Neutral Citation Number: [2023] EWCA Crim 175

Case No: 202203368 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM LIVERPOOL CROWN COURT
MR RECORDER LASKER
T20220023

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 February 2023

Before :

LADY JUSTICE WHIPPLE
MRS JUSTICE CUTTS
and
HER HONOUR JUDGE ROBINSON

- -

Between :

Andre Jordan Bell	**Appellant**
- and -	
Rex	**Respondent**

- -
- -

Ms Martine Snowden for the **Appellant**
The Respondent was not present or represented

Hearing dates : 16 February 2023

- -

Approved Judgment

LADY JUSTICE WHIPPLE:

Introduction

1. On 4 February 2022 (Count 2) and 12 October 2022 (Counts 1 and 3), the Appellant pleaded guilty to the following: count 1, possession of Class A (cocaine); count 2, possession with intent to supply Class B (cannabis) and count 3: possession of Class B (ketamine). On 11 November 2022, Recorder Lasker sentenced the Appellant at Liverpool Crown Court. The overall sentence was one of 15 months imprisonment, that being the sentence imposed on count 2, with concurrent sentences of 3 months imprisonment on count 1 and 1 month on count 3.

2. The Appellant appeals against sentence with the leave of the single judge. In his grounds of appeal, advanced by his counsel Ms Snowdon, who represented him at trial and on this appeal, he submits:

    a. That the sentence of 15 months was manifestly excessive; and

    b. That the sentence should, in any event, have been suspended.

Facts

3. On the afternoon of 31 January 2021 plain clothes police officers spoke to the appellant who was getting out of his car by his home address. He had a young child with him. The appellant was told that the police could see cannabis on the driver's seat and he was asked to open the vehicle. He was not fully cooperative and there was a struggle when he was detained. Eventually PAVA spray was used and the appellant was placed in the back of a police vehicle.

4. The appellant's phone was seized and his house was searched. Officers recovered 758.86 grams of cannabis with a value of £7,148 to £9,238; 11.24 grams of cocaine with a value of £449 to £1,124 and 6.99 grams of ketamine with a value of £139 to £279.

5. Analysis of the phone showed a number of incoming texts which included "You dropping today? Please let me know", "Drop us weed mate", "Alright bro, can I grab a Q?", "Hi bro, how are you? Which strains are you on at the moment?" and "You still active?".

6. Much of the cannabis recovered was divided up into sandwich bags: 7 were packaged as 1oz deals, 18 were packaged at ¼ oz deals, 245 were packaged as £20 deals. police also recovered scales and snap bags.

7. The police also recovered scales and a large quantity of snap bags, as well as £625 in cash.

Materials Before the Sentencing Court

8. The Appellant was 31 years old at sentence. He had four previous convictions for 12 offences spanning the period from 2009 to 2020.

a. In 2009 he was sentenced to an extended sentence of 9 years in a YOI (varied on appeal to 6 years) for five offences of robbery and three of theft.

b. In 2012 he was sentenced to an IPP minimum term 33 months for one offence of robbery.

c. In 2013 he was sentenced to 26 weeks' imprisonment for assaulting a constable and possessing an item inside prison without authority.

d. On 14 December 2020 he was fined for driving over the specified limit for drugs on 5 April 2020.

9. The Court had a pre-sentence report available to it, dated 3 November 2022 and prepared by John Fisher of the Probation Service. Mr Fisher recorded that the Appellant has a "Cancard" which is a medical ID card recognised by the police, which provides validation that the holder is consuming cannabis for medical reasons. The Appellant said that he consumed cannabis to assist with a serious issue he has with his back. Mr Fisher asked the Appellant about the cannabis which he had in his possession (he having pleaded to possession with intent to supply that cannabis). He recorded the Appellant's answer:

> "Mr Bell informed me that, prior to his purchasing the Cannabis found within his property he had been gambling on-line and had won approximately £22,000 over the course of seven or eight days. Upon winning this money he decided that he would 'bulk buy' Cannabis. In explaining this further Mr Bell informed me that he made his purchase during a 'window' in the Covid 19 lockdowns as he felt that, should a further lockdown be imposed then he would not have the opportunity to purchase the Cannabis he used as an aide to his physical and mental health. Upon further discussion Mr Bell informed me that, at the time he was not happy with the medication prescribed by his GP as it was having an adverse effect upon his thinking and memory. As a result of this he decided that it would be better to 'self-medicate' by using Cannabis.
>
> With regard to his part in supplying the drug to others Mr Bell informed me that he would give Cannabis to family and friends, explaining as he did that some of his family use Cannabis and, as he had Cannabis in his possession, he could not let them 'go without' if they requested some from him. Mr Bell was adamant however that he did not give any Cannabis to anybody that he did not know personally and never made any form of financial gain from his providing others with the drug."

