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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 2nd July 2019

B e f o r e:

LADY JUSTICE RAFFERTY DBE

MR JUSTICE NICOL

and

MR JUSTICE FREEDMAN

R E G I N A

- v -

DAVID DEAN PEDLEY

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Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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Mr Robin D C Howat appeared on behalf of the Applicant

J U D G M E N T
(Approved)

Tuesday 2nd July 2019

LADY JUSTICE RAFFERTY: I shall ask Mr Justice Nicol to give the judgment of the court.

MR JUSTICE NICOL:

1. These are renewed applications for leave to appeal against both conviction and sentence, following refusal by the single judge. The applicant also needs an extension of time of five days within which to make his application for leave to appeal against conviction.

2. In the Crown Court in Birmingham, the applicant faced two indictments. They both involved police operations codenamed "Crackle". One of the indictments ("Crackle 2") charged the applicant with three counts of conspiracy to supply a Class A drug (cocaine). Initially, the applicant pleaded not guilty. The Crown opened its case. The applicant then asked to be re-arraigned and changed his plea to guilty on a written basis of plea. That was on 9th December 2016.

3. On the second indictment ("Crackle 1") the applicant was charged with two counts: conspiracy to rob a G4S cash-in-transit van (count 1); and conspiracy to transfer a prohibited firearm (count 2).

4. The applicant was first tried in February 2017 on the "Crackle 1" indictment. The jury were unable to agree on verdicts. He was retried before Her Honour Judge Montgomery QC and a jury. On 16th May 2018, he was acquitted of count 1 (conspiracy to rob); he was convicted of count 2 (the firearm conspiracy).

5. On 30th July 2018, he was sentenced by Judge Montgomery to concurrent terms of ten years

and nine months' imprisonment for each of the drug conspiracies. He was sentenced to a consecutive term of six years and three months' imprisonment for the firearm charge. The total sentence was, therefore, one of seventeen years' imprisonment.

6. A co-defendant, Ezekiel Osbourne, at the retrial was likewise convicted of the same firearm charge and likewise acquitted of conspiracy to rob. He was also sentenced to six years and three months' imprisonment for the firearm conspiracy and, on a guilty plea, to a consecutive term of four years' imprisonment for a separate conspiracy to supply heroin.

7. Another co-defendant, Edward Stewart, was convicted at the first trial of "Crackle 1". His application for leave to appeal against conviction was refused by the full court on 14th November 2017: see [2017] EWCA Crim 1955.

8. Ryan Clarke was charged on a separate indictment with simple possession of a firearm. He pleaded guilty to that charge and was sentenced to four years and nine months' imprisonment.

9. So far as the drugs conspiracies were concerned, it seems that the applicant's basis of plea was accepted by the Crown. The facts of those offences were, briefly, these. Count 1 related to a 1 kilo block of cocaine of 95 per cent purity. It was found on 30th May 2016 in the flat of a man called Brent Caney. One month earlier, the applicant's phone had been cell-sited in the vicinity of Caney's flat. On that same day the applicant had passed a bag to a man called Dugan. When the police stopped Dugan's car, they seized the bag and found that it contained £28,500.

10. The applicant pleaded guilty to count 1 on the basis that he had paid Dugan the money for the cocaine, which was later found in Caney's flat.

11. Count 5 of the "Crackle 2" indictment concerned 13th May 2016 when, in a series of transactions, the applicant purchased high purity cocaine from an Albanian for about £51,000.

12. Count 7 of "Crackle 2" reflected the applicant's recruitment of others to assist the harbouring of cocaine. The prosecution's case was that he was an organiser and hands-on leader. The total weight of cocaine involved in the three drug conspiracy counts was 2.5 kilos.

13. We turn to the firearm matter ("Crackle 1"). The transfer took place on 5th April 2016. Osbourne and Clarke were seen together that evening in Birmingham. After they had separated, Clarke went to the home address of Edward Stewart in Northampton. There were calls between Clarke and Osbourne and Osbourne and Stewart. When Clarke returned to Birmingham, he was stopped by the police. In a box behind the front passenger seat was a Smith & Wesson .44 calibre revolver. In Clarke's car the police found a mobile phone. The phone had received a text message which said "B14 4DW". That is the post code for an area which includes Pendeen Road, Yardley Wood, Birmingham, and was one street over from the location where Clarke was stopped by the police. It appeared to be where Clarke was heading, because Pendeen Road had been entered into his Satnav.

