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No: 201304303 A7
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 25 September 2013

B e f o r e:

LORD JUSTICE PITCHFORD

MR JUSTICE SAUNDERS

MR JUSTICE SPENCER

R E G I N A

v

MARTIN HARROD

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Mr J Morgans appeared on behalf of the **Appellant**
Mr S Heptonstall appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. MR JUSTICE SAUNDERS: Mr Morgans, who appeared on behalf of this appellant and has said everything that could be said on his behalf, has properly described this as a tragic case.

2. On 24 July 2013 at Norwich Crown Court, the appellant pleaded guilty to one offence of supplying a Class A drug to another. The plea was entered as part of the early guilty pleas scheme. On 8 August 2013, he was sentenced to 9 months' imprisonment. He appeals by leave of the single judge.

3. The appellant is 39 years of age, and until this conviction he was a man of good character, not simply in the negative sense of having no convictions but was a man of positively good character and in regular employment. The person to whom the appellant supplied the drugs was a man called Alex Maile. The appellant and Alex Maile were very close friends and had been for many years. About once a month they would spend a weekend in each other's company, watching sport and at times during the weekend taking drugs together, either MDMA (ecstasy) or amphetamines. They took it in turns to buy the drugs which they consumed together.

4. It was the appellant's turn to buy the drugs on the weekend of 13/14 April 2013; it could as easily have been Alex Maile's. The drug that the appellant believed he was buying was MDMA. They had consumed that drug together many times in the past with no ill effects. In fact, he was supplied with a drug known as PMA, which is similar to ecstasy but is more toxic.

5. The fact that this was a different drug was unknown to the appellant and Mr Maile, and they were unaware of the real nature of the drug they were consuming. They both suffered adverse reactions to the drug. In the case of Alex Maile, the adverse reaction was so severe that it caused him to stop breathing. As soon as the appellant realised what was happening, he tried to resuscitate his friend and called an ambulance. Paramedics arrived, but despite their best efforts, and indeed the appellant's, they were unable to save the life of Mr Maile. The appellant admitted the matter to the police and went as far as he could to assist in preventing any sort of recurrence.

6. The judge had before him a large number of references which he described as 'unusually persuasive' in speaking very highly of the appellant. Most significantly he had a letter from the father of Alex Maile, which said:

> "There is no excuse for Alex's death but I do not hold [the appellant] responsible in any way. [The appellant] has suffered greatly since that fateful day and I am sure will continue to suffer for the rest of his life."

He then made a plea to the court to be merciful to the appellant. From information that we have received today, but was not before the judge, it may be that that view is not shared by all of the family, but certainly it was and is Mr Maile's view.

7. There can be no doubt that the appellant has been very much affected by the death of his friend, and the author of the pre-sentence report indicated that there was very little chance of any reoffending.

8. The judge was faced with an extremely difficult sentencing task. He does not seem to

have been addressed on the sentencing guidelines which he should have been, but he was supplied with the case of R v Francis-Nichols and Smith [2007] EWCA Crim 3213. That was a case where the facts were similar, but that did, as has been pointed out by the prosecution on this appeal, precede the guidelines. We accept the written submissions made by the prosecution made at this appeal hearing that this appellant's offending is properly categorised as a lesser role within category 4 of the guidelines for the supply of Class A drugs. It was a small quantity of drugs and was "sharing minimal quantity between peers on a non-commercial basis". The range of sentence set out by the guidance for that category of offender is a higher level community order to 3 years' imprisonment, with a starting point of 18 months' imprisonment. None of the aggravating features set out in the guideline were present, and as the prosecution accept, the following mitigating factors are present: remorse, which we accept was considerable, and the fact that this appellant had no previous convictions. As the offence was sharing the drugs with only one other person, the sentence could properly be at the bottom of the sentencing range if one leaves out of account the death that resulted.

9. Mr Morgans in his written submissions, but not in his oral submissions today, relied on R v Denslow [1998] Crim LR 566 for the proposition that in cases such as this the sentence should be the same as for simple possession. We agree with what was said by this court in R v Wolfe [2012] 1 Cr App R (S) 94 that the observations made in Denslow cannot and should not be promoted into a statement of law. Denslow pre-dates the guidance which deals with offences of joint purchase for sharing of minimal quantities of drugs between peers on a non-commercial basis, and it is to the guidance that judges should refer. Under the guidance, therefore, leaving aside the death, the starting point would be a high level community order.

10. However, all of this would be to ignore the fact that a death occurred. We agree with the written submissions of the prosecution that the death has to be treated as a substantial aggravating feature of the offence. Death was not intended, it was not anticipated, it has been greatly regretted and there was no reason for the appellant to consider that it consider it could happen, except for the fact that any supply of Class A drugs carries with it risks. In this case, the two of them had been consuming the same drugs together for many years without ill effects and it was, as I have said, only because the appellant was supplied with something that he did not request that the death occurred. The serious aggravating feature of death is also somewhat moderated by the effect that the death has had on the appellant, so movingly spoken of by Mr Maile's father.

11. As regards the views of Mr Maile as to the proper sentence, the aim of a victim impact statement is to inform the court of the effect of the offence on the family of the victim. The court should properly take that into account, but as the Lord Chief Justice said in R v Perkins & Ors [2013] EWCA Crim 323, the views of the victim as to the appropriate sentence is not something that can affect the thinking of the judge.

12. The principal point of the appeal has been to submit to us that any sentence of

imprisonment which had to be passed could be suspended. In Francis-Nichols, the Court of Appeal decided on facts which are very similar to this case that the sentence of 9 months' imprisonment that they imposed could not be suspended. The issue of whether to suspend a sentence is a fact-specific exercise, and this court will not interfere unless it can be shown that the judge erred in his approach to the issue. Before finally returning to the question of suspension, we will look at the length of the sentence which was imposed, one of 9 months.

13. It is difficult to say and to know what the exact starting point was which was taken by the judge. Allowing for credit for positive good character, it would seem that the judge must have taken a starting point of something like 15 months to arrive at the 9-month sentence, allowing for a one-third discount for the plea of guilty. Although the prosecution have pointed out that the plea was not necessarily at the earliest opportunity because it was not made before the magistrates, it is this court's understanding that it is a part of the early guilty pleas scheme that those who enter pleas at that stage are entitled, except in exceptional circumstances, to a discount of one third.

14. We feel that it was possible in the exceptional circumstances of this case to take a starting point which was lower than the one taken by the judge. We make significant allowance in that starting point, as I have said, for the positive good character and also for the effect of this sentence on the appellant and the remorse which he undoubtedly feels. We accordingly feel that, before the discount for plea, an appropriate starting point on these exceptional facts would have been one of 9 months' imprisonment, which is reduced to 6 months to allow for a reduction for the guilty plea.

15. Finally we return to the question of suspension. As we have said the question of whether to suspend the sentence was a matter for the judge's discretion. We are unable to say that he erred in the way he exercised that discretion. Accordingly, we reduce the sentence to one of 6 months' imprisonment, and to that extent the appeal is allowed.