IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE 202400200/A1-2024000202/A1
[2024] EWCA Crim 769

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 20 June 2024

Before:

LADY JUSTICE MACUR

MR JUSTICE BRYAN

MRS JUSTICE TIPPLES

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

REX
V

ANAND TRIPATHI
VARUN BHARDWAJ

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MS C PATTISON appeared on behalf of the Attorney General.
MR B WAIDHOFER appeared on behalf of the Offender TRIPATHI.
MS C MAWER appeared on behalf of the Offender BHARDWAJ.

J U D G M E N T

LADY JUSTICE MACUR:

1. On 15 December 2023 and following a trial, Anand Tripathi ("offender 1") was sentenced to a total of 15 years' imprisonment in relation to conspiracy to being knowingly concerned in carrying goods, namely 272-plus kilograms of cocaine with intent to avoid prohibition on importation, 15 years in respect of a conspiracy to be knowingly concerned in carrying goods as regards 2503 kilograms of cannabis and 10 years' imprisonment concurrent in relation to a conspiracy to be knowingly concerned in carrying goods with intent to evade a duty, the contraband in that case being cigarettes which caused a loss to the Revenue of around £8 million. The offender was jointly tried with Varun Bhardwaj ("offender 2") on the same counts. The second offender was convicted of two additional counts, namely possessing a controlled drug of Class B and failure to comply with a section 49 Notice to disclose the key to protected information. An overall sentence of 19 years' imprisonment was imposed in his case, the lead offence taken as the conspiracy to import cocaine with concurrent sentences of 10 years and 5 years (as per the first offender) on counts 2 and 3 and 1 years' imprisonment concurrent in respect of each of the two additional convictions.

2. This is an application by His Majesty's Solicitor General, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer a sentence of each offender which he regards as unduly lenient. We grant leave in each case.

3. In summary, on dates between September 2021 and November 2022, the two offenders and others unknown were concerned in the importation by C of substantial quantities of

cocaine, cannabis and cigarettes as we have previously indicated. The two offenders created and/or operated companies using false or stolen identities. The drugs and cigarettes were hidden within shipments of yams, oranges, palm kernel or snack products. A total of 272 kilograms of cocaine and 2503 kilograms of cannabis was seized, with the wholesale value of around £24.15 million. A total of 18,680,000 cigarettes were seized, generating a loss to the Revenue of around £8 million. In addition, the second offender was found to have 1 kilogram of cannabis at his home address. He refused to provide the personal identification number to enable police to interrogate a mobile phone which was also seized at the time of the search.

4. Investigations had commenced following the discovery by a Somerset farmer of a consignment of cocaine contained within Columbian palm kernel. The South West Regional Organised Crime Unit identified the first offender as the director and company secretary of Tatab Ltd, a freight transport company and customs clearing agent responsible for the delivery and the second offender as an employee of the same. There were other companies which the two offenders operated or had links to which also organised shipments of contraband.

5. The first offender was experienced in importation and customs clearance and was essential to the success of the conspiracies, as was the second offender's technical knowledge in computing and telecommunications. The second offender supervised deliveries and the unloading of containers at the Tatab warehouse and was able to oversee the business on occasions when the first offender was undergoing dialysis, as he did three times a week. Both offenders had international links to upstream suppliers and

co-conspirators in respect of shipments of controlled drugs and cigarettes. They each went on international trips in furtherance of the conspiracies and, clearly, the first offender's ill health, to which we refer below, did not prevent him from playing a *leading role* in what is correctly described as a "sophisticated conspiracy".

6. The first offender was arrested. When interviewed he provided a prepared statement. He said that he owned Tatab Ltd which was a legitimate Customs clearance and logistics business and that he had been training the second offender for around a year, with a view to selling his company to him due to his own failing health. He denied any knowledge of or involvement in the importation of drugs. After his interview, however, and when he was being escorted through the police station, he said:

> "And you know I'm telling you off the record that these people that uh wanted me to do drugs I did only one shipment, 24 pallets but there was for other person and after that I stopped because they wanted me to bring drugs. I'm not telling you. And listen a black man... shoot me. I can't tell you..."

Regardless of that comment, he pleaded not guilty at trial.

7. After arrest and in the course of two interviews, the second offender said that he contacted a Mr "X" via a red Ulefone. Mr X was a leading criminal and the second offender referred to organisations in Dubai and Russia and some sort of investigation that he said he was carrying out himself. He made some admissions of using aliases and various companies and said that the cannabis found at his home had fallen out of a shipment which had arrived at the Tatab warehouse. He had picked it up and "kept it as

evidence". He said he did not know what it was and that he was preparing himself to meet the police, though had not in fact done so. He denied any involvement in a conspiracy to import drugs.

