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No: 201901929/A2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday 9 August 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE GOSS

MR JUSTICE KNOWLES

R E G I N A

v

STEVEN ROWLANDS

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Mr C Rees appeared on behalf of the **Appellant**

J U D G M E N T

(Approved)

1. LORD JUSTICE HOLROYDE: On 26 April 2019 in the Crown Court at Cardiff, this appellant was sentenced by Her Honour Judge Jones to a total of three years four months' imprisonment, for two offences contrary to section 46 of the Serious Crime Act 2007 to which he had pleaded guilty at an earlier hearing. He now appeals against his sentence by leave of the single judge.
2. The appellant is now aged 35. His only previous conviction was for driving with excess alcohol as long ago as 2006. He has dealt admirably with a number of difficulties and set backs in his life and is highly regarded by those who know him. Unfortunately, at a time when it seems he was under some financial pressure, he fell into conversation in the course of an evening out with a cocaine dealer. That conversation led him to decide that he could make money by acting as a middleman in selling benzocaine to drug dealers. He knew that benzocaine was used by drug dealers to dilute the purity of cocaine and other white powder drugs. He had a contact through whom he was able to buy benzocaine from China, paying the Chinese supplier in Bitcoin. He advertised the product on eBay, passed on orders to his supplier and arranged for delivery to be made direct to the customer. His profit was around £130 per kilogram of benzocaine.
3. The appellant was arrested in July 2018. His most recent transaction was the sale of one kilogram of benzocaine destined for a female customer, which was being delivered in a package falsely declaring the contents to be bath salts. Examination of the appellant's mobile phone linked him to a number of customers around the United Kingdom, including a man in South Wales whose home was searched by the police and found to have within it two kilograms of cocaine, benzocaine, £34,000 in cash and valuable watches and jewellery. That man was subsequently sentenced to nine years' imprisonment. He had stored the appellant's phone number in his own phone as "Benzo boy".
4. In interview, the appellant made full admissions. He admitted that in addition to the transaction which was intercepted, he had supplied about 21 kilograms of benzocaine over a period of about seven months. We note that that course of activity was brought to an end by the intervention of the police, rather than voluntarily given up by the appellant.
5. The appellant was charged on an indictment containing two counts. Count 1 related to the intercepted package destined for the female customer. Count 2 was a specimen count covering the supply of 21 kilograms of benzocaine. The particulars of each count were in identical terms as follows:
 - i. "Steven Kelvin Rowlands between the 31st day of December 2017 and the 3rd August 2018 did an act, namely, sourcing and supplying benzocaine, which was capable of encouraging or assisting the commission of one or more of a number of offences, namely the supply of Class A or Class B drugs, believing that one

or more of those offences would be committed and that his act would encourage or assist the commission of one or more of them."

6. The appellant pleaded guilty to both counts at the earliest opportunity. There was evidence before the court that the benzocaine could be used to dilute or cut cocaine in the proportions of one part benzocaine to three parts cocaine. Thus, if all of the benzocaine sold by the appellant had been mixed with cocaine, it would have resulted in well over 80 kilograms of cocaine at the level of purity sold on the streets.
7. A pre-sentence report was prepared. It assessed the appellant as presenting a low risk of re-offending. It recorded his expressions of shame and remorse for what he had done. The judge was provided with a most impressive bundle of testimonials. She was also assisted by sentencing notes helpfully prepared both by prosecution and defence counsel. She was referred to relevant case law.
8. The judge treated the appellant as a man of good character. She referred to the very strong personal mitigation which had been advanced on his behalf. She noted that there is no definitive sentencing guideline applicable to offences contrary to section 46 of the 2007 Act. At page 3G to 4C of her sentencing remarks she explained her approach as follows:
 - i. "I must start at a point which is that of the maximum sentence for the most serious offence. The most serious offence here must be the Class A offence, so as if you were supplying Class A drugs. I am then obliged to calibrate the sentence, considering that you knew that the benzocaine could be used with either supply of Class A or Class B drugs, but that you did not actually supply those drugs and you did not actually know for certain whether they would be Class A or Class B. But the reality is that you sold the benzocaine on, not caring, or not bothering to enquire and not being concerned, whether they would be used for cutting Class A or Class B drugs.
 - ii. There is clear evidence here that the benzocaine was used to assist and facilitate the supply of drugs because a known drug dealer, a convicted drug dealer, was in touch with yourself.
 - iii. I am concerned that it was during a conversation with a cocaine dealer, a Class A cocaine dealer, that you got the inspiration to commence the enterprise. You know cocaine is a Class A drug.
 - iv. I have looked at the Sentencing Guideline for Class A and Class B drugs. I am trying to be as fair as I possibly can to you, but I

cannot get away from the fact that you believed that that benzocaine could be used for Class A or Class B."

