IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2021/01120/A4
NCN: [2021] EWCA Crim 1104

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 9th July 2021

LADY JUSTICE SIMLER

MRS JUSTICE CUTTS DBE

HIS HONOUR JUDGE PICTON
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v –

CORY PHIPPS

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Mr S Dyble appeared on behalf of the Appellant

J U D G M E N T

Friday 9th July 2021

LADY JUSTICE SIMLER: I shall ask Mrs Justice Cutts to give the judgment of the court.

MRS JUSTICE CUTTS:

1. On 28th January 2021, having pleaded guilty to three drug offences before the magistrates, the appellant (then aged 19) was committed to the Crown Court for sentence, pursuant to section 14 of the Sentencing Act 2020.

2. On 16th April 2021, in the Crown Court at Ipswich, he was sentenced to 32 months' detention in a young offender institution for each offence, to run concurrently. These comprised: one offence of supplying a controlled drug of Class A, contrary to section 4(3)(a) of the Misuse of Drugs Act 1971; one of possessing a drug of Class A with intent to supply, contrary to section 5(3) of the same Act; and one of being concerned in offering to supply a controlled drug of Class A to another, contrary to section 4(1) again of the same Act. The total sentence was, therefore, one of 32 months' detention. Ancillary orders were also made.

3. The appellant appeals against those sentences with the leave of the single judge.

4. This was a tragic case. On 30th May 2020, when the appellant was still at school and aged just 18 years, he supplied nine MDMA tablets to a group of his friends (offence 1). A friend of his from school, named Hayden Light, had telephoned the appellant to arrange the purchase and they met that evening. The appellant supplied the tablets for £40. He told Hayden Light that the pills were "really good" and were 300 milligrams in strength. They were stronger than average.

5. Hayden Light consumed the tablets with three other friends of the same age when the appellant was not present. The three of them had all earlier consumed a moderate amount of alcohol and a number of canisters of nitrous oxide. Despite the discouragement of the others, one of them, Ben Moughton, took three of the MDMA tablets. He suffered an adverse reaction to them and began to act strangely. He kept walking off and ended up lying in a puddle by some bushes.

6. The emergency services were called. Sadly, he suffered cardiac arrest in the ambulance and was declared dead on arrival at hospital.

7. A post-mortem examination found that he died of a drug-induced drowning due to a fatal amount of MDMA in his system.

8. The appellant was arrested the following day, 31st May 2020. In his bedroom the police found a further 13 tablets of MDMA of the same type as those sold to Hayden Light (offence 2). His phone was seized and text messages consistent with dealing MDMA were found. They showed that he had been selling the drug for approximately a month prior to his arrest (offence 3). It is right to say that one of the messages was dated in December 2019; the remainder concerned the month prior to this offence.

9. In interview the appellant eventually admitted the sale of the tablets to Hayden Light. He initially said that he had bought them from a friend and then said that he had obtained them on the dark web.

10. The appellant submitted a basis of plea in which he spoke of being a social user of MDMA. Following lockdown, he was unable to purchase the drug from his usual source and so bought two separate purchases of 25 tablets from the dark web, for which he paid two to three pounds

per pill. Some he used himself. Others he sold to a small group of friends at £5 per tablet. In the basis of plea it was submitted that on the evidence the death of Ben Moughton could not be attributed directly to the consumption of the pills he supplied to Hayden Light. It was conceded in this document that the case fell within category 3 "significant role" of the relevant Sentencing Council guideline.

11. In a written document in response, the prosecution accepted that the evidence from the phone showed mostly drug dealing for about a month before the appellant's arrest. There was one text in December, which suggested the sale of drugs on that occasion. There was no evidence of dealing in between. We pause to note that on the evidence it seems that there was one message in December and then three others before the day in question, all in May. All of those messages were to friends. No messages advertising the sale of drugs were sent to others.

12. In their written document, the prosecution accepted that they could not prove the causation of Ben Moughton's death "in the sense that there may have been other factors at play", but contended that the evidence showed that the ingestion by him of MDMA was at the very least a contributing factor. The prosecution also placed the offending within category 3 "significant role" of the guidelines.

