NCN: [2021] EWCA Crim 1249

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202100662/A3

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 6 August 2021

Before:

LADY JUSTICE CARR DBE
MR JUSTICE GOSS
MR JUSTICE KNOWLES

REGINA
V
VLADIMIR MURRJA

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MR M BASHIR appeared on behalf of the Applicant

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**J U D G M E N T**

LADY JUSTICE CARR:

Introduction

This is a renewed application by the applicant for leave to appeal against sentence. The applicant is an Albanian male, now 40 years of age. He received an overall custodial sentence of five years following his guilty pleas to two offences of producing a controlled drug of class B, contrary to section 4(2)(a) of the Misuse of Drugs Act 1971. On 4 December 2020 in the Crown Court at Sheffield the applicant changed his plea to guilty for the drug offence on indictment T20200480 (offence 2). On 29 December 2020, having pleaded guilty before the magistrates, the applicant was committed for sentence pursuant to section 14 of the Sentencing Act 2020 in respect of the offence on committal S20210011 (offence 1).

On 15 February 2021 Mr Recorder Kirtley ("the Judge") sentenced the applicant to 32 months' imprisonment for offence 2 and 28 months' imprisonment for offence 1. The sentences were ordered to run consecutively to each other.

The facts

The facts are set out in detail in the Criminal Appeal Office summary, the full contents of which we do not need to repeat on this renewed application. In very brief summary, as to offence 1, on 24 February 2020 the owner of a property in Sheffield attended to conduct a building check. The property was split into several units which he rented out, one of which was rented to a Najeed Khalid. An inspection of that unit led to the discovery of a cannabis set up. Police officers were notified. Mr Khalid attended and was spoken to. He said he had sublet the unit to a male he knew as Stefan Succi.

Inside the property there were found six rooms divided by wooden partitions. One room was a bedroom which contained, amongst other things, a notebook with handwritten notes and an i-Phone. The five other rooms were grow rooms containing cannabis plants and follow-on plants, plastic sheeting, lighting, canopies, ducting, extraction fans, water containers and in the corridors and toilets there was liquid feed, foil and cardboard boxes.

DNA was recovered from cigarettes found in a number of the rooms. At the time this did not match any DNA held on the police database but it did match DNA recovered from a cannabis production discovered in the West Midlands area in 2017. Fingerprints were also found at the property which were subsequently matched to the applicant following his arrest in July 2021.

The estimated yield for the 315 cannabis plants found for the purpose of offence 1 was around 33.1 kilograms, with a value of between £132,000 and £165,000 (if sold in kilogram weights) and a value of between £153,500-odd and £260,000-odd (if sold in ounces). If sold in single gram-size deals the value would be around £330,000. The estimated yield of the follow-on crop would have been 26.8 kilograms of cannabis, with kilogram sales values of between £108,000 and £135,000; ounces values between £124,000-odd and £210,000-odd; and the value of gram-size deals of a value of at least £267,000. The maximum potential benefit was an annual yield, if sold in gram-size deals, of a little over £929,000.

As for offence 2, on 22 July 2020 a police officer attended an address in Wheatley following reports of a strong smell of cannabis. The applicant was found at the rear of the property.

He cooperated and allowed the officer to enter. A strong smell of cannabis was evident. The applicant confirmed that he lived in the property alone. The modus operandi was similar to the previous set up at the property in Sheffield, albeit that the overall level of cultivation was smaller due to the smaller size of the property. The electricity to the property had been bypassed. The tenancy agreement was in the name of a different person but it was dated 13 March 2020, just over two weeks after the grow at the property in Sheffield had been discovered.

In the Wheatley property there were 67 established plants with an estimated yield of 7.035 kilograms. The maximum value, dependent on the size of sale amounts, was estimated at a little over £70,000. The follow-on crop was 146 plants with an estimated yield of 15.33 kilograms and a maximum potential of a little over £150,000.

The applicant was of previous good character. He originally pleaded guilty to offence 2 on a basis which stated amongst other things that he had been homeless at the time of committing the offence and had been asked to water and tend the plants. He received no financial gain from the activities; rather he had acted as a "gardener" at the instruction of others at both factories. The basis of plea was not accepted by the Crown, in particular it was not accepted that the applicant was homeless.

The applicant withdrew his basis of plea when it came to the day of sentence. Counsel however was able to advance certain matters advanced in the basis of plea to support the submission that the applicant's role was only significant and nothing more; he was a gardener and had a lack of financial advantage.

