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[2023] EWCA Crim 70

IN THE COURT OF APPEAL

CRIMINAL DIVISION



CASE NO: 202203434 A1

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 19 January 2023

Before:

LADY JUSTICE CARR

MR JUSTICE JACOBS

HIS HONOUR JUDGE THOMAS KC

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

v

HARRY McCUSKER

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MS CATHERINE PATTISON appeared on behalf of the Solicitor General
MR SIMRAN GARCHA appeared on behalf of the Offender

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1. We have before us an application by His Majesty's Solicitor General for leave to refer a sentence which he considers to be unduly lenient. On 8 June 2022 in the Crown Court at Lewes the offender pleaded guilty to two offences contrary to s.1(1) of the Criminal Law Act 1977: conspiracy to supply a Class A controlled drug, namely cocaine (count 1), and conspiracy to convert criminal property (count 2). On 28 October 2022 the offender was sentenced by His Honour Judge Stephen Mooney (“the Judge”) to an overall sentence of 4 years and 9 months' imprisonment, made up of a custodial term of 4 years and 9 months on count 1 and a concurrent sentence of 3 years on count 2.
2. The offender is Harry McCusker. He is aged 28. In summary, between 31 December 2019 and 19 May 2021, when he was between 24 and 26 years old, he conspired with James Hurrell, Paul Robson, Charlie Salisbury and others to supply cocaine to various destinations in the South of England. The conspiracy was large scale and sophisticated. The offender's role involved being the custodian and courier of significant quantities of cocaine, and the conspiracy generated a significant quantity of cash. The conspiracy to convert involved not only the offender's original co-defendants on count 1, but also the offender's partner, Tyler Hawley, and Nicolle Burns, who was Robson's stepdaughter and Salisbury's partner.
3. For the Solicitor General it is submitted that the Judge fell into error by concluding that a sentence of 4 years and 9 months' imprisonment sufficiently reflected the seriousness of the offender's role, the presence of the aggravating factors, and the overall seriousness of the offending. For the offender it is said that, whilst the sentence could be said to be lenient, it cannot be said to be unduly so.
4. We grant leave.

The Facts

5. We turn first to count 1. The conspirators took receipt of imported cocaine in quantities of up to 20 kgs at any one time. The cocaine was distributed to various destinations across the South of England, including London, Dorset, Devon and Cornwall. Significant sums of money were generated. The conspirators used encrypted mobile telephones using apps such as EncroPhone and EncroChat. As is common, they used various “handles” to contact one another. They took a number of steps to ensure the security of their operation, including the use of EncroPhones to arrange deliveries; when multiple deliveries were made on the same day, the courier would only collect what was required for the individual drop and then deposit the cash received (if received) before collecting the drugs for the next delivery; if multiple deliveries were being made, the drugs would be collected from different locations on each occasion; passwords were used to ensure that the courier and the recipient could identify each other; Robson sometimes wore a high-visibility jacket in order to avoid arousing the suspicion of police at a time when movement was restricted due to Covid measures; the conspirators used rental vehicles often, and there were discussions between them as to the modification of a vehicle in order to have a hidden compartment built.

6. Hurrell and Salisbury each played a leading role in the conspiracies. The offender and Robson were each couriers involved in the supply and distribution exercise. Both were known to Salisbury, who acted as a conduit and relayed messages between Hurrell and them, the offender and Robson. The offender was more involved than Robson. He was also a custodian who took receipt of the cocaine, stored it, distributed it and took receipt of cash. On one occasion he divided a kilogram block of cocaine into smaller quantities in preparation for onward distribution. Between April 2020 and July 2020 the offender was involved in the delivery of a kilogramme of cocaine on 19 April, taking possession of £64,000, possession of a kilogramme of cocaine and the delivery of 9 ounces of cocaine on 11 May 2020. On 14 May 2020 he supplied 4.5 ounces of cocaine and was in possession of £5,000. On 19 May

he delivered £10,000. On 21 May he was in possession of 20 kgs of cocaine, 10 kgs being subsequently supplied onwards to another. On the same day he was involved in the supply of another kilogramme of cocaine. On 27 May he was involved in the supply of 10 kgs of cocaine. On 1 June he was involved in trying to source a kilogram of cocaine. On 23 July 2020, £20,000 was paid into his bank account.

7. At the time the offender was also working as a carpet fitter. His workload reduced because of the Covid pandemic and national lockdown but, as restrictions came to be lifted, he sought to increase his carpet-fitting work and to reduce his involvement as a drugs courier.
8. He was arrested on 25 May 2021 and when interviewed answered “no comment”.

The sentencing process

9. The offender pleaded not guilty at the PTPH and a trial date was fixed for 14 September 2022. He served a defence statement in November 2021 denying being party to any conspiracy. That stance was maintained until 8 June 2022, when the case was listed for mention and he entered guilty pleas. A basis of plea was proffered in October 2022 but not accepted by the prosecution.
10. The offender had no previous convictions for drugs or criminal property offences and had not been sentenced to a term of imprisonment before. There were character references, which we have read, speaking highly of him as a good person, with a strong work ethic. There was some indication that he needed treatment for mental health problems, with references to suicidal thoughts, depression and anxiety, but no apparent formal diagnosis or treatment plan.
11. The Judge determined that a Newton hearing was not required. The matters in dispute between the prosecution and the offender were of little significance and would not have made a significant difference to the sentencing outcome. He considered that there were elements of significant role offending, but he would sentence the offender on the basis of lesser role in

category 1 offending. The elements of lesser role offending outweighed the elements of significant role offending. He accepted that the offender was operating under the instruction of others and had chosen to remain involved as someone who was prepared to assist when required. He maintained that level of involvement even when he genuinely tried to leave. The lure of the money that he was generating was just too great. He was, in the Judge's words, "enthusiastically involved". The Judge did not accept that the offender had been pressured into his involvement in the conspiracy, and that was a position accepted on the offender's behalf.

