IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202002432/A1

NCN: [2020] EWCA Crim 1728

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 4 December 2020

Before:

LORD JUSTICE DAVIS

MRS JUSTICE McGOWAN DBE

MR JUSTICE FOXTON

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 OF THE CRIMINAL JUSTICE ACT 1988

REGINA

V

HANNAH JANE GAVES

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MS K BROOME appeared on behalf of the Attorney General.

MR C THOMAS appeared on behalf of the Crown.

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J U D G M E N T

Introduction

LORD JUSTICE DAVIS:

1. This is an application on behalf of the Attorney General, seeking leave to refer a sentence on the ground that it is unduly lenient. We grant leave.
2. The offender in question is a woman called Hannah Gaves. She is 27 years old, having been born on 12 April 1935. She was 25 years old and a prison officer at the time of the offence. On 29 July 2020, at her first appearance in the Magistrates' Court, the offender had pleaded guilty to three charges. The first was possession of cocaine with intent to supply, the second was possession of cannabis with intent to supply and the third was attempting to convey a listed item, namely tobacco, into prison contrary to section 40 of the Prison Act 1952. She was committed to the Crown Court for sentence. In due course, on 28 August 2020, she was sentenced by the Recorder of Winchester to a term of 3 years' imprisonment. Various ancillary orders were also made.

Background facts

3. The offender had been serving as a prison officer at HMP Erlestoke. She was still in her probationary period at the time of the offending, although she had by then been serving some 11 months and was close to concluding her period of probation. More senior members of staff had begun to have suspicions about her behaviour. It was noted, for example, that despite being a new member of staff she did not appear to be having any problems with the prisoners. Further, the fact that prohibited items were being brought into the prison had been brought to the attention of senior staff by another prisoner.
4. An investigation was commenced. During this investigation CCTV footage was reviewed. This showed the offender spending a considerable period of time in a cell with a particular prisoner. At all events a decision was made to stop and search the offender when she next attended for work, on 27 January 2019. She attended for her shift that day shortly after 7.00 am. She was told that she was suspected of bringing prohibited items into prison and was asked if she had anything prohibited on her. She answered: "Yes, weed and tobacco". She was asked who the intended recipient of the items was but she refused to say. She then started to cry. The police were called and the offender was arrested. It then appeared that when she had said that she had been carrying weed and tobacco that was not the whole truth: because when she was searched, not only was a quantity of herbal cannabis in a black bag and five packets of tobacco found in her handbag but in addition, and hidden in her underwear, was a lump of a white substance wrapped in clingfilm. That was later tested and found to be just over 6 grams of crack cocaine at 81% purity.
5. She was interviewed. She provided a prepared statement. She stated that she knew that she was taking cannabis into prison, had been fearful and felt that she had no option to refuse. She stated that she believed that the person who had asked her to take the items into prison would hurt her if she named that person. The person who had arranged this knew where she lived and had contacted her on social media. She stated that she did not know the exact nature of the substance which she was taking in her underwear but was told to take it in like that. She answered "no comment" to questions asked in interview. It seems that she was crying throughout the interview and at times found it difficult to answer questions in any event. She was charged on 25 January 2020 with the three offences which we have mentioned.

The sentencing process

6. Unsurprisingly, given that she was being employed as a prison officer, the offender had no previous convictions or cautions of any kind. The indications are that she comes from a thoroughly respectable background. Furthermore, there were positive character references supplied in support of her by various individuals.
7. For the purposes of the Definitive Guideline relating to Drug Offences issued by the Sentencing Council, it was common ground before the judge that this matter was to be categorised by reference to count 1 as category 3A. This unquestionably was the case of a leading role because one of the specified matters for that is "where a defendant abuses a position of trust or responsibility, for example, a prison employee ...". Furthermore, it was category 3 because that specifically includes, irrespective of quantity, an offence of supplying of drugs in prison by a prison employee. By reference to category 3A, therefore, the starting point under the Guideline is 8 years and 6 months' custody, with a category range of 6 years 6 months to 10 years' custody.
8. The matter was debated before the judge. He noted the background facts. He accepted that this was to be categorised as category 3A offending for the purposes of the Guideline.
9. There had, in the course of debate before the judge, also been cited two particular authorities which have also been cited to us. One was the case of R v McDade [2010] EWCA Crim 249. This, it is to be stressed, is a case which antedates the relevant Sentencing Guideline. But some general remarks made in that case are worth repeating now. What, amongst other things, was said by the Court on that occasion included the following:

> "3. Contrary to popular belief the majority of prisoners want to complete their sentences as quietly and safely as possible. The minority of aggressive, dominant offenders want to continue inside prison the behaviour they exhibited when at large. The means they need to achieve this end include drugs and mobile telephones, each a form of currency within a prison. With the power and influence these things can bring they seek to disrupt the lives of others within the prison -- inmates and prison officers alike -- for their own advantage.
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> 4. The easiest way to acquire these items is to procure the co-operation of a prison officer by whatever means he or she can be suborned, intimidated or otherwise corrupted, and this is what happened in these two appeals.
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> 5. A corrupt prison officer is much better placed than an outsider to find ways of defeating a prison security system. The effect of this activity is twofold. First, the discipline and order of the prison is undermined and with it the safety and human rights of the inmates. One of the three key objectives of the prison service is stated in these terms: 'Providing safe and well-ordered establishments in

> which we treat prisoners humanely, decently and lawfully.' Secondly, those prison officers who are true to the trust imposed in them, and resist such attempts to corrupt them will suffer. They will come under suspicion themselves. They will be subject to closer scrutiny and checks. They will also naturally resent the rewards their corrupt colleagues enjoy.
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> 6. For both these reasons, therefore, the deterrent function of sentencing ... plays a prominent part in sentencing such officers when they appear in court for offences of this nature."

10. Those considerations are to borne in mind in this case: although we accept that it is precisely those considerations which doubtless caused offending of this kind to be categorised in the way that it is for the purposes of the Definitive Guideline relating to drug offences. The other case cited to the judge, and as also cited to us, is the case of R v Fulcher [2020] EWCA Crim 1102. That also stresses the seriousness of prison officers acting in this kind of way.
11. The judge, in his sentencing remarks, after referring to the Guideline, went on to say this:

"I am able to start at the bottom of that range, which I am going to convert into months, all right? So, the bottom of the range is 6½ years. That is 78 months. Then I go on to look at what I can do to reduce that figure further. I do bear in mind the fact that you were on probation, that there is the fact that your responsibility therefore is in some way diminished and that I feel that we can reduce that period of 78 months down 66 months, against which I then bring in the other features of the impact of the COVID and the particular references that I have from those who employ you and who know you. So I am able to reduce that further to 54 months, and we are dealing now just with charge 1, and that is where I feel that is as far as I can go, pressurising as much as possible. Then of course I take one third off that to mark your plea of guilty at the very first opportunity. So the 54 months is 4½ years. One third off that brings it down to 36 months or 3 years. That is as far as I can go. It is very sad. It makes me feel very unhappy to have to do this in your case, but you would understand that really that is as lenient as a judge can be in these circumstances. I firmly believe I am not being unduly lenient, but at the same time it is a grave sentence to have to serve, 3 years in Her Majesty's prison. You know only too well what that means for you."

Disposal

12. We have to say that we are rather surprised at the apparently explicit determination of this very experienced judge to take the course that he did in reaching the ultimate sentence that he reached. Not only did the judge go almost immediately to the very bottom of the range indicated as available by the Guideline, but, having done that, he then proceeded to go significantly below that, factoring in for that purpose (before giving credit for plea) what one would have thought would have been the mitigating factors already used in deciding where within the Guideline range he should end up.
13. In the present case, as we have said, under the Guideline, the starting point here was one of eight-and-a-half years. The sentence then had to be increased somewhat because here there were three offences, not one. Then, of course, there had to be deducted the

appropriate allowance for the various mitigating factors. But even there, those mitigating factors were not of the strongest. True it is that the offender was of previous good character. But, as we have said, she would have been, that is why she was able to take the job in the first place. Her trusted position thus would make her services so attractive to those seeking to smuggle illicit items into prison. Second, although she was relatively young it is not as if she was in her teens or anything like that. Third, although true it is that, and as the judge emphasised, she was a probationary officer, the fact is that she had completed some 11 months of service and indeed had nearly completed her entire probation period.

14. It may be the case that she had not engaged in this activity for any financial gain. But assuming it to be a fact (and as was accepted below) that, as she said, she had been coerced or pressurised into doing what she did, then that too, in this particular context, is a matter of no real weight. Such a fact provides very limited mitigation even in the context of those who are not prison officers who are coerced into bringing drugs in to prison - see R v Reynolds [2017] 1 Cr App R(S) 42, at paragraph 20. That is even more so in the case of a prison officer. Prison officers know what their duties and responsibilities are. If threats are made to them with a view to bringing items into prison, they know that their responsibility is to report that threat and they know that their responsibility is to not to give way to that threat. Accordingly, while such a factor may operate, where accepted, to displace the otherwise aggravating factor of acting for the purposes of financial gain and may have some bearing on the role played it ordinarily cannot be permitted to have any greater impact than that.
15. Further, as to the judge's allowance for the Covid-19 situation prevailing in prisons, that no doubt was a factor which could be taken into account - see R v Manning [2020] EWCA Crim 592 and the relevant guidance that has been issued. It is difficult, however, to see how it can properly, under the guidance, be used in quite so blunt a way as the judge used it here in driving the sentence down so significantly.
16. Overall, and with all respect to the judge, we take the view that this sentence was not simply lenient it was unduly lenient; and this Court must interfere. The importance of deterrent sentencing in this context, as reflected by the categorisations given in the Definitive Guideline, must be upheld. In our judgment, there was no sufficient justification for not only going to the very bottom of the Guideline but then going significantly below it, before credit was given for the guilty plea. Given all the circumstances, we think that a figure, before credit for plea, of around 8 years might well have been appropriate in this case. However, we do wish, to the extent permissible, to respect the judge's evident desire for leniency in this case; and Ms Broome, appearing for the Attorney General today, did not seek to suggest a figure higher than 7 years as the appropriate figure before credit for plea. In the circumstances of this particular case we are prepared to accept that as the appropriate figure. Giving, then, full credit of one-third the resulting sentence is, on our calculation, one of 4 years 8 months' imprisonment.

Conclusion

17. Accordingly, we quash the sentence on count 1 of the indictment as imposed by the judge and substitute a sentence of 4 years and 8 months imprisonment. To that extent, this Reference is allowed.

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

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