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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 20 November2018

B e f o r e:

LORD JUSTICE HOLROYDE

MS JUSTICE RUSSELL DBE

HER HONOUR JUDGE WALDEN-SMITH
(SITING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 OF THE CRIMINAL JUSTICE ACT 1988

R E G I N A
v
KAY STRUGNALL

Mr J Polnay appeared on behalf of the **Solicitor General**
Ms E Thornber appeared on behalf of the **Offender**

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J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: On 13 August 2018, in the Crown Court at Norwich, Kay Strugnalll pleaded guilty to two offences of possession with intent to supply ofa class A controlled drug, namely diamorphine, commonly known as heroin.

2. On 17 September 2018, she was sentenced on each charge to a community order for 12 months with a drug rehabilitation requirement for six months and a rehabilitation activity requirement for 15 days.

3. Her Majesty's Solicitor General, on behalf of the Attorney General, believes the sentencing to have been unduly lenient. He therefore seeks leave, pursuant to section 36 of the Criminal Justice Act 1988, to refer the matter to this court so that the sentencing may be reviewed.

4. We express at the outset our gratitude to Mr Polnay (for the Attorney General) and Ms Thornber (here, as below, for the offender) for their very helpful written and oral submissions.

5. Ms Strugnall is now approaching her 38th birthday. She has a number of previous convictions, starting in 2000, when she was aged 20. These include two offences of possession of cannabis resin and three of possession of heroin. All of her previous offences have been dealt with in magistrates' courts and none has resulted in a prison sentence. It is relevant to record that she has twice failed to answer to her bail and has twice had to be brought before the court for breaches of community punishment orders.

6. Her most recent previous convictions were on 11 February 2014, when she was fined for possessing heroin and possessing cannabis resin.

7. On 7 July 2017, police executed a search warrant at a property of which, as we understand it, Ms Strugnall's partner, Mr Read, was the tenant and where she lived with him. The police found two parcels of heroin with a total weight of 29.78 grams. The wholesale value of that heroin was assessed at between £1,200 and £1,800, and street value at about £20,700. In addition there was £205 in cash, digital scales, plastic snap bags and a mobile phone from which were recovered messages related to drug supply. The prosecution summarised these finds by saying that the premises appeared to be the centre of operations of a small retail distribution outlet where the drugs were no doubt intended to be bagged up.

8. Both the occupants, Ms Strugnall and Mr Read, were arrested. In interview Ms Strugnall admitted that the heroin was hers. She falsely claimed that it was for her personal use. She was released on bail for the investigation to continue. We should mention that Mr Read in due course pleaded guilty to permitting his premises to be used for supplying heroin.

9. The police returned to the premises on 5 September 2017 and executed a further search warrant. No drugs were found but £485 in cash was recovered. Ms Strugnall was not co-operative. Eventually she surrendered a Kinder egg container, which she had

concealed between her buttocks, in which were found three wraps of heroin with a combined weight of 3.05 grams. The wholesale value of that was estimated as £120. The street value, though not specifically stated, must have approached £300.

10. In interview, Ms Strugnall again claimed, again falsely, that this was heroin for her personal use. She was offered help in relation to her drug use but declined the offer because she did not think it would help.

11. Some months passed whilst the drugs were analysed and the mobile phone investigated. In due course Ms Strugnall was charged and sent for trial. Initially, as a result of a prosecution error, she was only charged with the first of the two offences which we have mentioned. She was sent for trial on that charge on 4 April 2018 and made her first appearance in the Crown Court on 1 May 2018, when she entered a not guilty plea. She was not represented by counsel that day because of Bar action but her solicitors had been on the record for almost a month by that time. Her case was adjourned for trial with a warned list fixing of 13 August 2018.

12. Before that date was reached, in mid June, the prosecution gave notice that they wished to amend the indictment by adding a second charge of possession with intent to supply relating to the drugs found on the second occasion. That amendment was made at a pre-trial review on 13 August, when Ms Strugnall pleaded guilty to both counts.

13. Sentencing was adjourned so that a pre-sentence report could be prepared. That report was completed on 12 September 2018 and was available to the judge at the sentencing hearing a few days later.

14. The author of the report noted that Ms Strugnall presented as defensive and at times reticent about the detail of her offences. She said that she had been using heroin since the age of 21. She had nonetheless been able to maintain full time employment for the last 12 years, apparently using heroin before going to work and upon her return at the end of the day.

15. She told the reporting officer that she had only supplied to a couple of friends and had only been rewarded by being able to pay for her own drug use. The probation officer noted that she was reluctant to elaborate upon this account, as might well be imagined when one considers the value of the drugs recovered. She accepted that her only financial debt was a credit card debt which she was able to service from her income from her employment, and she confirmed that she had not been acting under duress. She continued to say, despite her guilty plea, that on the occasion of her second arrest the drug which she was carrying had been for her personal use. The author of the report noted that she presented as extremely anxious now that she faced the prospect of immediate imprisonment and was clearly concerned about losing her employment.

16. The author of the report assessed Ms Strugnall as being faced with a choice of continuing to use drugs or committing to abstinence. Recognising the likelihood of immediate imprisonment, he said that, if the court took the view that a suspended sentence was appropriate, he felt able to recommend the imposition of a drug

rehabilitation requirement "as a means under which her heroin use can finally be addressed". The author of the report continued as follows:

> "This is not to say that there are no reservations as to her attitudes to drug treatment; certainly it is apparent that Ms Strugnall seems to be quite defensive and suspicious of drug treatment (she expressed for instance grievance at how, in her opinion, the drug treatment provider had apparently made her partner ill by giving him the 'blocker' drug Subutex whilst he still had heroin in his system). Furthermore, Ms Strugnall presented as an individual who was not entirely prepared to interrogate the particular historical issues that might underpin her drug misuse, instead wishing to simply take a pragmatic, in-the-moment approach. I would suggest that drug treatment will not be a comfortable experience for Ms Strugnall. However, despite her anxieties, Ms Strugnall said that she would comply in full with a DRR and understand that she will need to make herself available for monthly reviews."

17. We have been provided with a full transcript of the sentencing hearing on 17 September 2018. The prosecution, in the course of opening the facts, submitted that the finding of £485 on the occasion of the second search was a significant indication of a continued selling of class A drugs.

18. After some reflection and discussion between counsel, it was common ground at the Bar that each of the offences fell within category 3 of the sentencing guideline, being cases of supplying direct to users, often referred to as street supply, with a significant role. The guideline therefore indicated a starting point of four and a half years' custody and a range of three and a half to seven years.

19. In mitigation, Ms Thornber indicated from the outset that her submissions were aimed at persuading the court to allow Ms Strugnall a chance to be able to address her addiction. The judge responded by observing that the pre-sentence report did not suggest that Ms Strugnall was enthusiastic in terms of compliance. Ms Thornber replied that Ms Strugnall was upset that the pre-sentence report was written in the terms it was, because she had been trying her best and would be very grateful for the opportunity to address her use of heroin. Through counsel, it was indicated that Ms Strugnall would give her entire effort to the drug rehabilitation requirement, if allowed to do so. Her employer was now aware of her drug use, and her employment nonetheless continued.

20. Ms Thornber then began to submit that the court might consider a suspended sentence with a drug rehabilitation requirement. The judge intervened to observe that the problem with that submission was that, even making every allowance in Ms Strugnall's favour, the seriousness of the offending was such that the length of the appropriate custodial sentence would exceed that which could be suspended. Ms Thornber accepted that point, but submitted that, notwithstanding the guidelines, the court could take the view that Ms Strugnall was in employment and had never had a drug rehabilitation requirement, although she had been addicted since the age of 21.

21. With no further submission from Ms Thornber, the judge explained that a failure to co-operate with a community order would mean that Ms Strugnall could in the future be sentenced to a lengthy period of imprisonment and she expressed the hope that Ms Strugnall would understand that. The judge then continued with these words:

> "I accept, functioning drug addict, able to hold down employment, has a home and there's a lot which she loses by going into custody. But the facts of this, and the ... flamboyant re-offending on bail hardly endears her to any tribunal, and if she is to be sentenced to custody then it is a whole lot more than what might have otherwise been capable of being suspended. So, I am inclined, just about, as long as she understands and it's explained to her, to make a community order."

The judge went on to refer to the aggravating feature of the previous convictions but repeated that she was "just about persuaded" to avoid the imprisonment.