8. Both were charged and ultimately convicted. Sentence was adjourned.

9. The first offender had no previous convictions, the second offender had a conviction in 2010 for driving offences and was therefore able to be treated, for the purposes of sentence, as a man effectively of good character.

10. The first offender relied upon a medical report in that it appeared as an out-patient letter from a Dr Wilkinson, a locum consultant nephrologist, in respect of his medical needs and prognosis, to the effect that dialysis patients are vulnerable in the prison community, that the offender would need to be incarcerated in close proximity to a dialysis unit so that he could receive thrice weekly dialysis, that the life expectancy of a dialysis patient, if he did not receive a transplant, is 5 to 10 years. This life expectancy shortening the older the patient is. The offender's life expectancy with a transplant was in the range of 10-15 years, given his age and co-morbidities but he would be at risk of infections due to immunosuppression medication which he was taking for his previous failed transplant operation. It was recognised that his medical conditions could be adequately treated in a UK prison but he would need regular dialysis or regular out-patient appointments if he were to be transplanted.

11. In her sentencing remarks, the judge described her approach to sentence after referring, at

some length, to the facts of the case by reference to the Sentencing Council Guidelines.

She said:

> "In this case the Sentencing Council has provide guidelines for the substantive offences alleged in relation to counts one to four and there is no dispute that they apply to conspiracy charges, counts one to three. The application is not however straightforward for the following reasons.
>
> In relation to counts one and two I have to consider the impact of a particular provision relating to the quantity of drugs involved as they exceed the indicative amounts by a very significant margin.
>
> In relation to count three the quantity again exceeds by a significant margin, the highest band which is up to £2 million of duty evaded. In relation to count four... the quantity of cannabis seized is out of all proportion to the quantities with which simple possession charges are normally concerned.
>
> In relation to count one applying the guidelines as I must and considering them and seeing to what extent it would be contrary to the interests of justice to limit the sentences to the boxes as it were that are provided within the guidelines... I am satisfied that the following leading role feature apply."

She then went on to indicate:

> "You both had close links to the original source or sources, you had contact in Dubai... You also both had frequent exchanges with contacts using Russian and Ukrainian telephone numbers concerning the progress of the containers, the upstream suppliers...
>
> You both used your own and many other shell businesses as a cover..."

She accepted that there was no evidence that they were involved in the organisation of buying and selling in terms of purchases or expected exchange of money. However, albeit that there was no reference of payment, it was obvious that it was performed with a view to achieving a considerable financial or other advantage. She said:

> "You were each performing in my judgment more than a merely managerial or operational role... you both had a directional role in determining how best to ensure the drugs reached you in the use of your companies...
>
> In my judgment the sheer quantity of cocaine and also cannabis is such that a considerable financial advantage could be anticipated, although how much remains unknown and some awareness and understanding of the scale of the operation. In my judgment you had more than some awareness, you were playing an integral role. I conclude that you are both in the category of leading role."

She went on in similar fashion in relation to counts 2 and 3, indicating that the enormous quantity of cocaine and cannabis were such that the following provision applies:

> "Where the operation is on the most serious and commercial scale involving a quantity of drugs significantly higher than Category 1, sentences of 20 years and above may be appropriate depending on the offender's role."

12. Going forwards in the sentencing comments, the judge indicated that the two offenders fell towards the "lower end of leading role". She had previously determined, having considered comparative authorities, that a sentence in the mid-twenties would be appropriate in terms of the term of imprisonment to be served. However, she went on to say:

> "I take into account the current overcrowded conditions in prison in assessing the appropriate starting point before personal mitigation is considered. This applies the principle set out most recently in the case of *R v Ali [*2023] EWCA Crim 232 approving a passage from the Court of Appeal decision in *R v Manning [*2020] EWCA Crim 592 as remaining relevant, 'Applying ordinary principles where a court was satisfied that a custodial sentence had to be imposed. The likely impact of that sentence continued to be relevant to the further decisions as to its necessary length'."

Thereafter, she took the starting point to be one of 22 years and then went on to mitigate that sentence, in the case of Mr Tripathi, by 7 years and, in the case of Mr Bhardwaj, by a

further 3 years.

13. Ms Pattison, on behalf of His Majesty's Solicitor General, takes no issue with the categorisation of the lead offending which was established to be count 1. Rather, her submission is that the judge fell into error in her assessment of the adjusted starting point from what should have been at least 25 years and also the downward adjustments made in each case to reflect the very high prison population and thereafter personal mitigation. She submits that a significant upward adjustment on count 1 was merited, to reflect the quantity of the cocaine, the commercial scale of the operation and totality of the offending on counts 2 and 3, in the case of the first offender, and additionally in respect of counts 4 and 5 in relation to the second offender. On the basis of the judge's view that each offender had a *leading role,* she maintains that a figure of at least 25 years' imprisonment was merited and that whilst many judges would have considered a higher sentence was warranted, she concedes that a 25 year term starting point would not fall into the category of an unduly lenient sentence.

14. However, Ms Pattison submits that the judge wrongly applied a downward adjustment in respect of prison population, submitting that Ali properly interpreted, indicates that principle to be derived from this authority is only a factor to be considered in respect of shorter custodial sentences or those on the cusp of custody, that is, those sentences which may fall to be suspended. Therefore, the judge should not have taken this factor into account at all.

15. However, Ms Pattison recognises that the significance of the incarceration in relation to

the first offender's health, was appropriate to be considered per se in the sentencing exercise. Nevertheless, albeit that the first offender was suffering from a serious medical condition which required ongoing treatment, this was co-existent with the offending and therefore the impact of his medical circumstances should be distinguished from those of the offender in the case of Keith, to which we refer below. The evidence adduced on behalf of the first offender confirmed that he can be adequately treated in a UK prison. The Sentencing Guideline makes clear that there will always be a need to balance issues personal to the offender against the gravity of the offending and the public interest in imposing appropriate punishment for serious offending. A further reduction of 7 years in his case, on top of the three year reduction for prison conditions in general, has resulted in a sentence that does not fairly reflect the seriousness of the offending. His overall sentence of 15 years falls into the category of unduly lenient sentences.

16. Ms Pattison submits that in the case of the second offender, his personal circumstances are unexceptional. The same argument regarding a reduction in term to address prison conditions apply as for the first offender. A reduction of 7 years has resulted in a sentence that does not fairly reflect the seriousness of the offending. Consequently, an overall sentence of 19 years' imprisonment is unduly lenient.

17. Mr Waidhofer, on behalf of the first offender, submits that the judge's indication of the appropriate sentence in the "mid-20s" could justifiably include a range of 23 to 27 years and should not necessarily lead this Court to consider that she had identified 25 years as a starting point. Further, he submits, that the starting point would have to be tapered by the fact that the offender fell towards the lower end of *leading role* and that the judge could

not reasonably be criticised for reducing the starting sentence prior to further reductions, most particularly, he submits, in respect of the first offender's ill health. He makes no submissions to seek to support the judge's reduction in relation to the prison overpopulation but greatly relies upon the case of Keith which he submits indicates that a person with the first offender's medical conditions should benefit from a merciful disposal by the Court, and which could reasonably result in an overall reduction of 7 to 10 years. If we are against his primary submissions, he initially sought to persuade us in writing that that this Court should be mindful of "double jeopardy". He realistically concedes in oral submissions that such a principle in the circumstances of this case do not apply.

18. Ms Mawer, on behalf of the second offender, echoes Mr Waidhofer in saying that the judge brought to the sentencing exercise a detailed knowledge of both offending and offender. She submits that the figure of 22 years was reached after careful balance of the mitigation and that the sentencing judge was not wrong to apply a further reduction because of the principle to be derived from Ali. She boldly submits that there is no authority for the proposition advanced by the Solicitor General that, in cases where lengthy sentences are at issue, the Ali principle ceases to apply. Further, she submits that the second offender's personal mitigation was not insubstantial. This included his conduct at trial, his young family, his background generally and previous good character. She also seeks to persuade us that the fact that he did not fulfil those characteristics of *leading role*, which involved supervision or influence on others, should be counted as mitigation in his favour.

Discussion

19. We agree with counsel for the offenders that the trial judge is usually in the best position to assess culpability and harm. In doing so, with reference to the facts of the case and the basis of the findings that she made, and after her review of Court of Appeal authorities involving contraband significantly in excess of indicative points of entry in the categorisation of harm, (although not even close to the quantities involved in this case) the judge indicated that:

> "The starting point taking into account all matters including totality could justifiably be in the mid-20s."

20. We are able to objectively appraise that the scale of operation committed by these two offenders in a *leading role*, called for a sentence significantly beyond the top of the range, and we simply cannot accept the submissions of Mr Waidhofer, that the judge intended to infer, having referred as she did to the authorities including Sanghera, that this was a case where mid-range would incorporate a 23-year starting point.

21. We have no reason to distance ourselves from the judge's determination of the factors of culpability which assigned to each offender a *leading role*. However, we do question why, since both offenders certainly did demonstrate more than one of the factors indicating a leading role, that the judge found that they fell towards the bottom of that category. As she indicated, both offenders had close links to the original source or sources of the contraband, used real and sham business as a cover and had an expectation of considerable financial or other advantage and were performing more than a managerial or operational role.

22. There is no question in our minds that the correct starting point should have been at least 25 years. In the case of the first offender, it may well have been higher and not deemed manifestly excessive. In the case of the second offender, the totality of his offending (that is taking into account the additional counts) could have called for an even greater sentence, in the region of at least 27 years. The amount of duty evaded for the cigarettes aside, these offenders were responsible for the importation of massive quantities of not only Class A but Class B drugs. That they did not dirty their hands in direct dealing is of limited of consequence. On the contrary, that they were in directional control of operations to enable custom clearance highlights their high status.

