Regina v Luke Neil

No Substantial Judicial Treatment

Court
Court of Appeal (Criminal Division)

Judgment Date
13 April 2022

Case No: 2021 03980 A1

Court of Appeal Criminal Division

[2022] EWCA Crim 1097, 2022 WL 03146386

Before: Lord Justice Edis Mrs Justice Cockerill His Honour Judge Potter (Sitting as a Judge of the Court of Appeal (Criminal Division)

Wednesday, 13 April 2022

Representation

Ms Rosalia Myttas-Perris appeared on behalf of the Appellant.

Judgment

Mrs Justice Cockerill:

1. On 11 March 2021, having pleaded guilty before Guildford Magistrates' Court, the appellant was committed for sentence pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000 in respect of offences of producing a controlled drug of Class B (cannabis) and possessing a prohibited weapon (offences 1 and 3 on the memorandum of entry).

2. On 2 August 2021, in the Crown Court at Guildford before Her Honour Judge Lees, the appellant (then aged 24) pleaded guilty to count 6 of indictment T20210128. Counts 1 and 2 of that indictment (formerly offences 4 and 2 respectively of the previous indictment S20210071) were ordered to lie on the file against him on the usual terms.

3. On 22 November 2021, in the Crown Court at Guildford, HHJ Lees then sentenced the appellant (who was then 24) as follows. In relation to offence 1, producing a controlled drug of Class B (cannabis), contrary to section 4(2)(a) of the Misuse of Drugs Act 1971 , a sentence of 2 years and 3 months' imprisonment; in relation to offence 3, possessing a weapon for the discharge of a noxious liquid/gas/electrical incapacitation device, contrary to section 5(1)(b) of the Firearms Act 1968 , 1-month imprisonment concurrent; and in relation to count 6, possessing a controlled drug of Class B, contrary to section 5(2) of the Misuse of Drugs Act 1971 , a sentence of 1-month imprisonment concurrent, leaving a total of 2 years and 3 months' imprisonment. The statutory victim surcharge was applied and an order was made for the forfeiture/destruction/disposal of all drugs, drug paraphernalia, pepper spray, BB gun, and all mobile phones containing drug-related messages, along with the cash seized by the police.

4. The appellant appeals against sentence by limited leave of the single judge, who also granted a representation order for counsel. Ms Myttas-Perris has appeared before us today and we have been much assisted by her oral submissions as well as by her very clear grounds of appeal.

5. The underlying facts may be summarised as follows.

6. On 26 February 2019 the police executed a search warrant at an address in Stanwell. The police found large amounts of herbal cannabis, along with other drug paraphernalia, including grinders and scales. A number of mobile phones were found, along with a can of pepper spray. In an outhouse at the back of the property the police found eleven cannabis plants that had been growing. The occupants of the house were arrested by the police, and whilst that was happening the appellant returned to the property and asked why the arrests were being made, stating: " *Everything in that house belongs to me* ". A mobile phone was seized from the appellant which contained a few messages indicative of drug dealing and he was arrested. When interviewed by the police on 27 February he answered "no comment" to questions relating to drugs, their cultivation and the pepper spray.

7. Subsequent analysis revealed that there had been a total of 1.04 kgs of cannabis found at the property, with an estimated street value of between £7,555 and £11,880 and a wholesale value of somewhere in the region of £3,500 to £6,000.

8. The appellant was aged 24 at sentence. He had seven convictions for nine offences spanning from 20 March 2014 to 9 November 2020. Those convictions comprise offences of battery (2014); theft (2014); conspiracy to burgle (2015); aggravated vehicle taking and vehicle theft (2016); burglary (2016); and most recently he has a conviction in 2020 for handling stolen goods. In addition, he had one drugs conviction which was for possession of Class B drugs.

9. At the PTPH counsel for the appellant uploaded a basis of plea which was advanced out of an abundance of caution in relation to the then count 2. It was asked as to whether there was an issue as to whether Mr Neil intended to supply the cannabis harvested from the eleven plants he cultivated. The basis of plea provided as follows:

> "[The appellant]:
>
> > a. I was in possession of 11 cannabis plants which I had cultivated myself.
> >
> > b. The plants were primarily intended for my own personal use, however I also intended to supply cannabis to my brothers who are cannabis users.
> >
> > c. At the time of my arrest on 26 February 2019, the cannabis plants were approximately one week away from maturity and therefore had not yet yielded any cannabis which could be smoked.
> >
> > d. I stood to gain no financial advantage from supplying cannabis to my brothers; I would have given it to them for free.

e. The cultivation of cannabis was entirely my own operation in which my brothers and my mother had no involvement.

f. I had no intention whatsoever to supply skunk cannabis."

