Neutral Citation Number: [2022] EWCA Crim 1452

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NOS 202200893/A1, 202200929/A2 & 202202099/A1

Royal Courts of Justice
Strand
London
WC2A 2LL
Thursday 27 October 2022

Before:
LORD JUSTICE EDIS
MRS JUSTICE YIP DBE
THE RECORDER OF SOUTHWARK
HER HONOUR JUDGE KARU
(Sitting as a Judge of the CACD)

REX
V
SEAN DUIGNAN
LESLIE AMOO
JORDAN HAMILTON

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MR K MORONEY appeared on behalf of the Appellant Duignan
MISS N CHOUDHURY appeared on behalf of the Appellant Amoo
The case of Hamilton was heard as a non-counsel Appeal
MR M BOWYER appeared on behalf of the Crown

J U D G M E N T

MRS JUSTICE YIP:

1. These three appeals have been listed together because in each case it has come to light that the Crown Court has purported to sentence for offences on which the offender stands unconvicted and where no formal pleas have ever been entered. They are otherwise wholly unconnected and after dealing with the relevant procedural background we will deal with the appeals separately.
2. The point highlighted by all three appeals is the importance of checking the Magistrates' Court Sending Sheet to establish the basis upon which charges have been sent. As these cases illustrate, care needs to be taken not to make assumptions that conflict with the records.
3. Because there are three appeals before us we will refer to each of the appellants by surname in the judgment; no disrespect is intended.

The cases before the court

4. Sean Duignan was sentenced on 3 March 2022 at Maidstone Crown Court to a total of two years and six months' imprisonment for offences which had originally been the subject of two separate sets of proceedings. Three of the offences were summary only matters which had been sent to the Crown Court as related summary offences under section 51(3) of the Crime and Disorder Act 1998. Having been validly sent in that way, they were never put to him in the Crown Court. The sentencing judge was told that Duignan had pleaded guilty to those offences in the Magistrates' Court. One offence was treated as though it had been committed for sentence and guilty pleas to the other offences were recorded administratively. It is now agreed that Duignan did not enter any guilty pleas in the Magistrates' Court and that he has been unlawfully sentenced for three offences for which he has never been convicted, albeit those sentences did not affect the total length of imprisonment.
5. Duignan appeals against sentence with leave of the single judge. In processing the appeal the Criminal Appeal Office identified the procedural errors which led to Duignan being sentenced for matters upon which he was not convicted.
6. Leslie Amoo was sentenced at the Central Criminal Court on 28~February 2022 to a total of 12 months' imprisonment suspended for two years for two offences which had appeared on the indictment and to which he had pleaded guilty at trial. He had also been sent for trial on a charge of possessing cannabis. However the procedure adopted by the magistrates was flawed. That was an offence triable either way to which section 17A of the Magistrates Courts Act 1980 applied. Amoo indicated that he intended to plead guilty to that charge. The magistrates ought then to have treated the indication as a guilty plea and committed him for sentence on that offence pursuant to section 4(1)(b) of the Powers of Criminal courts act 2000 which applied at the time of the hearing. In the event the magistrates did not follow section 17A, no formal plea was recorded and he was not convicted by the magistrates. Instead that charge was sent to the Crown Court for trial. It was never put to him for plea there. The sentencing judge was told that Amoo had pleaded guilty in the Magistrates' Court and decided to proceed as though the cannabis charge had been committed for sentence. A concurrent sentence of four weeks' imprisonment suspended for two years was imposed. It follows that Amoo was unlawfully sentenced for an offence for which he had not been convicted, although the overall length of sentence was unaffected.
7. Amoo appeals against sentence with the leave of the single judge. Again the procedural

errors leading to the unlawful sentence were identified by the Criminal Appeal Office when processing the appeal.

