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No: 201802649/A2

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 14 March 2019

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE WILLIAM DAVIS

HIS HONOUR JUDGE POTTER

(Sitting as a Judge of the CACD)

R E G I N A

v

ROBERT HOLLAND

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Mr A Watkins appeared on behalf of the **Appellant**

Miss L Summers appeared on behalf of the **Crown**

J U D G M E N T

(Draft for approval)

MR JUSTICE WILLIAM DAVIS: Robert Holland is 39. On 28 February 2017, he pleaded guilty to an offence of conspiracy to supply class A drugs, namely MDMA. He pleaded not guilty on that same occasion to two counts alleging involvement in the importation of class A drugs, one count relating to MDMA and the other to cocaine. The case was adjourned for trial. For reasons that are not apparent to us, it was not until 16 April 2018 that the trial was finally listed. Prior to the trial, on 9 April 2018, Mr Holland's solicitors informed the court and the prosecution that he intended to plead guilty. That is what he did two days later when the case was listed for that purpose.

He was sentenced on 31 May 2018 as follows. In respect of counts 1 and 2, conspiracy to import MDMA and cocaine respectively, nine years' imprisonment, concurrent on each count; count 3, conspiracy to supply MDMA to which he pleaded guilty back in February 2017, the sentence imposed was three years consecutive, so a total of 12 years.

The next day, that sentence of three years was varied to two years eight months, still to run consecutively. It was a variation under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000. The variation arose because the judge had intended to apply the full one-third discount for the plea of guilty on that count. In error he only applied 25 per cent. It was entirely appropriate that that matter was dealt with by way of a slip rule hearing under section 155. The manner in which that was done was unusual. Defence counsel emailed the court to point out the error. The judge on receiving the email simply directed the reduction of four months in the

overall sentence in an email to the Court Office.

In *Cox [2019] EWCA Crim 71*, at paragraph 18, this court stated that any variation of sentence, whether in the defendant's favour or not, should be carried out in open court. Where, as here, there was a reduction in sentence the defendant would not be required to attend. However, a hearing was necessary in order to ensure open justice. Nonetheless, as Cox emphasised, and we say also, the fact that no such hearing took place does not render the variation a nullity and we affirm the varied sentence as it was imposed.

The appellant appeals against his overall sentence of 11 years eight months with the leave of the full court. The appeal concentrates on the sentence imposed in respect of the conspiracy to import class A drugs. The agreement was with a man called Arthur, who was also charged on the indictment. He pleaded guilty on the day of trial. The period of the conspiracy was August 2015 to February 2016. Those dates reflected the delivery of two parcels, one from the Netherlands and the other from Germany. The parcel from the Netherlands was intercepted on 25 August 2015 at the customs' hub in Coventry. It contained 989 MDMA tablets. It was addressed to a Mr Harper at an address in Wales. The address in Wales was in fact the home of the co-defendant Arthur.

On 4 February 2016 a parcel from Germany arrived at the same customs' hub. This was addressed directly to Arthur but at the home address of this appellant in Ilkeston, Nottinghamshire. The police carried out a controlled delivery of that parcel in repackaged form because as it arrived at the customs' hub it had contained a total of 497 grams of cocaine at 70 per cent purity and 1749 MDMA tablets. When the police carried out the controlled delivery the appellant was not at home. His wife got hold of him on the telephone. He confirmed to the police that he was expecting a parcel. As a result the police searched his house and found 98 MDMA tablets, together with other drugs paraphernalia. Further, in his car were two receipts for other parcels sent on to Arthur's address in Wales. Arthur was also arrested and his address was searched. There was found over £2,000 in cash, a substantial quantity of powdered MDMA and various dealer's lists indicating dealing in MDMA.

Holland's mobile telephone showed contact between him and Arthur. It included a text conversation about a parcel having been intercepted by customs. That was clearly a reference to the events in August 2015. When Mr Holland's telephone was examined for that purpose, it also revealed the conspiracy to supply MDMA in company with a man called Wright. That was supply within Mr Holland's own home area. The drugs at his home were part of his stock in trade. The telephone messaging showed that Mr Wright was dealing with MDMA at a street level. His supplier was Mr Holland. Over five months from September 2016 Wright had paid Holland a little over £1,500.

This was clearly paying for drugs.

Mr Holland had no previous convictions at the time of his sentence. More to the point he was of positive good character. There was a glowing reference before the judge from his warrant officer from the time when he served in the Welsh Guards.

