IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202101267/A4

[2021] EWCA Crim 1674

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 2 November 2021

LADY JUSTICE CARR DBE
MR JUSTICE JEREMY BAKER
HIS HONOUR JUDGE KATZ QC
(Sitting as a Judge of the CACD)

REGINA
V
MARK FOLEY

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MR J REES QC appeared on behalf of the Applicant

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J U D G M E N T

LADY JUSTICE CARR:

Introduction

1. On 1 March 2021 the applicant pleaded guilty to two offences before Johnson J ("the Judge") as follows: count 4, an offence of consent or connivance in the commission of an offence, contrary to section 33(1)(c) and 33(6) of the Environmental Protection Act 1990 or neglect to which that offence was attributable, contrary to section 33(1)(c) and 33(6) and 157(1) of the Environmental Protection Act 1990; count 16, an offence of making false or misleading statements, contrary to section 44 of the Environmental Protection Act 1990.

2. Following a Newton hearing at which the applicant's basis of plea was rejected, the Judge imposed sentences of two years three months' imprisonment on count 4 and 20 weeks' imprisonment on count 16, such sentences to run concurrently.

3. This is the applicant's renewed application for leave to appeal against sentence for which purpose he has had the benefit of representation from Mr Rees QC acting pro bono.

The facts

4. The applicant, now 64 years old, was sole director and the majority shareholder of ME Foley Contracts Ltd ("MEFCL"). MEFCL was a special purpose vehicle set up by the applicant to purchase Stowey Quarry, a site covering 8.7 hectares set amongst agricultural land in the Chew Valley, Somerset ("the Site").

5. Through MEFCL the applicant was responsible for management of the Site. In 2012 the Environment Agency ("EA") granted MEFCL a permit to operate waste operations and construction work at the Site. The permit limited the total quantity of waste that could be stored or used at the Site to 100,000 tonnes.

6. The applicant's previous convictions included a conviction in 2015 for permitting the contravention of the requirements of an environmental permit in that year for which he was fined £2,900 and ordered to pay costs in the sum of £2,200.

The offending on count 4

7. The applicant's offending on count 4 covered the period from 1 January 2016 to 31 December 2016. During the course of the year local residents had become concerned at what was being stored and deposited at the Site, as well as concerned at the increase in activity of drivers around the Site, those drivers being clearly unfamiliar with the area. The residents noticed offensive odours coming from the Site which appeared to be odours from decomposing household waste.

8. On 1 June 2016, the EA carried out a site inspection. It found extensive evidence of non-permitted waste. A Compliance Assessment Report ("CAR") was sent on 10 June 2016 advising the applicant to stop taking in non-permitted waste and to arrange immediately for such wastes already on site to be removed. Further site inspections took place on 17 June, 25 August and 13 September 2016. On each occasion very large amounts of non-permitted waste were found, including new waste. Attempts had been made to conceal the waste with a covering of a top layer of sandy material. Further

CARs were issued giving deadlines for removal.

9. On 13 October 2016 another site inspection took place. Yet again large quantities of non-permitted material, including new material, were found. The applicant was given a deadline of 31 January 2017 for removal. He emailed the EA to indicate that no new inert waste was being accepted and that work had begun to remove the non-permitted waste. However, MEFCL's permit was suspended. A visit by the EA on 18 November 2016 revealed the Site to be closed with no one in attendance. The applicant was reminded in a further letter of his obligation to remove the non-permitted waste.

10. The EA survey suggested that approximately 75,000 cubic metres of the Site had been filled and that during 2016 almost 100,000 tonnes of unpermitted waste had been deposited. The Site remained highly contaminated with carcinogenic, mutagenic and eco-toxic materials, acid and putrid odours were present, alongside occasionally strong hydrogen odours. Cleaning up the site containment, said the survey, would require treatment for 30 years with an estimated cost of over £13 million. The cost of removal of the waste was estimated at around £25 million.

Count 16

11. The applicant's offending on count 16 covered the period from 30 October 2017 to 1 December 2017.

12. In December 2016 the applicant wrote back to the EA stating that MEFCL had acted immediately to ensure that the non-permitted waste was removed and the duty of care tickets for the removed waste would be posted to the EA's office.

13. The applicant was first interviewed under caution in July 2017. In October 2017 he wrote to the EA stating that 60 loads of waste had been removed from the Site and that the remaining non-permitted waste would be removed in due course.

14. On 30 November 2017 the applicant emailed the EA with copies of 60 Waste Transfer Notes ("WTNs") covering the period from 17 October to 28 October 2017. 45 of those WTNs were false. The purported transfers of waste had not actually taken place.

Plea and sentence

15. The applicant was not charged until September 2019. He indicated guilty pleas in February 2021 and entered guilty pleas in the following month. His guilty plea to count 4 was entered on the basis that his actions had been negligent rather than deliberate. He pleaded guilty to count 16 on the basis that his actions had been reckless but he had not known the WTNs to be false.

16. His bases of plea were not accepted. Following a three-day Newton hearing the Judge ruled that on count 4 the applicant had acted deliberately, and that on count 16 he had known that the WTNs were false.

17. The applicant fell to be sentenced by reference to the Sentencing Council Guideline on Environmental Offences for Individuals ("the Guideline"). The Judge placed the

applicant's culpability at the highest level, concluding that he had intentionally breached the law. He also placed harm at the higher end of Harm Category 1. In mitigation it was noted that the applicant suffered chronic illness, including through a form of blood cancer. The supportive statements provided were also noted and the applicant's remorse was accepted as genuine. It was recognised that the case had been hanging over the applicant for five years, not due to any shortcomings on his part, and it was recognised that the prison conditions in the pandemic would be harsher than normal.

Grounds of appeal

18. Mr Rees for the applicant concedes that the offence on count 4 was deliberate Category 1 offending but contends that the Judge erred in assessing the harm at the "highest end" on the basis, in short, that this was only a risk of harm case; no actual harm was caused. Reliance is placed on the Guideline where it is stated that risk of harm is less serious than actual harm and will normally justify moving down to the next category of harm. Mr Rees emphasises his submission that the Judge failed adequately to reflect the true nature of this case. Further, there had been unlawful waste on the Site for many years predating the indictment period, so it was not possible to ascertain the precise extent of pollution during the indictment period. There was, given the background to the Site, little or no damage to amenity value. Costs of remediation were also only a risk element, not an actual harm factor. Mr Rees points to the fact that the falsity of the WTNs could not affect the proper categorisation of harm for the purpose of count 4. Thus, the over-arching submission is that the Judge ought to have taken a starting point before assessing aggravating and mitigating factors of less than 18 months.

19. Mr Rees accepts that the Judge correctly identified aggravating factors alongside mitigating factors. Balancing those matters against each other, it is said that the Judge should have arrived at a lower figure than the term of two years and six months before credit for guilty plea. In short, the total term of two years and three months' custody imposed by the Judge is said to be manifestly excessive.

Discussion and analysis

20. As indicated, the Judge's categorisation of the offending for the purpose of the Guideline is rightly not challenged. Under the Guideline, the starting point was 18 months' custody with a range of one to three years. The question for us is whether it is arguable that a term of two years and six months' imprisonment before credit for guilty plea was manifestly excessive.

21. We have concluded that it is not. First, the Judge was well-placed to sentence the applicant having presided over his three-day Newton trial. He heard all evidence from two witnesses from the EA, alongside written evidence, and also oral evidence from the applicant. He had the benefit of an extensive bundle of documentation, including the permit for waste disposal, the CARs setting out the findings of the EA following its attendances, emails and other relevant correspondence.

22. Secondly, the Judge was entitled to place culpability at the top end of the scale even acknowledging, as he did, the applicant's health problems, the fact that he had to some

extent handed over day-to-day control of the Site and that there had been a degree of misunderstanding as to the amount of waste permitted.

23. Thirdly, as for harm the Judge did not place harm at the "highest" end, rather at the "higher" end. He was entitled to do so, even though, as he acknowledged, there had been only a risk of as opposed to actual harm to human and animal health and to flora. It is conceded that on the facts here the Judge was not required to move down to the next category of harm. The polluting material was on the Site in vast quantities, across the width and breadth of the Site and in part of a dangerous nature. The Site remained highly contaminated with material that was carcinogenic and mutagenic. Significant quantities of landfill gas were being generated. Leachate seepages were present, alongside acid and putrid odours. There had been alarm within the community and the Judge found in terms that there had been a major adverse effect to the amenity value of the land. Further, the costs of remediation would, so he found, run on any view into many millions of pounds.

24. As indicated, the Judge acknowledged the relevant mitigating factors including remorse, positive character references, chronic ill-health, the impact of the pandemic on prison conditions and the significant delay in the case. Against those were the following aggravating factors: the applicant's previous conviction in 2015, his failure to respond to Site visits and warnings, the evidence of wider community impact, the location of the Site near to important water resources (albeit that there was only a risk of contamination in this regard) and concealment of the unauthorised activity.

25. Standing back, in our judgment it is not arguable that the Judge was not entitled to adopt a term of two years and six months before credit for guilty plea on count 4, a term well within the relevant sentencing range for the relevant category. It is important to remember that the Judge chose to impose a concurrent sentence for the offending on count 16. The submission of WTNs was not only dishonest but also amounted to a major interference with the regulatory regime. It simply cannot be said that an overall sentence of two years and three months' imprisonment was manifestly excessive when set against the totality of the applicant's offending.

26. For these reasons the renewed application is refused. We repeat our thanks to Mr Rees for his helpful submissions and assistance.

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