[2022] EWCA Crim 1361

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/00911/B2

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 12th October 2022

B e f o r e:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE DOVE

MR JUSTICE BOURNE

R E X

- v -

HEATHER McGRORY

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Mr D M Outterside appeared on behalf of the Appellant

J U D G M E N T

Wednesday 12th October 2022

LORD JUSTICE HOLROYDE: I shall ask Mr Justice Dove to give the judgment of the court.

MR JUSTICE DOVE:

1. On 25th February 2022, in the Crown Court at Nottingham, the appellant was sentenced to five years' imprisonment in relation to two counts of conspiracy to supply controlled drugs. Count 1 charged conspiracy to supply Class A drugs and count 2 charged conspiracy to supply Class B drugs. Both conspiracies took place between 1st August 2018 and 15th November 2019. On count 1, the appellant was sentenced to five years' imprisonment. On count 2 she was sentenced to a concurrent term of three years' imprisonment.

2. She now appeals against the overall sentence of five years' imprisonment with the leave of the single judge.

3. The facts of the case are as follows. The conspiracies in which the appellant became involved were engaged in the large scale supply of drugs, in particular to students in the Nottingham area. The conspiracy involved the supply of cocaine and MDMA (drugs of Class A). Cannabis was the Class B drug with which the conspiracy was mainly concerned. The operation depended upon a customer phoning or communicating using a messaging platform with a drugs line. Following this, the order would in the main be delivered by car to the customer by a driver who patrolled around with a stock of drugs contained in their car. The conspiracy was headed by two brothers and was described by the judge as "prolific", bearing in mind the amount of telephone evidence, the quantity of bulking agent used to cut the drugs, and the photographs of members of the team with drugs and money which were discovered.

4. The judge concluded that he could be sure that the number of deals completed would have been in the tens of thousands over the lifetime of the conspiracies. The judge concluded that the quantities of drugs which were involved in the conspiracies took them both into category 1 of the guidelines for possession with intent to supply Class A and Class B drugs. The judge was not, however, persuaded that the scale of the offences was such as required the sentence to exceed the guidelines provided for category 1 offences.

5. The involvement of the appellant was that of a delivery driver – a role which she fulfilled for several months. She was an active part of the team, as evidenced by photographs which were recovered during the course of the investigation. The appellant derived little financial benefit from the drug dealing, and the judge accepted that in terms of the guidelines she did not have a significant role, as the prosecution had submitted, but rather had undertaken a lesser role in the conspiracy.

6. The appellant pleaded guilty at her trial after the case had been opened to the jury, on 7th October 2021.

7. Others who were charged stood trial and the case was heard by the judge over the course of six weeks. Whilst the appellant had entered a basis of plea at the time she pleaded guilty, the reality is that the judge was clearly well placed to form his own conclusions in relation to her involvement from the understanding of the case which he obtained during the trial, and from the evidence which he heard.

8. The appellant was aged 24 at the time when the offences started and was of good character prior to becoming involved in them.

9. In mitigation it was submitted that her role was only ever as a driver and that in the light of *R v Khan* [2014] 1 Cr App R 10, the sentencing categorisation in her case ought to have been adjusted to reflect the reality of her involvement in the activities of the conspiracy. Reference was made to texts within the evidence which suggested that she was naïve and did not appreciate the seriousness of that with which she had become involved. Other texts also suggested that she was worried about how those at the head of the conspiracy might behave if she withdrew from it. The evidence showed that she had only been engaged in the drug dealing from July 2019 and had only a limited understanding of the overall scale of the operation.

10. In terms of personal mitigation, it was clear that the appellant had been a hard-working care worker and indeed had a reference from an employer who spoke highly of her and indicated a willingness to employ her in the future. It seems that it was the loss of her job which had led her to be tempted to work as a driver in the conspiracies. She expressed her clear remorse for having become involved in these offences. In September 2020, the appellant had had a daughter for whom she was the sole carer. At the time of being sentenced, she was pregnant and due to have another child in April 2022. No further evidence in relation to the arrangements to secure the welfare of her children was placed before the sentencing judge. It does not appear that the judge was therefore provided with the material in relation to the arrangements in respect of children, the need for which was explained by this in *R v Rescorl* [2021] EWCA Crim 2005, in particular at [12] and [15]. This is a topic to which we shall return below.

11. Since the sentencing hearing, the appellant has given birth whilst in prison. The material which is before the court explains that her baby will be able to stay with the appellant in prison until the baby is 18 months old, with the possibility of a further six months in the mother and baby unit at the prison thereafter.

12. In his submissions before us this morning, further detail has been provided by Mr Outterside which was not before the sentencing judge. It appears that the appellant's baby was born on 19th April 2022 and is now six months old. On 5th October 2022 the appellant's baby left the prison to undertake respite care with the child's father as a voluntary placement. The father of that baby also cares for the appellant's other child who is now just 3 years old. There were question marks, explained by Mr Outterside, as to the ability of the father to be able to cope with looking after both of the children. Mr Outterside explained that at the moment reviews are being undertaken in order to examine whether or not the baby will be returned to the appellant. It is clearly the appellant's desire and hope that her baby will be returned to her so that she can continue to care for her and nurture her relationship with that child as its mother. All of these arrangements are being supervised by appropriate agencies, including an involvement by Social Services.

13. The relevant sentencing guidelines provide that for an offence of possession with intent to supply Class A drugs the starting point for a category 1 offence, where the offender has a lesser role, is seven years' custody, with a category range of six to nine years. In relation to the same type of offence and category for a Class B drug, the starting point is three years' custody, and the range two years six months to five years. None of the specified aggravating features is present in the appellant's case. In relation to mitigation, as pointed out above, the appellant was of good character and she expressed remorse for what she had done.

14. The appeal is advanced on the basis of two grounds. Firstly, it is contended that in light of *Khan*, the judge ought to have adjusted the starting point downwards from category 1. Secondly, it is submitted that insufficient weight was given to the appellant's personal mitigation, in particular her immaturity at the time of the offences, and the impact which such a lengthy term of imprisonment would have upon the appellant's two young children in the

light of the approach taken in *R v Petherick* [2012] EWCA Crim 2214.

15. The starting point for considering these submissions is to examine the basis upon which the sentencing judge arrived at his overall sentence. Whilst he accepted that the appellant was not involved over the whole time period of the conspiracy, the judge reflected that by reducing the starting point from that which is suggested in the guidelines to one of six and a half years' custody. In doing so, and in accepting that the appellant had a lesser role in the conspiracy, he reflected the assessment which he had made of her overall engagement with this criminal activity.

16. For her guilty plea at the start of the trial, the judge awarded the appellant a ten per cent discount, which reduced the sentence further to six years. He then applied a further downward adjustment of one year to reflect her personal mitigation and in particular the impact of the loss of her parental role with her child and the child that she was expecting.

17. In fact, the process set out in the guidelines was not in this instance followed by the judge. He ought to have adjusted the starting point first to reflect the appellant's personal mitigation prior to reducing the sentence to a sentence suitable after trial, and then allowed the appropriate discount for her guilty plea.

18. The central concern, however, which we have in relation to the sentence which was imposed was that the judge was not equipped, as he should have been in light of the authority of *Rescorl* (cited above), with all of the necessary information about the impact of the sentencing exercise not only on the appellant, but also upon her children who on any view were innocent parties in relation to the appellant's offending. Clearly in light of the decision of this court in *Petherick*, the question of the impact upon the appellant's children, including the child who was expected at the time of sentencing but who has now been born and has been present with her in prison, should have been central to the assessment of her personal mitigation.

19. We are not satisfied from the sentencing remarks that either the judge afforded appropriate significance to this issue, or that he was fully and properly informed of the position, or finally that he had the regard he should have done to the impact upon the appellant's children and their family life.

20. In all of those circumstances we have reached the conclusion that had the judge, as we are, been fully informed of the position in relation to the appellant's children and the impact upon them, he would have taken a very different view, as we do, to the reduction which should be made to reflect the appellant's personal mitigation.

21. Adopting the correct methodology for assessing the sentence in this case, we are prepared to accept the starting point which the judge took of six and a half years is correct. However, where we differ from the judge is in the reduction which is then made to reflect the appellant's personal mitigation. The judge failed properly to reflect the impact which the sentence would have upon both the appellant as a mother of two young children and also, and in particular, those two young children who will undoubtedly be affected by the sentence which is imposed.

22. In all of those circumstances, in our judgment it would have been appropriate for the judge to reduce the starting point from six and a half years' imprisonment to four and a half years. There would then be the need to allow for the guilty plea and, giving the appropriate discount, that leads to a sentence of four years' imprisonment.

23. It follows that we are entirely satisfied that the sentence of five years' imprisonment that was imposed was manifestly excessive. We quash that sentence and substitute for it a sentence

of four years' imprisonment. The concurrent term of three years' imprisonment is unaffected by our decision.

24. To that extent this appeal against sentence is allowed.

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

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