

2019/02404/A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION
Neutral Citation Number: [2019] EWCA Crim 1526

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 28th August 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE JEREMY BAKER

and

MR JUSTICE FREEDMAN

REGINA

- v -

TAWONA MANDISHONA

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr W Davis appeared on behalf of the Appellant

J U D G M E N T
(For Approval)

Wednesday 28th August 2019

LORD JUSTICE SIMON: I shall ask Mr Justice Freedman to give the judgment of the Court.

MR JUSTICE FREEDMAN:

1. This is an appeal against sentence brought with the leave of the single Judge who, although he refused an application for bail pending appeal, ordered that the appeal should be expedited.

2. On 17th June 2019, in the Crown Court at Maidstone, having earlier pleaded guilty to two counts of possession of a controlled drug of Class A with intent, the Appellant was sentenced by His Honour Judge Thomas to concurrent terms of eighteen months' immediate detention in a young offender institution.

3. It is submitted, on the Appellant's behalf by his Counsel, Mr William Davis, that whilst a custodial sentence is appropriate, that sentence ought in all the circumstances to have been suspended. The Appellant is 20 years of age. He has no previous convictions, warnings, reprimands or cautions.

4. At about 7.10pm on 9th August 2018, two police officers on duty in an unmarked car in Chatham, Kent noticed the Appellant on a pushbike outside a fish and chip shop. The Appellant was riding the bicycle in an aimless way, speaking on his mobile telephone and looking around. He entered a pedestrian underpass which was known to be an area for drug dealing activity. The Appellant was seen to interact with two other males in the underpass, one of whom was a known drug user. The officers approached and asked him where he was from. He replied, "Chatham Grove", but said that he could not remember the number as he had only recently come down from West London. He was searched. A package containing Class A drugs was found in the pocket of his jeans. It contained seven wraps of 1.79 grams of heroin of 56 per cent purity; four wraps of

0.683 grams of crack cocaine of 75 per cent purity; one wrap containing 0.112 grams of heroin; and one wrap containing 0.087 grams of crack cocaine. There were also seized from him a mobile telephone, a key and £41.20 in cash.

5. During the search, the Appellant's mobile phone rang constantly. One of the officers answered it. The contact identified himself as Terry and asked when the Appellant was coming home. The caller used a different name for the Appellant. The Appellant refused to provide the PIN for the telephone to the officers. He was arrested. During a further search in custody, an additional £30 cash was found in the pocket of tracksuit bottoms which he was wearing under his jeans. The key was used to unlock a property in Chatham Grove, but no items were seized during a search of that property.

6. When he was interviewed, the Appellant declined to comment, save to say that he had never tried Class A controlled drugs. He tested negative for Class A drugs. He agreed to provide the PIN for his telephone, but nothing relevant was found on it.

7. On 16th April 2019, at a plea and trial preparation hearing, the Appellant pleaded guilty to two counts of possessing controlled drugs of Class A with intent, but not guilty to a count of possessing criminal property. The basis of plea was that the Appellant had become friends with a group of boys he had met in June 2018. He spent time with them and they bought him clothes, food and drink. He did not expect to be asked to do anything in return. However, after some time he was told that he should do something in return as they had spent a lot of money on him. He felt obliged to return the favour, but was not given any specific information as to what he had to do.

8. On 9 August 2018, he met the group in London and was driven to Kent. He was told to go to a particular location and to wait for further instructions. He was given a bicycle and told to go to

an underpass to meet someone who would give him a parcel. Two men arrived. One gave him a parcel which was wrapped and knotted. They did not speak and the Appellant moved away. He said that he looked in the bag and discovered the drugs. He was immediately stopped by the police and arrested near the underpass. The money which he had was from his employment. He performed a limited function under the direction of the others. He felt that he had to repay them for what they had done for him.

