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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO: 2021 03361 A2

[2022] EWCA CRIM 774

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 12 May 2022

Before:

LADY JUSTICE SIMLER

MR JUSTICE GARNHAM

RECORDER OF WESMINSTER
HER HONOUR JUDGE DEBORAH TAYLOR

REGINA
v
VYTAUTAS KIMINIUS

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MS C DAVIES appeared on behalf of the Applicant

J U D G M E N T

Lady Justice Simler:

Introduction

1. On 12 November 2018 the applicant was driving a stolen Range Rover. He drove around a blind bend on the wrong side of the road and collided directly with a Ford Fiesta driven by Ms Radwell, who later died from the severe injuries she sustained in that collision.
2. On 5 December 2019 the applicant pleaded guilty on rearraignment to causing death by driving while uninsured. He was then tried in the Crown Court in Cambridge and convicted on 7 February 2020, by His Honour Judge Enright and a jury, of causing death by dangerous driving. He absconded after the trial, leaving the country and attempting to change his name to avoid identification.
3. On 14 May 2020, before the same judge, he was sentenced in his absence to a term of 54 months imprisonment for causing death by dangerous driving, with nine months imprisonment concurrent for the insurance offence. The question of disqualification was postponed. On 10 December 2021 the case was relisted under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 in order to enable the judge to express the disqualification in a manner consistent with R v Needham. No account was taken in the sentence for those matters of the fact that the vehicle that the applicant was driving was a stolen vehicle. His arrest in the stolen vehicle prompted a review of past police investigations into an address linked to him where cannabis growing had been discovered.
4. On 30 October 2020 he surrendered to custody and on 22 December 2020 he appeared in the Peterborough Crown Court in relation to a number of additional matters. On 12 February 2021, in the Crown Court at Peterborough before His Honour Judge Enright, he pleaded guilty to four offences and was sentenced by the judge on 20 October 2021 as follows: For offences of conspiracy to handle stolen goods contrary to section 1(1) of the Criminal Law Act 1977, a term of imprisonment of two years three months was imposed; for breach of bail, three months imprisonment to run concurrently was imposed; for seven counts of converting criminal property contrary to section 327(1)(c) of the Proceeds of Crime Act 2002, a term of two years imprisonment, concurrent on each count, to run

concurrently to the other sentences was imposed; and for being concerned in the production of a controlled drug of Class B (cannabis) contrary to section 4(2)(b) of the Misuse of Drugs Act 1971, there was a consecutive sentence of five years and four months. The total sentence passed by the judge was seven years seven months imprisonment, ordered to run consecutively to the term of imprisonment to which the applicant was already subject. A number of ancillary orders were made which do not concern us.

5. The applicant applies for an extension of time of 14 days in which to renew his application for leave to appeal against sentence and for a representation order after refusal by the single judge. We have had the benefit of submissions both in writing and orally from Ms Davies, who appears *pro bono* on his behalf and to whom we are grateful. We have also read an email dated 8 April 2022 from the applicant's solicitors explaining how and why the renewal form was put in late.

<u>The facts and sentence</u>

6. The facts are fully set out in the Criminal Appeal Office summary and it is not necessary, therefore, for us to repeat them.

7. Before his sentence on 14 May 2020 the applicant was a man of good character. The Crown Court sentenced him without a pre-sentence report. None was necessary then and nor is one necessary now.

8. For the conspiracy to handle offence, the judge determined that the offence fell within category A for culpability because of the applicant's significant role and the professional and sophisticated nature of the offending. The value of the stolen cars was estimated to be in excess of £62,000, placing it within category 2 harm. The judge said that meant a starting point of three years. We consider that the judge must have been referring to the notional sentence rather than the starting point when he made that observation. Credit for guilty plea was 25 per cent and that therefore led to a sentence of 27 months imprisonment.

9. For the cannabis offences, the production of cannabis took place over a five year period. The applicant had a leading role, in that he directed and organised repeated cannabis growing sites on a commercial scale. He did so in the expectation of substantial financial

gain. He also used a business as a cover for his criminal activities. It was a commercial, well-organised enterprise. The judge found the offences fell within category 2 for harm. This was a large scale operation. In addition to the 1 kg bag of cannabis found at his home in June 2019, bank statements showed payments between 2016 and 2019 reflecting just under £80,000 spent on growing equipment. That took no account of cash purchases. Having regard to all these features, the judge took a notional sentence of eight years from a starting point within the category range of six years. After full discount for guilty plea, that produced a sentence of five years and four months.

8. For the Proceeds of Crime Act offences, the Crown and the defence agreed that the figure was £85,000, placing the offending within category 5 for harm. The culpability was category A, owing to the duration of the offending. This produced a sentence of three years, which was discounted to two years to reflect the applicant's guilty plea.

The application

9. In written grounds of appeal developed orally by Ms Davies, she contended on the applicant's behalf that the notional sentence for the production of cannabis was too high. The sentence effectively placed the offence within category 1 for harm, industrial-scale quantities. She submitted that the judge erred either in placing the offence within category 1 or at the very least at the very top of category 2. She submitted that the aggravating features were not sufficient in this case to uplift the sentence to one of eight years.

10. Secondly, she contended that the totality of the sentence was manifestly excessive. While the categorisation and the individual sentences for the other offences could not be criticised, the adoption of the eight year sentence for the cannabis offending rendered the sentence overall manifestly excessive. Furthermore, the applicant was already serving a lengthy sentence for causing death by dangerous driving and insufficient regard for totality was made.

11. In writing, Ms Davies also made reference to the Covid conditions within the prison estate, for which she submitted insufficient allowance had been made. However, and realistically, she did not pursue that argument in her oral submissions.

12. Refusing leave to appeal the single judge gave the following reasons:

> "I have considered the papers in your case and your grounds of appeal.
>
> It is properly conceded on your behalf that the individual sentences are not excessive, save [it is argued] for that for the cannabis cultivation. The appeal is advanced on the basis of the cannabis sentence being excessive, there being insufficient allowance for totality [the four sentences to each other and to the earlier death by dangerous driving sentence], and no allowance being made for prison conditions during the pandemic. I deal with each in turn.
>
> Cannabis: this was a robust sentence, at the top of the relevant category, and longer than that which some other judges would have imposed. It was one, however, that the Judge was entitled to pass and his individual sentences on other offences [such as the handling] were lower than others might have imposed, and his discounts for guilty pleas were generous though entirely proper.
>
> Totality: the 5 types of offending [causing death by dangerous driving, cannabis, handling stolen good, POCA and Bail Act] are all distinct and could, save for totality, have been met with consecutive sentences. The Judge was right to make a clear allowance for the effects of totality and his method, by imposing 2 of those sentences [POCA and Bail] in concurrent terms so as not to add to the total time that will be spent in prison, was a suitable means of his doing so.
>
> Covid: I do not think the decision of Lord Burnett CJ in R v Manning [2020] 4 WLR 77 imposes a requirement that all custodial sentences must be reduced, rather that Covid is a matter that a Judge can take into account when passing sentence or, as on the facts of Manning, considering whether to suspend a sentence. I do not think that Manning renders any sentencing remarks that fail to make mention of a covid submission vulnerable to appeal."

13. We agree with those reasons and that none of the grounds advanced by Ms Davies is arguable.

14. As the single judge observed, the notional sentence of eight years for cannabis production was at the top of the category 2 range and was expressly not placed in the category 1 range despite prosecution submissions that it should be. The guideline makes clear that:

> "The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step 1, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features."

15. In this case there were three features of culpability that all made the applicant's role a leading one. There was also aggravation, in that this was an ongoing and large-scale operation that endured over five years, with significant profit made. There was little, if any, mitigation. In those circumstances, we can see no arguable basis for criticising the upward adjustment to eight years for this offending.
16. The principle of totality means that it will normally be appropriate to order sentences to run concurrently to each other where the offences arise out of the same incidents or facts or there is a series of offences of a similar kind, especially when committed against the same person. In the present case the offences committed by this applicant are entirely distinct. They were committed at different times and over different periods and the victims (where there were victims) were different. So far as the Bail Act offence is concerned, it is generally the case that a sentence for a Bail Act offence should be consecutive. The handling offences were entirely separate to the dangerous driving offence. The production of cannabis was a wholly separate set of offending and different in kind to the handling. Passing concurrent sentences for these offences would suggest that there is no difference between multiple criminal activities and more limited criminal activity. Moreover, as the relevant guideline makes clear, cleaning up criminal gains is an integral part of crime. It should, when exposed, be marked by an appropriate sentence.
17. This was a case where, in principle, all sentences could have been consecutive but tempered by the principle of totality. In fact the judge made a clear allowance for the effects of totality by imposing two of the sentences (the Proceeds of Crime offence and the bail offence) in concurrent terms so as not to add to the total time that would be spent in prison. This was an entirely suitable means of allowing for totality and in our judgment the approach of the judge cannot arguably be impugned as wrong in principle. Nor is there any arguable basis for challenging the total sentence as manifestly excessive.
18. This application is accordingly refused and there is no good reason for extending time in those circumstances. We are grateful to Ms Davies for her able submissions.

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