Neutral Citation Number: [2019] EWCA Crim 1131
No: 201901648/A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday 12 June 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE MARTIN SPENCER

HIS HONOUR JUDGE PICTON
(Sitting as a Judge of the CACD)

R E G I N A
v
MOKA BUSBY

Computer Aided Transcript of the Stenograph Notes 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)

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.

Mr L Thompson appeared on behalf of the **Appellant**

J U D G M E N T

(Approved)

MR JUSTICE MARTIN SPENCER:

1. With leave granted by the single Judge, the appellant appeals against a sentence of 15 months' imprisonment imposed at the Crown Court at Oxford on 17 April 2019 for an offence of administering a poison or noxious substance with intent, contrary to section 24 of the Offences Against the Person Act 1861 and a sentence of one month's imprisonment for possessing Clonazolam.
2. The facts of this matter are that in December 2017 the appellant had fallen out with her mother and had been made homeless and was living temporarily with her father, along with her father's partner, her younger half-brother and the victim, Jonathan Deacon who was the son of her father's partner from a previous relationship. As there was a lack of bedroom space, the appellant was sleeping in the living room.
3. On 13 December 2017 the appellant and Jonathan Deacon had an argument over the fact that Mr Deacon wanted to use the living room to watch television whilst the appellant wanted to go to sleep. Jonathan Deacon had a habit of having a two-litre bottle of Coca Cola from which he would drink periodically during the course of the day. On 14 December 2017, whilst Mr Deacon was out shopping, the appellant spiked his Coca Cola bottle with a drug called Clonazolam, a synthetic Benzodiazepine. When Mr Deacon returned home, he resumed drinking from the bottle. At one point he stood up in order to clear ice from the road outside and found that he was very unsteady on his feet. He felt lightheaded and clammy. He fell over twice and had difficulty standing back up. He felt drunk. His family called an ambulance. When the paramedics arrived, Jonathan Deacon was sleepy and lethargic and slurring his words. The appellant at that stage apparently realised the seriousness of what she had done and she told Miss Lindsey, her

father's partner (Jonathan Deacon's mother), what she had done, saying:

> "You're going to hate me but I put something in his drink to make him go to sleep."

Miss Lindsey, was horrified and immediately said:

> "Go and get it whatever it is you have given him."

The appellant then produced a blue bottle which she handed to the paramedics who were thus able to identify what it was and it was taken to the hospital so that those treating Mr Deacon there knew what he was suffering from.

4. Fortunately, Mr Deacon did not suffer any permanent ill-effects from the poisoning. In a Victim Personal Statement he revealed that he suffered from mental ill-health issues, with which he battles, but he did not feel that what the appellant had done had exacerbated his mental ill-health. He also confirmed that there had been no long-term physical effects from the incident: all he has been left with is a small scar from the cannula which was inserted when he was taken to hospital. In this statement made on 6 March 2019, he generously said that he did not want the court to make a Restraining Order. He said: "As her brother and dad live with us, I don't want to affect their close relationship." He said that he would possibly be open to talking with the appellant if she wanted to explain. He hoped an explanation might help him to move forward. He said: "I do not want Moka to go to prison. I just want her to get the help she needs."
5. The appellant pleaded guilty on 1 March 2019 and was sentenced on 17 April 2019. In a pre-sentence report, the appellant was said to accept responsibility for the offences and to have expressed remorse for her actions. The author said:

> "It is difficult however to fully analyse her offending behaviour as she claims to have no memory of putting the Clonazolam into the bottle which her step-brother was drinking from."

The author said that the appellant recognised the seriousness of her offending and of the harm which could have been caused to Mr Deacon. The author stated:

> "The index offence is indicative of impulsive thinking and her mental health diagnosis of emotional unstable personality disorder renders Miss Busby at increased likelihood of failing to consider the consequences of her behaviour on others. Although personality disorders are typically treated by long-term therapy, I assess that Miss Busby would also benefit from exploring her offending behaviour by the imposition of a rehabilitation activity requirement. She has indicated a willingness to engage with this intervention."

6. The court also had available to it a psychiatric report from Dr Alcock reflecting an assessment made by him on 14 March 2019. Dr Alcock related the difficult upbringing which the appellant had experienced, as well as her long-standing history of problems with mental health. He related that the appellant had also told him that she was "deeply sorry" for what occurred and "felt terrible" about what she had done. He diagnosed an Emotionally Unstable Personality Disorder within the ICD classification.

7. Sentencing the appellant, the learned Judge referred to the unknown risk, what was called 'the gamble', which the appellant had taken in administering this drug to Mr Deacon who was already taking a drug called Fluoxetine, as the appellant was well aware. She had no way of knowing the potentiating effects of each drug on the other. The learned judge pointed out that Mr Deacon had fallen over twice and had this happened outside he could have smashed his head on the pavement or against a wall or on a sharp object and sustained a much more serious injury. He said:

"It's not unfair to say that you were prepared to gamble not just with his wellbeing and his health but his very life."

The learned judge then said this:

"Mr Deacon – and it's a great credit to him – not only does not want a restraining order and supports the position taken by his mother and step-father, but he also says that he does not want you to go to prison. You have no previous convictions or cautions. The degree of pre-meditation, the high risks that you were taking is such that this clearly passes the custody threshold by a considerable degree. Those who purchase illegal substances via the internet and choose to use them unlawfully in the way that you did must expect sentences of imprisonment. In my view after trial this would have merited a sentence of 20 months' imprisonment. I'm going to give you credit of 25%, pleas not being indicated in the lower court."

Having indicated the sentences imposed the learned Judge said:

"This is not a case where the nature of the offence and the level of pre-meditation involved is such that I could regard it as appropriate to suspend the sentence."

8. In what we regard as extremely well-presented written grounds of appeal against sentence, Mr Thompson has submitted that the learned judge's starting point was excessive. He has referred us to the case of R v Harries (Paul) [2012] EWCA Crim 3071, an authority which he had also drawn to the attention of the learned sentencing judge. There, where the defendant had taken amphetamine into work and spiked cups of coffee with it which he gave to two men to drink, the defendant's motivation had been to bring about their dismissals as revenge for workplace bullying which he had suffered from the victims. They suffered physical symptoms including palpitations, racing heart and shaking and were treated in hospital for high heart rates and raised blood pressure. The defendant had then falsely told his employer and the police that he had seen the men taking drugs at work, in the hope of getting them dismissed. A sentence of six months' imprisonment (which was suspended) was upheld by the Court of Appeal upon an

Attorney-General's Reference. The court there was referred to an old case, R v Ronald Jones 12 Cr.App.R (S) 233 where the court had suggested that an offence of administering poison could be equated with either a section 20 offence or a serious offence of assault occasioning actual bodily harm. In Harries it was acknowledged that this would lead to a starting point of 18 months' imprisonment if the assault guideline was applied. In Jones the Court of Appeal imposed an 18-month prison sentence, which was partially suspended.

9. Mr Thompson submits that both Jones and Harries were significantly more serious than the present case. He submits that the harm in the present case is not remotely comparable with a section 20 offence of wounding or inflicting grievous bodily harm and would amount to lesser harm on the assault occasioning actual bodily harm guideline. He equates the present case to Callaghan [2001] EWCA Crim 198 where the appellant, like this appellant, was of good character and slipped a prescription-only drug into the wine of a female friend with effects of sedation, drowsiness and confusion. This had rendered the victim unconscious. When she regained consciousness the following morning she found herself in her mother's house next door. On the skin of her abdomen, just below the knicker line, the appellant in that case had drawn with a felt-tip pen the words "in here" alongside an arrow pointing down towards her private parts. The Court of Appeal not only upheld a sentence of six months' imprisonment but stated that "The length of that sentence was just as it should have been".

10. Mr Thompson submits that the learned judge placed much greater reliance on the degree of pre-meditation and the risk of fatality than truly existed. The drugs were not obtained for the purpose of committing the offence and the risk of serious injury for the victim was, he submitted, slight. He submitted that the starting point should have been on a par

with Callaghan and that the learned Judge, for example, should have used the Sentencing Council's Guidelines for assault occasioning actual bodily harm, and had he done so the matter would have been categorised at level 2 with a starting point of 26 weeks' imprisonment.

11. In addition, Mr Thompson submits that insufficient credit for plea was given and there was inadequate reduction in the sentence for the significant mitigation that was available to the appellant. Finally, he submits the learned Judge should have given greater consideration to imposing a suspended sentence and failed to address the Guideline on the imposition of custodial and community sentences. This was despite the fact that the sentencing judge's attention had been drawn to that guideline, with specific reliance being placed on the table at page 8 dealing with factors which should be weighed in considering whether it is possible to suspend the sentence. He submitted before the learned judge, and repeats the submissions before us, that upon proper consideration of the factors in that table, they would all be regarded as in favour of suspending the sentence. Thus the appellant does not, he says, present a danger to the public; she has no convictions before this offence or since; appropriate punishment could be achieved without immediate custody; there is no history of non-compliance with court orders; there is a real prospect of rehabilitation as demonstrated by the pre-sentence report; there was strong personal mitigation and immediate custody would have a detrimental effect upon others, particularly the appellant's father who attended the court below in support of her. Mr Thompson reminds us that the court has emphasised on numerous recent occasions that sentencing courts must pay attention to the Imposition Guidelines.

12. We are largely in agreement with the submissions which Mr Thompson has made. In our judgment, for this offence – and we agree with the learned Judge that these cases are all

fact-specific – he adopted too high a starting point and a sentence of 20 months' imprisonment before credit for plea was in our view manifestly excessive. Furthermore, we consider that the learned judge failed to give the appellant sufficient credit for recognising almost immediately the seriousness of what she had done, informing her step-mother and providing the blue bottle to the paramedics so that Mr Deacon received the right treatment and was given the optimum chance of recovery, as in fact happened. In our judgment, an appropriate sentence before reduction for plea would have been one of eight months' imprisonment and this should have been reduced to six months after credit for plea.

13. Furthermore, in our judgment the learned Judge should have given more serious consideration to suspending the sentence. As Mr Thompson has submitted, the facts set out in the Imposition Guideline should have been considered in turn, and had they been we take the view that they would almost certainly have led the learned judge seriously to consider suspending the sentence.

14. We therefore substitute for the sentence of 15 months' imprisonment a sentence of six months' imprisonment which we suspend for a period of 12 months. Similarly, we suspend the sentence of one month's imprisonment for possession of Clonazolam, although we note that that sentence has in fact already been served. Thus, in the (in our view) unlikely event that the suspended sentence were to be activated, there would be nothing to be served for the offence of possessing Clonazolam and only a short residual period in relation to the sentence of six months which has not yet been served.

15. In addition, following the recommendation in the pre-sentence report, we attach to the suspended sentence a rehabilitation activity requirement of 20 days. To that extent, this appeal is allowed.

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