9. The prosecution did not accept the basis of plea. However, it accepted that it made no difference whether the Appellant was a courier for a whole parcel (his case), or a runner of individual wraps to users (the Crown's case). On this basis, the prosecution accepted that the Appellant stood to be sentenced under the definitive guidelines for drug offences on the basis of Category 3, lesser role, acting under direction, namely, a starting point of three years' custody, with a range of two years to four years six months. This was confirmed at a hearing on 9 May 2019. Accordingly, no *Newton* hearing was sought and the Judge on that occasion agreed with this approach. The matter was adjourned for a pre-sentence report, before it came before the H Judge on 17 June 2019.

10. In his sentencing remarks, the Judge contrasted the Appellant with those who came before the Court from disadvantaged backgrounds and with no way forward in life, who became involved in drugs and drugs business. By contrast, he said that the Appellant came before the Court with many advantages. He was in the course of undertaking a university degree and yet had become involved in the drugs trade. Yet, despite the Appellant's more advantageous position, the Judge was asked to deal with him in a different way from those who have had more reason to escape their lives. The Judge said that only an immediate custodial sentence could be passed on people who deal in Class A drugs. He was aware of, and had noted, the suspended sentence guidelines. However, in his judgment "*someone in your position, doing what you did is so serious that only*

such a sentence [an immediate custodial sentence] can be imposed upon you". The Judge said that he made allowance for the Appellant's age, circumstances and references, but that the offence was so serious that "I cannot contemplate a suspended sentence in your case". He therefore took a sentence at the bottom of the range, of two years, reduced by 25 per cent for the guilty plea, and imposed concurrent sentences of eighteen months' immediate detention on each count. He said that "those who deal in Class A drugs inevitably, in my judgment, save in exceptional circumstances, must face an immediate ... custodial sentence".

11. On behalf of the Appellant, it has been submitted that the sentence should have been suspended, bearing in mind his basis of plea. His lack of involvement in the chain was supported by the absence of any relevant evidence on his phone. The assertion that the cash found on him was from his wages was unchallenged. A drugs test carried out on him after arrest was negative as regards his having consumed Class A drugs at that time, and the Appellant confirmed that he had never been a user of Class A drugs. He was of previous positive good character, both in the sense that he had no previous convictions and that he had witnesses who spoke to his qualities. There were good references from a foster carer who knew him and his family, from one of his closest friends, and from a weekend employer for whom the Appellant had worked for two years.

12. The Appellant is studying for a BSc degree at university and has just completed his first year. He did well enough at school to earn a place there, and there is evidence that his essay work at university was good.

13. It was submitted on behalf of the Appellant that there was strong mitigation. The pre-sentence report assessed the Appellant as posing a low risk of re-offending and a low risk of harm to the public. He was considered by its author to be an immature, naïve individual who would find custody extremely difficult to deal with as it would bring him into contact with more sophisticated

offenders. She commented that the Appellant could be managed safely within the community.

14. It was submitted by Mr Davis on his behalf that the Appellant's culpability was limited on the basis that he became involved in the offending due to the malign influence of others. On his basis of the plea, which was accepted by the prosecution, he was manipulated by others. He was the subject of their gifts and was then expected to repay them by acting, at their request, in their drugs' business. Custody was likely to be counterproductive both for the Appellant and for the community as a whole.

15. The factors set out in the Sentencing Council's Definitive Guideline on Imposition of Community and Custodial Sentences indicated that an immediate custodial sentence did not need to be imposed in the instant case. There was a realistic prospect of rehabilitation. Appropriate punishment could be imposed without the imposition of an immediate custodial sentence. There was strong personal mitigation. There was no history of poor compliance with court orders. Immediate custody would result in a significant harmful impact on others if the Appellant encountered bad influences in prison.

16. The Judge's view that the sentence could not be suspended was by reference to the seriousness of the offence. Mr Davis, on behalf of the Appellant, submitted that the Judge was wrong to say that he could not contemplate suspending the sentence, save in "exceptional circumstances". It was submitted that that was the wrong test and that if the Judge applied it, he may have been harking back to a former test which had been replaced by the direction that the Court must impose whatever is the appropriate sentence, which may be a suspended sentence. It was submitted that in all the circumstances of this case, a suspended sentence was appropriate, and that it could have been accompanied by a curfew and by an order to undertake unpaid work in the community.

17. It is right to say that, earlier in his sentencing remarks, the Judge had said that he was aware of the suspended sentence guidelines and had noted them. The reference to "exceptional circumstances" may have embraced the circumstances to depart not only from an immediate custodial sentence, but from any form of custodial sentence. That having been said, it seems to this Court that the Judge erred in a related respect, namely, in his view that only an immediate custodial sentence could be passed on people who deal with Class A drugs. That might be so in most cases, and it would be very unwise for anybody to assume that there are prospects of being able to avoid an immediate custodial sentence in a case of possession of Class A drugs with intent to supply. Further, an aggravating feature of this case is the fact that the Appellant associated himself with an Inner City London group who travelled to a smaller town in order to supply drugs. People involved in the supply of Class A drugs, even in small quantities at the bottom of the supply chain and acting on the instructions of others, will in most cases end up with an immediate custodial sentence. That said, the suggestion that there could never be a case where a suspended sentence was appropriate, or that there remains a threshold previously abolished of exceptional circumstances in order to justify a suspended sentence, was wrong.

18. The question for this Court is: what is appropriate in the circumstances of this particular case? The Judge should have engaged more with the facts of the Appellant's case. Had he done so, it would have been appreciated that such was the Appellant's mitigation about him being exploited and set up by others, his personal circumstances and the other matters prayed in aid on his behalf that a suspended sentence was justified.

19. The Appellant's background and the prospects of his rehabilitation were a material consideration. The Judge said that the Appellant was in a much more advantageous position than others. His background is set out in the pre-sentence report. He was brought up in Peckham by his mother. He had very limited contact with his father. He said in the statement which formed

the basis of his plea that, although he had no need to take part in street dealing, money had been tight at times. According to his statement, he grew up in an area where gang violence and drug dealing is considered to be almost commonplace. Despite this, until the matters for which he was before the Court, he had succeeded in avoiding such offending and had been of previous good character. From the school that he attended, and despite a disadvantaged childhood, he had succeeded in attaining a university place. He always worked hard to achieve good grades and to stay in the top set class at his school. This was not the case of a person who had had advantages in life, but of a person who had gone to university through his own efforts. It is said by Mr Davis on his behalf that it is desirable for him to complete his education and to move on to work if that is appropriate in all the circumstances.

20. In the judgment of this Court, this was a case where the sentence of detention should have been suspended. That would have followed from the basis of the plea, from the mitigation referred to above, including the fact that the Appellant was exploited and set up by others, and his personal circumstances. If this matter had been considered below in this way, then the Court necessarily would have considered making a curfew order and an order for unpaid work within the community. It is, therefore, necessary for this Court to consider whether such a course is appropriate in the event that the immediate sentence is quashed.

21. In the judgment of this Court, in circumstances where the Appellant has already served over nine weeks of the sentence in detention (the equivalent of serving a determinate sentence of over four months), it would be wrong to impose any conditions.

22. In the judgment of this Court, this was not a case where the only option was a sentence of immediate detention in a young offender institution. It follows from the above that there was real mitigation in this case and that the Judge adopted too rigid an approach in not suspending the

sentence.

23. In all the circumstances, in our judgment, the sentence was manifestly excessive. We allow the appeal to the extent of quashing the sentence of immediate detention and in its place imposing a suspended sentence of detention. In circumstances where the Appellant has served nine weeks in custody, there should not be any conditions attached to the suspended sentence. The sentence is varied by replacing the concurrent sentences of immediate detention of eighteen months in respect of each of counts 1 and 2 with concurrent sentences of eighteen months' detention on each count, suspended for two years from the date of sentence below (that is, for two years from 17 June 2019). The effect of this is that if the Appellant were to commit an offence between now and the expiry of that two year period, in addition to being sentenced for that offence, he would, in addition to that sentence, be liable to the activation of the suspended sentence of detention.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk