Neutral Citation Number: [2020] EWCA Crim 147

Case No: 201904443 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT TRURO
HHJ LINFORD
T20190296

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 12th February 2020

Before:

LADY JUSTICE THIRLWALL DBE
MRS JUSTICE CHEEMA-GRUBB DBE
and
HHJ WENDY JOSEPH QC
(Sitting as a Judge of the CACD)

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REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988

Between:

THE ATTORNEY GENERAL	**Appellant**
- and -	
DANIEL PECK	**Respondent**

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- -

Mr Harpreet Sandhu for the **Attorney General**
Mr Ramsay Quaife for the **Respondent**

Hearing date: Tuesday 21st January 2020

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Approved Judgment

THIRLWALL LJ:

1. Daniel Peck is 22 years old. Until the convictions with which we are concerned he was of good character. At a plea and trial preparation hearing on 24th October 2019 in the Crown Court at Truro, he pleaded guilty to:-

    i) Being knowingly concerned in the fraudulent evasion of the prohibition on the importation of MDMA, a class A drug (known as ecstasy), between 1st October 2018 and 13th October 2018, contrary to section 170(2) of the Customs and Excise Management Act 1979) (Count 1).

    ii) Possessing MDMA with intent to supply, on 28th October 2018, contrary to section 5(3) of the Misuse of Drugs Act 1971 ("the Act")) (Count 2).

    iii) Simple possession of a class A drug bromophenethylamine (known as 2C-B) contrary to section 5(2) of the Act (Count 3).

    iv) Simple possession of a Class B drug (ketamine) on 28th October 2018, contrary to section 5(2) of the Act (Count 4).

    v) Being concerned in the supply of MDMA, a class A drug, between 8th September 2017 and 28th October 2018, contrary to section 4(3)(b) of the Act) (Count 5).

2. On 8th November 2019, he was sentenced to 24 months' imprisonment suspended for 24 months on counts 1, 2 and 5 with requirements to complete 300 hours of unpaid work and to abide for six months by a daily electronically monitored curfew between 19:00 hours and 06:00. No separate penalty was imposed in respect of counts 3 and 4.

3. The Attorney General seeks leave to refer the sentence to this court as unduly lenient pursuant to s36 CJA 1988.

Preliminary Observation

4. There were a number of paragraphs of the reference, described as final, that had not been agreed by counsel for the defence. He had indicated where the areas of disagreement were in mid-December. The reference had been changed (in part) but there remained disagreement by the date of the hearing on 21st January. There was nothing on the face of the document headed Final Reference to inform the court that the facts were not agreed. This is regrettable. Mr Sandhu, who drafted the reference and who presented the case before us, said that he did not think the differences between him and counsel for the offender were of significance. We leave out of account the content of the four paragraphs that were not agreed.

FACTS

5. On 12th October 2018, UK Border Agency officers intercepted a package from the Netherlands containing 201 MDMA tablets (with a combined weight of 80.7 grams). It was addressed to Logan Chapman at the offender's home address in Cornwall. The MDMA had a purity of 44%. Each tablet was valued at £10. The total value of the package was, therefore, £2,010 (Count 1).

6. Police officers went to the offender's home on 28th October 2018. The offender was there and agreed to a search of his bedroom. The offender said that he had ordered MDMA tablets online in the name of Logan Chapman. The police officer who attended at the house said:

> "Peck seemed very anxious and it was clear to me that he was a young man who had not had any previous involvement with the police. He appeared to be making immediate admissions to the offence. I cautioned Peck, deciding it would be more appropriate to organise a suspect interview with him as a voluntary attendee."

7. The offender gave the police his phone and the PIN for the phone. As counsel for the crown very fairly put it at the hearing before the judge "so alongside the guilty pleas it may be thought that is something relevant when considering where in the range to place it."

8. The offender provided the police officers with a box from the wardrobe in his bedroom and a set of scales. The box contained:-

    a. Two plastic bags containing a total of three MDMA tablets (valued at £10) each and two broken MDMA tablets. These formed the basis of Count 2 (possession with intent to supply).

    b. Another plastic bag containing 938 milligrams of crystalline MDMA with a purity of 96% (which was valued at £40). This too was included in Count 2.

    c. A fourth plastic bag containing 9 tablets of 2C-B (with a combined weight of 1.59 grams and which were valued at £10 each) (Count 3).

    d. Three more bags containing 8.46 grams of ketamine (with a street value of £170) (Count 4).

9. He also took £1,180 from his bedside cabinet and handed it to the police. At the hearing in November he did not oppose the making of an order under Section 27 of the Misuse of Drugs Act.

10. The drugs recovered from the offender's bedroom had a street value of £330. Those the subject of counts 3 and 4 were for his own consumption.

11. The offender was not arrested because of his co-operation with the police. He was asked to attend an interview under caution voluntarily on 2nd November 2018. By then he had legal advice and answered, "No comment" to the questions asked of him.

12. His phone was examined. It contained text messages which showed that the offender had been concerned on several occasions between September 2017 and October 2018 in the street level supply of MDMA, 2C-B, ketamine and nitrous oxide (a controlled substance under the Psychoactive Substances Act 2018). This was the basis of count 5. The importation discovered in October 2018 was not an isolated event.

13. In the two months before he was arrested the offender had exchanged messages about the supply of drugs with 18 people. (The contact details of 16 of them were saved in his

telephone. It was agreed that he knew all 16.) The names of the contacts were readily identifiable and all the text messages were easily read.

14. Texts showed that the offender was dealing in drugs and legal highs. Some suggested that the offender was open to selling in larger quantities for onward sale. See for example the following text "Could do like 150. You make 100 then. And orange Teslas [ecstasy], they're banging. Would sell out instantly". Whether this or other such suggestions were put into effect is not apparent and they are inconsistent with the accepted basis of plea.

15. On 28th June 2018, the offender sent a "broadcast" message to a contact of his to say that he had received a fresh supply of MDMA tablets and that anyone who wished to purchase any from him should contact him. The offender said, "… this is my last ever lot and I'm stopping selling and sorting my life out…" There was some evidence that he did attempt to sort his life out. But in October he committed the offence at Count 1.

Funds recovered

16. In addition to the money the offender gave to the police at his home further sums were restrained in his bank account. The offender did not seek to recover them. The inescapable inference is that they were drugs related. A count of converting criminal property in the sum of £22,000 was not proceeded with because the offender was able to prove that the deposits relied on were not connected with his offending.

Delay

17. The offender was not charged until 27th August 2019, 10 months after the offences. He had cooperated fully with the police at his home. His phone was full of evidence, easily read. Analysis of the drugs was not complex. The result of the delay was that he was 21 by the time of the sentencing hearing. He was 17 when the offending began.

The Proceedings

18. The offender pleaded guilty on the following, written basis: "that he sold mostly legal highs, such as nitrous oxide, alongside MDMA, to known and established recreational users of drugs, in part to fund use."

19. The prosecution did not take issue with that and the judge sentenced on that basis. Having heard argument on the circumstances in which the guilty pleas were offered he gave the offender maximum credit. We shall return to that later in this judgment.

20. There was no pre-sentence report prepared before the hearing, notwithstanding the offender's age and his character. Even if it had been thought at the PTPH that immediate custody was the inevitable outcome there were aspects of the offender's history and background which were relevant to the sentencing exercise. In such cases a pre-sentence report should be sought.

21. Fortunately, the judge was able to call upon an experienced probation officer whom he made clear he held in high regard. He had interviewed the offender at court and gave evidence. This was followed by a written report which this court has read. The judge was impressed by the opinion of the probation officer who, having set out the offender's

history and current circumstances to which we shall refer below, considered that he posed a low risk of reoffending.

22. There were before the court a large number of letters from people who had known the offender in a number of different capacities. There was evidence that he had been bullied and was something of an outsider in school. This resonated with the view of the probation officer that his involvement firstly in taking drugs aged 17 and then selling them and legal highs had given him some acceptance and social status which had previously eluded him.

23. His employer described him as a valued employee and said he was remorseful. Another explained that the offender was a young man who had had many vulnerabilities in his life. He had begun participating in the Cornwall boxing team where he was very much valued.

24. It was clear from letters from family members that he had a profound understanding of the impact of what he had done upon the rest of his family. He was also described as polite, well-mannered and full of remorse.

25. The judge adjourned to consider sentence.

Sentencing remarks

26. The judge said that he had tried to balance "on the one hand the frankly enormous criminality of what you have done with the personal mitigation that is available, and also to reflect the reality of the situation here. He described the purchase of the 200 ecstasy tablets against a background of actively dealing "in this very dangerous drug for a significant period of time." The importation had been undertaken to supply the business. The judge accepted that he had started with legal highs and had then moved onto dealing class A drugs on the basis that these were people who wanted this commodity and were also using legal highs: "You were doing so not to make any great profit but there was certainly money to be made". He confirmed that he would sentence on the basis of plea tendered to the court.

