IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2022] EWCA Crim 1199

CASE NO 202200670/A2

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 26 July 2022

Before:

LADY JUSTICE THIRLWALL DBE

MR JUSTICE SPENCER

MR JUSTICE LINDEN

REGINA
V
DANIEL DONALD MIDDLETON

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MR E FENNER appeared on behalf of the Appellant.
MR P McGEE appeared on behalf of the Crown.

J U D G M E N T

1. MR JUSTICE SPENCER: This is an appeal against sentence, brought by leave of the single judge.
2. On 15 March 2021 in the Crown Court at Isleworth the appellant, who is now 39 years of age, pleaded guilty to an offence of conspiracy to supply a Class A drug (cocaine). On 2 February 2022 he was sentenced by Ms Recorder Maya Sikand QC to a term of 7 years' imprisonment. The judge allowed credit of 25% for the appellant's guilty plea. It follows that the appellant's provisional sentence, before credit for plea, was 9 years 4 months.
3. The grounds of appeal, in short, are these. First, that the judge's starting point was too high; second, that insufficient weight was attached to his personal mitigation; third, that more weight should have been attached to the excessive delay in his being sentenced and to the impact of the pandemic, and fourth, that credit for his guilty plea should have been a full one-third rather than 25%. There were co-defendants sentenced on the same occasion. There is no complaint of disparity.
4. We are grateful to Mr Fenner for his oral submissions on behalf of the appellant, in the course of which he has realistically (if we may say so) reduced the scope of the appeal considerably, as we shall explain in due course. We are also grateful to Mr McGee, on behalf of the prosecution, who has assisted the Court with a respondent's notice in view of the issues raised in the grounds.

The facts

5. In advance of the sentencing hearing Mr McGee had provided the judge with a very comprehensive sentencing note, in which the evidence was set out in meticulous detail. For present purposes we can take the facts quite shortly but first it is important to put the appellant's offending in its proper chronological context.
6. On 15 November 2019 the appellant was released on licence from a sentence of 5 years 2 months' imprisonment for an offence of conspiracy to purchase or acquire firearms and ammunition. In view of his extensive criminal record he must have known that if he committed any further offence during the period of his licence he was liable to be returned to prison to serve some or all of the remainder of that lengthy sentence. The sentence expiry date was 17 June 2022. Within 2 months of his release on licence the appellant began offending again in this serious conspiracy to supply cocaine.
7. The conspiracy was charged as being committed between 1 January 2020 and 18 December 2020, the day after the appellant's arrest. Although he initially submitted a basis of plea, that basis was not accepted by the prosecution and was soon abandoned by the appellant. He therefore fell to be sentenced for his participation in a conspiracy which ran for nearly 12 months.
8. The conspiracy related to a Class A drug dealing operation run from an address in Denham near Gerrard's Cross, on the outskirts of London. It was at that address that the conspirators gathered and from that address that the drugs were sold to the end users via a mobile phone number, a drugs line, to which the conspirators were also linked.
9. For a period of around two months, from October 2020, there was a police surveillance operation which culminated in the execution of a search warrant at the address in question on 17 December 2020. This was a flat above shops, the home of a co-accused, Hassan Fouad. That day police officers observed a number of vehicles used by the three other defendants, including this appellant, coming and going at the address. The four

defendants were all inside the flat when the police entered. Fouad was in the bedroom and the other three including this appellant tried to escape by climbing out of windows but all were detained and arrested.

