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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 3 May 2019

B e f o r e:

LADY JUSTICE NICOLA DAVIES DBE

MR JUSTICE SPENCER
MR JUSTICE MORRIS
R E G I N A
v
SEAN CHRISTOPHER PROSSER

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Mr C Witcher appeared on behalf of the **Applicant**
Ms R Aisthorpe appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. MR JUSTICE SPENCER: This application for an extension of time and for leave to appeal against conviction has been referred to the Full Court by the Registrar. The

circumstances are unusual. We grant the extension of time and we grant leave to appeal against conviction.

2. On 13 June 2018, in the Crown Court at Northampton, the appellant, who is now 23 years of age, pleaded guilty to a single count of possessing a controlled drug of Class A with intent to supply, contrary to section 5(3) of the Misuse of Drugs Act 1971. The particulars of offence alleged that the Class A drug in question was a quantity of diamorphine (heroin).

3. The appellant was sentenced by Mr Recorder Syfret QC to a term of 3 years' imprisonment for that offence. He was also in breach of a suspended sentence order of 12 months' imprisonment suspended for 2 years, imposed in October 2017 for an offence of burglary. That sentence was activated in full and ordered to run consecutively. He was also sentenced, on this same occasion, to 6 months concurrent for an offence of driving a vehicle taken without authority.

4. The drugs offence arose from the appellant's arrest on 14 May 2018, when he was found to be in possession of a plastic Kinder egg containing 25 wraps of a power suspected to be heroin. A field test for heroin was positive. The appellant pleaded guilty on the basis that he was a runner for a drugs line and had been tasked with delivering the wraps of drugs contained in the Kinder egg.

5. Subsequent forensic analysis of the content of the wraps revealed that in fact it was not heroin at all, but a mixture of paracetamol and caffeine. That information was communicated to the appellant's solicitors by the Crown Prosecution Service on 6 September 2018, with a copy of the streamlined forensic report. The report was dated 18 July 2018. The letter from the Crown Prosecution Service acknowledged that the charge to which the appellant had pleaded guilty was not made out and he would no doubt want to appeal against his conviction. Rightly, however, the letter pointed out that the appellant was certainly guilty of attempting to possess heroin with intent to supply.

6. In the light of this fresh evidence, it is plain that the conviction for the substantive offence of possessing diamorphine with intent to supply cannot be allowed to stand. We have had the advantage of submissions this morning, and in writing, from Mr Witcher, on behalf of the appellant, and from Ms Aisthorpe, on behalf of the Crown. There is no dispute that the conviction must be quashed. It is unsafe because the powder was not in fact heroin.

7. However, the prosecution contend that this court should exercise its power under section 3A of the Criminal Appeal Act 1968 to substitute, for the appellant's plea of guilty to the substantive offence, a plea of guilty to the offence of attempting to commit the substantive offence. That application is not opposed on behalf of the appellant. Section 3A provides as follows:

8.

"(1) This section applies on an appeal against conviction where—

(a) an appellant has been convicted of an offence to which he pleaded guilty

(b) if he had not so pleaded, he could on the indictment have pleaded, or been found, guilty of some other offence, and

(c) it appears to the Court of Appeal that the plea of guilty indicates an admission by the appellant of facts which prove him guilty of the other offence.

(2) The Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the appellant's plea of guilty a plea of guilty of the other offence and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity."

9. All the requirements in subsection (1) are satisfied. The offence of attempt was a statutory alternative by virtue of section 6(3) of the Criminal Law Act 1967. The appellant's plea of guilty to the full offence clearly indicated an admission of facts which prove him guilty of the offence of attempt, which is the next requirement.

10. We are satisfied that this is a proper case for exercising the court's discretion to substitute a plea of guilty to the offence of attempting to possess a quantity of diamorphine with intent to supply to another, contrary to section 1(1) of the Criminal Attempts Act 1981. We therefore take the course of substituting a plea of guilty to that offence instead of allowing or dismissing the appeal.

11. We are now required, by section 3A, to pass such sentence in substitution for the sentence passed at the trial as may be authorised by law, not being a sentence of greater severity.

12. On behalf of the appellant Mr Witcher, who appeared in the court below, submits that the sentence for the substituted offence of attempt should properly be less than the sentence imposed for the full offence. Ms Aisthorpe, on behalf of the Crown, concedes that we should look again carefully at the categorisation of the offence under the relevant Sentencing Council guideline.

13. Before exploring the argument further it is appropriate to set out a little more background of the offences. On 14 May 2018, as part of a drugs operation, police officers spotted a co-accused called Hobbs on a street in Northampton. He was in possession of a similar Kinder egg containing 37 individual wraps. They too were believed to be heroin and crack cocaine on the basis of field tests but they were subsequently discovered to be the same mixture of paracetamol and caffeine. Hobbs was also in possession of a bag of herbal cannabis and a grinder.

14. It was when the police went to conduct a search at Hobbs' flat that they saw the appellant approaching the building. There was intelligence to link Hobbs and the appellant as dealers for the same drugs line. On seeing the officers the appellant attempted to make off on foot but he was detained after a struggle and handcuffed.

The Kinder egg in question was found in his possession together with some £320 in cash and three mobile phones.

15. In interview, the appellant said that he was homeless and a heroin user. He said he had purchased the drugs found in his possession for £130 and was intending to use them himself. He said the money in his possession was his own: most of it was left over from a job he had a while ago and some was a birthday present. He denied selling drugs. He was in receipt of no benefits and had been sofa surfing. He said that the three mobile phones were his and there would be no evidence of drug dealing on them. It is right to say that there is no evidence of dealing found on the phones, if indeed they were examined. He would not say where he got the drugs from. He said he was friendly with Hobbs and sometimes went around to visit him. He did not know if Hobbs sold drugs; he could not account for why the drugs each of them had were packaged in the same way. Plainly what he said in his interview was not the truth but he accepted his guilt by pleading guilty at the stage of the pre-trial preparation hearing.

16. Hobbs too had originally pleaded guilty to possessing heroin and cocaine with intent to supply but he was subsequently allowed to vacate his plea when the fresh evidence came to light. He too pleaded guilty instead to an offence of attempting to possess diamorphine with intent to supply, as well as to an offence of simple possession of cannabis. He had no previous convictions, unlike than this appellant. We are told that Hobbs received a suspended sentence of 2 years' imprisonment. No disparity argument is advanced.

17. By contrast, the appellant has an extensive criminal record albeit no conviction for drugs supply. He had convictions for dishonesty, in particular shoplifting, and for battery and assault. As we have already indicated, the present offence was committed in breach of a suspended sentence for burglary.

18. Because of the way that the appeal has developed no transcript was obtained, in the usual way, by the Registrar of the judge's sentencing remarks. However, we are grateful to Mr Witcher for providing a note of what the judge said and we have been able to listen to the digital recording of the sentencing remarks, courtesy of the Criminal Appeal Office at short notice, to check the accuracy of his note.

19. It is clear that the judge sentenced the appellant on the basis that he was a runner for a drugs line. Because this was street dealing it was category 3 under the relevant Sentencing Council guideline. The judge found that the appellant's role fell somewhere between "lesser" and "significant" and therefore adopted a starting point of 4 years. He gave the appellant 25% credit for his guilty plea. The starting point for category 3 "significant" role is four-and-a-half years' custody, whereas the starting point under category 3 for "lesser" role is 3 years. It follows that the judge, in choosing 4 years, was veering towards "significant" rather than "lesser" role although it was between the two.

20. Mr Witcher submits that as a drugs runner who had no knowledge that he was running fake drugs the appellant had no true knowledge of the operation of the drugs enterprise

and should be entitled to be sentenced at or close to the starting point for category 3 "lesser" role, that is to say 3 years after trial.

21. Ms Aisthorpe realistically conceded, in her helpful submissions in opening the facts to us, that Mr Witcher's submission must be right. The fact is that the appellant would not have been aware that someone above him in the chain was seeking to pass off as heroin something which was in fact a fake drug. We also think there is force in Mr Witcher's submission that the judge, in passing sentence for the full substantive offence, would have assumed that the circumstances showed a degree of trust on the part of those providing the appellant with the packages; on the face of it he was trusted to deal real drugs.

22. In his admirably succinct submissions, for which we are grateful, Mr Witcher accepted that this appellant nevertheless had to receive an immediate custodial sentence. There was no comparison to be made in that regard with the co-accused.

23. We think there is force in Mr Witcher's submissions. We also bear in mind that, as a general proposition, the sentence for an attempt will generally be less than for the full offence. Having said that, however, the appellant's culpability in unwittingly committing only the offence of attempt was no different from his culpability for the substantive offence.

24. We think that instead of the judge's starting point of 4 years after trial, the appropriate starting point for the offence of attempt would be 3 years after trial. With 25% credit for plea, the appropriate sentence is therefore 27 months' imprisonment, 9 months less than the sentence he received for the full offence.

25. Accordingly, for the offence of attempting to possess diamorphine with intent to supply, the sentence we impose is one of 27 months' imprisonment. The other sentences remain unaltered and the suspended sentence of 12 months will still run consecutively. The total sentence is therefore now 3 years 3 months rather than 4 years.

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

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