



Neutral Citation Number: [2021] EWCA Crim 141

Case No: 202002741 A4

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**T20200477**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 08/02/2021

**Before :**

**LORD JUSTICE COULSON**  
**MRS JUSTICE MCGOWAN DBE**  
and  
**HER HONOUR JUDGE MUNRO QC**

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**Between :**

**Emma Louise White**  
**- and -**  
**Crown Prosecution Service**

**Appellant**

**Respondent**

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**Rabah Kherbane** (instructed by **The Registrar**) for the **Appellant**  
**Alex Wright** (instructed by the **CPS**) for the **Respondent**

Hearing date: 26.01.2021  
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**Approved Judgment**

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be at 10.30 on 08.02.2021.

**Mrs Justice McGowan DBE :**

1. On 22 July 2020 in the Crown Court at Inner London, before Her Honour Judge Sullivan, the appellant pleaded guilty to 5 offences of Supplying a controlled drug of Class A to another, contrary to s.4(3)(a) of the Misuse of Drugs Act 1971. On 29 September 2020 she was sentenced to 30 months imprisonment on each count. She now appeals against sentence by leave of the single Judge who also granted a Representation Order.

**FACTS**

2. In early 2020 police officers carried out test purchase as part of Operation Anoda, targeting the supply of Class A drugs in the Lambeth area. On 25 February an undercover officer contacted the relevant drugs line which advertised Class A drugs for sale with messages such as “Light and dark, fattest rocks”.
3. There were a number of other defendants charged on the same indictment. It was the prosecution case that Kirk Reid was just above the others in the supply chain and they dealt at his direction. The appellant was charged on counts 6 to 11, as follows.
  - (i) Count 6 alleged that on 9 March undercover officer “Ana” received a message advertising drugs for sale. She called the number and a male voice asked her what she wanted. She said one wrap of brown and one of white. He directed her to Corrance Road. After a few minutes the appellant approached the officer and said she had been sent to serve her. She handed over three wraps of crack cocaine in exchange for £15.
  - (ii) Count 7 alleged that on 11 March “Ana” called the drugs line number and a male voice told her to go to 2 Ferndale Road. She arranged to buy three wraps of cocaine. The officer made her way to the address and the appellant opened the door and invited her inside. The appellant asked what she wanted, and the officer said she had arranged to buy three wraps for £15. The appellant then made a phone call to confirm the order and handed over three wraps in exchange for £15. As the officer left, she saw a male who appeared to be a drug user. He told the appellant he had called the number but no one answered.
  - (iii) Count 8 alleged that on 12 March “Ana” called the drugs line again and it was answered by the appellant. After arranging the purchase of two wraps of cocaine the officer was told to go to 2 Ferndale Road. At the address the appellant let the officer in and handed over two wraps for £15. She told the officer that she had the phone as she worked for them.
  - (iv) Counts 9 and 10 alleged that on 23 April “Ana” called the drugs line again and it was answered by Reid. She arranged to buy one wrap of heroin and one of cocaine for £25. Ana went to 17 Ferndale Road, the home of a co-accused Tina Carter, the appellant opened the door and invited her in. The appellant then handed over the heroin and cocaine wraps for £25.

4. When arrested and interviewed the appellant denied involvement. She has the typical antecedent record of a chronic drug user. She was aged 30 at sentence (born 7 January 1990). She had 40 convictions spanning 2008 to 2016. Her convictions included failing to surrender, possession of Class A drugs, prostitute loitering, theft, criminal damage, breach of conditional discharge, failing to attend for the duration of a follow up assessment, failing to comply with a community order, breach of suspended sentence, attempted robbery and obstructing a constable. In December 2016 she was sentenced to 18 months imprisonment for robbery.

## **SENTENCING EXERCISE**

5. She pleaded guilty and offered a basis of plea which put forward facts which were outside the knowledge of the prosecution. She said that she sold the drugs because she was threatened and assaulted by Kirk Reid. The prosecution could not agree those facts but the learned judge accepted that, if they were proved to the requisite standard, they would mitigate the appellant's offending. However, the Court was not prepared to accept the allegations of threats and assault in the absence of evidence from the appellant. She declined to give evidence and was sentenced on the basis of the prosecution's analysis of her role.
6. In passing sentence the judge observed that these were category 3 offences involving street dealing on four occasions. On one of those occasions she had been trusted to have custody of the drugs line telephone. The advantage to the appellant was to receive drugs to feed her own addiction.
7. The judge accepted that she probably did act under the direction of Kirk Reid which was a feature of a lesser role. The judge went on the find that, in reality her offending lay on the cusp between significant and lesser role. She had 40 previous convictions and the most significant was the robbery in 2016. Despite having had stable accommodation on her release from custody she offended again, and previous drug rehabilitation had not worked.
8. The court declined to order a pre-sentence report. We have the benefit of such a report and an additional report from the prison on progress to date. Both were ordered by the single judge.
9. The judge took into account the mitigating factors but noted that she was not the primary carer for her children, who lived with her mother. The judge said she would give credit for the progress in addressing her addiction while in custody and would make some allowance was made for the conditions in custody due to the pandemic. She allowed 25 per cent credit for the pleas and passed a sentence of 30 months imprisonment on each count concurrent.

## **GROUND OF APPEAL**

10. We are grateful to counsel, Mr Kherbane, for his very full advice and grounds and a skeleton argument. The Crown was represented by Mr Wright who has provided a very helpful Respondent's Notice and who attended to assist the court in dealing with criticisms made of the judge's approach.

11. There are 4 grounds of appeal, drafted as follows,

- (i) The judge adopted a starting point that was too high, as the Applicant did not at all occupy a 'significant role'; and even if placement within the starting point noted was correct, the sentencing Judge did not – despite suggesting that she had given this 'due weight' – apply any reduction to the sentence on account of the significant personal and offence mitigating factors present, and the lengthy period experienced in custody by the Applicant during severe lockdown restrictions;
- (ii) The sentencing Judge did not order a pre-sentence report ('PSR'), where one was required in all the circumstances;
- (iii) The sentencing Judge wrongly failed to consider the extraneous mitigation put forward, and therefore the sentence was passed on the wrong factual basis; and
- (iv) The sentencing Judge did not properly consider or apply parity. The Applicant received a sentence that was lengthier than her co-defendants in a similar position. The Applicant also received a sentence of the same length as a co-defendant in a substantially more aggravated position, who had been sentenced for an additional offence of permitting her premises to be used for the supply of Class A drugs during the period of 20 April to 5 May.

12. Ground 1. Mr Kherbane submits that 40 months was too high a starting point before adjustment for the aggravating and mitigating features present. He says that the judge was wrong to put this offending on the cusp of the lesser and significant role categories. He argues that the appellant was acting under the direction of another and that the judge was wrong to find that the appellant was motivated by 'financial or other advantage'. He submits that the correct starting point was 3 years, before adjustment, and that all the mitigating features should reduce the sentence to around 15 months.

13. The judge applied the Sentencing Council guideline in force. In her assessment of the appellant's role she found that there was an element of gain, even if it was only drugs for the appellant's personal use. In any event the judge was passing sentence for a number of separate offences, so the sentence had to be adjusted upwards to reflect that, and the appellant's previous record of offending. The judge did adjust to reflect personal mitigation, including an element of pressure from the co-accused, and she was entirely correct to conclude that the appellant was not the primary carer for her children. It is not entirely clear what starting point in the guideline the judge actually took before reaching a figure of 40 months before credit for the guilty plea. No particular figure for the adjustments was expressed. However, stepping back and looking at the total sentence for the total offending we are persuaded that the combination of the particularly strong mitigation in this case does mean that the sentence imposed was manifestly excessive.

14. The supply in this case was at the lowest level. It was accepted that she was at the bottom of the supply chain and acted under the direction and under some degree of pressure from Kirk Reid, her supplier. The repetition of the conduct is part of the

pattern of the dealer who regularly sells from their own address at the direction of another who avoids direct personal involvement. The advantage, of a personal supply of drugs, was also at the lowest level. There was no suggestion in this case of any greater advantage.

15. Ground 2. The judge refused the application to adjourn for a pre-sentence report. She had some material which showed that the appellant had been making good progress whilst on remand, particularly in remaining free from drug use and working towards rehabilitation. We recognise that there is an element of hindsight in our review of the position, having the advantage of recent reports but we accept the submission that the judge would have been assisted in her assessment of the appellant's rehabilitation by having such a report available to her.
16. We accept that there is a great deal to be said on the appellant's behalf. She had made exceptional progress whilst in custody, she has taken advantage of all the opportunities offered to her, she has cooperated fully with those working with her. Significantly the experienced authors of the reports express confidence in her commitment to remaining drug free. We are extremely grateful for the additional material made available to the court about the licence conditions that will be put in place to maintain contact and supervision at a high level. We are told that the current emergency covid provisions will affect the provision of accommodation and that the projected end of such provision at the end of March 2021 may well alter the position.
17. We think this is a case in which a report should have been ordered before sentence was passed. We recognise the advantage this court has, in January 2021, in looking back over the progress made and continuing since sentence was passed in September 2020 but the sentencing judge would have been better able to make an individual assessment of this appellant had such a report been available.
18. Ground 3. Complaint is made that the judge did not adequately consider what is referred to as 'extraneous mitigation'. That is said to describe the features of the case put forward in the basis of plea, namely that the appellant had been assaulted and threatened into committing these offences by the co-accused, Kirk Reid. There is no foundation in law for this submission. The judge was faced with the defendant saying she had been assaulted by a co-accused. The prosecution had no factual basis upon which they could agree. The judge quite rightly told the appellant that there would need to be an evidential basis before she could make such a finding. The appellant declined to give evidence on a Newton hearing. The judge quite properly accepted the position of the appellant as being below Kirk Reid in the hierarchy, that was supported by the evidence in the case. She could not have gone any further without a proper basis and we are grateful to Mr Wright for attending the hearing to ensure that the propriety of the sentencing judge's approach is made clear.
19. Ground 4. Mr Kherbane argues that there was an unfair disparity in the sentences passed on the co-accused. The submission fails to recognise the force of the fact that this appellant was sentenced for a number of offences, more than those who were at a similar level as her in the chain. The judge was perfectly correct in her approach of adjusting the sentence upwards in this case to reflect the totality of the offending.

## CONCLUSION

20. Accordingly, we accept the force of the submission that a report should have been ordered and that the starting point adopted was too high. The report would have informed the judge more fully than counsel could on the appellant's personal circumstances and on the progress being made. We are persuaded in light of the material available to the court that a more substantial adjustment should have been downwards to take account of all the mitigating features of this case, particularly, in light of the prospects of rehabilitation. Further, given the length of the sentence, to take account of the current conditions in custody following the authority of *R v Manning [2020] EWCA Crim 592*.
21. Applying the guideline for a category 3 offence involving a lesser role, the starting point is 3 years. That must be adjusted upwards to reflect the appellant's record and the number of offences. The factor of pressure from a co-accused is already reflected in the assessment of the role as falling into the lesser category.
22. Thereafter there should be a significant reduction to reflect the very strong personal mitigation in this case. There was substantial mitigation in the material foreshadowed in the report before the court below which is confirmed before us in the more recent reports. There is also in this case the unusual aspect of the covid restrictions on the provision of appropriate accommodation only being available until the end of March 2021.
23. We adjust the sentence to account for the substantial personal mitigation, leading to a realistic prospect of rehabilitation, and reach a figure of 2 years before applying credit for the guilty pleas which leads to a sentence of 18 months.
24. We have carefully considered imposing a suspended sentence order but that would not provide adequate supervision and the support which this appellant undoubtedly needs to maintain that good progress. Accordingly, to fit the unusual circumstances of this case we take the view that a sentence which will allow a release in time to take advantage to the accommodation provisions, only available until the end of March 2021, is the proper course. We have been provided with the draft conditions that are proposed to be added to the licence, (see below at Appendix A). They cover specific requirements about continuing supervision, not offending, no contact with previous associates, drug abuse treatment and accommodation. It is not the function of this court to draft licence conditions, but we are satisfied that the proposals meet the needs of the case.
25. Taking all relevant considerations into account we reduce the sentence to a term of 18 months on each count ordered to run concurrently. To that extent his appeal is allowed.

## **Appendix A**

### Recommended licence conditions

1. Ms White will be subject to the standard licence conditions which include: to be of good behaviour, to keep in touch with her supervising officer, to reside permanently at an address approved by her supervising officer and to have visits at the address, and not to travel abroad without prior permission,
2. Attend Lorraine Hewitt House, Brighton Terrace, Brixton, London SW9 8DG, as directed, to address your dependency on, or propensity to misuse a controlled drug,
3. Attend Lorraine Hewitt House, Brighton Terrace, Brixton, London SW9 8DG as reasonably required by your supervising officer, to give a sample of oral fluid / urine in order to test whether you have any specified Class A or specified Class B drugs in your body, for the purpose of ensuring that you are complying with the condition of your licence requiring you to be of good behaviour,
4. In addition, Ms White will be subject to a non-contact condition in relation to her co-defendants as follows:-  
Not to have contact with Kirk Reid, Tina Carter, Michael Pearce or Justin Darling, without the prior approval of your supervising officer.