In sentencing, the judge concluded that as well as the two parcels intercepted by customs, the parcels in respect of which receipts were found in Holland's car were also drug consignments. Therefore this was not a one-off dealing in MDMA and cocaine. The judge also referred to the fact that the cocaine came from somewhere close to its original source because of its high purity. Finally, the judge considered that it was important for sentencing purposes that there was not just one drug involved but two, and that the drugs were of significant quantities.

In respect of this appellant, the judge said this:

"... in your case I am satisfied that if you had taken your trial in respect of all matters the court would have imposed a sentence upon you of fifteen years' imprisonment. That would have been made up of sentences of eleven years for the importation offences and trying to balance the scales and reduce the totality to four years for supplying MDMA in [the] conspiracy with Mr Wright. I give you as much credit as I can and so I reduce the total sentence which you would have received from fifteen to twelve years. That will be nine years on each of the conspiracies to import and three years on the conspiracy to supply MDMA."

Pausing there, as we have already observed, the final sentence on the second conspiracy was eventually set at two years and eight months.

The judge also sentenced Mr Arthur on the same occasion. He concluded that the sentence in respect of the conspiracies to import drugs had he, Mr Arthur had a trial would have been nine years and set his overall sentence accordingly.

The sentence having been imposed, counsel who appeared for Mr Holland at the sentencing hearing, who has also appeared before us, asked for clarification of the sentence imposed in respect of importation. He invited the judge's attention, as doubtless he had already, to the Sentencing Council Drugs Guideline which indicated that for somebody involved in importation of this amount of drugs, involved at a significant level, the range was up to 10 years. The judge said this:

"I have sentenced him at the top of significant. So, he is in the same category as Mr Arthur."

Counsel pointed out that the category range ended at 10 years rather than 11. The judge said this:

"... there are two drugs involved and so ... that explains the flexibility."

We observe immediately that it does not explain why in Mr Arthur's case the starting point was nine years, whereas in this appellant's case it was 11 years.

The two grounds of appeal are interconnected. First, it is said that the sentence for the importation offences was excessive in itself, and second, the total sentence was excessive given that a consecutive sentence was imposed on the separate conspiracy involving the supply of MDMA.

The harm category in relation to each drug under the importation guidelines fell squarely within Category 2 by reference to the amounts involved. In respect of Mr Holland's role, he was somebody who clearly had an operational role in the chain and was motivated by financial advantage. That gave him a significant role. Within the context of this importation, which involved relatively moderate quantities of drugs, there was some element of a leading role because within the conspiracy such as it was he did have substantial links to others within the conspiracy. But that must be regarded in the context of a conspiracy that was of itself relatively modest in scale. We observe that the bottom end of the category range for a leading role in the guideline is nine years, the upper end of a significant role is 10 years. Using the category ranges as a sliding scale, which we observe is the correct approach, we come to the conclusion that nine years' custody was the appropriate starting point for the conspiracies involving importation. The fact that there were two conspiracies with two different drugs in our view was not of significance in the context of this case. Where two drugs were undeniably imported in February of 2016, the importation of cocaine and MDMA literally came in the same parcel.

We therefore disagree with the judge as to his reasoning for going beyond the category range for a significant role in a drugs importation. This is not a case that is put on the basis of disparity. Equally we cannot ignore the starting point that was applied in the case of Mr Arthur. In her Respondent's Notice and in her brief oral submissions today, Miss Summers on behalf of the prosecution cannot put Mr Arthur and Mr Holland in any very significantly different category in terms of participation or culpability. The reality is, in our view, that the starting point for Mr Holland should have been the same as that as expressed for Mr Arthur, namely nine years' custody. The judge

clearly gave him 20 per cent discount for his plea of guilty; it came late, but before the date of trial. We see no reason to depart from that. Rounded down, that means that the sentence in respect of the importation counts should be seven years' custody rather than nine. Once that reduction takes effect, it seems to us that any argument in relation to totality no longer has any force. The imposition of a consecutive sentence for the quite separate supply conspiracy was entirely justified.

It follows that we quash the sentences of nine years' imprisonment on counts 1 and 2 of the indictment and substitute for them sentences of seven years' imprisonment. The other sentence will remain consecutive, so the total sentence now will be nine years and eight months rather than 11 years and eight months. To that extent, this appeal is allowed.

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