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IN THE COURT OF APPEAL
CRIMINAL DIVISION



No. 202303395 A1

[2024] EWCA Crim 253

Royal Courts of Justice

Friday, 23 February 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE STACEY
HIS HONOUR JUDGE MENARY KC RECORDER OF LIVERPOOL

REX
V
AMARU ANDERSON

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MS S. WELLS appeared on behalf of the Appellant.

J U D G M E N T

MRS JUSTICE STACEY:

1 The applicant seeks an extension of time of 234 days and leave to appeal against sentence. The application was referred to the full court by the single judge and a representation order was granted for junior counsel.

The Facts

2 The applicant pleaded guilty at a Plea and Trial Preparation Hearing to two counts of possession with intent to supply class A drugs (heroin and crack cocaine) on 9 June 2022 in the Crown Court sitting at Chelmsford.

3 On 13 January 2023, in the same court, before Mr Recorder Clegg KC, the applicant (who was then aged 23) was sentenced to a determinate sentence of 67 months for each count. Although not stated, it was implicit from the sentencing remarks, and we make it explicit, that the two sentences were ordered to be served concurrently. The offences are defined in s.313(5) of the Sentencing Act 2020 ("the Act") as offences of class A trafficking. The applicant had been convicted of previous class A drug trafficking offences as defined on 25 September 2014, 12 March 2015 and 30 April 2018. In accordance with subsection (2) of s.313 of the Act, the judge was obliged to impose an appropriate custodial sentence of seven years, unless the court was of the opinion that there were particular circumstances which related either to the offence or to the offender that would make it unjust to do so in all the circumstances.

4 Since the index offences were committed before 28 June 2022 (the day on which s.124 of the Police, Crime, Sentencing and Courts Act 2022 came into force, the sentencing regime was governed by s.313(2) of the Act. It is to be noted that for offences committed after 28 June 2022, the seven-year minimum term must be imposed unless the court is of the opinion that there are "exceptional circumstances which (a) relate to any of the offences or

to the offender and (b) justify not doing so" (s.313(2)(a) of the Act). The new wording of the circumstances in which a court may depart from the seven year term when it applies aligns the minimum term provisions for drug trafficking to those in force for firearms offences.

- 5 For his early guilty pleas the Recorder allowed the applicant 20 per cent credit, as much credit as was permitted by s.73(3)(a) of the Act, but he declined to find that it would be unjust to apply the three strike minimum term.

Facts

- 6 On 11 May 2022 the police found the applicant and a co-defendant, Abede El Samade Rakik, (aged 18) using the flat of a known class A drug user in Tanys Dell, Harlow to operate a busy drugs' phone line and deal class A drugs from the premises. They were found with 66 wraps of heroin. The drugs line phone was found next to where the applicant was sitting and there was evidence of drugs being marketed on the various phones that were seized by the police at the time. A further 19 wraps of heroin and 47 wraps of cocaine fell out from the bottom of the applicant's trouser leg as he was being led from the building after his arrest.
- 7 The crown accepted a basis of plea that the applicant could not have been running the drugs line for more than a couple of months before he was arrested, because of his longstanding health difficulties. They also accepted that he had been frank with the police about his involvement in assisting those running the drugs line. He had been discharged from hospital and was recovering from surgery in the early spring of 2022. He had owed substantial debts of over £10,000 to a drug dealer and he only went back to drug dealing to clear those debts after his discharge from hospital. He had reduced the debt to all but £3,000 when he was arrested. The prosecution accepted that he was now a reformed character.

