

No: 201805301/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION
Neutral Citation Number: [2019] EWCA Crim 842

Royal Courts of Justice
The Strand
London, WC2A 2LL

Thursday, 2 May 2019

B e f o r e:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)

MR JUSTICE JAY

and

MR JUSTICE FREEDMAN

R E G I N A

Appellant

v

AYOUB BENHAMMOU

Respondent

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Mr Benjamin Waidhofer of Counsel appeared on behalf of the Appellant

J U D G M E N T

MR JUSTICE FREEDMAN:

1. This is an appeal against sentence by permission of Mrs Justice Farbey given on 01 March 2019. On 26 November 2018, the Appellant was sentenced at Southwark Crown Court by Mr Recorder May, on a guilty plea, to a total sentence of 3 years, comprising
 - (1) Count 1: possession with intent to supply Class B drugs (cannabis), 2 years;
 - (2) Count 2: possession of a Class A drug (cocaine), 9 months concurrent;
 - (3) Count 3: dangerous driving, 6 months consecutive;
 - (4) Count 4: possessing criminal property of £1,756.40, 6 months consecutive.
2. There were other relevant orders comprising a disqualification order of 12 months, with an extension of 18 months, forfeiture and destruction of the drugs, forfeiture of the money and a victim surcharge order of £170.00.
3. On 26 May 2017 in the early hours of the morning, at about 3.10am, the attention of three police officers was drawn to a blue BMW vehicle being driven in the West End of London. The police stopped the vehicle because attention had been drawn to the same vehicle the night before. The vehicle was driven by the Appellant with three passengers but it was not alleged that the Appellant was the driver on the previous night.
4. A police van with the three officers drew up. They got out to speak to the four occupants of the BMW. As one police officer approached the BMW, the vehicle suddenly reversed and came close to the three police officers, albeit that they did not have to jump out of the way. There was no collision because having reversed, the

vehicle went forwards and sped off, mounting the northbound footpath of Regent Street and drove along it for a short distance. There were no pedestrians in the vicinity. The vehicle was driven dangerously, but at most only for a few minutes. The police officers returned to the van, but by the time they sought to chase the BMW, it had gone.

5. The Appellant was identified around the Piccadilly area by one of the officers. The police officers got out of the van and approached the Appellant. They also found the BMW which by then was empty. The Appellant did not run away, but he did give a false name. He was arrested for possession of drugs found in the car and for being involved in a driving offence. He maintained the false name, but having taken his fingerprints, police officers were able to identify him.
6. The search of the BMW revealed sealed clear plastic bags comprising three bags with 13.8 grams, 3.35 grams and 6.87 grams of skunk cannabis and 4.8 grams of cannabis resin, found under the driver's seat and in the footwell (that is the subject of Count 1). The Appellant was body searched at the police station and the police found grip sealed clear plastic bags inside of which there were two further grip sealed plastic bags containing a total of 1.03g of cocaine (that is the subject of Count 2). The police searched the Appellant's Bottega Veneta shoulder bag and found the sum of £1,756.40 (that is the subject of Count 4).
7. The Appellant gave a "no comment" interview later that same day when interviewed by the police. The offer of pleas of guilty followed a long conference with Counsel, having met Counsel for the first time. The pleas offered at trial had been offered about two months earlier and rejected.

8. The Appellant had a bad criminal record. Although he was 22 (almost 23) on sentence, he had had 10 court appearances for 20 offences. The last two court appearances comprised the following. First, on 15 February 2016, he was convicted at Southwark Crown Court of offences similar to the instant ones. They were committed in September 2015 and comprised two counts of possession with intent to supply cannabis and cannabis resin respectively, possessing cocaine and possessing criminal property for which he was sentenced to a total of 10 months' detention in a young offender institution.

9. Secondly, in August 2016 he committed further offences of a similar kind and more serious for which he was convicted in January 2018 following a trial and sentenced by Isleworth Crown Court on 15 March 2018 comprising
 - (1) two counts of possession with intent to supply of cannabis and cannabis resin, for which he was sentenced on each to 18 months concurrent;
 - (2) possession with intent to supply a Class A drug (heroin), for which he was sentenced to 28 months concurrent;
 - (3) assault occasioning actual bodily harm, for which he was sentenced to a total sentence of 28 months' imprisonment concurrent.

