IN THE COURT OF APPEAL
CRIMINAL DIVISION

Neutral Citation Number:
[2023] EWCA Crim 1195

Case No: 2023/00569/A3

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 4th October 2023

B e f o r e:

LORD JUSTICE STUART-SMITH

MR JUSTICE CHOUDHURY

THE RECORDER OF NOTTINGHAM
Her Honour Judge Shant KC
(Sitting as a Judge of the Court of Appeal Criminal Divisions)

R E X

- v -

RAYON WHEATLEY

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Miss E Heath appeared on behalf of the Appellant

J U D G M E N T

Wednesday 4th October 2023

LORD JUSTICE STUART-SMITH: I shall ask Mr Justice Choudhury to give the judgment of the court.

MR JUSTICE CHOUDHURY:

1. On 3rd September 2021, in the Crown Court at Woolwich, the appellant (then aged 30) pleaded guilty to the following offences: count 1, conspiracy to supply a Class A drug (cocaine); count 2, conspiracy to supply a Class B drug (cannabis); and count 3, possessing criminal property.

2. Following a lengthy delay, the appellant was sentenced on 9th February 2023 by Mr Recorder Kovats KC to 63 months' imprisonment on count 1, 36 months' imprisonment on count 2, and 14 months' imprisonment on count 3. All of the sentences were ordered to run concurrently with each other.

3. The appellant appeals against sentence with the leave of the single judge.

4. The facts may be briefly summarised as follows. Between 1st May 2021 and 5th August 2021 the appellant conspired with others to supply cocaine and cannabis.

5. In the spring of that year a mobile telephone number ending 552 was identified by police officers as a drugs line ("the Rayon Line") offering to supply cocaine and cannabis to users across South East London. Investigation revealed the appellant to be the person topping up the pay-as-you-go account associated with that number. Further investigations revealed the mobile number ending 303 was registered to the appellant. Communication data for the 552 phone showed that the handsets using these two numbers were in the same place throughout

the period, and that two other numbers, ending 507 and 461, were at the same place as the 303 number.

6. Messages sent using the 552 number were consistent with drug dealing. Further analysis of the call data revealed that another man, Dwayne Parker, was acting as a runner for the Rayon Line.

7. Search warrants executed at the appellant's address on 5th August 2021 produced several phones, the contents of which were consistent with use in a drugs line; business cards for J & G Food Services, containing numbers that matched two of the drugs' lines numbers; and £10,060 in cash.

8. A search of Parker's address produced various items of drug paraphernalia and a further mobile phone containing both drug line numbers appearing on the business cards. Quantities of drugs were found in his bedroom, as well as on his person when he was stopped and arrested.

9. Two others were identified in connection with the drugs lines. However, no evidence was offered against them in respect of the conspiracy.

10. Like the appellant, Parker pleaded guilty to the conspiracies and to the possession of criminal property.

11. The Recorder rejected the Crown's contention that the appellant had played a leading role in the conspiracy. He stated as follows:

"The Crown's position is that [the appellant] was in control of

the Rayon line, and he was the one directing the offer for sale and the sale of the drugs in question. Counsel for [the appellant], Miss Heath, does not accept that he was in sole possession of that phone, but there is no evidence of anybody else controlling that line. And I am satisfied to the criminal standard that the phone – as I said, nicknamed the Rayon line – was in fact controlled by [the appellant] at all material times.

In the light of the large quantity of drugs messages on the line, it is clear that there was a significant amount of drug dealing in both class A and class B drugs. However, Miss Heath, on behalf of [the appellant], says that the evidence from the telephone download shows that these were offers of, effectively, sales to users, retail sales. There was no evidence on the phone of buying and selling of wholesale amounts of drugs. That is not disputed by Miss Khan on behalf of the Crown.

My reading of the sentencing guidelines is that when it refers under leading role to directing or organising buying and selling on a commercial scale, what the guideline has in mind by the phrase 'commercial scale' is wholesale quantities of drugs, as opposed to quantities suitable for end use. If my understanding is correct, then it follows that on the evidence available, while [the appellant] was indeed directing or organising the buying and selling of drugs, this was not on a commercial scale within the meaning of that guideline.

The Crown say that [the appellant] was also in a leading role because he had substantial links to and influence on others in a chain. They point to the involvement of Mr Parker as one of the runners of the Rayon line drugs business. Mr Parker indeed himself accepts that he was a runner in the Rayon line drugs business, but there is no evidence as to how many other people were involved. And where the guideline talks about substantial links to an influence on others in the chain, in my judgment, more is required than is in this case.

There is no evidence that [the appellant] was close to the original source of drugs. There is evidence of substantial financial or other advantage. There is reference in the evidence to business cards, but I am not satisfied that those business cards were being used as a cover for the selling of drugs. While it is possible that they were, I cannot be satisfied to the criminal standard that that was the case. And there was no suggestion that [the appellant] was abusing a position of trust or responsibility.

On the other hand, on any reading of the evidence, [the appellant] did have operational or management function within a chain. He was involving others within the operation, and he did have himself an expectation of significant financial or other advantage, not limited to meeting any habit of his own. He also

> had an awareness and understanding of the scale of the operation.
>
> I am therefore satisfied that on both count 1 and count 2, [the applicant] falls to be sentenced on the basis of significant role. However, the evidence in this case – and it is a conspiracy that lasts three months, it involves both class A and class B, and there is extensive telephone evidence – all that means that it falls at the top end of significant role, in my judgment."

