[2022] EWCA Crim 692

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/01338/B2, 2022/01340/B2

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 10th May 2022

B e f o r e:

LORD JUSTICE COULSON

MRS JUSTICE FARBEY DBE

MR JUSTICE BOURNE

R E G I N A

- v -

DARREN BALAAM

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr B O'Toole appeared on behalf of the Appellant

Miss G Noble appeared on behalf of the Crown

J U D G M E N T

Tuesday 10th May 2022

LORD JUSTICE COULSON:

1. The appellant is now aged 38. On 28th April 2022, in the Crown Court at Guildford, he was convicted of failing to surrender to bail. He was sentenced by Her Honour Judge Lees ("the judge") to 28 days' imprisonment. He now appeals against both his conviction and his sentence.

2. The appeals are brought as of right. Section 6(5) of the Bail Act 1976 equates a failure to surrender with a criminal contempt of court, and, perhaps anachronistically in this day and age, pursuant to section 13 of the Administration of Justice Act 1960, an appeal against a committal order for contempt can be brought without leave. The appellant has therefore sought to avail himself of that right as to both conviction and sentence.

3. The facts of the underlying alleged offence were these. On the night of 25th to 26th April 2016, some meat and cash were stolen from a butcher's shop in Banstead, Surrey, where the appellant was employed. His employer concluded from the CCTV footage that the appellant had been responsible. He was charged with burglary on 20th October 2016 and sent for trial by the magistrates on 7th December. He was present on that occasion, and again on 4th January 2017, when he was arraigned and pleaded not guilty. On that occasion, he was granted conditional bail. He instructed solicitors and they prepared and served a defence case statement on his behalf on 24th March 2017.

4. The case was placed in a three week warned list for April, with a back-up date in May/June, but it was not reached in either of those periods. The case was therefore listed for further directions on 21st July 2017, when the appellant was represented by Mr Vanstone of counsel. The appellant did not attend that hearing. It remains unclear whether he ought to

have attended or whether in fact his attendance was not required. At some point in 2017, it is apparent that the appellant was no longer in contact with his solicitor, Mr Middlehurst of Maclaverty, Cooper, Atkins.

5. The trial was fixed for 2nd November 2017. The evidence was that Mr Middlehurst thought he would probably have sent the appellant the necessary notification of the date after the hearing by way of a text message, but there would therefore be no paper trail. Mr Middlehurst apparently accepted that he may not have done so, because he did not always remember.

6. Subsequent to the hearing before the judge, there has been some further evidence about the communications between the appellant and his solicitors in the run-up to the trial. Mr Vanstone endorsed his brief for the trial on 2nd November 2017 in an admirably comprehensive way. His note recorded that, in the run-up to the trial, Mr Middlehurst had left voicemail messages on the contact number that he had for the appellant; he had texted that number; he had emailed the email address that he had for the appellant; and he had also written to his last known address. None of those communications was answered.

7. On 2nd November (the trial date) the appellant failed to surrender at Kingston Crown Court. Enquiries were made about his whereabouts. It was then that it became apparent that, despite Mr Middlehurst's efforts, he had not had a communication from the appellant for some time. As a result of those enquiries, a warrant not backed for bail was issued. The warrant was executed on or around 12th October 2021, when the appellant returned from a short holiday and came to the attention of immigration officials at Gatwick Airport. He was bailed to return to Guildford Crown Court on 27th October 2021, on which day the prosecution offered no evidence in respect of the burglary at the butcher's shop. The appellant did not admit the offence of failure to surrender under the Bail Act.

8. The substantive hearing in respect of that offence did not take place before Judge Lees until 28th April 2022. The appellant gave evidence. He said that he had not been notified of the trial date. He admitted that he knew there was going to be a trial, and accepted that he was aware of his duty to stay in contact with his solicitors and the court. He said that he assumed that the trial had been dismissed. He accepted that he had made no attempt to contact his solicitors at any stage.

9. Having heard the appellant's evidence, the judge concluded that he had been deliberately untruthful. In particular she found:

> "The evidence which has been provided does not demonstrate he had reasonable cause to fail to attend his trial, simply that the solicitors have no records to say whether or not they warned him as to the trial date, but the solicitor with conduct would 'not be surprised if dates were missed by us' because the firm was closing and had poor IT. The solicitor did not deal with what he would do in every case following a client's failure to attend a trial … but an attempt at communication once that was realised would be expected and required by a trial judge."

