Neutral Citation No. [2025] EWCA Crim 179

IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT MAIDSTONE
HHJ STATMAN T20210628

CASE NO 202402272/A5

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 13 February 2025

Before:
LORD JUSTICE DINGEMANS

MRS JUSTICE TIPPLES

HIS HONOUR JUDGE FORSTER KC
(Sitting as a Judge of the CACD)

REX
V
GARETH DAVIES

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 F McGRATH appeared on behalf of the Appellant.
MR R POSNER appeared on behalf of the Crown.

J U D G M E N T
Approved

LORD JUSTICE DINGEMANS:

Introduction

1. The appellant is a 45-year-old man who was, before the occurrence of the matters the subject of this appeal, of previous good character. He was sentenced for an offence of offering to supply a Class A drug (being 5,000 tablets of MDMA) and a separate offence, occurring on a separate occasion, of supplying four tablets of MDMA. All related to his dealing with a person called "Mike" who, unknown to the appellant, was an undercover National Crime Agency officer.

The factual background

2. At the time when the offences were committed the appellant was working as a Field Intelligence Officer for the UK Border Force in Folkestone. He had previously worked as a prison officer for a number of years. In October 2018, he was suspended from work following a report he had been involved in the production of cannabis. The appellant believed that that report was the result of a malicious call made by a former partner. In the event, no action was taken and the appellant returned to work, although that report appears to have been the catalyst for the National Crime Agency investigation into him.
3. In the summer of 2019 the National Crime Agency deployed an undercover officer, to pose as a criminal sailor in Folkestone, and to develop a relationship with the appellant. The officer known as "Mike" arrived in Folkestone in September 2019 and began going to a gym which was frequented by the appellant and located close to his place of employment. Mike first spoke to the appellant on 7 October 2019.
4. Over the relevant period, the appellant and Mike engaged in a number of conversations and during the course of their conversations and relationship as it developed, Mike

bought a sample of MDMA. The appellant had sourced four MDMA tablets from a contact provided by someone within his social circle which he in turn gave to Mike. It is apparent that the contact was a person dealing in drugs.

5. The relationship continued and culminated in the appellant making an offer to supply 5,000 MDMA tablets to Mike. Mike handed over money to the appellant, who then left. Later the appellant returned, saying he had been unable to obtain the drugs and he handed the money back to Mike in a car park. He was arrested just after handing the money back. The judge concluded that it was not clear whether the appellant would have been able to source that quantity of drugs and found that the appellant had attempted to big himself up to Mike in the expectation that Mike would give him information that he (the appellant) could present to his superiors at the UK Border Force. The appellant had ambitions himself to apply for a role within the National Crime Agency.

The Proceedings

6. After the appellant had been arrested the proceedings started. The judge heard an application for the proceedings to be dismissed for an abuse of process on the basis of entrapment by Mike. Evidence was given by Mike, and it appears that it became clear to everyone that there was no entrapment. The hearing turned into a form of trial of the issues about whether the appellant intended ever to supply the 5,000 MDMA tablets that he had offered to supply.

7. At the end of the abuse of process hearing (which we were told took place over a number of days) the judge dismissed the application and, so we are told, gave a short ruling simply dealing with the fact that there was no abuse of process. We do not have a transcript of any findings made. It appears that the judge made no findings of fact in

relation to the trial of issues. It seems that the findings of fact were set out in the sentencing remarks to which we turn later. The appellant then pleaded guilty and the judge found that he was entitled to 15 per cent credit given the time at which that plea was offered.

8. Matters were adjourned for a pre-sentence report and a psychiatric report to be obtained for sentence. As a matter of fact it appears that the appellant had suffered abuse as a child. He then pursued a successful work life. He married, but was then involved in acrimonious divorce proceedings and was on occasion sleeping rough in his car after the loss of his tenancy but still maintaining his work. He had in fact worked in the Prison Service from early 2000 and joined the Border Force in 2014. There was also evidence that his mother was dependent on his support. The pre-sentence report made a number of adverse comments about the appellant, but some of those fell away in the light of the judge's findings set out in the sentencing remarks. The psychiatric report showed that the appellant suffered from a low mood and was anxious.

9. The judge, in his sentencing remarks, found that the appellant was dissatisfied at work with the Border Force, although there were others in the Border Force who were hoping to help him move forward. The judge said the appellant decided to go "rogue" in the hope that he might gain information to enhance his application to the National Crime Agency but the appellant had disregarded all the rules and procedures designed to protect those gathering evidence. The judge found that the appellant had, for his own purposes, bigged himself up before the undercover officer as to what he could or could not do, and the judge then said: "We will never know what would have happened next" before saying that he was sure there was a complete lack of a plan, evidenced by

the handing back of the money. The judge found that the fact that the appellant was a civil servant in the Border Force was an aggravating factor.

10. The judge applied the Sentencing Guidelines for supplying or offering to supply Class A drugs. The judge found that the MDMA tablets equated to category 2. In fact, we were given some calculations from the weight of the tablets which had been recovered. For category 2, the indicative amount of MDMA is 1 kilogram. It appears that if the appellant had been able to supply 5,000 tablets from the same source that he had supplied the four tablets, that would have equalled about 2.2 kilograms. The judge found that the appellant had a significant role in this operation, and that gave a starting point of 8 years and a range of 6½ to 10 for the offences, but the judge made the finding that the supply was highly unlikely ever to be completed.

11. Count 2 was the actual supply of the four MDMA tablets which had taken place before the offer of 5,000 tablets had been made and the judge found that the appellant had a significant role. That was category 4 and in accordance with the guidelines that was a starting point of 3 years 6 months and a category range of 2 years to 5 years. The judge dealt with category 1 as the lead offence, which was of the offer of the 5,000 tablets. He ended up with a sentence of 7 years, having reflected aggravating and mitigating features, which was reduced to 5 years 11 months with 15 per cent discount for plea. We have a report from prison showing that the appellant is doing well in prison and is being considered for a transfer to open conditions.

The grounds of appeal and respective cases

12. There are two grounds of appeal that were advanced by McGrath on behalf of the appellant. The first was that section 60(3) of the Sentencing Act 2020 requires the Court

to assess the harm caused or intended to be caused or which might reasonably foreseeably have been caused, and the court must follow the guidelines unless it is satisfied, in the interests of justice, not to do so. The short submission was made that it was not in the interests of justice to do so in this case, where the offer meant that the offence was completed, but the evidence showed no plan to deliver the drugs. During the course of the submissions references were made to sections 60(4) and 60(5) of the Sentencing Act and subsection sections 60(4)(b) which provides: "nothing in this section imposes on the court a separate duty to impose a sentence which is within the category range." It was submitted that when proper regard is taken of the harm, the sentence should have been well below the category range.

13. As far as the second ground of appeal was concerned, was a complaint in relation to the way in which the judge had treated, as an aggravating factor, the appellant's employment.

14. Mr Posner, on behalf of the prosecution set out the background to the abuse proceedings, and noted that the judge had heard the evidence and was best placed to make the findings of fact. Mr Posner pointed out that, in relation to count 2, the appellant had sought out a drug dealer for the supply of MDMA.

15. We are very grateful for the excellent written and oral submissions from both Mr McGrath and Mr Posner.

16. As to the point whether it is in the interests of justice not to follow the guideline, this was a very difficult sentencing exercise. On the one hand, the judge found the motivation for the offence was so that the appellant could big himself up with his employer (the Border Force), although the circumstances in which he set about doing that showed a remarkable lack of judgment. On the other hand, the judge was unable to say what would have

happened next in circumstances where there were established procedures for dealing with informers and criminals which are designed to protect the public, as well as police officers and public servants, which were deliberately ignored by the appellant. Further, the appellant had actually obtained four tablets of MDMA from a drug dealer, thereby contributing to the business of that particular dealer and handled them for Mike. This was a transaction which on its own merited a starting point of 3 years 6 months. The judge also had to take into account the fact that this was an appellant who was a public officer and the substantial aggravating factor that the appellant had decided, as the judge put it, to go rogue. There is however this reality, which is that it is common ground that on the evidence that is now known, and indeed the evidence that was discovered during the trial of issues, that there was in fact no supply of 5,000 tablets that was ever going to take place. This was not also a situation of a finding where the appellant hoped that he would be able to obtain 5,000 tablets to supply or had any intention of following through but for his hopelessness as a criminal, and therefore distinguishes this case from almost every other supply or offer of supply of drugs case.

17. In the circumstances where the judge has not taken full account of his findings about the appellant's lack of intention to supply, it is necessary to revisit the sentencing exercise. We do so by looking at the real harm that was caused here, which was the supply of MDMA to the undercover officer, which merited, on its own, a starting point of 3 years 6 months. That had to be increased and was aggravated by the offer made on count 1, even if it was never intended by the appellant that it should be pursued. This is because it was a criminal action, it was for a substantial amount of MDMA and it showed again, a complete disregard for any established procedures for investigating and pursuing the

investigation of crime. There was, in that respect, the substantial aggravation, rightly identified by the judge, in relation to the appellant's own role with the Border Force.

18. In our judgment, aggregating the criminality of both counts, leads to a sentence of 6 years before addressing mitigation, making a reduction for mitigation of 1 year. That leaves a sentence of 5 years before a final discount for plea which remains at 15 per cent. On our calculation, that gives a sentence of 4 years and 3 months and not the 5 years and 11 months that was imposed by the judge. Given the way that the judge had structured the sentence, we will therefore adjust the sentence on count 1 by reducing the 5 year 11 months to a sentence of 4 years and 3 months and leaving the sentence on count 2 undisturbed. To that extent, the appeal succeeds.

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

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk