IN THE COURT OF APPEAL

CRIMINAL DIVISION

OFFICIAL SENSITIVE (IN CHAMBERS)

NCN: [2021] EWCA Crim 840

CAO Reference: 202100707-A2

Royal Courts of Justice

Thursday, 22 April 2021

Before:

LORD JUSTICE SINGH

MR JUSTICE SAINI

MR JUSTICE HILLIARD

REFERENCE BY THE ATTORNEY-GENERAL
UNDER s.36 OF THE CRIMINAL JUSTICE ACT 1988

R E G I N A

-v-

AAF

MR J. SMITH appeared on behalf of the Solicitor General

COUNSEL appeared on behalf of the Defendant

JUDGMENT

(Approved)

LORD JUSTICE SINGH:

Introduction

1. This is an application for leave, made on behalf of Her Majesty's Solicitor General, to refer a sentence to this court as being unduly lenient, under s.36 of the Criminal Justice Act 1988 ("the 1988 Act").

2. In order to protect the identity of the offender, it has been necessary for this court to conduct the hearing in camera. It is also necessary to anonymise the judgment and to make a reporting restriction so that nothing which would tend to identify the offender may be made public. We initially gave judgment in camera but indicated that we would give an open judgment in due course, after giving the parties the opportunity to consider a draft of it in confidence, so that they could make representations as to what further modifications might be necessary.

3. With those safeguards in place, we are satisfied that it is possible to give an open judgment in this case that maintains a fair balance between the principle of open justice and the protection of the safety of the offender.

4. In the Crown Court, the offender was sentenced to a period of imprisonment for an offence involving the supply of controlled drugs.

5. At a late stage in the proceedings before the Crown Court, the offender pleaded guilty.

The facts

6. The facts have been agreed by counsel for Her Majesty's Solicitor General and for the offender. The supply of drugs extended over time. The value of the drugs was high. The offender was a leading member of the enterprise, although there may have been others who were higher up the chain. The offender controlled the enterprise in this country. He had relevant previous convictions.

7. There was no pre-sentence report before the court. Clearly none was necessary in the circumstances of this case, in which a lengthy custodial sentence was inevitable.

Aggravating and mitigating features

8. On behalf of Her Majesty's Solicitor General, it is submitted that the following aggravating factors appear to have been present:

(1) The offending was sophisticated and involved the recruitment of others.

(2) The offending was closely linked to violence.

(3) The offending was for substantial financial gain.

(4) The organisational role of the offender and close links to the source.

(5) The scale of the drugs supplied.

(6) The offender's relevant previous convictions.

9. On behalf of Her Majesty's Solicitor General, it is also accepted that there was the mitigating factor that the offender had pleaded guilty.

Submissions for Her Majesty's Solicitor General

10. On behalf of Her Majesty's Solicitor General, it is submitted that the sentence imposed was unduly lenient and failed to take proper account of the nature of the offences of which the offender had been convicted and the aggravating features of the case. In particular:

(1) The offender's role plainly fell within culpability category A in the relevant guideline issued by the Sentencing Council. The harm caused, by virtue of the quantity of drugs concerned fell into category 1. The judge was correct to make those findings.

(2) The offender, therefore, fell within category 1A, for which the recommended starting point is 14 years' custody, with a range of 12 to 16 years.

(3) The offending was substantially aggravated by the relevant previous convictions of the offender.

(4) The judge was entitled to give the offender limited credit for his guilty plea.

Submissions for the respondent

11. On behalf of the offender, counsel makes the following submissions.

12. He accepts that the sentence is lenient, but submits that it was not unduly so. It is submitted that:

(1) The judge recognised that there may have been others higher up the chain in the enterprise.

(2) There can be larger operations than this.

(3) There are individuals who operate at a higher level than the offender.

(4) An offender with a leading role might be expected to put more distance between himself and some of the incriminating items in the case.

(5) The value of the drugs may not have been as great as the prosecution suggested.

(6) There was no evidence connecting the offender to any importation or of any contact with others who were organising the importations.

13. Accordingly, it is submitted that the offender fell to be sentenced towards the bottom end of a category 1 leading role, on the cusp with the category 1 significant role.

14. It is conceded that the offender's previous convictions aggravated the offending, but it is submitted that such aggravation should be kept in proportion as the previous offending was of a different scale and seriousness.

15. Furthermore, it is submitted that the judge was entitled to reduce the sentence on account of all of the material before him, which included details of the offender's personal

circumstances and the additionally burdensome time spent in custody during the Covid-19 pandemic, for example.

16. Accordingly, it is submitted that the judge would have been justified, after balancing both aggravating and mitigating factors, to return to the suggested starting point in the guideline of 14 years after trial or perhaps "a little shy" of that figure.

17. No issue is taken about the discount to reflect the offender's guilty plea.

The issue

18. The sole issue before this court has arisen from the fact that the offender approached the police and offered to provide information. He did not enter into an agreement pursuant to the Serious Organised Crime and Police Act 2005 ("the 2005 Act"), but provided more informal material under the "text" system. Counsel for the offender is aware that he did so and was shown the text in the Crown Court.

19. The information provided led to the creation of 15 intelligence reports relating to organised crime. Two of those were immediately graded at low value; one was thought to be of potentially high value, but was subsequently downgraded to low; the remaining 12 were circulated on police intelligence indexes. Some of the information provided did add to the intelligence picture concerning organised crime. However, there were no arrests or seizures made as a result of the information given.

Authorities on the impact of a "text"

20. In *R v A and B* [1999] 1 Cr App R (S) 52, Lord Bingham CJ set out the relevant principles at page 56. These included (at paragraph 3) that:

> "It has been the longstanding practice of the courts to recognise by a further discount of sentence the help given, and expected to be given, to the authorities in the investigation, detection, suppression and prosecution of serious crime."

Lord Bingham continued:

> "The extent of the discount will ordinarily depend on the value of the help given and expected to be given. The value is a function of quality and quantity. If the information given is unreliable, vague, lacking in practical utility or already known to the authorities, no identifiable discount may be given; or, if given, any discount will be minimal. If the information given is accurate, particularised, useful in practice and

> hitherto unknown to the authorities, enabling serious criminal activity to be stopped and serious criminals brought to book, the discount may be substantial. Hence little or no credit will be given for the supply of a mass of information which is worthless or virtually so; but the greater the supply of good quality information, the greater in the ordinary way the discount will be. Where, by supplying valuable information to the authorities, a defendant exposes himself or his family to personal jeopardy, it will ordinarily be recognised in the sentence passed. For all these purposes, account will be taken of help given and reasonably expected to be given in the future."

21. In *R v P and Blackburn* [2007] EWCA Crim 2290; [2008] 2 Cr App R (S) 5, in a judgment given by Sir Igor Judge P, this court gave guidance on offenders who have entered into a formal agreement pursuant to ss.71 to 75 of the 2005 Act. The court confirmed that the pre-existing "text" system would continue to exist alongside that statutory scheme. At para.34, it was said that:

> 'The creation of a statutory scheme would not deprive an offender of whatever consequent benefit he should receive on the existing "text" system.'

However, it was also said that offenders would take the consequence that any discount of sentence might be reduced simply because the value of assistance in this form was likely to be less; and of course the safeguards associated with the statutory scheme are not present.

At para.38, it was said that:

> "While there are no hard and fast rules, the quality and quantity of the material provided falls to be considered. Particular value should be attached to an individual willing to give evidence or to information which produces convictions for, or prevents, serious crimes, or which leads to the destruction of major gangs."

At para.39, it was confirmed that:

> "The reduction for the provision of such information should be applied by the sentencing court before any discount for a guilty plea."

At para.39, the court emphasised that the exercise is not a strictly mathematical one. It was said that:

> "In this type of sentencing decision, the mathematical approach is liable to produce an inappropriate answer and that the totality principle is fundamental."

It was further said that, in this court on appeal, the focus will be on the sentence which should reflect all the relevant circumstances rather than its mathematical computation.

