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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202002746/A2

Neutral Citation Number: [2020] EWCA Crim 1745

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 8 December 2020

Before:

LORD JUSTICE HOLROYDE

MR JUSTICE HOLGATE

MR JUSTICE MARTIN SPENCER

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

REGINA

V

AMIR MOHAMED

Computer Aided Transcript of Epiq Europe Ltd,  
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MS K BROOME appeared on behalf of the Attorney General.

MR M STRADLING appeared on behalf of the Crown.

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

1. LORD JUSTICE HOLROYDE: After a trial in the Crown Court at Snaresbrook before HHJ Kamill and a jury, Amir Mohamed was convicted of two offences of possessing a controlled drug of Class A with intent to supply, contrary to section 5(3) of the Misuse of Drugs Act 1971. On 5 October 2020 he was sentenced to concurrent terms of 2 years' imprisonment suspended for 2 years. Her Majesty's Solicitor General believes that total sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this Court so that the sentencing may be reviewed.
2. The offences were committed on 6 December 2018. Mr Mohamed was then aged 20. He had no previous convictions. Police officers saw him in company with a known user of Class A drugs, in an unlit corner of a car park which was known for drug dealing and drug use. Mr Mohammed had just over £150 in cash and two mobile phones, an iPhone and a Nokia. He smelled of cannabis. He was arrested. When searched at the police station, he said that he had Class A drugs inside his trouser leg. A plastic bag was recovered which contained 36 £10 wraps of crack cocaine and 13 £10 wraps of heroin. Mr Mohamed said it was for personal use. He provided the police with the PIN for his iPhone but not for his Nokia phone.
3. When interviewed under caution he made no comment. He was released under investigation. The police were able to use specialist software to access the Nokia phone. It had been in use for only three days before Mr Mohamed's arrest. It contained crude ledgers showing expenditure, current balance and stock levels, consistent with drug dealing. We understand that it also contained one or more advertisements from persons offering to supply drugs.
4. On 9 October 2019 Mr Mohamed appeared before a magistrates' court and was sent for trial. He pleaded not guilty to both charges when arraigned in the Crown Court on 12 November 2019. In his defence statement, and in the oral evidence which he gave at trial, he put forward the defence that he was addicted to crack cocaine, heroin and cannabis, and was using Class A drugs in significant quantities each day. He claimed that on the day of his arrest he had left the house with about £500 and had made a bulk purchase of drugs for his own use. He gave an unconvincing explanation for the records on his Nokia phone. The jury disbelieved him and convicted him of both offences.
5. In the time which had passed since the offences and before trial, Mr Mohamed had been fined for possession of crack cocaine, that offence having been committed in January 2019. In February 2019 he had been stabbed by an unknown person and had spent 2 weeks in hospital, successfully undergoing surgery but losing a kidney. He recuperated over about a year and had subsequently obtained employment.
6. No pre-sentence report was thought to be necessary. In succinct submissions in mitigation, Mr Stradling, who represented Mr Mohamed at trial, as he does in this Court, referred to the passage of time since the offences, and the trauma of the stabbing. He submitted that Mr Mohamed, was now in "a much healthier and happier position" than at the time of the offence when it seemed he was a drug user. He suggested the possibility of a community order with a drug rehabilitation requirement.
7. The judge indicated that she did not accept that Mr Mohamed had been an addict at the time of the offences, and commented that as a rule drug dealers go to prison,

subject to exceptions when appropriate. She adjourned sentencing until the following week.

8. At the sentencing hearing, Mr Stradling made further submissions. There were testimonials before the court from members of Mr Mohamed's family and friends. It was apparent from these that he comes from a law-abiding family who remain supportive of him and who expressed understandable fear about his vulnerability in prison during the Covid-19 pandemic given that he has only one functioning kidney. His friends painted a picture of a young man who had begun using drugs and had fallen into bad company, but who had successfully put that behind him following the stabbing.
9. The sentencing hearing took place just after Mr Mohamed's 22nd birthday. The judge observed that he was a bright young man, capable of achievement, who had been in a low mood at the time of the offences because he felt himself to be an underachiever. She said that she did not accept that he was a drug user, because of a negative test soon after his arrest, at a time when drugs could have been expected to be in his system if he did have a drug habit, and also because his parents had never spotted any sign of a drug habit. She went on however to say that he had now "become clean" and had turned himself around. He had only one other conviction, that to which we have referred for possessing a comparatively small amount of cocaine in early 2019, and he had suffered extraordinary trauma when stabbed.
10. At page 3B of her sentencing remarks the judge then said:
  - i. "Prison sentences should be kept as short as possible, particularly in this time where there are very difficult circumstances in prison, and it seems to me that you, yourself, have turned your life around and there is little point in sending you to prison directly now. I am therefore going to trust you. The guidelines say I should be looking at four and a half years after a trial. Well I am not going to. I am going to cut it right down, not just to a short period but to a period whereby I can suspend the sentence and this will be a period of two years suspended for two years ..."
11. For the Solicitor General, Ms Broome submits that the sentencing was unduly lenient. Under the Sentencing Council's relevant Definitive Guideline Mr Mohamed had played a significant role in category 3 offences. The starting point was therefore four-and-a-half years' custody, with a category range from three-and-a-half to 7 years. The fact that there were two different Class A drugs was an aggravating feature. There were mitigating factors: his previous good character, his young age, delay and personal mitigation. She submits however that the judge gave too much weight to the personal mitigation. She argues that the significant reduction in the length of the term of imprisonment was inappropriate and was seemingly chosen to allow the sentence to be suspended. The total sentence, she submits, did not reflect the totality of the offending and was outside the range which could properly be considered to be appropriate.
12. Mr Stradling relies on the mitigating factors and on the judge's view that Mr Mohamed could make something of his life. He refers to the well-known words in the Lord Chief Justice's judgment in R v Manning [2020] EWCA Crim 592, at paragraph 41, to the effect that sentencers should keep in mind that the impact of a custodial sentence is likely

to be heavier during the Covid-19 pandemic than it would otherwise be, and that current prison conditions are a factor which can properly be taken into account in deciding whether to suspend a sentence. Mr Stradling submits that, whilst the sentencing was undoubtedly lenient, it was not unduly lenient in the particular circumstances of this individual offender.

13. We are grateful to both counsel for their submissions, in particular for the skill and focus with which they have addressed us this morning.
14. In our judgment, two of the Sentencing Council's guidelines are relevant to this case and must therefore be followed unless it would be contrary to the interests of justice to do so. Under the guideline relating to offences of possession with intent to supply, the appropriate category was clearly category 3 "significant role". It must be remembered that the guideline indicates the sentence for a single offence. We accept that in the circumstances of this case the fact that there were two offences adds comparatively little to Mr Mohamed's overall criminal. It does however add something; and it certainly reinforces the conclusion that there was nothing in the nature of the offending to require any reduction from the starting point of four-and-a-half years' custody.
15. The personal mitigating factors, correctly identified by both counsel, were undoubtedly significant. Collectively, they made it appropriate for the judge to make a significant downwards adjustment from the guideline starting point. In particular, the fact that Mr Mohamed was only 20, and of previous good character at the time of the offences and that he had succeeded in turning his life around before his trial, carried considerable weight.
16. It is however necessary to bear in mind that the passage of time between offending and conviction was in large part the result of Mr Mohamed's own actions in refusing to provide the PIN for his Nokia phone and in putting forward a defence which the jury found to be untrue. The fact that a defendant contests his trial does not of course make the offending more serious, but it does mean that less weight can be given to what might otherwise be an important mitigating factor based on the passage of time.
17. It must also be borne in mind that the judge, whilst it would seem accepting that Mr Mohamed had been a drug user at some stage, because she found that he had "become clean", did not accept that he was an addict when he committed the offences, or even that he had used drugs shortly before committing them. In those circumstances, with all respect to Mr Stradling, his suggestion to the judge of a community order with a drug rehabilitation requirement was misconceived. The basis of the mitigation was that Mr Mohamed had already become free of drugs by his own effort. The judge rightly did not base her decision on any therapeutic consideration. She imposed no requirements as part of the suspended sentence orders.
18. The Sentencing Council's Imposition guideline requires sentencers, when considering the imposition of a custodial sentence, to answer in correct sequence four questions:
  - Has the custody threshold been passed?
  - Is it unavoidable that a sentence of imprisonment be imposed?
  - What is the shortest term commensurate with the seriousness of the offending?
  - Can the sentence be suspended?
19. The judge clearly, and correctly, answered the first two of these questions in the affirmative. Plainly the custody threshold had been passed and, as we have indicated, there was no basis here for considering a community sentence with a drug rehabilitation

requirement. She was also right to say that prison sentences should be for the minimum period commensurate with the seriousness of the offending. With all respect to the judge however her approach to the third question cannot be justified. There was clearly a significant element of planning and preparation on the part of Mr Mohamed. There is no suggestion in this case that he was selling drugs as a result of coercion or intimidation. Although he had turned his life around, and for that and other reasons it was appropriate to reduce the sentence below the guideline starting point, we cannot accept that there was, as the judge put it, "little point" in sending him to prison. That might be an understandable observation if considering only his rehabilitation; but drug dealing can and often does cause great harm to those who purchase the drugs, as Mr Mohamed himself surely knew, and the need to impose appropriate punishment for such offending was an important purpose of sentencing in this case. Section 125(1) of the Criminal Justice Act 2003 provides:

- i. "In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause, or might foreseeably have caused."

20. In the circumstances of this case, we are satisfied that the judge failed to give sufficient weight to the inherent seriousness of this type of offending. Further, we accept Ms Broome's submission that the length of the sentence was only explicable on the basis that it enabled the sentence to be suspended. It was well below the bottom of the appropriate category range and did not reflect the seriousness of the offending. It cannot be justified on the basis either of the greater impact of prison sentences generally during the pandemic, or of the particular anxiety which we accept Mr Mohamed will feel because he has suffered the loss of a kidney. On general principles the prison service must be expected to provide appropriate care for him, and it is not suggested that the prison service will be unable to do so. In the circumstances of this case, it was not, in our view, open to the judge to pass a sentence of a length which could be suspended. The fourth question posed in the Imposition guideline should therefore not have arisen.
21. As we have indicated, the mitigating factors personal to Mr Mohamed were significant. We give as much weight to them as we can. We recognise that prison will be particularly hard for Mr Mohamed, and that he will be going into custody for the first time in his life, in the circumstances apparent from this judgment. For those reasons, we are persuaded by Mr Stradling's submissions that it is possible to arrive at a total sentence which falls somewhat below the bottom of the relevant category range. We are however satisfied that the sentence imposed by the judge was outside the range of sentences properly open to her and was unduly lenient.
22. For those reasons, we grant leave to Refer. We quash the sentences imposed below as unduly lenient. We substitute for them concurrent sentences on each count of 3 years' imprisonment. The total sentence therefore becomes one of 3 years' imprisonment, which will commence when Mr Mohamed surrenders to custody.
23. LORD JUSTICE HOLROYDE: Mr Stradling, subject to any submissions you wish to make, it seems to us appropriate that Mr Mohamed should surrender forthwith to custody. Is there anything else you want to say against that?
24. MR STRADLING: No. No thank you.

25. LORD JUSTICE HOLROYDE: Arrangements will be made -- if Mr Mohamed would be good enough to wait outside -- for him to surrender.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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