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IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 23 January 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MRS JUSTICE ELISABETH LAING DBE

HER HONOUR JUDGE WENDY JOSEPH QC

(Sitting as a Judge of the CACD)

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

R E G I N A

v

ROWAN LOPEZ

MARK LAWRENCE

Mr J Polnay appeared on behalf of the **Attorney General**

Mr H Marshall appeared on behalf of the **Offender Lopez**

Mr M Sahu appeared on behalf of the **Offender Lawrence**

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J U D G M E N T

(Approved)

1. LORD JUSTICE HOLROYDE: On 14 September 2018, after a trial before a Recorder and a jury in the Crown Court at Wood Green, Rowan Lopez and Mark Lawrence were convicted of two offences of conspiracy to supply a controlled drug of Class A. The drugs in question were cocaine, the subject of count 1 and heroin, the subject of count 2.
2. On 29 October 2018 the Recorder sentenced each man to concurrent terms of 3 years 9 months' imprisonment on each count. In the case of Mark Lawrence the Recorder activated in full a suspended sentence of 14 months' imprisonment but ordered it to run concurrently with other sentences. Thus, for each offender, to whom we shall hereafter refer by their surnames only, intending no disrespect, the total sentence was one of 3 years 9 months' imprisonment.
3. Her Majesty's Attorney General regards those sentences as unduly lenient. Accordingly, the Solicitor General applies to this court for leave to refer the sentencing to this court so that it may be reviewed.
4. Both count 1 and count 2 alleged a conspiracy period of 28 January 2018 to 23 March 2018. During that period both Lopez and Lawrence were involved in operating a "drugs line" from a mobile phone with a number ending 1471. That phone was used in the commercial supply of cocaine and heroin.
5. Observations were kept from late January 2018 onwards and on a number of occasions Lopez was seen coming and going from a particular building, on one of those occasions being in the company of Lawrence. On a total of five occasions the watching officers saw either Lawrence or Lopez leave the building, meet briefly with one or more persons on a nearby footpath and exchange something from hand to hand. On three of those occasions the officers were able to identify the person meeting one of the offenders as a known user of Class A drugs.
6. On 14 February 2018 Lopez was seen making such an exchange in a park. The person whom he met on that occasion was stopped shortly afterwards. He was found in possession of one wrap of heroin and one of crack cocaine. The circumstances were such that it was possible that he had smoked a further wrap of cocaine before being stopped. The mobile telephone found on that man showed contact with the 1471 phone, including a message sent to 1471 reading "Thank you Marc". This particular drug user stored the 1471 number in his own phone under the name "Everything" and the drug line came to be referred to as "The Everything Phone". On that occasion shortly afterwards Lopez met with Lawrence, although when Lawrence was stopped and searched nothing incriminating was found.
7. Five days later, on 19 February 2018, Lawrence was again stopped. On this occasion he was in possession of a total of 49 wraps containing either heroin or crack cocaine with a total estimated street value of £570. Whilst he was being searched his personal phone was being repeatedly called by the 1471 phone which he too had stored under a name including the word "Everything".

8. When interviewed, Lawrence said he was a drug user and claimed that the drugs in his possession were all for personal use. He denied being a drug dealer.
9. Lopez, for his part, was arrested on 14 March 2018. He was in possession of the 1471 phone and a sum of cash in excess of £2,600. He had come from an address occupied by a drug user. Within that address was found a jacket containing Lopez's personal mobile phone. There were also found the wrappings from three wraps of crack cocaine, one of which bore traces of Lopez's DNA.
10. Lopez, in interview, similarly denied being a drug dealer. He declined to give the PIN numbers of the mobile phones.
11. Billing records showed calls to the 1471 phone from a number of people who were known either to be current drug users or past drug users as well as from other numbers.
12. Analysis of the billing records also showed that on three occasions the phone had been used to send bulk text messages consistent with a technique used in the commercial supply of drugs to drug users. The 1471 phone had also been in contact on occasions with the personal phones of both Lopez and Lawrence, giving rise, contended the prosecution, to an inference that they had each on occasions been operating the drugs line.
13. Lopez is now 31 years old. He had in the past been convicted of a total of 12 offences, several of which involved disorderly and anti-social behaviour as a young adult. In 2013 he had received his first custodial sentence, a term of 18 months' imprisonment for an offence of violent disorder. Most significantly, in 2016, he pleaded guilty to offences of possession with intent to supply of two Class A controlled drugs namely heroin and crack cocaine. Following a successful appeal to this court, his total sentence was 3 years' imprisonment. He was released on licence from that sentence on 14 July 2017, only about 6 months before he became involved in the present offending, and he was on licence throughout the period of his present offending. We understand that following his arrest for the present matters he was recalled from licence in mid-March for 28 days.
14. In relation to those 2016 offences, Lopez had also been made subject to a criminal behaviour order. It seems however that the order had been made in his absence and in the present proceedings the prosecution were not able to satisfy the Recorder that the criminal behaviour order had properly been served upon Lopez. A count alleging breach of the criminal behaviour order was therefore not pursued. For similar reasons, we take the view that it could not be thought to be an aggravating feature of the present offending that Lopez was aware that he was subject of such an order.
15. Turning to Lawrence, he is now aged 38. He had previously been convicted of six offences. On 4 October 2017, following his guilty plea to an offence of causing serious injury by dangerous driving, he was sentenced to 14 months' imprisonment suspended for 24 months and was made subject to a requirement of 220 hours unpaid work. The present offending began less than 4 months after he received that suspended sentence. During that 4-month period Lawrence came before a Magistrates'

