Neutral Citation Number: [2018] EWCA Crim 2297
2018/00234/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 3rd July 2018

B e f o r e:

LORD JUSTICE TREACY

LORD JUSTICE HOLROYDE

and

MR JUSTICE GREEN

R E G I N A

- v -

MOHAMMED ASIF

Computer Aided Transcript of Epiq Europe Ltd, 165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr O S P Blunt QC appeared on behalf of the Appellant

J U D G M E N T
(Approved)

Tuesday 3rd July 2018

LORD JUSTICE TREACY: I shall ask Lord Justice Holroyde to give the judgment of the court.

LORD JUSTICE HOLROYDE:

1. On dates in June and August 2017, in the Crown Court at Wolverhampton, the appellant pleaded guilty to a total of seven counts on an indictment. The pleas were entered on different occasions because the indictment underwent amendment in the course of the proceedings. The court accepted that he was entitled to full credit for his pleas.

2. On 14th December 2017 he was sentenced by His Honour Judge Webb to a total term of imprisonment of 20 years ten months. He now appeals against that sentence by leave of the single judge.

3. The offences which the appellant admitted and the sentences imposed were as follows: on count 1, possession with intent to supply of a controlled drug of Class A (cocaine), six years' imprisonment (the maximum penalty being life imprisonment); on count 2, possession with intent to supply of a Class A controlled drug (heroin), ten years six months' imprisonment (the maximum is again life imprisonment); on count 3, possession with intent to supply of a controlled drug of Class B (the synthetic cannabinoid known as "Spice" or "Mamba"), six months' imprisonment (the maximum is fourteen years). Those three sentences were ordered to run concurrently with each other, making a total for the three drugs offences of ten years six months' imprisonment.

4. Counts 4 and 5 were offences of possessing a prohibited firearm, contrary to section

5(1)(aba) of the Firearms Act 1968. Count 4 related to one revolver; count 5 related to two other revolvers. For each of those offences (which carry a maximum of ten years' imprisonment and, subject to exceptional circumstances, a minimum of five years' imprisonment), the appellant was sentenced to seven years' imprisonment. Those sentences were ordered to run concurrently with each other, but the sentence on count 4 was ordered to run consecutively to the sentence for the drugs offences. On count 6, which charged possessing ammunition without a firearm certificate, the appellant was sentenced to three years four months' imprisonment to run consecutively (the maximum is five years' imprisonment). Finally, on count 7, which charged possessing a prohibited weapon, contrary to section 5(1)(b) of the Firearms Act 1968 (which carries a maximum of ten years' imprisonment), he was sentenced to three years' imprisonment to run concurrently. Thus, the total sentence was, as we have indicated, 20 years and ten months' imprisonment.

5. The charges arose out of searches conducted by the police on 26th May 2017. In a house where the appellant lived, the officers found a number of packages of controlled drugs, together with cutting agents, scales and other paraphernalia associated with drug dealing. They also found plastic bags containing cash in excess of £45,000 and a single bullet. In all, the heroin found at the house amounted to more than 1 kilogram and there was about one-quarter of a kilogram of cocaine. Those drugs were at purities of 40 to 60 per cent. Their total value was in excess of £60,000.

6. Police officers also searched other premises with which the appellant was associated. Parked nearby they noticed a Skoda car. When asked, the appellant told the police where they could find the keys for the car. When it was unlocked, the boot was found to be packed full of drugs and guns: a Baikal shotgun, two shotgun cartridges, a revolver, a gas powered pistol, two tasers, a black bag containing blocks of heroin amounting to 11.5 kilograms in weight (with a street

value of £1.13 million), a service revolver loaded with live rounds, a Baikal handgun, a Flobert revolver and bullets, a glove containing further bullets, a sock containing shotgun cartridges, 5 kilograms of synthetic cannabinoid to be used for Spice/Mamba (with a street value of £50,000), three live shotgun cartridges, a number of spent shotgun cartridges and five live rounds of ammunition. The total street value of the heroin seized was £1.47 million. There was crack cocaine valued at £5,510; and the cannabinoid was valued at £50,000.

7. We note that the total weight of heroin recovered was about three times the indicative weight which is used in the Sentencing Council's definitive guideline in categorising offences of possession with intent to supply as category 1 offences.

8. As the learned judge put it in his sentencing remarks, these finds showed the appellant to be "a drug dealer with an arsenal". The appellant accepted that he was in possession of all the guns and ammunition which had been recovered, although in the end not every item was listed in the indictment.

9. The appellant was 30 years old at the time. He has a number of previous convictions as a juvenile, but his previous offending did not involve either drugs or firearms and had not resulted in any custodial sentence.

10. In submissions in mitigation Mr Blunt QC, appearing then as now for the appellant, addressed the learned judge, amongst other things, as to the weight of the heroin recovered. He referred in this context to the level of purity which we have mentioned, suggesting that that brought down the weight to something of the order of 8 to 10 kilograms at 100 per cent purity.

11. In his sentencing remarks the learned judge considered the sentencing guideline for drugs

offences. He concluded that counts 1 and 2 were category 1 offences in which the appellant had played a leading role, albeit that he may not have been the only person to play such a role in relation to those drugs. The guideline indicates for such an offence a starting point of fourteen years' custody and a range of twelve to sixteen years. The indicative weight on which that range is based is, as we have indicated, 5 kilograms.

12. The possession of the drugs with intent to supply was aggravated by the possession of the firearms, but the learned judge was rightly careful to avoid double counting because he intended to impose consecutive sentences for the firearms offences. He did, however, reflect in the concurrent sentences on counts 1 to 3 the fact that he was sentencing for three offences and three different types of controlled drug. At page 4A of his sentencing remarks he said this:

> "After a trial the sentence on the heroin count would have been fourteen years. With a third deduction, that comes to ten years and six months. For the cocaine offence, it would be six years because there is a significantly lesser amount of cocaine and six months for the cannabinoid, making a total, all concurrent, of ten and a half years for those offences."

14. We observe that the learned judge, perhaps as a result of the submissions which had earlier been made to him about the weight of drugs, seems there to have fallen into error in his application of the sentencing guidelines. The definitive guideline makes plain that at step one, when determining the category of harm, the weight to be taken into account is the overall weight of the drugs. The level of purity of the drugs is not a relevant consideration at step one. It becomes a relevant consideration at step two, when it may serve as an aggravating feature if the drug is of particularly high purity. The result, as it seems to us, is that the learned judge fell into error in determining that the appropriate sentence after trial would have been fourteen years, which is the guideline starting point based on an indicative weight of heroin of only about one-third of the total recovered here. It seems to us that there could have been no legitimate

complaint if for the count 1 offence the learned judge had taken a sentence after trial of sixteen years.

15. When turning to the firearms offences, the learned judge considered the six questions posed in the familiar cases of *R v Avis* [1998] 1 Cr App R 420 and *R v Sheen and Sheen* [2012] 2 Cr App(S) 3. At page 4C of his sentencing remarks he answered the questions as follows:

> 1. The weapons had no lawful use. There were a number of weapons, all of which were lethal. There was ammunition to go with them. One revolver was loaded. A semi-automatic pistol had ammunition in the magazine, though not loaded into the chamber.
>
> 2. All the firearms were clearly held in readiness to be used or transferred.
>
> 3. They were clearly intended for use in serious criminal activity.
>
> 4. The appellant had no record for serious offences of violence.
>
> 5. None of the firearms had been used as such.
>
> 6. Consequently, no damage or injury had been caused with them.

16. The learned judge regarded the offences charged in counts 4 and 5 as coming right at the top of the sentence available to the court, namely a maximum of ten years' imprisonment in each case. Each of those offences accordingly merited a ten year sentence before giving credit for the guilty pleas. Having regard to totality, however, the learned judge said this (at page 4G):

> "I had considered consecutive sentence in respect of counts 4 and 5, allowing one third credit as promised by an earlier court. These offences come right at the top of the sentencing range and two consecutive sentences totalling thirteen years and four months would be somewhat too high, particularly as I propose to pass a consecutive sentence for the ammunition and I have already imposed ten and a half years for the drugs offences. Therefore, in respect of counts 4 and 5, the sentence will be seven years on each to run concurrently and on count 7 the sentence will be three years to run concurrently. On count 6, however, the sentence will be three years and four months' imprisonment consecutive to the seven years. That makes ten years and four months for the firearms offences."