8. Jordan Hamilton was sentenced at Woolwich Crown Court on 26 January 2022 to a total term of 22 months' imprisonment. He too was unlawfully sentenced for an offence which he had not been convicted of. The charge was obstructing a constable in the exercise of his duty which had been sent to the Crown Court for trial as a related summary offence under section 51(3) of the 1998 Act. He had not entered a plea nor had he indicated he would plead guilty in the Magistrates' Court.
9. At the plea and trial preparation hearing the judge was told that the prosecution would confirm their position with regard to this charge at the sentencing date. That did not happen. The sentencing judge was informed that Hamilton had pleaded guilty to the summary offence in the court below and proceeded on the basis that he "must therefore have been committed for sentence". There was no separate penalty for the summary offence but it wrongly appears on his record as a conviction.
10. Hamilton appealed against sentence challenging the length of the term of imprisonment. As with the other cases the unlawful sentence was identified by the Criminal Appeal Office. The single judge granted limited leave to appeal to correct the unlawful element of the sentence. He refused leave on all other grounds and Hamilton has not renewed his application on those grounds. Given the limited scope of his appeal he has not been present or represented today.

The relevant procedure

11. The power vested in a Magistrates' Court to send offences which are triable either way for trial in the Crown Court is contained in paragraph 51(1) and (2)(b) of the Crime and Disorder Act 1998. Section 51(3) provides for related either way or summary offences which would otherwise have remained in the Magistrates' Court to be sent to the Crown Court for trial at the same time. The provision for either way offences is section 51(3(a); that for summary only offences is 51(3)(b).
12. The procedure to be adopted in the Magistrates' Court in respect of either way offences is contained in section 17A of the Magistrates Courts Act 1980. The relevant provisions are:

> "(5) The court shall then ask the accused whether (if the offence were to proceed to trial) he would plead guilty or not guilty.
>
> (6) If the accused indicates that he would plead guilty the court shall proceed as if—
>
> (a) the proceedings constituted from the beginning the summary trial of the information; and
> (b) section 9(1) above was complied with and he pleaded guilty under it.
>
> ...
>
> (9) Subject to subsection (6) above, the following shall not for any purpose be taken to constitute the taking of a plea—

(a) asking the accused under this section whether (if the offence were to proceed to trial) he would plead guilty or not guilty;
(b) an indication by the accused under this section of how he would plead."

Section 9 of the 1980 Act deals with the procedure for summary trial. Pursuant to section 9(3):

"(3) If the accused pleads guilty, the court may convict him without hearing evidence."

13. The procedure to be followed by the Crown Court once the summary offence has been sent for trial under section 51 is set out in schedule 3 paragraph 6 of the Crime and Disorder Act 1988. If convicted on the indictment and if the Crown Court concludes that the summary offence is properly described as a related offence, the substance of the summary offence is to be put to the defendant and he should be asked if he pleads guilty or not guilty. If he pleads guilty, the Crown Court shall convict him but may deal with him only in a manner that a Magistrates' Court could have dealt with him. If he does not plead guilty the powers of the Crown Court shall cease unless the prosecution inform the court that they would not desire to submit evidence on the charge relating to the summary offence, in which case the court will dismiss it. It is not open to a judge of the Crown Court to quash the sending for trial or otherwise correct errors made in the Magistrates' Court. Such power is vested only in the Divisional Court: see R v Gould and others [2021] EWCA Crim 447.
14. Unless the sending is obviously invalid, the Crown Court should not be unduly unconcerned about a mistake in recording the statutory basis for the sending. Care must be taken though to ensure that any sentence subsequently imposed falls within the jurisdiction that would have been available if the basis of sending was correctly recorded: see R v Ayhan [2011] EWCA Crim 3184.
15. If the sending is obviously bad on the face of it, such that the Crown Court concludes that it cannot proceed on the basis of it, the prosecution may have to consider the position carefully. As is apparent from the cases before us, it may often be that the summary offence will add nothing to the overall sentence. The prosecution may then take a pragmatic view that it is no longer in the public interest to proceed with the charge. In other cases there will be good reason to do so and the intervention of the Divisional Court may be required to rectify the position. Each case must be considered on its own merits. Obviously, it would be preferable for such errors not to occur in the first place. Once an error has occurred though, great care must be taken not to compound it. The problem cannot be corrected in the Crown Court by assuming that what should have occurred did in fact occur when that is contradicted by the records from the Magistrates' Court. Such assumptions run the risk that materialised in each of these cases that the court will proceed to sentence on offences for which there is no valid conviction.
16. Having set out the overall procedural context for these appeals, we turn to deal with the cases separately.

