

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.



IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT ISLEWORTH
(HER HONOUR JUDGE ROSE) [01TX0266121]

Case No 2024/02345/A3
[2024] EWCA Crim 1039

Friday 16 August 2024

B e f o r e:

LORD JUSTICE WARBY

MR JUSTICE CAVANAGH

MR JUSTICE WALL

R E X

- v -

ERJON XHAFERI

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr A Hill appeared on behalf of the Appellant

J U D G M E N T
(Approved)

Friday 16 August 2024

LORD JUSTICE WARBY:

1. On 18 June 2024, in the Crown Court at Isleworth, the appellant was sentenced by Her Honour Judge Rose to 23 months' imprisonment for two offences. For an offence of producing a controlled drug of Class B, contrary to section 4(2)(a) of the Misuse of Drugs Act 1971, to which he had pleaded guilty during his trial, he was sentenced to 22 months' imprisonment. For an offence of failure to surrender, contrary to section 6 of the Bail Act 1976, to which he had pleaded guilty at an earlier hearing, the judge imposed one month's imprisonment, which she ordered to run consecutively.

2. On this appeal, which is brought with the leave of the single judge, the appellant challenges the sentence for the production offence. No issue is taken with the sentence for the Bail Act offence.

3. The grounds of appeal are that the sentence was far in excess of the appropriate starting point in the Sentencing Council guideline when neither the facts of the offending, nor the circumstances of the offender justified such an uplift. It is submitted that the judge failed to give adequate weight to the appellant's true role and to his mitigation.

4. The relevant facts can be shortly stated. On the morning of 15 July 2021 police attended and entered a house in Feltham which had been reported as being used to grow cannabis. They had apparently been prompted by intelligence from British Gas. As the officers attempted to force entry, the appellant appeared at an upstairs windows. Told to stay where he was, the appellant instead jumped from the window and attempted to run away. He was apprehended.

5. A search of the house revealed that cannabis was being grown on a commercial scale. In three of its six rooms, with lighting and ventilation, there were some 100 plants in various states of growth. Expert evidence later estimated the street value of the plants at £70,000.

6. The appellant was found to be in possession of two iPhones which had been used to make calls as the police tried to enter the house, which was boarded up. It later proved that the calls had been made to one Giviliano Leskaj. Leskaj was later apprehended, pleaded guilty to the production of cannabis and was sentenced to two and a half years' imprisonment on the basis that he had played a significant role in the offending.

7. The appellant was aged 23 at the time of the offending and 25 at the date of sentence. He was of previous good character, with no convictions or cautions for any offending in the United Kingdom. He had entered the UK illegally from his home in Albania.

8. In interview the appellant's account was that he had been living at the property for three months, acting as the cannabis gardener. He claimed that he had been put under pressure to do so to pay back someone to whom he owed £24,000 for bringing him into the country. He said that he ran away because this was his first encounter with police. His defence at trial was that he was a victim of modern slavery. By his guilty plea, he abandoned any attempt to maintain that defence.

9. The judge held that the case fell into harm category 2, as the operation was capable of producing significant quantities for commercial use and was well above the category 3 starting point of 20 plants. She concluded, however, that the appellant had played a lesser role, without influence on others above him in the chain. The starting point was therefore 12 months, with a range of 26 weeks to three years' imprisonment. However, his case was not towards the lower end of the scale, because he was not engaged through pressure or coercion

and he did receive money.

10. The judge identified the ongoing nature of the operation as an aggravating factor. She also said that "there is some question of the premises having unlawful access to utility supplies, bearing in mind what was said about the British Gas intelligence". She declined to give credit for the appellant's guilty plea, which had been entered after the Crown's case had effectively been called. She concluded by stating that taking account of the nature of the offending and everything she knew about the appellant, the appropriate sentence was one of 22 months' imprisonment.

11. There is no dispute, nor do we doubt, that the judge identified the correct guideline category and starting point. We have, however, concluded that she erred in positioning this case within the guideline range and that, in consequence, the sentence was manifestly excessive. That is for three main reasons.

12. First, this was a substantial commercial operation within category 2 and well beyond the category 3 starting point based on 20 plants. But it nevertheless fell a long way short of the top end of the category 2 range, which encompasses all commercial operations short of those that are capable of producing "industrial" quantities.

13. Secondly, in referring to the ongoing nature of the operation, the judge correctly identified one aggravating feature of the case which clearly did fall to be taken into account. But this is only an aggravating factor to the extent that it has not already been taken into account in identifying the offence category. Further, the judge's reference to the possibility of unlawful access to utility supplies does cause us some concern. That is a matter listed in the guideline as a potential aggravating factor. But, as the judge acknowledged in her sentencing remarks, there was no information about the matter, other than the fact that the

police raid was prompted by intelligence from the utility provider. We do not consider that this could amount to a sound basis for increasing the sentence passed on the appellant to any substantial extent, when he was not said to have initiated or established the operation, or to have known about any unlawful abstraction of power.

14. Thirdly, and most importantly, this offending was committed by a relatively young man who was said to lack maturity, who was of previous good character, and who had expressed remorse. All of these are matters listed in the guideline's non-exhaustive catalogue of factors reflecting personal mitigation. The judge made no express reference to any of these matters. We do bear in mind that she said she had taken account of all the circumstances of the case. But we conclude that she cannot have afforded appropriate weight to these significant mitigating features.

15. In our judgment, the appellant's role did not justify any uplift from the category starting point. The scale of the operation and its ongoing nature over the three months in which the appellant was involved did require such an uplift, but there were no other aggravating features of the case of any weight. We do not consider that the nature of the offending and the aggravating factors would justify a sentence as long as 22 months' imprisonment. The personal mitigation to which we have referred should have exerted substantial downward pressure on the sentence.

16. The result is that we allow the appeal. We quash the sentence of 22 months' imprisonment and substitute a sentence of 16 months' imprisonment.

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

Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
