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NEUTRAL CITATION NO: [2024] EWCA Crim 1218

IN THE COURT OF APPEAL
CRIMINAL DIVISION

The Royal Courts of Justice
The Strand
London
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
(MR RECORDER CAMPBELL KC) [01CW1179423]

Case No 2024/03207/A1
2024

Thursday 10 October

B e f o r e:

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

MR JUSTICE MARTIN SPENCER

MRS JUSTICE CUTTS DBE

R E X

- v -

MAHAMUD ALI

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Miss N Lake appeared on behalf of the Applicant

JUDGMENT

Thursday 10 October 2024

LORD JUSTICE HOLROYDE: I shall ask Mr Justice Martin Spencer to give the judgment of the court.

MR JUSTICE MARTIN SPENCER:

1. By this application the applicant applies for leave to appeal against a sentence of 12 months' imprisonment imposed by Mr Recorder Campbell in the Crown Court at Southwark on 3 September 2024 for a single offence of being concerned in the supply of Class A drugs, having pleaded guilty at the first opportunity on 21 February 2024 in the Westminster Magistrates' Court and been committed for sentence. The application has been referred to the full court by the Registrar.

2. The facts of this matter are that at about 11.50 pm on 11 March 2023, the applicant was seen by the manager of a bar in Soho, London, to be approaching customers and offering to supply them with drugs. The manager of the bar asked the applicant to leave, and the applicant said: "Most of your guys are calling me to pick up". Shortly afterwards the bar manager saw police officers and gave them a description of the applicant, who was detained nearby for a drugs search. The applicant told the officers that he had been trying to sell paracetamol as cocaine. Six small bags of white powder were subsequently found in the applicant's left-hand jacket pocket and the applicant was arrested.

3. Subsequent forensic analysis showed that the white powder contained about 3 grams of paracetamol which had been crushed into six bags which the applicant had been attempting to pass off as half gram bags of cocaine. A tiny amount of cocaine (0.049 grams with a nil value) was also found.

4. The applicant gave the police the PIN to his mobile phone, on which they found a message requesting a "20-bag" to be delivered to the bar where the applicant had been found operating, together with a message stating "cash waiting".

5. In interview the applicant admitted selling paracetamol as cocaine and stated that he had picked up off the street the trace of actual cocaine that had been found.

6. Sentencing the applicant, the learned Recorder recognised that to supply fake drugs is less serious than offering to supply actual drugs. He referred to the decision of this court in *R v Tugwell* [2001] EWCA Crim 719, [2001] 2 Cr App R(S) 113, where the appellant, who was of a similar age to the applicant, had pleaded guilty to two counts of offering to supply MDMA (ecstasy) and two counts of possessing cannabis and possessing MDMA. That appellant had attended a pop festival where he was approached by undercover police officers wanting to buy ecstasy. The appellant had offered them what he held out to be ecstasy tablets, but on analysis were found to contain an innocuous and possibly health promoting form of zinc tablet. He received a sentence of two years' imprisonment after a plea of guilty, which this court reduced to 15 months' imprisonment on the basis that "the distinction between the supply of real ecstasy and fake ecstasy was not sufficiently reflected in the sentence passed. Giving the judgment of the court, Toulson J (as he then was) stated:

"It is right that supplying fake prohibited drugs involves a lesser degree of criminality than supplying the real thing. That difference is reflected in the fact that the relevant charges were ones of offering to supply, rather than actual supply, of Class A drugs. But we do not think it right to regard the case as simply one of obtaining money by fraud. It is certainly a form of fraud, but it is a fraud in the context of a particular market, namely the market in prohibited drugs. Markets exist where there are willing buyers and willing sellers. Offering to sell is a form of market promotion, even if the offeror cheats the offeree by supplying false drugs."

7. The learned Recorder here indicated that the sentence he would pass was less than if the drugs were genuine, but stated that it was still a serious offence because the applicant's activities worked to create a market for drugs (echoing the words of Toulson J in *Tugwell*). Having referred to the aggravating and mitigating factors, the independent psychiatric report of Dr Agarwal, and the pre-sentence report, and having applied a one-third discount as credit for the applicant's plea of guilty, the learned Recorder imposed an immediate sentence of 12 months' imprisonment.

8. In considering whether to impose an immediate or suspended sentence of imprisonment, the learned Recorder stated that the best argument in favour of suspending the sentence was the state of the prison population, referring to *R v Ali* [2023] EWCA Crim 232. He then said:

"However, I do not believe this is strong enough to justify the conclusion I should suspend the sentence, bearing in mind what I regard as poor prospects of rehabilitation in your case and also the need for appropriate punishment to be achieved by immediate custody."

9. On behalf of the applicant, Miss Lake, for whose written and conspicuously able oral submissions we are very grateful, submitted that the learned Recorder erred in two regards: first, in finding that there was no realistic prospect of rehabilitation, thereby placing too much weight on the psychiatric report and insufficient weight upon the opinion and recommendation of the Probation Service, as expressed in the pre-sentence report; and secondly, in finding that appropriate punishment could only be achieved by immediate custody when balancing all the factors that fell to be considered, including the severe overcrowding of the prison estate and the applicant's health concerns.

10. To those two factors, Miss Lake has added a third in the course of her oral submissions by reference to paragraph 6.4 of the psychiatric report, where Dr Agarwal referred to the fact that there was a history of lack of compliance with antidepressant medication prescribed to the applicant in 2023, which formed part of Dr Agarwal's opinion that there was a reduced prospect for rehabilitation. That was an opinion relied upon by the learned Recorder. Miss Lake refers to the earlier part of Dr Agarwal's report, where he deals with the applicant's past psychiatric history and what he was told by the applicant, as recorded at paragraph 5.22 of the report. There was, she submits, no history of being prescribed antidepressant medication in 2023, and therefore there was a misunderstanding on the part of Dr Agarwal that there had been a failure to comply with the applicant's medication regime.

11. However, we note in the subsequent recitation of the medical history there was a further relapse into depression in 2023, which caused the applicant to be referred to the Community Mental Health Team and a reference in the notes of that organisation, under the heading "Mental History/Diagnosis", to the following:

"Psychiatric support in prison, where he was on a mental health wing, he stated he was provided with medication. However, he would throw this medication away."

Thus we consider that, although there may have been an error in relation to the date, Dr Agarwal was entitled to consider that there had been a history of failure to comply with medication by reference to that note.

12. Expanding on the first of her submissions, Miss Lake reiterated that this was a particularly unsophisticated offence and that the applicant is a man who can be described as vulnerable, with poor decision making, a low level of maturity and a lack of consequential thinking, but who is now in stable accommodation and is striving to stop himself falling back

into the dire financial position which had led to this offending. She submitted that there is in fact a realistic prospect of rehabilitation as, although the applicant does have previous convictions, these are "sporadic and show no real pattern".

13. The author of the pre-sentence report assessed the applicant as at low risk of recidivism and a low risk to the public. The Probation Service has expressed a willingness to work with him and is of the view that counselling would benefit him.

14. Miss Lake makes no complaint as to the length of the sentence imposed. The application for leave to appeal is confined to the failure of the learned Recorder to suspend the sentence.

15. In referring this application to the full court, the Registrar observed:

"This application is referred to the full court to consider the relevance of guidelines and the correct approach where the drugs were fake."

Tugwell and the cases cited therein were decided before the availability of the guidelines from the Sentencing Council on sentencing in drugs cases. In the course of argument in the court below, there was discussion between prosecuting counsel and the learned Recorder as to the correct approach in modern cases. Prosecuting counsel, Mr Benson, did not initially take the learned Recorder to the sentencing guideline at all, but took him straight to the previous authorities and in particular *Tugwell*, whilst acknowledging that those authorities are relatively old. There was then this exchange:

"RECORDER CAMPBELL: Well, I follow that, but can we have a bit of structure to this. I mean, presumably I start with the usual guideline, do I not, rather than going straight to cases, which pre-date the guidelines. ... do I not go for the general drug guideline, section 4.3, supplying or offering to supply? Do I not do that and then make a discount?"

MR BENSON: I would submit that your Honour should be guided by the case law rather than that guideline, because that guideline relates to the selling of actual drugs, and this is not a case that involves the selling of actual drugs.

RECORDER CAMPBELL: Well, I follow that, but there was an offer to supply an actual drug. So, one way of doing it – you may say this is wrong, okay, but one way of doing it might have been to start with the guideline and say, 'Well, that is what it would have been if it would have been supply of the actual drug, but it must be subject to considerable discount of a factor of two or three, or whatever'. And you might say that *R v Tugwell* is an illustration of that principle, although it pre-dates the guideline. But you are not saying to do that ... you are saying go straight to *R v Tugwell*."

16. As often happens when a person is prosecuted for selling fake drugs, the applicant was charged with an offence of offering to supply a controlled drug. The Sentencing Council's definitive guideline applicable to supplying or offering to supply controlled drugs therefore applied to the offence charged and the Recorder was, pursuant to the Sentencing Act 2020, required to follow it. There is nothing in the guideline to exclude cases of offering to supply fake drugs, albeit that the guideline is drafted with reference to offering to supply real drugs. Where a different offence is charged in such circumstances, and that different offence is not itself the subject of a specific guideline, then the supply of drugs guideline will provide a relevant analogy.

17. In our judgment, the learned Recorder was right about the correct approach, which is to consider the appropriate sentence had the drugs offered for sale been genuine by reference to the applicable guideline and then make an appropriate reduction to reflect the fact that the drugs were not genuine but were fake. The availability now of an applicable guideline will make reference to pre-guideline cases often inappropriate. What the discount should be to take into account the fact that the drugs were fake will depend on a number of factors, including, for example, whether the product being offered for sale is itself dangerous, and, if

so, how dangerous; and also on the personal circumstances of those to whom the product is being offered.

18. The approach should therefore be:

1. Consider the appropriate starting point by reference to the applicable guideline;
2. Adjust the starting point to take into account aggravating and mitigating factors in the usual way;
3. If appropriate, apply a further discount to take into account the fact that the drugs were fake, the amount of the discount to be decided according to the particular facts of the case, including, for example, the nature of the product in fact being offered for sale; and
4. Apply any discount as credit for the offender's guilty plea.

19. Returning to the present case, we consider that the learned Recorder carried out a careful sentencing process. He balanced all the relevant factors and, in our view, reached a sentence that was just and appropriate. We consider that he was entitled, on the basis of all the material before him, to conclude that the prospects of rehabilitation were not as high as was being submitted. It is clear that the Recorder had in mind the provisions of the imposition guideline and, where that is the case, this court will only interfere with a decision not to suspend where that decision is clearly wrong, or one to which no reasonable judge could have come.

20. That is not the case here. Despite the attractive and able submissions of Miss Lake, we consider that the sentence of 12 months' immediate imprisonment is neither manifestly excessive, nor indeed even excessive.

21. Given that this application was referred to the full court to consider the relevance of the guidelines and the correct approach where the drugs being offered for sale were fake, and that we have given such guidance in this judgment, we consider that the appropriate course is to grant leave to appeal, but in the event this appeal against sentence is dismissed.

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

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