At the conclusion of the delivering of this judgment, Counsel for the Appellant indicated that there was no sentence for the offence of possession with intent to supply a Class A drug, but his antecedents indicate that he was sentenced.

10. The second set of offences were committed in August 2016, which must have been shortly after his release from prison for the first set of offences for which the Appellant had received a total sentence of imprisonment of 10 months in February 2016.

11. Mrs Justice Farbey J, on giving permission, required a chronology to be prepared and agreed which we have found to be a helpful document. The following is apparent from the chronology in addition to the foregoing:

- (1) On 26 May 2017, the instant offences were committed whilst the Appellant was on bail for the second set of offences, that is between their commission in August 2016 and trial in January 2018 (and sentence in March 2018);
- (2) Later on the same day (26 May 2017), the Appellant was interviewed under caution and ‘released under investigation’;
- (3) On 26 March 2018, a postal requisition was issued from Southwark Crown Court. This was 11 days after the sentence at Isleworth Crown Court for the second set of offences;
- (4) On 2 May 2018, the Appellant made his first appearance for the instant offences at the Magistrates’ Court when he indicated pleas of guilty to possession of cannabis and cocaine. Evidently, he had not been charged relating to the supply of drugs at that stage.
- (5) On 30 May 2018, there was fixed the PTPH when according to the Chronology “no counsel attended re: CBA dispute with LAA. Appellant did not attend court, bail was revoked as a result”. At that point the indictment contained the same four counts, but the allegation of possessing of criminal property involving a sum of in the order of £50,000.
- (6) Between 12 September 2018 and 13 November 2018, Counsel were in discussions to resolve the matter without the need for trial. The Defence offered pleas to Counts 1-3 and to leave the cash to be determined at cash forfeiture proceedings because another party had come forward to claim the

money. The basis of plea was not then acceptable to the Crown. It is stated on behalf of the appellant that the pleas which were subsequently accepted were first offered in September 2018 but were rejected, which rejection was subsequently reviewed and reversed on the day of the trial.

- (7) On 26 November 2018, the prosecution applied to amend count 4 to the sum of £1,756.40 being cash found on the Appellant's person on 26 May 2017, to which the Appellant pleaded guilty at the date of trial, being his first arraignment.

12. The parties submitted to the Court that the following Sentencing Council guidelines applied, namely

- (1) In respect of possession with intent, under the 'Drug Offences, Definitive Guideline', possession with intent was a Category 3 offence, (only 28 grams, but involving street dealing in which the Appellant had played a 'significant role'. The starting point is 12 months with a range of 26 weeks to 3 years.
- (2) In respect of possession of criminal property, under the "Fraud, Bribery and Money Laundering Definitive Guideline", this was a Category 6 offence in which the Appellant had medium culpability. The starting point, based on £5,000, is a high-level community order, with a range of a low-level community order to 1 year's imprisonment.
- (3) In respect of dangerous driving, the Court was asked to consider the Magistrates' Court Guidelines. The maximum sentence is 2 years, and both parties submitted that a short sentence of imprisonment was appropriate.

13. In his sentencing remarks, the Recorder stated that he would give credit for the guilty pleas, but that he would not give full credit because they were not entered at the first

opportunity and that when interviewed there was no response to any of the questions asked. Unfortunately, the Recorder did not identify what credit he did give, saying that he did not find 'a mathematical approach' particularly helpful in the particular circumstances of the case.

14. The Recorder stated that he gave credit for a number of things including (a) the totality principle to reflect the overall criminality, and (b) the age of the Appellant being 22. He said that he would balance these factors against the history of offending of the Appellant, and particularly drew attention to the first and second set of offences referred to above, both involving charges of possession with intent to supply cannabis and cannabis resin. He drew attention to the fact that as with the first set of offences, he was again charged with possession of heroin. The Recorder said that it was the repetition of the same offences that he had to take into account.

15. The Recorder concluded that 3 years' imprisonment was the appropriate sentence which he said could have been made up in a different way, but which he regarded as the correct total amount. The composition of the sentences was as set out at the outset of this judgment. As noted above, he made the orders of forfeiture and destruction and of disqualification and the victim surcharge.

16. The grounds of appeal in summary were that the Recorder failed in the following respects, namely

- (1) to give reasons for deciding on the sentence and thus 'calculated' the total sentence arbitrarily and without regard to the features which he was to consider';
- (2) to impose a concurrent sentence where one should have been imposed;

- (3) to make any adjustment or allowance for totality to reflect the chronology of events and the sentence imposed at Isleworth Crown Court.