Sean Duignan

17. Duignan was aged 30 at the date of sentence and is now aged 31. He had 28 previous

convictions for 52 offences. The first set of proceedings he faced involved offences of sending a malicious communication with intent to cause distress or anxiety, and criminal damage.

18. In March 2021 he was on licence having recently been released from a custodial sentence. On 7 March 2021 he sent a series of threatening voice note messages to his former partner, including threats that if she had another man he would chop off his limbs and head.
19. On 19 April 2021, after the complainant had asked him for money, he went to her house. An argument ensued during which Duignan knocked her mobile phone from her hand causing her to close her front door. He then began kicking the door, causing the lock to detach and damaging the door frame. The damage cost £230 to repair.
20. On 17 November 2021 he appeared before the North Kent Magistrates' Court and on his election was sent to Woolwich Crown Court for trial on these two charges under section 51(1) and (2) of the Crime and Disorder Act 1998. The sending of these offences was lawful, save that the criminal damage charge should have been sent under section 51(3) as a related summary offence. However this does not invalidate the sending: see Ayhan.
21. Both charges appeared on the indictment. Having pleaded not guilty to both at the plea and trial preparation hearing, Duignan entered guilty pleas on 10 February 2022.
22. On 13 January 2022 while on bail awaiting trial for the Woolwich matters and while disqualified from driving, Duignan was seen driving a stolen BMW car. When the police attempted to stop him he reversed at speed into the marked police vehicle before driving off at speed. After a further attempt to reverse into the police car, he drove off again, driving through a closed gate onto private farmland causing alarm to bystanders and property damage.
23. As a result of these events, Duignan was charged with handling stolen goods, dangerous driving, driving whilst disqualified, driving without insurance and criminal damage. He appeared before the magistrates on 15 January 2022. He was sent to the Maidstone Crown Court for trial. The offences of dangerous driving and handling stolen goods were sent under section 51(1) and (2) of the 1998 Act. The other offences were correctly sent as related summary offences under section 51(3).
24. On 14 February 2022 Duignan pleaded guilty to dangerous driving (count 1) and handling stolen goods (count 2). At that hearing the court was told that he had pleaded guilty to the other matters at the Magistrates' Court. Sentence was adjourned to obtain the sending sheet and for the Woolwich case to be transferred so that Duignan could be sentenced for all outstanding matters together.
25. At the sentencing hearing on 3 March 2022 the outstanding summary offences were not put to Duignan. At no stage was the correct procedure under paragraph 6 of schedule 3 adopted. However, guilty pleas to the driving offences were recorded administratively. There was a further administrative error in that the driving whilst disqualified offence was incorrectly recorded as driving otherwise than in accordance with a licence. The court clerk treated the criminal damage offence as though it had been committed for sentence following a guilty plea in the Magistrates' Court, opening a file with an "S" number for it. In fact Duignan never entered guilty pleas to any of the three summary offences and has not been convicted of them. It is apparent though that he accepted his guilt and intended that the court should sentence him for all the offences.
26. Sentencing Duignan, the judge said that the two Woolwich offences were a series of

offences targeting the same victim and assessed their seriousness together. He said that the extreme effect of the offending on the victim as set out in her victim personal statement aggravated the offences, as did his previous history of offending, including that he had only just been released from prison on licence.