The sentence

The Judge said that the applicant would be sentenced for two separate cannabis cultivation operations. In respect of each he considered the applicant to have had both an operational function and an awareness and knowledge of the scale of the operation. This was significant role Category 2 offending in relation to class B cultivation for the purpose of considering the Sentencing Council Guideline for Drugs Offences ("the Drugs Guideline"). The Judge said that he took into account the matters that had been raised on the applicant's behalf, including that he was working only for accommodation and victuals, rather than having a direct financial gain, and that he had cooperated when the circumstances underlying offence 2 were uncovered. He had no previous convictions here or in Albania. He had a family and relationship responsibilities in this country. The Judge said he bore in mind the effect of the current Covid circumstances on prison conditions and also the length of the periods during which the applicant accepted his responsibility for the two offences.

With regard to offence 1, having taken all matters into account but considering the seriousness of the cultivation, its size, extent and those matters relied on by the Crown, the term would be 42 months' imprisonment. After one-third credit for guilty plea, that produced a term of 28 months' imprisonment.

In relation to offence 2, that was a reiteration of the applicant's behaviour on offence 1 but in a different location. Taking all matters into account, the sentence after trial was four years' imprisonment. After 20% credit for guilty plea, that produced a sentence of three years and two months' imprisonment. The two matters would run consecutively but, having

regard to totality, the Judge said that the appropriate total sentence was five years' imprisonment.. Accordingly he adjusted the sentence of three years and two months on offence 2 downwards to one of 32 months' imprisonment only.

Grounds of appeal

Mr Bashir, who has appeared pro bono for the applicant on this renewed application and for whose submissions we express our gratitude, advances two headline grounds of appeal.

The first relates to the applicant's withdrawal of his basis of plea. In his written grounds, Mr Bashir submitted that the applicant was incorrectly advised to withdraw his basis of plea and incorrectly advised that to do so would not make a material difference to sentence. The relevant discussion with counsel took place without an interpreter. The applicant could not have understood the complicated consequences said to have arisen out of the potential maintaining or withdrawal of the plea. There is a handwritten note from the applicant, which we have read, stating that he did not fully understand what a Newton trial was. This is said to be evidenced by the fact that submissions in mitigation were then made by reference to matters which the Crown had not accepted. It was submitted that the consequences of this and the subsequent attempt to rely on facts in the (withdrawn) basis of plea caused the sentencing exercise carried out by the Judge to commence on a false premise. The applicant asserted in mitigation that he was a gardener but there was no evidence to support that. Thus the Judge was entitled to reject it and so incorrectly analysed the applicant's role within the context of the offences as a whole.

In his oral submissions, Mr Bashir has taken a somewhat different tack on his first ground. He

argues that, one way or another, there should have been a Newton trial to resolve the disputes between the applicant and the Crown as to the issues raised in the basis of plea. It is suggested by Mr Bashir that that course would have resulted in a finding of lesser role in favour of the applicant.

The second ground of appeal relates to the principle of totality. It is said that the Judge did not place proper weight on the Totality Guideline. It is submitted, that had the Judge correctly considered the relevant guidance and the case law such as R v Manning [2020] EWCA Crim 592, he would not have passed consecutive sentences. Doing so led the Judge to over-emphasize the aggravating factors.

Discussion and analysis

Like the Judge we do not consider that a pre-sentence report was necessary in this case.

As the Single Judge identified when refusing leave, the applicant had plainly gone from one factory to another after the first had been discovered and closed. Both factories were producing substantial quantities of cannabis and it was entirely permissible to place both operations within Category 2 of the Drugs Guideline. There is no arguable complaint against that characterisation.

We turn then to the suggestion that there should have been a Newton hearing which would have resulted in findings favourable to the applicant. It is entirely unclear to us how that submission can be made out or assist the applicant. There was a factual dispute which has not been resolved. It is entirely speculative as to what the outcome of any Newton

hearing would have been.

There is, in our judgment, in any event, no arguable ground of appeal on the basis that the applicant's withdrawal of the basis prevented the Judge from being able to contextualise the offending correctly. The Judge expressly accepted the submission made for the applicant that his involvement at both factories was limited to cultivation of the plants in return for board and lodging, as opposed to having a direct financial gain. Even as a gardener he had an operational role and awareness and an understanding of the scale of the operation. Indeed, until today it was always accepted that even on the full basis of plea it would still be Category 2 and significant role offending.

As for totality, the applicant was connected to two different cannabis factories giving rise to two separate offences of cannabis production on two separate occasions. Consecutive sentences were fully justified, provided that due heed was paid to totality. In our judgment the Judge paid such heed, reducing the final sentence by six months accordingly. This was not therefore a case of the Judge simply adding together notional single sentences or failing to address the offending behaviour, together with the factors personal to the applicant as a whole. He carried out a fact-sensitive and personalised sentencing exercise by reference to the correct principles. The suggestion that he failed to consider the effect of the pandemic on prison conditions is not understood, for it is something to which he expressly referred.

Standing back, this was a firm sentence overall, but it cannot be said that an overall sentence of five years' custody was manifestly excessive or even arguably so. For these reasons, the

application for leave is refused.

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

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