9. The judge assessed the appellant's culpability as a significant role, performing an essential function within a chain and doing so for financial reward. She assessed the level of harm as amounting to Category 1 under the guidelines relating to offences of supply of both class A and class B drugs. She accepted that the appellant had been very naive in becoming involved in this offending and was now genuinely remorseful. She concluded that the appropriate total sentence before giving credit for the early guilty pleas would have been five years' imprisonment. In those circumstances, she imposed concurrent sentences of three years four months' imprisonment on each count.
10. In his helpful written grounds of appeal and oral submissions, Mr Christopher Rees, representing the appellant before this court as he did below, submits that the judge was wrong to refer to the sentencing guideline in relation to the supply of class A drugs. He emphasises that the appellant knew that the benzocaine would be used in the supply of controlled drugs, but did not have a belief as to whether they would be drugs of class A or of class B. Counsel acknowledges that in the cases of Watling [2012] EWCA Crim. 2894 and Woodford [2014] 1 Cr.App.R (S) 32, this court has held that the sentencing judge had been correct to consider the class A guideline. But, argues Mr Rees, in each of those cases the offender was charged under section 45 of the 2007 Act and believed that the chemical which he was supplying would be used in the supply of class A drugs. Similarly, in relation to Hall [2014] 2 Cr.App.R (S) 20, a case in which the offenders were charged under section 46 of the 2007 Act, this court held that the sentencer had been correct to consider the class A guideline. But Mr Rees points out that the offenders in that case believed their product would be mixed with cocaine. In the present case Mr Rees submits there was no such specific belief. The appellant accordingly had a lower level of culpability, and whilst the judge could properly refer to the guidelines for class B offences of supply, he submits that she should not have considered the guideline for class A offences.
11. It is further submitted that the judge failed to give sufficient weight to the strong mitigating features of the appellant's effective previous good character, his naivety in the commission of the offence, his full admissions in interview and co-operation with the police, and his remorse. In his written submissions, Mr Rees invited consideration of the sentences passed in a number of other cases, in particular Woodford in which this court reduced the sentence for a section 45 offence from eight years' imprisonment to six years in a case in which those guilty of the full offence of supplying the class A drugs would have been likely to receive sentences of 10 years or more. The quantity of adulterants supplied by the offenders in that case was much greater than the quantity of benzocaine sold by this appellant. We note however that in Woodford the offender not only had strong personal mitigation, but also had substantial caring responsibilities.
12. We have reflected carefully on Mr Rees's submissions. Benzocaine is not a controlled

drug and selling benzocaine is not in itself illegal. However, section 46 of the 2007 Act, so far as is material for present purposes, provides as follows:

i. "1. A person commits an offence if—

(b) he does an act capable of encouraging or assisting the commission of one or more of a number of offences, and

(c) he believes—

(i) that one or more of those offences will be committed (but has no belief as to which); and

i. (ii) that his act will encourage or assist the commission of one or more of them.

ii. (2) It is immaterial for the purposes of subsection (1)(b)(ii) whether the person has any belief as to which offence will be encouraged or assisted."

13. Thus the appellant's conduct was criminal because by supplying the benzocaine he was doing an act capable of assisting the commission of one or more offences of supplying controlled drugs of class A or class B, and was doing so in the belief that one or more such offences would be committed, even though he had no belief as to which, and in the belief that his act would assist their commission. As we have just noted, by section 46(2) it was irrelevant whether he had any belief as to which offence would be assisted.

14. The maximum penalty for an offence contrary to section 46 is prescribed by section 58 of the 2007 Act, which so far as material for present purposes provides as follows:

i. "(1) Subsections (2) and (3) apply if-

ii. ...

(b) a person is convicted of an offence under section 46 by reference to only one offence ('the reference offence')

i. ...

ii. (3) In any other case [ie any case other than murder] he is liable to any penalty for which he would be liable on conviction of the anticipated or reference offence.

iii. (4) Subsections (5) to (7) apply if a person is convicted of an offence under section 46 by reference to more than one offence ('the reference offences')

iv. ...

v. (6) If none of the reference offences is murder but one or more of them is punishable with imprisonment, he is liable-

(a) to imprisonment for a term not exceeding the maximum term provided for any one of those offences (taking the longer or the longest term as the limit for the purposes of this paragraph where the terms provided differ)
..."

15. The effect of those statutory provisions is that in a case such as this of an offence contrary to section 46 committed by reference to more than one reference offence, the offender is liable for the maximum penalty applicable to the most serious of the reference offences. That is so even though he has no belief as to which of the reference offences will be committed and regardless of whether he has any belief as to which of the relevant offences he is assisting.
16. In the light of those statutory provisions, the approach taken in this case by the judge was correct. The appellant believed that the benzocaine which he sold would be used in the supply of controlled drugs. He had no particular belief as to whether any specific supply would be of drugs of class A, or drugs of class B, or both. But he believed that offences of supply would be committed and he believed that his sale of the benzocaine would assist those offences. The fact that he had no particular belief as to the class of drug which would be supplied cannot be equated with a belief that only drugs of class B would be supplied.
17. We accept Mr Rees's submission that the culpability of the appellant was somewhat less than that of a seller of benzocaine who believed that all of it would be used in the supply of class A drugs. But the judge rightly took that into account by considering both the guidelines for class A supply and the guidelines for class B supply. It must be remembered that under those guidelines a quantity of five kilograms of cocaine or 20 kilograms of amphetamine regardless of purity would be sufficient to bring a case within Category 1 harm and a significant role in the supply of such quantities would result in a starting point for sentence of 10 years' imprisonment and five-and-a-half years' imprisonment respectively.
18. The appellant supplied or was in the process of supplying a total of 22 kilograms of benzocaine capable of being mixed with significantly larger quantities of either or both of those drugs. We therefore reject the submission that the judge's approach to sentencing process was wrong in principle. She was correct to consider the guidelines both for supply of class A drugs and for supply of class B drugs. We also reject the submission that the notional sentences after trial which the judge felt appropriate were excessive when compared with fact-specific decisions in other cases.

19. There is clearly a much better side to the appellant, which the judge recognised and in our view took fully into account. The appellant can be proud of what he has achieved and can look with pride at what others have written about him in the testimonials before the court, and it is sad to see him in this position. His personal mitigation must however be seen in the context of his choosing to act in a way which would assist the supply of substantial quantities of controlled drugs and would thus contribute to the misery and crime which the illegal use of drugs causes.

20. In all the circumstances, we are unable to say that the sentence imposed was manifestly excessive. For those reasons, grateful though we are to Mr Rees for his submissions, the appeal fails and is dismissed.

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

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