27. The judge concluded that taken together the appropriate sentence for these offences was 12 months before giving one-sixth credit for the guilty plea. He imposed nine months' imprisonment for the malicious communications offence and one month consecutive for the criminal damage, making a total of 10 months on the Woolwich indictment.
28. The judge dealt with the offences arising out of the driving of the stolen BMW together. No complaint is made about the approach he adopted or the overall sentence of 20 months' imprisonment imposed for those matters. On each of the two counts on the indictment, dangerous driving and handling stolen goods, the judge imposed a sentence of 20 months' imprisonment concurrent to each other. He purported to sentence him to one month concurrent for the criminal damage. For the summary driving offences he ordered no separate penalty, other than endorsement of Duignan's licence. The total of 20 months' imprisonment for these offences was ordered to be served consecutively to the 10 months for the Woolwich offences, making up a total of two years and six months' imprisonment.
29. As a result of his conviction for dangerous driving, Duignan was required to be disqualified from driving. Whilst it would usually be obligatory for the court to make an order for an extended driving test, Duignan was already the subject of a disqualification order which carried a requirement for an extended driving test and in those circumstances the court was not required to make such an order, indeed was not permitted to do so.
30. The judge indicated that he would be disqualified for "a basic term of three years with an extension of five months and a further uplift of eight months", making a total of four years and one month, intending that the period of three years' disqualification would run from "broadly speaking" the likely date of release from prison.
31. Although the total period of disqualification was not unlawful, the way it was expressed was not strictly correct pursuant to section 35A and B of the Road Traffic Offenders Act 1988, as explained in R v Needham and others [2016] EWCA Crim 455. The Court Clerk added a requirement for an extended driving test administratively when the sentence was recorded. If we allow the appeal and adjust the custodial term we will have to revisit the period of disqualification in any event. The order for the extended driving test should also be removed from the record.
32. By his grounds of appeal, Duignan contends that the sentence for the Woolwich offences (malicious communication and criminal damage) was manifestly excessive. He submits that these were minor offences which did not merit a further substantial custodial sentence and that he should have been dealt with by way of a concurrent sentence or no separate penalty. It is asserted that he changed his pleas in the expectation that the sentence for those offences was unlikely to add to the custodial sentence that he would get for the Maidstone matters. This is a point that Mr Moroney has stressed this morning in his oral submissions. However, we agree with the observations of the single judge when giving leave that there is no suggestion that the pleas were equivocal. It appears that Duignan elected trial in the hope that the complainant would not attend. Having been properly convicted on his own guilty pleas, the question for us is whether the sentence imposed was manifestly excessive.

33. We do not think that there can be any proper complaint about the imposition of a consecutive term of imprisonment for these offences. They were committed whilst on licence, having only recently been released from prison, against the background of a long history of repeated offending. The sentence of one month for the criminal damage, involving the deliberate damage to the complainant's front door, is unobjectionable. The real focus of complaint is the sentence for the malicious communication offence.
34. No definitive guidelines have been issued by the Sentencing Council in relation to this offence. We do not think that the Magistrates' Court Guidelines for the different offence under section 127(1) of the Communications Act 2003 offer any real assistance, noting that is a summary only offence which does not include the element of intending to cause distress or anxiety. The maximum sentence for this offence is 24 months. The judge decided to treat the malicious communication offence as the more serious offence, but he plainly had totality in mind. He noted that the offences were aggravated by being committed in a domestic context. He highlighted the effect on the complainant which he regarded as extremely serious. However, a close reading of her impact statement suggests that while annoyed by the messages, she was not unduly distressed by them. Her no doubt genuinely held view that social services removed her children as a result of this offending is not substantiated by independent evidence. It is likely that the picture was somewhat more complex than the complainant may believe.
35. The voice note messages were though unpleasant. As the judge said, Duignan made a thorough nuisance of himself and behaved appallingly very soon after his release from prison. We do not seek to minimise the impact of such offending and consider that the judge was right to mark this offending, which was entirely separate from the Maidstone offences, with a consecutive custodial sentence. However, we think that the seriousness could have been met with a shorter term and that the sentence imposed by the judge for the malicious communications offence was too long by a factor that means it was manifestly excessive and requires adjustment.
36. Looking at the two offences together, we conclude that the appropriate starting point after trial would have been six months' imprisonment which we reduce to five months after giving credit for the guilty pleas. That end point could have been achieved in more than one way. For simplicity we will adopt the same approach to the breakdown as the judge. We will therefore not adjust the sentence for criminal damage but will reduce the sentence for the malicious communication to four months' imprisonment. The sentence which the judge purported to impose for the summary offences to which no plea had been entered clearly cannot stand. However it is plain to us that Duignan intended to accept these matters and to be sentenced for them in a way that would resolve them without adding to the overall length of the custodial sentence.
37. Having been validly sent as related summary offences, they should have been put to Duignan adopting the procedure set out in paragraph 6 of schedule 3 of the Crime and Disorder Act 1988. If he pleaded guilty the Crown Court would convict him and could then sentence for those offences only in a manner which the Magistrates' Court could have dealt with him for.
38. So that the matter can be resolved today without the need for a further hearing or any risk of Duignan being treated less favourably on another occasion by a judge who may not be fully appraised of all the background that we are, we will reconstitute the court with one of us sitting as a judge of the Crown Court, pursuant to section 8 of the Senior Courts Act

1981. The charges will be put to him and we anticipate that he will plead guilty, as appears to have been intended previously, so that those charges can be disposed of today without affecting the overall sentence in any way. We propose to deal with that at this stage.

