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No: 201603403 A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 16 December 2016

B e f o r e:

LORD JUSTICE HAMBLEN

MR JUSTICE NICOL

HIS HONOUR JUDGE LUCRAFT QC
(SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

R E G I N A

v

STUART WALSH

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(Official Shorthand Writers to the Court)

Mr M Maher appeared on behalf of the **Appellant**
The Crown did not attend and was not represented

J U D G M E N T
(Approved)

1. JUDGE LUCRAFT: The appellant, Stuart Walsh, is 36 years old. On 28 April 2016 at the Crown Court at Manchester before His Honour Judge Walsh he was sentenced to a term of 8 years' imprisonment. The court also imposed a victim surcharge. He appeals with the leave of the single judge.

2. It is contended that the sentence passed was manifestly excessive. It is submitted that the learned judge was influenced by acquittals of the appellant on other drugs offences, and, as a result, took matters into account in assessing the sentence that he ought not to have done. It is also submitted that the judge failed to take account of the low purity of the amphetamine (2 per cent) and instead focused on its monetary value.

3. The appellant was one of six defendants facing an indictment containing six counts. Count 1 charged the appellant and others with conspiracy to supply amphetamine. Counts 2, 3 and 4 alleged that he and others were involved in conspiracies for the supply of cocaine, diamorphine and cannabis. The dates spanning each of those four counts was between 1 and 30 September 2015. Counts 5 and 6 did not concern this appellant.

4. On day one of the trial, the appellant pleaded guilty to the conspiracy to supply amphetamine. He then stood trial on the remaining counts. He was acquitted of counts 2 and 3 and the learned judge directed a not guilty verdict in respect of count 4.

5. In relation to the appellant's co-accused, they all pleaded guilty to various counts on the indictment upon day one of the trial. Christopher Swaine pleaded guilty to counts 1, 2 and 3 and was sentenced to 18 months' imprisonment. Lee Taylor was acquitted on counts 1 to 3 and pleaded guilty to producing cannabis (count 5) and was sentenced to 3 months' imprisonment. Steven Anderson was acquitted on count 4 at the direction of the learned judge. He pleaded guilty to possession with intent to supply cannabis (count 6) and was sentenced to 12 months' imprisonment. Daniel Whelan pleaded guilty to counts 1 and 2 and was sentenced to concurrent terms of 18 months and 42 months' detention in a Young Offender Institution. Nico Edgar pleaded guilty to counts 1, 2 and 3 and was sentenced to a detention and training order for 12 months on count 1 and concurrent terms of 2 years on counts 2 and 3.

6. In September 2015 there had been an undercover police operation that revealed significant street dealing in drugs. The learned judge sentenced the co-accused on the basis that each of them played a significant part in what was going on in the street dealing but not a leading role. Whelan and Edgar were street dealers, and Swaine had allowed his premises to be used as a safe house from which dealing on the streets took place.

7. On 25 September 2015, the appellant and Taylor were seen to enter the address belonging to Swaine. The police then executed a warrant. Inside the address, police recovered 2 kilograms of amphetamine, as well as a substantial quantity of heroin and diamorphine.

8. The appellant and others were arrested and charged, and the matter then set down for trial. The appellant changed his plea to guilty to conspiracy to supply amphetamine, and, as I have indicated, was acquitted of the offences relating to Class A drugs.

9. On the day of trial and plea, the appellant served a defence statement. The appellant's defence, as set out in that document and then put before the jury through evidence in the trial, was that he was involved and played a leading part in the conspiracy to supply amphetamine. The cocaine and diamorphine was supplied by others without his knowledge or participation. He knew nothing about the presence of Class A drugs found at Swaine's address. In giving evidence, the appellant said that, having been convicted of conspiracy to supply Class A drugs on 1 May 2009 and sentenced to 4 years' imprisonment, he had made a deliberate decision not to involve himself in the supply of Class A drugs because of the consequences that could follow. In fact, the original sentence had been one of 54 months but reduced on appeal to 4 years.

10. The appellant's case was that he had made a commercial, hard-headed business decision to involve himself in the supply of Class B drugs. He had been convicted on 10 June 2013 for the production of cannabis. Plants were cultivated for him at a third party's address and the cannabis would be sold for commercial gain. He had received a sentence of 18 months suspended for 24 months for that offence, but nonetheless continued to supply Class B drugs.

11. In March 2015 he acquired a mobile phone in a false name for the purpose of pursuing a business in the supply of amphetamine. He had then provided that phone to the youngest of the co-defendants, Edgar (who was two months over his 17th birthday when recruited), to act as a drug dealer on his behalf. Through Edgar, Swaine was recruited to allow his premises to be used to store drugs. The appellant admitted in evidence that others were also recruited to deal on his behalf.

12. The learned judge came to the conclusion that, as a result of the hard-headed commercial decision to be involved in the business of selling drugs, the appellant made a substantial profit. £800 in cash was recovered in the search, along with the 2 kilograms of amphetamine with a street value of some £20,000. It was clear that the appellant had made substantial sums of money. He had not been working nor in receipt of benefits, and there was some evidence of him frequenting casinos and some evidence of the hire of high-value cars.

