[2015 Gib LR 274]

POVILATIS v. R.

SUPREME COURT (Jack, J.): September 22nd, 2015

Criminal Procedure—appeals—appeals against sentence—Supreme Court to undertake limited review of Magistrates' Court's sentence—only to interfere if (i) sentence not justified by law, (ii) wrong factual basis, (iii) irrelevant considerations or omission of relevant consideration, (iv) failure to honour legitimate expectation, or (v) wrong in principle or manifestly excessive

Criminal Procedure—appeals—appeals against sentence—Supreme Court Act 1960, s.15 irrelevant to Supreme Court's approach to appeals against sentence—English High Court no jurisdiction to hear appeals against sentence

The appellant was charged in the Magistrates' Court with one count of theft.

The appellant stole an expensive mobile phone from a shop. He was charged with theft and pleaded guilty. He had numerous previous convictions for theft, including at least one from the same shop. The Magistrates' Court sentenced him to six months' imprisonment.

On appeal against sentence, the appellant submitted that (a) when hearing an appeal against sentence, the Supreme Court should adopt the broad approach of the English Crown Court and sentence afresh on the basis of all the evidence, rather than merely engaging in a review of the Magistrates' Court's sentence; (b) this submission was supported by s.15 of the Supreme Court Act 1960 (which provided that, in default of alternative legislative provision, the Supreme Court should exercise its jurisdiction in substantial conformity with the law and practice of the

English High Court) as this section gave rise to the inference that the English Crown Court's approach should be adopted given that the English High Court had no jurisdiction to hear appeals against sentence; and (c) his sentence should be overturned and replaced with a sentence of three months' imprisonment as indicated by the English Sentencing Guidelines Council's guidelines on theft from a shop.

The Crown submitted in reply that (a) the Supreme Court could only engage in a limited review of the sentence imposed by the Magistrates' Court, and (b) in undertaking such a review, it should adopt the restrictive approach to appeals against sentence taken by the English Court of Appeal of interfering only when (i) the sentence was not justified by law, (ii) it had been passed on the wrong factual basis, (iii) some matter was improperly taken into account or there was some fresh matter to be taken into account, (iv) there was a failure to honour a legitimate expectation, or (v) the sentence was wrong in principle or manifestly excessive.

Held, dismissing the appeal:

(1) The Supreme Court, when hearing appeals against sentence from the Magistrates' Court, would adopt the restrictive approach taken by the English Court of Appeal. Sections 276–277 of the Criminal Procedure and Evidence Act 2011 required the Supreme Court to take this approach when hearing appeals against conviction, and it was unlikely that Parliament intended the court's approach to appeals against sentence to be significantly different from its approach to appeals against conviction. Section 15 of the Supreme Court Act 1960 did not allow the court to adopt the broad approach of the English Crown Court because it referred specifically to the English High Court and not to the Crown Court. As the English High Court had no jurisdiction comparable to that of the Supreme Court of Gibraltar to hear appeals against sentence from the Magistrates' Court, s.15 did not assist in construing s.276 (para. 11; paras. 13–14; para. 16).

(2) Adopting this restrictive approach, the appellant's sentence would be upheld and his appeal would be dismissed. The only relevant question was whether the sentence imposed by the Magistrates' Court was wrong in principle or manifestly excessive. The sentence was harsh but not so harsh that the court would interfere. The English Sentencing Guidelines Council's guidelines on theft from a shop suggested a lower sentence, but they acknowledged that the circumstances surrounding theft from a shop could vary significantly. The appellant stole reasonably high value goods, there was evidence that he targeted this shop specifically, he had no means of supporting himself except through crime, and he was a serial criminal. In these circumstances, the Magistrates' Court was entitled to take the view that a deterrent sentence was necessary and the sentence did not fall outside the band of sentences which it could have properly imposed (paras. 17–20).

Cases cited:
(1) *R.* v. *Cooper*, [1969] 1 Q.B. 267; [1968] 3 W.L.R. 1225; [1969] 1 All E.R. 32; (1968), 53 Cr. App. R. 82, *dicta* of Widgery, L.J. considered.
(2) *R.* v. *Swindon Crown Ct., ex p. Murray* (1997), 162 J.P. 36, distinguished.

Legislation construed:
Criminal Procedure and Evidence Act 2011, s.276: The relevant terms of this section are set out at para. 6.
s.277: The relevant terms of this section are set out at para. 7.

Supreme Court Act 1960, s.15: The relevant terms of this section are set out at para. 13.

J. Daswani for the appellant;
M. Zammitt for the respondent.

1 **JACK, J.:** This is an appeal against a sentence of six months' imprisonment passed by the Magistrates' Court on July 29th, 2015.

