



Neutral Citation Number: [2020] EWCA Crim 1560

Case No: 201901325 A4

IN THE COURT OF APPEAL
(CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2020

Before :

LORD JUSTICE GREEN

MR JUSTICE JULIAN KNOWLES

HIS HONOUR JUDGE BLAIR QC
THE RECORDER OF BRISTOL

Between :

TYLER WHITTINGTON

- and -

THE QUEEN

Applicant

Respondent

Mr David Leathley for the Applicant
The Crown did not appear and were not represented

Hearing dates: 4 November 2020

APPROVED JUDGMENT

Mr Justice Julian Knowles:

Introduction

1. This is an application for an extension of time of approximately 14 months to renew an application for leave to appeal against sentence, following refusal by the single judge. The original application was also significantly out of time. On 12 September 2018 in the Crown Court at Cardiff the Applicant was sentenced by Mr Recorder Treverton-Jones QC, having been convicted by the jury, on three counts (namely, Counts 1, 3 and 5) of possession of a controlled drug of Class A, with intent to supply, contrary to s 5(3) of the MDA 1971 namely cocaine and heroin.
2. The Applicant's application for leave to appeal against sentence was received in the Criminal Appeal Office on 8 April 2019, about 180 days out of time. In Counsel's original advice it stated the application was late in because of new facts raised by the financial investigation under the Proceeds of Crime Act 2002. The Applicant only indicated a desire to challenge his sentence on 6 February 2019 following a visit from solicitors. On 13 June 2019 the single Judge (Nicklin J) refused leave to appeal. On 21 June 2019 the single Judge's decision was sent to the applicant.
3. On 8 September 2020 the application to renew the extension of time and leave to appeal was received in the Criminal Appeal Office, thus approximately 14 months out of time.
4. The Registrar has helpfully drawn our attention to the fact that a guilty verdict may have been wrongly returned on Count 2, simple possession, which was an alternative to Count 1, possession with intent to supply. Once the Applicant had been found guilty on Count 1, no verdict should have been taken on Count 2. The records are, unfortunately, incomplete, but for the avoidance of doubt, we quash any guilty verdict on Count 2 and order that that Count lie on the file on the usual terms.
5. The Applicant was sentenced to eight years' imprisonment concurrent on each count. He was also made subject to the victim surcharge. Given the existence of confiscation proceedings, a technical issue arises whether that order should have been made, but in the absence of any evidence of prejudice, we say no more about it.

Facts

6. The facts were as follows.
7. The Applicant was arrested on 1 April 2018 in Newport, in possession of a small quantity of Class A drugs, mostly heroin and a little cocaine. But when the police went to his address in Newport they found in a cupboard just outside his flat a quantity of heroin and cocaine. There was a trial. The Applicant was convicted by the jury. In passing sentence, the judge said that the quantity of heroin found was about 1 kg (the Grounds of Appeal suggest a lesser quantity, namely 490 g) and there had been a significant amount of cocaine. He said the offences were therefore very serious. The Applicant had admitted possession but denied intent to supply.
8. The judge said that the evidence which he had heard showed that the value of the cocaine and the heroin which was found in the cupboard was well over £10,000, and if the heroin were to have been adulterated the value would have been more than double that. Under the relevant

Sentencing Guidelines, the judge assessed the Applicant as having a significant role, and the amount of drugs involved placed the case into Category 2. The sentences of eight years were in accordance with the starting point for such offences under the Guidelines.

9. The Applicant has relevant previous convictions for drug offences as recently as 2016.

10. When refusing leave the single judge said:

“It is the quantity of the drugs – not their value (as to which there will frequently be a dispute) – that governs the categorisation on the sentencing guidelines. The forensic drugs report identified that ... the quantity of heroin was over 1kg. That is before any cocaine is taken into account. The Judge was correct to assess the applicant as having a significant role. The supposed evidence from the proceeds of crime investigation that the applicant’s lifestyle and available property is inconsistent with the applicant having a significant role is unpersuasive. These are not pre- requisites for a finding that a person performed a significant role. In light of that, the sentence cannot remotely be described as manifestly excessive; it is squarely within the guideline. No error of approach or principle has been identified. The balance of the matters raised in the advice (§4) appear to be a belated challenge to the conviction of the applicant on the basis that the drugs (or at least a quantity of them) were not in his possession. These are not appropriate matters to raise in a sentence appeal.”

