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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 1252



No. 202300471 A4

Royal Courts of Justice

Wednesday, 11 October 2023

Before:

LORD JUSTICE WARBY
MR JUSTICE MURRAY
HIS HONOUR JUDGE LEONARD KC

REX
v
JOHN PAUL BURGON

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Mr B. Thomas appeared on behalf of the Appellant.
The Crown were not represented.

J U D G M E N T

LORD JUSTICE WARBY:

- 1 On 30 January 2023, in the Crown Court at Leeds, John Paul Burgon was sentenced to a total of seven years and four months' imprisonment, having earlier pleaded guilty to two drug offences, one of dangerous driving and one of perverting the course of justice. He was disqualified from driving for 68 months. He now appeals against sentence with the leave of the single judge.

The Facts

- 2 The offences we have mentioned were the subject of three indictments.
- 3 On the first indictment (case T20217672), the appellant faced a single count of participation in a conspiracy to supply a class A drug between 1 May and 1 October 2020. The operation centred on drug dealing to a number of flats and apartments in a private block of flats at Armley. It employed two dealing lines. Customers would place orders by calling whichever line was active at the time. The holder of the phone would then attend and supply the drugs.
- 4 The leader of the operation was Marcus Thomas, who was known to police as a drug dealer. In June 2020 he and his sister were stopped by police in possession of over £6,000 in cash and a phone which had been used to send out bulk messages soliciting drug purchases. On 15 July 2020, another of those who became co-defendants of the appellant, one Leanne Ridings, was stopped in possession of cash contaminated with diamorphine and a phone linked to one of the dealer lines. Ridings's role, it emerged, was to deliver drugs. The phone records showed that another co-defendant, Michael Sharlotte, had performed the same role until the date of Ridings's arrest.
- 5 The appellant was stopped by police and arrested on 29 September 2020 when he was a passenger in a vehicle driven by Marcus Thomas and was found to be in possession of heroin and crack cocaine. The appellant was also holding the SIM card for the dealer line. That SIM card had been used in one of the appellant's mobile telephones for the previous six days.
- 6 The nature and scale of the operation emerged from these various arrests and seizures of money, drugs and mobile telephones. The evidence showed that the conspirators were dealing both heroin and cocaine. The dealer lines had received over 57,000 messages during the conspiracy period. Expert evidence calculated that if one in three of these had resulted in a supply of three wraps equating to £20, the quantity of drugs sold in the conspiracy period would have been over five kilograms, yielding just over £360,000 for the conspirators as a group.
- 7 On the second indictment (case T20227257) the appellant faced a single count of supplying a class A drug to another on 10 August 2021, the drug on this occasion being crack cocaine. That charge arose from a test purchase by a police officer deployed in the Harehills area of Leeds. The officer asked a female unknown to him where he could buy "rock" or "white". The woman made a call, an order was placed, and shortly afterwards the appellant arrived in a hire car and supplied the officer with two wraps of crack cocaine.
- 8 In interview, the appellant made no comment. But he pleaded guilty to the second drug offence at the plea and trial preparation hearing for that offence. Shortly afterwards he entered a guilty plea to the first indictment also. His pleas were on the basis, not challenged by the prosecution, that he had turned to drink and drugs in 2020 when the pandemic forced his employer out of business and he lost his job as a scaffolder and had family issues. He had accumulated a drugs debt, which resulted in others subjecting him to mental pressure

and threats. It was these matters that drove him to agree, in September 2020, to help others in the supply of drugs to pay off his drug debt. He had not been involved in the supply of drugs before that time. Some of his debt remained outstanding after his arrest in late September. He was asked to, and he did, commit the offence on the second indictment in order to clear the outstanding amount.

- 9 Case T20227167, the third indictment, was concerned with events some months later. Just after 8 pm on 25 October 2021 the appellant was driving a black Audi A1 along South Farm Road when he was observed by officers who were in an unmarked police vehicle. He was turning right onto Coldcotes Circus, against the one-way system. He drove past the officers, waving at them as he did, going the wrong way down the road. When the officers pursued him the appellant drove on to Oak Tree Place where he collided with two parked vehicles in a driveway, causing some £2,200 worth of damage. He then fled the scene on foot. This gave rise to the charge of dangerous driving.
- 10 The charge of perverting the course of justice arose from what happened the following day. The appellant called West Yorkshire Police and made a false report that his car had been stolen. He gave the details of the Audi A1, claiming that he had left it parked on the street at 11 pm on 22 October 2021 before going to a house party. He said his keys had also been stolen. Unfortunately for him, not only had the officers seen him at the wheel of the car the previous day, he had also left behind a bank card with his name on it and a Nokia mobile phone belonging to him as he fled the scene of the crash.
- 11 Interviewed by police on 9 December 2021, the appellant admitted driving dangerously and making a false report of theft to the police. He entered an early guilty plea, meriting full credit.

Antecedents and other sentencing materials

- 12 The appellant was aged 40 at the date of sentence. He had 13 previous convictions for 21 offences between 3 October 2003 and May 2010. One of these was for simple possession of MDMA for which he had received a fine. That was in 2004. He had no convictions or cautions in the decade preceding the offending on the first indictment. There was no pre-sentence report, and we are satisfied that none was required. A number of character references were submitted on the appellant's behalf, setting out his personal circumstances, including the breakdown of his marriage and other matters of personal mitigation. There was also a letter from the appellant explaining how he came to offend, and expressing his remorse.

Sentencing Remarks

- 13 His Honour Judge Phillips KC began his sentencing remarks in respect of this defendant by referring to the material we have just mentioned and stating that he had taken it into account. The judge referred to the sad failure of the appellant's marriage, and his subsequent loss of self-control. He noted that there was extensive evidence over the course of time of the appellant's good character, his good conduct whilst on remand and his efforts to turn his life around. These included documented efforts to address his addiction and the wish to start a new relationship.
- 14 Dealing with the first indictment the judge accepted that the background was as set out in the appellant's basis of plea. He proceeded on the footing of the defence contention that the appellant's role had been that of a street dealer in the later part of the conspiracy for a period of some six days. Addressing a dispute over the categorisation of the appellant's role the judge concluded that the offending fell *"at the top of the lesser role and there are elements*

of significant role that cannot be ignored in this case". On that basis, the sentence after trial would have been one of 54 months. He said that the appellant's guilty plea merited a reduction of *"at least 20 per cent"*. The sentence after credit for plea was one of 44 months.

- 15 On the second indictment, the appellant's role involved a single incident of supply. He was not alleged to have been involved in the wider conspiracy of which that episode formed part. There was, however, again a dispute about the categorisation of his role. The appellant's case was that his role was limited, under supervision, his purpose being to pay off the debt. The prosecution case was that the appellant had an operational function indicated by his hiring a vehicle to deal drugs and his arriving swiftly on the scene following the call. The judge said:

"I am satisfied on the evidence that that is an appropriate assessment that is sustained by the evidence."

He thus identified a starting point of 54 months, which he reduced to 44 months, before a further reduction to 40 months to reflect totality. Allowing a 25 per cent reduction for the guilty plea the judge arrived at a sentence of 30 months consecutive to the sentence on the first indictment.

- 16 On the third indictment, for the driving, the judge identified a sentence of 12 months after a trial which he reduced to eight months to reflect the early guilty plea. The charge of perverting the course of justice was serious, he said, but on this occasion it was short-lived, no one else was implicated, it was unlikely to succeed and the appellant did not escape liability. After trial the sentence would have been nine months. That came down to six months for the plea.
- 17 The judge concluded by saying to the appellant that *"Having regard to the fact that you had been charged in respect of the drugs offences at this point those sentences are consecutive"*. By this he meant that the sentences were to be consecutive to one another and to the sentences on the first and second indictments. The total sentence was, therefore, one of 88 months' imprisonment.
- 18 After that sentence had been passed the defence pointed out that the prosecution assertion in respect of the second indictment, that the appellant had hired a vehicle, was contrary to the evidence, which showed that someone else had done so. Having reflected on this point, the judge declined to reduce the sentence, stating that he still took the view that this was a significant role because the appellant had arrived quickly on the scene following the phone call to the dealer line, and in his judgment that showed an awareness of the operation and playing an operational function.

Grounds

- 19 In support of his contention that the total sentence was manifestly excessive in all the circumstances, Mr Thomas has developed the following specific criticisms of the sentencing process.
- (1) In relation to the first indictment, Mr Thomas says that the judge's notional sentence before reduction for plea was too high. Fifty-four months is the starting point for category 3 significant role, and taking that starting point does not properly reflect the fact that, as the judge himself accepted, there were elements of lesser role present. Further, the reduction given for guilty plea was not "at least 20 per cent" that the judge had mentioned. Doing the arithmetic, it was rather less than 19 per cent.
 - (2) In relation to the second indictment, Mr Thomas submits that the judge's notional

sentence was again too high, as he wrongly categorised the appellant's role as a significant one rather than a lesser one as he should have done.