22. The judge then heard briefly from counsel for Mr Read and proceeded to make brief sentencing remarks in which she pointed out to Ms Strugnall that the further offence, which she described as seeming "to cock a snook at the whole criminal justice system whilst on bail" would in the ordinary way, even allowing for guilty pleas, result in a sentence of "coming up to five years' imprisonment". The judge nonetheless indicated that she would make a community order with a drug rehabilitation requirement. Ms Strugnall expressed her willingness to co-operate with such an order. Further discussion then followed, because the judge had not dealt with the length of the community order nor with the suggested further requirement of a rehabilitation activity requirement.

23. To complete the chronology of relevant matters, we should move ahead in time and refer to a report prepared for the assistance of this court on 30 October 2018 by the responsible officer of the relevant community rehabilitation company which supervises the court's order. This report indicates that Ms Strugnall had attended all five probation appointments which had been set and that, when she attended, she had engaged well within the meetings and appeared to be open and honest in discussions. However, she had not initially responded to messages telling her to arrange appointments to start her drug rehabilitation requirement. She had not done anything to start that requirement until she was brought before the court on 18 October for the first review hearing. Since that time, the report indicates, she had twice attended for testing. On both 22 October and 29 October, the testing had proved positive, not only for heroin but also for methadone. As the author of the report observed, Ms Strugnall is not prescribed methadone.

24. The reporting officer had discussed with her the possibility of going on to a methadone prescription. The report says:

> "We discussed the benefits and that it will help her reduce and eventually stop if it is monitored. However, she was reluctant at first, but said that she would consider it. I explained that if she kept to the methadone then there would be no positive heroin on her tests which is a positive step to

> recovery. She wants to think about it. I surmise from this that she is not ready to stop using. However, we seem to have achieved something today and I may be able to get her to have a titration appointment."

The report added that Ms Strugnall appeared anxious about this forthcoming hearing.

25. With that necessarily rather lengthy review of the circumstances of the case, we turn to the submissions.

26. For Her Majesty's Attorney General, Mr Polnay draws attention to the provisions of section 125 of the Coroners and Justice Act 2009 and section 174 of the Criminal Justice Act 2003. The former provision requires that every court must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case "unless the court is satisfied that it would be contrary to the interests of justice to do so". The latter provision requires the court to state in open court in ordinary language and in general terms the court's reasons for deciding on a sentence which has passed, to identify any relevant sentencing guidelines, to explain how the court discharged any duty imposed by section 125 of the 2009 Act and, where the court was satisfied it would be contrary to the interests of justice to follow the guidelines, to state why.

27. Mr Polnay goes on to refer to the terms of the Sentencing Council's definitive guideline in relation to the drugs offences and in particular to a paragraph to be found on page 12 of that document, which says:

> "Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of a success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial sentence."

28. Mr Polnay goes on to refer to the provisions in the drug guideline requiring the court first to consider whether the custody threshold had been passed in a particular case and then to go on to consider whether it is unavoidable that a custodial sentence be imposed. The courts must also consider aggravating and mitigating factors and, by section 143 of the Criminal Justice Act 2003, must treat the fact that an offence was committed whilst an offender was on bail as an aggravating factor.

29. Mr Polnay submits that the sentencing here was unduly lenient. He submits that the judge's assessment that the case merited a sentence approaching five years' imprisonment was correct. That being so, the imposition of a medium level community order simply did not reflect the seriousness of the offence, in particular the fact that the offending continued whilst on bail.

30. He submits that the judge made no express finding as to the categorisation of the offending or as to the appropriate amount of credit for a plea and did not state why she found that it was contrary to the interests of justice to apply the definitive guideline. He submits that this was not an exceptional cases such as to justify a departure from the sentencing guideline.

31. For Ms Strugnall, Ms Thornber realistically acknowledges the aggravating feature of the previous convictions and the aggravating feature of offending on them. She relies by way of mitigation on the fact that Ms Strugnall was supplying only the drug to which she was addicted. Ms Thornber also relies on the personal mitigation available to Ms Strugnall and on her guilty pleas. Ms Thornber reminds us that a sentence can only be described as unduly lenient when it falls outside the range which the sentencing judge could reasonably consider appropriate in all the circumstances of the case. Here she argues the sentencing was not unduly lenient because it was an exceptional case which called for exceptional treatment. Whilst the pre-sentence report might fairly be described as a mixed report, the author did in the end recommend a drug rehabilitation requirement.

32. The judge had carefully decided to sentence by way of a community order rather than a suspended sentence so as to encourage compliance with the court's order and so as not to tie the hands of any future court in the event of any breach. Ms Thornber points out that this court, in the case of Her Majesty's Attorney General v Forsythe-Wilding [2018] EWCA Crim 1180 declined to attempt any definition of the phrase in the guideline "short or moderate length", stating that the meaning of that phrase would vary according to the circumstances of the case. Here, Ms Thornber submits the offences carried a maximum sentence of life imprisonment. In that context, she argues a sentence of the length which the judge indicated could fairly be described as short or moderate.

33. She goes on to argue that the judge did comply with all statutory requirements and it was apparent from all that was said during the sentencing hearing, as well as the sentencing remarks, why the judge took the course she did.

34. As an alternative submission, Ms Thornber argues that, even if this court were persuaded the sentencing was unduly lenient, it should nonetheless exercise its discretion not to vary the sentence. In this regard, Ms Thornber understandably gives emphasis to the fact that Ms Strugnall remains in employment and can continue to contribute positively to society whilst continuing to receive treatment for her drug use.

35. We have considered these submissions anxiously. We are acutely conscious of the importance of this case for Ms Strugnall. The guidelines to which we have referred make it clear that, even where the custody threshold has been passed, a custodial sentence is not inevitable. There may be a good reason for a court to exercise leniency in a different case and, if the rehabilitation of the offender has a sufficient prospect of success, a community order with a drug rehabilitation requirement may be a proper alternative to a short or moderate custodial sentence. Nothing which we say in this judgment is intended to discourage judges from taking such a course in an appropriate case.

36. However, and with all respect to the learned judge below, we are in no doubt that this was not an appropriate case for the judge to take the course which she did. Our reasons are as follows.

37. First, it is important not to underestimate the seriousness of the offending. Although the judge did not expressly say so, we infer that she agreed with counsel that each of the two offences involved Ms Strugnall playing a significant role in a category 3 offence, for which, as we have noted, the guideline gives a starting point of four and a half years custody. Each offence was aggravated by the previous convictions of drug possession. The first offence involved a significant quantity of a class A drug. It can be viewed as potentially 270 £10 pounds deals of heroin.

38. The second offence involved a smaller quantity of the controlled drug that was committed whilst on bail for the first. That was a gravely aggravating feature which the judge identified but to which she appears to have given insufficient weight.

39. There was, in our view, only limited mitigation available to Ms Strugnall. As to her personal mitigation, she was in work and she was securely accommodated. She was very far from the type of offender, sadly a familiar figure before the criminal courts, who is an addict with little more to his life than selling drugs on the street in return for sufficient to maintain his own daily need.

40. In the circumstances of this case, the two offences would usually result in consecutive prison sentences amounting in total, even after credit for guilty pleas, to a significant period in custody.

41. Secondly, we regret to say that we cannot accept Ms Thornber's submission that the judge complied with her duties in respect of the sentencing guidelines. In particular, as both counsel recognised in their oral submissions to the court this morning, it is not clear from the transcript whether the judge regarded this as a case in which it would be contrary to the interests of justice to apply the guideline or whether she purported to sentence within the guideline.

42. The sentencing guidelines exist to promote consistency in sentencing. They do not remove judicial discretion, but they do ensure that all relevant considerations are addressed in the correct sequence. The court always retains power to depart from the guideline where the interests of justice require it, but in such a situation it should not be difficult for the sentencer to explain, as statute requires him or her to do, why that is so. The importance of such an explanation is obvious. It is the means by which the offender, the public and, if necessary, this court can know why the court has departed from the guidelines. It also assists the many other offenders who have been sentenced in accordance with the guidelines to understand why a distinction has been drawn.

43. Here, if the learned judge did take the view that it would be contrary to the interests of justice to follow the guideline, she did not explicitly say so, nor did she say why. For our part, we are unable to identify any features of the case which would make it contrary to the interests of justice to follow the guideline. Of course it is a heavy blow for anyone to receive a substantial custodial sentence, particularly someone who has never before served a custodial sentence, and even more so when the consequence is likely to be loss of employment and, it may be, loss of accommodation. Those are factors to be taken into account in an offender's favour but they are not, without more, reasons why it would be contrary to the interests of justice for the offender to suffer the

usual consequences of the offending. That is particularly so when the court has to sentence for two offences, one of which was committed whilst on bail for the first.

44. Thirdly, if the judge regarded this as a case which, within the sentencing guideline, came into the category for which a drug rehabilitation requirement was a proper alternative to custody, she again, with respect, did not explicitly say so nor explain why. For our part, we are unable to regard this as such a case.

45. Although the phrase "short to moderate term" is not defined, we are not immediately persuaded by Ms Thornber that it extends to a total sentence of the length which would be appropriate here. But even if Ms Thornber could succeed on that point, we cannot see how, in the circumstances of this case, a drug rehabilitation requirement could be assessed as having such a prospect of success as to make it appropriate. The relevant features are these. Community punishment orders imposed in the past have been breached. True, those breaches were some years ago, but they do not make a promising start to the court's consideration. Next, when arrested, Ms Strugnall was uncooperative and made false claims that the drugs were only for her personal use. Next, she is, as we have said, far removed from the category of addict for whom life holds very little. Nonetheless, the author of the pre-sentence report found her reluctant to commit to treatment, and sadly the passages which we have quoted from the more recent report indicate that her reluctance continues despite having heard all that the sentencing judge had to say. After her first arrest, Ms Strugnall did not seek treatment or help. She reoffended whilst on bail. None of this provides a promising setting for persuading the court to adopt a therapeutic rather than a punitive course. Ms Thornber's submissions to the learned judge were perfectly proper and were no doubt persuasively made, but they were no more than an assertion of Ms Strugnall's belated wish to take an opportunity to receive help. It was by no means a final and long sought-for opportunity. There had been opportunities in the past.

46. We agree with Ms Thornber that the judge did reflect carefully on the form of the sentence with a view to encouraging compliance and providing for an appropriate sanction in the event of non-compliance. With respect, however, the judge did not place sufficient focus upon the important antecedent question of whether there was such a prospect of compliance and successful rehabilitation as would justify a non-custodial sentence.

47. We are conscious of the pressure of work on Crown Court Judges and Recorders. We understand why the judge approached the sentencing exercise in the manner she did, engaging in a dialogue with counsel and expressing her sentencing remarks succinctly. We make no criticism at all of that. But, with respect to the judge, we regard this as a case in which no sufficient reason was expressed for her taking the course she did and we cannot see that the course which was taken was justified in the circumstances of this case. We cannot agree with Ms Thornber that this sentencing would not harm public confidence. In our view, the public would be surprised that an offender who supplied class A drugs and then did it again whilst on bail should be dealt with in this way, when the pre-sentence report was not able to offer a good prospect of rehabilitation.

48. For those reasons, we are satisfied that the sentencing was unduly lenient and that custody was unavoidably necessary. As to the total term of that custody, we infer from the judge's remarks that she had in mind a total sentence, taking account of totality, of around seven years after trial. We also infer that, if passing such a sentence, she would have been prepared to give full credit for the guilty pleas, resulting in a total term of four years eight months. That in itself would be a comparatively lenient course, but it would not be unduly lenient. In the circumstances of this case, we think that we should not go beyond that length of sentence which the offender heard indicated by the judge.

49. We therefore grant leave to refer. We quash the sentences imposed below. We substitute for them the following: on count 1, two years, four months' imprisonment; on count 3, two years, four months' imprisonment consecutive. Thus the total term is one of four years eight months' imprisonment.

50. Ms Thornber, is there any compelling reason why Ms Strugnall cannot surrender to custody by 4.00 pm today?

51. MS THORNBER: Not to my knowledge, my Lord.

52. LORD JUSTICE HOLROYDE: Are you able to assist us with the relevant local police station following her --

53. MR POLNAY: Wymondham.

54. LORD JUSTICE HOLROYDE: You'll have to spell it, I'm afraid.

55. MR POLNAY: W-Y-M-O-N-D-H-A-M.

56. LORD JUSTICE HOLROYDE: Thank you. Then the offender must surrender to custody at Wymondham PIC by 4.00 pm today.

57. Thank you both very much.