27. He referred to the evidence of Mr Ciocci, the probation officer, whose evidence we have already rehearsed. He added that since the search of his house the offender had "turned his life completely around and had had the offences hanging over him for a long time". He pointed to another case in a different city where the supply of ecstasy had led to the deaths of two young people. He had sentenced the supplier to prison. The young people were his friends.

28. In relation to the importation (Count 1) the judge pointed out that Category 3 importation involves 300 tablets. There were 200 here. Category 4 is only four tablets. The guideline makes clear that if the amount significantly exceeds the four tablets in category 4, judges should look at the higher category and the range that is available.

29. The judge then turned to the supply guidelines and continued "the sentencing range, for someone involved in this supply can involve a starting point of 3 ½ years, because although there are elements that this is a significant role, this was a low grade enterprise and has elements of a lesser role because of your naivety. So I have a starting point of 3 1/2 years."

30. He then reduced the sentence to two years on the basis that the plea was entered at the earliest opportunity as we have already said. The highest reduction for an early guilty plea is one third. The judge in fact reduced the sentence by well over 40% to reach a sentence of 2 years [on Count 1] which he then suspended. He imposed a concurrent sentence of the same length on Counts 2 and 5.

31. The judge referred in summary terms to the following passage in the supply guideline at Step 2: "Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial sentence". This part of the guideline is directed to combining a drug rehabilitation order with a community order instead of imposing a custodial sentence.

32. At the end of his remarks the judge said in direct and powerful terms that if the offender put a foot wrong he would send him to prison and he reserved the case to himself. He added "You get to play, as I said to somebody else today, one card in your life only once, and that is your good character ….and you will never be able to play it again."

33. He concluded by saying "By imposing the sentence that I have, I have sought to do justice in this case, bearing in mind all I know about the offence, the offender and with regard to the guidelines, and I have also had regard to a number of authorities of the Court of Appeal in which this approach can at least be considered to be one which is just."

Post-sentence

34. Since he was sentenced the offender has received outstanding reports from his supervising probation officer. There is a report dated December 2019 and an update which was provided to us on the morning of the hearing. Both are to the same effect. We quote from the latter, dated 20 January 2020 "Dan has been absolutely brilliant at getting his unpaid work done and I cannot fault his commitment to attending these sessions. Unpaid work in Cornwall is particularly bad at the moment with many of the groups being cancelled but Dan has managed to negotiate around these issues and fly through his hours." He had already competed 200 hours at a rate of 21 hours per week. This rate of achievement is remarkable. The probation officer also commented that although there was no supervision requirement the offender had maintained very close contact with her. The judge's assessment that the offender would respond to a non-custodial sentence was undoubtedly correct. The probation officer expressed her concern as to the effect upon the offender of being sent to prison.

Submissions

35. On behalf of the Attorney General, Mr Sandhu submits, in summary, that this sentence is unduly lenient because it fails adequately to reflect harm and culpability as required by the guidelines, it does not take account of the fact that there were two aspects to the offending: importation and supply over a period of a year. Further that he did not take account of a number of aggravating factors and gave too much weight to personal mitigation. It is not disputed on behalf of the Attorney General that this was a case in

which the judge was right to pass concurrent sentences reflecting the whole of the criminality.

36. On behalf of the offender whom he represented before the sentencing judge Mr Quaife submits that the sentence is not unduly lenient and that the very experienced judge passed an appropriate and understandable sentence in all the circumstances. He reminds the court, correctly, of the observations of Lord Lane CJ in *Attorney General's Reference (No 4 of 1989)* (1989) (11) Cr. App R (S) 517 and repeated many times since:

> "the court may only increase sentences which it concludes were unduly lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that that naturally gives rise to – merely because in the opinion of this Court the sentence was less than this Court would have imposed".

The Guidelines

37. On the facts here Count 5 (possession with intent to supply) constituted the more serious offending, since it continued for over a year. It was appropriate to reflect the whole of the criminality in the sentence on that count and to treat the other aspect of the offending, the importation, as an aggravating factor. Count 2 marked the end of the period represented by Count 5. A concurrent sentence for that offence was appropriate.

38. In relation to Count 5 the offender was in Category 3, significant role. Whilst the judge found this to be a low-grade operation, a description with which we do not disagree, it was his own business, he ran it and he did so for money, not vast sums but into four figures and he ran it for over a year. The offender's role cannot properly be categorised as lesser. The starting point was 4 years and 6 months.

39. On Count 1 the harm category was below category 3 and above category 4. The role was significant for the reasons we have set out above. Were the judge sentencing separately for that offence a starting point below the category 3 range would have been appropriate (about 4 years). As we have said, it was appropriate to deal with it as an aggravating factor on count 5.

40. The judge's remarks as set out at paragraphs 29 and 30 above are not easy to follow. It would appear that when describing the starting point for Count 1 the judge was in fact referring to the sentence before reduction for the plea of guilty since he had already factored in much of the mitigation as he had carried out his sentencing exercise – and went on immediately thereafter to make the reduction for the guilty plea. It is not clear where he started. To reach a sentence before plea of 3 ½ years he must have started significantly above 3 ½ years but the preceding passage of his remarks suggests that he was referring to the lower end of the range for lesser role Category 3. This was not justified.

Other aggravating factors

41. Mr Sandhu submits that this was a sophisticated operation. He relies on the fact that the offender bought the drugs via the internet. We do not consider that buying something online is a mark of sophistication. The other evidence to which we have referred points in the other direction (all names and messages on his mobile phone, easily read. There was no burner phone, no codes, no attempt to hide any of his dealings).

42. We reject Mr Sandhu's submission that the offender had drawn other people into dealing in drugs. The texts do not bear such a conclusion. He sought to rely on established evidence of community impact on the basis that the judge had, when sitting in Plymouth, sentenced a supplier of ecstasy to two young people who had lost their lives as a result of taking it. That tragic outcome in another town is not what is meant by community impact in the sentencing guideline. The judge, correctly, did not approach it as such.

43. It follows that the two factors we have identified above: the length of the offending and the importation were the aggravating factors taking the sentence up from the starting point of 4 years and 6 months.

Factors reducing culpability and personal mitigation

44. We reject Mr Quaife's submission that this was dealing to fund his own habit. It was partly that but also partly to make money – and to win friends and status. He was not in the category of a dependent drug user who needed rehabilitation from drugs. He was using drugs recreationally.

45. We do not consider that the judge was entitled to rely on the passage in the guideline we have set out at paragraph 31 above. The judge had rightly concluded that a custodial sentence was necessary. A drug rehabilitation order was not necessary. It was not open to the judge to use this passage as a factor reducing the length of the sentence of imprisonment, particularly given the weight he gave to the other mitigating factors to which we now turn.

46. There were the following factors reducing culpability and other mitigating factors: his positive good character, his age, his naivete/immaturity, his remorse, his determination to make something of his life, as evidenced by his work in the boxing team, and in his employment. He had turned his life around in the year between detection and sentencing.

47. To those matters should be added his open and honest attitude at the time the police came to his home which was not eclipsed by his no comment interview and the delay between the search of his home and charge.

48. Taking all these matters and balancing them against the aggravating factors to which we have referred the appropriate sentence on count 5 before reduction for the plea was 4 years imprisonment.
49. We have taken account of the offender's cooperation with the police earlier in the process, as required. Thereafter there was no offer of pleas to any counts until there had been significant negotiations. A one third reduction was not appropriate. The conventional reduction of 25% should be applied. This leads to a sentence of 3 years imprisonment. We reduce that by a further three months to take account of the work he has already completed since sentence together with the severe daily curfew bringing the sentence to one of 2 years and 9 months imprisonment.

50. There is no provision for the suspension of a sentence of more than 2 years, irrespective of the matters in favour of such a course were it available.

51. We understand the judge's approach. He was faced with powerful evidence that it was possible to stop this young man reoffending. There was evidence before us that he would find prison very difficult. It is, however, inescapable that where a person imports and deals in Class A drugs over a prolonged period, even if he is a person of positive good character with every expectation of good behaviour in future, an immediate prison sentence of some length is almost always the outcome.

CONCLUSION

52. It follows that we give leave to the Attorney General in respect of the sentences on Counts 1, 2 and 5. We quash the sentences of 2 years imprisonment suspended for two years and substitute on each Count – 2 years 9 months imprisonment to be served concurrently. We make no orders in respect of Counts 3 and 4. The judge's order of no separate penalty remains in force.

53. The offender must therefore present himself at Camborne Police Station at 10am on Thursday 13th February.