

ENGLAND AND WALES / JUDGMENT

Phelps, R v

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Neutral Citation Number: [2009] EWCA Crim 2308 IN THE COURT OF APPEAL CRIMINAL DIVISION No. 2009/03690/A1 Royal Courts of Justice The Strand London WC2A 2LL Thursday 15 October 2009 B e f o r e: THE LORD CHIEF JUSTICE OF ENGLAND AND WALES (Lord Judge) MR JUSTICE PENRY-DAVEY and MR JUSTICE KEITH

- ----- R E G I N A

- v - STEVEN STANLEY PHELPS

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- ----- Mr N Rimmer appeared on behalf of the Applicant Miss M Hughes appeared on behalf of the Crown

- ----- J U D G M E N T Thursday 15 October 2009 THE LORD CHIEF JUSTICE: I shall ask Mr Justice Keith to give the judgment of the court. MR JUSTICE KEITH:

1. On 11 May 2009 at Milton Keynes Magistrates' Court, the appellant pleaded guilty to an offence of possessing an offensive weapon. He was committed to Aylesbury Crown Court for sentence where on 19 June 2009 he was sentenced by Judge Mowat to twelve months' imprisonment. He had on 12 July 2007 been sentenced to four weeks' imprisonment suspended for two years for possession of a bladed article. That sentence was activated to be served consecutively. However, in the course of the hearing the appellant became violent and attacked the dock officers. The judge chose to deal with that contempt of court summarily. She sentenced the appellant to two years' imprisonment for his contempt, to be served consecutively to his other sentences. The appellant now appeals against his sentence for his contempt. An appeal lies to the Court of Appeal as of right against an order of the Crown Court in exercise of its jurisdiction to punish someone for contempt. That is the effect of sections 13(1) and 13(2) (bb) of the Administration of Justice Act 1960.
2. Since the appellant is not appealing against the other sentences which the judge imposed, we need say little about them. The offence for which he was sentenced to twelve months' imprisonment had occurred exactly a year before he was committed to the Crown Court for sentence. The police had been called to where the appellant was living with his partner and her young son. They had been arguing, and the appellant had armed himself with a crossbow. When the police arrived, she was observed to have injuries on her face. In the

stand-off which then ensued, the appellant ignored a police instruction to disarm. He came out of the house with the crossbow which was loaded with a bolt and had been drawn back into the firing position, although the judge assumed in the appellant's favour that the safety catch was on.

3. The contempt of court occurred when the appellant's counsel was addressing the judge in mitigation. We take what happened from a statement which the judge made later that day, and from the statements of the dock officers who were attacked. The appellant became agitated because he thought, rightly or wrongly, that his counsel, Mr Nicholas Rimmer, who also appears for him today, was not saying everything which could have been said on his behalf. He was told by the dock officers, both of whom were women, to calm down. His response was to spit at the smaller of the two and to punch her in the face. The judge had also told him to calm down, but he had not and so she ordered him to be hand-cuffed. He resisted. At that stage, the court clerk raised the alarm by pushing the panic button. Three custody officers responded. All of them were men. The judge described the appellant as then going "completely wild", lashing out with his fists at everyone, including punching the smaller of the two dock officers in the face with all his strength, and punching the other dock officer in the shoulder. She was to tell the judge that she felt it snap. Although she thought at the time that it may have been dislocated, it transpired that it was tissue damage (although that, of course, was bad enough).
4. The appellant's father then came into the well of the court from the public gallery. The judge asked him to leave court, but he refused claiming that the custody officers were banging his son's head. The judge did not see them doing that. What she saw was the appellant struggling violently with the custody officers while they tried to restrain him, and the appellant's father lash out at them. While this was going on, the appellant was screaming abuse, including "fucking judge", "fucking judges", and "all judges are cunts". Over and over again he shouted: "Give me the maximum". Eventually, the custody officers managed to handcuff him and remove him from the court.
5. The judge had remained in court throughout, hoping that her presence would have an inhibiting effect on the appellant. She was to describe the incident as the most violent behaviour she had seen in court or anywhere else. By the end of the incident, she could see that the eyes of the smaller of the two dock officers were swelling and going red. We should add (although the judge was unaware of it) that the appellant is said to have continued to have behaved violently after being removed from the courtroom, including head-butting one of the police officers who arrived at the court after the commotion had been reported. However, we have put that to one side because it did not form part of the behaviour which constituted the contempt for which the appellant was sentenced.
6. The judge rose for a short time -- Mr Rimmer told us that it was for ten minutes or so -- and then returned to court in the absence of the appellant. He had by then been arrested for his attack on the dock officers, and had been taken to a local police station. In the immediate aftermath of the incident, the judge's instinct had been that it would not be "particularly

productive" to deal with him summarily for his contempt. However, when she returned to court, she was contemplating dealing with the appellant for the contempt there and then. When she told Mr Rimmer that, he did not argue otherwise. He added that, as he was not in a position to take instructions, there was nothing that he could usefully say. Mr Rimmer proceeded to complete his mitigation in relation to the offence for which the appellant had been committed to the Crown Court for sentence and whether the suspended sentence should be activated.

7. In the end, the judge decided to deal with the appellant summarily for his contempt of court. She did not rise again, but proceeded to sentence him there and then. She thought that his behaviour had made it impossible for him to be brought back into court for him to hear her sentencing remarks. After sentencing him for the offence for which he had been committed to the Crown Court for sentence, and after activating the suspended sentence, she then passed the sentence of two years' imprisonment for the contempt, which was the maximum sentence available to her in the light of section 14(1) of the Contempt of Court Act 1981. She added that it was not for her to decide whether any other charges should be brought arising out of the incident; that was a matter for the police and the Crown Prosecution Service once they had taken into account the wishes of those the appellant had attacked. In fact, no further charges were laid against the appellant or his father.
8. Mr Rimmer does not suggest that it was inappropriate for the judge to have dealt with the appellant's contempt summarily. The need for the court to act decisively, to show that its authority has not been undermined, and to demonstrate that behaviour of this kind will never be tolerated and that it will be dealt with quickly and severely, justified the use of a truly summary procedure in this case. Nor is it suggested that a more formal procedure should have been followed. There could, after all, have been no dispute about what the appellant had done, the judge having had as good a view of things as anyone else in the courtroom. The criticisms of the judge are that this was not an appropriate case for the maximum sentence of two years, and that in any event the judge should have given herself some time to reflect about what the SMITH BERNAL WORDWAVE appropriate course to take was, and that she should have given Mr Rimmer the opportunity to give the appellant advice and to take his instructions about what it was that had prompted his outburst. Mr Rimmer would then have been in a position to address the judge in mitigation, and the appellant would have had an opportunity to apologise for his conduct. In those circumstances, the judge might have passed a shorter sentence.
9. We should add that appealing against his sentence to the Court of Appeal was not the only thing which the appellant did in his efforts to have his sentence reduced. On 14 July 2009, his solicitors wrote to the Crown Court requesting a hearing (presumably before Judge Mowat) so that he could "purge" his contempt. In support of that approach, Mr Rimmer relied in his skeleton argument on the decision of the Court of Appeal in *Delaney v Delaney* [1996] QB 387, which he submitted showed that proceedings for contempt can be restored after sentence so that consideration could be given to whether the contemnor had purged his

contempt. The letter was referred to the resident judge at Aylesbury Crown Court. He refused the request on the basis that "criminal contempts are not like civil contempts: they cannot be purged". As a result of that letter, the appellant's solicitors asked the Criminal Appeal Office for the appellant's appeal against his sentence which had already been lodged to be listed for hearing.

10. In our view, the resident judge was right to conclude that an application to purge the appellant's contempt could not be entertained. That was because the appellant had been sentenced to a determinate term of imprisonment for the criminal offence of contempt. It is true that section 14 of the 1981 Act expressly preserves the court's power at common law to order the early discharge of someone committed to prison for contempt of court, but at common law a person committed to prison for contempt of court for a fixed term could not be discharged. As Potter J (as he then was) said in *R v Montgomery* [1995] 2 Cr App R 23, at p 30B, "any analogy with committal of a litigant to prison for contempt (by disobedience to an order) in civil proceedings was inapt". In any event, Delaney did not apply to contempts in the face of the court.
11. Having said that, the Crown Court has the power under section 155(1) of the Powers of Criminal Courts (Sentencing) Act 2000 to vary or rescind a sentence imposed on an offender. Indeed, with effect from 14 July 2008, the period during which it can do so was increased from 28 days to 56 days from when the sentence was imposed. Since the judge had sentenced the appellant before he had had a chance to calm down and decide whether he wanted to apologise for his conduct, it may have been appropriate for the resident judge to have treated the appellant's solicitors' request for a hearing to purge his contempt as an application for a variation of his sentence under section 155(1). Indeed, the Crown Court's power to recall its original sentence was the way in which the Court of Appeal justified the reduction of the offender's sentence by the Crown Court in *Montgomery*.
12. The courts have long acknowledged that a balance must be struck between the need for judges to be seen to act promptly and decisively when a contempt is committed in the face of the court, and the danger that the judge is thought to be over-reacting to thoroughly unacceptable behaviour. The conventional wisdom is that in most cases a cooling-off period, together with other procedural safeguards, may be appropriate. That is what Lawton LJ had in mind when he offered the following guidance in *R v Moran* (1985) 81 Cr App R 51 at p 53: "First, a decision to imprison a man for contempt of court should SMITH BERNAL WORDWAVE never be taken too quickly. The judge should give himself time for reflection as to what is the best course to take. Secondly, he should consider whether that time for reflection should not extend to a different day because overnight thoughts are sometimes better than thoughts on the spur of the moment." Lawton LJ also addressed the question whether it was appropriate to proceed to sentence without giving the contemnor the opportunity to take legal advice. He said: "Thirdly, the judge should consider whether the seeming contemnor should have advice. We do not accept the proposition which was tentatively put forward on this appeal that this contemnor had a right to legal advice.

