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IN THE COURT OF APPEAL
CRIMINAL DIVISION



Case No: 2022/03048/A1

Neutral Citation Number: [2023] EWCA Crim 297

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 7th March 2023

B e f o r e:

LORD JUSTICE BEAN

MRS JUSTICE FARBEY DBE

MR JUSTICE CHAMBERLAIN

R E X

- v -

HYZAIFAH KHAN

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Ms I P Rawat appeared on behalf of the Appellant

JUDGMENT

MRS JUSTICE FARBEY:

1. On 14 February 2022, in the Crown Court at Aylesbury before HHJ Sheridan, the appellant (then aged 20) pleaded guilty to two counts of possessing a controlled drug of Class A with intent to supply contrary to section 5(3) of the Misuse of Drugs Act 1971. The counts related to the supply of cocaine and heroin respectively. On 30 May 2022, in the same court, the appellant was sentenced by Ms Recorder Hunter QC to three years' detention in a young offender institution on each count. The sentences were ordered to run concurrently with each other. Appropriate ancillary orders were made. He appeals against sentence by leave of the single judge who also granted an extension of time of 111 days.

The Facts

2. On 15 February 2021, at around 3.55 pm, police officers on duty in the Aylesbury area noted two suspected Class A drug users standing by an alleyway. The appellant was seen to walk towards them. When the appellant noticed the vehicle in which the police officers had been travelling, he turned and began to walk quickly away in a different direction. One of the police officers got out of the vehicle, approached the appellant and identified himself as a police officer. The appellant ran away.
3. While running, the appellant spat out a clingfilm wrap which was later analysed and found to contain one wrap of crack cocaine and one wrap of heroin. The appellant was also seen to throw an item under a car, which was found to be a bag containing 15 individual wraps of heroin.
4. The appellant was apprehended by the police and was found to be in possession of a mobile phone (which had been ringing at the time) and £455 in cash. He was arrested and, on arrest, he stated that he had never done this before and that he hated himself. The police subsequently found a further bag with 20 wraps of crack cocaine weighing approximately 3.5 grams under the car where the heroin wraps had been thrown.
5. The appellant's mobile phone was seized. It contained messages indicative of the appellant dealing in Class A drugs. The messages indicated that he had sold 11 deals of heroin and 12 deals of crack cocaine, which was consistent with the £455 that had been found in his possession. The total value of the drugs that had been seized was £740.
6. The police attempted to search the appellant's address but he had given a false address. By the time his real address had been ascertained, it was considered too late to carry out a search.
7. The appellant was 20 years of age at the date of sentence. He was of previous good character.

Sentencing Remarks

8. In her sentencing remarks, the Recorder applied the relevant sentencing guideline. She took into consideration that the appellant had been in possession of a phone containing tick lists in the sense of financial figures noted next to individual names in a list of contacts. We would add that there were other notes on the phone that related to amounts and pricing of heroin and cocaine. The Recorder noted that the appellant was dealing in two different drugs; he had concealed the drugs in his mouth; and he had given a false address.

9. In relation to culpability under the guideline, the Recorder concluded that in light of his conduct the appellant must have known something of the scale of the operation and that he had had more than a limited role. In relation to harm, the offences fell within category 3 of the guideline because the appellant was a street dealer. The starting point for a category 3 "significant role" offence was four years and six months' detention. The category range was three years and six months to seven years' detention.
10. The Recorder took into consideration the mitigating factors but concluded that the seriousness of the offending would have led to a sentence of four years' custody after a trial, which she reduced by 25 per cent to three years for the appellant's guilty pleas given at the plea and trial preparation hearing.

The Grounds of Appeal

11. In her written and oral submissions, Ms Rawat (who did not appear below) submitted that the judge was wrong to treat the appellant as having had a "significant" as opposed to a "lesser" role. None of the factors indicating a significant role was present; whereas all of the factors indicating a lesser role applied. In particular, the appellant had performed a limited function under direction and had been engaged by pressure or coercion.
12. Ms Rawat submitted that the judge had failed to give proper weight to mitigating factors. She emphasised the appellant's young age at the date of the offending (19 years) and his previous good character. During the significant period between the commission of the offences (February 2021) and his first appearance in the Magistrates' Court (January 2022), he had committed no further offences. He had agreed to supply the drugs to pay off a debt he had incurred through his cannabis use. He had stopped taking drugs and worked hard in his father's car mechanics' business in the period after his arrest. He had expressed considerable remorse. He suffered from ongoing psychological problems in the form of low mood, stress and anxiety. He had been assessed in the pre-sentence report that was before the Recorder as posing a low risk of re-offending and a low risk of harm.
13. Ms Rawat contended that the Recorder had made an error by applying a 25 per cent discount for the guilty pleas: the appellant had indicated his pleas at the earliest opportunity at the Magistrates' Court and was entitled to a one-third discount.
14. Finally, Ms Rawat maintained that the sentences on each count ought to have been suspended; the decision to impose immediate detention was wrong in principle.

Discussion

15. The appellant was caught with a tick list and other drug-related information on his phone. As the Recorder emphasised, he resorted to sophisticated methods of covering up what he was doing. On his own account, he had become involved in the supply of Class A drugs to pay off his drug debt, and so had an expectation of significant financial advantage. These are all factors that point to more than a limited role under the guideline.
16. The written Grounds of Appeal described how the appellant had been threatened with serious bodily injury if he did not sell drugs. Ms Rawat accepted that this account of pressure and coercion, which would suggest a limited role, was not advanced in mitigation before the Recorder. Nor is it reflected in the account of the offence which the appellant gave to the Probation Service when he was interviewed for the purposes of a

pre-sentence report. We give it little weight.

17. For these reasons, we see no reason to interfere with the Recorder's conclusion that the appellant had a significant role. There is rightly no challenge to the Recorder's assessment of harm as category 3. The Recorder's categorisation of the offending cannot be criticised.
18. In reaching her overall sentence, the Recorder took into consideration the strong mitigation, particularly the appellant's previous good character, for which she gave a six month discount. However, the Recorder was sentencing the appellant for two offences relating to different Class A drugs. The seriousness of the offences meant that he could expect a lengthy sentence. We see no error in the Recorder's approach or in her overall conclusions.
19. The Recorder did not have the psychological or prison reports that we have considered. While we recognise that the appellant suffers from a degree of stress and anxiety, and while we have given careful consideration to what his mother told the court, we are not persuaded that the sentence passed by the Recorder was excessive.
20. The documents show that the appellant did not indicate guilty pleas in the Magistrates' Court but he did indicate that he would likely plead guilty in the Crown Court on a written basis of plea. This court has held that for the purposes of determining the appropriate reduction in sentence, an indication of a guilty plea must be an unequivocal indication. An indication of a likely plea is not enough: see *R v Plaku* [2021] EWCA Crim 568, [2021] 4 WLR 82, at [17]. The discount of 25 per cent was unimpeachable.
21. Given that the sentence exceeded the two year maximum that may attract suspension, the Recorder was bound to pass a sentence of immediate detention.
22. In summary, despite Ms Rawat's helpful submissions, the sentence imposed by the Recorder was neither excessive nor wrong in principle. Accordingly, this appeal is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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