- 8 In their sentencing note the prosecution submitted that in terms of culpability under the Sentencing Council guidelines the applicant had a significant role. He had an operational function within a chain. He involved others in the operation, whether by pressure, influence, intimidation or reward. There was evidence of some exploitation of his younger co-defendant and the cuckooing of the long-term drug user's flat that was being used to operate the drugs line. There was an expectation of substantial financial advantage. The harm fell into category 3 as the applicant and co-defendant were selling directly to users. Very fair-mindedly, the prosecution accepted that although the cuckooing exercise and control over the home of another person was an aggravating feature, it was one of the features that clearly placed the applicant into a significant role which was already accounted for in the categorisation of the offence. However, his case was aggravated by the commission of the offence whilst on post-sentence supervision and his previous convictions.
- 9 Before the Recorder the applicant sought to argue that the seven-year minimum term should be dis-applied on two grounds. Firstly, it was submitted that it would be unjust to apply the minimum sentence in a case in which the first of the three drug trafficking offences was from nearly eight years earlier and the third was committed when the offender was only 15 years old. Secondly because of the applicant's poor health. He had been diagnosed with systemic lupus erythematosus in 2018 ("SLE") having become severely ill whilst in prison. He received extensive drug therapy for this illness. He now has secondary chronic kidney disease ("CKD"). There have been periods when he has been a wheelchair user and had restricted mobility on leaving prison in 2020. He had a double hip replacement surgery in January 2022 because of his medication for SLE and his recovery and physiotherapy following surgery lasted until April 2022. He has an increased risk of contracting infections from other prisoners and it is difficult for him to maintain the level of hygiene required for the management of his condition in prison. There is the risk that he might need further

treatment, possibly including kidney dialysis and a kidney transplant. It was submitted that the effect on Mr Anderson of a long prison sentence was far greater than for an offender without his medical history, which was a circumstance that would make it unfair to impose the mandatory minimum term.

The Sentence

- 10 In very brief sentencing remarks, the Recorder rejected the submission that it would be unjust to impose the minimum term because of the applicant's poor health:

"I have looked at such authorities as there are and I can find none that suggest that ill-health is a reason that would enable a judge to avoid the passing of the minimum term on the grounds that such would be unjust and I must accept that treatment will be available to you, as and when required, inside the prison service, as it would be if you were at liberty."

- 11 After allowing the maximum credit permitted the Judge imposed a sentence 67 months and ordered forfeiture and destruction of the drugs and paraphernalia seized.

- 12 The single judge referred the application for leave and the request for an extension of time to the full court on two linked grounds. Firstly, that it was unjust to impose the mandatory minimum sentence on the applicant whose illness will make serving a prison sentence unusually onerous compared to a healthier prisoner serving a similar sentence. Secondly, because the Recorder had commented that there were no authorities to the effect that the ill-health of an offender can be a reason to dis-apply the minimum sentence. The applicant relies on a line of authorities that state otherwise.

- 13 For the purposes of this appeal, the applicant has provided a further letter from his treating consultant nephrologist, Dr Paul Hardman of the Oxford Kidney Unit at Churchill Hospital, Headington, Oxford dated 25 May 2023. It was not before the sentencing judge, but contains much of the information known to the sentencing judge. Dr Hardman had last seen his patient in April 2022 when the lupus was in remission and the secondary CKD was also

stable. His kidney function then was 63 per cent. Dr Hardman was concerned that the risk of stopping the immunosuppressive medication would result in a significant relapse of illness. Dr Hardman believes that managing the applicant's health care in a closed prison was challenging and there had been difficulty in obtaining accurate information on his condition. He had no recent blood tests or basic information on the applicant's weight, blood pressure and medications in custody. He was concerned that his patient's susceptibility to picking up infection and illness from his immune suppression medication and weakened immune system could in turn spark a relapse of lupus activity. Dr Hardman stressed in his letter that the applicant has a very serious disease which if left untreated or with a lack of access to a medical service could cause life-threatening complications and lead to a permanent requirement for treatment with kidney dialysis.

- 14 We also had a prison report from the Prison Offender Manager covering the period 1 June 2022 to 24 November 2023 which addressed the applicant's conduct whilst in custody. There were 12 negative entries, including late locking up, rudeness to staff, refusing direct orders, covering his observation panel and delaying the regime. He had also sent threatening electronic communications from his assigned custody laptop to the governor of the Offender Manager Unit and the Prison Offender Manager. On the plus side he had had no adjudications and had received four positive entries between April and June 2023 for matters such as witnessing another prisoner collapsed in his cell and informing staff, a negative MDT sample and attending a forum and collecting canteen bottles during his domestics. The record is not consistent with extreme tiredness and fatigue which are the symptoms of SLE. There was one reference to his health in the report. He had left an education entry English lesson stating he was not feeling well and not returned to the classroom. He was then reported to be hanging around the downstairs corridor after class. There was no reference to prison life being any more difficult for him than any other inmate without his health condition, nor was there any mention of difficulties in accessing

medical and health care, beyond Dr Hardman not receiving up-to-date information from the prison.

