Neutral Citation No. [2015] NICA 45

Ref: **MOR9705**

Judgment: approved by the Court for handing down (subject to editorial corrections)

Delivered: **16/06/2015**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

REGINA

-v-

PHILIP HEDLEY

Before: Morgan LCJ, Girvan LJ and Gillen LJ

MORGAN LCJ (giving the judgment of the court)

[1] The applicant seeks leave to appeal the sentence imposed on him on 5 March 2015 by his Honour Judge Grant at Downpatrick Crown Court. He was sentenced to a determinate custodial period of 30 months, comprising 15 months to be spent in custody and 15 months on licence, imposed following his pleas of guilty to counts of possessing criminal property contrary to section 329, sub-paragraph (1)(c) of the Proceeds of Crime Act 2002; theft, contrary to section 1 of the Theft Act (Northern Ireland) 1969; assault on police, contrary to section 66 sub-paragraph 1 of the Police (Northern Ireland) Act 1998; and resisting police, contrary to section 66, subsection 1 of the same Act. The overall sentence also included the activation of a suspended sentence of six months imposed on 11 October 2014, again for theft. Mr Blackburn appeared on behalf of the appellant and Mr Magee for the prosecution. We are grateful to all counsel for their helpful oral and written submissions.

[2] The background to the offences is that on the first indictment the circumstances were that in the early hours of Thursday, 11 December 2014 two commercial premises in Newtownards were entered and a number of items stolen. The burglaries were discovered the next morning. The applicant lived in the same street as the burgled premises, and as a result of viewing CCTV footage from the house where the applicant was resident, police sought to conduct a search of his apartment. On 12 December 2014 the search took place and a Samsung camera and Dell laptop were seized in the flat

and he was arrested for the burglaries. He was conveyed to Bangor and three interviews were conducted on 12 and 13 of December 2014.

[3] In the second and third interviews he claimed that a male brought the items into his flat the night before to see if he was interested in buying them but he continued to deny involvement with the original offences, although admitted that he had received stolen goods to which he eventually pleaded guilty.

[4] The second indictment related to an incident at 17.42 on Thursday, 8 January 2015 where staff at the Asda shop in the Ards Shopping Centre reported to police that they had detained the applicant and his co-accused after they were observed passing through the check-out without paying for all the goods in their trolley. The applicant had attended the supermarket with a co-accused who was prosecuted separately and summarily for these offences. They had placed meat and other goods totalling £118.55 into bags within their trolley, proceeded to the check-out where they paid £30 for a number of items but didn't produce the 38 items contained within the shopping bags in the trolley. Police attended at Asda where the applicant had been placed in a small holding room. He offered to pay for the items but when notified of his arrest for theft he became agitated, aggressive, grabbed and punched a police officer with a can of beer he was holding which he sprayed around the room and over the officers. He resisted efforts to restrain him. Further police assistance was required and he was eventually subdued but continued to struggle and threatened to headbutt the police officer. As a result of the struggle, the officer was bleeding from the nose, which was bruised, he suffered scrapes around his left eye, a cut to his right temple, stiffness and pain in his neck. The goods fortunately were recovered and were fit for resale.

[5] We also now have the advantage of the circumstances in which the applicant committed the offence that led to the suspended sentence being imposed on him and that was again an opportunistic theft on his part where a shop assistant had left her own personal mobile phone, a gold coloured Samsung Galaxy S5 valued at over £500 on a counter within the shop and the applicant had helped himself to it. The phone was fortunately recovered, which probably played a large part in the fact that a suspended rather than an immediate sentence of imprisonment was imposed.

[6] So far as the incident in January 2015 was concerned, the applicant at interview claimed that he could not remember the incident because of his medication but eventually admitted that he was the person shown on the CCTV. He denied assaulting the police officer but admitted throwing beer around him and he denied resisting arrest but admitted not being compliant during the course of his arrest.

[7] He has an appalling criminal record comprising some 224 convictions, 10 of which were for burglary, 27 of which were for theft and 4 for convictions for handling stolen goods, so it is clear that he has an extensive record for dishonesty.

[8] The pre-sentence report indicates that he had an unsettled personal family background, that he became involved from early adolescence in the use of illegal drugs, abuse of alcohol and criminality and he was assessed by the Probation Service as not presenting as serious risk of harm but was assessed, unsurprisingly, as somebody who presented a high risk of future offending.

[9] The learned trial Judge accepted that the assessment was correct, which inevitably was the case. The applicant had paid no attention to previous disposals of various types in relation to him or indeed attempts to help him and he concluded that the current offences were significant offences, particularly having regard to his background record. As regards the possession of criminal property offence, the learned Judge referred to R v Corrigan [2010] NICA 23 in which the courts considered this type of offending behaviour and indicated the aggravating factors in relation to that offence and no issue is taken with his starting point of 18 months in relation to the first indictment on the charge of possessing criminal property.

[10] In terms of aggravating factors, the learned Judge considered the most significant to be the applicant's extensive record for offending similar to all the counts on the indictment. Further, he had carried out the current offending while on the licence period of a two year determinate custodial sentence, again imposed for theft, and the suspension of a six month determinate custodial sentence imposed for theft of the Galaxy phone and of course the last offence occurred while he was on bail which is a separate consideration which needs to be taken into account. The Judge identified starting points of 18 months' custody for the possession of criminal property, about which there is no dispute; 18 months custody for theft in relation to the previous record, which Mr Blackburn challenges; and nine months' custody for the assault on police and six months for resisting police.

[11] The applicant has placed some emphasis on the advice of the Sentencing Guidelines Council. This Court has indicated in McCaughey [2014] NICA 61 and other cases how the Sentencing Guidelines Council's comments should be taken into account. But it seems to us that the Guidelines in this case are of very little assistance to the applicant in any event. First of all, it is demonstrably clear from the Guidelines that the custody threshold is passed where there is any use of force in relation to theft, as clearly was the case in this instance. Secondly, in relation to theft from a shop, the Guidelines make clear that where the offender demonstrates a level of persistent or seriously persistent offending the community and custody thresholds may be crossed even though the other characteristics of the offence would otherwise warrant a lesser sentence. So it is clear that the Guidelines themselves recognise that the custody threshold is passed in this case and the approach that should be taken is markedly different in cases where the offender is a persistent offender. That is consistent with

the remarks of the English Court of Appeal in the case of R v Page [2004] EWCA Crim 3358 where the Court said that:

> "... shoplifting by isolated individuals, not accompanied by threats or violence, albeit a nuisance particularly to shopkeepers, was generally not dangerous or frightening ..."

Nor does it particularly, when compared with many other offences, damage the confidence of the public.

> "It was a classic offence for which custody should be the sentence of last resort and would almost never be appropriate for a first offence."

But the Court went on to say that:

> "Even where a defendant has to be sentenced for a large number of such offences, or where he or she had a history of persistent similar offending on a significant scale, the comparative lack of seriousness of the offence and the need for proportionality between the sentence and the particular offence, would, on a plea of guilty, rarely require a total sentence of more than two years and would often merit no more than 12 to 18 months."

[12] In this case the learned trial Judge, having given full discount in relation to this offence, imposed a sentence of 12 months which, in our view, was well within the Page Guidelines.

[13] Mr Blackburn has called into question whether the applicant received the discount that he ought to have received having regard to the fact that this was the first case to come before this Court from the Ards pilot, an arrangement whereby an offender has an opportunity at first appearance before the Magistrates to indicate an intention to plead guilty and to be referred directly to the Crown Court for disposal. This was a case in which the offender had come before the Court having, in his interviews, accepted that he was on the CCTV, but not having made full admissions.

[14] He had come before the Court having committed the theft but also significant offences of violence. He was caught red-handed in relation to the theft and in those circumstances it is difficult to see that he would normally have been entitled to anything approaching full discount. Nevertheless, the learned trial Judge, in our view

in a proper way, decided to exercise leniency having regard to the approach that the applicant had taken when he came before the court at first instance and provided him with full discount. If this man had failed to avail of that opportunity, then it seems to us that his discount would have been very substantially reduced indeed. If he had subsequently come to the Crown Court and pleaded guilty we suspect that the discount would have been reduced by the order of 50% in any event if not more, having regard to the fact that this was a red-handed case.

[15] We turn then to the question of totality. We agree that this Court in R v Hughes [2003] NICA 17 has indicated that it is important to consider that question and in deciding upon the imposition of a suspended sentence it is necessary to stand back and look at the suspended sentence and to address the question of whether the sentence for that offence, if it had been dealt with at the same time as the subject offence, would have required a consecutive sentence. But it seems to us that the initial offence was a substantial offence in relation to substantial property and that the subsequent theft offence was an offence which was committed with all of the aggravating factors, not just of the record, but of the fact that the determinate custodial sentence licence period was in place and that the offender was on bail at the relevant time. Those factors indicate to us that a consecutive sentence would have been an appropriate disposal.

[16] R v Richardson (unreported 19/12/97) indicates that the Court is particularly careful in relation to consecutive sentences where an offence is committed while the defendant is on bail and that was this case. The bail was in relation to an offence of dishonesty and the suspended sentence also was in relation to a similar offence of theft. So, in our view, looking at both the background and the authorities in relation to totality and bail, there is no support for the view that the Judge erred in any way in coming to the conclusions he did on the various sentences.

[17] For those reasons, we do not consider that the arguments, carefully and fully submitted by Mr Blackburn, are of any avail to the applicant and accordingly refuse leave to appeal.