10. As to the Appellant's explanation of being in possession of the other drugs, the PSR recorded this:

> "Mr Bell informed me that he has never used either of these drugs and, as his 30th birthday was approaching he decided to purchase them for his own use. Upon explaining this further Mr

> Bell advised me that, as he was suffering with a particularly deep period of depression due to his various issues he made the decision to have a 'blow out' during his birthday celebrations. In light of this he had purchased the drugs for his own use only."

11. Mr Fisher outlined the Appellant's personal circumstances. He lives with his partner and two young children, both of whom have specific health needs. He is in receipt of benefits and is unable to work due to his back pain due to degenerative disc disease. He has a history of depression and anxiety for which he takes medication. He was assessed to be at medium risk.

12. Mr Fisher recognised that the Court might conclude that a sentence of immediate custody was necessary, but in the alternative suggested a community-based penalty with a rehabilitation activity requirement over 15 days to complete offence focussed work and increase his understanding of his behaviour, with a view to lowering the risk of his reoffending.

13. The Court was provided with three character references attesting to the Appellant's good character.

14. The Prosecution had uploaded a sentencing note in advance which suggested that the culpability of this offending was significant, on the basis that the Appellant appeared to be a sole trader with expectation of significant financial advantage, with harm in Category 3 because the Appellant was selling directly to users. In addition, there was aggravation in the form of the Appellant's previous convictions and the breach of the Appellant's IPP licence conditions.

The Sentencing Hearing

15. This Court has not been provided with a transcript of Ms Snowdon's submissions at the sentencing hearing, but through her we understand that she submitted that the culpability category was "lesser" because this was simply supply to friends and family for which the Appellant expected little, if any, financial advantage. She said that the £650 which was found on the Appellant at arrest had in fact belonged to his partner, who was willing to give evidence at the hearing; the police had returned the money to her. We understand Ms Snowdon's submissions to have built on the explanation recorded in the PSR about his personal use of cannabis for medicinal purposes, the reason for his possession of small quantities of cocaine and ketamine, and the limited extent of his intended supply of the larger quantity of cannabis. She argued for a community sentence to permit the Appellant to remain with his family, noting that he had caring responsibilities for his two young children and noting the progress he had made since release from the custodial part of his IPP in 2017.

16. In passing sentence, when it came to categorisation under the guideline, the Recorder said this:

> "This is a Category 3 case when I have to consider the sentencing guidelines. Although I have had some submissions

> to the contrary, I do think your role is that of a significant role which means that the sentencing guidelines indicate a starting point of twelve-months with a range of up to three-years, that is after trial."

17. The Recorder referred to the Appellant's past convictions, and to the mitigation advanced, namely his family circumstances and the good work he had done with young people. He said that there was evidence of "I think, quite significant dealing" and identified a sentence of 20 months after trial which he reduced by a quarter to reflect the guilty plea to arrive at 15 months imprisonment as the appropriate sentence on the lead offence. He dealt with the concurrent sentences. Then he turned to the issue of suspension and said this:

> "The biggest issue for me has been to decide whether or not I can suspend it and, I am sorry to say because it gives me no pleasure to send you immediately into custody, but, in my view, the circumstances of this case are such that I do not think it is appropriate for me to exercise my discretion in suspending the sentence, so you will serve, I think, half of that sentence and then you will be released back into the community."

The Grounds of Appeal

First Ground: Manifestly Excessive

18. By her first ground, Ms Snowdon challenges the sentence of 15 months imprisonment. First, she argues that the judge was wrong to put this offending in the significant category. There was an issue in relation to the Appellant's expectation of financial gain. It was the Prosecution case that the Court could infer from the amount of cannabis and from the paraphernalia found in the Appellant's possession that he was involved in dealing on some scale, and that he had an expectation of financial gain as a result. It was the Appellant's case that there was no such expectation of financial gain.

19. The Appellant was found with £625 cash on him, but it was his case that the money belonged to his partner, which the Prosecution accepted because the money was in fact returned to her. Ms Snowdon says that she offered to call evidence from the Appellant's partner about that money, but the Recorder declined that invitation. It seems to us that the £625 case played no part in the Recorder's sentencing conclusions. It was not part of the Prosecution's case about the expectation of financial gain, and we put it to one side.

