Neutral Citation No. [2023] EWCA Crim 676

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO: 2023 00602 A2

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 7 June 2023

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE SWEETING

HER HONOUR JUDGE ROSA DEAN

REX
v
BEN BUTLER

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Non-counsel application

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction

1. This is the renewed hearing of an application for permission to appeal against sentence. It appears that the applicant is on home detention curfew, but he has not appeared or applied to appear and there is no representation before us.
2. On 30 July 2020 in the Crown Court at Wood Green the applicant (who was then aged 30) pleaded guilty to a charge of simple possession of cannabis and not guilty to possession of cannabis with intent to supply and a count of money laundering. The applicant had six convictions for six offences which had been committed between 2010 and 2018. This included a conviction for possession of a Class B controlled drug. He had served one custodial sentence of 3 months' imprisonment in 2010.
3. After a trial on 19 December 2022 he was convicted of possession with intent to supply cannabis and money laundering, and on 27 January 2023 (when he was then aged 33) he was sentenced to 2-and-a-half years for possession with intent to supply the cannabis and 12 months concurrent for the money laundering. The proposed ground of appeal is that the sentence was manifestly excessive.
4. The brief circumstances are that on 27 March 2020 the applicant was seen in his motorcar by police officers. He was making contact with the driver of another vehicle in order to sell cannabis to the driver of that vehicle. The significance of 27 March 2020 is that this was shortly after the National Lockdown for the Covid 19 pandemic.
5. The applicant's car was searched and he was arrested. His home address was later searched. In the car was found 26.8 gms of skunk cannabis, a clear sealed bag and a knotted bag containing 3.8 gms of cannabis, and five clear bags containing a total of 7.22 gms of cannabis, and four packages containing 11 gms of skunk cannabis and a hand-rolled cigarette. The total value of the drugs was estimated to be somewhere between £2,500 and £5,800. At his house there was 37.5 gms of skunk cannabis, and elsewhere there was found to be 82.3 gms of skunk cannabis, another 9 gms of skunk cannabis and in other locations another 182 gms of skunk cannabis. The total weight of the drugs found was therefore just

under half a kilo of cannabis. A number of high value goods, including a Rolex watch and ten pairs of trainers thought to be worth thousands of pounds, were found together with £24,500 in cash. The sum of £24,500 formed the basis of the money laundering charge because that represented the proceeds of earlier criminal drug dealing. The applicant's defence was that the drugs were for personal use and that the monies had been obtained from other sources, namely gambling, personal savings and the sale of another Rolex watch.

6. A short form pre-sentence report was obtained. That showed that the applicant continued to claim that he was not guilty, but he had showed remorse and he had turned his life around and was now working in a shop and restaurant. References showed that the applicant had suffered back and knee injuries playing sport which had affected him, but he had before that time volunteered and assisted youngsters.

7. The judge when sentencing considered that this was a high-level category 3/significant role offence. That gave a starting point of 1 year but a range of 6 months to 3 years. The judge found that this offending was at the top of the range. The money laundering was a category 5B offence for the offence specific guideline, with an 18-month starting point and another range of 6 months to 3 years. The judge took into account the aggravating factors of the previous convictions, but also the mitigation of delay, injuries and their effect, and current work. The judge sentenced all of the criminality on the possession with intent to supply cannabis count, saying that the least he could give, balancing aggravating and mitigating features effectively, was 2-and-a-half years. As noted above, the money laundering sentence was 12 months concurrent.

8. We do not consider that it is arguable that this sentence was manifestly excessive. This is because the judge rightly used the drugs offence as the lead offence and was entitled to decide that the applicant's sentence, even taking into account mitigation, was towards the top of the guideline range for category 3/significant role offending. The judge was also entitled to make that finding in the light of all the criminality shown by the dealing on the day and what was found in the applicant's home.

The Other Penalty

9. We should record that the Registrar has in a helpful note drawn the court's attention to *Archbold 2023 at 5A-169c*, which provides:

> "Where a defendant is charged with alternative offences, and in circumstances where they plead guilty to the lesser offence but are subsequently convicted of the more serious offence, the proper approach appears to be for the court to order the lesser offence to lie on the file, rather than to impose no separate penalty on the offence."

This is because in **R v Cole** [1965] 2 QB 388, it was held that a guilty plea does not amount to a conviction unless and until a sentence is passed, and when a defendant pleads guilty to the lesser offence and the more serious alternative proceeds to trial, the correct practice is to record the guilty plea. If the defendant is acquitted of the more serious offence, he can then be sentenced on the count to which he had pleaded guilty, which ranks as a conviction from then on; but if convicted of the more serious offence, he will be sentenced on that matter and the court should consider that the alternative offence should lie on the file. That practice avoids a defendant being convicted of two alternative offences for the same criminal conduct.

10. In these circumstances, we do consider that the judge was wrong to order no separate penalty on the count for possession, which the applicant had, as already indicated, pleaded guilty to on 30 July 2020. The judge had ordered no separate penalty when it was drawn to his attention that he had omitted to sentence or deal with that offence, and that was dealt with on the papers; although, again, that should have been announced in open court.

11. In these circumstances, we grant permission to appeal against sentence, quash the sentence of no separate penalty on the original count 2 (namely simple possession) and direct that the original count 2 shall be ordered to lie on the file. This has the effect of meaning that, notwithstanding the guilty plea, the applicant has not been convicted of simple possession. This is because he has been convicted of the more serious offence of possession with intent to supply and been sentenced for that. In all other respects the appeal 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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