

Regina v Afreh Osei-Ababio

[2019] EWCA Crim 380

Before: Mr Justice Popplewell Her Honour Judge Wendy Joseph QC (Sitting as a Judge of the CACD)

Friday, 18 January 2019

Representation

Ms L Bald appeared on behalf of the Appellant.

Judgment

Her Honour Judge Joseph:

1 On 11 July 2018, before His Honour Judge John in the Crown Court sitting at Kingston-upon-Thames, the appellant pleaded guilty to possessing controlled drugs of Class A with intent to supply, contrary to section 5(3) of the Misuse of Drugs Act and to possession of criminal property, contrary to section 329(1) (c) of the Proceeds of Crime Act 2002 . He was sentenced to 5 years 11 months' imprisonment and 12 months consecutive respectively. He appeals against that sentence with leave of the single judge.

2 The facts are these: on 17 January 2018 police attended a property in Wye Street SW11 to arrest another individual. They smelled cannabis, entered and saw the appellant who said he was house-sitting for the man they had come to arrest. In the bedroom that the appellant clearly occupied, police found packages containing a total of 24 grams of crack cocaine with a purity of between 80% and 93%. The judge did not permit the particularising of other substantial quantities of crack cocaine found in the premises, on the basis the Crown was too late to do so and, as he put it, 'it would make little difference to sentence'. We, of course, concentrate on the matter for which he was sentenced. Also found in the appellant's room was cash totalling £11,125. Also found were electronic scales and a flick knife and elsewhere in the premises mobile phones and SIMS, for two of which the appellant accepted he was responsible. On one of these SIMS were messages relating to drugs dealing. His DNA was found on the inner wrappings of some of the drugs. In interview, he provided a prepared statement disputing that the drugs or cash were his and disputing that he was the occupier of the flat.

3 At sentence on count 1 (the drugs matters), the issue arose as to whether the appellant had played a "leading" or only a "significant" role. In the Sentencing Council's Definitive Guideline on possession with intent to supply Class A drugs, matters which may indicate a "leading" role include close links to the original

source and expectations of substantial financial gain. Under "significant" role it includes operational or a management function within a chain and motivation by financial or other advantage, whether or not operating alone and some awareness and understanding of the scale of operation. The judge recognised there were features capable of falling into both categories and concluded that the appellant fell on the cusp between "leading" and "significant".

4 Complaint is now made that he was wrong to do so and should have put the matter squarely within the category of "significant" role. Ms Bald submits that the sum of money found is not so very large as to support the contention that he played a leading role; that the wraps found suggested he was further down the chain undertaking more risky aspects of the venture; and that only one of the phones seems to have been used for the drug dealing and that at street level.

5 Whilst understanding her submissions we, like the judge, also see features pointing the other way. This is certainly not a case of street dealing of half a gram on a street corner. This is clearly a substantial ongoing operation with drugs of high purity, no doubt yet to be cut, and with this appellant firmly in its midst. In our view, the judge was entitled to look at all the features and to recognise that it contained aspects of both. The simple fact is that things do not always neatly fall into a particular category.

6 the judge then identified the following aggravating features. Firstly, the high value of the drugs - this speaks for itself. Secondly, the appellant's previous convictions. This requires some examination. He has a conviction for possession of Class A drugs with intent to supply. Now aged 47, he had 22 sets of previous convictions comprising 53 offences. They are largely for dishonesty and they include burglaries and robberies but the matter to which the judge referred was that in June 2007 he was sentenced for robbery, breach of licence and possession with intent to supply Class A drugs. For these matters he received an indeterminate sentence with a minimum term of 3 years. He in fact served 6 years before being released in August 2013. It follows that though the previous drug offending was some 11 years in the past, he had re-offended in a similar way within 5 years of his release. Thirdly, at the time of offending he was on licence for that matter.

7 The judge was right to treat each of these matters as aggravating features and, in our judgment, taken together they must move the sentence significantly upwards. The judge then allowed a small amount of credit for personal mitigation and 15% credit for late plea of guilty of which no complaint is made. Bearing in mind all of these features, we conclude that the sentence of 5 years 11 months is an entirely proper one.

8 We turn then to count 3 (money laundering). Complaint is made firstly, that the sentence was consecutive and secondly, that no reduction has been made for totality. The judge concluded as to this offence that the appellant played a significant role as part of a group and that he fell into category B medium

culpability. Harm was assessed upon the basis of the sum of £11,125 at the bottom of category 5. The range at the bottom is 6 months' imprisonment but the judge noted that category 6, which applies to figures of less than £10,000, has a top end range of 1 year. Clearly a great deal depends on the facts of a particular case and most especially the source of the criminal property. The judge recognised and properly recognised the level of harm associated with the underlying offences, it not being in dispute that the money was the product of drugs dealing. He said in his sentencing remarks (page 6B):

"Class A drug dealing is a pernicious offence. As an addict you know full well that it ruins people's lives."

He concluded that an appropriate sentence for this offence was 15 months and gave credit, the level of which is not complained of. What is complained of is that it was imposed consecutively, without giving counsel a chance to argue the matter. We observe that neither counsel themselves raised it and certainly had no reason to assume what the judge had in mind. In any event, we have now heard full argument.

9 Had the judge structured the matter so as to impose concurrent sentences, the sentence on count 1 would have had to be accordingly raised to represent this other wrongdoing which, as the judge observed, represented separate and in effect earlier dealing. Had he done this no possible complaint could have been made.

10 There remains the question of totality. True it is that the judge did not specifically address the guideline issued by the Sentencing Council on Offences Taken into Consideration and Totality; it undoubtedly would have been better had he done so. Counsel did not specifically raise it with him. But the question that we must address at the end of the day is whether this appellant's sentence wrong in principle or manifestly excessive? We conclude that though it might be described as harsh for the totality of the offending, it was neither wrong in principle nor manifestly excessive. Accordingly the appeal fails.