Neutral Citation Number: [2019] EWCA Crim 1192
2018/05204/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 20th June 2019

B e f o r e:

LORD JUSTICE HAMBLEN

MR JUSTICE LEWIS

and

HIS HONOUR JUDGE PICTON
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

MICHAEL LLOYD

Computer Aided Transcript 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)

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr G Trembath QC appeared on behalf of the Appellant

J U D G M E N T
(Approved)

Thursday 20th June 2019

LORD JUSTICE HAMBLEN: I shall ask His Honour Judge Picton to give the judgment of the court.

HIS HONOUR JUDGE PICTON:

1. This is an appeal against sentence brought with the leave of the single judge.

2. On 6th July 2018, in the Crown Court at Birmingham before His Honour Judge Drew QC the appellant pleaded guilty to one offence of conspiracy to evade the prohibition in the importation of controlled drugs, contrary to section 1(1) of the Criminal Law Act 1977. On 19th November 2018, he was sentenced by Judge Drew to seven years and three months' imprisonment.

3. A co-accused, Geoffrey North, had previously pleaded guilty in the Crown Court at Southwark on 19th August 2016 on a separate indictment to the same conspiracy and been sentenced by Ms Recorder Jones to six years and eight months' imprisonment.

4. In the summer of 2014 the appellant and his co-accused were involved in a professional conspiracy to import 15 kilograms of high purity cocaine, with a potential street value of over £2 million, from Spain into the United Kingdom. The conspiracy was infiltrated by two undercover National Crime Agency officers who posed as a haulage contractor and a driver willing to assist with the importation. It was agreed that they would be paid £20,000 for their role in the plan. The co-accused Geoffrey North met with the first undercover officer to arrange the importation and was accompanied by the appellant who took an active part in the discussions. In the course of those discussions explicit reference was made to the nature and amount of the drug that was to be imported. Although North did most of the talking, the appellant played a full role in the

making of the arrangements. In particular the appellant suggested that they could double the amount of drugs to be imported on future occasions to make more money.

5. Further planning was undertaken by telephone. North took the lead on the part of the conspirators.

6. After the drugs had been handed over in Spain the cocaine was swapped for a similar looking substance and conveyed into the United Kingdom in accordance with the arrangements made for delivery. This took place at the home of the appellant's stepfather who handed over a bag of cash in exchange for the consignment. The appellant was in regular telephone contact with this stepfather throughout this time. Officers then arrested the appellant's stepfather at the scene of the handover. The appellant made eleven attempts to contact him in the hour after his arrest.

7. North was arrested in Ilford, shortly after the handover. Other alleged co-conspirators were also taken into custody. The police were not, however, able to arrest the appellant at this stage. Instead, he left the country in order to avoid them being able to do so.

8. The drugs were analysed and found to be 15 kilograms of cocaine at 80 per cent purity. The normal purity of cocaine at street level in the United Kingdom is around 20 per cent. The drugs would have cost between £384,000 and £409,000 to buy in Spain and would have a wholesale value in the United Kingdom of between £540,000 and £675,000. Sold as street deals, the value would be just under £2.4 million.

9. The appellant's stepfather denied knowing what was in the box that was handed to him in exchange for the cash he passed to the undercover officers. North declined to answer questions when he was interviewed and was bailed by the police. He was due to return for a further

interview in December 2014, but instead absconded and went to live in Mallorca.

10. The appellant's stepfather, along with two other alleged co-conspirators, stood trial at the Central Criminal Court but they were all acquitted. North was eventually located living in Alcudia and was arrested pursuant to a European Arrest Warrant. He pleaded guilty to the conspiracy and was sentenced in the Crown Court at Southwark on 19th August 2016 to six years and eight months' imprisonment, as already mentioned.

11. The appellant was also the subject of a European Arrest Warrant which was eventually executed in Spain. He was returned to the United Kingdom and arrested on 8th June 2018. As he had been subject to a European Arrest Warrant, no interview took place.

12. When he was arraigned, the appellant pleaded guilty. However, His Honour Judge Drew expressed himself as troubled by the apparent leniency of the sentence passed upon North by Ms Recorder Jones when he appeared at Southwark. The case was adjourned in the hope that the appellant could also be sentenced by the Recorder in order that the same judge would deal with both co-conspirators. In the event, that did not prove to be possible and so the matter was re-listed before His Honour Judge Drew in November 2018 and he proceeded to pass sentence. The judge clarified with prosecuting council that (a) there was nothing to suggest that North had benefited from some exceptional mitigation that was not apparent from the papers in the case, and (b) the prosecution had not attempted to reference the sentence passed on North on the basis of undue leniency. Prosecuting counsel confirmed that to be the case.

13. In his sentencing remarks the judge identified that the appellant had played an important organisational role in a category 1 conspiracy. The judge noted that this was to be the first of a series of runs and that the only reason those plans did not come to fruition was because the

negotiations took place with undercover police officers. The judge referred to the fact that this was serious offending and that the appellant was involved in large-scale drugs dealing. The drugs were of a very high purity, 80 per cent plus, and when combined with a bulking agent would have yielded huge profits for those involved.

14. The judge identified the appellant as having played a significant role in guideline terms and thus the starting point, based upon 5 kilograms, was ten years' custody, with a range of nine to twelve years. The judge commented that here the volume of drugs involved greatly exceeded that indicative amount, but he faced what he termed a "problem" by reason of the sentence passed on North by the Recorder. North had also played a significant role and, in addition, had previously been convicted of a drug trafficking offence for which he received a sentence of seven years and six months' imprisonment. That sentence was passed in 2008.

15. The judge commented that he wished to ensure that the appellant did not gain any advantage or suffer any disadvantage from the fact that he absconded. There is no reference in the opening, or the judge's sentencing remarks, to suggest that the judge was told that North had also absconded and been at large for a period, although the timescale between initial arrest and sentence clearly points towards that having been the case.

16. The judge determined that the respective roles of both North and the appellant should be assessed as being on an equal footing, but that North's case was aggravated by his antecedents. The judge referred to the fact that the appellant had no previous convictions. The judge expressed the view that had he been dealing with them together, then he would have taken as a starting point sentences in the region of twelve to fourteen years. He referred to the fact that the Recorder who dealt with North's case took a starting point of ten years, commenting that he could not comprehend the reasoning for that approach. He decided, however, that in fairness he

had to take account of that when determining the appropriate sentence for the appellant. The judge said he also had to bear in mind the appellant's mitigating features, his age and the absence of relevant previous convictions.

17. The judge stated that if he had been untrammelled by North's sentence, he would have settled upon a sentence after a trial for the appellant that was greater than ten years but in the event considered that to do so would be entirely unfair, particularly in the light of North having the significant aggravating feature of a relevant previous conviction. The judge said that a distinction had to be drawn between the appellant and North and he would achieve that by identifying a sentence after a trial of nine years' imprisonment.

18. The judge then addressed the issue of credit for the guilty plea. He commented that the appellant would normally be entitled to a one-third discount. The judge stated, however, that the purpose of a one-third discount was to reflect the degree of remorse shown by a defendant who pleads guilty at an early stage. The judge did not think it was right and appropriate to give the appellant that discount because he went on the run for four years, thus showing no sign of remorse but rather an intention to evade responsibility for his actions. The judge commented that once he was extradited and brought back to this country, and faced with the overwhelming evidence against him, he did the only sensible thing which was to plead guilty. The judge stated that the period of his absconding was a very substantial one and that had to be reflected in some way. The judge commented that to reduce the discount for the guilty plea seemed to be the right way to do it because it was an indication of lack of remorse.

19. In the circumstance the judge stated that the appropriate discount for his guilty plea would be significantly reduced to reflect the period of time he had spent on the run. There had been no charge in relation to it because he had not been arrested prior absconding. Thus

it was that the judge settled upon what he considered in the circumstances to be the appropriate level of discount, namely 20 per cent. The application of that level of discount to the length of sentence after a trial identified by the judge, namely nine years, resulted in the sentence of seven years and three months' imprisonment referred to earlier.

20. The ground of appeal upon which leave was granted asserts that the judge erred in reducing the appellant's credit for plea to 20 per cent on the basis that he had absconded. The single judge refused leave based upon an argument as to disparity as between the appellant and North. The single judge identified that in fact the sentencing judge's approach was if anything overly favourable to the appellant, pointing out that the Court of Appeal has indicated that in circumstances of sentences being passed by different judges on different offenders, the second judge should pass the sentence which he or she considers appropriate and leave the Court of Appeal to address any potential disparity argument that might arise therefrom – see *R v Broadbridge* (1983) 5 Cr App R (S) 269.

21. So far as the ground upon which leave was granted is concerned, we have been able to indicate to Mr Trembath QC, who appears for the appellant today as he did in the court below, that we require no persuading to the conclusion that the approach adopted by His Honour Judge Drew in respect of the issue of credit for the guilty plea was flawed. This topic that has been considered by this court before in *R v Banasik* [2011] EWCA Crim 140. The appellant in that case was responsible for causing the death of a pedestrian by reason of an episode of dangerous driving. He was not apprehended at or near the scene but rather, by the morning of the following day, was on a coach back to Poland where he remained until a European Arrest Warrant was issued and executed. Having been returned to this country, he pleaded guilty at the first time of asking and would, in normal circumstances, have been entitled to the maximum credit for plea. The sentencing judge reduced credit to 10 per cent,

apparently on the basis that the appellant had left the jurisdiction in anticipation of being arrested. The court stated that:

> "The fact that the appellant hastily fled from the scene and returned to Poland, where he remained at large for over two years, was properly a factor to be taken into account as a seriously aggravating feature in determining the seriousness of the offence. But to take it into account further in substantially reducing credit for his guilty plea meant that there was an element of double counting."

The court confirmed that:

> "Credit for a guilty plea, and at what stage in the proceedings the plea is tendered or indicated, must be a quite separate matter from matters concerned with the facts of the case, its seriousness and the aggravating and mitigating features."

Although the case was decided under the previous guideline there is nothing in the current one that suggests the position to have changed.

22. It is to be noted, however, that the court nonetheless dismissed the appeal. It did so on the basis that, contrary to the view of the sentencing judge that the appropriate length of sentence after a trial was one of five years, in fact the appellant's offending merited around seven years and accordingly the sentence imposed by the judge could not be assessed as being manifestly excessive.

23. The circumstances of the appellant's case bear some comparison with those that pertained in *R v Saliuka* [2014] EWCA Crim 1907, where the appeal focussed on alleged disparity between two co-defendants, one of whom had been the beneficiary of what the sentencing judge

described as an "incredibly lenient Goodyear indication" that had previously been given by another judge and by which he felt bound. On appeal the court considered firstly whether the sentences imposed upon the appellant should be assessed as manifestly excessive when considered in isolation and concluded that they should not. The court then turned to the disparity argument and rejected that as well. It dealt with the matter in these terms:

> "Even if the sentence passed upon Hussain was lenient, he says, citing the well-known case of *Fawcett* (1983) 5 Cr App R(S) 158, that right-thinking members of the public would think that something had gone wrong in the administration of justice, where these two persons convicted of the same offence, being convicted at the same time were sentenced quite differently. The logical extension to the appellant's argument is that if an unduly lenient sentence was passed upon one of them, that requires the court to pass an unduly lenient sentence upon another offender. Right-thinking members of the public would then rightly think that something had gone wrong with the administration of justice. In our judgment, one sentencing error is not cured by making another. Disparity is an argument often deployed in this court but it seldom succeeds. Undue leniency shown to Hussain is no reason for reducing a perfectly proper and otherwise entirely appropriate sentence passed upon this appellant."

Discussion

24. The length of sentence after a trial identified by the Recorder when sentencing North was inexplicably lenient – His Honour Judge Drew thought so and that accords with our assessment. For a quantity of high purity cocaine three times the indicative amount that put the case into category 1 a sentence towards the top of, if not beyond the range there identified, should have been the result. This was a professional drug importation being carried out by an organised crime group of which both North and the appellant were a part. The conspiracy to which they leant themselves had envisaged that in fact 20 kilograms should be brought into the country and that further and larger consignments should follow.

25. Further, rather than seeking to find out why North had received such an inexplicably low sentence, we consider that His Honour Judge Drew should have proceeded to sentence by way of imposing what he considered to be the correct sentence for the appellant in the circumstances of the case and his particular role within the conspiracy. Proceeding in that way would have been in accordance with the case of *Broadbridge*, to which reference has already been made. The judge, however, considered that he should be loyal to the approach adopted by the Recorder but sought to reflect the aggravating feature of the appellant absconding for a period of four years by reducing the credit for the guilty plea that he would apply to what was an artificially low assessment of that which the offence would merit after a trial. He was wrong to proceed in that way as the court made clear in *Banasik* – absconding so as to avoid an arrest that an offender appreciates is imminent does not amount to a factor that can operate so as to permit a court to reduce the level of credit for plea. It did not do so under the old guideline and neither do we assess it to do so under the current one. The exceptional circumstances that may permit a court to make some adjustment to the normal levels of credit arising from the stage at which a plea is entered are set out at section F of the current guideline. They do not encompass a situation such as this. The judge should have allowed the appellant the benefit of the full one third reduction that arose from his timely plea of guilty, irrespective of him having spent four years in Spain hiding from justice. That factor, if it was to be taken into account in the assessment of the appropriate sentence, should have featured at the stage when the judge was deciding on the length of sentence after a trial and before he reached the stage of applying credit for the guilty plea.

26. We have concluded, however, that, notwithstanding the judge's error, it is impossible to say that the sentence actually imposed upon the appellant should be assessed as being manifestly excessive. Even with credit for the guilty plea being impermissibly limited to just 20 per cent, the actual sentence imposed by His Honour Judge Drew was significantly shorter

than the appellant should have received. A sentence shorter than it should have been is not to be converted into one that has to be assessed as being manifestly excessive just because a co-defendant, sentenced by a different judge on a different occasion, also received a sentence that was too short. Whilst there may be some situations where the disparity as between defendants is so gross that it requires some intervention on appeal, we do not consider that such is the case here.

28. Accordingly, despite the attractive and helpful submissions made on the appellant's behalf by Mr Trembath, this appeal against sentence must be dismissed.