22. The court considered that the normal level of reduction under the statutory scheme of the 2005 Act would continue to be between one-half and two-thirds and that only in the most exceptional case would the reduction exceed three-quarters: see para.41.

23. In *R v S* [2019] EWCA Crim 569, at paras.31 to 34, in giving the judgment of this court, Simon LJ summarised the relevant principles as follows:

> "(1) No certain rules apply as to the extent to which the assistance will be reflected in the adjustment of sentence; the decision is fact-specific.
>
> (2) It is necessary to form a view as to the quantity and quality of the information provided.
>
> (3) The court will consider the terms on which the information was given; whether, for example, the offender was paid and, if so, how much.
>
> (4) The weight to be attached is for the Crown Court and this court will not interfere with such findings unless the decision either involves an error of law or principle or falls outside the judge's discretion, in that no court properly directing itself in accordance with the law could have come to such a conclusion or is fundamentally lacking in any underlying reasoning."

Submissions about the "text" in this case

24. On behalf of Her Majesty's Solicitor General, it is submitted that the appropriate starting point in this case should have been above 14 years and should have been towards the top of the bracket recommended in the guidelines, in other words 16 years. It is submitted that the inference to be drawn from the facts is that the judge must, in effect, have given a reduction of something like 45 or 50 per cent before taking into account the impact of the guilty plea. It is submitted that the nature of the information given in this case should not have attracted a reduction approaching 50 per cent, which is afforded ordinarily to an offender entering into a formal agreement under the 2005 Act.

25. Further, it is submitted that the quantity of the information is not a particularly significant one, although it is accepted that it was not entirely insignificant either. Regarding its quality, much of the information was graded as low quality: no arrests or seizures were made. However, some of the information was new and added to the intelligence picture concerning organised crime. Such information is of some value. In those circumstances, it is submitted that the judge was entitled to make some reduction, but made a reduction to an impermissible degree in this case.

26. On behalf of the offender, no issue is taken as to the applicable principles, which are set out in the authorities to which we have already referred. The following points are emphasised:

(1) The information was provided at a relatively early stage.

(2) The judge was best placed to make an assessment of the offender's role in the enterprise.

(3) The offender has put himself and others at risk, given the circumstances of this offending.

(4) The exercise of making a reduction for information provided to the authorities is not a mathematical one, and this court will not interfere unless the outcome was one that was not reasonably available to the sentencing judge. In any event, the judge did not give a reduction as high as might have been given if this case had arisen under the scheme of the 2005 Act.

(5) The judge was also entitled to take into account the impact of the current pandemic on prison conditions.

Conclusions

27. We are very conscious that the judge had a difficult sentencing exercise to perform. Inevitably, in circumstances such as these, he could not explain his reasoning in an open way so that others, including this court in due course, would be able to see the reasoning of the sentencing judge. Moreover, it was not possible to give him the assistance which we have now been able to receive from counsel. We have done so in a hearing held in camera. We have been assisted in particular by reference to the relevant principles to be derived from authority.

28. Nevertheless, in this case, we have reached the conclusion that we agree, in essence, with the submissions for Her Majesty's Solicitor General. With due respect to the judge, the sentence passed in this case fell so far below from what would normally be appropriate in accordance with the applicable guideline that it must be regarded as unduly lenient, even having regard to the provision of information to the police.

29. In our view, the information provided, while of some value, was of a relatively low grade and should not have attracted the large reduction in sentence that it did.

30. We consider that the appropriate sentence after trial in this case would normally have been one of 15 years' custody. A reduction to reflect the assistance which the offender gave to the police of 20 per cent would have been the maximum that was appropriate. That would have given rise to a sentence of 12 years after trial. Applying the discount that was appropriate for the guilty plea and rounding down the figures in favour of the offender that would have resulted in a sentence of ten years and nine months.

31. Accordingly, we grant the application for leave by Her Majesty's Solicitor General under s.36 of the 1988 Act; we quash the sentence that was imposed in this case and substitute a sentence of ten years and nine months' imprisonment.

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