12. It was agreed below that harm fell into category 3 of the relevant sentencing guidelines. The Recorder took account of the serious aggravating factor, namely that in September 2017 the appellant was sentenced to three years' imprisonment for possession of Class A drugs with intent to supply, and to a concurrent term of six months' imprisonment for a similar offence relating to Class B drugs.

13. As for mitigation, although there was some evidence of good conduct in custody, the Recorder found that there were "no significant mitigating features here".

14. It is also relevant to mention that the Recorder rejected a contention put forward by the appellant that he had engaged in this criminal conduct in order to discharge a drugs debt.

15. The Recorder then proceeded to pass sentence as follows:

> "Applying the guidelines in this case, in my judgment, falling at the top end of the scale for significant role, the sentence I would have passed on [the appellant] for a contested trial on count 1 would be 84 months. I will reduce that by 25 per cent to 63 months. So count 1, 63 months' imprisonment. For count 2, that is conspiracy to supply Class B, as I have said, this will be a concurrent sentence. The sentence would have been one of four years, so 48 months, with 25 per cent credit. That is 36 months concurrent."

The Grounds of Appeal

16. There are two grounds of appeal. First, it is contended that the Recorder erred in concluding that the starting point for count 2 was 48 months' custody; and second, it is said that the Recorder erred in not taking account of the factors reflecting personal mitigation, including the evidence of the appellant's conduct in prison.

17. Miss Heath, who appears on behalf of the appellant as she did in the court below, submits that the Recorder's conclusion that the appellant played a significant, as opposed to a leading role warranted a starting point of one year's custody, with a range of 26 weeks to three years, and that taking a starting point of four years for count 2 clearly resulted in a manifestly excessive sentence. She further submits that in respect of mitigation there was evidence that showed the steps being taken to address addiction and the appellant's general good conduct, and that these matters ought to have been taken into account in applying a reduction from the starting point.

18. Miss Heath fairly acknowledged the difficulties in advancing the argument in respect of count 2, given that there is no challenge to the application of the guidelines in respect of count 1 and the fact that the appellant's role in the conspiracy was significant.

19. Accordingly, the starting point in respect of count 1 is four years and six months' custody, with a range of three years six months to seven years (84 months). It was entirely consistent with the Recorder's finding that the conduct here fell at the upper end of that range, to take as the sentence of 84 months' custody as the notional sentence before any reduction for plea and mitigation.

20. We accept that in respect of count 2 the Recorder appears to have incorrectly applied a different starting point and range that that which would have been appropriate in light of the finding that the appellant's role was "significant" rather than "leading".

21. However, given that the sentence on count 2 was ordered to run concurrently with the far longer sentence on count 1, the error in that regard did not render the overall sentence incorrect.

22. It is right to note that when dealing with multiple counts, a proper application of the totality principles means that the sentence may need to be increased in order to reflect the overall criminality involved. This may be achieved by uplifting the sentence on the lead count, or by aggravating each of the individual concurrent sentences. In such circumstances the severity of the sentence for the lesser offence may influence the level of uplift to be applied to the lead sentence. However, the Recorder's sentencing remarks do not suggest that he did anything other than to impose a separate sentence on each count. Thus, the Recorder began by stating that the sentence he would have passed in respect of count 1 after a trial would be one of 84 months' custody which, after reduction for the guilty plea (25 per cent), came to 63 months' custody. He then proceeded separately to sentence for count 2. He stated at the outset that the sentence would be concurrent. There is nothing to suggest that the Recorder considered, as he ought to have then done, whether any uplift or any adjustment to the sentence on count 1 was necessary in order to reflect the appellant's overall criminality. The failure to do so means that the error in respect of count 2 has not resulted in a longer sentence than might otherwise have been the case.

23. As for mitigation, this was a case where the appellant had engaged in similar criminal conduct in recent years, when aged 26. The Recorder correctly treated that as a serious aggravating factor. Whilst evidence of "determination and/or demonstration of steps having been taken to address addiction or offending behaviour" could be a factor reflecting personal mitigation, the Recorder was entitled to regard that evidence as insufficient to reduce the sentence significantly. The evidence from the Peabody Trust as to the appellant's conduct

appears to relate to a period before the current offending, and the evidence of engagement with prison programmes is somewhat limited. Such mitigation could, at most, only have resulted in a very small reduction overall, which, had the totality principles been properly applied, would have been likely to have been offset by an increase in the overall sentence to reflect the overall criminality of the multiple offending involved.

24. Our conclusion, therefore, is that the sentence cannot be said to be manifestly excessive. Accordingly, for these reasons, this appeal against sentence is dismissed.

25. Before leaving the matter we deal with a small point which has been brought to our attention by the Criminal Appeal Office, which is that the appellant's offending took place during the operational period of a suspended sentence. On 12th April 2021, in the Crown Court at Woolwich, following his conviction for the offence of dangerous driving, the appellant was sentenced to 12 months' imprisonment, suspended for 24 months. The index offences were committed between May and August 2021. The suspended sentence is not referred to in the sentencing remarks and does not appear to have been brought to the Recorder's attention.

26. In our judgment, the appropriate course at this stage, bearing in mind that this appellate court must not impose a sentence that would result in the appellant being dealt with more severely than he had been in the court below, is simply to activate the suspended sentence as from 9th February 2023, such sentence to run concurrently with the other sentences imposed. Thus, the overall sentence of 63 months' imprisonment remains unaffected.

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