THE CLERK OF THE COURT: Sean Duignan, you are charged with three charges as follows: Charge 1. On 13 January 2022 at Edenbridge in the County of Kent without lawful excuse, destroyed an electric gate, wire fencing and grass fields to the value of £1,600 belonging to Anthony Edwards intending to destroy or damage such property or being reckless as to whether such property would be destroyed or damaged, contrary to sections 1(1) and (4) of the Criminal Damage Act 1971. Do you plead guilty or not guilty?

MR DUIGNAN: Guilty.

THE CLERK OF THE COURT: Charge 2. On 13 January 2022 at Edenbridge in the County of Kent used a motor vehicle, namely a Black Ford Eco Sport registration FV60 AAO on a road or other public place, namely Little Browns Lane, when there was not in force in relation to that use such a policy of insurance or such a security in respect of third party risks as complied with the requirements of Part VI of the Road Traffic Act 1988, contrary to section 143 of the Road Traffic Act 1988 and Schedule 2 to the Road Traffic Offenders Act 1988. Do you plead guilty or not guilty?

MR DUIGNAN: Guilty.

THE CLERK OF THE COURT: Charge 3. On 13 January 2022 at Edenbridge in the County of Kent drove a motor vehicle, namely a Black Ford Eco Sport registration FV60 AAO on a road, namely Little Browns Lane while disqualified from holding or obtaining a driving licence, contrary to section 103(1)(b) of the Road Traffic Act 1988 and Schedule 2 to the Road Traffic Offenders Act 1988. Do you plead guilty or not guilty?

MR DUIGNAN: Guilty.

THE CLERK OF THE COURT: Thank you.

MRS JUSTICE YIP: Sitting as a judge of the Crown Court then I direct that Duignan is convicted on his pleas and convictions should be recorded against him for those three summary offences. Having pleaded guilty to the summary offences, Duignan will be sentenced for them in the same way as was intended in the court below with no separate penalty but his licence being endorsed for the driving offences. It should be noted that the second of the driving offences is to be correctly recorded as driving whilst disqualified.

39. Having dealt with that, I return to the appeal. We quash the sentence of nine months' imprisonment on count 1 of the Woolwich indictment and impose instead a sentence of four months' imprisonment. There will be one month's imprisonment concurrent for the criminal damage. The sentences on count 2 of the Woolwich indictment and the total of 20 months on the Maidstone indictment are to be served consecutively. The overall sentence accordingly reduces from 30 months' imprisonment to 25 months.

40. Dealing with the disqualification from driving, the judge intended a discretionary period of three years with appropriate extensions to take account of the time Duignan would serve in custody. The sentence for the dangerous driving was and remains 20 months. Pursuant to section 35A of the Road Traffic Offenders Act 1988 an extension period of 10 months is required. An additional uplift to the discretionary period must then be considered to take account of the custodial term for the other offences. We take account of the time Duignan spent on remand. We have regard to the observations at paragraph 38 of Needham that precise arithmetical calculation is not required and taking

account of the reduced sentence on the other matters the uplift under section 34B will be one month, producing a total period of disqualification of three years and 11 months.

41. For the reasons previously given there is no requirement to record that Duignan should pass an extended driving test in relation to this conviction. The existing order to that effect remains in force. To that extent Duignan's appeal is allowed.

Leslie Amoo

42. Amoo was aged 34 at the date of sentence and is now 35. He had no previous convictions but had been cautioned for possession of cannabis in 2006. On 29 May 2020 police officers on mobile patrol noticed a strong smell of cannabis coming from the vicinity of where Amoo and two others were standing. As the officers approached him he started to walk away. He was detained for the purpose of a search under section 23 of the Misuse of Drugs Act 1971. He became agitated, pushed past one of the officers and ran off. Another officer shouted for him to stop and put his hand out towards Amoo. Rather than stopping or slowing down, he charged at the officer and knocked him to the floor. The officer sustained nasty grazes to his arm as depicted in the photographs we have seen. Amoo was apprehended some minutes later and arrested. At the police station he was found to have a bag of cannabis in his underpants.
43. Amoo appeared before the magistrates on 30 July 2020 on three charges: obstructing a constable in the exercise of his powers under section 23 of the Misuse of Drugs Act 1971, assaulting an emergency worker and possessing cannabis. All three charges were sent for trial at Woolwich Crown Court pursuant to section 51(1) and (2)(b) of the 1998 Act. Amoo was arraigned on 14 January 2021 on an indictment containing two counts: obstructing a constable (count 1) and assaulting an emergency worker (count 2). He pleaded not guilty and the matter was listed for trial in November 2021.
44. On the second day of trial he changed his pleas to guilty. The charge relating to possession of cannabis was not on the indictment and was never put to him in the Crown Court. Before the magistrates Amoo indicated that he intended to plead guilty to possession of cannabis. The procedure that should then have been followed is that set out in section 17A(6) of the Magistrates Courts Act 1980. That would have resulted in a conviction being entered in the Magistrates' Court on the basis of his plea. It would then have been open to the court to commit to the Crown Court for sentence pursuant to section 4(1)(b) and subsection (2) of the Powers of Criminal Courts (Sentencing) Act 2000 which applied at the time of the hearing. According to the Magistrates' Court record that did not happen and instead Amoo was sent for trial under section 51(1) and (2) of the 1998 Act. Even if the Magistrates had for some unexplained reason intended to send this charge for trial rather than as a committal for sentence, the appropriate provision was section 51(3)(a) as a related either way offence.
45. Despite what appears on the record, the sentencing judge was informed that Amoo had entered a guilty plea in the Magistrates' Court. Counsel and the judge appear to have agreed that the sending pursuant to section 51(1) and (2) was an administrative error and ought to have been recorded as a committal for sentence. The judge proceeded to sentence on that basis.
46. We can well understand why the judge sought to take a pragmatic course. He was plainly endeavouring to leave nothing outstanding and to deal with matters as they properly

should have been. However on the face of the record the cannabis charge had been committed for trial. It was not open to the judge to quash the sending for trial or otherwise correct errors made in the Magistrates' Court. Amoo had not been committed for sentence and had not formally entered a plea or been convicted. The course adopted by the judge of assuming there had been a committal for sentence resulted in him purporting to sentence for this offence when there was no conviction. That sentence is therefore a nullity.

47. Recognising the difficulty that had arisen through the procedural errors in the Magistrates' Court and the practical reality that this charge makes no difference to the overall sentence, the prosecution has sensibly concluded that the conviction and sentence for possessing cannabis should be removed from Amoo's record and that it is not in the public interest to seek to resurrect and proceed with this charge. We agree.
48. The matter having been sent from the Magistrates' Court that court no longer retains jurisdiction. It is unnecessary in the circumstances of this case for us to reconvene as a Divisional Court to quash the sending for trial, given that the charge was in fact sent to the Crown Court for trial but is no longer to be proceeded with, the prosecution may give notice of discontinuance and we have been told that that is what will happen in relation to that charge. On that basis we will simply order that the conviction and sentence for possessing cannabis be expunged from Amoo's record.
49. We turn then to Amoo's appeal against sentence for the remaining offences. He was sentenced to two months' imprisonment on count 1 (obstructing a constable) and 10 months' imprisonment consecutive on count 2 (assaulting an emergency worker), both suspended for a period of two years with a rehabilitation activity requirement of 20 days. He was ordered to pay £500 compensation to the injured officer and prosecution costs of £1,500.
50. The judge had regard to the Sentencing Guidelines for Assaults on Emergency Workers and to the Guideline for the Imposition of Community and Custodial Sentences. He noted that there was no definitive guideline for obstructing a constable but recognised the need to consider the degree of culpability and level of harm.
51. In relation to count 2, the judge concluded that it involved high culpability because substantial force was used. The level of harm was placed into Category 2 which covers minor physical or psychological harm or distress. He noted that this gave a starting point for the assault, had the victim not been an emergency worker, of a medium level community order with a category range up to 16 weeks' imprisonment. He identified one aggravating factor, namely that the assault was committed under the influence of cannabis or at least knowing that he had cannabis hidden on him. He treated Amoo as being of good character and noted his caring responsibilities. Because this was an assault on an emergency worker the guidelines required the sentencer to consider a significantly more onerous penalty of the same type or a more severe type of sentence than for the basic offence. The judge concluded that the appropriate sentence for the assault without the aggravated element was four months' imprisonment. He applied an uplift of six months to reflect that the offence was committed against an emergency worker, taking the sentence to 10 months. Beyond referring to the need a consider culpability and harm, the judge did not further explain how he arrived at the sentence of two months for count 1. He did not afford any credit for plea since the charges had been contested at trial up to the end of the prosecution case. Miss Choudhury realistically concedes that no objection

