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IN THE COURT OF APPEAL
CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT CAMBRIDGE
MR RECORDER M GIULIANI 35NT1197323
CASE NO: 2024 02242 A5

NCN: [2024] EWCA Crim 1656

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 19 December 2024

Before:
LADY JUSTICE ANDREWS
MR JUSTICE BRYAN
MR JUSTICE EYRE

REGINA
v
ELIS KOLA

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

MR OLIVER SMALL appeared on behalf of the Appellant
MR ABDUL KAPADIA appeared on behalf of the Crown

J U D G M E N T

LADY JUSTICE ANDREWS:

1. On 21 May 2024 in the Crown Court at Cambridge before Mr Recorder Giuliani and a jury, the appellant (then aged 39 and of previous good character) was convicted of a single count of possession of Class A drugs (cocaine) with intent to supply. On 22 May he was sentenced to 3 years' imprisonment. He appeals against that sentence by leave of Bennathan J.
2. On 9 March 2023 the appellant was encountered by two police officers. They had been keeping a white Vauxhall car under surveillance in the streets of Cambridge but it eluded their pursuit. They eventually came across the car parked in a car park. It had been rented in Cambridge some three weeks earlier. The appellant was sitting in the driver's seat. The area in which the car was parked is known for the supply of drugs. Cambridge is some 150 miles away from where the appellant was living in York. When the police came upon him, he was accessing his android Smart phone and appeared to one of the officers to be either reading or sending a message. When he was asked by the officers if he had any drugs in the car, he immediately confirmed that he did. Inside the driver's door was a black sock, containing several wraps of cocaine in differently weighed packages, 13.24 gms in total. The officers also found £180 and 10 Euro in the central console and some coins in a chewing gum tub. During the search of the car the appellant's phone was constantly ringing. However, upon subsequent interrogation the phone was found to contain no messages relating to the supply of drugs. The appellant made no comment in interview. He defended the case on the basis that the drugs were for his own personal consumption. The prosecution called expert evidence in relation to the nature of the packaging and the different weights of the drugs being consistent with street dealing. The jury convicted.
3. The Recorder sentenced the appellant without the benefit of a pre-sentence report. We consider it is unnecessary to obtain one in order to determine this appeal.
4. This was on any view street dealing and therefore fell within Category 3 of the Definitive Sentencing Guidelines. The issue on this appeal is whether the Recorder erred in ascribing

to the appellant a significant rather than a lesser role and therefore in taking a starting point of 4-and-a-half years rather than 3. We consider that he plainly did. There was no evidence that the appellant's function was of an operational or management nature, or that he was involving any others in the drugs operation. Whilst he was a long way from his home engaging in street dealing, that is consistent with being a County Lines runner, being brought in by others from outside the area.

5. In the absence of an explanation as to why he was doing what he was doing, for example to feed a drugs habit, the Recorder was of course entitled to draw an inference that the appellant was motivated by financial gain. However, it is hard to ascribe an expectation of *significant* financial gain to someone on the basis that they have £180 in the car, even if that money were the product of street dealing and not simply a float or a kitty which might be entrusted to a runner. The drugs in the car had a street value of around £1,150.
6. The Recorder appears to have based his finding that the appellant had an awareness of the scale of the operation purely on the fact that he had his Smart phone in his hand when the police opened the car door. He drew an inference that the appellant was deleting messages exchanged with users from the fact that there was no drugs-related material found on the device, despite the fact that neither of the police officers whose statements were read to the jury said that they saw him doing anything of the kind. We agree with Mr Small that the inference was not reasonably open to the Recorder on the evidence. Moreover, even if it had been, there was no justification for then making the further assumption about the nature of any hypothetical deleted messages. There was no proper basis for being satisfied to the criminal standard that the appellant played a significant role in the drugs operation.
7. Although the Crown sought valiantly to persuade us to the contrary, we are not persuaded by any of the points that were made in the Respondent's Notice or articulated before us this morning by Mr Kapadia on behalf of the Crown. This was obviously lesser role street dealing and should have been treated as such. An equally plausible explanation, if not *more* plausible explanation, for the absence of any drug-related material on the phone is as

Mr Small had submitted to the judge, that he was getting directions from others as to where he should go to deliver them. On the face of it, he was nothing more than a courier.

8. The correct starting point should have been one of 3 years. The Recorder identified no other aggravating features. There was, however, significant mitigation. This was the appellant's first criminal offence. When apprehended he immediately told the police where the drugs were. Those factors were sufficient in the Recorder's view to bring the offending down to the bottom of the range, and we agree.
9. The Recorder also acknowledged that because the appellant is Albanian and speaks little English, incarceration could be significantly more difficult for him than for anyone else, and he reduced the sentence he was otherwise minded to pass by a further 6 months to reflect this factor.
10. Were we to do likewise, that would bring the sentence down from 2 years to 18 months. The sentence so adjusted would be within the range to which the guideline on the Imposition of Community and Custodial Sentences applies. Unfortunately we do not have all of the material before us that would be required were we to carry out an evaluation in accordance with that guideline. Mr Small has very helpfully explained a little to us this morning of the appellant's background. We understand that he works as a carpenter and there has been a letter provided by a relative this morning making it clear that on his release from prison, he will have a roof over his head and hopefully could return to his lawful employment and not get into any further trouble with the authorities.
11. Bearing in mind the time that he has already served and the likelihood that he would be released in the near future were a determinate sentence to be passed, as well as the absence of any material on the basis of which we could properly evaluate whether to suspend the sentence, we have concluded that the appropriate course would be to pass a determinate sentence of 18 months in substitution for the sentence imposed by the Recorder. To that extent this appeal is allowed.

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Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400 Email: Rcj@epiqglobal.co.uk