- (3) In relation to the third indictment, it is said that the judge's notional sentence for perverting the course of justice was too high, and that he failed at this stage to have sufficient regard to the principle of totality.

Discussion & conclusions

- 20 Having reflected on these submissions, our conclusions are these.
- 21 The judge was clearly entitled indeed in our view right to impose consecutive sentences for each of the four offences with which he had to deal. The grounds of appeal, therefore, raise two main questions. The first is whether each sentence, viewed in isolation, represented a proper application of the sentencing guidelines to the pertinent facts about the offending and the offender. Secondly, we must review the aggregate sentence and consider whether the principle of totality was adequately taken into account.
- 22 The appellant's role in the conspiracy was to participate in street dealing, placing the case in harm category 3. His case was that he only became involved at the end of September 2020, and the prosecution evidence is consistent with that. The judge was therefore sentencing for involvement lasting some six days. In that time, however, the appellant was in possession of the dealer phone, effectively running the drugs line of the operation, albeit he was part of a short chain. In our view, there is no room for criticism of the judge's assessment that this appellant's role in the conspiracy was at the top end of the "lesser role" category, with elements of "significant" role. On that footing, a starting point of 54 months cannot be criticised. That is the top end of the range for lesser role.
- 23 However, the next step in the sentencing process is to consider aggravating and mitigating factors. There were no aggravating factors in relation to this offending, and some weight had to be given to the absence of any recent convictions and the extensive personal mitigation to which the judge had rightly referred. In our judgment, this balance called for a significant downward adjustment before reduction for guilty plea. As we shall explain, we believe the judge himself recognised this and did take account of it when sentencing on the second indictment. At any rate, his remarks in respect of the conspiracy do not reflect any such consideration.
- 24 For this reason, our view is that the notional sentence after a trial should not have been more than four years (48 months). We would reduce that by 10 months, which is roughly 21 per cent to reflect the judge's assessment of the scale of the reduction to be given for the guilty plea. That results in a sentence of 38 months instead of 44 on that indictment.
- 25 Turning to the second indictment, we accept that the judge's categorisation was in error. There was nothing to justify it once the mistaken allegation that the appellant had hired the car had been put to one side. The appellant's function on this single occasion was not to hold the phone; he was a subordinate and should have been treated as playing a lesser role. At the next step, however, the judge was, in our view, overly lenient. Having identified his starting point, he made a substantial reduction before considering the effect of the guilty plea. This reduction must have been intended to reflect the mitigating factors. This, however, was the appellant's second Class A drug trafficking offence in the space of nine months. It was committed after the appellant's arrest for the first such offence. When that arrest took place he was in possession of drugs so that, albeit he was not charged until later, it was manifestly the case that proceedings for the first offence were pending or imminent at the time he committed the second. These, in our judgment, were weighty aggravating

factors and by this stage the potency of the personal mitigation had been very much spent. In all these circumstances, and making all due allowance for totality, the appropriate sentence after trial could not have been less than one of 40 months. The judge's eventual sentence of 30 months after reduction for plea was not excessive.

- 26 The offending on the third indictment was subsequent to the drug offending and wholly separate and distinct. The two offences were themselves quite separate from one another. We see no error in the judge's approach to the notional sentence after a trial. This offending was aggravated by the fact that it was committed after the appellant's arrest for the second drug offence and while proceedings were very much pending. In this context the mitigating factors to which we have referred have even less weight. The judge made no reference to totality when dealing with this aspect of the matter but standing back to review the overall sentence we do not consider that any further reduction was called for on that account.
- 27 For these reasons we quash the sentence on the first indictment and substitute a sentence of 38 months' imprisonment. The other sentences of imprisonment will remain unaltered. The consequence is that the total sentence is now one of 82 months rather than 88 or, to put it in years, six years and 10 months rather than seven years and four months.
- 28 We must make a consequential adjustment to the length of the driving disqualification. This must be reduced, we calculate, to one of 65 months, comprising 24 months' disqualification with an uplift of four months in respect of the dangerous driving (pursuant to section 35A of the Road Traffic Offenders Act 1988) and a further uplift of 37 months in respect of the other offences under section 35B of the 1988 Act.
- 29 To that extent, the appeal is allowed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.