Sometimes situations arise in court when the judge has to act quickly and to pass such sentence as he thinks appropriate at once, so there cannot be any right to legal advice. Justice does not require a contemnor in the face of the court to have a right to legal advice. But if the circumstances are such that it is possible for the contemnor to have advice, he should be given an opportunity of having it." Lawton LJ added that "giving a contemnor an opportunity to apologise is one of the most important aspects of this summary procedure, which in many ways is Draconian". That is eminently sensible advice, though it would be wrong to assume that every apology amounts to a genuine expression of regret. Contemnors may be apologising for their conduct because they know that that may be the route to a shorter sentence.

13. On balance, we think that it was perhaps a little hasty for the judge to sentence the appellant there and then. This all happened in the morning. The judge could have put the case back until after lunch or the following morning, in order to give the appellant time to calm down and be brought back to the court building. That would also have provided Mr Rimmer with the opportunity to speak to him, and it would have afforded the appellant the chance to apologise if he chose to. It would also have enabled the judge to collect her thoughts, to hear whether there was any mitigation, and to spare her from any possible criticism that she had responded to the appellant's behaviour with a knee-jerk reaction. Most important of all, it might have resulted in her imposing a lesser sentence.
14. Having said all that, this was on any view shocking behaviour on the part of the appellant. Front line officers must be protected. The appellant took advantage of the fact that the officers initially with him in the dock were women. Moreover, he has an appalling history of lashing out at authority. He is only 23 years of age, and yet he has six previous convictions for assaulting police officers in the execution of their duty, and two more for resisting or wilfully obstructing police officers in the execution of their duty. The pre-sentence report on him spoke of his family sharing "anti-authority views", and it said the appellant's lifestyle had SMITH BERNAL WORDWAVE "characteristically been focused on drinking, the pub, fighting and clashing with authority and the police". Had the appellant's behaviour in the dock resulted in him being charged with offences of assault occasioning actual bodily harm instead of him being dealt with summarily for contempt, we think that even upon pleas of guilty he could have expected a sentence similar to the one he actually received, given the aggravating feature that his behaviour constituted a contempt of court as well. It is difficult to imagine a worse case of bad behaviour in court -- at any rate, behaviour which did not result in the contemnor facing really serious charges.
15. However, we cannot exclude the possibility that if the appellant had been given an opportunity to apologise, he would have taken it, and that his apology would have been treated by the judge as a genuine expression of regret on his part. He has, after all, today apologised to the court through Mr Rimmer. Had he had the opportunity to do that, it may well be that the judge would have been persuaded to reduce the sentence which she would otherwise have imposed. We cannot say that it was wrong for the judge to have taken an

additional two years' imprisonment as her starting point in the light of the appellant's behaviour. It was severe, but not in the circumstances inappropriate. But since the judge may well have been persuaded to impose a slightly shorter sentence had she heard Mr Rimmer in mitigation -- namely that the appellant's reaction had been the instinctive response of a man who was at a low point in his life and in the grip of alcohol dependence -- and had his apology been conveyed to the judge, we propose to reduce the appellant's sentence for his contempt of court by three months to one of 21 months' imprisonment. To that extent, this appeal is allowed, though it is to be noted that not only will the appellant serve only half of that sentence, but unlike the other sentences of imprisonment he receives, he will be entitled to be released unconditionally in respect of that sentence. That is the effect of section 258(2) of the Criminal Justice Act 2003. SMITH BERNAL WORDWAVE

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