13. In a Victim Personal Statement the mother of Ben Moughton spoke movingly of her son and of the terrible impact of his loss on the entire family. Perhaps remarkably in the circumstances, she stated that she felt no malice towards the appellant and thanked him for taking responsibility for his actions. In her view, however, he needed to face the consequences of them.

14. The appellant had one conviction in 2014, when aged 12, for an unrelated matter, which the judge disregarded. He was, therefore sentenced, as a man of previous good character.

15. The judge had the benefit of a pre-sentence report on the appellant. He told the author of the report that he had started to supply MDMA to his friends just before the New Year in 2019, and he did so in the hope that he would made a good profit. In the view of the author, the immaturity of the appellant was a contributory factor in his offending. This was linked with his desire to fit in with his peer group and find a sense of belonging. He had shown, in her view, a high degree of victim empathy and awareness. He held himself responsible for Ben Moughton's death and was devastated by his actions. He had determined, out of respect for Ben and his family, to gain a good education and career. Prior to this offending he had had to repeat his first year of sixth form through lack of motivation. Since his arrest he had been studying hard and trying to achieve the best A-level results he could. He had been accepted to study Business Management at the University of Roehampton in London. The author expressed concerns about his vulnerability in a custodial setting and feared that his maturation process would be delayed by contact with those of a similar history and mindset. He was assessed as suitable for unpaid work and curfew, and it was said that he would benefit from a rehabilitation activity requirement involving intensive and structured interventions to address his drug misuse and deficit in thinking skills.

16. We have seen a prison report prepared for the purposes of this appeal. We are pleased to see that the fears of the author of the pre-sentence report have not materialised. The appellant has continued to take full responsibility for his offences and has displayed high levels of remorse. He is an enhanced offender under the Incentive Earned Privileges Scheme. He has no adjudications against him. He has been keen to start a course as part of his sentence plan, but no group work can be conducted in Norwich Prison due to the Covid-19 pandemic. The appellant has, therefore, completed in-cell work to address his misuse of drugs and the link to his offending. He has shown great willingness to address the issues which led to his conviction.

He has also applied for educational courses, is future-focused, and wants to attend university.

17. In sentencing, the judge proceeded on the basis that the appellant had admitted to the author of the pre-sentence report that he had been dealing drugs for five months prior to his arrest. He considered that he was not in a position to make a finding of fact that the appellant actually caused Ben's death. He observed that the appellant had not been charged with manslaughter. He did not conclude that the appellant knew the full strength of the drugs he sold. However, the consequence of the appellant's offending was the death of a young person. In his view, this had to be treated as a substantial aggravating feature of an offence of supplying drugs. The judge observed that the case served as a stark reminder and grim illustration of the terrible harm that can be caused by those who supply and consume unlawful drugs.

18. He placed the appellant's offending within category 3 "significant role" of the sentencing guideline. This has a starting point of four and a half years' custody, with a range of three and a half to seven years.

19. In mitigation, the judge expressly took account of the appellant's remorse, his lack of maturity and young age. He acknowledged that a sentence of immediate custody would impact on the appellant's future, but observed that that was a consequence of the crime he had committed.

20. Taking all matters into account, the judge reached a notional sentence, before credit for the guilty plea, of four years' detention in a young offender institution. He afforded full credit for the guilty pleas, thereby reaching the sentence of 32 months' detention.

The Appeal

21. The appellant submits that this sentence was manifestly excessive. Mr Dyble, who appears before us as he did at the court below, contends first that the judge failed to give sufficient weight to the appellant's strong mitigation, that is to say, his good character, his age and immaturity at the time of the offence, his remorse, and the fact that he had stopped using drugs and turned his life around. Further, he submits that the judge was wrong to treat the death of Ben Moughton as a serious aggravating factor when, in his submission, there was no cogent evidence to prove that it was a culpable act of the appellant that contributed to the death. He submits that there was no direct supply by the appellant of drugs to Ben and that in those circumstances the death should not have been treated as an aggravating factor at all.

22. Mr Dyble submits that the sentence was wrong in principle in that the custodial term should have been of a length capable of being suspended and that in those circumstances that is what should have been the result, particularly in the light of the decision of this court in *R v Manning* [2020] EWCA Crim 592.

