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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202101632/A1-202101634/A1

[2021] EWCA Crim 1161

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 15 July 2021

LORD JUSTICE SINGH

MR JUSTICE GOOSE

HER HONOUR JUDGE DHIR QC

(Sitting as a Judge of the CACD)

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

REGINA

V

JONATHON BAILEY

ADAM TRUMAN

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MR P RATLIFF appeared on behalf of the Attorney General.

MR S KHAN appeared on behalf of the Offender Bailey.

MR N ROSS appeared on behalf of the Offender Truman.

J U D G M E N T

LORD JUSTICE SINGH:

Introduction

1. This is an application on behalf of the Solicitor General for permission to make a Reference to this Court, under section 36 of the Criminal Justice Act 1988 ("the 1988 Act").
2. On 15 February 2021 the two offenders (who are respondents to this application) appeared in the Crown Court at Manchester for a further plea and trial preparation hearing on an indictment containing three counts. Counts 1 and 2 were that the first and second offenders were guilty of a conspiracy to supply a controlled drug of Class A, namely cocaine, and conspiracy to supply a controlled drug of Class B, namely amphetamine, both between 11 April and 4 December 2019. On count 3 both were charged together with a man called Maugham with conspiracy to supply a controlled drug of Class B, namely cannabis, between the same dates.
3. The first offender pleaded not guilty to all three counts and the second offender pleaded guilty to counts 1 and 2. Maugham pleaded guilty to count 3. On 7 May 2021 the first offender changed his plea on counts 2 and 3 to guilty. The pleas from the first and second offenders were acceptable to the prosecution. It was agreed that the operative duration of the conspiracies was between 4 November and 4 December 2019.
4. On 7 May 2021 the offenders were sentenced by the Recorder of Manchester (HHJ Dean QC) in the following way: on count 1, which was conspiracy to supply cocaine, the second offender received a sentence of 27 months' imprisonment; on count 2, which was conspiracy to supply amphetamine, the first offender received a sentence of 33 months' imprisonment and the second offender a sentence of 20 months' imprisonment, that to run concurrently with the sentence on count 1; on count 3, which was conspiracy to supply cannabis, the first offender received a sentence of 30 months' imprisonment which was to run concurrently with the sentence on count 2. The counts which were not applicable were ordered to lie on the file.

The Facts

5. The facts are almost completely agreed save for one matter to which we will return. The facts arose from a police investigation which in turn arose from a wider operation concerned with the activities of an Organised Crime Group dealing in illegal drugs in the Manchester area. Covert surveillance officers observed the second offender meeting others and supplying drugs. These exchanges were observed or otherwise overseen by the first offender. At the relevant times the second offender was an employee of the first offender's legitimate business. Examples included events on various dates in November and December 2019; in particular on 4 December 2019 the first offender went to the second offender's home address and the two then drove off in convoy. Maugham called the first offender who was then in telephone contact with the second offender. Shortly after the second offender drove to and met a vehicle at a public house in Middleton. He was in telephone contact with the first offender and the two drove to the second offender's home address. The first offender then travelled to a nearby location and transferred a package to another male before calling and then going to meet Maugham, who retrieved a package from the first offender's vehicle and entered a restaurant. The police then entered the restaurant, detained Maugham and recovered 2 kilograms of

skunk cannabis with a street value of between £11,000 and £15,000 from the boot of his car.

6. The second offender was arrested at his home address on 4 December 2019. Recovered from his home address were the following heat-sealed packages containing amphetamine:
   (i) 18 kilograms (wet weight) with a purity of less than 5% and a value of between £27,000 and £63,000.
   (ii) 1.89 kilograms (wet weight) with a purity of 6% and a value of between £3,000 and £7,000.
   (iii) 1.96 kilograms (wet weight) with a purity of less than 5% and a value between £3,000 and £7,000. In each case the relatively low purity of the amphetamine would have meant a sale towards the lower end of the valuation. We should note that in the course of the hearing before us, it was accepted on behalf of the second offender that a purity level of 5% to 6% is usually taken to be the level which renders the amphetamine suitable for street dealing.
7. The second offender was interviewed and answered "no comment" to all questions asked. Also recovered were bags containing the following quantities of cocaine:
   (i) 82.6 grams with a purity of 42% and a value of between £3,304 and £13,876.
   (ii) 99.8 grams with a purity of 51% and a value of between £5,089 and £20,359.
   (iii) 41.3 grams with a purity of 50% and a value of between £2,155 and £8,620.
   (iv) 0.7 grams with a purity of between 53% and 57% and a value of £50 and £70.
8. Also recovered were adulterants for cutting drugs and two digital scales.
9. Messages recovered from the second offender's mobile phone showed that he was concerned in the storage, adulteration and supply of multi-kilo quantities of amphetamine. The messages showed that he delivered the drugs under the direction of the first offender. Examples of such messages were dated 10, 15 and 20 November 2019 and showed the drugs were supplied in Manchester and Middlesbrough. The messages showed that the network supplied drugs all over England. We should note, however, that at the hearing before us it has been stressed on behalf of the second offender that what he admitted to was limited to Manchester and one journey to Middlesbrough.
10. On 17 December 2020 the second offender and Maugham were arrested again and charged. On 18 December 2020, the first offender was arrested and charged.