11. Before us on this renewed application, Mr Leathley did not seek to pursue the grounds of appeal which had not persuaded the single judge to grant leave. He accepted, expressly, that the single judge had been right and that leave to appeal on the grounds as then presented had been ‘deservedly refused’. That was a realistic concession.

12. Instead, Mr Leathley focussed his submissions on the current COVID-19 pandemic and argued that that should result in this Court reducing the Applicant’s sentence. He referred to *Manning* [2020] EWCA Crim 592 (30 April 2020) and *Jones* [2020] EWCA Crim 764 (12 June 2020) in which this Court considered the impact of the pandemic on sentencing.

13. Mr Leathley argued, firstly, that the effect of the pandemic in prisons has been to make the impact of imprisonment harsher than it would otherwise be because of, for example, the reduced time out of cells that is currently permitted. There are also reduced family visits. He said that the judge, had he known the sentence he imposed would span the pandemic (which, of course, he could not have known when he imposed it), would not have imposed such a long sentence. Mr Leathley also relied on what he said were the Applicant’s mental health conditions, including schizophrenia. We were not, however, taken to any medical evidence nor does it appear that the sentencing judge was referred to such evidence. Mr Leathley said that Mr Whittington’s family were concerned he might not be receiving his medication.

14. The impact of the COVID-19 pandemic on sentencing has been considered by this Court in several cases, and we therefore reserved judgment in this case to consider those decisions and their effect on the correct approach to appeals against relatively lengthy sentences such as those

to which the Applicant is subject. As well as the two cases cited by Mr Leathley, the issue was raised in *Korta – Haupt v Chief Constable of Essex* [2020] EWCA Civ 892 (13 July 2020); *Randhawa* [2020] EWCA Crim 1071 (23 July 2020); *Wayne* [2020] EWCA Crim 1303 (25 September 2020); and *Beirne* [2020] EWCA Crim 1218 (8 October 2020). In Scotland, the issue was considered by the Appeal Court, High Court of Justiciary, in *Crown Appeal against Sentence by Her Majesty’s Advocate Against Ian Lindsay* [2020] HCJAC 26 (12 June 2020).

15. In *Manning*, supra, a Reference by the Solicitor General, the Lord Chief Justice said at [41]-[42]:

“41. We are hearing this Reference at the end of April 2020, when the nation remains in lock-down as a result of the Covid-19 emergency. The impact of that emergency on prisons is well-known. We are being invited in this Reference to order a man to prison nine weeks after he was given a suspended sentence, when he has complied with his curfew and has engaged successfully with the Probation Service. The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19.

42. Applying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended. Moreover, sentencers can and should also bear in mind the Reduction in Sentence Guideline. That makes clear that a guilty plea may result in a different type of sentence or enable a Magistrates' Court to retain jurisdiction, rather than committing for sentence.”

16. In the Scottish case of *Ian Lindsay*, supra, (an appeal by the Crown against the sentences passed on the defendant for coughing in the faces of two police officers) the Lord Justice Clerk said at [9] that the sheriff had applied a discount of one third (from six months to four months) to reflect ‘the considerable utilitarian value of the plea of guilty; particularly due to the current inability to conduct trials and backlog, caused by the Covid19 pandemic’. It was submitted for the Crown that the sheriff had fallen into error in giving an enhanced discount on account of the pandemic [10].
17. At [13] the Lord Justice Clerk said that the discount of one-third was in line with usual practice for a plea of guilty in the circumstances of the defendant’s case and therefore that the premise of the Crown’s argument that an enhanced ‘pandemic discount’ had been awarded was a false premise. She went on at [14] to follow the approach in *Manning*, supra.

18. On the same day this Court gave judgment in *Jones*, supra. The application for leave to appeal against sentence had been referred to the Full Court because of the short sentences involved. On 17 March 2020, just six days before the first lock-down began, in the Crown Court at Cardiff, the applicant was sentenced on count one (attempted burglary) to eight months imprisonment and on count 2 (possession of Class A drug) to no separate penalty.