10. Inside the flat a large quantity of drugs were found, along with paraphernalia including scales, polythene bags, a blender flask and lottery tickets in abundance used to wrap drugs. Cash was found and a number of mobile phone handsets. The premises were littered with obvious signs of preparation for drugs supply.
11. The drugs found in the flat were principally cocaine. There were eight knotted plastic bags containing nearly 60 grams of cocaine at 92% purity, with an estimated street value of nearly £6,000. There were a further two knotted plastic bags containing 114 grams of cocaine at 97% purity. There were also amounts of cocaine of lower purity which had already been adulterated with cutting agents.
12. The address where the appellant had been living with his partner was searched. No drugs were recovered there but the police did find a set of digital scales with traces of white powder. At the address of another defendant, Kevan Wichman, the police found amongst other things a piece of paper on which were apparently recorded large sums of money ranging from £10,000 to £100,000 and a list of names, one of which was a name used by the fourth co-accused, Paul Gordon.
13. The police had searched Wichman's address previously on 12 October 2020. He was there at the time with the appellant. On that occasion the police recovered 21.7 grams of cocaine at 95% purity and some cannabis. Wichman asserted on that occasion that the drugs were for his own use. He was arrested on suspicion of possession with intent to supply and released under investigation. The appellant was allowed to leave. It was however a warning shot across his bows.
14. The total quantity of cocaine recovered during the police searches was 357.63 grams, with a potential street value of some £35,530. There were smaller amounts of cannabis, ketamine and MDMA (ecstasy). Importantly, it was the opinion of the drugs expert witness that massive financial outlay would have been necessary to purchase cocaine in these quantities of this purity. It was therefore unlikely that what the police discovered on 17 December represented the first investment in the enterprise. Plainly it was simply a snapshot of the overall conspiracy. What was found was consistent with a purchase of high purity cocaine in 2 ounce deals which were subsequently adulterated and repackaged for distribution in smaller sized deals.
15. At the flat the police found a mobile phone which revealed details of the drugs line. The phone was locked and the PIN number was not provided by any of the defendants. However, it was apparent that there were a number of missed calls that day, by inference calls from drugs customers. The number had been in operation from the beginning of 2020. Predominantly it had been used by Wichman but it had also been used by the appellant. In particular there was a period from 9 to 20 February 2020, when there was cell site data matching the appellant's own mobile phone. The appellant accepted that he had been in control of the phone at that time, when Wichman was temporarily abroad. There was a match between phone activity and police surveillance of various defendants outside the flat on occasions and the appellant was seen in the surveillance arriving and leaving the flat.
16. When interviewed on 17 December the appellant was represented by solicitors but not (if we may so term it) his usual solicitors. He gave a prepared statement in which he

suggested, quite untruthfully, that he had been at the flat that day only to pick up Christmas presents for his son. He denied any knowledge of the drugs at the address and denied any involvement in supplying drugs. Other than that it was largely a no comment interview. He was remanded in custody and was recalled to prison to continue to serve the sentence from which he had been released on licence.

The history of the proceedings

17. The appellant's first appearance at the magistrates' court was on 19 December 2020 (two days later). At that stage, he was charged not with conspiracy but with possession of cocaine with intent to supply, on the basis of the drugs found in the search on 17 December. The Better Case Management form records that he was represented at the hearing by solicitors and that he had been advised about credit for a guilty plea. The form indicated not guilty pleas and that the defendant denied being part of the activity. The form indicated that a defence statement would be served in due course.
18. The case was sent to the Crown Court with the plea and trial preparation hearing (PTPH) scheduled for 18 January 2021. That hearing was adjourned. The PTPH in fact took place on 15 March 2021. In advance of that hearing the prosecution had served the indictment charging conspiracy to supply cocaine. The appellant entered a guilty plea at the PTPH. At that stage there was no basis of plea indicated but a signed basis of plea dated 27 March 2021 was subsequently filed. It minimised the appellant's involvement. It asserted that the appellant had been entrusted with possession of the drugs phone handset merely for a period of 12 to 14 days during February 2020 when a co-conspirator was abroad. The appellant had merely answered the phone saying there were no drugs available for the time being and that a new consignment was expected soon. When the co-conspirator returned to the UK the handset was returned to him. The appellant, it was suggested in the basis of plea, never sold or passed on any Class A drugs and his role was limited to keeping the drugs line alive during that 12 to 14 day period. He was unaware of the drugs in the flat when he was arrested in December 2020.
19. Unsurprisingly the prosecution refused to accept that basis of plea. A written response was served by the prosecution setting out why the basis of plea did not reflect the true level of the appellant's involvement. In the light of that response, on 20 April 2021 the appellant indicated that he no longer wished to pursue the matters raised in his basis of plea and that was confirmed at a further case management hearing on 20 April 2021. Sentence was at that stage adjourned to 4 June and then to 17 June, owing to lack of court time. Thereafter the sentencing hearing was adjourned again until 1 September and then 21 October. We infer that those adjournments were owing to pressure on court time, no doubt caused in part at least by the impact of the pandemic.
20. On 20 October there was a mention hearing because a mental health assessment for the appellant was required. The case was put back to 3 November for a further mention. On 28 October the defence applied to vacate this mention hearing and asked for it to be re-listed on 1 December, as further time was needed for the mental health assessment. It had been anticipated that the appellant might be transferred to a psychiatric unit and that a mental health related disposal might be sought. In the event nothing came of that and no transfer was necessary.
21. As a result of the defence request the matter was re-listed for mention on 5 January 2022;

the sentencing hearing was then fixed on that occasion for 2 February 2022 and took place on that date. We observe that the three co-defendants also had to wait all this time for their sentencing to take place.

The appellant's background

22. The appellant had a very bad record for serious offending. In October 2010 (aged 28) he was sentenced to 5 years' imprisonment for conspiracy to rob on a guilty plea. In June 2013 he was fined for an offence of attempting to possess a Class A drug (cocaine). It appears that this related to a test-purchase type of offence involving an undercover officer. In June 2016 the appellant was sentenced to 6 years' imprisonment for possession of a firearm and ammunition when prohibited, again on a guilty plea. Finally, on 30 June 2017, on a guilty plea, he was sentenced to 5 years 2 months' imprisonment for conspiracy to purchase or acquire a firearm and ammunition. This is the sentence from which he was released on licence on 15 November 2019.
23. There was no pre-sentence report nor was any report necessary. A significant sentence of immediate custody was inevitable. The judge was however provided with material relating to the appellant's mental health issues comprising in particular a referral form which set out his recent medical history. The date of the referral was 11 February 2020, which we note was just at the very time the appellant, on his own admission, was manning the drugs line. The referral explained that the appellant was recently released from prison, had a history of bipolar disorder and schizophrenia, was hearing voices all the time and had mood swings. He was said to be currently homeless. It was said that a mental health assessment was required. His mother would not have him at home. There was no history of self-harming and he was in receipt of medication.
24. The judge had letters from the appellant's partner and the appellant's mother. There was also a letter from the appellant himself, in which he explained that his mental health problems and his long history of drug abuse could be traced back to a tragic event in his childhood, when at the age of 14 he witnessed his father being shot dead. His mental health had deteriorated again recently when his grandmother died in February 2020. He had been very close to her and she was the last link he had to his father. His letter did not explain or acknowledge the whole of his offending, the suggestion being that he had taken up the offer of heroin and crack cocaine to feed his own habit in return for looking after the drugs line for a week.
25. During the course of the prosecution opening, we note from the transcript, there were a number of exchanges between the judge and counsel, from which it is quite apparent that the judge was fully seized of all the issues which arose including all those referred to in the grounds of appeal. The judge also had the benefit of a written sentencing note from the appellant's advocate at the hearing Mr Gray. It was clear that the judge had read and noted all the points made.

The judge's sentencing remarks

26. In her sentencing remarks the judge observed that the total street value of the cocaine which had been seized by the police was £35,530, some of which was of exceptionally high purity. What had been seized by the police on 17 December 2020 gave an insight into the operation as a whole, but the conspiracy had lasted for almost a year and the actual weight of the value of the drugs was far greater.

27. The prosecution had alleged that each of the defendants in the conspiracy played a leading role for the purpose of the Sentencing Council guideline, and that the quantity of the drugs made it category 3 offending. That would indicate a starting point of 8 ½ years's custody and a range of 6 ½ to 10 years. The judge said that she took the view on the evidence that each defendant had played a leading role, because the buying and selling was being organised on a commercial scale, the drugs were of such a high purity that it was reasonable to infer close links to the source, and there was the expectation of substantial financial advantage. She accepted however that there was some overlap with significant role factors and she would therefore approach the case as being at the lower end of leading role and top end of significant role. In explaining her conclusion on this issue she said:

> "Doing the very best I can to reflect culpability and harm in this case, and bearing in mind what each Counsel has said to me, that these are guidelines and not tram lines, I am going to take the starting point of nine years, as far as the conspiracy is concerned."

28. She then addressed the appellant's case specifically. She noted his vulnerability, the letters from his partner and his mother, his own letter, and his mental health difficulties. The judge noted the concession by Mr Gray on behalf of the appellant in the course of mitigation, that the appellant's mental health difficulties "cannot be said to reduce his culpability" but would make his custodial term harder, which the judge said she accepted and factored into her assessment. She said that the aggravating feature in the appellant's case was that he had been released on licence only 2 months before beginning this drug dealing. She acknowledged that because he had been recalled to prison after arrest he had been in custody through all the Covid restrictions and lockdowns. She bore in mind in sentencing the appellant, as she did in the case of each of the defendants, that Covid continues to affect the custodial environment. She allowed 25% credit for the appellant's guilty plea. She then passed the sentence of 7 years' imprisonment.

The grounds of appeal

29. We deal with the grounds of appeal and the submissions in support of each ground in turn. The first issue in the grounds of appeal was whether the judge's starting point of 9 years was too high before consideration of aggravating and mitigating factors. In the course of his oral submissions Mr Fenner realistically abandoned that ground of appeal. He accepts that the judge was entitled to conclude that 9 years was the appropriate starting point in all the circumstances.

Credit for plea

30. The next issue is whether the judge should have allowed more than 25% credit for the appellant's guilty plea. It is submitted that in view of his mental health issues the appellant entered his guilty plea at the first reasonable opportunity, and full credit of one-third should have been allowed. Mr Fenner submits, on the basis of what Mr Gray had said in his submissions to the judge in the lower court, that when the appellant indicated a not guilty plea in the magistrates' court, he was not in a very good state mentally. For example he did not even recognise the solicitor who was representing him, who was not his usual solicitor.

31. In relation to credit for plea, reference is made in the grounds of appeal to the decision of this Court in R v Marland [2021] EWCA Crim 706; [2022] 1 Cr App R(S) 12. In that case there were exceptional circumstances to explain why at the first hearing in the magistrates' court the defendant had not indicated a guilty plea. It had been a remote hearing, with the defendant in one location, i.e. prison, and his legal representatives attending remotely from a different location. There had been no opportunity for his legal representatives to speak to him and advise him before the hearing. That had also been confirmed in writing on the Better Case Management form. At the time of the hearing his representatives held genuine concerns about his mental health and his fitness to plead.
32. Despite Mr Fenner's valiant submissions in this regard, we cannot accept that there were similar exceptional circumstances in the present case. From the circumstances we have already explained, it is clear that the appellant had given firm instructions that he was not guilty of any involvement in drugs supply. He had given a false account in his police interview. He was represented by solicitors. He gave the same false account on the Better Case Management form, which they completed on his behalf. The form recorded that he had been advised on credit for plea. He knew perfectly well he was guilty and could and should have indicated a guilty plea.
33. Nor is there any force, in our view, in the submission that it was only when the indictment was served (not long before the PTPH) that he knew what the real allegation was and he then pleaded guilty straightaway. It is said, we infer, that this should be regarded as indicating a guilty plea at the earlier reasonable opportunity. That is not a sound proposition in law or on the facts. Furthermore, when he entered the plea it was qualified by a wholly unrealistic and dishonest basis of plea which was subsequently abandoned.
34. In our view, the judge was quite correct to allow only 25% credit for plea and we reject that ground of appeal.

The judge's provisional sentence

35. It follows, on the arithmetic, that the judge's provisional sentence after adjustment from the starting point for aggravating and mitigating factors must have been 9 years 4 months. The question is whether that provisional sentence before credit for plea was manifestly excessive. That involves analysing the aggravating and mitigating factors.
36. The judge indicated that she found two aggravating factors. The first was that the appellant had only been out of prison for 2 months when he began this offending. In our view, that was a very significant aggravating factor. The second aggravating factor the judge found was the previous conviction for a drugs offence in 2013. The judge attached little weight to that. We agree with Mr Fenner that it did not bear very great weight; it was a count of simple possession of cocaine a long time ago and at most demonstrated that, even then, the appellant had a problem of cocaine addiction. However, we think that the nature and extent of the appellant's general record of other serious offending, including serving three sentences of 5 years' imprisonment or more, was itself a further significant aggravating factor and should have been regarded as such.
37. Turning to mitigating factors, it is said that the judge failed to give sufficient weight to the appellant's mental health issues which overlapped with the reason for his drug dependency and the additional contribution of the death of his grandmother. It is submitted that the judge failed to give sufficient weight to his mental disorders, not so

much in terms of culpability but in terms of the added difficulty he would face in serving his sentence.