The extension of time application

- 15 The application is substantially out of time, being 234 days late. The explanation from the applicant's solicitors is that they are a small firm with staff shortages, the pressure of work is immense and there is a long queue of work to be done. When his solicitors were able to attend to this appeal in June 2023, they sent the appeal and the application to the wrong address. They did not then appreciate their error until September 2023, some three months later. They failed to make a formal request in accordance with the Criminal Procedure Rules, but have now submitted a detailed letter in support setting out the basis of their application. They say it would not be fair on their client if the extension of time was refused when the fault did not lie with him.

Our analysis and conclusions

- 16 The Recorder was wrong to say that ill-health could never be relevant in considering whether the exception to the minimum term applied. The wording of s.313(2) is open textured. For offences committed before 28 June 2022, the seven-year term, if applicable, had to be imposed:

"... unless the court is of the opinion that there are particular circumstances which—

(a) relate to any of the offences or to the offender, and

(b) would make it unjust to do so in all the circumstances."

- 17 Self-evidently, an offender's health condition or health diagnosis relates to the offender. The statute does not circumscribe the particular circumstances that may or may not be taken into account in any particular case. It follows, as a matter of both common sense and statutory construction, that there was no basis to conclude that the applicant's health had to

be disregarded. Whether an offender's health condition will make the minimum term unjust will be fact sensitive in every case.

- 18 Counsel for the applicant has provided a number of authorities that establish the proposition, in general terms, that whilst an offender's serious medical condition will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate, an offender's serious medical condition may enable a court as an act of mercy, in the exceptional circumstances of a particular case, to impose a lesser sentence than would otherwise be appropriate: see for example *R v Bernard* [1997] 1 Crim App R (S) 135 and *R v W* [2012] EWCA Crim 355 or *R v McMeekin* [2018] EWCA Crim 2373. Similarly, if a health condition is difficult to treat or manage in prison, it will not automatically entitle an offender to a lesser sentence: see *Bernard* again. But if there is compelling evidence that it may be relevant to the sentence, then it may be admitted: see for example *R v James* [2011] EWCA Crim 2411 where a sentence was reduced to enable the offender to have radiotherapy treatment for a cancerous lymphoma. It was therefore a material misdirection for the Recorder to conclude that it was not permitted to consider the applicant's medical position.
- 19 The question is whether on the facts of this case, the Recorder having closed his mind to that possibility, the applicant's health condition was such that the failure to reduce the mandatory minimum term resulted in a sentence that was manifestly excessive. The applicant has serious health issues and an unpleasant combination of health conditions, which we accept are life-limiting. His immunosuppressant treatment increases the risk of infection and further complications. At his relatively young age, it must be particularly difficult to endure. Nothing we say intends to minimise the pain and anxiety that he experiences with his condition. But the difficulty for the applicant is that even if we accept Dr Hardman's evidence, which we do, and if we overlook that the report could and should have been prepared before the sentencing hearing, there is still insufficient evidence that the applicant's health circumstances are such that the minimal term should be dis-applied. The prison

report does not support his submission. It makes no reference to him encountering additional difficulties because of his health or that a prison life being more onerous because of his health condition. Nor is there evidence that his health condition was not being properly managed whilst in custody, merely that Dr Hardman is not receiving data about it. As for his being a reformed character, it was not accepted in the basis of plea and it is not borne out by the prison report either. The four positive reports are to be welcomed and it is encouraging that he tested negative for drugs, but the 12 negatives are disappointing.

20 It was wrong in principle for the Recorder to rule out the possibility of the reduction of the minimum term and we have considered the matter afresh. Having done so the applicant has not established that the imposition of the minimum term set by Parliament was unjust or the sentence manifestly excessive. As to the extension of time, the application for leave is substantially - over seven and a half months - out of time. There have been a catalogue of errors by the solicitors in progressing the application in a timely manner, one or two of which would be excusable, but the totality is not. However, if there had been merit in the appeal, the extension of time would have been granted as it would not be in the interests of justice for an applicant to be disadvantaged by the shortcomings of his legal team. However, since the grounds are not reasonably arguable, the application for an extension of time is refused, leave is refused and the application is dismissed.

CERTIFICATE

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