(Of course, we now know from Mr Vanstone's endorsement of his brief what the judge did not; that such attempts at communication were made repeatedly by Mr Middlehurst). The judge went on:

> "[The appellant], who accepts it was his responsibility to do so and who was subject to the Bail Act, did not contact the solicitors or the court about his case. He has given evidence today that he assumed the case had been dismissed. There is no foundation for that assumption. He accepts he did not contact the solicitors at all. The [appellant] has given evidence of his criminal record, indicating a lengthy familiarity with court proceedings by 2017.
>
> I find on the balance of probabilities at the very least that the [appellant] had no reasonable excuse to fail to attend his trial.

> The reality is he simply chose not to engage with the solicitors he had instructed or with the court, as was required of him, and so he is guilty of the charge under the Bail Act and so I need to consider the consequences of that."

10. As to sentence, the judge reiterated that she regarded the appellant's evidence, that he assumed that the case had been dismissed, as deliberately untruthful. She therefore found that, for the purposes of the applicable sentencing guidelines, the appellant's culpability was in category A, because his failure to contact his solicitors at any stage represented a deliberate attempt to evade or delay justice. As to harm, the judge concluded that the offence was in category 1 because of the effect on the administration of justice, and in particular the fact that there could be no trial as a result of the appellant's failure to surrender to bail.

11. The recommended starting point for a category 1A offence is six weeks' custody, with a range from 28 days to 26 weeks. The judge put the sentence in this case at the lowest point within that recommended range (i.e. 28 days), because she recognised that, because of the personal difficulties that the employer was having at the time of the trial in November 2017, he had indicated that he no longer wished to support the prosecution case.

12. Before turning to the detailed arguments, it is appropriate to set out the relevant parts of section 6 of the Bail Act 1976:

> "6. Offence of absconding by person released on bail.
>
> (1) If a person who has been released on bail in criminal proceedings fails without reasonable cause to surrender to custody he shall be guilty of an offence.
>
> (2) If a person who —
>
> (a) has been released on bail in criminal proceedings, and

> (b) having reasonable cause therefor, has failed to surrender to custody,
>
> fails to surrender to custody at the appointed place as soon after the appointed time as is reasonably practicable he shall be guilty of an offence…"

13. We turn to the appeal against conviction. Mr O'Toole submitted that the judge had said that she was not concerned with the offence under section 6(1) and that the only issue was under section 6(2). He put the critical submission at paragraph 17 of his helpful Grounds of Appeal document in this way:

> "It is submitted that the learned judge's ruling was incorrect in law. A person found by a court to have reasonable cause to fail to surrender because he was not advised by his solicitor of the date of the hearing cannot be guilty of failing to surrender as soon as reasonably practicable thereafter because knowledge of the date of the hearing when he was required to attend is a fundamental element of the offence. A separate query arises over whether a person who was unaware of a hearing date but subsequently became aware of it after the hearing and then failed to surrender as soon as reasonably practicable could be guilty of an offence under section 6(2)(b), but that was not the evidence here. The learned judge accepted that the applicant had never been aware of the hearing date on 2nd November 2017 but ruled that the onus on him was to surrender to the court at some later time because he would have been aware of the proceedings since first appearing at the PTPH on 4th January 2017."

14. It seems to us that that argument fails for a number of separate reasons. Primarily, we find that it is based on a false premise. At no time did the judge conclude that the appellant was not guilty of an offence under section 6(1). On the contrary, she expressly found, in the passage that we have cited, that the evidence did not demonstrate that the appellant had reasonable cause not to attend his trial. She accepted, at least on the evidence before her, that there were some doubt as to whether or not the solicitors had told the appellant about the trial date following the hearing on 21 July 2017. But, as she went on to say, that could be no

defence to the charge under section 6(1) because the appellant had properly accepted that it was his responsibility to stay in contact with his solicitors and the court. She found on the evidence that he had no reasonable excuse to fail to attend his trial. She therefore found on the evidence that he was in breach of section 6(1).

15. We accept that some of the debate prior to the judge's ruling does separately consider section 6(1) and section 6(2), and that some of that debate is a little muddled. But we are entirely satisfied that, when she came to give her ruling as to whether or not there was a breach of section 6(1), the judge had no difficulty in concluding that there had been such a breach. There was therefore no reasonable excuse for the appellant's non-attendance on 2nd November 2017.

16. Furthermore, since the hearing before the judge, we have seen the further evidence, and in particular the helpful endorsement on his brief by Mr Vanstone. That made it plain that the solicitors had indeed tried every means possible of alerting the appellant to the trial date. That further evidence only confirms the judge's conclusion that he had no reasonable excuse for his non-attendance on 2nd November 2017.

17. On that basis, therefore, the appeal against conviction, which assumes no finding against the appellant under section 6(1), must fail.

18. We ought, however, to deal with the substance of the argument anyway, because we do not accept Mr O'Toole's submission about section 6(2) in any event. His argument amounted to saying that, if it is unclear whether or not a firm of solicitors told their client about the specific trial date, that client can never be guilty of a failure to surrender under 6(1) or 6(2), and can ignore his own obligations to stay in contact with the solicitors and the court, or to find out what was happening with his trial, despite the terms of his bail. Such a submission

is, in our view, untenable. Section 6(2) is there as a fallback to ensure that, whatever the position about the specific non-attendance at the trial, or any actual or inferred knowledge of the date, a defendant is not absolved from his obligation under the Bail Act, and in particular the obligation to stay in touch with solicitors and with the court. In our view, the judge would have been entitled, on the evidence, to conclude that an offence under section 6(2) had been made out, even if (which we do not accept) she had ruled that there was no breach of section 6(1). The appellant did not require express notification of the precise trial date to be in breach of section 6(2).

19. Finally on this point, we note that, at one stage during his oral submissions, Mr O'Toole submitted that, because in this case there was no express condition of bail that the appellant keep in contact with his solicitors, he was not under any such obligation. We reject that submission. It is misconceived. In our view, there is a clear obligation on the part of every defendant, whether it is stated in the bail conditions or not, to stay in touch with his solicitors and the court. The duty is on the defendant; it is not on anyone else. That is ultimately because it is for the defendant to show a reasonable excuse for his or her non-attendance, and not anyone else.

20. For all those reasons, therefore, the appeal against conviction is dismissed.

21. We turn to the appeal against sentence. There could be no doubt that the judge was entitled to put this offence within culpability category A. That is because the appellant properly accepted that he was aware of the duty to stay in contact with his solicitors, and therefore to attend court when required. But it is also because, on the facts of this particular case, one of the appellant's previous convictions was a failure to surrender to bail. The judge was quite right to say that that was not an aggravating factor in terms of the sentence itself, because it was now some 20 odd years old. But that previous offence should have ensured

that this appellant, of all people, was keenly aware of his culpability if he ignored his obligations under the Act.

22. Thus, the only potential criticism that can be made of the sentence is that the judge was wrong to put the offence into category 1 harm. That is said to be because of the employer's separate decision in November 2017 that, for his own personal reasons, he no longer felt able to support the prosecution. The argument is that, as a result, there would not have been a trial anyway. In this way, the appellant is seeking to take advantage of that coincidence to suggest that the harm caused by his failure to surrender was not in the top category.

23. We accept that, at least in general terms, the state of the prosecution case against a defendant may be a relevant consideration when the judge considers harm for the purposes of sentencing that defendant for failing to surrender. But we do not consider that it is necessary – or indeed appropriate – for the judge in this case, when dealing with an offence of failing to surrender so long after the event, to speculate too long about what might have happened to the prosecution case if the appellant had kept in contact with his solicitors and attended court. The employer could have been the subject of a witness summons. The trial might have been effective. It is acknowledged that the CCTV footage was so poor in quality that it required some evidence from the employer. But there may have been ways in which that evidence could have been adduced. On the facts of this case, it certainly goes too far to say that, because of the employer's own personal circumstances, there would have been no trial in any event.

24. In our view, the judge had to look at harm in the round. She was entitled to conclude on the evidence that there had been a delay and an interference with the administration of justice as a result of the appellant's non-attendance, regardless of whether or not the employer was continuing to support the prosecution.

25. Crucially, the judge recognised that the employer's reluctance to support the prosecution by late 2017 was a relevant factor in the sentencing exercise. She recognised that by imposing a sentence of 28 days' imprisonment, which was right at the bottom of the category 1A recommended range. It is also to be noted that the 28 days is less than the highest recommended term under category 2A. In other words, the judge properly recognised all the difficulties with the state of the prosecution case in 2017, and arrived at a sentence that met the facts in the round. It cannot be suggested that the sentence was manifestly excessive.

26. For those reasons, therefore, like the appeal against conviction, the appeal against sentence must be dismissed.
