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IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday, 21 May 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE PICKEN

SIR DAVID FOSKETT

R E G I N A

v

KLISDORIN LUMNICA

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London, EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Ms C Guiloff appeared on behalf of the **Appellant**

J U D G M E N T

(Approved)

1. SIR DAVID FOSKETT: On 22 June 2018, at Kingston upon Thames Crown Court, the appellant pleaded guilty to conspiracy to supply class A drugs, namely, cocaine. The conspiracy was alleged to have been in existence between November 2017 and May 2018. On 2 November 2018, he was sentenced by His Honour Judge Stephen John to 14 years' imprisonment. He appeals against that sentence with the leave of the single judge.

2. The appellant was aged 24 and had no previous convictions. He had been under police surveillance for a while and on 17 April 2018 he was seen leaving his home in Epsom by car with a distinctive blue carrier bag. He drove for about 15 minutes before parking at the end of a cul-de-sac on Kingston Road. As he parked, one of the alleged co-conspirators approached the car, opened the passenger door and removed the blue carrier bag. He transferred to another car and drove away. Police stopped that car and found two blocks of cocaine weighing 2.02 kilograms with a purity of 97 per cent inside the blue bag.

3. Other evidence showed the appellant attending the property of two other alleged co-conspirators in Surbiton on 8 May and a text message sent to one of them indicated that the appellant went there twice that day. On 9 May, the appellant sent his girlfriend a text message explaining that he was at that property again and that they were counting money.

4. On 17 May, police stopped the car being driven by the appellant and on the front seat was a half kilogram block of cocaine wrapped in cling film with 64 per cent purity. He was in possession of three mobile telephones and several keys. His home address was searched and found to be in an untidy state, littered with crack pipes. One of the appellant's keys was the key to the Surbiton property to which we have referred. When that property was searched, a hidden compartment behind a shelving unit was discovered, from which was discovered a ledger book with writing and nearly 9.15 kilograms of cocaine.

5. When interviewed, the appellant made full admissions in interview. He said that he had become indebted to an Albanian man following a property investment and that he was carrying out his role as a courier and the one who cut the drugs in order to pay off that debt.

6. The prosecution opened the case on the basis that the appellant said that he had over a period of months supplied wholesale an estimated 30 kilograms.

7. Ms Carolina Guiloff, who represented the appellant before the judge and before us and for whose helpful submissions we express our appreciation, says that this was an overstatement of the amount involved and that it should have been nearer to 25 kilograms. It is not a point that she pressed substantially in her oral submissions and, with respect to the submission, it does not seem to us that it would make any material difference to the outcome.

8. The judge said that the basis for the appellant's sentence was that he was concerned, firstly, in the supply on 17 April of 2.02 kilograms of import purity cocaine to the person who collected the bag from his car; secondly, in the possession with intent to supply on 17 May of about half a kilogram of import quantity cocaine; thirdly, in the conspiracy with others represented by the nearly 9.5 kilograms of largely import purity cocaine found in the Surbiton property on 17 May; and, fourthly, in the same conspiracy about a further 18 kilograms of cocaine supplied during the course of his involvement. The judge did say that the sentence would have been the same even if his admission to the additional quantity of 18 kilograms was absent.

9. The judge reached the ultimate sentence by concluding that the appellant had a leading role in what was plainly a category 1 offence. He said that the appellant was towards the top of the conspiracy. The extremely high purity of the cocaine indicated that he was very close to the import source as none of the drugs had been cut in any way. Very substantial sums must have been required in order to buy the drugs which were the subject of seizures and wholesale levels totalling, the judge said, between £375,000 and £430,000. It might be that another person arrested who was yet to be tried was above him in the hierarchy but the judge said the appellant was in a leading role.

10. The submission that his role was only significant, as had been suggested by the prosecution, was rejected. The judge said that his leading role indicated a starting point of 14 years within a range of 12 to 16 years before considering factors that either increased or decreased seriousness. The judge said it was clear that the appellant had substantial links to and influence on others within the chain and had involved others in the operation in which he was at or near the top in this country. However, the judge said that this did not involve coercion of others. Secondly, he had close links to the original source because of the import purity cocaine. Thirdly, he had the expectation of substantial financial gain and based on his own mitigation he had accumulated substantial debts in Albania because of a failed building project. Fourthly, in interview he admitted that during his period in the conspiracy a substantial quantity of cocaine had been supplied. As we have said, in respect of that, there is a suggestion that that figure was somewhat overstated but it is of no real relevance to the outcome.

11. The judge concluded that the sentence after a trial would have been 20 years because of the aggravating factors, namely, the quantity and high quality of the drugs involved, both being serious aggravating factors, the judge said. The street value of the drugs seized was in the region of £1.25 million. Assuming that the other 18 kilograms were of import quality, their street level value would be in the region of a further £2 million. Applying the 30 per cent discount that the judge considered appropriate for the plea of guilty and the submissions made during the interview, the resulting sentence was 14 years.

