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IN THE COURT OF APPEAL

CRIMINAL DIVISION

**[2023] EWCA Crim 524**



No. 202300611 A3

Royal Courts of Justice

Tuesday, 25 April 2023

Before:

LORD JUSTICE WILLIAM DAVIS  
MR JUSTICE JAY  
HIS HONOUR JUDGE ANDREW LEES

**A REFERENCE BY HIS MAJESTY'S SOLICITOR GENERAL  
UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988**

REX  
V  
SUBHAAN NAZIR

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MS F ROBERTSON appeared on behalf of the Applicant Solicitor General.

MR A CRITCHLEY appeared on behalf of the Respondent.

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**J U D G M E N T**

LORD JUSTICE WILLIAM DAVIS:

- 1 On 18 August 2022 Subhaan Nazir, born on 24 March 2001 and now aged 22, was in the driver's seat of his Audi A3 car in the car park of a gym in Reading. A man called Iqbal was in the passenger seat. Shortly after 3 o'clock in the afternoon, police officers approached the car. As they did so, Nazir put something in his mouth and swigged water in an apparent effort to swallow it. He succeeded. He had swallowed two small plastic wraps, one of crack cocaine and one of heroin. This became apparent two days later when he used a drugs toilet at a police station and the wraps were recovered.
- 2 In the car itself were mobile telephones, rolls of plastic bags and torn up plastic bags. One of the telephones which was on the passenger side of the car had bulk outgoing messages advertising the supply of class A drugs. The telephone was a drugs line with the name "Frenchi" line. As the police were speaking to Nazir and Iqbal, two people walked out of the car park. They were stopped by police officers. One had a mobile telephone which had been receiving messages about drugs from the "Frenchi" line. Moreover, a message had been sent from that telephone to the "Frenchi" line minutes before the police arrived in which the user of the telephone had asked, "R ya coming or wat."
- 3 Nazir and Iqbal were arrested. There were no drugs inside the car. At Nazir's house the police found several SIM cards and £300 in cash; again, no drugs. The next day, 19 August 2022, a close examination was made of the Audi. The police found a magnetic box attached to the car on the nearside rear wheel arch. Inside the box were 33 wraps of crack cocaine and 17 wraps of heroin. The knotted plastic wraps were £10 street deals. The plastic appeared to be the same type of plastic as the plastic bags in the car. Later, DNA analysis of the knotted wraps revealed the DNA profiles of both Nazir and Iqbal.
- 4 Iqbal appeared before the Magistrates' Court on 20 August 2022. He indicated pleas of guilty so his case was committed for sentence to the Crown Court. Nazir appeared before the Magistrates' Court two days later. He gave no indication of his pleas. His case was sent for trial at the Crown Court. At the plea and trial preparation hearing (PTPH) he pleaded not guilty to two counts of possession of class A drugs with intent to supply, namely a count relating to crack cocaine and a count in respect of heroin. Nazir's trial was listed on 23 January 2023. He was convicted by the jury on 26 January 2023. He was sentenced on 27 January 2023 at a point at which Iqbal also had been brought to court.
- 5 At the sentencing hearing the prosecution submitted in relation to Nazir that the case fell clearly into Category 3, significant role, in the Sentencing Council's drugs guideline. This was street dealing involving some level of sophistication. Thus, Nazir must have had some awareness of the scale of the operation. The starting point was four-and-a-half years' custody. A significant aggravating factor was Nazir's previous conviction. On 15 October 2020 he had been in possession of cocaine and heroin with intent to supply the drugs at his home. On 3 March 2021 he had been sentenced to 39 months' detention in a young offender institution. In August 2022 he was still on licence in relation to those offences.
- 6 On behalf of Nazir, it was argued that his offending was towards the bottom of the category range. It was argued there was no expectation of significant financial advantage. The scale of the operation was limited and unsophisticated. Nazir was simply assisting Iqbal who was running a drugs line.
- 7 The judge's sentencing remarks in relation to Nazir were relatively brief. We can rehearse them almost in their entirety:

"The starting point in the category, as you've heard, is four years and six months in custody. I've heard from counsel that there's no significant gain. There isn't significant role. No operational management and didn't coerce anyone else into joining. It's accepted that there's an understanding of the scale of the operation, I don't accept that. There was an expectation of significant financial reward, I think it was expected that there was, whether it was reached is another matter, but significant reward was expected. But that tells me that within the significant role this defendant meets at least two of the criteria.

I would treat that as a starting point of three years and six months. Of course there can be no credit for guilty plea in this matter. I note that the defendant was living at home, was not I'm told particularly sophisticated, although there is some sophistication given that the box is outside the car, so some thought went into that, and sophisticated enough for the officers not to find the drugs on the first search, and had to look for them after.

The offence is aggravated of course by the defendant being on licence, and of course there being a trial. However, I take the aggravated feature, which is otherwise previous similar conviction, which would then take the matter up four years, I come down looking at his age, definite immaturity, not terribly sophisticated, which brings this matter down to a three-year custodial sentence in this matter, and I will come back to that, but it will be a three-year custodial sentence."

8 HM Solicitor General now applies to refer that sentence as unduly lenient, pursuant to section 36 of the Criminal Justice Act 1988. We shall grant leave to make the application.

9 We remind ourselves of what was said by Lord Lane CJ in *Attorney General's Reference* (No. 4 of 1989) [1991] WLR 41 when section 36 of the 1988 Act was in its infancy:

"A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection, regard of course must be had to reported cases and in particular to the guidance given in this court from time to time in so-called guideline cases. However, it must always be remembered that sentencing is an art rather than a science. The trial judge is particularly well placed to assess the weight to be given to various competing considerations and that leniency is not in itself a vice."

Those principles hold good today save that of course the sentence now must be considered by reference to the relevant Sentencing Council guidelines.

10 In short, the question we have to answer is whether the minimum term imposed by the judge in each case fell outside the range reasonably open to him.

11 The first submission of the Solicitor General is that the judge gave no explanation for her decision to take a starting point, as she put it, of three years six months' custody. She appeared to accept that Nazir had a significant role in the supply of class A drugs, and the guideline indicates a starting point of four years six months' custody in those circumstances. The guideline is not to be applied mechanistically. There will be cases where a nuanced approach is appropriate. However, there was nothing in this case to suggest a significant reduction in the starting point that is generally applied in street-dealing cases where the

offender has a significant role. Because this type of offending is common place, it is particularly important to maintain a consistency of approach. One of the statutory purposes to which the Sentencing Council must have regard when setting a guideline is consistency. That is not to say that a particular category within a guideline must be applied rigidly. The existence of the category range provides flexibility. But departure from the starting point must be justified.

- 12 In this case the judge gave no reason to reduce the starting point in the way that she did. We cannot identify any good reason ourselves. Rather, we consider there were features of this case which should have increased the level of culpability. Unusually, the list of culpability factors in the guideline in relation to possession of drugs with intent to supply is specifically identified as non-exhaustive. Use of a drugs line is not referred to in the guideline but it is a factor which increases culpability. In this case the telephone may have been Iqbal's. That is of no account when we are speaking of a joint operation.
- 13 It follows that the judge erred in reducing the starting point in the way that she did. Rather, a modest increase would have been appropriate.
- 14 On behalf of the offender, it is argued that the judge concluded that Nazir's offending fell between a significant and lesser role so that a starting point of three years six months' custody was appropriate. The judge said nothing which supports the argument that the starting point represented some kind of balance between different levels of role. None of the factors in the guideline in relation to lesser role is identified in the sentencing hearing. Indeed, defence counsel expressly conceded that none apply.
- 15 The Solicitor General then argued that insufficient weight was given to the aggravating factors: previous conviction for similar offences related to class A drugs; offending on licence; use of sophisticated methods to avoid detection, namely the magnetic box. The judge determined that an increase of six months' custody was required by reference to the aggravating factors. She did not explain why a relatively modest increase was appropriate. Nazir's previous conviction related to possession at his home of some hundreds of street-deal wraps of heroin and cocaine. It related to events which occurred less than two years before the offence with which the judge was concerned. Though it is not possible to tell precisely when Nazir was released on licence, it cannot have been very long before he committed the offences in August 2022. It was a significant aggravating factor. The fact that Nazir was recalled on that licence pending his trial is irrelevant. His recall related to that previous offending. The aggravating factor is offending when on licence. The attempt to avoid detection was also a matter of significance albeit that care must be taken to avoid double counting. Use of the magnetic box was an indication of sophistication in offending.
- 16 The judge increased the notional custodial term by six months to take account of those aggravating factors. In our view that gave insufficient weight to those factors.
- 17 We conclude that the least sentence that should have been identified by the judge before taking account of mitigating factors was five years six months' custody.
- 18 The final argument of the Solicitor General is that the reduction for mitigating factors was excessive. The judge referred to Nazir's age. Whilst this was by no means an irrelevant consideration, Nazir was 21 at the time of the offending. Given his history, any reduction in the sentence should have been modest. The judge referred to "definite immaturity, not terribly sophisticated". We take that to be a single mitigating factor relating to the offender. The judge cannot have been referring to the lack of sophistication in the offending.

- 19 We acknowledge that the judge had heard the trial. She had had the opportunity to observe Nazir giving evidence which we can see from the court log occupied about 40 minutes. We must have regard to the view of the judge who heard the trial. Equally, there was no explanation for her conclusion in relation to maturity. Moreover, it appears to be at odds with the nature of the drug dealing in which he was participating and with his immediate reaction when he realised drugs officers were approaching his car. It was the reaction of a seasoned drug dealer. In our view the judge was entitled to reduce the sentence by six months but no more to take account of mitigating factors.
- 20 The sentence imposed was three years' imprisonment. Taking proper account of the guideline and of all factors relating to the offending and offender, a sentence of five years' imprisonment should have been the outcome. The sentence imposed, therefore, was unduly lenient.
- 21 We shall quash the concurrent sentences of three years' imprisonment in relation to the two counts in relation to which Nazir was convicted by the jury. We shall substitute concurrent sentences of five years' imprisonment.
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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge