

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE COURT OF APPEAL
CRIMINAL DIVISION
NCN: [2021] EWCA Crim 1905
Case No: 2021/02924/A3



Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 2nd December 2021

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Fulford)

MRS JUSTICE McGOWAN DBE

MRS JUSTICE CUTTS DBE

REGINA

- v -

AGIM ARAPI

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Miss E Lewis appeared on behalf of the Appellant

JUDGMENT

1. Thursday 2nd December 2021
2. **LORD JUSTICE FULFORD:** I shall ask Mrs Justice Cutts to give the judgment of the court.
3. **MRS JUSTICE CUTTS:**
 1. In June 2021, in the Crown Court at Leeds, the appellant stood charged on an indictment containing two counts. On 11th June 2021, he pleaded guilty to count 1, an offence of possessing a controlled drug of Class B with intent, contrary to section 5(3) of the Misuse of Drugs Act 1971. On 24th June 2021, he changed his plea to guilty on count 2, an offence of possessing criminal property, contrary to section 329(1)(c) of the Proceeds of Crime Act 2002.
 2. On 1st September 2021 (then aged 42 years) he was sentenced to 18 months' imprisonment on count 1 and 10 months' imprisonment concurrent on count 2, a total sentence therefore of 18 months' imprisonment.
 3. The appellant now appeals against sentence with the limited leave of the single judge.
 4. The appellant had two younger co-accused: Ardit Braka and Muhammet Qamo, aged 24 and 27 years respectively. Both changed their pleas to guilty on count 1. Count 2 was ordered to lie on the file in relation to each on the usual terms. They were each sentenced to 12 months' imprisonment.
 5. The facts can be briefly stated. On 13th May 2021 police executed a search warrant at an address in Beeston. The appellant was in the first floor rear bedroom. Each of the co-accused was in a different room in the house. Two large bags of cannabis, each weighing one kilogram, were found in the rear bedroom. This had a street value of between £17,000 to £20,000. In excess of £20,000 in cash was found in a carrier bag in the front bedroom. Drugs paraphernalia, including scales and a bud compactor, were also seized from the property.
 6. The appellant and his co-accused were all of previous good character.
 7. Counsel on behalf of all of them invited the judge to sentence straightaway, rather than to adjourn for the preparation of pre-sentence reports.
 8. In sentencing the appellant, the judge observed that no counsel had advanced mitigation to the effect that an immediate sentence of imprisonment should be suspended. He placed the offence in count 1 in category 3 "significant role" of the relevant Sentencing Council guideline. This has a starting point of one year's imprisonment, with a range of 26 weeks to three years. In his view, the case fell above the starting point set out in that category as the evidence showed that the appellant and his co-accused were not merely in possession of the cannabis with intent to supply. The drugs paraphernalia and seized cash were evidence of a pre-sale operation. The offenders had an expectation of significant financial advantage or other gain and some awareness of the scale of the operation.
 9. The judge declined to make any reduction in the sentence by reason of the difficulties faced by those serving custodial sentences during the Covid-19 pandemic, in accordance with the judgment of this court in *R v Manning* [2020] EWCA Crim 592. This, he said, was because the appellant had been arrested on 13th May 2021, when the pandemic was at "an advanced stage". Everyone would have been aware at that time

of the conditions during the pandemic for remand and serving prisoners. In those circumstances no reduction on this ground was appropriate.

10. The judge approached the appellant's sentence by considering the offending as a whole, and he imposed concurrent sentences with totality in mind. He reached a starting point of 24 months' imprisonment on count 1, to which he afforded 25 per cent credit for the guilty plea. This reduced the sentence to 18 months' imprisonment. He imposed a concurrent term of ten months' imprisonment on count 2.
11. Leave was given by the single judge on the basis that the judge erred in not allowing any reduction in respect of the current conditions within prisons. The appellant renews the ground upon which leave was refused: that in coming to the appropriate sentence, the judge adopted too high a starting point, resulting in a sentence that is manifestly excessive.
12. In her attractive submissions on behalf of the appellant, Miss Lewis argues that the starting point for category 3 "significant role" is based on six kilograms of cannabis and points out that that in this case only two kilograms had been seized. In those circumstances the case fell towards the lower, not the higher, end of the sentencing range. This is especially so as there are no statutory aggravating factors, and the appellant is a man of previous good character. Miss Lewis submits that the judge fell into error in using factors which placed the offence within category 3 "significant role" as additional aggravating factors. She further submits that the judge adopted the wrong approach when considering whether there should be any reduction in the sentence by reason of the conditions in prison during the pandemic. Miss Lewis contends that, despite lockdown having ended, prison regimes are far from normal. We are told that the appellant suffers from hepatitis B. Prisoners' freedoms are heavily restricted, with little or no access to social visits, education or time out of the cells. The appellant had been in custody on remand for nearly four months at the time of sentence and subject to such a regime, which should have been taken into account by the judge.
13. We turn first to the contention that the judge adopted too high a starting point. We agree with the single judge that this is unarguable. True it is that there were only two kilograms of cannabis, but that was not the only consideration. As the judge observed, drug paraphernalia was found which indicated that the appellant's involvement in the offence went beyond simply an intention to sell the cannabis located on the premises. It indicated the scale of his offending, with considerable pre-sale involvement and a commercial aspect to it. The appellant had also to be sentenced for possession of criminal property. £20,000 is a significant sum and indicative of involvement in earlier criminal activity. The judge would have been entitled in those circumstances to have increased the sentence from the starting point. He would also have been entitled to pass a consecutive sentence for the possession of the cash. Instead, he front-loaded the sentence on the drugs offence and ordered that the sentence on count 2 should run concurrently with it. We are unpersuaded in those circumstances that the notional sentence of a total of 24 months' imprisonment, before credit for the guilty plea, was manifestly excessive.
14. We find force, however, in the ground upon which Miss Lewis was granted leave. In *R v Manning* this court made it clear that the conditions in prisons at that time during the pandemic represented a factor which could properly be taken into account when imposing shorter sentences. In giving the judgment of the court, Lord Burnett CJ observed:

"41. ... Judges and magistrates ... 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. ...

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. ..."

15. We are told that although the nation is no long in lockdown, as it was at the time of the decision in *Manning*, prison conditions remain difficult. By reason of the pandemic, prisoners frequently remain confined to their cells for very long periods and have no access to education or other facilities within the prison. Visits remain impacted. In our judgment, it thus remains incumbent on judges and magistrates who are imposing shorter sentences to consider the impact of prison conditions upon the offender. In our view, the date of the commission of the offence has no relevance in this regard. The impact of the pandemic on prison conditions remains the same for all offenders, whatever their state of knowledge about them may have been at the time that they committed the offence.
16. We consider, therefore, that the judge fell into error in refusing to consider the likely impact on this appellant of a custodial sentence on the basis that he must have been aware of prison conditions when arrested in possession of drugs in May 2021. Indeed, we are unpersuaded that he can be deemed to have had such knowledge at all. It is unrealistic to suppose that someone committing an offence would have at the forefront of their mind knowledge of these conditions, especially those such as this appellant who are of good character and from another country.
17. In our view, it was necessary and appropriate in this case to take into account the conditions under which the appellant would be held in custody. We conclude that, had the judge done so, the appropriate total sentence would have been one of 16 months' months' imprisonment.
18. We give effect to this conclusion by quashing the sentence of 18 months' imprisonment on count 1 and substituting a sentence of 16 months' imprisonment in its place. That sentence remains concurrent with the sentence of ten months' imprisonment imposed on count 2, with which we do not interfere.
19. Accordingly, and to that extent, this appeal against sentence is allowed.

4. _____

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk
