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# JOHN JOSEPH GYORGY

COURT OF APPEAL (Lord Justice Staughton, Mr. Justice Tudor Evans and Mr. Justice Owen): January 12, 1989

*Probation order—time spent in custody prior to making of probation order—subsequent custodial sentence imposed for offence in respect of which probation order made—whether appropriate to make allowance in sentence for time spent in custody.*

A sentence of imprisonment, imposed for an offence for which the appellant had originally been put on probation, reduced, to allow for time spent in custody on remand prior to the making of the original probation order.

The appellant appeared before the Crown Court for various offences, having spent about seven months in custody on remand. A probation order was made in respect of those offences. He appeared again in the Crown Court several months later, for a number of further offences and to be dealt with for breach of the probation order. He was sentenced to a total of 13 months' imprisonment, which included six months for the earlier offences. The sentence was imposed on the assumption that the time spent in custody prior to the making of the probation order would count towards the sentence imposed for those offences, when this was not the case, as was made clear by section 67 of the Criminal Justice Act 1967.

**Held:** the sentence had been imposed on a misapprehension, and although it was richly deserved the Court would vary the appeal so as to give effect to the intentions of the sentencer.

**References:** Probation order—time spent in custody prior to making of probation order, *Current Sentencing Practice* D3.3(c); *Archbold* 5–439. Commentary: [1989] Crim.L.R. 513.

*P. Forrest* for the appellant.

**STAUGHTON L.J.:** John Joseph Gyorgy is now aged 25. He has a long history of drug addiction and of crime, although none of the crimes were of a very serious nature. Not long ago he was offered the chance to rehabilitate himself by the courts. He made little or no effort to take it. He was brought back and dealt with appropriately at Bristol Crown Court on September 8, 1988 by Mr. Malcolm David sitting as an assistant recorder. He was sentenced to a total of 13 months' imprisonment. He now appeals against sentence by leave of the single judge. His appeal is in a way, as we said to his counsel, the least meritorious that we have ever heard. But he has a technical point to support it. The assistant recorder took a mistaken view of the law, one which was apparently shared by counsel then appearing for Gyorgy and one which, in view of the complexity of some areas of the law, we can understand.

On November 30, 1987 he appeared at Bristol Crown Court and pleaded guilty to a whole range of offences: five offences of theft from a shop on different occasions (there were six but two of them were on the same occasion), one offence of burglary of a chemist and one of driving whilst disqualified. A probation order was made with a condition of medical treatment. The order was for two years. Gyorgy

had been seven months in custody in connection with those offences. He made little or no effort to comply with the probation order. He was in breach of it when he fell to be sentenced at Bristol Crown Court on September 8, 1988. He was also in further trouble for theft from a service station on December 8, 1987 of six filofaxes valued at £9.99 each, for driving whilst disqualified on the same day, and for four offences of failing to surrender to bail in January 1987, March 1987 and twice in March 1988. He asked for three offences to be taken into consideration, one of theft from a shop in March 1988 and another in May, and of theft from a car in March and April 1988.

The assistant recorder also referred to an offence in connection with some jeans, but in the papers before us we are not able to determine what that was. For the theft of the filofaxes and driving whilst disqualified, he was sentenced to six months' concurrent. For the four bail offences, one month concurrent on each but consecutive to the sentence of six months. The probation order was revoked, and six months was imposed for each of the offences for which that order had been made, concurrent with each other but consecutive to the other sentences. That made 13 months in all. That was a wholly appropriate sentence. But there is this passage in the transcript of the mitigation. Counsel said:

> "Your Honour, as I have already indicated he spent just over two months on remand in custody primarily for these offences as your Honour has today to deal with him for the breach of a probation order. He had spent seven months in custody prior to that. That may be something the prison service will take into account when your Honour imposes sentence at the end of the day. (The assistant recorder): If he is sentenced in relation to all those offences that would be taken into account. (Mr. Taylor): Because he has spent that time in custody now and received a probation order—and your Honour has now revoked the probation order—and deal with it in some other way."

There is underlying that passage the assumption that the time spent in custody in connection with the offences for which a probation order was imposed would count. That assumption was wrong. See section 67(1) of Criminal Justice Act 1967 (not the Prison Act 1952 referred to in counsel's opinion).