can be taken to that.

52. Having considered Amoo's mitigation and the impact of the Covid pandemic on prison conditions, the judge decided that the sentence could be suspended. A rehabilitation activity requirement was made to address drug awareness.
53. By his grounds of appeal Amoo complains that the judge did not explain how he arrived at the sentence on count 1 and so his decision-making is not open to scrutiny. On count 2 he challenges the judge's categorisation and maintains that the starting point of four months' imprisonment adopted for the basic offence was excessive even for a Category A2 offence. He says that the uplift of six months was also far too severe.
54. Complaint is also made about the judge finding that Amoo was under the influence of cannabis or had deliberately hidden the cannabis and treating this as an aggravating factor. It is further suggested that the judge did not allow properly for Amoo's personal mitigation.
55. Miss Choudhury has elaborated on that this morning, highlighting that medical evidence was before the judge, albeit it is not referred to in the sentencing remarks. That medical evidence set out a range of symptoms experienced by Amoo following his arrest and expressed concern that he was possibly developing a generalised anxiety disorder as a result of the impact of the proceedings and the delay in resolving them.
56. Miss Choudhury has also explained the considerable potential impact on Amoo's employment as a quantity surveyor. He is required to undertake different projects for his employer and at the time of commencing a new project his criminal record will be checked. Miss Choudhury points out that that will reveal his conviction. That in itself is likely to be a detriment to him. The impact of a custodial sentence on his record is a matter that Miss Choudhury highlights has been causing Amoo further concern.
57. Finally, the grounds of appeal argue that the award of £500 compensation was too great given the minor nature of the injuries and the fact that officers "sign up to undertake a job that may on occasion require the detaining of suspects and that in turn may require physical intervention of those suspects". It is also suggested that insufficient account was taken of Amoo's needs.
58. We bear in mind that the judge had the benefit of hearing the prosecution evidence, including that of the officers. In the circumstances we do not think that proper complaint can be made of his categorisation of count 2. That gave a starting point of a medium level community order but a range of up to 16 weeks' imprisonment for the basic offence. The judge must have placed the offending at the upper end of the range. He was required to consider a significantly more onerous penalty or a more severe type of sentence because the offence was committed against an emergency worker.
59. Counts 1 and 2 were committed within a very short space of time and might reasonably be described as making up a single incident. We do not think it was wrong in principle to impose consecutive sentences but the offences had to be considered together with totality firmly in mind. Taken together we accept the judge was entitled to conclude that these offences crossed the custody threshold. Having heard the evidence, the judge was well-placed to consider culpability and harm. By the standards of common assaults the injuries sustained were not trivial. However, we see no reason why the starting point would be elevated to the very top and indeed slightly above the range. Amoo was a man of positive good character, with strong character references and significant personal mitigation. In our view the basic offence would not have crossed the custodial threshold,

absent the aggravation of it being committed against an emergency worker.

