



Neutral Citation Number: [2019] EWCA Crim 2219

Case No 2018/03489/A1

IN THE COURT OF APPEAL
(CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 March 2019

Before :

LORD JUSTICE GROSS

MR JUSTICE SWEENEY

AND

SIR KENNETH PARKER

REGINA

v

KIAL PAYNE

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Mr H Salmman appeared on behalf of the *Appellant*.

Judgment

Mr Justice Sweeney:

1. On 10 April 2018, which was a week after his eighteenth birthday, the appellant pleaded guilty in the Cardiff Youth Court to three offences of supplying a controlled drug of Class A and to two offences of possession of a Class A drug with intent to supply. He was committed to the Crown Court at Cardiff where, on 24 July 2018, he was sentenced by HHJ Lloyd-Clarke to concurrent terms of two years and eight months' detention in a young offender institution on each charge.
2. He now appeals against that sentence by leave of the single judge.
3. The facts, in short, are these. The appellant has seven other convictions for fourteen offences, including one for possession of a Class B drug.
4. In the period between November 2017 and March 2018, and thus at a time when he was aged 17, the appellant was involved in a "county lines" drug supply network in Cardiff. He used what was known as the "Mikey 2" drugs telephone line. On three occasions he sold Class A drugs to an undercover police officer as follows: on 8th November 2017, 0.271 grams of heroin for £25; on 5th December 2017, three wraps of crack cocaine for £25; on 13th December 2017, 0.217 grams of heroin and 0.298 grams of crack cocaine, again for £25.
5. In February 2018, the appellant committed the offence of simple possession of a Class B drug, to which we have already referred, and two driving offences, for all of which he was bailed. He was still on bail at the time of committing the offences of possession with intent to supply. They were discovered when, on 20 March 2018, police officers executed a search warrant at his home in Cardiff and found 0.7 grams of 88 per cent pure crack cocaine and eight wraps of 22 per cent pure heroin, together with £360 in cash, drugs paraphernalia, knives and mobile phones. The total value of the drugs seized on that occasion was £160.
6. As we have indicated, the appellant's eighteenth birthday was on 3rd April 2018. On 8th May 2018, he was sentenced to a four month detention and training order for the offences committed in February 2018.
7. There was a pre-sentence report before HHJ Lloyd-Clarke in July 2018. Its author recorded that the appellant had told him that he owed some money and was fearful that drug associates would go to his mother's house if he did not pay them. The author further recorded that the appellant had indicated that he wanted to live a pro-social life, but the author recognised that, given the gravity of the offending, immediate custody was inevitable, as (he recorded) did the appellant.
8. In passing sentence, the judge rehearsed the facts, including that the appellant was aged 17, albeit latterly going on 18, at the time of the offending. Applying the relevant Guideline, she concluded that the offences were all within category 3 "significant role" and were aggravated to some extent by the drug offence in February 2018, and much more so by the fact that the March 2018 offences were committed whilst on bail. She also took into account what the maximum sentence would have been if the appellant had been aged 17 at the time of conviction, and sentence had taken place in the Youth Court. Ultimately, the judge concluded that, had the appellant been an adult at the time of the commission of the offences, the starting point of four and a half years would, after balancing the relevant aggravating and mitigating features, have gone up to a notional sentence after trial of five years' custody, from which she

deducted, first, 20 per cent, to reflect the appellant's age at the time of the offences, and then 33 per cent to reflect his early guilty pleas. Thus, she ultimately imposed the sentences to which we have referred.

9. Another offender, who was aged 17 and of previous good character, was sentenced by the Youth Court to a Referral Order of twelve months for similar, though not identical, offences.
10. On the appellant's behalf, Mr Salmman, in succinct and attractive submissions, abandons a ground originally advanced as to alleged disparity with the sentence imposed on the other offender. In our view, he was wise to do so. He concentrates upon the core submission that the sentence ultimately imposed was manifestly excessive when viewed against the background of the appellant's age at the time of the offending, and the change of age before sentence. He makes three points. First, he submits that, in all the circumstances, the judge erred in going upwards from the starting point of four and a half years to the notional sentence before trial of five years - given the appellant's age and the absence of truly aggravating previous convictions.
11. Second, Mr Salmman submits that the judge paid insufficient regard to the appellant's young age of 17 when he committed the offences, and to the delay between the initial offences and the latter offences - which, he submits, was not the appellant's fault, albeit that it was the appellant's choice to commit the offences which were discovered when his home address was eventually searched.
12. Third, Mr Salmman asserts that, against the background that the appellant's only previous custodial sentence was the four month detention and training order to which we have already referred, the sentence imposed was too big a jump.
13. We have carefully considered these submissions. We remind ourselves that the appellant fell to be sentenced for five offences, the last two of which were committed whilst he was on bail, which was obviously a very serious aggravating feature. In those circumstances, it seems to us that, from the starting point in the Guideline, which she correctly identified, and given that there were five offences, the judge was entitled, having balanced the aggravating and mitigating features, to conclude that the aggravating features outweighed the mitigating features and thus to increase the custodial term to a notional sentence after trial of five years.
14. The principal ground advanced is that relating to the appellant's age. In that regard, the judge clearly had in mind the relevant Guideline, which provides at paragraph 6.46:

"When considering the relevant adult Guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two-thirds of the adult sentence for those aged 15 to 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence, the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age."
15. It is obvious, therefore, from the Guideline that it was a matter for the judge's discretion as to the amount of discount that she gave in relation to the appellant's age at the time of the offending, and it is clear that the correct stage at which to deal with that issue was the stage at which she did so.

16. In our view, taking the picture as a whole, it cannot be suggested that a discount of 20 per cent for age in relation to an offender who, during the latter part of his offending, was so close to his eighteenth birthday, was manifestly insufficient. Equally, as to the final submission advanced, it seems to us that the gravity of the offending plainly did justify the sentence that was imposed.
17. Accordingly, and notwithstanding the attractive way in which the appellant's case has been advanced, we have concluded that the sentence was within the appropriate range and was thus not manifestly excessive. Therefore, the appeal is dismissed.