> "The length of any sentence of imprisonment imposed on an offender by a court shall be treated as reduced by any period during which he was in custody by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose, but where the offender was previously subject to a probation order, an order for conditional discharge or a suspended sentence in respect of that offence, any such period falling before the order was made or suspended sentence passed shall be disregarded for the purposes of this section."

If the assistant recorder took the view that the seven months already spent in custody would count against the six months which he imposed for the offences for which a probation order had originally been made, it is odd that it did not occur to him that the sentence had already been served. At all events, clearly the sentence imposed by the assistant recorder was based on a misapprehension. Despite our view that it was richly deserved anyway, we have come to the conclusion that we ought to set it aside to the extent of achieving what the assistant recorder sought to achieve. That will now happen if we substitute such sentence as allows his immediate release which would otherwise not occur before March 22 of this year. We allow the appeal to that extent.

# NEIL BARTLEY

## COURT OF APPEAL (Lord Justice Staughton, Mr. Justice Tudor Evans and Mr. Justice Owen): January 13, 1989

*Detention in young offender institution—theft from mail by postman—whether sentence of detention appropriate.*

Six months' detention in a young offender institution reduced in a case of theft from the mail by a postman.

The appellant, aged 20, pleaded guilty to opening a postal packet and theft. The appellant was employed as a postman; he was seen to open a test package prepared by investigation officers, and stole another package, containing a calculator, valued at £11.

Sentenced to six months' detention in a young offender institution on each count concurrent. The appellant had lost his job as a result of the conviction, and as a result had been forced to sell the house which he was buying on mortgage.

**Held:** counsel conceded that a custodial sentence was inevitable, as a grave breach of trust by a public servant was involved in the case, but in the view of the Court, he had served a long enough sentence (having been in custody for two-and-a-half months) and the Court would substitute such a sentence as would result in his immediate release.

**References:** detention in a young offender institution, *Current Sentencing Practice* E2.; Commentary: [1989] Crim.L.R. 594.

*B. Battock* for the appellant.

**TUDOR EVANS J.:** On October 28, 1988, in the Crown Court at Canterbury, the appellant, who is now 21 years of age, pleaded guilty to opening a postal packet (count 1) and theft (count 2). He was sentenced on count 1 to six months' detention in a young offender institution. For theft, he received the same sentence concurrent. He now appeals against sentence by leave of the single judge.

On June 2, 1988, investigation officers from the Post Office Investigation Department specially prepared two postal packets. One was addressed to a Mr. Griffin and the other to a Mr. Gill. The addresses were in the area covered by the Dover sorting office where the appellant was employed. The packets were securely sealed and placed among other packets which were due to be handled by the appellant on the day in question. The investigation officers kept observation. The appellant returned to the sorting office after his first delivery run and the officers observed him holding the two packets. He sorted the one to Mr. Griffin properly, but the other one addressed to Mr. Gill was taken behind the sorting frames. It was opened and the appellant looked inside. He then replaced the back of the envelope and sorted it correctly. Those were the facts on count 1.

Later, a search was made for both packets by the investigation officers and only the one addressed to Mr. Gill was discovered. After the appellant had returned from his second delivery round, he was interviewed by a Mr. Ward, one of the investigating officers. He was asked about the package addressed to Mr. Griffin. The appellant admitted that he had had it and he said: "The calculator is at home." That was a calculator which had been inside the packet addressed to Mr. Griffin. When he was asked why he had opened the packet addressed to Mr. Gill, he said that he had done it because he was, as he put it, "just nosey."

The appellant was taken to his house where a search was conducted and the calculator and the cover of the packet in which it had been contained were found. He told the police that he was going to buy one of the calculators and on this occasion, he was tempted to steal. The calculator had a value of £11.

The appellant is now 21 years of age. He earned a substantial sum each week as a postman in the Dover area. He has one previous conviction for an offence of shoplifting for which he was fined. According to the probation officer's report, the appellant was buying his house on mortgage, but as a result of employment consequential upon these offences and financial difficulties, he has been forced to put up the house for sale.

Mr. Battock accepts that an immediate sentence for this offence was inevitable, but he submits that the sentence of six months was too long. He makes the concession in relation to an immediate sentence because he accepts that a grave breach of trust by a public servant was involved in this case. We agree with him. On the other hand, the amount involved was very small and the appellant is still a young man with only one previous conviction to which we have referred. The effect of these offences upon him has been that he has lost his employment and he has had to give up the house that he was buying on mortgage.