13. The learned judge referred in his sentencing remarks to the period covered by the indictment (September 2015) and commented that the appellant fell to be sentenced for his culpability arising out of his activity in that period of time, but that it was clear that his drug-related activities so far as the dealing in amphetamine was concerned stemmed from the acquisition of the phone in March 2015. The judge commented:

> "You frankly said that, about one month after that period of time, the phone was utilised by you and Nico Edgar to supply drugs."

14. The learned judge then went on to note that the decision to supply drugs on a significant scale was taken while the appellant was still subject to a suspended sentence

of imprisonment imposed on 10 June 2013. The learned judge was of the view that, although the appellant did not fall to be sentenced for a breach of that sentence as the period of the indictment was outside the operational period, the commercial hard-headed decision to continue to be involved in the supply of Class B drugs whilst subject to a suspended sentence was an aggravating feature of this case.

15. The learned judge made clear that ordinarily the case so far as the appellant was concerned was one that fell into a leading role and category 2, with a start point of 6 years' imprisonment and a range of sentence of between 4 1/2 to 8 years' imprisonment. The leading role was identified as appropriate on the basis of the clear evidence of organisation and the design being to make commercial profit on a significant scale. The learned judge also identified as aggravating factors significant dealing and the recruitment of others who were vulnerable.

16. The learned judge concluded that the appellant's antecedent history, participation in the conspiracy and the aggravating features he had identified were such that it took the case outside of the category 2 range. He identified as a start point following trial a sentence of 9 years' imprisonment. He allowed 10 per cent for the late plea, and imposed a sentence of 8 years' imprisonment.

17. On behalf of the appellant it is submitted that the learned judge should have passed a sentence limited to the conduct within the indictment and not to have sentenced the appellant for his admitted conduct in relation to the supply of amphetamine before September 2015. In support of the argument, reliance is placed on a number of authorities that have been provided to us. In particular, we derive assistance from the decision of R v Cairns and Ors [2013] EWCA Crim 467; 2 Cr App R (S) 73, and in particular what is set out in paragraph 8:

> "After conviction following a trial, the judge is bound to honour the verdicts of the jury but, provided he does so, is entitled to form his own view of the facts in the light of the evidence."

And the earlier decision of R v Twisse [2001] 2 Cr App R (S) 9 where the court said this:

> "6. The next matter to be emphasised, as was recognised by the Court in Djahit, is the importance of only sentencing for the criminality proved or admitted by means of, in most cases, a request that the offence be taken into consideration: see Canavan [1998] 1 Cr App R(S) 243, and in the context of drug supply, Brown [2000] 1 Cr App R (S) 300. This established precept of English law is now reinforced by Article 6 the European Convention on Human Rights.
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> 7. If the prosecution can prove that a defendant has been acting as a supplier over a substantial period of time, it can put the court in a position to sentence properly in one of three ways: first, by charging a number of offences of supplying or possession of drugs at different dates; or, secondly, by charging the defendant with conspiracy to supply over a

> prescribed period; or, thirdly, by charging him with being concerned in the supply of a controlled drug over a specified period, contrary to section 4(3)(b) of the Misuse of Drugs Act 1971.
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> 8. What, however, is important is that, if the indictment is not drawn as we have suggested and the defendant does not ask for offences to be taken into consideration, judges when sentencing should refrain from drawing inferences as to extent of the defendant's criminal activity, even if such inferences are inescapable having regard, for example, to admissions made or equipment found. In other words, a defendant charged with one offence of supply cannot receive a more substantial sentence because it is clear to the court that he has been trading for 9 months: but the court is not required to blind itself to the obvious. If he claims that the occasion in question was an isolated transaction, that submission can be rejected. He can be given the appropriate sentence for that one offence without the credit he would receive if he really were an isolated offender."

18. We also note the other authorities referred to us: R v Thompson [2012] EWCA Crim 1764, R v Nnamani [2015] EWCA Crim 596 and R v Ahmadzay and Ahmad [2009] EWCA Crim 1115.

19. It seems to us that, although the learned judge could not ignore the detail of the evidence given by the appellant and was entitled to take account of what he said in evidence, what he could not do was to do so in such a way as to effectively enlarge the charge for which the appellant was to be sentenced.

20. Turning to the relevant guideline, this is a case where the appellant's role is correctly identified as a leading role. It bears all of the hallmarks of a leading role and was accepted by the appellant in his evidence. It is also a case within category 2, and so on a start point of 6 years and a range of sentence of between 4 years 6 months and 8 years' custody, the appellant's previous convictions, and in particular the conviction in 2009 for conspiracy to supply Class A drugs and in 2013 for production of cannabis, together with his use of persons under 18 such as Edgar as a dealer, are clear aggravating factors. On the other hand, the relatively low level of purity of the drugs is a factor reducing seriousness. Here the amount of amphetamine seized was about 2 kilograms, and we note the indicative amount for category 2 is 4 kilograms.

21. The start point following a trial in the circumstances of this case would be one close to the top of the range for this category, a sentence of 7 1/2 years' imprisonment; allowing credit for the late plea, a sentence of 6 1/2 years' imprisonment. To that extent, this appeal is allowed.