17. The Crown Court sentenced the Appellant without a pre-sentence report. No report is necessary, and no point is taken in this regard in the appeal.

18. In giving leave to appeal, Mrs Justice Farbey stated that

- (1) the sentencing remarks did not appear to apply the relevant Sentencing Council Guidelines. It was critical in this case for the Recorder to consider and apply the guidelines referred to above as well as the guidelines on reduction of sentence for guilty plea and on totality;
- (2) it was arguable that the dangerous driving and/or criminal property charges ought to have been concurrent with the sentence for possession of cannabis with intent, as they all arose from the same incident or facts;
- (3) the Recorder did not appear to have considered whether the total sentence ought to have been reduced (by virtue of the principle of totality) to reflect the delay in commencing the prosecution, which arguably led to the effect that the Appellant was bound to serve consecutive sentences for the second set of offences (the Isleworth offences) and the instant offences. The argument was that this was disproportionate.

19. It was regrettable that the Recorder did not avert to the specific Sentencing Council Guidelines. Without this, in the instant case, it is difficult to understand the basis of sentence and the extent to which it complies with the guidelines, and to the extent that it does not, the reasons for the same. This has been compounded by the failure of the Recorder to identify the extent of the reduction for the guilty plea. This Court has repeatedly emphasised the reasons why it is necessary for the sentencer to identify the

relevant guidelines and to explain the sentences by reference to the relevant guidelines. In those cases where there is a departure from the guidelines, it is especially important to explain the basis for such departure.

20. The failures in this case in part, but not entirely, have been alleviated by the knowledge that the parties made joint submissions to the applicable guidelines in respect of the relevant offences. The parties directed the Court below to the appropriate characterisation and categorisation of the offences and identified the relevant starting points. Regrettably, this still does not suffice because the Recorder did not state expressly how he was applying the category to the facts of the case, nor did he identify the amount allowed for the guilty plea, nor did he address the consideration of delay. This was not a case where it was obvious what was the approach, such that the above failures were significant.

21. Consideration shall first be given to the specific offences and then to the question of whether sentences should have been concurrent, then to the discount for the pleas and finally consideration of delay and the totality principle.

22. As regards possession with intent to supply cannabis and cannabis resin, the starting point was that identified by Counsel to the Court of 12 months. Although the quantity of drugs was small, the starting point in respect of 'street dealing' is not based on quantity and therefore it was a Category 3 offence. There then stood to be considered the factors increasing seriousness. The Recorder was right to refer to the previous convictions of the same kind and to the fact that they were proximate in time, especially excluding the time served in prison for the first and second sets of offences. In the words of the Recorder, these sentences "clearly did not have a sufficient deterrent

effect". A further statutory aggravating factor was the fact that the offences had been committed whilst on bail pending the second set of offences.

23. Inextricably bound up with the character of the offence was the possession of criminal property. The combination of the cash and the packets of drugs was indicative of street dealing. In these circumstances the Count 4 offence was to be considered as not just arising from the same facts and incidents but as being part of and evidencing the nature of the offending for which the Appellant was sentenced in respect of both Counts 1 and 4.

24. In our judgment, the appropriate sentence was to build the criminal property as being a feature of the street dealing and to make the sentences concurrent. It is noted that this is what occurred when the Appellant was sentenced at Southwark Crown Court for the first set of offences.

25. In any event, the sentence for Counts 1 and 4 together were 2 years 6 months. This is high relative to the first set of offences (10 months on a plea) and the second set of offences (in respect of the possession of cannabis with intent to supply, 18 months after a trial). If the discount for a guilty plea were 25%, this would amount to a sentence of 3 years and 4 months before the pleas of guilty. In our judgment, that would have been manifestly excessive. However, that criticism is removed by making the sentences for Counts 1 and 4 concurrent.

26. A substantial increase from the second set of offences to the instant offences was appropriate to reflect the statutory aggravating circumstances. Consideration has been given to having a discount of below 25, bearing in mind that although the plea was at

the time of the first arraignment before the Crown Court, it was also at the time fixed for trial. However, 25%, in our judgment, is still to be applied for the following reasons. The matter might have been arraigned at an earlier stage without some delays for which the prosecution should take all or some of the responsibility. A part of the problem was that Count 4, the criminal property charge, in its inception comprised about £50,000. This was only abandoned and replaced by the charge of the sum of £1,756.40 at the time of the trial. Without this, it is to be inferred that the need for a trial might have been avoided. A related aspect was the passage of 2 months of review and change of heart of the prosecution in the 2 months prior to November 2018 as referred to in the agreed Chronology.

27. In these circumstances, a credit of 25% was appropriate for the guilty plea. On this basis an overall sentence of 2 years and 8 months before a plea would have been, that is 30 months, before a plea would have been appropriate for Count 1 and 8 months for Count 4 on the basis that the sentences for Counts 1 and 4 were concurrent. On the basis of a 25% discount for a guilty plea, this leads to concurrent sentences of 2 years for Count 1 and 6 months for Count 4. The interference of this Court is to reduce an overall sentence of 2 years and 6 months for these counts to 2 years. There is no reason to interfere with the concurrent sentence of 9 months following a guilty plea for Count 2, for possession of cocaine.

28. In his written grounds, Counsel for the appellant did not complain about the consecutive sentence in respect of dangerous driving and recognised that this offence was separate from and independent of the other offences. Here too, there is no reason to interfere with the sentence of imprisonment of 6 months for dangerous driving following a guilty plea. The overall sentence in this case is therefore to be reduced

from 3 years to 2 years 6 months subject to consideration of the point about delay and the examination of the totality principle.

29. The Appellant points to the fact that if the instant matters had been prosecuted earlier in time, then the Appellant could have been sentenced for these matters and the second set of offences at the same time. There is scope for criticism that the Appellant was charged for the instant offences only after the sentencing for the second set of offences, and despite knowledge of the Crown about the offences since the time of their commission about 10 months earlier. The criticism would have had more force still if the Appellant had sought to bring to a head those matters at an earlier stage with a view to encouraging the Crown to deal with all matters at once, but he did not do so. The appellant's counsel submitted that there was no scope for criticism because he had not been charged until after the second set of offences had been disposed of. In our judgment, these points are peripheral and the essential point as regards sentence resulting from delay is the central point of the appellant's counsel which we have to consider. He submits that if the matters had been dealt with at once, the appellant would or might have had a lower sentence than the totality of the sentence which he did receive, namely 3 years, as he received in the lower court and 2 years and 4 months comprising in all 5 years and 4 months. The submission would go on to say that the same applies even on the basis of the reduction which has been intended to be made by this Court from 3 years to 2 years and 6 months and that an overall sentence of 4 years and 10 months is excessive.

30. The Appellant's Counsel points to the approach in the totality guidelines to an offender serving a determinate sentence where the instant offences had been committed before the original sentence was imposed. In those circumstances, the guideline says that the

approach is as follows:

"Consider what the sentence length would have been if the court had dealt with the offences at the same time and ensure that the totality of the sentence is just and proportionate in all the circumstances. If it is not, an adjustment should be made to the sentence imposed for the latest offence"

31. It was submitted that in the event that the instant offences had been sentenced at the same time as the second set of offences at Isleworth, the sentence in respect of Count 1 would not have been so much higher than the sentence for possession with intent to supply Class B drugs within the second set of offences. We do not agree. The Court would still, in our judgment, have sentenced the Appellant consecutively on the basis that the offences were entirely separate and independent of the second set of offences. The aggravating features about repetition and offences committed whilst on bail still would have applied. In that regard, we not only reject the submission made that these were to be regarded as part of one transaction, such that they could be treated as concurrently but the aggravating feature of the fact that the offences which we are dealing with were committed on bail renders that argument, in our judgment, a hopeless argument.
32. This point may have had some weight in the event that we were not to decrease the sentence for Counts 1 and 4 from 2 years 6 months to 2 years. However, having done so, and for the above reason, we take the view that no further adjustment is required.
33. In all the circumstances, we would reduce the overall sentence from 3 years to one of 2 years 6 months. We would therefore allow the appeal to the following extent, by making the sentences for Counts 1 and 4 concurrent instead of consecutive save as above the sentences of imprisonment must stand. The other orders remain so that the disqualification in respect of dangerous driving of 12 months is to have a 15-month

extension instead of an 18-month extension to reflect the shorter overall prison sentence of 2 years and 6 months.

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

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