10. At a hearing on 2 August 2021 the appellant pleaded guilty to count 2 on the basis of plea. There was an indication from the Crown that pleas offered in the case as a whole were acceptable and there was no intent to proceed against any of the defendants on count 2. The prosecutor at that hearing indicated that the appellant's basis of plea was not acceptable and would require a Newton hearing.

11. The Newton hearing took place on 22 October 2021 in front of HHJ Lees. Mrs Emma Gower gave evidence for the Crown in relation to plant yield. The appellant gave evidence in relation to the plants and his intentions. The judge found against Mr Neil and ruled that he would be sentenced " *on the basis of cultivation for commercial supply involving significant financial gain* ".

12. As to the plants, Ms Gower stated at the outset she had not seen the plants or examined them in person. From the images she had seen, she observed that they did not appear to be at full-flowering maturity. When asked about projected yield, she said that this was very difficult to estimate when the plant had not yet reached full maturity and was " *not an exact science* ". She said that yield would depend on a range of factors, including the quality of light and feed. Mrs Gower gave a possible range of 40 grams to 105 grams per plant and gave 38 grams to 78 grams per flowering head per plant as a medium range. Mrs Gower was asked by the prosecution about the cannabis and drugs paraphernalia in the house. She confirmed the total weight of the cannabis found was 1.04kg. She was asked how long it would take for the eleven plants to generate that amount of cannabis and said there would be a huge range, but approximately 10 to 12 weeks. She said that it was " *difficult to say* " and that we were not talking about " *hundreds of plants* " or anything on a large scale to generate such an amount. She agreed in cross-examination that potential yield of a plant is influenced by a number of environmental factors and that a first-time cultivator is likely to produce lower yielding plants than someone who has been doing it for a number of years and has refined their methods. She also accepted that yield could fall even lower than her previous estimate of 40 grams to 28 grams, as it had in those Court of Appeal cases. She agreed that the skunk cannabis in the house did not derive from the eleven plants cultivated by the appellant and there was no evidence that linked the two.

13. The judge's sentencing remarks following the evidence considered the case of *Healey [2012] EWCA Crim 1005* and concluded that the appellant did not have a leading role but rather a significant role. She noted the aggravating factors of the nature of any likely supply as concluded on the basis of the Newton hearing, the level of profit element, the exposure of third parties to the risk of serious harm through the location of the drug-related activity, the presence of others (especially children or non-users), the presence of a weapon (the BB gun), and also noted that she would treat the possession of cannabis and pepper spray as further aggravating factors rather than sentencing them separately.

14. Having noted her conclusion as to financial gain she considered the mitigating factors, including the effects on the appellant's mother, his educational endeavours, his loss of employment and health factors, as well as the submission that he sought support to change his life. She then noted that the starting point from the guidelines was 12 months and concluded that the appellant fell within the upper end of that. She recorded that she had balanced carefully all the aggravating and mitigating

factors in the case and concluded that a notional sentence after trial, if there had been one, would have been 30 months. With credit of 10 per cent, the sentence was therefore 27 months.

15. It has now submitted before us that the learned judge erred in her finding of category 3 harm, effectively by reference to the question of numbers and yield. Ms Myttas-Perris reminds us that the relevant sentencing guidelines provide the following guidance in relation to harm:

> "In assessing harm, output or potential output are determined by the weight of the product or number of plants/scale of operation."

She also draws our attention to the fact that the Court of Appeal in *Healey* provided further guidance for the assessment of harm at [11]:

> "…the quantities which appear in the sentencing guideline pictorial boxes as broad indicators of harm are neither fixed points nor are they thresholds."

The essence of the point which she has made is that the appellant had eleven plants, which is plainly, she says, closer to seven - the starting point for category 4 harm - than to 20 - the starting point for category 3 harm. Ms Myttas-Perris therefore says that this is a case which falls squarely within category 4.

16. Also prayed in aid were the nuances in the expert evidence:

a. in relation to the yield of the plants if grown to maturity,
b. the difficulty of calculating yield.
c. the fact that the evidence provides that midrange of 38 grams to 78 grams of flowering head per plant, the fact that Ms Gower has conceded that it could fall as low as 28 grams.

17. , and the fact that Mr Neil was a first-time cultivator. It was therefore submitted on behalf of Mr Neil that any doubt ought to have been resolved in his favour and the court ought to have based the projected yield on the lower estimate provided by the expert namely 418 grams in total or 38 grams per plant or at least on the basis of the midrange estimate, which, it was submitted, was closely approximate to the 55-grams mark in the guideline, enabling the court therefore to operate simply on the basis of the numbers of plants, which, it was submitted, would put it squarely within category 4.

