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Neutral Citation No. [2023] EWCA Crim 48

IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202202798/A3



Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 17 January 2023

Before:

LORD JUSTICE DINGEMANS

MRS JUSTICE MAY DBE

HIS HONOUR JUDGE CONRAD KC

(Sitting as a Judge of the CACD)

REX

V

KENNLEY MARK BAILEY

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MR H KHATTAK appeared on behalf of the Appellant.

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction and grounds of appeal

1. The appellant is a 39-year-old man. He had before these events five convictions for nine offences spanning from 2005 to 2017, and relevant previous offences were for battery, possessing Class A and C drugs and driving offences. His most recent offence was in 2017 but on 24 June 2021, in the Crown Court at Birmingham, the appellant pleaded guilty to producing a controlled drug of Class B and possessing a Class B drug and on 3 February 2022 he changed his plea to guilty to a count of supplying a Class B drug. This followed the withdrawal of a basis of plea suggesting that there were only 40 cannabis plants which had been discovered growing in his property and not the 83 claimed by the prosecution. The significance of there being only 40 was that, at that stage, the appellant was contending that they were all for his own use. The appellant was entitled to 25 per cent credit for plea given the time at which that plea was entered. On 11 January 2022, on a separate indictment, the appellant pleaded guilty to a count of cruelty to a person under the age of 16. The appellant was entitled to 10 per cent credit for his plea given the stage at which that plea was entered. On 9 September 2022 the appellant was sentenced for all the offences. He was sentenced to 24 months' imprisonment for the offence of cruelty to a person under 16, 10 months consecutive for producing a Class B drug with 1 month concurrent for supplying and another month concurrent for possession of a Class B drug. That gave an overall sentence of 34 months.
2. The grounds of appeal for which leave had been granted by the single judge were that: first the judge erred in finding that the appellant played a significant role in producing the cannabis; secondly, the judge erred in adopting a starting point of 16 months for the offence of production of the Class B drug; thirdly, that insufficient weight was given to

the appellant's mitigation; and fourthly, that the judge erred in finding that the sentence must be immediate imprisonment.

3. The fourth ground of appeal is not pursued. This is because, so far as the sentence for cruelty to a person under 16 is concerned, the categorisation of that offence was common ground below. The judge took a sentence towards the bottom of that and made appropriate discounts for mitigation and ended up with a sentence of 24 months. It was accepted, and properly accepted given the circumstances, that the sentence for the drug offending had to be consecutive to that offence.

Factual circumstances

4. In those circumstances it is not necessary to go into any of the details in relation to the child cruelty matter. On 15 January 2020, when the appellant was interviewed in relation to the child cruelty offence, police officers went to search his address. They found that the premises were being used to grow cannabis plants. Two rooms were dedicated for that purpose. The second floor had 13 plants, three industrial lights, a fan, a timer and blackout blinds. A smaller room contained a built-in cupboard with seedlings and smaller cannabis plants. Eighty-three plants were growing inside the property. The potential value, if sold, would have been between £9,200 and £54,500 depending on the wholesale amount. Plant growth products were recovered and the appellant's phone was analysed. It contained a limited number of messages that indicated that the appellant had supplied cannabis to other persons or was prepared to do so. A quantity of herbal cannabis was also recovered indicating that the appellant was himself a user of cannabis.
5. In interview the appellant admitted growing the cannabis. He said he did not believe that it was against the law and that the plants were for his personal use but he had given three plants to his cousin. He said he also had a friend who would use the cannabis to make

cannabis oil from which food items could be made.

The sentencing hearing

6. There was a pre-sentence report, a letter of remorse from the appellant, which we have read, and character references showing the appellant to have been a hard-working and reliable local entrepreneur. He was described as kind and caring. The appellant had worked with West Midlands Mediation Service giving advice about gangs and knife crime, mentoring young persons and had then developed depression after losing his job from which he earned about £25,000 per annum. He had also worked at a shop in Birmingham and had cooked and supplied food and provided employment. He had supplied food to homeless people. He was assessed as being generally a loving and supporting father to his 11 children aged between 2 and 21. Two of those children lived with him but the others visited regularly and some stayed over on occasions. He was considered in the pre-sentence report to be a disciplinarian who had acted irrationally in relation to the child cruelty matter.
7. So far as the drug offences were concerned, the judge considered that the number of cannabis plants made this some kind of factory by way of a description. The judge found that the appellant had a significant role because he was the only person involved in the operation and was well aware of the scale and nature of the operation. The judge found that this was a category 3 case which is for 20 plants. This was significantly above that because there were 83 plants, but was short of category 2. Category 3 had a starting point of 12 months with a range of between 6 months to 3 years. The judge said that he must move up because of the scale of the operation within that category and also because of the previous convictions.
8. The judge found an aggravating feature was that the appellant's children were present in

the house when visiting and that the appropriate sentence or starting point would have been 16 months. The judge reduced that by 25 per cent which came to 12 months. The judge made a further slight reduction to reflect the totality and came to an overall sentence of 10 months for the drug offences.

The disposal of the appeal

9. We turn to the first ground of appeal that the judge erred in finding that the appellant played a significant role and not a lesser role and therefore erred in taking the sentence of 16 months before the various discounts were applied. It was common ground that this was category 3 offending but that was for 20 plants and there were 83 plants. This meant that the judge was right to record that there needed to be some upward adjustment in category 3 to reflect the number of plants. A category 3 significant role has a starting point of 12 months and a range of 26 weeks to 3 years. A category 3 lesser role has a starting point of a higher level community order and a range of a lower level community order to 26 weeks.
10. So far as categorisation of the role is concerned, it was common ground that there was a feature of significant role and some understanding of the scale of the operation because the appellant was the only person involved. We agree, however, that there were other features of a lesser role, being an expectation of limited financial gain. This was the effect of the prosecution evidence showing that the cannabis plants were mainly being grown for personal use. In addition, it could be said that there was no influence in the chain above because there was no chain. We do not accept that because it was an operation mainly for his own use it could be said to be an operation “for his own use” because part of the purpose was the commercial element.
11. In our judgment the judge was wrong to find that this was a significant role without

reflecting the elements of the lesser role and it was therefore wrong to take the starting point of 16 months without reflecting the elements of the lesser role. In our judgment, in this case, a starting point for a role which straddled significant and lesser roles was 9 months. That did require upward adjustment to reflect the number of plants, his previous record and the fact that children visited his premises where two rooms were given over to producing cannabis. The sentence required to be reduced to reflect the very considerable personal mitigation which we have already identified. Doing the best that we can, we consider that a sentence before discount for plea of 7 months would have been appropriate. There was then a discount of 10 per cent for plea taking the sentence to about 6 months. There were issues of totality identified by the judge. This gives a sentence of 4 months for the separate drug offending.

12. As to the other grounds about insufficient weight to the appellant's mitigation, that has been reflected in the overall sentence now taking account of the sentence for child cruelty and the sentences for the drug offences. As we have already indicated, the fourth ground of appeal was not pursued.
13. In those circumstances the appeal is allowed to the extent that we reduce the sentence from 10 months for the separate drug offence to one of 4 months but we continue to make that consecutive to the sentence of 2 years imposed for the child cruelty. The concurrent sentences of 1 month on the other matters remains as they are. This means that the aggregate sentence is reduced from one of 34 months to one of 28 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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