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IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202304088/A1
NCN: [2024] EWCA Crim 296

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 9 February 2024

Before:

LADY JUSTICE ANDREWS

MRS JUSTICE CHEEMA-GRUBB

RECORDER OF REDBRIDGE
(HER HONOUR JUDGE ROSA DEAN)
(Sitting as a Judge of the CACD)

REX
V
KENNARD GRAY

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MR J HUDSON appeared on behalf of the Applicant.

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**J U D G M E N T**

1. MRS JUSTICE CHEEMA-GRUBB: This is a renewed application for leave to appeal against sentence. On 15 August 2021, the applicant, who is now 72 years of age, flew to Jamaica. He returned 2 weeks later. When he landed at Manchester Airport on 30 August, he had with him a padlocked suitcase containing 16.66 kilograms of cannabis wrapped in 35 black polythene packages. The sale value of this herbal cannabis was £14,000, had it been sold in £1 packs, rising to over £50,000, if it had been sold in typical street deals.
2. When interviewed by the police, Mr Gray said, in a prepared statement, that he had packed his own suitcase the night before he was due to travel and left it in his cousin's car. He denied knowing that anything unlawful was in his luggage. It was apparent to the customs officials who stopped him that he did not have the key to the padlock on the suitcase.
3. He was charged with fraudulent evasion of a prohibition on the importation of cannabis contrary to section 170(2) of the Customs and Excise Management Act 1979. He pleaded not guilty at the PTPH and served a Defence Statement, in which he maintained his account, and blamed his family for having replaced the clothes and belongings he had packed with the cannabis. The trial was due to be heard on 4 October but a week or so before that date the applicant's solicitors notified the court that he would be changing his plea.
4. The applicant had a number of relevant albeit aged previous convictions: in October 1982, for a drugs offence in Germany (involving a small quantity of cocaine) he was sentenced to 1 year and 8 months' imprisonment. In June 1985, for importing controlled drugs, he was made subject of an 18-month sentence of imprisonment suspended. Then, in November 1995, for two counts of importing controlled drugs, he received 6 years'

custody. He had not been before the courts since 2008.

5. On 10 November 2023, he was sentenced at Manchester Crown Court, by HHJ Potter, to 33 months' imprisonment. The sentencing judge had the benefit of a short form pre-sentence report. The applicant had told the author that, due to his partner's death and losing his own job as a result of redundancy during Covid-19, he was in financial difficulties before he travelled to Jamaica for a funeral and a holiday. Whilst there his cousin suggested that he could earn a small profit by bringing cannabis into the United Kingdom. He was due, he said, to pass the cannabis in his suitcase to one person, and that would be the end of his involvement.

6. He described himself as a daily smoker of cannabis and expressed the view that it is not harmful. He had committed the importation offences in his youth to make money but he was not currently in debt. He was retired and had a number of health issues which made him unfit for work. These include cataracts and glaucoma, for which he was due to have an operation in November 2023. He is a Type 2 diabetic and suffers from shortness of breath due to asthma and chronic obstructive pulmonary disease. He said that he had not offended between the commission of this offence and sentence, a period of about 2 years. When the probation officer discussed the impact of potential imprisonment, Mr Gray said that, despite having been in custody before, he would feel vulnerable due to his advanced age and medical conditions. He was also afraid of losing his accommodation.

7. The prosecution provided a Sentencing Note. They invited the judge to sentence on the basis of a *significant role* culpability, and within harm category 3. The indicative amount in that category is 6 kilograms and an upward adjustment would be required for about two-and-a-half times that amount. However, they did not suggest that the case merited a sentence beyond the *significant role* category 3 range which is 18 months to 3

years, the starting point being 2 years' custody. The only aggravating feature relied on by the prosecution was the history of previous convictions we have mentioned. Counsel for the applicant asked the judge to allow 17.5 per cent credit for the guilty plea before trial and he agreed with the classification reached by the Crown in the Sentencing Council Guideline, as well as the requirement for an upward adjustment to reflect the greater weight and the impact of the antecedents.

8. Defence submissions in mitigation were targeted at a potential suspended sentence and reference was made to R v Ali [2023] EWCA Crim 232, in which this Court gave guidance on the need for courts considering imposing short terms of imprisonment to have regard to the current high prison population.

9. The judge approached the case on the basis that the applicant's deliberate decision to import a large quantity of cannabis into the United Kingdom was done with full knowledge from experience of what the consequences would be. He rejected the suggestion that only modest financial benefit would have accrued to the applicant. He considered that the quantity of cannabis involved and the aggravating feature of the previous convictions justified taking a sentence outside the range prior to reduction for mitigation. Starting with a provisional sentence of 4 years' imprisonment, he reduced the term by 6 months for the applicant's health difficulties which would make custody more difficult for him than for the average prisoner. He was prepared to discount the sentence by 20 per cent because of information on the court records that, had there not been a guilty plea, the trial would not have been reached until 2025, thus he reached the final term of 33 months which was not capable of suspension.

10. Mr Hudson, who appears to present this application at his own expense and without expectation of remuneration, submits that the judge gave undue weight to the antecedent

history, applied too high an uplift for the weight of cannabis and had insufficient regard for the personal mitigation available to the applicant. He develops his written submissions by focusing on the upward adjustment to the starting point in category 3 of the guideline. Even if the judge had decided this was a category 2 case, the lowest end of the category 2 range is, he points out, 2½ years. How, he asked, could the judge then have gone to category starting point of 4 years, which is what he did? The only feature that was relied on in this respect is the antecedent history but Mr Hudson submits, realistically, that the previous convictions are too old to have had such a powerful impact. As to mitigation, he submits that there was no reason for the judge to reject the account of personal financial hardship, which led the applicant to return to offending, offending which was out of character for him, for many years.

11. We have sympathy for Mr Gray, and we conclude that there is some degree of error in the exercise of the judge's discretion in fixing sentence in this case. Accordingly, we grant the application for leave to appeal and we grant a representation order for Mr Hudson.
12. We dispose of the appeal in this way. In our judgment, the doubling of the category starting point, so that it was 1 year outside the range to allow for the quantity of drugs and the applicant's antecedent history was unjustified. Considerable time had lapsed since the last drugs importation conviction and it is an overarching principle of sentencing that the aggravating effect of relevant convictions reduces with the passage of time. Although the applicant had a much larger quantity of drugs than the indicative weight, it was well below the indicative weight for the next category up. It is to be observed that the applicant failed to accept that his offending was harmful given the benign view he took of cannabis himself. But of itself this was insufficient to justify a move to double the category starting point.

13. We are also persuaded that the judge failed to take proper account of the personal mitigation available to this applicant. His age, medical condition and the history of bereavement and loss of work needed to be reflected fairly at stage 2 of the guideline. In our judgment, the sentence before discount for plea should have been at the top end of the category range, namely 3 years. The impact of the antecedent history, which should have been taken into account at the next step, is more than balanced out by the applicant's age and the medical conditions, especially given the age of the offences concerned. Allowing the 20 per cent for the guilty plea, the term that should have resulted is in the region of 22 months. We turn to the question of whether immediate custody was required. The relevant specific guideline has a list of features which are to be considered in every case. None of those which fall on the side of an immediate sentence apply. This is not a dangerous offender. In the circumstances, appropriate punishment does not require immediate imprisonment and so on, whereas many of those which lean to suspension do apply. The applicant can be rehabilitated, as the pre-sentence report indicates, and there is strong personal mitigation that we have already summarised.
14. We are persuaded therefore that the sentence imposed was manifestly excessive and wrong in principle. The term of 33 months will be quashed and replaced with a suspended sentence of 22 months which will be suspended for 16 months.
15. LADY JUSTICE ANDREWS: Mr Hudson, thank you. Can I just say that it is always nice in this Court when counsel, acting in the best traditions of the Bar, comes at their own expense to argue a case like this, and you have done a very good job for your client today. So, I think that needs to be marked.
16. MR HUDSON: I am very grateful. Thank you.

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