The facts

2 The facts are straightforward. Mr. Povilatis, at about 2.30 p.m. on June 11th, 2015, entered the Netgear electronics shop in Waterport Terraces. He took an iPhone 6 valued at £469 and left. The theft was noticed shortly afterwards, but he had been able to make his getaway. Subsequently, on July 28th, 2015, the police were patrolling Winston Churchill Avenue when they saw him and arrested him for the theft from Netgear. The following day, he pleaded guilty at the Magistrates' Court.

3 Mr. Povilatis has previous convictions in Gibraltar. In 2013, he was sentenced to 6 weeks' imprisonment for theft, attempted theft and 2 charges of going equipped for theft. In June 2014, he was sentenced to 4 months' imprisonment for burglary and 3 terms of 6 weeks for 3 thefts, all sentences to run consecutively, thus giving a total of 4 months and 18 weeks (about 7½ months). That was reduced on appeal to a total of 20 weeks' imprisonment.

4 In August 2014, he was given a further two months for burglary. In November 2014, he was given three months' imprisonment for theft. In January 2015, he was fined £300 for theft. At least one of these previous offences involved the same Netgear shop, which suggests a degree of targeting by Mr. Povilatis.

5 The mitigation advanced is that Mr. Povilatis committed the offences out of financial desperation. He had come to Gibraltar from his native Lithuania in order to seek work. He had, it is said, been unable to find work, although I have to say I find that surprising in the light of the

booming economy here in Gibraltar with negligible rates of unemployment. At any rate, his list of previous convictions shows that he supports himself by dishonesty.

The approach to sentencing appeals

6 The Supreme Court's powers in relation to criminal appeals are given by s.276 of the Criminal Procedure and Evidence Act 2011, which, so far as relevant, provides:

> "(1) On an appeal against conviction, or against conviction and sentence, other than an appeal upon a case stated, the Supreme Court may—
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> (a) quash the conviction and acquit the appellant;
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> (b) affirm the conviction;
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> (c) substitute a conviction for any other offence of which the appellant could have been lawfully convicted if he had been tried in the first instance upon an indictment for the offence with which he was charged or of which he could have been lawfully convicted by the Magistrates' Court;
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> (d) in either of the cases mentioned in paragraph (b) and (c), affirm the sentence passed by the Magistrates' Court or substitute for it any other sentence, whether more or less severe and whether of the same nature or not, which that court would have had power to pass; or
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> (e) order a re-trial of the appellant before the Magistrates' court.
>
> (2) On an appeal against sentence only, the Supreme Court may—
>
> (a) affirm the sentence; or
>
> (b) substitute any other sentence, whether more or less severe and whether of the same nature or not, which the Magistrates' Court would have had power to pass.
>
> (3) On an appeal against any other order, the Supreme Court may affirm, quash or vary the order, and in any such case the Chief Justice may make any consequential or incidental order which may appear just and proper.
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> (4) Subsections (1) to (3) have effect subject to any enactment relating to any such appeal which expressly limits or restricts the powers of the Supreme Court on the appeal.
>
> (5) This section applies whether or not the appeal is against the whole of the decision."

7 It was not suggested that s.276(4) is relevant to the current appeal. Section 277 of the Act gives specific directions as to the approach to be taken by the Supreme Court when hearing an appeal against conviction. The section provides:

> "(1) Subject to subsection (2), the Supreme Court, upon the hearing of an appeal against conviction, must allow the appeal if it thinks that—
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> (a) the verdict should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
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> (b) the judgment of the Magistrates' Court should be set aside on the ground of a wrong decision of any question of law; or
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> (c) on any ground there was a material irregularity in the course of the trial,
>
> and in any other case must dismiss the appeal.
>
> (2) The Supreme Court, even if it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, may dismiss the appeal if it considers that no miscarriage of justice has actually occurred.
>
> (3) Subject to this Part, the Supreme Court must, if it allows an appeal against conviction, quash the conviction and direct a judgment and order of acquittal to be entered."

8 There is no corresponding section dealing with appeals against sentence. This therefore gives rise to an important point of principle. Is the Supreme Court deciding itself what sentence it itself would pass? Or is the court's function limited to a review of the Magistrates' Court's sentence, and if so, on what principles?

9 The wording of s.277 is taken from s.2 of the Criminal Appeal Act 1968 (UK) as originally enacted. (The wording of the English legislation was amended by the Criminal Appeal Act 1995 (UK): see Archbold, *Criminal Pleading, Evidence & Practice*, at para. 7–43 (2014 ed.).) Section 2 dealt with appeals to the Court of Appeal from a jury trial in the Crown Court. The classic statement of the approach of the Court of Appeal on an appeal against conviction is Widgery, L.J.'s judgment in *R.* v. *Cooper* (1) ([1969] 1 Q.B. at 271). This was an identification case and he said that it was—

> ". . . a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses,

> and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act, 1966—provisions which are now to be found in section 2 of the Criminal Appeal Act, 1968—it was almost unheard of for this court to interfere in such a case.
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> However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it."

10 It is clear, in my judgment, that a similar approach needs to be taken to an appeal against conviction by the Magistrates' Court.

11 In relation to appeals against sentence, the principles upon which the English Court of Appeal acts are summarized in *Archbold* (*op. cit.*, at para. 7–135) as follows:

> "In broad terms, it is submitted that the court will interfere when: (a) the sentence is not justified by law, in which case it will interfere not as a matter of discretion but of law; (b) where sentence has been passed on the wrong factual basis; (c) where some matter has been improperly taken into account or there is some fresh matter to be taken into account; (d) where there has been a failure to honour a legitimate expectation; or (e) where the sentence was wrong in principle or manifestly excessive."

This is a restrictive approach. The court's function is a very limited one. Importantly, this approach is completely judge-made. There is nothing in the wording of the 1968 Act which obliged the Court of Appeal to adopt it.

12 By contrast, in England, when considering an appeal against sentence from the Magistrates' Court, the question for the Crown Court is not whether the sentence passed by the magistrates was within their proper discretion to pass, but what sentence on all the evidence was the right one: *R.* v. *Swindon Crown Ct., ex p. Murray* (2). In other words, the appeal court is starting the sentencing exercise itself. It should sentence "without regard to the decision of the justices": *Archbold* (*op. cit.*, at para. 2–192).

13 There is nothing in the wording of the 2011 Act to indicate which approach Parliament intended the court to apply when considering appeals against sentence. Mr. Daswani suggests that s.15 of the Supreme Court

Act 1960 is in point. This provides that, in default of alternative legislative provision, the Supreme Court should exercise its jurisdiction "in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice." He submits that this supports the inference that the approach taken on an appeal to the Crown Court should be followed.

14 The difficulty with this argument is that the Crown Court is not the same as the High Court in England: see ss. 4 and 8 of the Senior Courts Act 1981 (UK) (formerly the Supreme Court Act 1981 (UK), but renamed by the Constitutional Reform Act 2005 (UK), Schedule 11, para. 1(1)). The High Court does hear appeals by way of case stated from the Magistrates' Court and judicial reviews of decisions of the Magistrates' Court, but has no jurisdiction comparable to that of the Supreme Court here on appeal from the Magistrates' Court. Accordingly, s.15 does not assist in construing s.276.

15 Mr. Zammitt suggested that adopting the approach of the English Court of Appeal would mean that the Supreme Court was acting effectively on the same principles as would be applied in a judicial review. I disagree. The English Court of Appeal, in hearing an appeal against sentence, is generally determining whether a sentence is manifestly excessive. That is not a test used on judicial review.

16 In my judgment, it is unlikely that Parliament intended that the Supreme Court's approach to an appeal against conviction should be wildly different to its approach to an appeal against sentence. Much more likely is that the same approach should apply to both. Since the Act is explicit in applying the approach of the English Court of Appeal to appeals against conviction, the same, in my judgment, should apply to appeals against sentence.

Determination

17 I turn, therefore, to consideration of Mr. Povilatis's appeal. The key question in the current case, on the test which I have held to be correct, is whether the magistrates' sentence was "wrong in principle or manifestly excessive." None of the other heads set out in *Archbold* (*op. cit.*, at para. 7–135) applies. It is not suggested on Mr. Povilatis's behalf that a prison sentence was wrong in principle. That is, in my judgment, a correct concession. Mr. Povilatis has a significant number of previous convictions for all but one of which he was sentenced to a custodial sentence. No request was made in the Magistrates' Court for there to be a pre-sentence report, so there was no serious scope for a non-custodial sentence to be passed.

18 The sole issue in my judgment is whether six months is "manifestly excessive." It is undoubtedly a harsh sentence. However, is it so harsh that

this court should interfere? Mr. Daswani submits that the sentencing guidelines indicate a lower sentence should be imposed; he suggests three months.

19 The difficulty with that submission is that the guidelines on theft from a shop themselves say that the "circumstances of this offence can vary significantly" (Sentencing Guidelines Council for England and Wales, *Theft and Burglary in a building other than a dwelling: Definitive Guideline*, at 16 (2008)). In the current case, Mr. Povilatis stole reasonably high value goods. There was evidence that he targeted this shop particularly. He has no means of supporting himself except by crime. He appears to be a serial criminal. In these circumstances, in my judgment, the magistrates were entitled to take the view that a deterrent sentence was necessary to protect the shopkeepers of this city.

20 Six months' imprisonment does not fall outside the band of sentences which the Magistrates' Court could properly impose on Mr. Povilatis. The sentence is not, in my judgment, manifestly excessive. Accordingly, I dismiss the appeal.

Appeal dismissed.