

2019/01107/A3  
IN THE COURT OF APPEAL  
CRIMINAL DIVISION  
Neutral Citation Number: [2019] EWCA Crim 1532

Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Thursday 29<sup>th</sup> August 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE JEREMY BAKER

and

MR JUSTICE FREEDMAN

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**REGINA**

- v -

**ZAFRAN MAHMOOD**

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Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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**Mr D Wood** appeared on behalf of the Applicant

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**J U D G M E N T**  
**(For Approval)**

**LORD JUSTICE SIMON:** I shall ask Mr Justice Freedman to give the judgment of the court.

**MR JUSTICE FREEDMAN:**

1. This is a renewed application for leave to appeal against a sentence of eight years and two months' imprisonment imposed by His Honour Judge Sheridan on 18<sup>th</sup> March 2019 in the Crown Court at Aylesbury for one count of possession of a controlled drug of Class A with intent to supply (Count 1). No separate penalty was imposed on two further counts: possession of a controlled drug of Class A with intent (count 2); and possession of criminal property (count 3). The application for leave to appeal was refused by the single judge who took the view that for the reasons given in his sentencing remarks, the Judge was entitled to describe the Applicant's role as "leading" and to place the offending into Category 2 of the Sentencing Guidelines. The Applicant renews his application to the full Court through Mr Wood of Counsel, who has appeared pro bono and to whom the Court is indebted for the assistance which he has provided.

2. At 1.40pm on 23<sup>rd</sup> January 2019, officers were on duty in Oxford Road, Aylesbury, when they noticed a woman whom they suspected to be a drug user, waiting at a bus stop. The Applicant, who was driving a Volkswagen Golf motor vehicle, stopped and collected the woman. Another woman, Amanda Redding, was seated in the front passenger seat. The car travelled for a short distance before stopping to let the first woman out. The officers decided to stop the vehicle. When they illuminated their blue lights, the Applicant attempted to drive away at some speed, but was prevented from so doing by other traffic. The Applicant was arrested on suspicion of drug supply. A total of £305.00 in cash was found under the driver's side sun visor, as well as two "burner" mobile telephones. An expert drew the conclusion that there were drug dealing messages on the phones.

4. The car keys, along with other sets of keys, were taken by the officers. They took the Applicant to the police station. Amanda Redding was taken to her address. Officers went to the Applicant's address at Argyle Avenue, where another individual was identified. From that address the police recovered a set of keys belonging to a property in Wendover, which was also linked to the Applicant. They discovered a safe at the Wendover address which held 434.97 grams of heroin with a street value of £39,360. Another key, found with the Applicant's car keys, opened a locked box within the safe which contained 18.71 grams of cocaine divided into 187 wraps, with a street value of around £1,700, together with other drug paraphernalia, including digital scales. Officers located another safe at Ms Redding's address. A key found at the Applicant's address in Argyle Street opened that safe. Between those two safes, officers recovered a total of £29,914.68 in cash.

5. Ms Redding was also found with a number of wraps on her person: 11.6 grams of heroin, divided into 36 wraps; 6.03 grams of crack cocaine, divided into 28 wraps; and 1.61 grams of crack cocaine, divided into eight wraps. The prosecution linked the drugs found on Ms Redding to the Applicant's drug operation. The total quantity of heroin recovered was 446.63 grams, with a street value of £40,630. The total quantity of cocaine, including what was found on Ms Redding, was 26.35 grams, with a street value of £2,400.

6. The Judge found that the offending fell into Category 2 harm, not Category 3 as had been submitted. The Judge aggregated not only the weight of the drugs found (in total, about half a kilogram), but also what the cash represented in terms of drugs. The Judge took the view that just under £30,000 of cash was equivalent to the value of about half a kilogram of heroin. Together, drugs of about half a kilogram and cash equivalent to a further half a kilogram amounting to an overall weight equivalent of about 1 kilogram, according to the Judge, fell into Category 2 and not Category 3.

7. In considering culpability, the Judge said that the Applicant had a "leading role", rather than a "significant role". The Judge recognised that a leading role encompassed a large range of criminal responsibility and that this was not the largest commercial scale. Nevertheless, he considered that, under the guidelines, the Applicant had substantial links to, and influence on, others in a chain. The heroin was of high purity, which indicated that the Applicant would have been close to the original source and gave some indication as to where he fell within the chain of supply. The amounts of cash and drugs, with keys and safes at different addresses, indicated that the Applicant was directing or organising buying and selling on a commercial scale. There was an expectation of substantial financial gain. The Judge also inferred that the cash in the safes represented not operational costs but profit from drug dealing. The Judge said that he had taken a global view of the matter.

8. The Judge rejected the notion that this was street dealing on the part of the Applicant. On the contrary, in his judgment, the Applicant had a "leading role" and did not engage directly in street supply himself, but involved others.

