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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/04407/A4

NCN: [2024] EWCA Crim 334

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 20th March 2024

B e f o r e:

LADY JUSTICE MACUR DBE

MR JUSTICE HOLGATE

HIS HONOUR JUDGE PATRICK FIELD
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

OLGERT MURATAJ

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Mr I Callaghan appeared on behalf of the Appellant

J U D G M E N T

Wednesday 20th March 2024

LADY JUSTICE MACUR: I shall ask Mr Justice Holgate to give the judgment of the court.

MR JUSTICE HOLGATE:

1. On 7th November 2022, having pleaded guilty before the Magistrates' Court to a single charge of possession of a Class B drug with intent to supply, the appellant was committed to the Crown Court for sentence. On 11th December 2023, in the Crown Court at Briston, he was sentenced by His Honour Judge Longman to six months' imprisonment. The appellant now appeals against sentence by leave of the single judge.

2. At around 6.50 pm on 3rd April 2020, police officers were on mobile patrol in Shirehampton. They noticed two vehicles apparently in convoy heading towards the Portway. This was during the Covid lockdown and there were very few other vehicles on the road. One vehicle was an Audi and the other was a VW Passat. Each contained two white males. Officers turned their vehicle around and searched for the cars. As they did so, they saw the appellant, alone and on foot. He walked away from the officers as the patrol car stopped. He darted out of sight. When the officer saw him again, the appellant appeared extremely nervous and was shaking.

3. One of the officers approached the appellant, who was holding a silver and black car key. As the officer got closer, the appellant threw the key over the officer's head into a rear garden. It was later recovered. He was detained for a search. He was crying and emotional. He told the officer that he had a partner who was six months pregnant and he just wanted to go home. The appellant also said, "There's two kilos of cannabis in the car, but it's not mine".

Officers found the drugs and the appellant was arrested. They also found an iPhone and a quantity of cash. The appellant said, "The drugs are not mine. I'm just the driver. I'm getting paid £100 to drive the car". He also said that he had entered the UK illegally about six months previously.

4. Later that day, the police searched the appellant's home address. They found £1600 in cash and a small quantity of cannabis, valued at £25, at the premises.

5. The appellant was interviewed. He provided a prepared statement to police in which he admitted the offence of possession with intent. He stated that the appellant had acted as a driver; that he had provided transport for the delivery of the two kilograms under direction; and that the cannabis did not belong to him.

6. The indictment charged the appellant together with a co-defendant, Halim Vladi, who was a passenger in the car on the same day. He was also charged with other offences relating to possession for supply and the growing of cannabis. He pleaded guilty at a much later stage.

7. The appellant had no previous convictions. The author of the pre-sentence report said that the appellant posed a low risk of re-conviction and a low risk of causing serious harm to others. She suggested that he could be suitably punished by a community order, with an unpaid work requirement and a rehabilitation activity requirement for up to ten days to address his immigration status, employment, training and education.

8. In his sentencing remarks, the judge said that the appellant's role had fallen between "significant" and "lesser". He noted that the appellant had shown remorse from the moment he was arrested and had admitted the offence in interview. The substantial delay was a further mitigating feature along with previous good character. He passed a sentence of six months' imprisonment, which the appellant had already served.

9. We are grateful to Mr Callaghan for his written submissions. He says that the judge did not refer to the guideline on the imposition of custodial and community sentences. Here, a community punishment should have been imposed. The custody threshold was not reached. The judge, he submitted, should have imposed a community order for 12 months, but by virtue of section 208(11) of the Sentencing Act 2020, he should not have imposed in that order any requirement for the purposes of punishment. He submits that in this case there were exceptional circumstances which included the fact that the appellant had served the equivalent of over nine months' custody – a matter to which the court could have regard under section 205.

10. In his skeleton argument, Mr Callaghan submitted that if the custody threshold was not reached in this case, the fact that the appellant has served his time does not render the appeal academic. He has a custodial sentence on his record, and the effect of section 256AA of the 2020 Act is to impose a supervision requirement for 12 months. Mr Callaghan submits that the custodial term should be quashed and replaced by a community order for 12 months, with a rehabilitation activity requirement.

Discussion

11. We note that the single judge suggested that the sentencing judge should have considered suspending the custodial sentence. But that assumes that the custody threshold was reached. In any event, it is not normally appropriate to suspend a custodial sentence where the time already spent on remand would entirely swallow up the custodial period if it were to be activated: see *R v Rakib* [2012] 1 Cr App R (S) 1.

12. The sentence of six months' imprisonment implied a sentence, before allowing credit for the guilty plea, of nine months. When the significant mitigation available to the appellant is

factored in, including the acceptance of guilt in his police interview, the implicit sentence after trial would have been at least 12 months' imprisonment.

13. The definitive guideline indicates that where the amount of cannabis involved is six kilograms (the indicative quantity for category 3), culpability on the cusp between "significant" and "lesser" roles would attract a sentence of six months' custody. That figure needs to be reduced to reflect the fact that here the quantity of cannabis was two kilograms. Next, the appellant's mitigation included previous good character, substantial delay, the acceptance of guilt at the police station, and remorse. Then full credit for the guilty plea would fall to be deducted. The custodial term would therefore become vanishingly small.

14. Instead, this was a case in which the custody threshold was not reached and a community order could and should have been imposed (*Rakib*). It would be wrong to impose any requirement for the purposes of punishment in view of the time that the appellant has already served, but the rehabilitation activity requirement suggested in the pre-sentence report is appropriate: see *R v Coates* [2023] 2 Cr App R (S) 4.

15. We therefore conclude that the sentence imposed in this case was wrong in principle. We quash the sentence of six months' imprisonment and we substitute a community order for 12 months, with a rehabilitation activity requirement lasting up to ten days.

16. To that extent only, the appeal is allowed.

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

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