IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT BIRMINGHAM
MR RECORDER GURNEY 20BW1947522
CASE NO 202303537/A2
[2024] EWCA Crim 809

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 2 July 2024

Before:

LORD JUSTICE MALES

MR JUSTICE BRYAN

MRS JUSTICE THORNTON

REX

V
ARMAAN KHAN

MR G CULLEN appeared on behalf of the Appellant.

A P P R O V E D J U D G M E N T

MR JUSTICE BRYAN:

1. On 8 September 2023, in the Crown Court at Birmingham before Mr Recorder Gurney and a jury, the appellant (then aged 29) was convicted on 2 counts of possession of a Class A drug with intent to supply, namely heroin and crack cocaine, and on 11 September 2023 he was sentenced by the Recorder to 6 years 6 months' imprisonment on each count concurrent.

2. The appellant appeals against sentence by leave of the single judge on the ground that the sentence passed was arguably manifestly excessive.

3. Turning to the facts of the appellant's offending. On 10 May 2022, Police Officers attended Centenary Plaza Apartments on Holiday Street, Birmingham, in relation to an unrelated matter. At around midday, PC Jones was stood in the foyer and saw the appellant walk through and go outside the building in the direction of Suffolk Street Queensway. At that stage officers had no reason to stop him. Staff at the building told officers that the appellant was from Apartment 4. Officers were aware of intelligence which stated the appellant was using apartments in the city to store and bag up drugs, and as a result, they obtained a warrant to search the address.

4. No one was in when they forced entry to Apartment No 4. They found a number of items from behind the kickboard in the kitchen, including:
    - 430 wraps of heroin weighing 73.87 grams (the average weight of each wrap being 8.17 grams). These represented 8.2 gram deals valued at £20.00 each, totalling £8,600.00;
    - 1 paper package containing heroin weighing 5.84 grams worth around £200.00);
    - 19.87 grams of loose crack cocaine worth about £710.00); and
    - Scales covered in white powder.

    The total value of the drugs was around £9,510.00.

5. The packaging was forensically examined and fingerprints attributed to the appellant were found on a plastic bag containing the wraps of heroin and another fingerprint was found on an individual drugs wrap. A caretaker had witnessed the appellant's repeated attendance at the flat over the preceding weeks.

6. On 22 August 2022, the appellant handed himself in at Perry Barr Custody Suite and was arrested and cautioned. In interview, he gave no comment to all questions asked. He was then further arrested and recalled to prison. There was then a delay of 7 to 8 months before he was charged and his first appearance in the magistrates' court. During this time, he was in prison serving the remainder of his licence. It is said he suffered prejudice as a result of that delay in the context of the sentence he subsequently received.

7. The appellant had 4 convictions for 7 offences between 7 August 2008 and 5 June 2020. These included, on 5 June 2020, two offences of possession of a Class A controlled drug

with intent to supply (again heroin and crack cocaine) and possession of a bladed article, to which he had pleaded guilty and for which he received 40 months' (3 years 4 months') imprisonment. He was released on licence in December 2021 and was still on licence at the time of the present offences committed (at most) only 5 months since his release on licence for similar offences. The appellant had therefore recommenced the very same sort of serious drug offending very shortly after his release on licence.

8. The grounds of appeal, advanced by Mr Cullen on behalf of the appellant, were that the starting point taken was arbitrary, the sentencing remarks lacked clarity and that the overall sentence was manifestly excessive. In this regard, the Crown had taken the position that this was Significant Role / Category 3 under the Drugs Guidelines, with a starting point of 4 years 6 months and a range of 3 years 6 months to 7 years' custody, with the aggravating features of the previous similar convictions and the offences being committed whilst on licence for similar offences, all of which the defence realistically accepted. Aside from personal mitigation, such as it was, the defence also sought to rely on the time served on recall between arrest and charge, the time served on remand for this offence not counting by virtue of the appellant being a serving prisoner (between March and the day of sentence), and the environment in which the defendant had to serve this time (during Covid conditions).

9. The Learned Recorder indicated at the outset of his sentencing remarks that he placed the appellant's offending towards the upper end of the range based on quantity, increasing the starting point to 6 years, and then uplifting therefrom to reflect the aggravating factors of the relevant previous convictions and the offending being committed whilst on licence for similar offences. After acknowledging the mitigating features, he then passed a sentence of 6 years 6 months' imprisonment.

10. Mr Cullen submits it is far from clear how the Learned Recorder reached the sentence he did. First, while he accepts that the starting point for Category 3 for street dealing is not based on quantity, he says it is unclear how the Learned Recorder came to the conclusion that the amount of drugs placed this at the top end of the scale for Category 3, given that the indicative weight is 150 grams in other cases. Mr Cullen submits that the sentence passed was consistent with the bottom end of the range for a Significant Role / Category 2 offence where the indicative quantity is 1 kilogram, and he describes the Learned Recorder's choice of a starting point as "somewhat arbitrary".

11. Secondly, he identifies that the Learned Recorder appears to have uplifted the sentence by 6 months for the additional aggravating features. Whilst he acknowledges that that was not in of itself objectionable, it is not clear what account the Learned Recorder took of mitigation. Either he did not take sufficient account of mitigation or, if he did, then the elevated starting point, after aggravating factors, must have been at the very top of the range which it was submitted was inappropriate on the evidence before the court.

12. As for mitigation itself, the appellant was recalled to serve 13 months of his previous sentence prior to this case being disposed of. Whilst Mr Cullen acknowledged that this is the risk that an offender takes by offending on licence, he submitted that by recalling the appellant 8 months prior to him facing the current charges, this gave rise to prejudice to

the appellant, and that this should have been taken into account in the context of the sentence passed. It is also submitted that the time served on remand for this offence not counting by virtue of him being a serving prisoner (between March and the day of sentence), and the environment in which the defendant had to serve such time (during Covid conditions), should have been taken into account.

13. We are grateful to Mr Cullen for the quality of his submissions. We consider there is force in his submissions so far as it concerns the Learned Recorder's indication, at the outset of his sentencing remarks, that he placed the appellant's offending towards the upper end of the range based on quantity. We can see no basis for such an approach. As the Drug Guidelines expressly state:

> "Where the offence is supply directly to users (including street dealing...) the quantity of product is less indicative of the harm caused and therefore the starting point is not solely based on quantity. The court should consider all offences involving supplying directly to users as at least category 3 harm, and make an adjustment from the starting point within that category considering the quantity of drugs in the particular case."

14. The quantities of Class A drugs here were entirely consistent with the starting point. The Learned Recorder's approach is given no more traction by reference, as he did, to the number of wraps that were found – this simply reflects the parcelling of the drugs into street deals and does not justify an increase from the starting point of 4 years and 6 months.

15. However, the Learned Recorder was on much firmer ground in relation to the very serious aggravating factors of relevant and recent previous convictions for Class A drug dealing (again heroin and crack cocaine) in circumstances where the associated substantial recent custodial sentence of some 40 months' imprisonment had not deterred the appellant from further such offending within months of his release on licence, with the consequence that the offences were committed on licence for exactly the same sort of offending. Such aggravating features, coupled with the fact that the appellant was being sentenced on count 1 to reflect the totality of his offending across both counts, justified a substantial elevation from the starting point to around 5 years 6 months.

16. There then needs to be a reduction to reflect available mitigation. However, so far as the appellant's recall to prison is concerned, he only has himself to blame for that and all the associated time in prison was spent serving the remainder of that sentence. There is no mitigation there. Equally, it was a consequence of the appellant's reoffending on licence that the time spent on remand did not count towards sentence. Again, he had only himself to blame for that. Prison conditions during Covid was a relevant mitigating factor which the Learned Recorder took into account. The appellant's other available mitigation was, as Mr Cullen realistically accepted, unexceptional. Overall, we do not consider that the available mitigation justified a reduction of more than 3 months.

17. The sentence that was passed of 6 years 6 months' imprisonment was manifestly

excessive. We quash it and substitute a sentence of 5 years and 3 months' imprisonment. To that extent, the appeal against sentence is allowed.
