

ENGLAND AND WALES / JUDGMENT

Morgan, R. v

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Neutral Citation Number: [2012] EWCA Crim 1939 IN THE COURT OF APPEAL CRIMINAL DIVISION Case No: 201203311/A1 Royal Courts of Justice Strand London, WC2A 2LL Date: Friday, 24th August 2012 B e f o r e: MR JUSTICE IRWIN MRS JUSTICE NICOLA DAVIES DBE

- ----- R E G I N A v STUART ANTHONY ROYSTON MORGAN
- ----- Computer Aided Transcript of the Stenograph Notes of WordWave International Limited A Merrill Communications Company 165 Fleet Street London EC4A 2DY Tel No: 020 7404 1400 Fax No: 020 7831 8838 (Official Shorthand Writers to the Court)
- ----- Mr P Mason appeared on behalf of the Applicant Mr L Chinweze appeared on behalf of the Crown
- ----- J U D G M E N T MR JUSTICE IRWIN: 1. 2. 3. 4. 5. 6. 7. On 2nd April 2012 in the Yeovil Magistrates' Court this applicant pleaded guilty to theft. By necessary consequence of that plea he was in breach of a suspended sentence order imposed on 2nd February 2012 at the Exeter Crown Court, comprising 6 months' imprisonment suspended for 2 years, with conditions of 2 years' probation supervision and a requirement to undergo treatment for drug dependency, by or under the direction of the probation services for 12 months for offences of burglary and possession of a Class A drug. On 4th May 2012, following committal, His Honour Judge Cottle, sitting in the Exeter Crown Court, sentenced the applicant as follows: for the substantive offence of theft, 9 months' imprisonment and for the breach of a suspended sentence, which was admitted, the breach being constituted in major part by the theft offence, 6 months' imprisonment, those sentences to be served consecutively to each other. The Registrar has referred the applicant's application for leave to appeal against sentence to the Full Court and granted a representation order and for reasons which will emerge, we grant leave and proceed to deal with the substance of the appeal. The theft offence facts can be summarised as follows. The applicant was asked to drive two other men to the Western Power distribution site in the early hours of the morning of the day concerned. They removed fittings from the bottom fence around the site and entered the compound. Police were summoned and saw a co-accused carrying a roll of metal towards a gap in the fence. The appellant was inside the compound standing by two large skips containing the rolls of copper wire. The appellant told police that the third man, who had been seen but who was not apprehended, was a man to who he owed money in relation to drugs that had been supplied to him. In interview about the theft, the appellant made no comment. All of the copper rolls of wire were recovered. They had been piled up

near the point of entry to the site. The facts of the burglary offence, for which the appellant had received the suspended sentence in February were as follows. On Friday 20th December 2011 the appellant was involved in a non dwelling-house burglary of a portacabin at James Pryce Tractors in Tiverton. Various items were stolen, including two Blackberry mobile phones which were later recovered at the appellant's home address. In interview the appellant had denied the offence but, of course, subsequently admitted his guilt. The appellant was at sentence 41 years of age. He had 56 convictions for theft and kindred offences and nine for fraud and like offences. He had received 12 weeks' imprisonment in 2009 for burglary and theft; 5 years' imprisonment in 2004 for six offences of burglary and theft, one theft from a motor vehicle, two offences of receiving stolen goods, six of obtaining by deception and one of attempting to obtain by deception. On that occasion he asked for 26 matters of a similar nature to be taken into consideration. He had received other sentences of imprisonment for burglary and theft in 1997, 1994 and as far as back as 1991. 8. 9. The pre-sentence report was prepared for the judge, in the course of which the appellant accepted responsibility for the theft but sought to mitigate it by stating he had been coerced into taking part because of the drug debt. He was said to have limited appreciation of the consequences to the community of his offending, with a poor attitude to victims and the community. His anti-social behaviour and pro-criminal attitudes were closely linked to his heroin addiction - as we pause to comment, no doubt was his long standing repeat offending of this kind. His progress on the suspended sentence order had been poor. He was in breach, by means of a failure to attend, in any event. He had consistently failed to supply clean drug test. His continued use of heroin meant that he remained at a high risk of re-offending.

10. The grounds of appeal advanced on behalf of this appellant included reference to the fact he pleaded guilty at the Magistrates' Court and was committed because of the suspended sentence of the breach. His co-accused, who had committed a greater role in the substantive offence of theft before the magistrates, was dealt with by them and dealt with by means of a community order. Thus it was said by Mr Mason, again with commendable clarity and brevity, that in circumstances where the magistrates felt that the case was suitable for sentence by them in respect of the co-accused, the sentence passed by the judge on this appellant was manifestly excessive.
11. The Registrar referred the application for leave to this court, really because of a technical problem. Looking at the memorandum of the entry on the register of the relevant Magistrates' Court, the substantive offence of theft was committed to the Taunton Crown Court, as it was then said to be, pursuant to paragraph 8(6) of Schedule 12 of the Criminal Justice Act 2003. It is accepted by all parties, as had been observed by the Registrar of Criminal Appeals, that was an error and the committal could not have been pursuant to that paragraph.

12. The legal position in relation to committals of this kind is technical. It is well established that an error in recording the basis of committal will not be fatal to the validity of the committal. This court will look to the substantive decision taken by the magistrates as to the basis of committal: see *R v Ayhan* [2011] EWCA Crim 3184) restating the effect of *R v Folkestone and Hythe Juvenile Court Justices ex parte R*
- (1982) 74 Cr App R 58. However, the basis of the committal is important, since a decision to commit by one or other route may result in a limit on the powers of sentence available to the receiving court. 13. If a defendant who is subject to a suspended sentence of imprisonment, breaches that sentence by committing a further offence, which is triable either way, and admits his guilt of that further offence, the magistrates have two matters to address: a fresh offence and an admitted breach of a Crown Court suspended sentence. It is important for the magistrates to keep in mind that those are discrete, separate matters. It will normally be the case that magistrates will feel that the Crown Court should deal with a breach where the Crown Court has imposed a suspended sentence. It should be noted that magistrates have the power to deal with such a breach themselves (see Schedule 12 paragraph 11(2) of the Criminal Justice Act 2003). However, as we have said, the SMITH BERNAL WORDWAVE Magistrates' Court will very often conclude that a breach of a Crown Court suspended sentence should be committed to the Crown Court.
14. What then of the substantive offence that constitutes the breach? Good sentencing practice requires that all matters should normally be dealt with together, perhaps particularly so, where the relevant breach of a suspended sentence is a fresh offence. In this case the committal of the breach is in conformity with Schedule 12 of the 2003 Act but the underlying power to commit is that laid down in section 6(1) of the Powers of Criminal Courts (Sentencing) Act 2000, the committal being under or consistent with paragraph 11 subparagraph 2 of Schedule 12, which is one of the enactments recited in section 6(4) of the 2000 Act. Thus the breach is, without more, committed by way of section 6(1).
15. The wording of section 6(1) may be important. The subsection reads as follows: "This section applies where a magistrates' court ('the committing court') commits a person in custody or on bail to the Crown Court under any enactment mentioned in subsection (4) below to be sentenced or otherwise dealt with in respect of an offence ('the relevant offence')." 16. It might be argued that "the relevant offence" may also comprise the substantive offence which constitutes the breach, in addition to the breach itself which is of course a separate criminal offence and which will be sentenced separately. Unless "the relevant offence" is the substantive offence, the latter cannot be committed under section 6(1). 17. Subsection (2) of the Act reads as follows: "Where this section applies and the relevant offence is an indictable offence, the committing court may also commit the offender, in custody or on bail as the case may require, to the Crown Court to be dealt with in respect of any other offence whatsoever in respect of which the committing court has power to deal with him (being an offence of which he has been convicted by that or any other court)."

18. This is certainly apt to catch any unrelated offence which should be dealt with at the same time. If the substantive crime which breaches the suspended sentence does not constitute all of or part of the "relevant offence" under section 6(1), then section 6(2) would be apt to catch the substantive offence also; ie section 6(2) would be an appropriate route for committal of that substantive offence alongside the breach.
19. Why does all this matter? The answer is because of the potential limits of sentencing powers arising from different committal routes. 20. Section 7 of the Powers of Criminal Courts (Sentencing) Act 2000 limits the powers of sentencing in the Crown Court where the committal has been by way of section 6 of the Act. Section 7(1) reads as follows: "Where under section 6 above a magistrates' court commits a person to be SMITH BERNAL WORDWAVE dealt with by the Crown Court in respect of an offence, the Crown Court may after inquiring into the circumstances of the case deal with him in any way in which the magistrates' court could deal with him if it had just convicted him of the offence." It follows that, without more, a committal pursuant to section 6(1) or 6(2) will attract the limits of sentencing powers which apply to the Magistrates' Court dealing with that offence.
21. However, that position is altered or qualified by the provisions of section 7(2) which read as follows: "Subsection (1) above does not apply where under section 6 above a magistrates' court commits a person to be dealt with by the Crown Court in respect of a suspended sentence, but in such a case the powers under [paragraphs 8 and 9 of Schedule 12 to the Criminal Justice Act 2003] (power of court to deal with suspended sentence) shall be exercisable by the Crown Court."
22. Because of the abrogation of the limit of sentencing powers derived from section 7(2), there is no difficulty in respect of the breach of a suspended sentence. The breach, in the pure sense, must be covered by the phrase "in respect of a suspended sentence" which is laid down in paragraph 7(2). Thus, in respect of the suspended sentence breach, it must be that the Crown Court has the powers of sentence, set out in paragraph 8 and 9 of Schedule 12 of the 2003 Act. Those powers mean that the Crown Court is not limited to the sentencing powers of the Magistrates' Court, at least in respect of the strict offence of breaching the suspended sentence. However, the matter may be less clear in respect of the substantive offence. The legislation does not say that section 6(1) is disapplied in respect of "the relevant offence", much less "any offence which constitutes a breach of a suspended sentence". 23. It may be possible that section 7(2) means that where a person is committed to be dealt with by the Crown Court in respect of a suspended sentence, then the Crown Court has untrammelled powers of sentence subject to the schedule to the 2000 Act in respect of all matters committed to the court. That would seem doubtful given the explicit reference to paragraphs 8 and 9 of Schedule 12 and powers contained therein which, on the face of it, are only really relevant to the breach problem. It follows that it may well be the case, absent a committal pursuant to section 3 of the 2000 Act, that section 7(1) is only disapplied in relation to the Crown Court powers on the breach proper of the suspended sentence and not in relation to the substantive offence which constitutes the breach, even where that is

committed to the Crown Court at the same time as the breach of the suspended sentence.

24. This analysis has not been fully addressed by either side in this case. It will require careful thought and written submissions before a satisfactory answer can be reached.
25. There is one clear route by which the difficulty could be avoided. Sections 3(1) and 3(2) of the Powers of Criminal Courts (Sentencing) Act 2000 read as follows: SMITH BERNAL WORDWAVE "(1) Subject to subsection (4) below, this section applies where on the summary trial of an offence triable either way a person aged 18 or over is convicted of the offence.
(2) If the court is of the opinion—
(a) that the offence or the combination of the offence and one or more offences associated with it was so serious that greater punishment should be inflicted for the offence than the court has power to impose ... [the Crown Court should, in the court's opinion, have the power to deal with the offender in any way to do with him as if he had been convicted on indictment] the court may commit the offender in custody or on bail to the Crown Court for sentence in accordance with section 5(1) below." Section 5(1) gives the Crown Court in circumstances of a section 3 committal full powers of sentence.
26. We have already observed that any Magistrates' Court is likely to commit an offender who has breached a Crown Court suspended sentence by the commission of a further offence. If, at the same time, the Magistrates' Court were to consider that the gravity of the substantive offence which constitutes the breach, and/or the gravity of that offence taken with any other associated matters, was such as to satisfy the test in section 3(2), then those offences should be committed pursuant to section 3 rather than section 6.
27. Returning to the facts of this case: it is conceded by all parties that it cannot properly have been committed by paragraph 8(6) of Schedule 12. The sensible and helpful remarks made in the course of looking at the file by the Deputy Justice's clerk for South Somerset and Mendip, lead directly, in our view, to the conclusion that the true basis of the committal here was pursuant to section 6 of the Act. It follows that unless the analysis we have indicated may be possible is correct, the powers of the Crown Court were limited in that case to those of the magistrates and the judge in sentencing this appellant to 9 months' imprisonment for the substantive offence of theft was acting beyond the powers he had. We reach that conclusion with no hint of criticism towards the learned judge. As will already be evident from this judgment, the tortuous route and the difficulty of following it in this case is obvious.
28. As to the argument on the merits, accepting a limit on the sentence here mirrors the merits of the case in our view. The complaint of disparity between a community penalty passed on the co-accused and a 9 month substantive sentence passed on this offender, in our view, means that disparity was real. There is a valid argument that the sentence was excessive irrespective of the limitation on sentencing powers.

29. This offender was equally culpable with his co-accused but he cannot have been regarded as more culpable than his co-accused. It seems inconceivable that had the magistrates expressly considered this offence of theft against the criteria under section 3, they could not have been satisfied with their powers of sentence and that is because the role of the two in the offending was very similar. SMITH BERNAL WORDWAVE
30. Having considered the matter with the merits in mind, as well as the limitation in sentence, it seems to us that the proper course is to quash the sentence of 9 months' imprisonment and substitute a sentence of 4 months' imprisonment, reflecting the plea of guilty and beginning at the starting point of the Magistrates' Court sentencing powers. That will be served consecutively to the 6 months passed by the learned judge in respect of the breach, making a total of 10 months' imprisonment. As we understand it, 112 days have been served and they will count towards the total 10 months' imprisonment in the case.
31. To that extent, this appeal succeeds. SMITH BERNAL WORDWAVE

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