38. It is important to bear in mind that the relevant guideline on Sentencing Offenders with Mental Disorders emphasises the importance of a focus on the impact of such disorders on culpability, as Mr Fenner realistically accepts. The judge had rightly focused on that issue during the sentencing hearing and there had been the express concession, to which we have already referred, that the appellant's mental health difficulties could not be said to reduce his culpability. It would simply make his custodial term harder and the judge accepted that and said she would factor it into her assessment. We do not doubt that the appellant had some mental health difficulties, but the nature and extent of this conspiracy and his involvement in it precludes any significant mitigation arising from his mental disorder. He knew perfectly well throughout what he was doing, why he was doing it, and what the consequences would be if he were caught.

Delay in sentencing which will not count

39. The other substantial issue in relation to mitigating factors relates to the period of 14 months which the appellant had to serve in respect of his previous sentence, once recalled to prison for breaching his licence. None of that period of 14 months counts towards this 7-year sentence. It is submitted that the fact that it was such a long period (14 months) is no fault of the appellant. It arose largely through delays in court hearings attributable to the Pandemic and latterly attributable to the need to obtain a report or information about his mental health.
40. It was submitted on behalf of the appellant, and before this Court, that this was a proper case for the exercise of the Court's discretion to make some adjustment to the sentence for the current offence in order to reflect that there had been that excessive delay.
41. Reliance in the grounds of appeal was placed on the principles explained by this Court in R v Kerrigan [2014] EWCA Crim 2348; [2015] 1 Cr App R(S) 29, although Mr Fenner, in the event, again wisely if we may say so, did not press this as a discrete ground. For completeness, just to put the ground in context, in that appeal the Court considered two separate cases which raised the same thorny issue of a defendant being recalled to prison having committed further offences but not sentenced for several months thereafter. In one case the delay was 7 months and in the other case 10½ months. This Court concluded that in neither of those cases did the defendant come close to satisfying the high threshold for breach of the reasonable time requirement under Article 6 ECHR. It was held that the delay may not have been ideal but it was far from excessive and there was a satisfactory explanation. The defendants had been prejudiced only in the sense that they could not benefit from what in other cases had been described as the "unjust anomaly" that a further custodial sentence for fresh offending cannot be made consecutive to an existing sentence if the offender has been released on licence in between.
42. We acknowledge that the delay of 14 months in the present case is longer than in either of those two cases but it is equally explicable by the circumstances in which the Court found itself when the Pandemic was at its height. There was bound to be some delay in any event in order to clarify the appellant's basis of plea. Sentencing could have taken place in October 2021. It was then on the application of the defence that sentencing was postponed to investigate the possibility of some psychiatric disposal. No doubt the

appellant was advised at the time that the period he was continuing to serve in the interim would not count towards his eventual sentence. That is not to criticise the defence for seeking to clarify the position in relation to his mental health. We also take Mr Fenner's point that particularly where there are repeated adjournments at the last minute of a hearing which a defendant has built himself up to face, there can be considerable distress, particularly for someone who suffers from such mental health disorders.

43. Nevertheless we do not consider that the judge was under any obligation here to reduce specifically an otherwise appropriate sentence to avoid some perceived injustice arising from the delay in sentencing the appellant. The judge did not specifically refer to this additional dimension in her sentencing remarks but, it is plain that she had it well in mind, because she referred to the appellant being recalled on licence and the difficulty of serving that period in conditions made worse by the Pandemic. As Mr Fenner finally and realistically conceded, and contrary to the assertion in the grounds of appeal, the judge did specifically make allowance for the Pandemic.

Conclusion

44. We return then to the judge's balancing of aggravating and mitigating factors and the ultimate question of whether 9 years 4 months was manifestly excessive. On careful analysis, we are quite satisfied that it was not manifestly excessive. The significant aggravating factors of committing the offence on licence so soon after he was released, and his very bad criminal record generally, significantly exceeded the mitigation of his mental health difficulties and personal circumstances and the delay.

45. Accordingly, despite the able and attractive submissions of Mr Fenner, we are quite satisfied that this sentence of 7 years' imprisonment was neither manifestly excessive nor in any way wrong in principle. The appeal must therefore be dismissed.