19. At [15] Green LJ said:

“Mr Bishop, for the applicant, has framed his arguments under two broad headings. First, arguments relating to whether the sentence was manifestly excessive; second, arguments relating to the fact that the applicant was sentenced during the period immediately prior to the Covid-19 pandemic lock-down when the sentencing judge would have been unaware that in sentencing the applicant to custody he would be detained in conditions which would involve a greater degree of privation than would be the case but for the lock-down.”

20. The Court dismissed the first limb of the argument. As to the second, Green LJ cited [41] and [42] of *Manning*, supra, and said at [19]:

“We are of the view that in the present, exceptional, circumstances it is appropriate to take the conditions under which the applicant is presently held in custody into account. We do not of course criticise the judge for the sentence imposed because the judge was wholly unaware of the change in prison conditions that would arise just days after the sentence was imposed.”

21. On 23 June 2020 Holroyde LJ, Chairman of the Sentencing Council, made the following statement (available at <https://www.sentencingcouncil.org.uk/news/item/the-application-of-sentencing-principles-during-the-covid-19-emergency/>):

“The Sentencing Council is aware of and understands the concerns that many people have about the effect the Covid-19 emergency is having on conditions in prisons and the potentially heavier impact of custodial sentences on offenders and their families. There are well-established sentencing principles which, with sentencing guidelines, are sufficiently flexible to deal with all circumstances, including the consequences of the current emergency. These principles are familiar to judges and magistrates and were reaffirmed by the Lord Chief Justice when giving the judgment of the Court of Appeal in the case of *Manning*. The Council hopes this statement will help to clarify the position for those who are less familiar with the principles or not involved in the criminal justice system.

Each case must of course be considered on its own facts, and the court has an obligation to protect the public and victims of crime. Judges and magistrates must make their independent decisions as to what sentence is just and proportionate in all the circumstances of each individual case. By statute, a court must not impose a community

sentence unless it is of the opinion that the offence was serious enough to warrant such a sentence, and must not pass a custodial sentence unless it is of the opinion that the offence was so serious that neither a fine alone nor a community sentence can be justified.

In deciding whether a custodial sentence is necessary, a court must follow the approach set out in the Sentencing Council's *Imposition* guideline. This guideline requires the court to consider first whether the custody threshold has been passed. It makes clear that even where the court decides that the custody threshold has been passed, it must go on to consider whether it is unavoidable that a custodial sentence be imposed. If a custodial sentence is unavoidable, the court must then decide what is the shortest term commensurate with the seriousness of the offence(s) and must consider whether the sentence can be suspended.

In accordance with well-established principles, the court in answering those questions should take into account the likely impact of a custodial sentence upon the offender and, where appropriate, upon others such as children or other dependents.

This has recently been confirmed by the decision in the case of *Manning* ...

In addition, when applying the *Reduction in sentence for a guilty plea* guideline, the court must consider the exceptions in that guideline. The exceptions include whether there were particular circumstances affecting the defendant's ability to understand the allegations or to receive the advice necessary before pleading guilty, or where the defendant pleads guilty to, and is then convicted of, a different offence from that originally charged. In making these considerations, the court must keep in mind the practical difficulties of defendants accessing legal advice during the present emergency."

22. *Korta-Haupt*, supra, involved two appeals against sentence for contempt of court arising from breaches of Gang-Related Injunctions. Peter Jackson LJ said at [30]:

"Next, both judges gave consideration to the impact of Covid-19 on any custodial sentence. The significance of the pandemic, as was made clear in *Manning*, is that the impact of a sentence is likely to be heavier because of conditions in detention, lack of visits and anxiety. There is no entitlement to a 'Covid discount' – it all depends on the circumstances. In this case, there were no individual features of either appellant's situation that suggested a reduction was called for. The emergency had not prevented them from travelling the country during lockdown and the additional burden of the pandemic on them and their families during a relatively short period of detention was not significant."

23. The next case in time is *Randhawa*, supra. Hickinbottom LJ qualified the principle set out by the Lord Chief Justice, at [13] and [15]:

“13. Finally, relying on the recent judgment of this court in *R v Manning* [2020] EWCA Crim 592, Mr Smith submits that although the sentence was passed prior to the COVID-19 lockdown, the restrictions resulting from that pandemic have had serious adverse effects on the Appellant, with (e.g.) the postponement of home leave and family visits, difficult in any event because of the distance involved.