23. We however determine that in regard to the re-sentencing that is necessary in this case, that we should adopt the appropriately moderate submissions of Ms Pattison that a 25-year starting point would not have been criticised on behalf of the law officers and take that as our mid-point. We agree with Ms Pattison that the reduction in sentence made in both cases, on the basis of prison overcrowding in accordance with Ali, was misconceived in law. The principle to be derived from Ali is quite clearly aimed at the 'cusp of custody' cases, as is obvious from a careful reading of the judgment and not just the headnote. That was not the case here. It is illogical to suggest that the reduction in such a lengthy sentence would sensibly address the prospect that penal conditions may improve in the medium to long term. That issue aside however, we consider it was appropriate for the judge to have regard to the effect that incarceration per se would have upon the first offender, in terms of his continuing medical treatment. This is an accordance with the Sentencing Guidelines and good sense, and His Majesty's Solicitor General acknowledges that it was rightly so considered by the judge.

24. As we have indicated above, Mr Waidhofer relies upon R v Keith W [2012] EWCA Crim 355, as a case in which the Court of Appeal allowed a substantial reduction to reflect the appellant's poor medical prognosis. The sentence that was otherwise appropriate was reduced by over a third to reflect the "sentencing of a very old man with serious health problems for offences committed many years ago". This however was not to establish as a principle any such proportional reduction of sentencing in other cases where poor health may factor. Every case must be assessed on its own facts. At the time Keith committed the offences, he was able bodied. They were historically distant offences, and by time of his trial he suffered from a number of serious health problems and had a grave prognosis.

25. The reduction of 7 years in relation to the offender's health and prognosis, was in our view unmerited and leads to a sentence that falls outside the range that a judge at first instance may reasonably have considered to be appropriate on the objectively observed and indisputable facts of the case. This was an offender who had embarked upon a sophisticated conspiracy at a time of his ill-health. He had a full appreciation of the consequences of his ill-health and was undergoing dialysis at the time and throughout his offending. His ill-health does not afford him with a "get out of jail free card" and the circumstances of his case are, with respect, far less deserving of mercy than in the case of Keith. We are afraid that the florid submissions in writing in regard to the suggestion that "the first offender should be assured that he will only ever be released from custody from the inside of a coffin is an attempt to impose a sentence that in all the circumstances could only be described as manifestly excessive" finds little purchase. As the judge correctly reminded herself, the issue of the first offender dying in prison, if this arises, is

ultimately a matter for the prison authorities.

26. We conclude that the appropriate reduction, including a reduction for his good character, to which we turn in a moment, should have been no more than 5 years and the judge, unfortunately, fell into gross error in reducing the sentence by double that amount. That is an objective, right-minded and reasonable bystander would understand the need for some clemency in such a case as that of the first offender but public confidence in sentencing practices would be significantly undermined by the reduction of 10 years made in circumstances of the offending such as this. Consequently, we agree with Ms Pattison, the sentence to 15 years imprisonment was undoubtedly unduly lenient.

27. The personal mitigation proffered by the second offender was, as the judge correctly observed, "issues that can have little impact for the overall sentence for the most serious crimes". Thereafter, however, it appears she gave significantly more weight to these unexceptional elements of mitigation. The reduction of 6 years from the correct starting point was too great. Public interest requires deterrent sentences in the circumstances of the scale and nature of this offending. We are in no doubt that the sentences imposed were unduly lenient. We have already indicated that we do not consider that this is a case where we should bear in mind double jeopardy and that any submissions made in writing in those regards were misconceived.

28. In the circumstances, we consider that the proper exercise of our discretion is to resentence both offenders but to do so on the basis of the judge's findings of culpability and harm and, bearing in mind that this is an Attorney-General's Reference, to take a

starting point of 25 years, reflecting the totality of the offending, including that of the second offender.

29. We acknowledge that the offenders' lack of previous or relevant previous convictions is a statutory mitigating feature to be taken into account, albeit we do not understand why these points of mitigation deserve any more weight to be afforded to them by reason of the greater educational achievements and talents of these two offenders. Nevertheless, bearing in mind the mitigation that is afforded by their good character and taking into account the ill-health of the first offender, we conclude as follows. We quash the sentences imposed on count 1 in both offenders' cases. In so far as Tripathi is concerned, we substitute a sentence of 20 years' imprisonment. In the case of Bhardwaj, we substitute a sentence of 23 years' imprisonment. The other sentences which are to be served concurrently will remain as before. We consider that these are the least possible sentences commensurate with all of the circumstances of the case.