14. A member of the applicant's family also lives on Pendeen Road. The police did not allege that the family member was criminally involved, but simply that it would be a convenient rendezvous point. The applicant and Osbourne were long-standing friends. While Clarke was travelling to Northampton, there was a series of voice calls between the applicant and Osbourne. It was Osbourne who had sent Clarke the Pendeen Road post code. He had done so very shortly after receiving a phone call from the applicant. Immediately after Osbourne had done so, he called the applicant back. Osbourne was observed to be in the vicinity of the area where Clarke was stopped by the police.

15. The prosecution alleged that Osbourne and Stewart had orchestrated Clarke's journey and that the applicant was also involved.

16. The applicant's case was that he had nothing to do with the transfer of any gun. He and Osbourne were old friends, which explained why they were in frequent contact with each other. The applicant, we are told, was illiterate, which explains why there was a frequency of voice calls rather than text messages. The applicant said that he did not know Clarke or Stewart. He had not been involved in passing the post code to Clarke.

17. Before the jury was sworn, Judge Montgomery rejected an application to dismiss, amongst other things, the firearm charge. She said that the friendship between Osbourne and the applicant did not mean that there was no significance in the pattern of calls and text messages. The text message gave an address with which the applicant was associated. There was a strong inferential case for the applicant to answer.

18. Likewise, at the close of the prosecution case, the judge rejected a submission that there was no case for the applicant to answer. Before that stage, the judge had allowed an application by the prosecution for permission to rely on a previous conviction of the applicant and Ezekiel Osbourne for robbery, possession of a firearm/ammunition and aggravated vehicle taking. These convictions had been in September 2005. On that occasion, they had robbed a Securicor van driver of his cash box. The applicant had been sentenced to imprisonment for public protection and had actually served about ten years' imprisonment. The judge said that the following features were similar to the "Crackle 1" indictment which, it will be remembered, included conspiracy to rob, as well as the firearm conspiracy: the targeting of a cash-in-transit van; the use of a similar firearm to that intended for use in the present offence; and the use of a

car stolen in a burglary. Furthermore, the two defendants had acted together in that offence, and it was alleged that they had acted together in the present offences. The judge said that she had considered section 101(3) of the Criminal Justice Act 2003, but she did not consider that the admission of the evidence would have such an adverse impact on the fairness of the trial that the evidence ought not to be admitted. The convictions were not scandalous; nor was the admission of the evidence likely to lead to the jury being distracted.

19. Mr Howat, who drafted the grounds of appeal, appeared *pro bono* to act for the applicant before us this morning. We are grateful to him for his assistance. He argues that the judge was wrong not to withdraw the case from the jury at the close of the Crown's case. He also argues that the judge was wrong to allow the previous conviction of the applicant to be admitted in support of what he says was a weak case against the applicant. Mr Howat argues that the jury could only draw the inference on which the prosecution relied if they could safely reject all alternative explanations consistent with the applicant's innocence. Since the applicant and Osbourne were good friends and in frequent contact for non-criminal reasons, the jury could not so conclude.

20. As for the previous conviction, Mr Howat submits: (a) that it was a single instance and so not capable of establishing a propensity; (b) that the evidence of prior possession of a loaded firearm was so prejudicial that it ought to have been excluded under section 101(3) and/or section 78 of the Police and Criminal Evidence Act 1984; and (c) that this was an example of the Crown trying to bolster a weak case with a prejudicial earlier conviction.

21. Attractively though Mr Howat made his submissions, we are not persuaded that they even arguably demonstrate that the applicant's conviction on the gun conspiracy was unsafe. The judge rightly concluded that the jury could find that the combination of circumstances made

them sure of the applicant's guilty. His friendship with Osbourne did not preclude them communicating for criminal, as opposed to purely social, purposes – as, indeed, the earlier conviction demonstrated. It was not just that there had been communications between Osbourne and the applicant, but the particular timings were significant. The post code was further evidence on which the jury could find that the applicant was involved. The previous conviction was capable of showing a relevant propensity and was of significance for all the reasons which the judge gave. The admission of this evidence was no so unfairly prejudicial that it ought to have been excluded.

22. Accordingly, like the single judge, we refuse the application for leave to appeal against conviction. In these circumstances, it is superfluous to consider the application for an extension of time.

23. We turn to the renewed application for leave to appeal against sentence. The applicant was born on 15th April 1981. He was, therefore, 37 years of age at the time of sentence. We have mentioned already his previous convictions in 2005, for which he had been sentenced to imprisonment for public protection.

24. Following his arrest for the present matters, the applicant had been recalled to prison. That meant that none of the time in custody pending sentence counted against his sentence. In addition, in 2003, he was convicted of non-dwelling burglary and theft.

25. In passing sentence, the judge said that the applicant had played a leading role in the drugs conspiracies. He had directed the transmission of cocaine on a commercial scale. He had substantial links to others in the chain. He was close to the Albanian links to the original source. He expected to make a substantial financial gain. The amount of cocaine involved (2.5 kilos)

was well in excess of the indicative amount for category 2 (i.e. 1 kilo). A leading role in category 2 has a starting point of eleven years' custody, and a range of nine to fourteen years. Additionally, the applicant had routinely handled such drugs, whereas the guideline was for a single transaction. The very high purity was an aggravating feature. His guilty pleas were very late, but he would be given ten per cent credit. After trial, the sentences for the drug offences would have been twelve years, but they were reduced to ten years and nine months' imprisonment after credit for the guilty plea.

26. The firearm was no doubt brought into Birmingham for criminal purposes. There was no evidence that it was used to inflict harm. The judge took into account the applicant's personal mitigation and the delay in him awaiting sentence. There was, of course, no credit for a guilty plea in relation to the firearm conspiracy. Ordinarily, the judge would have imposed seven years, but she reduced this to six years and three months' imprisonment because of the time spent awaiting sentence.

27. Mr Howat argues that the judge was wrong to ascribe a "leading role" to the applicant for the drug conspiracies. He submits that it should have been a "significant role". He also argues that the judge gave insufficient allowance for mitigation. He informs us that the applicant had been present in Birmingham Prison awaiting the present sentence when a riot had taken place. The applicant had not participated in the riot. Even more in his favour, he had saved the life of a prisoner who was vulnerable in that situation.

28. Mr Howat also submits that too little credit was given to the applicant for his guilty pleas. Even though he pleaded guilty during the course of the trial, Mr Howat observes that the guideline in force at the time allowed for ten per cent credit during a trial, and that the new guideline was not in force at that time. He also submits that the applicant's guilty pleas to the

drug conspiracies had a "domino effect": it led to five other defendants pleading guilty one working day later, with a substantial saving in court time. He therefore argues, overall, that the total sentence was manifestly excessive.

29. We are unimpressed by Mr Howat's submission that the judge was wrong in her categorisation of this as a "leading role" offence. The judge had excellent opportunity to make that assessment, and we do not think it right to disturb it.

30. However, Mr Howat's other submissions have greater force. The fact that the applicant not only did not take part in a riot in the prison, but assisted another prisoner is greatly to his credit. It is also substantially to his credit that his plea of guilty, late as it was, had something of a "domino effect", leading to others pleading guilty. The judge also, in our view, could have made a greater reduction than she did to take account of the delay in the applicant's sentence – a delay that was not attributable to him at all.

31. Accordingly, we will grant the renewed application for leave to appeal against sentence. We allow the appeal against sentence to the extent of reducing the total sentence by one year. We will do so by reducing the sentences on the drug charges so that on each of those counts concurrent sentences of nine years and nine months' imprisonment will be substituted. The total sentence is, therefore, one of sixteen years' imprisonment, instead of the seventeen years imposed by Judge Montgomery.

32. To this extent the appeal against sentence is allowed.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk