, it being a non-domestic burglary, on his plea of guilty, he was sentenced to 1 year 6 months' imprisonment consecutive to URN55CH0531123, to which we will come in a minute.

    v) Count 5 was a count of theft. On his plea of guilty, he was sentenced to 4 months' imprisonment concurrent.

3. Turning to URN55CH0531123:

    i) Count 1 was an offence of non-domestic burglary. On his plea of guilty, he was sentenced to 2 years 6 months' imprisonment concurrent.

    ii) Counts 2 to 5 were further counts of burglary. Upon his plea of guilty, he was sentenced to 1 years 6 months' imprisonment on each concurrent.

iii) Count 6 was a count of theft. On his plea of guilty, he was sentenced to 8 months' imprisonment concurrent.

iv) Count 7 was a count of fraud. On his plea of guilty, he was sentenced to 4 months' imprisonment concurrent.

v) Count 8 was an offence of handling stolen goods. On his plea of guilty, he was sentenced to 6 months' imprisonment concurrent.

vi) Count 9 was an offence of handling stolen goods. On his plea of guilty, he was sentenced to 6 months' imprisonment concurrent.

vii) Count 10 was an offence of fraud. On his plea of guilty, he was sentenced to 4 months' imprisonment concurrent.

viii) Count 12 was another non-domestic burglary. On his plea of guilty, he was sentenced to 1 year 6 months' imprisonment concurrent.

4. Finally, indictment URN55CH0540223 purported to allege a count of theft, *to which he pleaded guilty*, and in respect of which he was sentenced by the judge to a period of 4 months' imprisonment concurrent. NB SEE POSTSCRIPT AT THE END OF THIS JUDGMENT

5. The total sentence, therefore, was 4 months' imprisonment. One other count was ordered to lie on the file on the usual terms.

6. The appellant now appeals against that aggregate sentence with the leave of the Single Judge.

Dealing with the nullity

7. Before we turn to the main substance of the appeal, we need to deal with one technical matter which affects the charge of theft included as the sole offence in indictment for case URN55CH0540223. Offences involving low-value shoplifting, where the value of goods stolen does not exceed £200, are triable only summarily unless the offender elects to be tried by the Crown Court (see section 22A of the Magistrates' Courts Act 1980). It is now apparent that the appellant did not elect to be tried by the Crown Court for this offence. Therefore indictment UR55CH0540223 was a nullity, as was the sentence passed by the Crown Court. As things stand, this charge remains in the Magistrates' Court.

8. How then should this Court respond to this particular charge? In our judgment, following the guidance set out in *R v Gould* [2021] EWCA Crim 447, the best way for us to proceed is to reconstitute ourselves as a Divisional Court, which we now do. We then grant leave to apply for judicial review of the decision purporting to send the offence to the Crown Court. We dispense with issue and service of a claim form and abridge all time limits as necessary. Having done so, we quash the purported sending of this offence to the Crown Court.

9. *Next, of our own volition, we nominate Stuart-Smith LJ to sit as a District Judge (Magistrates' Court), pursuant to section 66 of the Courts Act 2003, in order to deal with the outstanding case as in the Magistrates' Court. Stuart-Smith LJ then exercises the powers of a District Judge (Magistrates' Court) to sentence the appellant in relation to this offence, the sentence being that there shall be 7 days in custody to be served concurrently with the other sentences with which we are concerned. This power has been exercised because of the need to determine the proceedings in respect of this offence, and is exercised in the overall context of the proceedings as a whole in order to prevent further proceedings in the Magistrates' Court that are clearly unnecessary.* NB SEE POSTSCRIPT AT THE END OF THIS JUDGMENT

Appeal against sentence

10. We now turn to the substance of the appeal against sentence. The appellant had an appalling record. He had 51 convictions for 174 offences spanning from 13 September 1996 to 8 February 2023. His relevant convictions included 62 theft and kindred offences and three fraud and kindred offences. It is overwhelmingly clear that much or most of his offending is driven by his addiction to drugs.

11. In addition to a letter from the appellant, the judge had the benefit of a pre-sentence report although this was written in the light of only two of the offences for which he fell to be sentenced. The risk of re-offending was very high and the writer of the pre-sentence report realistically felt unable to recommend a non-custodial determination given the appellant's current non-engagement, homelessness and the lack of any supporting assessment from a potential non-custodial regime. The judge concisely summarised the catalogue of offending as follows:

> "Those offences were all committed by you over a period from the end of January of last year to 24 November, so a period of about ten months, during which time you committed seven non domestic burglaries, three thefts [from] motor vehicles and a bicycle, four offences of fraud, three offences of handling and also three offences of theft from a shop."

Having then identified the long-standing chaotic personal circumstances driven by drug abuse and latterly homelessness, he had categorised the seven domestic burglaries as each falling within category B2 of the relevant guideline, giving a starting point of 6 months and a sentencing range up to 1 year. With the exception of the theft of a bicycle, which he said may not necessarily cross the custody threshold, and the offences of shoplifting, which taken alone he held would not cross the custody threshold, the other offences, namely the three thefts of motorcars, four offences of fraud and three offences of handling he held would cross the threshold. He then correctly identified the appellant's appalling record as being a materially aggravating factor. Having done so, he explained his thinking as follows:

> "As I say, the guidelines apply to each and every one of the offences

> that you committed. I then have to consider whether or not the sentences should be consecutive with each other or concurrent. I have reached the conclusion that some of the sentences must be consecutive and cannot be concurrent, but again I have made some of the sentences concurrent because I must step back, having considered your overall offending, and take a view as to what the appropriate total would be for all the offences that you have committed.
>
> The other important factor is that you pleaded guilty to all these offences, and I am prepared to say that you should receive a reduction of one third for your pleas of guilty to these various offences."