9. The Judge applied the starting point under the definitive guidelines for drug offences for "leading role" and Category 2: heroin/cocaine, 1 kilogram, eleven years' custody before a guilty plea. This was reduced to eight years and two months after credit for the guilty plea. No separate penalty was imposed on counts 2 and 3, on the basis that count 1 encompassed the Applicant's overall criminality.

10. On the Applicant's behalf, it was submitted before the Judge that since the heroin found was 434 grams, the case fell into Category 3. However, the Judge found that he was entitled to treat the case as falling into Category 2, by combining the 434 grams with the other smaller quantities

of drugs and the cash of almost £30,000, which he found to be the equivalent of a further half a kilogram of drugs. He therefore rejected the submissions advanced on the Applicant's behalf. He found that the Applicant fell within the centre of Category 2, as if he had been in possession of 1 kilogram of Class A drugs.

11. Further, it was submitted before the Judge that, based on the evidence of the finding of the numerous wraps, drugs and cash, this was simply a case of street dealing, and therefore the Applicant should be treated as having a "significant role" only and not a "leading role".

12. However, the Judge found that he had a "leading role" within the definitive guidelines on drug offences. The Judge said that it defied reality that a person involved in mere street dealing would have a number of keys and safes at different properties. He inferred that this was to protect the Applicant's overall position as a drug dealer. Not only were there large quantities of drugs and cash, but others were involved in the enterprise, so that the Applicant did not have to be involved himself in the street dealing. The Judge also took into account that the heroin was not cut and was of high quality, which indicated that the Applicant must be "*much nearer to the source of it*". This gave an indicator which was indicative of where the Applicant was to be found in the supply chain. In all the circumstances, the Judge found that, having regard to the amount of drugs and cash, the applicant had an expectation of substantial financial gain. It was this that forced him to the overwhelming conclusion that the Applicant had had a "leading role".

14. The Applicant is 38 years old. He had four convictions for nine offences between 2000 and 2010, including one conviction in 2010 for possession of a controlled drug of Class A. In refusing leave, the single Judge observed that for the reasons he gave in his sentencing remarks, the Judge was entitled to place the offending into Category 2 of the sentencing guidelines and to characterise his role as being "leading". The indicative sentence of eleven years' imprisonment, in the view of

the single Judge, fell within the range of reasonable sentences open to the sentencing Judge. The Applicant received credit for the timing of the guilty plea (25 per cent) at the plea and trial preparation hearing stage, such that "*the sentence of eight years two months was not manifestly excessive*".

#### Submissions on behalf of the Applicant

16. Mr Wood, on the Applicant's behalf, submitted before us that the Judge erred in the following principal respects:

(1) in finding that the offending fell into Category 2, when he should have found that it fell into Category 3; or, if that submission were wrong, he should have found that the offending fell into the lower part of Category 2; and

(2) in finding that the Applicant had a "leading role", when this was simply a case of street dealing and that therefore he had a "significant role", not a "leading role".

17. As to the Category 3 submission, it was submitted by Mr Wood that the extrapolation of cash into weight of drugs, as undertaken by the Judge, was objectionable. It was accepted that some extrapolation was possible from cash into weight of drugs. However, the evidence was not specific enough to translate almost £30,000 in cash to half a kilogram of Class A drugs. Such evidence as there was from the expert report of Mr Gittings could be used to say that the 434 grams had, on one analysis, a value of about £40,000. If that were applied, it might give rise to a conclusion that £30,000 in cash was the equivalent of a weight of 300 grams, but it was very imprecise. Mr Wood accepted that it was also possible to infer that some part of the cash might be profit rather than proceeds of sales. However, there was no calculation as to what part would be profit; nor was there evidence as to what would be a higher amount to consider in weight the

extent to which the cash constituted profit, rather than proceeds of sales. Thus, whilst it might be possible to translate the £30,000 into a weight of 300 grams, that was wholly imprecise. It was simply an assumption, not based on evidence, to conclude as the Judge did that it amounted to an equivalent of half a kilogram. On this basis, the conclusion that the cash could bring the total weight to 1 kilogram was, as submitted by the Applicant, unsound. In these circumstances, Mr Wood submitted that the effect of the imprecision was that the Court should treat the weight as being closer to Category 3 of 150 grams, rather than Category 2 of 1 kilogram.

18. As regards the issue of whether a finding of "leading role" was justified, it is said that this was simply street dealing; that the Judge was wrong to say that the Applicant was "*not going to [get] his hands dirty doing the street dealing to individual addicts himself ...*" The Applicant may not have dealt himself on the street, but he took Ms Redding on to the street and remained in the car. Further, it was submitted that whilst there was evidence of cash and safes, more than one property and "burner" telephones, they were for the purpose of the street business of his own and not for a business operated by others. Mr Wood also submitted that there was no evidence of the length of time it had taken to accumulate such cash. There was, therefore, no evidence of conduct, beyond the evidence of the instant street dealing, and therefore there was no evidence to take the matter to a different role from street dealing.

