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IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202200693/A3
NCN [2022] EWCA Crim 540



Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 12 April 2022

Before:

LORD JUSTICE HOLROYDE

MRS JUSTICE FARBEY DBE

SIR NIGEL DAVIS

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

REGINA

v

PETER SWAILES (JUNIOR)

Computer Aided Transcript of Epiq Europe Ltd,
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Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR P RATLIFF appeared on behalf of the Attorney General.
MS J MCCULLOUGH appeared on behalf of the Offender.

J U D G M E N T

1. LORD JUSTICE HOLROYDE: Peter Swailes (Junior) (to whom we shall refer as "the offender") pleaded guilty to an offence of conspiracy to arrange or facilitate the travel of another with a view to exploitation, the particulars being that between 31 July 2015 and 25 April 2019 he conspired together with his father, Peter Swailes (Senior) and with others to arrange or facilitate the travel of Robert Stilgoe with a view to him being exploited. On 4 February 2022, in the Crown Court at Carlisle, he was sentenced by HHJ Archer to 9 months' imprisonment suspended for 18 months. Her Majesty's Solicitor General believes that sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.
2. The victim of the offending, Mr Stilgoe, was a vulnerable man with a learning disability. His IQ was in the extremely low range. He had been placed into care in his childhood, was highly suggestible and had very little understanding of the world around him. He had started to work for Mr Swailes (Senior) when he was about 18 years old and continued to do so for around 40 years. He was employed in roofing and labouring work, sometimes in dangerous conditions which paid no heed to his health and safety, and appears to have been paid only £10 per day. At the start of the indictment period, which reflected the coming into force of the Modern Slavery Act 2015, Mr Stilgoe was aged in his mid-50s. Those investigating the offending found him to be living in wretched conditions, housed by Mr Swailes (Senior) in a shed which was not waterproof and had no heating. He had no savings and almost no clothing or possessions.
3. The offender was jointly charged with his father. They pleaded not guilty and their case was listed for trial. Because of Mr Stilgoe's vulnerability, his cross-examination took place in advance of the trial, pursuant to section 28 of the Youth Justice and Criminal Evidence Act 1999. He had the assistance of an intermediary whilst giving his evidence.
4. In August 2021, some weeks after that cross-examination, Mr Swailes (Senior) died. The case proceeded against the offender alone. Shortly before the trial date, a key prosecution witness made a further statement, and made comments to an investigating officer which were very properly recorded and disclosed to the defence, which caused the prosecution to reappraise the strength of their evidence. The trial did not start on its scheduled date of 17 January 2022. Ms McCullough (then as now representing the offender) put forward a proposed basis of plea.
5. The terms of that basis of plea, set out in four paragraphs, are important. It stated that the offender had known Mr Stilgoe for many years and Mr Stilgoe was a regular visitor at the offender's home; stated that the offender, who did not live at the same location as Mr Stilgoe, was unaware of Mr Stilgoe's living conditions; denied that Mr Stilgoe had worked with the offender on a very regular basis, but accepted that from time to time Mr Swailes (Senior) would contact him and arrange for Mr Stilgoe to undertake work for the offender; and accepted that on occasion the offender paid Mr Stilgoe less than his minimal entitlement.
6. At a hearing on 18 January 2022 the judge was informed that the proposed basis of plea was acceptable to the prosecution, and was invited to give a Goodyear indication as to sentence.
7. The Sentencing Council has produced a definitive guideline for sentencing substantive offences of Human Trafficking contrary to section 2 of the 2015 Act. Although not directly applicable to a charge of conspiracy to commit such an offence, it is common

ground that it is relevant to the sentencing in this case.

8. The judge was informed by prosecution counsel that on the agreed basis of plea, the prosecution would regard the offence as falling within category C4 of the Guideline, for which the starting point is 26 weeks' custody and the category range from a high level community order to 18 months' custody.
9. The judge enquired about the offender's health and was informed by Ms McCullough that the offender had suffered two strokes, the first of which was in 2018, and had subsequently suffered a series of what were referred to as mini-strokes including one a few days earlier. He also suffers from fibromyalgia, is in constant pain for which he takes very strong pain relief medication and has been assessed as clinically depressed.
10. The judge indicated that he understood why, on the prospective basis of plea, it would be a case of lower culpability. He further indicated that he was prepared to accept the view of prosecution counsel, with her knowledge of the case, that the harm was limited. He stated that the seriousness of the offence could only be met by a custodial sentence, but that the length of the sentence would be such that it would be capable of being suspended. He did not give any indication that the sentence would be suspended, but did say that he would look as favourably as he could on any recommendations which might be made in a pre-sentence report.
11. The hearing was adjourned so that Ms McCullough could take further instructions. The offender was then re-arraigned and pleaded guilty.
12. At the later sentencing hearing the judge had the assistance of a pre-sentence report, a doctor's report about the offender's health problems and a psychiatric report. He also had a number of testimonial letters written by persons who know the offender well.
13. The offender was then 56 years old, a married man with adult children. He has basic reading skills but cannot write. He had left home at the age of 14 in order to escape the physical abuse he had suffered at the hands of his father. He had a number of spent convictions for offences of dishonesty many years ago.
14. In summarising the facts, prosecution counsel stated that it had been Mr Swailes (Senior) who had borne the primarily responsibility for the exploitation of Mr Stilgoe, with the offender having a serious but lesser role which involved lower culpability under the guideline. She went on to say that the offender's limited role had added to the already damaging consequences of his father's criminal conduct, so that the harm caused by the offender fell into category 4 of the guideline.
15. We are of course very conscious that Mr Swailes (Senior) died before any court could adjudicate on the allegations against him. We nonetheless think it right to say, for the purposes of the present application, that from all we have read it seems entirely clear that Mr Swailes (Senior) was throughout the prime mover and that his son lived in fear of him. Those propositions were not disputed by the prosecution.
16. In her mitigation, Ms McCullough referred to the efforts that the offender had made from a very young age to make his own way in the world; his strained and difficult relationship with his father; his poor health; his remorse for his part in failing to treat Mr Stilgoe fairly and with respect; and the adverse consequences of imprisonment for the offender's family as well as himself. She emphasised the basis of plea and the limited offending which was admitted.
17. In his sentencing remarks, the judge similarly emphasised the importance of focusing on the limited extent of the offending referred to in the accepted basis of plea. On that basis

the offender had not been responsible at all for Mr Stilgoe's living conditions. The extent of his culpability was that with the assistance of his father, and on limited number of occasions, he had facilitated the travel of Mr Stilgoe for work purposes and on occasion had paid him less than his minimum entitlement. The offender had exploited Mr Stilgoe, and the judge said it must have been obvious to him that Mr Stilgoe had no real appreciation of the potential consequences of some of the work which the offender had required him to perform at an undervalue. The fact that this had persisted over many years was an aggravating feature.

18. The mitigation factors were the lack of any recent or relevant convictions, the offender's physical and mental health problems, the favourable testimonials and the controlling influence which his father had exercised over him.
19. The judge concluded that the appropriate sentence after a trial would have been 10 months' imprisonment. He reduced that by 10% for the late plea. Applying the Sentencing Council's Imposition guideline, the judge found that there were no factors indicating that it would not be appropriate to suspend the sentence, and he did not regard it as a case in which appropriate punishment could only be achieved by immediate custody.
20. For those reasons the judge imposed the sentence of 9 months' imprisonment suspended for 18 months with a rehabilitation activity requirement. He declined to make a Slavery and Trafficking Prevention order.
21. In his careful submissions on behalf of the Solicitor General, for which we are very grateful, Mr Ratliff submits that the sentence was unduly lenient. In what he acknowledges to be a departure from what was submitted to the judge, he argues that prosecution counsel and the judge were wrong to place the offending in category C4 of the Guideline. Mr Ratliff submits that the judge should have placed it in category B culpability because the offender played a significant role in the offending and had an expectation of significant financial advantage. He further submits that the judge was wrong to treat the case as one of limited harm. Instead of focusing on the harm which Mr Stilgoe had already suffered as a result of the conduct of Mr Swailes (Senior), the judge should have found that the offender's actions and the conspiracy of which he was a part had caused harm falling within category 3, including at least some psychological harm and significant financial loss and disadvantage.
22. Mr Ratliff accordingly submits that the appropriate starting point was 6 years' custody with a category range from 5 to 8 years. He further submits that the judge should also have reflected in the sentence the fact that the offender's action had been part of a wider course of criminal activity. Taking into account the aggravating and mitigating factors, Mr Ratliff submits that the appropriate sentence should have been of a length which could not have been suspended.
23. In his written submissions, he had further argued that the judge had been inappropriately generous in allowing as much as 10% credit for the guilty plea. That submission was not specifically pursued in oral submissions.
24. Mr Ratliff acknowledges that if the sentence were found to have been unduly lenient, a question might arise as to whether the conviction of the offender is unsafe, on the basis that the Goodyear indication given by the judge had the effect of placing inappropriate pressure on the offender, such that his plea was not voluntary. If that be the position, Mr Ratliff submits that the appropriate course would be for the offender to make an

application for leave to appeal against conviction.

25. In her submissions on behalf of the offender, for which also we are grateful, Ms McCullough submits that the judge was correct in his categorisation of the offending, that he carefully considered all relevant features of the case and that the sentence was not unduly lenient. She emphasises that the basis of plea admitted only an extremely limited role, with the arrangements for Mr Stilgoe's work being at all times controlled and overseen by Mr Swailes (Senior).
26. Ms McCullough frankly accepts that she did not advise the offender of the possibility that the sentence might be referred to this court for consideration of whether it was unduly lenient. She submits that the offender would not have pleaded guilty if it had been asserted by the prosecution that the case fell into a higher category of the guideline, with a substantially greater starting point and sentencing range. She therefore submits that if the sentence were found to be unduly lenient, the offender's conviction could not be regarded as safe.
27. We should add for completeness that a report has been prepared for the assistance of this court as to the offender's progress under the suspended sentence order. It states that he has attended all appointments and has engaged well with those supervising him. It also refers to recent threats of, and commission of, attacks on the offender's property, and an indication by the offender that, if sentenced to immediate imprisonment, he would contemplate suicide as the only way to protect his family from harm.
28. We have reflected on the very helpful submissions we have received in what is far from a straightforward case.
29. The Solicitor General is in principle entitled to depart from prosecution submissions in the court below and so is entitled to argue that the judge was led into error in categorising the offending under the guideline. In the circumstances of this case, consideration of that argument must begin by focusing on the terms of the accepted basis of plea.
30. We can well understand why there might be scepticism as to some of the facts asserted in that basis of plea. The prosecution, however, faced significant evidential difficulties in proving anything more than the offender was willing to admit. A carefully-considered decision was made to accept the proposed basis of plea. The position was clearly explained to the judge, who also considered it carefully before accepting it. Having done so, the judge was of course bound to sentence on that basis, and rightly did so.
31. Mr Ratliff very helpfully confirmed that it was no part of his submissions to argue that the judge was not entitled to accept the basis of plea as a proper basis for sentencing. The sentencing which followed must therefore be considered by reference to the very limited admissions which were made as to the offender's criminal conduct.
32. It is a striking feature of this case that the course of proceedings which we have briefly outlined involved first, a careful consideration by all concerned of the proposed basis of plea and then an explicit categorisation within the guideline by reference to that basis of plea. The procedure to be followed when a defendant asks a judge for an indication as to sentence was clearly set out by this Court in R v Goodyear [2005] EWCA Crim 888. The decision in that case is now reflected in the Criminal Practice Direction at CPD VII Sentencing C. In the present case the procedure was largely followed. We would however stress the importance of what was said in Goodyear at paragraph 65 as to the duties of the defence advocate in such circumstances and in particular to note subparagraph (b) of that paragraph:

- i. "The advocate is personally responsible for ensuring that his client fully appreciates that...
 - ii. (b) any sentence indication given by the judge remains subject to the entitlement of the Attorney General (where it arises) to refer an unduly lenient sentence to the Court of Appeal ..."
33. That duty should be kept well in mind by all defence advocates when requesting an indication as to plea. It was, regrettably, overlooked by both counsel in the court below. In our view however, that oversight is not material to the decision which we have to make on this application.
34. In giving the limited indication as to sentence which he did, the judge expressly referred to the serious nature of the offending and was careful not to give any indication that the necessary prison sentence would be suspended. It was in those circumstances that the offender entered his guilty plea.
35. The agreed basis of plea did not include any admission that the offender conspired with anyone other than his father. It included an express denial of any knowledge of Mr Stilgoe's wretched living conditions and explicit assertions that the occasions when Mr Stilgoe worked for the offender were initiated by Mr Swailes (Senior). We agree that by his plea to conspiracy, the offender accepted that he knew he was part of a wider course of criminal conduct involving the exploitation of Mr Stilgoe; but in the circumstance of this case, and on the very limited basis of the plea, that admission did not add greatly to the offender's culpability.
36. In those circumstances the judge cannot, in our view, be said to have been wrong to place the offending into category C4 of the guideline. We see the force of Mr Ratliff's submissions as to culpability being in category B, though we note that for category B4 of the guideline the category range goes down to 1 year's custody. On the agreed basis, however, the offender could properly be said to have performed only a limited function under direction, and the harm caused, both by his own offending and by the limited wider criminality of which he admitted being part, could properly be regarded as limited. Those were generous assessments in the offender's favour and the resultant sentence was certainly lenient. But we cannot say that they were assessments which were not properly open to the judge. Sentencing is a fact-specific exercise, and the judge here reached his decision by properly observing the very narrow boundaries of the basis of plea.
37. For those reasons, we can see no basis on which either the length of the custodial term or the decision to suspend it can be said to be unduly lenient. Accordingly, grateful though we are to Mr Ratliff, leave to refer is refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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