He then passed the individual an aggregate sentence that we have already outlined.

12. On the appellant's behalf, Mr Lloyd points out that 4 years, after full credit for his guilty pleas, is equivalent to an aggregate sentence of 6 years after a trial. He submits that this is just too long and that the judge should not have directed that the sentences of 1 year and 6 months on count 4 of indictment 5023, and of 2 years and 6 months on count 1 of indictment 1123 to run consecutively. No challenge is made to the categorisation of the various offences adopted by the judge but Mr Lloyd submits that the starting point for any individual non-domestic burglary was 6 months and that to have reached a notional sentence of 6 years before reduction for pleas was manifestly excessive.

13. In agreement with the single judge, we do not think that this was a straightforward sentencing exercise. What is plain is that the judge adapted the structure he did in order to reach an aggregate sentence that in his view reflected the overall seriousness of the appellant's offending. There was no particular magic to the two offences that he took as lead and consecutive offences, nor was there any particular science that led him to impose 1 year and 6 months for one of his lead offences and 2 years and 6 months for the other.

14. When viewed in isolation, neither of the lead offences on its own was intrinsically so serious as to justify the sentences passed on them. What the judge has done is to attempt, by a combination of weighting the lead offences and making just two of the many individual sentences consecutive, to reflect the appellant's overall criminality taking into account the aggravating feature of his appalling record. We would not criticise the judge for adopting this approach. One consequence of the approach, however, is that each of the lead sentences is intended to reflect some of the offending involved in the non-burglary offences.

15. At first sight a sentence of 6 years before reduction for guilty pleas instinctively seems heavy. The first consideration however is the seven non-domestic burglaries. Although this was a course of offending, each offence merited a starting point of 6 months, which fell to be increased by reason of his record. Before taking account of the principle of totality and even if no upwards adjustment was made to the starting point, sentences of 6 months for each of the seven non-domestic burglaries would add up to an aggregate of 42 months. Before having resort to the principle of totality it is also necessary to take into

account the various aggravating features of which the most significant is his bad previous record.

16. It may be said that there should then be a substantial reduction for totality. So there should. But had the burglaries been the only offences that the appellant committed, he could not have complained if he had received an aggregate sentence of 42 months. As it was, they were not the only offences he had committed. As set out above, there was an extensive additional catalogue of different offences for which he fell to be sentenced which had to be reflected in a significant additional aggregate sentence, however that was achieved. Although the principle of totality also applied to those offences, the fact that he was a very persistent offender, albeit not at the most serious level of offending, is in one sense an aggravating rather than a mitigating feature.

17. In commendably moderate submissions, Mr Lloyd submits that tethering the aggregate sentence to individual sentences as indicated under the guidelines runs the risk of the end result being too heavy and that that is what has happened in this case. He submits that an aggregate sentence of 6 years before discounting for his pleas of guilty, is very high - too high for what is, when all is said and done, a series of broadly similar, unsophisticated and, in absolute terms, relatively minor offences. The judge was right to stand back and look at the case in the round and we have done the same. Having done so, we have come to the conclusion that there is force in Mr Lloyd's submissions and there is an aggregate sentence of 6 years before any reduction for guilty pleas was not merely a stiff sentence but one that was too high. Application of the guidelines to multiple offences such as these is a very imprecise art. Doing the best we can but without resorting to spurious scientific accuracy, based on guideline indications for individual cases, we consider that an appropriate aggregate sentence before reduction for guilty pleas would have been 4½ years. Applying the one-third discount for his guilty pleas the end result should be an aggregate sentence of 3 years. We propose to achieve that by quashing the sentence of 2 years and 6 months' imprisonment on count 1 of indictment URN55CH053123 and substituting a sentence of 2 years consecutive as before. Similarly, on counts 2 to 5 and 12 of that same indictment and count 4 of indictment URN55CH0415023, we quash the sentences of 1 year 6 months each and substitute a sentence of 1 year. *In addition, as previously indicated, we have quashed the purported sentence of 4 months' imprisonment on count 1 of indictment URN55CH540223 and substituted a sentence of 7 days passed in the circumstances we have already outlined.* NB SEE POSTSCRIPT BELOW To this extent, the appeal against sentence is allowed.

18. Mr Lloyd, Ms Bailey, we think that by shaving all the 1 year 6 months to 1 year and the 2 years 6 months to 2 years, we have achieved the desired outcome. That is certainly our intention. If, on mature reflection, as you go away from Court, you realise that we have made a mistake, would you please notify my clerk as soon as possible and we will deal with it under the slip rule or whatever. Thank you both.

AUTHORISED POSTSCRIPT TO JUDGMENT AS DELIVERED ON 26 MARCH 2025

Very shortly after delivery of the judgment as set out above, and before any order had been

drawn up or issued, the Court was informed that the appellant had not pleaded to the charge that purported to form the basis for count 1 of indictment URN55CH540223. In those circumstances, although it was open to this Court to take the steps up to and including quashing the order of the Magistrates Court purporting to send the case to the Crown Court, it was not open to this Court to pass sentence as indicated in the two highlighted passages set out above. The sentence having been ordered to run concurrently, this does not affect the outcome of the appeal and the substituted total sentence remains 3 years' imprisonment. We are informed that the prosecution agrees with this analysis and course of action. The net effect, therefore, is that that offence remains in the Magistrates' Court without the appellant having entered a plea. It will be for the prosecution to decide what, if anything, should be done about it. This Court understands that it is likely to be withdrawn but makes no order or observation on that point.