18. Before us this morning Ms Myttas-Perris has also revived the arguments made before the judge in relation to sentencing in relation to delay and the effect which that has had on Mr Neil's mental health, the fact that this was an isolated incident, and the prospects which Mr Neil has of rehabilitation via the offers made by his stepfather, Mr Beach. She has referred to the productive ways in which Mr Neil has applied his time in custody, despite the confines of prison in current circumstances.

19. It was submitted that the appropriate harm category for Mr Neil would be category 4, given the combination of the yield and seven plants, and it was submitted that even if category 3 was the appropriate harm category, a sentence of 27 months

was manifestly excessive. The fact that there were only eleven plants combined with the uncertainty of yield ought to have balanced against the finding that the appellant was towards the top end of "significant role".

20. It was submitted also that the sentence imposed on the appellant appears incompatible with the sentences imposed by the Court of Appeal on the defendants in *Healey* for similar offences.

21. Finally, Ms Myttas-Perris has submitted that if we are with her so far and the sentence can be lowered to under the 24-months' mark this would be a case for suspension. She says that this is not a case where the appellant poses a risk, it is not case where appropriate punishment can only be achieved by immediate imprisonment, nor, she says, is it a case of failure to comply with previous court orders. Therefore, it is said that Mr Neil should be given the opportunity to serve the sentence in the community.

Discussion

22. Having listened carefully to Ms Myttas-Perris's skilful submissions we are persuaded this far: that in this case the judge erred and the sentence imposed was manifestly excessive.

23. It is true that whatever starting point was reached there were a considerable number of aggravating factors, as the judge recorded, and there was a further escalation to be properly made by reference to the other two counts being sentenced concurrently so as to properly reflect the overall criminality of the offending behaviour. However, it does seem to us that, even allowing for this, the sentence logically reflects a starting point which is too high. The offence at category 3/significant has a starting point of 12 months with a range of 26 weeks to 3 years. That guideline is based on twenty plants with a 55-grams production rate. It is apparent that this is not a perfect fit for these facts and, as has been pointed to us, category 4/significant is based on seven plants and corresponds with a high-level community order starting point and a range of a mid-level community order to 26 weeks' custody, while category 4/leading is close to category 3/significant with a 12-months starting point and 3-year maximum.

24. It would appear, though it is not explicit, that the judge concluded that the yield in this case is probably at the slightly higher end of the scale. Hence, (in conjunction with the need to weight for the role being at the higher end of significant), she used the category 3 figures as the basis for her evaluation. That conclusion as to yield appears to be perfectly open to the judge simply as an extrapolation from the wider range given in evidence, which does not appear to have been controversial. That conclusion is also in line with the authority of *Healey* , where the tendency to higher yields was noted.

25. That combined approach and the fact that the number of plants was between the two categories indicative figures would, (even bearing in mind the appellant was assessed as being close to the leading role category), suggest a starting point before aggravating and mitigating factors of no higher than the 12-month starting point for category 3/significant. Bearing in mind the balance of aggravating and mitigating factors, (including the other offences being sentenced concurrently), we conclude that the sentence after trial would be no higher than 20 months. That would correspond to 18 months after credit for the plea.

26. That therefore engages the question of whether the sentence we impose should be suspended, a question which necessarily was not one with which the sentencing judge engaged. In our judgment there are significant factors weighing against suspension. One is the nature of the offence, (this being a production of drugs for financial gain case), as the judge found. There is also a history which shows poor compliance. By this we mean that there have been a number of convictions, including referral orders and suspended sentence. Although there was a hiatus in offending between 2015 and 2019, the record shows that repeated encounters with the criminal justice system have not stopped the appellant offending; and that is particularly the

case given these offences were not the only ones to occur after the completion of the suspended sentence imposed in 2016: indeed, the record shows that the appellant continued to offend after arrest in relation to this offence, the final conviction being in 2020.

27. There are not, in our judgment, similar countervailing factors. This is not a case where we can conclude that there is, based on the material which we have before us, a realistic prospect of rehabilitation or strong personal mitigation. While there has been an expression of desire to reform and Ms Myttas-Perris has drawn attention to the offer which is there for the appellant, despite the support of Mr Beach there has been this offending and we cannot conclude that there is, therefore, the requisite prospect of rehabilitation. Ms Myttas-Perris has, of course, carefully emphasised such features as the appellant's lack of maturity also. But none of this really reaches the hurdles in the guideline. Nor is this a case where we conclude that immediate custody will result in significant harmful impact on others.

28. We therefore conclude that, balancing all the factors, appropriate punishment can only be achieved in this case by the imposition of an immediate custodial sentence and it would not be appropriate to suspend the sentence.

29. For the reasons given, therefore, we have concluded that the judge imposed a sentence which was too long and on a basis which justifies the intervention of this court. We conclude that the appropriate sentence would have been 18 months. Accordingly, we quash the sentence imposed and substitute a sentence of 18 months' imprisonment and the appeal succeeds to this extent.