Neutral Citation Number: [2023] EWCA Crim 1611
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/03148/A1

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 14th December 2023

B e f o r e:

MR JUSTICE TURNER

and

SIR ROBIN SPENCER

R E X

- v –

HAMZAH ALI HAMEED

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Miss A Heyworth appeared on behalf of the Appellant

J U D G M E NT

SIR ROBIN SPENCER:

1. This is an appeal against sentence brought by leave of the single judge.

2. On 23rd August 2023, in the Crown Court at Cambridge, the appellant (who is now 25 years old) was sentenced by Mr Recorder Cooper to a term of two years' imprisonment for offences of possession of Class A drugs (crack cocaine and heroin) with intent to supply. He had pleaded guilty to those offences in the magistrates' court at the first opportunity and had been committed to the Crown Court for sentence.

3. We are grateful to Miss Heyworth for her written and oral submissions. In short, it is said that the sentence should have been suspended. The reason the single judge granted leave, as was made clear, was that following the sentencing hearing the author of the pre-sentence report expressed concern that the judge had misunderstood what his report was saying. The single judge directed that this must be clarified.

The facts

4. The facts may be shortly stated in view of the narrowness of the issue. On the evening of 18th July 2023, uniformed police officers on patrol in Peterborough were flagged down by a member of the public who was concerned about the behaviour of two males in the street, one of whom was the appellant. The concern was that one of them (not the appellant) was carrying a knife. In consequence the appellant was stopped and searched. The appellant was wearing a manbag beneath his jacket and in the bag the police found 193 individual packages of white powder wrapped in clingfilm or tin foil. The appellant was also in possession of three mobile phones and £100 in cash. It turned out that 187 of the wraps contained crack cocaine, with a street value of somewhere between £935 and £1,870. Six of the wraps contained heroin, with a street value of £30 to £60.

5. The appellant's home address was searched. A further four individual wraps of Class A drugs were found, together with a tick list of debts, a brand new iPhone and a set of digital scales contaminated with white powder. In a wardrobe the police found a large meat fork.

6. Examination revealed that on two of the phones recovered there were incoming and outgoing messages relating to drugs supply, some of which appeared to be block messages advertising the sale of heroin and crack cocaine.

7. In interview the applicant answered "No comment" to questions about the Class A drugs and the mobile phones. He said that the £100 found on him when he was arrested was cash from his universal credit benefit.

8. He pleaded guilty at the magistrates' court two days later, on 20th July and was therefore entitled to full credit of one-third for his pleas.

The sentencing hearing

9. The appellant had no previous convictions and only one caution in 2017 for possession of an offensive weapon.

10. There was a very full pre-sentence report which had been prepared just a few days before the sentencing hearing. It dealt in considerable detail with the appellant's troubled background, which included the impact of his mother's death from Huntingdon's disease some years earlier.

11. The appellant had been brought up partly in Peterborough, where his father lived, and partly in Glasgow, where his mother and her family lived. He had remained in Glasgow until he was seriously injured in 2017 when he was attacked by a group of people and struck on the

head with a hammer. He had returned to Peterborough to live with his father and stepmother, but it was not a happy experience. He told the probation officer that he had been befriended by a group of people who lived nearby. The suggestion in the pre-sentence report was that he had been groomed and exploited by these individuals.

12. However, the pre-sentence report also contained the following passage:

> "The [appellant] reports that those who owned the drugs which were seized by the police have not sought payment for them from him and he feels that, given their considerable wealth, they're probably not perturbed by these losses from when he was working for them and it is not anticipated they will demand repayment for that loss."

The appellant had told the probation officer that he was being paid £70 per day by people who were supplying him with drugs, in the expectation that he would supply them on the street to those callers who responded to the advertisements by phone.

13. The pre-sentence report made reference to the appellant's concern that, like many other members of his family who had died from Huntingdon's disease, he too might have inherited the disease, which is a cruel, incurable, progressive degenerative disorder. Reference was made in the pre-sentence report to a medical report which was before the court in which a GP explained this. The pre-sentence report also referred to learning difficulties arising from ADHD and dyslexia. The author of the pre-sentence report recommended that if a custodial sentence could be avoided, a constructive option would be a community sentence with various requirements.

14. There was also a liaison and diversion court report which investigated whether a mental health treatment requirement might be appropriate if a community order were to be imposed.

The conclusion of that report was that such a requirement would not be appropriate, although there would be a recommendation for various referrals within the community if a non-custodial sentence were to be the outcome.

15. The judge was provided with character references from members of the appellant's family (two sisters and an uncle). They spoke of the continuing impact on the appellant of the serious assault in Glasgow, of the family tragedy concerning the mother's death from Huntingdon's disease, and of the appellant's fear that he might have inherited the condition.

16. In his sentencing remarks, the judge explained why he was satisfied that the appellant's role in this Class A drug supply was "significant" for the purposes of the relevant Sentencing Council guideline. The appellant was carrying a significant quantity of drugs around with him; he had cash on him; he had luxury goods at his home address, including a coat costing £300; he had a tick list and scales for weighing out the drugs. The appellant knew the quantity of drugs he had and knew the amount he was likely to make from it. He knew what was going on.

17. Although it had been submitted in mitigation that the appellant was fearful and had been threatened and forced into becoming involved in supplying drugs, the judge observed that this could not really be reconciled with that part of the probation officer's report which said, in the passage we have already quoted, that the appellant was not concerned about the people wanting the money back from the appellant. The judge observed that it would be extremely unusual for those higher up in the chain not to want money back. For that reason, the judge did not accept all that the appellant was now saying.

18. For an offence of Class A drug supply in category 3 "significant" role, the starting point under the guideline was four and a half years' custody, with a range of three and a half to

seven years.

19. The judge identified the mitigating factors: the appellant's troubled childhood; the deterioration and death of his mother, which the appellant had witnessed; and "the awful attack" in Glasgow. The judge observed that, despite that experience of an apparently random attack, the appellant had embarked upon offending which was likely to bring him into contact with people who might well attack him. The judge did, however, accept that there might have been an element of grooming.

20. The judge referred to the appellant's psychological issues. He mentioned the neurological disease which the GP had suggested the appellant might have, although no diagnosis had been made at that stage. It is right to say that, in error, the judge added the words "resulting from your attack in Glasgow", although he must clearly have had in mind and meant that the neurological disease was the Huntingdon's condition.

21. Taking all these matters into account, from the guideline starting point of four and a half years' custody, the judge reduced the sentence to three years, before giving a further one-third reduction for the early guilty plea, resulting in the final sentence of two years. The judge considered whether that sentence might be suspended, but he was satisfied that the offences were so serious that it had to be immediate imprisonment.

Subsequent events leading to the appeal

22. Soon after the sentence had been imposed, the author of the pre-sentence report emailed the appellant's solicitor expressing disquiet at the sentence which the judge had imposed, and in particular the judge's failure, as he saw it, to appreciate the seriousness of the potential diagnosis of Huntingdon's disease. He sent a further email the following day identifying what he considered to be the flaws in the judge's approach.

23. Subsequently, a further report was obtained from the GP in the form of a letter, dated 6th September 2023, which the appellant seeks to adduce as fresh evidence and which we have read. That letter, in rather more detail, confirms what had been said in the original letter which was before the judge and Miss Heyworth confirms that in the course of her mitigation she focused on the seriousness, potentially, of Huntingdon's disease, if it was confirmed that the appellant was afflicted by it.

24. There was also an application to adduce as fresh evidence the series of emails from the probation officer, although that is no longer pursued for reasons which will become obvious shortly.

The basis of the appeal

25. In granting leave, the single judge said:

> "The post-sentence correspondence from the author of the pre-sentence report is unusual. I have some reservations about how he has expressed himself. However, it appears that he thinks the judge misinterpreted aspects of the report and that he may not have fully conveyed the extent of his concerns in the report. This has persuaded me to grant leave. I will direct a further report. It will be for the full court to decide whether the additional material may be relied upon."

26. The single judge ordered expedition of the appeal and directed that the author of the pre-sentence report should provide a further report explaining the matter more clearly.

27. Owing to the urgency of the appeal, it has not been possible to provide the report the single judge asked for. It has not been possible because the probation officer concerned is not currently in work. The tone and content of the emails which the probation officer sent to

the appellant's solicitors, and which had formed part of the material placed before the single judge with the grounds of appeal, attracted the attention and concern of the probation officer's manager, with the result that there is a letter to the court from the Regional Probation Director, dated 1st December 2023. In that letter there is an apology on behalf of the Probation Service for the tone of the probation officer's comments following sentence, and it is explained that there is to be an investigation at regional level of his conduct. The letter respectfully invites the court to disregard the probation officer's opinions and comments made following sentence, on the basis that his professional judgment in this case did not meet the high standards of the Probation Service.

28. For that reason, wisely, Miss Heyworth has not pursued that aspect of the appeal. Putting it bluntly, that really disposes of the matter which concerned the single judge. It is not, however, the end of the appeal.

29. There is an up to date prison report from the appellant's offender manager upon which Miss Heyworth relies. It is a document dated 7th December 2023 and is therefore completely up to date. The prison offender manager explains that when she first met the appellant back in mid-October she noticed that, although he engaged well, he appeared to be struggling and it was not until he mentioned a potential diagnosis of Huntingdon's disease that she realised that this might explain why he was slurring his words and struggling to concentrate. In consequence, she has referred him to the manager of the wing, to healthcare within the prison, and to the safety team. She saw him again a couple of weeks later to complete a sentence plan and noted that he contributed well. He has been identified as requiring work on victim awareness and thinking skills. He has settled in well, she says; he has a good working relationship with staff and gets on with his peers. He attends an English class and Islamic studies, and he attends Muslim prayers each week. There are no concerns expressed about his conduct in any way.

30. Miss Heyworth has told us in the course of her submissions that, on speaking to the appellant this morning, she is concerned that he does indeed appear to be slurring his words. He has told her that he has difficulties in prison, spilling hot drinks in particular, and he has a tendency to fall out of bed. That was also something mentioned in the supplementary report from the GP, dated 6th September.

31. Based upon the fact that the sentence was two years' imprisonment and therefore within the range for consideration of a suspended sentence, Miss Heyworth urges us to say that the sentence the judge imposed should have been suspended.

32. In her written submissions in the grounds of appeal Miss Heyworth had said that the judge was wrong not to give more weight to the potential diagnosis of Huntingdon's disease and appeared to have misunderstood what was being advanced in the pre-sentence report and in the doctor's letter. We have already dealt with that. She submits that the judge was wrong not to give more weight to the grooming of the appellant into involvement with the drug dealing. In her grounds of appeal she disputes that there was anything in the pre-sentence report to undermine that inference. She submits that the judge failed to give sufficient weight to the appellant's good character and strong personal mitigation in concluding that only immediate custody could be justified.

33. In the course of her oral submissions, Miss Heyworth has focused, sensibly if we may say so, on the sole issue of whether the sentence should have been suspended.

Discussion and conclusion

34. We have considered those submissions carefully, but we are unable to accept them. The judge plainly took into account all the mitigation in making such a substantial reduction from

the starting point. We agree with the single judge that no possible complaint can be made about the length of the sentence – two years, after credit for the guilty plea.

35. It may be that the judge failed to make it clear that he understood the neurological disease to be Huntingdon's disease, rather than some consequence of the hammer attack in Glasgow. However, the judge clearly took the diagnosis into account and, as we have said, Miss Heyworth confirms that she focused on that in her mitigation.

36. We can well understand the appellant's anxiety, and the anxiety of the family, that he too may have inherited this dreadful condition, but we do not consider that it affords any additional mitigation beyond that for which the judge gave credit. We were a little surprised when, in the course of oral submissions, we were unable to obtain confirmation from Miss Heyworth that all this medical evidence gathered for the purpose of the sentencing hearing and the appeal has actually been passed on to the prison authorities, and more particularly to the medical officer at the prison. If it has not been passed on, it is both surprising and regrettable, because that would have alerted the prison to the problem and, one hopes, would have expedited any referral to a consultant for a formal diagnosis of the suspected condition.

37. As to suspension of the sentence, the judge did not specifically refer to the relevant Sentencing Council guideline, but he clearly had it well in mind. It is true that, looking at the factors in the guideline for and against suspension, the appellant's character was on the positive side, as was strong personal mitigation. But these were very serious offences involving the supply of Class A drugs on the streets of Peterborough, so serious that appropriate punishment could be achieved only by immediate custody. The appellant should count himself fortunate, in our view, that the length of the sentence passed by the judge fell into the range for which a suspended sentence might even have been theoretically possible.

38. Miss Heyworth also draws our attention to *R v Ali* [2023] EWCA Crim 232; [2023] 2 Cr App R(S) 25, in which this Court gave further guidance on the approach to the imposition of suspended sentences in substitution for short custodial sentences in the current climate of prison overpopulation. This is not such a case.

39. Despite Miss Heyworth's submissions, we are quite satisfied that these offences were so serious that only immediate custody could be justified. We hope that the appellant continues to make good progress in prison, and we are confident that once the authorities are provided with all the material which is already available, he will receive all the medical attention he requires.

40. The sentence was neither wrong in principle, nor manifestly excessive. Accordingly, the appeal is dismissed.
