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Neutral citation No. [2023] EWCA Crim 1476

IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Case No: 2023/02609/A3



Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Tuesday 5<sup>th</sup> December 2023

**B e f o r e:**

**LORD JUSTICE DINGEMANS**

**MR JUSTICE GOOSE**

**HIS HONOUR JUDGE DREW KC**

**(Sitting as a Judge of the Court of Appeal Criminal Division)**

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**R E X**

**- v -**

**MALIK DOUGLAS**

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**Mr M Radstone** appeared on behalf of the Appellant

**Miss L McGarr** appeared on behalf of the Crown

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

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## **LORD JUSTICE DINGEMANS:**

### **Introduction**

1. The applicant's applications for an extension of time (13 days) and for leave to appeal against sentence have been referred to the full court by the Registrar. The need for the short extension of time arose because of counsel's workload, and it would be wrong to penalise the applicant for that. We will grant leave to appeal because it is apparent that there were errors made in the sentencing exercise.

2. The appellant is now aged 27; he was aged 26 at the time of sentencing. He had ten previous convictions for 20 offences, which included relevant convictions for eight drugs offences and two offences relating to shotguns, firearms and offensive weapons. Some of the drugs offences had been committed in July 2020, and the appellant was still on licence in relation to them.

3. On 26<sup>th</sup> May 2023, in the Crown Court at Wood Green, the appellant pleaded guilty and was sentenced by Mr Recorder Taylor on 23<sup>rd</sup> June 2023 as follows: on count 1, Possessing a prohibited firearm, contrary to section 5(1)(aba) of the Firearms Act 1968, four years and six months' imprisonment; on count 2, Possessing a controlled drug (Class B, cannabis) with intent to supply, contrary to section 5(3) of the Misuse of Drugs Act 1971, a consecutive term of two years and three months' imprisonment; and on count 3, Possessing criminal property, contrary to section 329(1)(c) of the Proceeds of Crime Act 2002, a concurrent term of six months' imprisonment. The total overall sentence was one of six years and nine months' imprisonment. Supplementary orders were made for the forfeiture, destruction or disposal of the firearm, the drugs and the cash which had been seized.

4. There are three grounds of appeal. First, it is said that the sentence on count 1 was wrong in law. This arises from a point which has been identified by both counsel. It relates to the

minimum term of five years' imprisonment required to be imposed for possession of the prohibited firearm (count 1). Secondly, it is said that the Recorder's starting point in relation to count 2 was too high. Thirdly, it is said that the Recorder failed to have regard to totality by the imposition of a consecutive sentence on count 2.

### **Factual background**

5. On 3<sup>rd</sup> March 2023, police officers executed search warrants under the Firearms Act and the Misuse of Drugs Act at an address in Summerhill Road, London. Police officers gained entry to the property and found the appellant and his mother present. Police officers searched the premises and found a .38 calibre revolver (count 1). An attempt had been made to remove markings on the firearm which had been deactivated and then reactivated so that it was capable of firing cartridges. Police officers also found three separate packets of cannabis (count 2). The first packet contained 1.03 grams of cannabis; the second packet contained 10.2 grams; and the third contained 2.563 grams. The estimated wholesale value of the cannabis was £1,000 to £1,500, and the estimated street value of the cannabis was £2,280 to £2,670. On a table near the cannabis the police found £720 in cash (count 3, possessing criminal property).

6. The appellant was arrested. He was interviewed later that day. In interview, he made no comment.

### **The sentence**

7. No pre-sentence report was obtained. We agree that, given the inevitability of a substantial custodial sentence for possession of the firearm, no pre-sentence report was required.

8. The Recorder noted that it was agreed that the relevant category for the firearm was 3B,

with a starting point of five years and six months, and a minimum term of five years' imprisonment. He recorded that the appellant had had a category 3 "significant role" in the offence charged in count 2, with a starting point of 12 months, with a range of 26 weeks to three years' imprisonment. The Recorder took into account the appellant's eight previous convictions for drug related matters. He took a starting point of 36 months and discounted it for the guilty plea, which gave a sentence of 27 months' imprisonment.

9. For mitigation, the Recorder considered the fact that the appellant had a young child and was attempting to build a relationship with the child's mother. The Recorder referred to totality and then imposed a sentence of 72 months, which he reduced by 25 per cent, for possession of the prohibited firearm, which gave 54 months' imprisonment. He imposed a consecutive term of 27 months' imprisonment for possession of the Class B drug with intent, and a concurrent term of six months' imprisonment for possession of the criminal property. That gave the total of six years and nine months' imprisonment.

### **The appeal**

10. In relation to ground 1 (the unlawful sentence in relation to the firearms matter), there is effectively common ground. There is a required minimum sentence of five years' imprisonment for this offence, unless the court is of the opinion that there are exceptional circumstances relating either to the offence or to the offender that justify not imposing such a sentence. There is no power to reduce the required minimum period to reflect a reduction for a guilty plea. The Recorder imposed a sentence of less than five years' imprisonment on count 1. He did not state that he had made a finding in relation to exceptional circumstances. The Recorder noted the minimum period, but then seems to have overlooked it when he applied credit for the guilty plea.

11. Section 11(3) of the Criminal Appeal Act 1968 prevents this court from increasing the

total sentence. However, it is common ground that the court may restructure the sentence so that the sentence on count 1 is increased to five years' imprisonment to comply with section 311 of the Sentencing Act 2020, so long as the overall sentence is not increased.

12. We therefore turn to the real point of the appeal: namely whether the sentence on count 2 should have been ordered to run concurrently with the sentence on count 1, with a small increase to the term of five years, rather than the six years and nine months' imprisonment to which the appellant was sentenced.

13. We have had careful regard to the sentencing guideline on totality, to which both Mr Radstone, who appears on behalf of the appellant, and Miss McGarr, who appears on behalf of the prosecution, have relied. We are grateful to both their helpful written and oral submissions. In so far as material, there is a passage in the guideline which reads:

"Consecutive sentences will ordinarily be appropriate where:

...

b. offences committed in the same incident are distinct, involving an aggravating element that requires separate recognition.

Examples include

- ...
- where the offender is convicted of drug dealing and possession of a firearm offence. The firearm offence is not the essence or an intrinsic part of the drugs offence and requires separate recognition
- ...

d. one or more offence(s) qualifies for a statutory minimum sentence and concurrent sentences would improperly undermine that minimum.

Examples include

- other offences sentenced alongside possession of a prohibited weapon (which attracts a five year minimum term) – any reduction on grounds of totality should not reduce the effect of properly deterrent and commensurate sentences. ..."

### **The drugs sentence and totality**

14. In our judgment, the Recorder was entitled to place the offence of possession of Class B drugs with intent at the top of the relevant category range because of the substantial aggravating factor of eight relevant previous convictions. The discount for the guilty plea gave a sentence of 27 months' imprisonment. As an individual sentence, that would have been appropriate. In our judgment, the Recorder was right to order that sentence to run consecutively because it represented different offending and different criminality from the firearms offence, which is, as we have indicated, a point recognised in the totality guideline.

15. We have stood back and considered whether an adjusted sentence, as it will now have to be to avoid increasing the total sentence of 21 months' imprisonment for this separate offending, means that the overall sentence is not proportionate. We are unable to find that that is so. Although Mr Radstone made attractive and succinct submissions on behalf of the appellant, we would not have been minded to interfere with the sentence for the drugs offending in any event. In circumstances, however, where we have to increase the sentence for the firearms offence, we must reduce the sentence for the drugs offence to avoid infringing section 11(3) of the Criminal Appeal Act.

16. Accordingly, we will allow the appeal to this extent. The sentence on count 1 is increased from four years and six months to five years' imprisonment. The sentence on count 2 is reduced from 27 months to 21 months imprisonment. This means that the overall length of the sentence remains as it was, at six years and nine months' imprisonment.

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