The Sentencing Process

11. The first offender was born on 8 August 1973; the second offender was born on 10 October 1982. They both have antecedents. The first offender was convicted of 31 offences on 17 occasions between 1989 and 2014. They included in 2014, before the Crown Court at York, sentences for offences of possession with intent to supply a Class A drug, namely cocaine, for which a sentence of 4 years' imprisonment was imposed. They also included an offence of possession with intent to supply a Class B drug, namely cannabis and a sentence of 2 years' imprisonment which was made consecutive. There was an offence of possession with intent to supply a Class B drug, namely amphetamine. There was a sentence of 18 months' imprisonment made concurrent and there was an offence of being concerned in the supply of a Class A drug, namely MDMA, and there was a sentence of 4 years' imprisonment. The total sentence was one of 6 years' imprisonment. The first offender was released on 20 February 2017 and his sentence expired on 21 February 2020. It will be apparent therefore that the present offences

were committed while he was still on licence.

12. The second offender had been convicted of three offences on one occasion before the Crown Court at Grimsby in 2003. There was an offence of possession with intent to supply a Class A drug, namely MDMA, for which there was a sentence of 18 months' imprisonment. There was an offence of possession with intent to supply a Class B drug, namely amphetamine, for which there was a concurrent sentence of 6 months and there was also an offence of possession with intent to supply a Class B drug, namely cannabis resin, for which there was a sentence of 1 month made concurrent. The total sentence was 18 months' imprisonment.
13. Each of these two offenders submitted a basis of plea. The first offender asserted that he played a management/operational role and therefore a *significant role* for the purposes of the relevant guideline in respect of the conspiracies to supply amphetamine and cannabis between 11 November and 4 December 2019, after which he voluntarily chose to have no further involvement. He was responsible for organising the delivery on behalf of others. His involvement was unconnected to his legitimate business activities.
14. In his basis of plea the second offender accepted involvement in conspiracies to supply cocaine and amphetamine between 4 November and 4 December 2019. He asserted that his involvement was limited to allowing his home address to be used for the preparation of drugs by another and acting as a drugs courier on a limited number of occasions. It was agreed that the bases of plea were appropriate for the purpose of sentencing.
15. There was no pre-sentence report in relation to the first offender. There was one in relation to the second offender. The author of the report noted that the second offender said that he was involved in the offences as a way to clear a drug debt which he had incurred. He was a user of cocaine, ketamine and cannabis. He had a 7-year-old son for whom he had caring responsibilities at the weekend. The author identified a low risk of reconviction generally but a higher risk of reconviction for an offence concerning drugs supply. Character references were submitted speaking to the personal circumstances and positive characteristics of both offenders. The first offender had a 9-year-old son and a 15-year-old stepdaughter.
16. Unfortunately, there is no transcript available unfortunately of the judge's sentencing remarks. We have, however, had the advantage of an Agreed Note of those sentencing remarks. There is a difference of recollection between the prosecution and the defence as to the stage at which during the sentencing hearing the judge mentioned the question of purity of the amphetamine. What is clear is that in the result he did decide that that affected the category into which the offence should be placed at Step 1 in the sentencing exercise. It has been stressed on behalf of those who have appeared on behalf of the two offenders that the prosecution did not question this at the hearing, and that indeed they found it unnecessary to make submissions on this topic in their pleas in mitigation as a consequence. Of course we bear in mind that the way in which the prosecution may have been conducted is not something that could bind us for present purposes but it may help to explain why the judge took the approach which he did.
17. In his sentencing remarks the judge sentenced in accordance with the bases of plea and noted that the pre-sentence report and other matters showed other sides to the offenders' characters. In respect of culpability the judge concluded that both offenders played a *significant role* but that the first offender played the *most* significant role and had drawn the second offender into the criminal activity, albeit the first offender did not fall to be

sentenced on count 1.

18. Turning to harm, the judge applied an approach to the quantity of amphetamine that was based upon purity. There is a difference in recollection, as we have mentioned, as to the stage at which this was mentioned.
19. The first offender was afforded a reduction in sentence of 20% and the second offender of 25% to reflect their guilty pleas. The judge said that in respect of the first offender the sentence on count 2 would have been three-and-a-half years' imprisonment after trial. Taking account of the guilty plea the sentence was therefore 33 months' imprisonment. The sentence on count 3 of 30 months would be served concurrently. The judge stated that in respect of the second offender the sentence on count 1 would have been 3 years after trial, allowing for the reduction for a guilty plea the sentence was therefore 27 months' imprisonment. The sentence on count 2 of 20 months' imprisonment was made concurrent.

The Relevant Guidelines

20. The Definitive Guideline on Drug Offences was issued by the Sentencing Council with effect from 1 April 2021; it replaced the earlier version of the guideline and, in the submission on behalf of the Solicitor General, contains a material difference for present purposes. The new guideline states that at Step 1 of the sentencing exercise, that is when determining the offence category, in assessing harm, quantity is determined by the weight of the product. It does not expressly mention purity as a factor of relevance at all.
21. In contrast, it is submitted that the previous version of the guideline (at pages 10 and 14) provided that the purity of the drugs was not to be taken into account at Step 1 but rather was dealt with expressly at Step 2 as either an aggravating or mitigating factor. In the guideline, in the case of Class B drugs, where the offender played a significant role and the weight of the drugs places the offence in category 1, the recommended starting point is 5 years and 6 months' custody, with a suggested range of 5 to 7 years. If, on the other hand, the offence is placed in category 3, the recommended starting point is 1 year custody, with a suggested range of 26 weeks to 3 years. In the case of a Class A drug, such as cocaine, for an offence which falls into category 3 and where the offender played a significant role the recommended starting point is 4 years and 6 months' custody with a suggested range of 3 years and 6 months to 7 years.

The Approach to be taken by this Court

22. In giving the judgment of this Court in Attorney-General's Reference (No 4 of 1989) 1990 90 Cr App R 366 at 371, Lord Lane CJ said:

    i. "A sentence is unduly lenient ... where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate."

23. Lord Lane CJ went on to state that even where this Court considers that a sentence was unduly lenient, it has a discretion as to whether to exercise its powers.

Submissions on behalf of the Solicitor General

24. On behalf of the Solicitor General Mr Ratliff submits that the judge fell into error by having regard to the purity of the drugs on count 2 at Step 1 of the sentencing exercise. He submits that the correct category by reference to weight was category 1 and not category 3. Further, he submits that the amount of wet amphetamine (21.65 kilograms) only reflected the volume seized by the police on a particular day, 4 December 2019. Since this was a case of conspiracy operative between 4 November and 4 December 2019, it would inevitably have involved the supply of multiple kilo volumes before the seizure took place.
25. Mr Ratliff submits that the first respondent's role fell at the upper end of a *significant role* ("operational or management function within a chain", "motivated by financial or other advantage"), on the basis that there were indicators of a *leading role* ("directing or organising buying and selling on a commercial scale", "substantial links to, and influence on, others in chain"). He submits therefore that the appropriate nominal sentence should have been in the region of 7 years' imprisonment. But he goes on to submit that the first offender's previous convictions for possession with intent to supply of Class A and B drugs including amphetamine and being concerned in the supply of Class A drugs in 2014 were significant statutory aggravating factors. Further, he reminds this Court that the first offender was on licence at the time he committed the present offences.
26. Mr Ratliff accepts that the judge was entitled to give credit of 20% for the guilty pleas at Step 5 in the sentencing process. Further, no criticism is made of the sentence of 30 months' imprisonment on count 3 or the decision to make it concurrent to the sentence for count 2. This was appropriate having regard to the principle of totality at Step 6 of the sentencing exercise. It is, however, submitted that the sentence for the lead offence, namely count 2 should have been increased to reflect the associated offending in count 3. In those circumstances, Mr Ratliff submits the appropriate sentence on count 2 should have been significantly higher than the 33 years' imprisonment imposed.
27. In respect of the second offender, Mr Ratliff submits that the judge fell into the same material error on count 2, on the basis of the relative purity of the amphetamine. He submits that the correct category should have been category 1 and not category 3.
28. In relation to count 1 Mr Ratliff submits that the quantity of drugs recovered (225 grams of cocaine) was well in excess of the indicative amount for a category 3 offence of 150 grams. Further, the second respondent played a *significant role* as he was motivated by financial advantage and had some awareness and understanding of the scale of the operation. It is, however, common ground that the second respondent's role was not as *significant* as the first respondent's.
29. Mr Ratliff submits that the appropriate nominal sentence therefore should have been in the region of 5 years and 6 months' custody. Further, there should then have been an adjustment upwards because the second respondent had previous convictions for possession with intent to supply of Class A and B drugs including amphetamine although he recognises their old age. Mr Ratliff accepts that the judge was entitled to reduce the sentence by 25% to reflect the second offender's pleas of guilty. In relation to totality he submits that the sentence for count 2 should have reflected the fact that it was the lead offence and should have taken into account the associated offending in count 1.
30. In those circumstances he submits that the appropriate sentence on count 2 should have been significantly higher than the 20 months' imprisonment imposed, with the result that the total sentence of 27 months was too low.

Submissions for the first respondent

31. On behalf of the first respondent Mr Khan submits that the total sentence of 33 months was lenient but not unduly so. He reminds this Court that the Recorder of Manchester is an experienced judge and was best placed to make the different assessments required, particularly since in this case there was continuity and the judge presided over all the hearings bar the first one. He submits that the judge was faithful to the first respondent's basis of plea, which was not challenged by the prosecution. On that basis of plea, it was accepted that he played a management/operational role and was responsible for organising the delivery of the drugs on behalf of others. But he was involved only between 11 November and 4 December 2019, after which he voluntarily chose to have no further involvement and it was said that his involvement was unconnected to his legitimate business activities.
32. Mr Khan submits that the judge did not fall into any material error by taking into account the purity of the amphetamine. He reminds this Court that the new sentencing guideline is simply silent as to the question of purity. He submits that during the sentencing hearing the judge raised the issue of the low purity of the wholesale quantity of amphetamine seized and made it clear that he would make a substantial downward adjustment in the assessment of harm to reflect this but that no complaint was made at the time by prosecution counsel. Mr Khan also submits that the judge may have reduced the custodial sentence to reflect the conditions in prison as a result of the current pandemic although he acknowledges that the judge did not expressly refer to this factor. Mr Khan also submits that the judge had proper regard to the personal mitigation as demonstrated by the contents of the character references. At the hearing before us Mr Khan has submitted that the judge used what he described a "scientific" approach which is to be commended rather than to be criticised. He reminds this Court that the judge faced a difficult sentencing exercise, not least because the two offenders pleaded guilty to two different offences, although overlapping ones and these pleas had been acceptable to the prosecution.

Submissions for the second respondent

33. On behalf of the second respondent Mr Ross submits that any leniency in the sentence was marginal and not such as to require the intervention of this Court. He emphasises that the prosecution opened the case on the basis that two of the three main amphetamine exhibits had a purity of less than 5%. He submits that the judge was faithful to the basis of plea entered for the second respondent, which had not been challenged by the prosecution. Although it was accepted that the second respondent played a significant role, it was submitted there were elements of a lesser role and the judge had rightly concluded that the first offender had drawn the second into the offending.
34. Having regard to the mitigation available to the second respondent and the favourable pre-sentence report and character references, it is submitted that the sentence after a *guilty* plea should not be regarded as unduly lenient.

Discussion

35. We consider that, with due respect to the judge he did fall into error at Step 1 of the sentencing exercise in reducing the weight of the amphetamine (count 2) because of its

low purity. We note that even under the old guideline purity was a matter not to be taken into account at Step 1 but at Step 2 because it could be an aggravating or a mitigating factor. The new guideline has removed the reference to "purity" at Step 2. This was clearly a deliberate decision. That said, as the Sentencing Council's response to the consultation on the draft new guidelines stated at page 17, the list of aggravating and mitigating factors now mentioned is not exhaustive and therefore the purity of the drugs can, in an appropriate case, be taken into account at Step 2 of the sentencing exercise.

36. We must consider what the minimum sentence ought to have been if the offence under count 2 had been placed in category 1, as it should have been by reference to the weight of the amphetamine. In the case of the first respondent we consider that, having regard to both aggravating and mitigating factors, the sentence after trial should have been above the top end of the suggested range, that is 8 years or 96 months. We bear in mind in particular the first respondent's criminal record and the fact that he committed the present offences while he was on licence. The sentence imposed on count 2 also needs to reflect the overall gravity of his offending including count 3, on which the sentence was and will remain concurrent. No issue is taken as to the reduction which the judge gave for the guilty pleas of 20%. Applying that reduction and rounding down figures in favour of the offender leads to a sentence of 76 months, that is 6 years and 4 months.
37. Turning to the second respondent, we consider that the minimum sentence on count 2, which should have been treated as the lead offence, should have been one of 7 years, that is 84 months after trial. We bear in mind the acknowledged difference in the roles played by the two respondents although they both fell into category of *significant role*. We also bear in mind that not all of the aggravating factors are present in his case, which are in the case of the first respondent. We have also taken into account the mitigating factors. Again, no issue is taken that the reduction which the judge gave for a guilty plea of 25% was appropriate. Applying that reduction leads to a sentence of 63 months or 5 years and 3 months. We do not think it necessary to alter the other sentences given that they were made and will remain concurrent.

Conclusion

38. In the result, we grant the Solicitor General permission to make a Reference under section 36 of the 1988 Act. We quash the sentences on count 2 in the case of each offender. In the case of the first respondent, we substitute a sentence of 6 years and 4 months. In the case of the second respondent, we substitute a sentence of 5 years and 3 months.

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