12. We would observe, with respect, that the judge was wrong to have included the admissions made in interview as a justification for going to 30 per cent rather than the 25 per cent justified by the fact of the plea of guilty at the PTPH. The current guidelines make it clear that it is something that should not be taken into account in determining the level of discount for the plea of guilty, but should be considered separately and prior to any guilty plea reduction as a potential mitigating factor.

13. The net effect of what the judge did, having regard to his final effective starting point of 20 years was to reduce the overall sentence by 1 year. We would respectfully agree that this was perfectly proper, but it should have been incorporated at an earlier stage in the sentencing exercise.

14. At all events, that is a relatively minor matter. Ms Guiloff submits primarily that the judge was wrong to reject the prosecution's position and treat the appellant as having a leading role.

15. It is, of course, acknowledged that the court is the ultimate arbiter of the role that a defendant played and is not bound by any agreement between the prosecution and defence. The judge was understandably concerned about the high purity cocaine with which the appellant was associated because, in the judge's view, it indicated that he was close to the import source.

16. We do not think that the logic of that can be criticised. Whilst it is right to say that the appellant's lifestyle, including his addiction to cocaine, made it less likely that he had any directorial involvement in the conspiracy, the fact is that he must have been regarded as sufficiently reliable to keep being entrusted with very valuable consignments of high quantity cocaine, as the delivery on 17 April demonstrates, and the arrangements at the flat in Surbiton also showed.

17. We consider that the judge was justified in treating him as having a leading role. Views might reasonably differ about whether he should be treated as at the higher or lower end of the sentencing range, but wherever the pointer falls, there is the addition to be made for the aggravating features to which the judge referred, albeit tempered somewhat by the mitigating factors.

Standing back from the detail, we test the sentence of 14 years in this way: it represents a sentence before discount for a plea of guilty, in other words after a trial, of 18 to 19 years, indeed somewhere nearer to 19 years, before a 25 per cent discount for the plea of guilty. Is an overall sentence of 18 to 19 years after a trial for this offence and given all the aggravating and mitigating factors manifestly excessive? We do not think so. It reflects the quantity and quality of the cocaine involved and the period of time, some 6 months, over which the conspiracy existed and the context of the role that the appellant played, whilst giving him credit for the admissions made during the interview and his previous good character.

18. It has been said that the judge was wrong not to take into account as a mitigating factor the appellant's addiction to cocaine. It seems to us that that was a matter that the judge was entitled to consider and in the circumstances reject because of the seriousness of the offence.

19. So for those reasons, in our judgment, the sentence of 14 years cannot be said to be manifestly excessive.

We have addressed the grounds of appeal advanced but during the course of her submissions Ms Guiloff raised the question of disparity between one of the other co-conspirators. It was not a matter that figured in the grounds of appeal and obviously was not a matter upon which the single judge was able to express a view. It is, of course, well acknowledged that if matters of this nature are to be raised, then they should be raised at that stage.

If we were forced to make the decision, we would not permit this matter to be raised as an argument. However, we have looked at the material that might be relied upon for this purpose. The particular co-conspirator to whom reference is made is a lady called Amber May. She was one of the occupants of the property in Surbiton to which we have referred. So that it should not be thought that we have not at least given some consideration to this, we will simply quote what the judge said about her role. It appears at page 6F through on 7D of the sentencing remarks. He said this:

”Amber May, despite the fact that you had a pivotal role in supplying Lumnica [in other words, the appellant in this case] with the use of your home and, specifically, your bedroom, and that I am satisfied that you knew, not only of the sophisticated hide which he installed and which, on your own evidence, you saw in operation, on all the evidence I have come to the conclusion that your role is properly described as a lesser one.

Many judges might be driven to the conclusion that your role could not be described as other than significant, but I am persuaded that this is not so in your case. This is for the following reasons:

Firstly, I believe that you were involved, at any rate to some extent, by naivety or exploitation because of your mental fragility and the various conditions from which you undoubtedly suffer.

Secondly, you had no influence on those above in the chain.

Thirdly, you performed a limited function under direction.

However, I do not accept that you had very little awareness or understanding of the scale of the operation. Nor do I consider that you were engaged by pressure, coercion or intimidation, rather, in my judgment, you allowed yourself to become involved in what was a sophisticated operation because of your unhappy connection with your former boyfriend ... an Albanian who persuaded you to allow another Albanian, who you knew through him, namely [the appellant], to use your home for storage of his drugs and as a base for dealing. But you knew what he was doing, as shown by your expressed concern about drawing a blind in the room and the lies which you told at trial.”

20. The judge identified the appropriate sentencing range and passed a sentence of 5 years’ imprisonment.

21. In our judgment, her position was entirely different from that of the appellant and no comparison between their sentences would afford any basis for a successful appeal in this case.

22. So for those reasons, the appeal is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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