12. When passing sentence, the Judge identified the starting point for lesser role category 1 offending within the Sentencing Council Guideline for Drugs Offences ("the Guideline") of 7 years' custody. He referred to the absence of relevant previous convictions and to the offender's mental health problems, which would make prison life difficult for him. He arrived at a term of 6 years after taking into account the offender's available mitigation, which term he then reduced by 20% to reflect the offender's guilty plea.

The parties' submissions

13. For the Solicitor General, Ms Pattinson challenges the Judge's assessment that a starting point of 7 years' imprisonment for the offence of conspiracy to supply cocaine fairly reflected the seriousness of the offender's role in the conspiracy, the presence of aggravating factors and the overall seriousness of the offending. Whether as a lesser role category 1 offence or straddling the boundary between lesser and significant role category 1 offending, it is said that the following factors relevant to culpability and harm merited a starting point significantly higher than 7 years' imprisonment: first, the overlap between the significant and lesser features in play; secondly, the quantity of cocaine involved being substantially greater than 5 kgs, being the basis for the starting point of 7 years for category 1 harm. The offender knew at least in general terms that he was taking custody of and supplying very large amounts of cocaine.

14. It is submitted then that an upwards adjustment was merited to reflect the following aggravating factors: the fact that this was a conspiracy spanning several months rather than a one-off offence; the totality of the offending; and the need for deterrence, given the prevalence and culture of drug supply, in particular on a commercial scale.
15. In summary, whilst it is accepted that there were mitigating factors meriting a downward adjustment, taking into account that mitigation, the offender's age and the 20% credit for guilty plea to be afforded, the overall sentence is said to be substantially too short, indeed unduly lenient.
16. For the respondent, Ms Garcha submits that the Judge sentenced on the correct factual basis, and that the sentence, whilst perhaps lenient, was not unduly lenient. The Judge reviewed the evidence and had a full grasp of the facts. Amongst other things, he had presided over the trial of Robson. He was fully entitled to conclude that the features of lesser role outweighed the features of significant role. She also updates the court in relation to the offender's personal circumstances. At the time of sentencing the offender had a 1-year-old child and was expecting twins with Ms Hawley. Those twins were born last night. Ms Garcha tells us that the offender finds his time in prison very difficult and points, amongst other things, to a very positive recent custody report. The offender is currently working in the laundry section of the prison and appears to be generally behaving well. We commend him for that and encourage him to continue that positive path forwards.

Discussion

17. References under s.36 of the Criminal Justice Act 1988 are made for the purpose of the avoidance of gross error, the allaying of wide-spread public concern at what may appear to be an unduly lenient sentence and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type: see, for example, *Attorney-General's*

Reference No 132 of 2001 (R v Johnson) [2002] EWCA Crim 148; [2003] 1 Cr App R (S) 41 at [25]. We remind ourselves that the hurdle is a high one. For appellate interference to be justified the sentence in question must be not only lenient but unduly so.

18. As the Solicitor General submits, it is important to recognise at the outset that the offences here being charged were conspiracies, not single substantive offences: see *R v Reed* [2015] EWCA Crim 171 at [40]. In sentencing for conspiracies, caution should be exercised against a slavish following of the guidelines on the basis of drug weight. It is also right that deterrence plays an important factor when considering what is and is not an appropriate sentence for serious drug offending such as this.
19. The starting point within the Guideline for category 1 lesser role offending is 7 years' imprisonment, with a range of 6-9 years. The starting point for category 1 significant role offending is 10 years' imprisonment, with a range of 9-12 years. Having carefully considered the submissions before us, we consider that the Judge was bound to take a term of significantly more than 7 years' imprisonment before making a downward adjustment for mitigation and credit for guilty plea.
20. 7 years is the starting point within the Guideline for a single offence of category 1 lesser role offending. It is based on a quantity of 5 kgs of cocaine. Here, first, there were elements of significant role offending, as Ms Garcha herself rightly acknowledged before the Judge: for example, the offender had an expectation of significant financial gain, having received £20,000 into his account in July 2020; he had some awareness and understanding of the scale of the operation. It was offending at the top end of lesser role. Secondly, the amount of cocaine involved far exceeded 5 kgs - indeed it was up to ten times that amount. The offender had personally taken custody of 20 kgs of cocaine and overseen its distribution, making deliveries and collecting payments. This was a very large-scale conspiracy; thirdly, the overall sentence had to reflect the totality of the offender's offending, including the second serious conspiracy to convert, which involved very large sums of money.

21. In these circumstances, a term of not less than 9 years' custody before downward adjustment was necessary. After reduction for the offender's mitigation of around a year, and 20% credit for guilty plea, the result is a custodial term of 6 years and 4 months. Seen in this light, the custodial sentence imposed by the Judge of 4 years and 9 months was not only lenient, but unduly so.

Conclusion

22. For these reasons, we allow the Reference. The sentence of 4 years and 9 months' imprisonment on count 1 will be quashed. In its place will be substituted a term of 6 years and 4 months' imprisonment. The concurrent sentence on count 2 remains undisturbed. As before, the offender will serve half of that period of time in custody before being released on licence.

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