19. In addition, Mr Wood submitted that, whilst the heroin was found to be of high purity, there was no specific analysis to show what its purity was and therefore no conclusion should have been reached that there was an indicator that the Applicant had been higher up the supply chain. Further, there was no evidence of the number of people in the business, other than the fact that Ms Redding was involved. Nor was there any evidence that the applicant had directed or organised a business on a commercial scale.

20. For all these reasons, it was submitted that this was a case in which the Applicant had not acted in a "leading role". If the Court were persuaded that he had acted in a leading role because of the quantity of drugs and cash, and if as a result the Applicant's offending fell into Category 2, then it would be unfair to count this against the Applicant twice, to determine both culpability and category of harm. It involved an element of double counting, or it was simply unfair to penalise the Applicant twice for the same matter.

### Discussion

21. The Court is of the view that the combination of cash and drugs is a legitimate approach to an assessment of the category. Thus, a quantity of drugs which by itself would not suffice a Category 2 categorisation, could, with cash on top, be so categorised. The Court, nonetheless, accepts the need for caution as to how far that goes in the circumstances of this case. There is sufficient material (drugs and money) to make a finding that the possession of almost £30,000 from drug dealing, of which some part was likely to be profit, did bring the matter into category 2, rather than category 3. However, this Court cannot be as confident as the Judge was, absent more precise information, to find that the cash was the equivalent of half a kilogram. In our judgment, this is a case which falls into Category 2, albeit beneath the indicative quantity of 1 kilogram.

22. As regards the finding of a "leading role", in the judgment of this Court, the Judge was entitled to assess the nature of the dealing and to find that the applicant had a leading role. The evidence in particular of large quantities of drugs and cash, keys and safes at different addresses has more than one of the indicia of a "leading role" being satisfied. The purity of the heroin, which is not explained by the applicant, indicated that he is likely to have had close links with the original source. It was not cut, and there was evidence that it was highly likely to be of high purity. For the reasons which he gave, the Judge was also entitled to rely on the cash as evidence of an expectation of substantial financial gain. That was whether the cash was looked at simply as cash



in hand from drug dealing or, as the Judge found, that it represented profit from drug dealing. The fact that there was evidence of a number of addresses, two safes containing substantial quantities of cash at different addresses and keys in one property relating to another property, indicated and added to the ability of the Judge to find that a commercial operation was being undertaken which went beyond simply street dealing.

23. Whilst the Judge was wrong to say that the Applicant was not involved in the street dealing and that he was the driver, there was evidence that Ms Redding was being used in the operation. Further, although the Applicant may have been involved in the actual street dealing, there was evidence that this was not the limit of his involvement, but that he had a leading role for the reasons stated above.

24. Mr Wood referred the court to *R v Khan and Others* [2013] EWCA Crim 800, and sought to persuade us that the Applicant was to be dealt with by reference to the single substantive offence referable to street dealing. That was a case about the effect of a conspiracy and the ability to move to a higher category for sentencing based on indicative quantities. That does not arise in this case. The applicant was sentenced by reference to culpability, demonstrated by his role and the category of harm, and following the definitive guidelines for drug offences.

25. The submission advanced on behalf of the Applicant that there was double counting between the indicia of culpability and category, because cash was relevant to both, is not a good point. If there is some overlap between (a) the quantities of cash for the purpose of analysing the quantity of drugs concerned to establish the category of harm, and (b) the indicators as to culpability demonstrated by the role of the Applicant, that does not involve double counting. It simply involves an application of the guidelines. The amount of cash does not have to be put into one compartment alone.

26. In all the circumstances, there was sufficient material for the Judge to find evidence of involvement in a "leading role" which went beyond street dealing. However, we would say that this is a case where the Applicant stood to be sentenced for a leading role, but below the centre of the scale for a leading role. The Judge sentenced the Applicant on the basis that he was at the starting point for both Category 2 and leading role. In our judgment there was a basis for sentencing below that starting point. Taking into account our conclusions both as regards category and role that the Applicant was below the centre of the scale, we have come to the conclusion that the sentence of eleven years' imprisonment, before credit for the guilty plea, was manifestly excessive. We have come to the conclusion that, in order to reflect what we have said, both as regards where the applicant stood in Category 2 and where he stood in relation to "leading role", the Judge ought to have reached the view that the sentence, before the guilty plea, should have been nine years, rather than eleven years' imprisonment. Giving the applicant credit of 25 per cent for his guilty plea, the sentence should be six years and nine months' imprisonment.

28. It follows that we therefore give leave to appeal against sentence. We go on to deal with the appeal. For the reasons given, we allow this appeal by substituting a sentence of six years and nine months' imprisonment for the sentence of eight years and two months' imprisonment imposed by the Judge.

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: [rcj@epiqglobal.co.uk](mailto:rcj@epiqglobal.co.uk)

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