IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202100961/A1

[2021] EWCA Crim 831

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 19 May 2021

LADY JUSTICE NICOLA DAVIES DBE
MR JUSTICE SPENCER
THE RECORDER OF SHEFFIELD
HIS HONOUR JUDGE JEREMY RICHARDSON QC
(Sitting as a Judge of the CACD)

REGINA
V
WAYYUNDI QURESHI

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MR M COMER appeared on behalf of the Appellant

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J U D G M E N T

THE RECORDER OF SHEFFIELD:

1. The real issue in this case is whether the imposition of an immediate custodial sentence of two years can be characterised as manifestly excessive in the circumstances of this appeal against sentence. We recognise the decision whether to suspend a sentence or to make it an immediate term of custody, is often one of the most difficult decisions any judge has to make. It is critical the guidance of the Sentencing Council in its Definitive Guideline of 2016 on the Imposition of Community and Custodial Sentences is at the forefront of the analysis and reasoning of the judge when passing sentence. It is also of equal importance it is demonstrated in the sentencing remarks of the judge. There is no need for a detailed exposition of reasoning, but there must be a short explanation of why the balance comes down to reach a particular result.
2. Leave to appeal in this case was granted by the single judge, Moulder J. The appellant is Wayyundi Qureshi. He is aged 23 years. He was aged 22 years when he was sentenced to a total of two years' imprisonment for drug-related crimes. He was sentenced by His Honour Judge Patrick in the Crown Court at Bristol on 10 March 2021. This followed guilty pleas on 21 January 2021 at the Magistrates' Court, after which he had been committed for sentence to the Crown Court.
3. There were six charges:
   (1) Offering to supply a class A drug (cocaine).
   (2) Offering to supply a class B drug (Ketamine).
   (3) Offering to supply a class B drug (cannabis).
   (4) Possession of cannabis with intent to supply.
   (5) Possession of Ketamine with intent to supply.
   (6) Possession of cocaine with intent to supply.
4. Charges 1, 2 and 3 were contrary to section 4(3)(a) of the Misuse of Drugs Act 1971; charges 4, 5 and 6 were contrary to section 5(2) of the same Act.
5. Charge 1 was correctly treated as the lead offence for which the appellant was sentenced to two years' imprisonment, representing his overall criminality. Concurrent sentences of four months were imposed on charges 2 and 3, and concurrent one month terms were imposed on charges 4, 5 and 6. All appropriate consequential orders were made.
6. The facts of the case are these. The appellant is an undergraduate at the University of the West of England. On 27 May 2020 police officers went to the home of the appellant at 52 Tolworth Road in Bristol. They conducted a search and found 0.86 grams of Ketamine, 5.3 grams of cannabis flowering head, 0.13 grams of cocaine, and £215 in cash.
7. The appellant was also searched. His mobile telephone contained a message from 13 January 2019 offering to supply 25 grams of Ketamine. Two further messages of 11 December 2019 offered to supply cocaine. Additionally, between December 2019 and May 2020 there were social media posts for groups offering to supply illegal substances, including cocaine, which if they had been executed would have yielded £500 profit.
8. The appellant was arrested and made full admissions to the police in interview.
9. It appears, for the most part, the appellant was supplying friends and acquaintances. This has been confirmed this morning by Mr Comer, who appears on behalf of the appellant.
10. The appellant has no previous convictions. There was a pre-sentence report before the judge which supported a non-custodial disposal of the case. The following passage appears within the report:

> "In my assessment, Mr Qureshi has learned a valuable lesson in experiencing the Criminal Justice System for the first time. He tells me that he now spends his time focusing on his studies rather than mixing with peers who remain involved in living a 'party lifestyle' and tends to stay in his room or go to the library. He tells me that he did not use substances whilst alone and due to public houses and nightclubs being closed due to the lockdown, this has reduced the risk of becoming embroiled in past behaviour."

11. The report also sets out the personal circumstances of the appellant and how he had moved away from his previous lifestyle whilst at university. He has supportive parents. The author of the report assessed the appellant as posing a very low risk of re-conviction.
12. The final recommendation of the report was that, although the offending would attract a custodial term, a community disposal would have been appropriate.
13. The judge also had the benefit of reading several references from university staff who taught the appellant, and others; all of whom wrote in positive terms. The appellant also wrote a letter setting out his historical and other difficulties whilst at university, as well as his mental health problems. It was a letter of apology for what he had done.
14. It is a matter of regret the judge did not set out in his sentencing remarks whether he accepted the propositions of the prosecution about where this case fell by reference to the Sentencing Council Definitive Guideline for Drug Offences, then in force. The case plainly came within Category 3. The role of the appellant was never clearly defined by the judge. The prosecution submitted the appellant came within the "significant" category which gave a starting point of four years and six months with a range of three years six months to seven years, for class A drugs. It seems to have been accepted that the case fell within Category 3, either at the lower end of significant role or on the border between lesser role and significant role. It will of course be appreciated that none of these sections are to be regarded as being hermetically sealed.
15. It is also a matter of regret that the judge did not set out the credit for plea in his sentencing remarks. We assume, given the appellant entered his plea at the Magistrates' Court and made full admissions to the police, the judge afforded him a full one-third discount. That is a reasonable inference to be made.
16. When passing sentence, the judge indicated that an immediate custodial sentence was necessary but it would be less than might otherwise be the case. He regretted that none of the mitigation advanced would save the appellant from being sent to prison.
17. Having set out the sentence, the judge then said this:

> "I have anxiously considered whether or not, following the Suspended Sentence Guidelines I can suspend this sentence. I have concluded that I cannot. I have come to the figure of 2 years giving you as much credit, probably more actually, than you are entitled to. But it would not be appropriate, in my judgment, to deal with you other than by the imposition of an immediate custodial sentence, for the reasons that I have identified."

18. Counsel for the appellant has this morning submitted before us, that due to all the mitigating features of the case, the judge should have imposed a suspended sentence order. He further asserts that following the arrest of the appellant, he started to turn his life around. We have made enquiries this morning and it appears in relation to the degree

course the appellant was undertaking, the university are prepared to allow him to continue his studies once he is released from prison. It was expressed this morning, he would "catch up".

19. We have considered this matter with great care. Before turning to the circumstances of this case, we make reference to three over-arching observations. First, it is very important in sentencing remarks that the judge sets out where the case falls within the relevant guideline of the Sentencing Council. If there is agreement; say so. If there is not, the judge must explain his or her view, and why. This can all be done very shortly. It does not need elaborate exposition. Second, if a custodial sentence is of a level where the definitive guidelines of the Sentencing Council on the Imposition of Community and Custodial Sentences of 2016 is actively engaged, it must be addressed in the sentencing remarks. The observation we made at the outset of this judgment is apposite. Third, where the issue is whether to suspend a custodial sentence or not, there is need to address the regimen set out on pages 7 and 8 of the guideline, in particular weighing the factors. In this regard, we respectfully endorse what was said in R v Middleton [2019] EWCA Crim 663 at paragraphs 25 to 29 (Sweeney J giving the judgment of the court: Simon LJ, Sweeney J and The Recorder of Newcastle-upon-Tyne) that the most careful balancing exercise, giving appropriate weight to various factors, must be undertaken by the judge. In some cases the circumstances of the crime itself will outweigh an accumulation of good mitigation or a report suggesting the offender can be rehabilitated. This requires the exercise of judgment. It must also be explained in the sentencing remarks. Again, this does not need elaborate exposition.

20. In this case, the judge indicated he reduced the prison sentence from where he thought at first it should have been. He did not explain what the sentence would have been. He then recited the formula that it would not be appropriate to suspend the sentence of imprisonment.

21. In many respects this was a straightforward case. We respectfully agree with the judge that these cases can be anxious when a decision has to be made whether to suspend the sentence of imprisonment for a first time offender with considerable personal mitigation, when he or she has committed a serious offence. We recognise these are difficult decisions for judges in the Crown Court. It is plain the learned judge in this case approached his task in an anxious fashion. He cannot be criticised for that.

22. In this case, the appellant was a young man aged 22 at the time of sentence, with no previous convictions to his name. He had a problematic mental health backdrop and was attracted by financial advantage to indulge in relatively low-level but serious drug peddling to friends and acquaintances. He had pleaded guilty at the first opportunity and had made a full confession to the police. The judge was right to regard the charge of offering to supply cocaine as the lead offence to reflect overall criminality by reference to the totality principle. By reference to the definitive guideline for drug offences of 2012, then in force, the appellant was in reality operating at a level between a lesser and significant role; the case plainly came within Category 3. We do not criticise the judge for reaching the conclusion that a sentence of three years would have been appropriate following a trial; indeed, perhaps in the circumstances, a sentence of three-and-a-half years would have been warranted. The judge was plainly right in this regard. There were no aggravating features and the appellant expressed remorse, and had been of positive good character. He was also of young age, and at university. There was also the backdrop to which we have already

drawn attention. We assume the judge gave full credit and this brought the sentence to two years, where the weighing factors, or balancing exercise, needed to be undertaken with some care in a case such as this.

23. On one side there is the important issue as to whether appropriate punishment can only be achieved by immediate custody. On the other side there is the realistic prospect of rehabilitation by reference to the pre-sentence report. There is also strong personal mitigation. We remind ourselves that the purposes of sentencing embraces not only the need to punish an offender, but also the need to reform and rehabilitate (see section 142 of the Criminal Justice Act 2003, now section 57 of the Sentencing Code 2020).

24. With respect to the judge below, we are of the view that he did not appear to approach this difficult task in this case by reference to the accepted regimen in the definitive guideline on custodial sentences. We do not doubt he gave anxious consideration to the case and exercised judgment, but he did not explain why he had reached the conclusion that a custodial sentence was imperative.

25. We start our analysis by stating this very important point. Anyone who sits in the criminal courts in this country, or has any understanding of crime in this and other countries, is aware of the comprehensively pernicious effect of drugs, in particular class A drugs, upon the lives of many people, many of whom are hopelessly addicted to those drugs. Drugs are frequently at the root of other forms of crime and it destroys the lives of many. Every day judges hear that individuals involved in criminal acts did as they did due to addiction. It is a blight on part of our society. The human and economic cost is incalculable. Lives are destroyed by such addiction. It is for this reason that those who are involved in peddling drugs must be punished appropriately and severely, where necessary, by reference to the guidelines of the Sentencing Council. Students who peddle class A drugs to other students can almost invariably expect to be sent to prison. Only rarely will the balance come down in favour of a suspended sentence. In many cases the need for punishment will outweigh other factors suggesting a suspended sentence. Each case is different and has to be adjudged on an individual basis by demonstrable reference to the definitive guideline. In this case, had there been a trial, as we have explained, a sentence of three years would have been justified and right by reference to the drug offences guideline. The appellant pleaded guilty and made a full confession. There was strong personal mitigation and the PSR makes a potent case for rehabilitation in the community. The appellant recognised the grave wrong he committed.

26. We, in common with the judge below, have not found our task to be at all easy in the circumstances of this appeal. Unlike the judge below, we are faced with the position that the appellant has now served 10 weeks in custody. In our judgment, in the circumstances of this appeal, it does not appear to be the case that appropriate punishment can *only* be achieved by immediate custody. The other factors we have sought to demonstrate bring the balance down in favour of a suspended sentence order. We add this: had the balance come down in favour of an immediate custodial sentence it would have to be reduced from two years. The judge did not mention the Manning phenomenon of sentencing during the Covid-19 crisis, and the detrimental effect on prisoners, warranting a reduction in sentence. However, as the sentence is not to be served as an immediate custodial term, we do not need to reduce the sentence further.

27. In these circumstances, we uphold the sentence of two years' imprisonment on charge 1 and the individual concurrent sentences on the other charges, but we suspend the total term

of two years' imprisonment for two years. Having now served part of that custodial term, we feel that there is now no need for unpaid work to be included as a component of the order. Had this sentence been imposed at first instance it would have been necessary, in our judgment. We will however make the rehabilitation activity requirement component of the order for 15 days. It must be made, and will be made, very clear to the appellant in a short while that any breach of this order will be reserved to the Crown Court. We will explain the consequences of the suspended sentence order to the appellant at the conclusion of this judgment.

28. In the result, the overall sentence is now one of two years' imprisonment, suspended for two years, with a rehabilitation activity requirement of 15 days. To this extent, this appeal is allowed.

THE RECORDER OF SHEFFIELD: Mr Qureshi, can you hear and can you see me on the television link? (The appellant nodded) Good. I want you to listen with great care to what have I have to say. First, do you understand the sentence that has been imposed upon you, that is to say a two year sentence suspended for two years. Please nod if you understand. (The appellant nodded). Good. There are two important points: 1. If you breach this order, for example if you do not attend the rehabilitation activity requirement, you are liable to be the subject of breach proceedings, and if brought before the Crown Court you could have the entirety of the prison sentence activated. Do you understand? (The appellant nodded) Good. 2. If you commit any crime punishable with imprisonment during the operational period of the suspended sentence order, that is to say two years, you will not only be sentenced for the fresh offence, but it is also likely to be consecutive to the suspended sentence which may well be activated. Again, do you understand? (The appellant nodded) Good. Thank you.

LADY JUSTICE NICOLA DAVIES: Mr Comer, within this sentence, as my Lord has indicated, is a rehabilitation requirement. That is what was recommended in the pre-sentence report and the concern of the court is that the appropriate probation office should know of this immediately. Is the appellant going to return to Bristol or to his parents?

MR COMER: My Lady, I do not know what the answer to that is in the immediate future. I will contact the probation officer at Bristol Crown Court tomorrow, if that assists this court, to let them know.

LADY JUSTICE NICOLA DAVIES: Yes, of course I accept your word for it. Effectively you are undertaking that within the next 24 hours you will contact the probation service in Bristol to inform them. You have the report. The person who wrote it is someone called Carla Bryant.

MR COMER: That is somebody I know, my Lady. I will undoubtedly pass that message on to the Bristol Probation Service and do my best to pass it on to the individual who wrote the report.

LADY JUSTICE NICOLA DAVIES: Thank you very much indeed. Could I also ask the Associate please, to send to Bristol Crown Court today, the order that has been made; and add to that the wish of the court that the Crown Court also notifies the Probation Service of the rehabilitation activity requirement. There is nothing wrong with two people trying to do it.

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