...

15. ... In our view, the Appellant having been sentenced prior to the COVID-19 lockdown, *Manning* (which requires consideration to be given to the adverse impact of the restrictions when considering a sentence of imprisonment) has no application here ...”

24. In *Wayne*, supra, the Court said at [16] that counsel for the Appellant had noted that although the matter had not specifically been raised before the judge, no consideration had been given to the present ongoing effects of the pandemic on the conditions in which the appellant would have been detained,
25. In *Beirne*, supra, [22] the Court of Appeal noted that the sentencing judge had been referred to *Manning*, supra, but did not further address the issue.

Discussion

26. We do not read these authorities as providing support for the proposition that a lengthy prison sentence like the Applicant’s should, without more, be substantially reduced on appeal on account of the pandemic in circumstances where it was passed many months before the pandemic and first lockdown started. In the Appellant’s case, that period was 18 months. The Applicant requires a substantial extension of time to make this application; it is only because he is so far out of time that he able to raise the pandemic issue at all. Had he made his original application in time, and applied to renew in time (as he should have done), then his case would have been determined in 2019, long before the pandemic began.
27. *Manning*, supra, established that the pandemic could be taken into account by sentencing judges in deciding on the length of sentence or (as in that particular case) whether to suspend a sentence. As the Lord Chief Justice explained, and as Holroyde LJ later amplified, the impact of the pandemic on prisoners can be taken into account during the sentencing process because of the general sentencing principle that the particular impact of a prison sentence on a prisoner must always be taken into account when a sentence is being determined.
28. The position is not the same on an application for leave to appeal. The *Manning* principle was qualified in *Randhawa*, supra, where it was held to have no application in relation to sentences passed before the lockdown started. In *Jones*, supra, a short sentence was reduced on appeal on *Manning* grounds, but the Court was at pains to point out that the facts were exceptional, the sentence was short, and the sentence had been passed only days before the lockdown began.
29. The present case is very different, for the reasons we have explained.

30. Whilst this Court, in accordance with well-understood principles, can reduce a sentence where there are proper grounds do so, we think it will be rarely – if ever - appropriate to do so in respect of a long sentence passed many months before the pandemic started. *Randhawa*, supra, would suggest that the *Manning* principle does not apply at all in such a case. Without taking such an absolute approach, we think it likely that particularly cogent evidence of the increased harsh impact of imprisonment because of the pandemic will be needed before such a course should be contemplated in the case of a long term prisoner. The more serious the offence, and the longer the sentence, the less the pandemic can weigh in the balance in favour of a reduction unless there is clear, cogent and persuasive evidence of a disproportionately harsh impact on the prisoner. Over the course of a long sentence the period of time during which the prisoner is subject to lock down because of the pandemic might be quite short in relative terms. It is for prison governors to do what they can to alleviate the worst adverse effects. The course of the pandemic is uncertain. The current lock down is due to end in early December. We hope that prison conditions might return to something near normal in the near future. We do not wish to say anything to encourage long term prisoners with no other viable grounds of appeal to apply to this Court for leave to appeal against sentence simply on the grounds of the pandemic. Such applications are likely to be given short-shrift.
31. Turning to the case before us, as we have pointed out, the Applicant is only able to make this argument because he is substantially out of time. There is not a great deal of evidence about the Applicant's particular circumstances, however we have seen correspondence from G4S from September 2020 indicating that he has two hours a day out of his cell, and one family visit per month. G4S acknowledged the situation is far from ideal. We accept that the Applicant 's prison regime has been impacted by the pandemic, in line with the authorities we have cited. On the other hand, his sentence was passed a long time before the first lock down. As we have said, the current, second, lock-down is due to end in early December 2020, and it is to be hoped that the prison regime to which he is subject will return to some sort of normality soon after that, although no doubt some restrictions will continue.
32. Overall, despite Mr Leathley's admirably clear submissions, we are not persuaded this is a case where we can properly interfere with what is otherwise a perfectly appropriate sentence.
33. We therefore refuse leave to appeal.