It seems to us that the sentence of six months in respect of these two offences was too long in all the circumstances. In our view, the appellant has served a long enough sentence. Accordingly, we shall quash the sentences passed and substitute such sentence as will secure the appellant's immediate release. To that extent, the appeal is allowed.

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## GERALD ALFRED THOMAS GARDNER

Court of Appeal (Lord Justice O'Connor, Mr. Justice Caulfield and Mr. Justice Eastham): January 16, 1989

*Delay—delay in proceeding with trial—defendant remaining abroad for substantial period—whether a ground for mitigating sentence.*

Four years' imprisonment upheld for a series of burglaries, notwithstanding the fact that the appellant had absconded and been at large for several years before being sentenced.

The appellant pleaded guilty to five counts of burglary, involving both domestic and commercial premises and damaging property. The offences were committed in 1982 and involved the theft of property worth about £20,000. Following the burglaries, the appellant was arrested and committed for trial: he sold his mobile home and went with his wife to Italy, and later to the Republic of Ireland: during this time he attempted to gain entry to South Africa. The appellant was not convicted of any offence during this period, but was arrested and released in Italy. The appellant returned to England in 1987 and surrendered after some time. Sentenced to four years' imprisonment. Leave to appeal was given in the light of *Bird* (1987) 9 Cr.App.R.(S.) 77, in which a measure of leniency was extended to an appellant who absconded and led a blameless life between his absconding and the date of sentence.

**Held:** the Court paid full attention to the observations in *Bird*, but felt that the facts of the present case were not exactly analogous with *Bird*. Although the appel-

lant had not been prosecuted in Italy, it could not be said with confidence that he had led a blameless life since he absconded, nor could it be said that his return to England was wholly voluntary. The sentences could not be criticised for the offences for which they were imposed.

**Cases cited:** *Bird* (1987) 9 Cr.App.R.(S.) 77.

**References:** delay caused by defendant absconding, *Current Sentencing Practice* L6; Commentary: [1989] Crim.L.R. 512.

*H. Harrop-Griffiths* for the appellant.

**CAULFIELD J.:** This appellant is Gerald Gardner and he is 44. On March 20, 1987 at St. Albans, he pleaded guilty to three counts of non-domestic burglary, commercial burglary, and received two years' imprisonment concurrent on each count. He also pleaded guilty to two substantial domestic burglaries, and he was sentenced to four years' imprisonment on each count concurrent. There was also a plea to damaging property, which received a sentence of six months. All these sentences were concurrent. Five other offences of burglary were taken into consideration. The total period of imprisonment was four years.

He applied for leave to appeal and an extension of time, a matter of eight days, and after consideration by the learned single judge, the learned single judge said: "You pleaded guilty to these offences—two of them dwelling-house burglaries—and you asked for others to be taken into consideration, and the sentences are in no way excessive."

The facts are commonplace. Without detail of the burglaries, they were all good-class burglaries. The houses that were burgled were fairly good-class houses in the Watford area. The commercial burglaries were places like filling stations. The total proceeds on the 1982 valuation of the pound sterling was in the region of £20,000.

After these burglaries the appellant was arrested and made admissions, and he was due to appear in the Crown Court. He was living in a mobile home with his wife. They decided to sell the mobile home, and with all their assets they went to southern Italy.

He was a slaughterman, was the appellant, by occupation, and he very soon obtained work in Italy as a slaughterman. While he was in Italy he must have been suspected of having committed some offence because, after a year in Italy, he was arrested on suspicion of burglary and held in custody for 10 days. Although no charge was preferred against him, his tools for his job, which included knives and guns, were confiscated by the police.

He could not return to his job, it is recited in the social enquiry report on the history obtained from him, and so he moved to the Republic of Ireland, where he obtained work with various building firms. He remained in Ireland with his wife until 1987.

While he was in Ireland a step-daughter, who lived in the Isle of Wight, became seriously ill, so Mrs. Gardner went off to the Isle of Wight to look after her daughter while the appellant went to South Africa. Of course South Africa is fairly strict as regards permits to work and, on arrival there, it was discovered he had no permit to work, so he was sent to England.

Once he was in England, the appellant very quickly obtained work at London Airport. He had to leave because of difficulties caused by the Inland Revenue. He took another job very quickly in Hayes, leaving for the same reason.

It was then that he decided to give himself up because he knew, he said, that until these outstanding matters were dealt with, there was no likelihood of his obtaining contentment with his wife and leading a normal life together.