60. For the aggravated offence we agree that the custodial threshold was crossed. That would have involved adopting a more severe type of sentence than for the basic offence. In applying the sentence uplift care must be taken to avoid double-counting by moving to a more severe type of sentence and then additionally uplifting that significantly. We do consider that an uplift of six months on a sentence that was already above the top of the range for the basic offence resulted in a sentence that was manifestly excessive. This was further compounded by the imposition of the separate consecutive sentence on count 1.
61. Further, having concluded that the custody threshold was crossed, the judge did not follow the guidance in the Guideline for the Imposition of Community and Custodial Sentences by standing back and asking whether a custodial sentence was unavoidable in all the circumstances. Had he done so, we consider that the judge should have concluded that given the considerable weight of mitigation available to Amoo he could have drawn back and imposed a community order instead. In our view, the better course is to impose a sentence on count 2 that reflects the totality of the offending and to make the sentence on count 1 concurrent.
62. We consider that a community order was appropriate in all the circumstances of this case. The required uplift for the aggravated offence means that this should be a high level community order. We therefore allow the appeal and substitute a community order for a period of two years with a rehabilitation activity requirement of 20 days on each count concurrent. We do not think that the award of £500 compensation was in any way excessive. The argument that officers sign up for a job that puts them at risk of harm is deeply unattractive. Assaults on police officers and other emergency workers are to be treated seriously, as the legislation and guidelines make plain. The injuries were thankfully relatively minor, but fairly reflected by the sum awarded. Amoo was and remains in well paid employment and had expressed a willingness and ability to pay compensation.
63. To the extent we have set out this appeal will therefore be allowed. A community order will be substituted for the suspended sentence in the terms set out. The orders for compensation and costs will remain.

<u>Jordan Hamilton</u>

64. Hamilton was convicted after trial at Woolwich Crown Court of an offence of attempted voyeurism. Subsequently he appeared before the Bromley Magistrates' Court on charges of breach of a Sexual Harm Prevention Order and obstructing a constable in the exercise of his duty. He was committed to the Croydon Crown Court for trial for the breach of the Sexual Harm Prevention Order and the charge of obstructing a constable was validly sent as a related summary offence under section 51(3) of the 1998 Act. Hamilton pleaded guilty to breach of the Sexual Harm Prevention Order and was sent for sentence at Woolwich alongside the attempted voyeurism offence.
65. No plea was ever taken on the summary offence. The sentencing judge was wrongly informed that Hamilton had pleaded guilty in the Magistrates' Court and proceeded on the basis that he had been committed for sentence on it. In fact there would have been no power to commit this summary offence for sentence after a guilty plea: see section 20(1) of the Sentencing Act 2020. As it was, Hamilton did not enter a plea, nor did he indicate a guilty plea. At the plea and trial preparation hearing the judge was told that the

prosecution would confirm their position with regard to this charge at the sentencing date. That did not happen.

66. Hamilton was sentenced to 22 months' imprisonment for breaching the Sexual Harm Prevention Order, with no separate penalty for the attempted voyeurism and the summary offence. He was also made subject to a further Sexual Harm Prevention Order. Such could be made following the conviction for attempted voyeurism but could not attach to the breach offence. The judge did not specifically state which offence it was attached to and it appears to have been erroneously recorded against the breach offence.
67. As we have stated, Hamilton has been granted only limited leave to appeal in order to correct the unlawful element of his sentence. He has not renewed his application for leave on any of his original grounds. We need say no more about them.
68. Since there has never been a lawful conviction for the summary offence, Hamilton should not have been sentenced for it. No separate penalty was imposed but the recording of a conviction and purported sentencing is a nullity and must be expunged from his record.
69. The charge should have been dealt with in the Crown Court pursuant to the provisions of schedule 3 paragraph 6 of the 1998 Act. It should have been put to him for a plea. The charge having been validly committed to the Crown Court it would still be possible for the charge to be put to him in the Crown Court. That would require his production. In circumstances where the charge attracted no separate penalty, the prosecution very sensibly take the view that they do not wish to proceed with it and they have given notice of discontinuance pursuant to section 23A of the Prosecution of Offences Act 1985. No further action is therefore required and in the case of Hamilton we simply direct that the record is amended to reflect the true position that there was no conviction or sentence on the charge of obstructing a constable. The judge had the power to impose a Sexual Harm Prevention Order following Hamilton's conviction for attempted voyeurism. The order he made was entirely lawful but he did not spell out which offence it attached to. It has been wrongly recorded against the breach offence. This is a purely administrative matter; it has no practical impact but the record should be corrected to record the new Sexual Harm Prevention Order against the conviction for attempted voyeurism. We shall also direct that this is done administratively.

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