23. We have reflected on these submissions. We cannot accept that the judge erred in treating the death of Ben Moughton as a serious aggravating factor. Whilst there was no direct causative link, such as to justify a charge of manslaughter, the post-mortem examination revealed a fatal amount of MDMA in his system. There is no sensible argument on the evidence that this MDMA came from anyone other than the appellant, albeit through a third party. We recognise, as did the judge, that the appellant did not supply the drug directly to Ben Moughton, that he had advised Hayden Light of the strength of the pills and that he was not responsible for the fact that Ben Moughton had taken three of them. Nonetheless, we consider that the judge was correct in his observation that the supply of drugs by the appellant had led to the death of a young person.

24. We consider, however, that both parties, and in consequence the judge, wrongly

categorised this offence within the relevant Sentencing Council guideline. The appellant fell to be sentenced by application of the revised drugs guideline, which came into effect approximately two weeks before his sentence. We are told today that his sentence proceeded by application of that revised guideline.

25. Within the revised guideline there was no change to the categorisation of harm from the old, and the judge was correct to find that this case fell within category 3 harm by reason of the appellant selling the drugs directly to users. There has, however, been a change in the factors which place an offence within the category of "significant role". Whereas under the old guidelines an offender would fall within "significant role" if he was "motivated by financial or other advantage", under the new guideline he falls within that category if he has the "expectation of significant financial or other advantage". He falls within "lesser role" if he has the "expectation of limited, if any, financial advantage".

26. The appellant plainly acted for financial advantage, but we cannot accept that the selling to a few friends at a profit of one to two pounds per tablet constitutes "expectation of *significant financial advantage*". Rather his expectation was of limited financial advantage. Under the new guideline, in our judgment he therefore fell within "lesser role". This has a starting point of three years' custody, with a range of two to four years and six months.

27. The appellant fell to be sentenced for three drugs offences. This, together with the sad death of Ben Moughton, aggravated the offending, which in our view warranted an upward adjustment from the starting point.

28. There was, however, strong mitigation. The appellant was only just 18 years of age at the time of the offending. It is clear from the pre-sentence report that he was immature for his age. He was of effective previous good character. He did not fall to be sentenced until approximately 12 months after the tragic events of 30th May 2020. In the intervening period he had done all that he could to turn his life around. He had stopped taking drugs, worked hard at school and obtained a place at university. From the outset he had shown considerable remorse. We have seen from the prison report that since his sentence he has not, even in the difficult conditions pertaining currently in prison by reason of the pandemic, regressed into his past life, but continues to do all he can to ensure that he does not re-offend.

29. There is no doubt that these are serious offences which warrant a custodial sentence. We are persuaded, however, that by misapplying the relevant guideline the judge fell into error and passed a sentence which was manifestly excessive.

30. Taking all the factors of this difficult case into account, and affording full credit for the guilty plea, we have come to the conclusion that the appropriate sentence was a total one of 21 months' detention.

31. By reason of the length of the sentence he had imposed, the judge did not consider whether the term should have been suspended. In the light of our conclusions we must, by application of the guideline on the Imposition of Community and Custodial Sentences, consider that question afresh.

32. Applying the factors in favour of suspension, we consider there to be a realistic prospect of rehabilitation and strong personal mitigation. The question is whether the offence is so serious that only immediate custody can be justified. We have given that matter anxious consideration.

33. We have come to the conclusion that had the judge been considering the question of

suspension at the time of sentence he would inevitably have answered that question in the affirmative and imposed a sentence of immediate custody. However, the position before us is different. The appellant has now been in custody for close to three months. By reason of that we are satisfied that he understands, if he did not before, fully the seriousness of the offending in which he engaged. By reason of the time he has spent in custody and the behaviour that he has displayed there, we have come to the conclusion that in the particular circumstances – and not wishing in any way to set a precedent – that the sentence in this case can and should now be suspended.

34. We give effect to that conclusion by quashing the sentence imposed and substituting for each offence a sentence of 21 months' detention in a young offender institution, suspended for 18 months, with requirements of 150 hours' unpaid work, a three month curfew from 8pm to 6am, and a Rehabilitation Activity Requirement of up to 30 days, to continue with the appellant's rehabilitation. That is the sentence on each offence, to run concurrently with each other.

35. Accordingly, and to this extent, the appeal against sentence is allowed.