20. Ms Snowdon says, however, in relation to the rest of the evidence, that there remained a dispute of fact as to whether the Appellant did have an expectation of financial gain. She says the judge should have settled that dispute by holding a *Newton* hearing. Because he did not do so, he was obliged to give the Appellant the benefit of the doubt and sentence in accordance with the Appellant's factual case that he had no expectation of significant financial gain. This would have put his culpability in the "lesser" category and led to a lower sentence.

21. The Recorder was well aware of the dispute between the Prosecution and the Defence in relation to culpability. He referred to it within his sentencing remarks. He would surely have had in mind the possibility of holding a *Newton* hearing to resolve the facts which underpinned that dispute if he considered that to be necessary. Provision for such a hearing exists within Crim PR 25.16(4): "the court may give directions for determining the facts on the basis of which sentence must be passed…". The Recorder would also surely have been aware that he was not obliged to hold a *Newton* hearing just because there was a dispute on the facts. The position is explained in Blackstone's Criminal Practice 2023 at paras D20.8-20.11 and D20.15-D20.20, drawing on guidance given by this Court in *R v Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App R 13, and subsequently. In some cases, the impact of the discrepancy on sentencing will be minimal and for that reason it is not necessary for the sentencing judge to resolve the difference (see Blackstone's para D20.16). In other cases, it will not be necessary to hold a *Newton* hearing because the Defendant's version of events is absurd or clearly unreliable (see Blackstone's para D20.18-19) but, as noted in *R v Mula* [2017] EWCA Crim 32, [2017] 4 WLR 124 at [43], in such a case the judge should explain why that conclusion has been reached.

22. In this case, we understand that Ms Snowdon did not invite the judge to hold a *Newton* hearing. She told us that she had assumed the judge was with her on the facts and that he would have directed such a hearing if he had been in any doubt about her case. In light of the legal principles summarised in the preceding paragraph, Ms Snowdon's assumption was not based on solid ground. We note the following passage from *AG's References (Nos 3 and 4 of 1996)* [1997] 1 Cr App R (S) 29 at p 32, which suggests that the onus is firmly on the defence in these situations:

> "If there is to be a challenge to important facts in the prosecution case … it must be made crystal clear to the sentencing judge."

23. Defendants are sometimes reluctant to go through with a *Newton* hearing where it relates to the basis of sentence following a guilty plea given that, if they are unsuccessful in persuading the Court of their version of events, their credit for that plea may be put in jeopardy (see Blackstone's at para D20.26 and the guideline on reduction in sentence for a guilty plea at para F2). Whether to press for a *Newton* hearing at sentence is therefore a decision to be made by a Defendant on advice at the sentencing hearing and there may well be factors pulling both ways. If there is a clear dispute on the facts, a *Newton* hearing is not requested by defence counsel at the sentencing hearing, and the sentence is then passed on the basis of the Prosecution's factual case, it may be difficult for a Defendant to complain on appeal that they have been sentenced on the wrong factual basis.

24. It would have been much better if the Recorder had stated in terms why he had rejected the Appellant's factual case that he had no expectation of financial gain and why he had not felt it necessary to hold a *Newton* hearing before doing so (see *Mula,* cited above). It is left to us to infer that the Recorder considered the Appellant's case to be untenable on the evidence before him, and to fall within the "absurd or clearly unreliable" category outlined at Blackstone's para D20.18. It is stated by the authors of that publication that the implication from *Newton* is that "the defence account may be so implausible that a judge ought not to be obliged to waste time by hearing evidence before rejecting it". The issue raised by this part of the first ground of

appeal is whether the Recorder was justified in treating this as a case falling within that description.

25. The Recorder was well aware of the Appellant's version of events, because that version was set out with clarity in the PSR and was the subject of submissions from defence counsel. He also knew about the quantity of drugs found in the Appellant's possession, the way the cannabis was divided up into hundreds of packages ready for sale, that there were scales and fresh bags ready for use, the content of the messages on the Appellant's phone and that the Appellant said he had won £22,000 by gambling without having produced any evidence to support that claimed source for his funds. It seems to us that the Recorder was entitled to take the view, on this evidence, that it would be a waste of time to call the Appellant and that he could be sure that the Appellant's account of dealing to friends and family without the expectation of any significant financial gain was simply incapable of belief. That means that on the particular facts of this case, the Recorder was entitled to sentence the Appellant on the basis that his role was significant without first hearing from him. We reject Ms Snowdon's submissions to the contrary.

26. We turn then to the second strand of Ms Snowdon's challenge to the 15-month sentence, which she advances in the alternative to her earlier argument and if this was significant culpability. She argues that the Recorder's notional sentence after trial of 20 months was too high.

27. The Recorder arrived at that notional sentence by taking account of what he described as "quite significant dealing". He then identified the aggravating factor of the Appellant's previous convictions. He acknowledged the mitigation available to the Appellant in terms of his family commitments and work with young people. Ms Snowdon argues that the Recorder gave insufficient credit for the considerable efforts the Appellant has made towards rehabilitation: while in custody he trained as a personal trainer and now, despite his back pain, he helps other young people to improve their wellbeing and behaviour through exercise; since coming out of prison, he has become a father and he is intent on being a strong role model for his young children whom he cares for while his partner is at work. These facets of his positive development and contribution to society were evidenced by the character statements put before the Recorder at sentence and Ms Snowdon argues that they should have resulted in a much greater discount to reflect personal mitigation.

28. There is no dispute about the 25% credit for guilty plea applied by the Recorder.

29. For reasons we have discussed, the Recorder was entitled to conclude that this was "quite significant dealing". In addition, there was aggravation as identified by the judge, relating to the Appellant's previous convictions. As Ms Snowdon points out, there are no previous drugs offences (although the 2020 driving offence was one of driving whilst under the influence of drugs, as was known to the Recorder); but there was a significant history of offending, including offences of violence, which aggravated the offending. The Appellant was in breach of the terms of his IPP licence conditions, a further aggravating factor. As to the Appellant's efforts towards rehabilitation, we understand the Appellant was in custody until 2017 and we note that on release he was free of offending until April 2020 when he drove while under the influence of drugs for which he was sentenced in December 2020; he committed these offences the following month in January 2021. So, although the pattern of his

offending is less frequent and might be said to involve offences of less seriousness, still he was repeatedly offending. Finally, we note that he was being sentenced not just for the lead offence of possession with intent to supply Class B drugs, but also for the two possession offences of Class A and Class B drugs, and those offences were further aggravating features.

30. An increase from the 12 months starting point under the guideline was justified. The bracket goes up to 3 years custody. We conclude that a notional sentence of 24 months before taking mitigation into account would have been within the range open to the Recorder. With a reduction for personal mitigation, that could properly reduce the sentence to the 20 months identified by the Recorder, to which he applied the discount for guilty plea. It would have been better if the Recorder had set out his workings. But the issue for this Court is whether the sentence of 15 months is manifestly excessive, and for the reasons we have given, we do not think it is.

Second Ground: suspension

31. We next consider Ms Snowdon's second ground of appeal, that if the Recorder wished to impose a custodial sentence at all, he should have suspended it. She has reminded us of the imposition guideline and submits that all three of the factors listed in that guideline as tending towards suspension are present on the facts of this case: there is a realistic prospect of rehabilitation for this offender, bearing in mind the steady steps to that end he has already made after so much serious offending earlier in his life; he has strong personal mitigation in that he has significant personal health issues and also has a young family who are dependent on him for care permitting his partner to go out to work; and his time in custody will adversely impact on members of his family.

32. In advance of this appeal, we were provided with a Supplementary Report from the Probation Service, which follows up the report prepared by Mr Fisher on sentence. This is dated 7 February 2023 and is prepared by Paul Brundell. Mr Brundell notes that the Appellant has committed two more offences of driving while under the influence of drugs since he committed the index offences which are under appeal. Mr Brundell says that the recent driving offences serve to emphasise the relevance of drugs in this case. The Supplementary Report confirms that the Appellant is subject to licence conditions pursuant to the IPP but we understand from Ms Snowdon that he has not been recalled on those conditions.

33. This Court has also been provided with a prison report from Scott Zysiak-Tobin, prisoner offender manager at Liverpool Prison where the Appellant is detained. He records two negative case notes against the Appellant since coming into custody and two positive case notes during that time, each of which stress his positive attitude and enjoyment of his work as a cleaner.

34. The Recorder did not address the imposition guideline in his sentencing remarks. He should have. Those guidelines set out the factors to which the court should have regard when considering whether to suspend. It is not simply a matter of exercising discretion, as the Recorder might be taken to suggest. We accept that there are factors present in this case which might favour suspension. But we also note the PSR which suggests that the Appellant does present an ongoing risk and that he has two more convictions since the date of the index offence. This offence, as with the others since

2017, was in breach of his IPP licence conditions and indicated poor compliance with those conditions. We have considered the nature and seriousness of this offending, and, standing back, we conclude that appropriate punishment can only be achieved in this case by immediate custody.

Disposal

35. We are very grateful to Ms Snowdon for her helpful submissions; but we are not with her. We dismiss this appeal.