So it was that the learned judge imposed the sentences which we have indicated.

17. In his written and oral submissions to the court, Mr Blunt takes two points. First, in relation to the sentencing for the drugs offences, he realistically accepts that the judge was entitled to assess the appellant as having played a leading role in a category 1 offence. He does not argue against the conclusion that the appropriate sentence after trial would have been fourteen years' imprisonment. But he submits that the applicant did not receive the credit he should have received for his guilty pleas. The judge said in terms that on count 1 there should be a reduction of one-third because of the guilty plea. But by what appears simply to have been an arithmetical error, the judge passed a sentence of ten years six months, which represents three-quarters of the fourteen year sentence which he would have imposed after a trial. To achieve his stated intention, the judge would have had to impose a sentence of nine years four months' imprisonment. The arithmetical point, which Mr Blunt understandably takes, is therefore correct as far as it goes.

18. We have to consider, however, whether that arithmetical error resulted in the judge passing a sentence for the drugs offences which was manifestly excessive. In our judgment, it did not.

As we have indicated, an appropriate sentence for these three drugs offences after trial would have been of the order of sixteen years. Giving full credit for the guilty pleas, that would have resulted in a sentence of about the same as the sentence of ten years six months' imprisonment which the learned judge imposed. We are, therefore, not persuaded that the sentencing in relation to the drugs offences was manifestly excessive in itself.

19. Turning to the firearms offences, Mr Blunt submits that the total term which was imposed to run consecutively to the sentences for the drugs offences was manifestly excessive. He submits that the sentence on count 6 (possession of ammunition without a firearm certificate) should have been ordered to run concurrently with the sentences on counts 4, 5 and 7 and not consecutively to them. In support of this submission, Mr Blunt argues that the presence of the ammunition, some of which had been loaded into the recovered firearms, was a feature of the offending which the judge had already taken into account in deciding that sentences of the maximum of ten years would have been appropriate after trial in relation to counts 4 and 5.

20. Considered in isolation, we do not find that to be a persuasive argument. The appellant was in possession of a deadly arsenal of weapons and live ammunition, the only purpose of which would be to kill, wound and terrorise in the pursuit of crime. Severe punishment was clearly necessary.

21. We must, however, consider the decision of this court in *Attorney General's Reference No 57 of 2009 (R v Ralphs)* [2010] 2 Cr App R(S) 30 and later cases including *R v Lewis* [2015] 1 Cr App R(S) 38. In *Ralphs* a constitution of this court (Lord Judge CJ, Rafferty and Henriques JJ) drew attention to the limited range of sentencing which is available when an offender is in possession of prohibited firearms and is convicted of offences which carry a minimum sentence of five years' imprisonment (in the absence of exceptional circumstances), but a maximum

sentence of only ten years. Where guilty pleas are entered, there is little room for case specific flexibility. At [25] of the judgment the court said this:

> "… Accordingly, ignoring exceptional circumstances (which do not arise for consideration in this case) the minimum appropriate custodial sentence was five years' imprisonment. Yet subject to orders for consecutive sentences, the maximum sentence was ten years' imprisonment. Although the minimum sentence is not subject to any discount for a guilty plea (*Jordan (Andrew James)* [2005] 2 Cr App R(S) 44 … the maximum sentence should normally be discounted."

At [26] the court went on to say:

> "… The question for decision is whether the restriction on the range of sentences can properly be circumvented in situations like this, where the offender was found in possession of more than one gun, or, and no less important, a combination of guns and appropriate ammunition for use with them which came into his possession on a single occasion and which were kept hidden and were found in the same hiding place, by an order for consecutive sentences."

In answering that question, the court noted that two well-established general principles of sentencing were engaged: first, the principle of totality; secondly, the principle that consecutive terms should not generally be imposed for offences which arose out of the same incident.

22. The submission of Her Majesty's Attorney General in *Ralphs* was that the total sentence which had been imposed for a number of firearms offences was unduly lenient and that sentences in double figures were necessary to mark the gravity of the offending. At [29] of the judgment, the court made this observation:

> "… In the context of a narrow range of available sentencing powers, and in particular the statutory maximum sentence, we are

> in reality being invited to circumvent the statutory maximum sentence on the basis that we believe it to be too low and to achieve our objective by disapplying well-understood sentencing principles of which Parliament must be deemed to have been aware when the statutory maximum and minimum sentence was fixed. Tempting as it is to do so, that is a step too far."

The problem, said the court, must be addressed by legislation.

23. It should be noted that the principle in *Ralphs* was expressed with reference to a case in which all the relevant firearms and ammunition were found in the same place and had been received by the offender at the same time. For that reason, the decision in *Ralphs* has not been followed in cases where there was the important factual distinction that firearms had been acquired at different times or stored in different locations: see, for example, *R v Gribben* [2014] 2 Cr App R(S) 28 and *R v Ullah* [2017] EWCA Crim 584. But where the principle in *Ralphs* applies on the facts, there is, as we see it, no justification for departing from it.

24. We note also that in the Sentencing Council's Definitive Guideline on Totality (at page 7) there is a statement of general principle that consecutive sentences will ordinarily be appropriate where one or more offences qualifies for a statutory minimum sentence and concurrent sentencing would improperly undermine that minimum. The statement is, however, immediately qualified by a note that it is not permissible to impose consecutive sentences for offences committed at the same time in order to evade the statutory maximum penalty. *Ralphs* is cited as authority for that proposition.

25. In the present case, all of the firearms and ammunition were stored in the boot of the Skoda. There is no evidence that the appellant had come into possession of any of them at a different time. The solitary cartridge which was found at the house is not the subject of a separate charge. In those circumstances it is, in our view, clear that the principle in *Ralphs* does cover the

circumstances of this offending. It may well be that the learned judge below was not addressed in detail about the implications of the decision in *Ralphs* and did not have the opportunity which we have had to give full consideration to it. Be that as it may, the combination of consecutive and concurrent sentences which he imposed totalling ten years and four months' imprisonment for the firearms offences exceeded the statutory maximum of ten years and offended against that principle.

26. The question remains whether the proper application of the principle, in a case where early guilty pleas were indicated, requires that the total sentence for a number of firearms offences cannot exceed six years eight months' imprisonment: that is, the statutory maximum of ten years, less full credit of one-third.

27. That point was not considered in detail in *Ralphs*, but we have already quoted the passage at [25] which indicates that, in general, credit should be given for a guilty plea. Furthermore, on the facts of *Ralphs* the court concluded that the level of credit given for the guilty pleas in that case was excessive and, accordingly, increased the sentence. Nonetheless, credit was given for the guilty pleas, albeit at a reduced level. The total sentence imposed by the court was eight years' imprisonment.

28. We conclude that where the principle in *Ralphs* applies, as it does here, the court should impose concurrent sentences which in the aggregate do not exceed the maximum of ten years' imprisonment, less such credit as may be appropriate in accordance with the sentencing guideline for any guilty pleas.

29. That is not a conclusion which we reach with any enthusiasm. It highlights the need, previously identified by this court, for Parliament to consider the issue. We have considered

carefully whether, in the circumstances of this case, any other approach could properly be taken. We have concluded, however, that any other approach would, in reality, be an improper attempt to circumvent the maximum sentence currently stipulated by Parliament.

30. In consequence, the submission that the sentence on count 6 should have been ordered to run concurrently rather than consecutively succeeds. For the reasons we have indicated, the total sentence for the firearms offences should be reduced from ten years four months' imprisonment to six years eight months' imprisonment. When that is added to the sentences which we have upheld for the drugs offences, the total sentence to be served by the appellant must be reduced to seventeen years two months' imprisonment.

31. We, therefore, allow the appeal against sentence to this extent. We quash the sentences imposed on counts 4, 5 and 6. We substitute concurrent sentences of six years eight months' imprisonment on count 4, six years eight months' imprisonment on count 5 and three years' imprisonment on count 6. All other aspects of the sentencing remain as before. Thus, the total sentence becomes, as we have indicated, one of seventeen years two months' imprisonment.

32. To that extent the appeal succeeds.

_____

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk