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No: 201505273/A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 27th January 2016

B e f o r e:
MRS JUSTICE THIRLWALL DBE
MR JUSTICE EDIS

R E G I N A
v

ABRAZAK GHALGHAL

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Mr G Hepburne-Scott appeared on behalf of the **Appellant**
The Crown was not present and was unrepresented

J U D G M E N T
(Approved)

1. MR JUSTICE EDIS: On 30th November this appellant was sentenced at the Lewes Crown Court to 16 months' imprisonment concurrently on two counts of supplying a controlled drug of Class A. He had pleaded guilty to both counts at a stage in the proceedings which entitled him to the maximum discount of one-third for his pleas and the judge arrived at a sentence of 2 years before plea discount. He now appeals against that sentence with leave of the single judge.

2. The facts of the case were set out in an unchallenged basis of plea. This said:

> "The defendant pleads guilty to supply of Class A heroin on the basis that he is a heroin addict who had purchased some heroin with a fellow addict for personal use.
>
> He was handing over his friend's share when he was arrested.
>
> There was no financial gain."

3. In fact the reason why the indictment contained two counts was that the appellant handed over four wraps in all, two of heroin and two of cocaine. The sentence proceeded on the basis that the basis of plea covered both counts despite the way it is drafted. The wraps each contained single street level doses. We do not have an accurate figure for the weight of the drugs involved but street level doses are generally significantly less than 1 gram, and thus four wraps would not in all likelihood exceed 1 gram in weight.

4. The arrest took place on 17th September 2014. He was granted bail by the police and charged on 13th January 2015, being granted bail by the magistrates on 14th January.

5. It is relevant to consider the chronology of events in the appellant's life after his arrest and before sentence. On 24th September 2014 he was sentenced to 3 months' imprisonment for shoplifting and breach of a conditional discharge. This was his 22nd appearance before the criminal courts for sentencing. On 20th July 2015 he was fined for a further offence of shoplifting. On 20th June 2015 he had been arrested for two offences of possession of controlled drugs, one of Class B and one of Class C. The magistrates sentenced him on 26th or 27th October 2015 to a community order with a drug rehabilitation requirement. Those convictions in 2015 were both for offences committed while on bail awaiting the disposal of the present matter. Sentence in this case was imposed 1 month after the community order had been imposed by the magistrates.

6. The sentencing judge referred to the record of the appellant prior to his arrest in September 2014. She said that he had throughout his life committed a large number of very serious offences and many drug offences. She noted that in recent years there was

constant low level shoplifting. He was, she found, in complete disarray, out of control and at a very low ebb. She also said this:

> "But you have been given time and again through these fifty offences opportunities for drug rehabilitation and you have breached them on each occasion, failed to complete courses and kept committing offences."

7. The appellant tried to interrupt the judge in her sentencing remarks at this point but she told him not to speak and observed he could not possibly say anything more impressive than his counsel had said. His counsel did not say anything further at that stage. In fact it appears that the appellant may have been trying to say something about his antecedents which revealed he had a number of convictions for serious violence and that he had been sentenced in 1998 for serious offences, including robbery, to a total term of 8 years. That was the last very serious offence committed by him. It was not actually right therefore to say that he had committed very serious offences throughout his life. He received a drug treatment and testing order in January 2004 and breached it in July and October of that year. In May 2005 a second such order was imposed in proceedings for breach of a community punishment order. He breached that and was sent to prison in February 2006. Until he was sentenced in September 2014 he had not been sent to prison since 2007 when he had received a sentence of 8 weeks for shoplifting. These drug treatment and testing orders were not imposed for drug offences but for shoplifting, no doubt to finance the drug habit. In fact until 1st October 2015 the appellant's long criminal record contained only one conviction for a drugs offence. That was for possession of cannabis in 2006 at a time when it was a Class C drug. It was not right therefore to say that he had been convicted of many drugs offences throughout his life. There was one conviction before his arrest for the present offences and one appearance for two offences after it. This present case was in fact his first Class A drug conviction.

8. The pre-sentence report said that if the court was minded to impose a suspended term of imprisonment, a medium intensity drug rehabilitation activity requirement of 9 months, a rehabilitation activity requirement of 10 days and a curfew should be attached to it. The judge observed that this was not the warmest endorsement of such a course that she had ever heard from the probation service. The judge said that the starting point for this offence was 3 years, assigning a lesser role to the appellant for the purpose of the relevant guideline. The range she said was 2 to 4 years. This means that she placed this case into category 3 for the purposes of her assessment of the application of the guideline. This appears to have been common ground before her. She reduced the sentence to the bottom of that range to arrive at her term of 2 years before plea discount. She said that the appellant did not qualify for any of the requirements proposed and imposed the sentence as an immediate term. She was rightly concerned that following his arrest in September 2014 the appellant had committed offences in 2015 while on bail.

9. It is now submitted on behalf of the appellant that the judge ought to have followed the suggestion in the pre-sentence report of a suspended sentence with appropriate

requirements. It is submitted that she did not characterise his criminal history accurately. As we have said, there is some force in that submission.

10. We start our assessment of the submission that the sentence was manifestly excessive with the guideline. The first task is to classify the offence. The judge was plainly right to assign a lesser role to this appellant. This kind of supplying is not done for financial gain. It falls squarely within one part of the guideline definition of a lesser role, which is as follows:

> "if own operation, absence of any financial gain, for example joint purchase for no profit, or sharing minimal quantity between peers on non-commercial basis."

However, the basis on which the case was placed in category 3 is not clear to us. That classification depends on quantity unless the offences is one of street dealing. This was not street dealing. Street dealing is defined in the guideline as "selling directly to users". This appellant did not sell to anyone. The quantity involved here was less than 5 grams which takes the case to category 4 which has a starting point of 18 months and a range of high level community order to 3 years' custody. In our judgment, the previous history of the appellant and the fact he had offended while on bail for this offence together meant that a decision to impose a prison sentence rather than a high level community order was entirely appropriate. However, when deciding whether to suspend that sentence and to impose requirements, it is important to have regard to the range of sentences which is available for the type of offence concerned. The guideline also says this:

> "Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial sentence."

11. In our judgment, the fact that the appropriate range does not require a prison sentence in all cases taken together with the guidance just quoted is relevant in deciding whether a sentence can properly be suspended. Plainly the length of the sentence is also a relevant consideration.

12. Although the previous history of this appellant means that a community order would be inappropriate in his case, it does not, in our judgment, require a sentence in excess of the starting point of 18 months in the correct range in the guideline. He was entitled to a discount for his plea of one-third and the resulting sentence is 12 months concurrently on each count. Although the community order with its drug rehabilitation requirement had only been imposed by the magistrates 1 month before sentence in this case he had complied with it “so far”. This was another factor relevant to the decision as to whether the sentence should be suspended. The judge did not refer to it.

13. In these circumstances we consider that the sentence of imprisonment of 12 months was of such a length which could, in all the circumstances, be suspended and we consider that it should have been. We impose the requirements suggested by the probation service except for the curfew. That is to say the suspended sentence order of 12 months concurrent on each count for 2 years will have attached to it a requirement of a medium intensity rehabilitation activity requirement for 9 months and a rehabilitation activity requirement of 10 days. We do not impose the curfew which would otherwise have been entirely appropriate because of the time that this appellant had spent in custody between sentence and the date of this appeal. To that extent therefore this appeal is allowed.