Court on 12 January 2018 and pleaded guilty to an offence of failing to attend for or remain for the duration of an initial assessment following a test for a Class A drug. He was fined for that offence. The present conspiracies began just over 2 weeks later.

16. At the sentencing hearing there were no pre-sentence reports. None were thought to be necessary at that stage of proceedings and we are satisfied that none is necessary now. There was information from the probation service about Lawrence, relating to failures on his part to attend appointments as part of his suspended sentence order. It became clear however, that those failures related to dates when he had been remanded in custody for the present offending.
17. It was submitted by all counsel, and the Recorder agreed, that for each of the offenders it was appropriate to have regard to the Sentencing Council's Definitive Guideline in relation to drug offences and within the relevant section of that guideline to view their offending in each case as a category 3 offence with a significant role. For such an offence the guideline indicates a starting point of four-and-a-half years' custody and a sentencing range from three-and-a-half years to 7 years.
18. In mitigation on behalf of Lopez, Ms Marshall (then as now appearing on his behalf) referred to very supportive letters from friends and family of Lopez. She submitted that he is an intelligent man but had sadly taken a very wrong path and had become addicted to drugs. It was further submitted that following his arrest for the present offences, Lopez had come to understand the need to make significant changes in his life when he was released.
19. In their letters to the court, members of his family emphasised the better side of his character and particularly emphasised the effect upon him of being detained in custody at a time when his child had been born to his partner. There was also before the Recorder a letter from Lopez himself, the contents of which clearly impressed the Recorder. Unfortunately neither that letter nor any copy of it has been available in the course of the present proceedings.
20. In mitigation on behalf of Lawrence, it was similarly submitted that he was a drug addict. It was also submitted that at the time of these offences he was liable to pay off a substantial drugs debt. It was suggested that the nature of his previous convictions meant that they were not relevant to his present offending. Counsel appearing for Mr Lawrence at that stage, not Mr Sahu who appears before us today, addressed the Recorder about the efforts which Lawrence had made over the years to set up various businesses which unfortunately had failed, resulting in financial problems and leading indirectly to a decline which resulted in Lawrence losing contact with his family. It was submitted on his behalf that during his remand in custody for these offences he had taken advantage of the help available to him to address his addiction. He had moreover resumed contact with his mother, thus ensuring that a higher level of family support would be available to him upon release than had been available recently.
21. In his sentencing remarks the Recorder indicated that the two men had been operating "the everything line" in tandem to supply Class A drugs. He said that in all the circumstances he could see no reason to distinguish between them when sentencing.

He summarised their offending as extending over a period approaching 2 months, during which time both men were actively engaged in the commercial supply of Class A drugs. The Recorder rightly referred to the misery caused by drugs and to the fact that drugs of the kind which they were supplying are responsible for ruining many lives both young and old. The Recorder then referred to the letters written in support of Lopez, which he said he had taken into account in deciding the appropriate level of sentence. At paragraph 14C of the transcript he said:

"The letters of reference, in particular, have had the effect of reducing the sentence I at first had in mind in this case, and having decided that there is no proper distinction to be drawn in terms of culpability between you, Mr Lopez, and you, Mr Lawrence, you, Mr Lawrence, will also benefit from those letters in the sense that I consider it unfair to sentence you to a greater term than that I will sentence Mr Lopez."

22. The Recorder then passed the concurrent sentences of 3 years 9 months' imprisonment on each man and in relation to Lawrence, he added this at page 14E:

"In addition, in Mr Lawrence's case, I will activate the suspended sentence order in full, but because of the circumstances which have led to the breach, and with an eye to totality, I will activate that sentence concurrently to the sentence of three years and nine months' imprisonment I am imposing on the trial indictment."

23. On behalf of the Solicitor General, Mr Polnay submits that there were here a number of aggravating features to which he submits the Recorder failed to give any or sufficient weight. He points to the following aggravating factors as affecting both men. First, it was a conspiracy involving a supply of drugs on multiple occasions over a 2-month period. Secondly, it involved the use of a drugs phone to broadcast the availability of drugs and to facilitate their distribution. Thirdly, the offenders were convicted of conspiring to supply both cocaine and heroin. In Lopez's case there were further aggravating features of his recent previous conviction for drug trafficking offences and the fact that the present offences were committed whilst on licence from the prison sentence received for those earlier offences. In relation to Lawrence, there was the aggravating feature that his offending was committed whilst subject to a suspended sentence.
24. Mr Polnay acknowledges the mitigating features to which we have referred. He submits however that the sentences imposed were unduly lenient. Given the duration of the conspiracies and the fact that two types of drug were involved, Mr Polnay argues that a substantial uplift was required from the guideline starting point of 4 years 6 months' imprisonment. He argues that although the Recorder was of course entitled to reduce Lopez's sentence to an extent, to reflect the personal mitigation available to Lopez, it was an error of principle to reduce Lawrence's sentence on the basis of mitigation which Lawrence himself could not advance.
25. Further, Mr Polnay submits that the previous conviction in Lopez's case was a particularly serious aggravating feature to which the Recorder appears to have given

little or no regard. In relation to Lawrence, Mr Polnay submits that the effect of the sentencing by the Recorder was that Lawrence received no additional punishment for committing this serious drugs offending in breach of a suspended sentence. Far from having regard to the principle of totality, he argues, the Recorder failed to consider that important aspect.

26. On behalf of Lopez, Ms Marshall submits that the sentence was not unduly lenient. She summarises the character references which were before the Recorder as painting a clear picture of the positive attributes of Lopez, who had struggled with addiction to both drugs and gambling and with depression but who had indicated genuine remorse and a determination to avoid offending in the future. He had enrolled in university since his last conviction, he had provided support to members of his family and he was particularly affected by the fact that a son had been born to him whilst he was in custody. The letter which Lopez himself had written, submits Ms Marshall, showed insight on his part into his offending.
27. Mr Marshall emphasises that the Recorder had heard all the evidence during the trial and she points to the fact that the sentence imposed was within the category range set by the guideline.
28. On behalf of Lawrence, Mr Sahu submits that the sentence was not unduly lenient. The mitigation which the Recorder heard and considered was significant and he submits that the scale of the offending was not as serious as the prosecution alleged. Counsel points to the specific guideline mitigating feature that the offenders were only engaged in supplying drugs to which they were addicted. He disputes the proposition that there was an error of principle about the weight given by the Recorder to mitigation in both cases. Mr Sahu submits that in reality, although perhaps expressed somewhat less clearly than would have been preferable, the Recorder was making a fair overall assessment of culpability and concluded that it would be fair, in all the circumstances of the case, to treat the two men equally. He further submits, with reference to the suspended sentence, that the Recorder correctly had regard to totality by activating it in full but ordering it to run concurrently.
29. We have reflected on these submissions. The offences of which Lopez and Lawrence were convicted were, as we have said, offences of conspiracy. Although the sentencing guideline applies specifically to substantive offences, this court in R v Khan [2014] 1 Cr App R(S) 10, confirmed that the guideline should also be used in cases of conspiracy. Where a conspiracy involves multiple supplies the sentencer is entitled to look at the aggregate quantity of the drug involved. Moreover, the fact of involvement in a conspiracy is an aggravating factor because each conspirator not only plays his own part, but also knowingly gives comfort and assistance to a fellow conspirator. In this case accordingly, the Recorder - having identified the appropriate guideline starting point of 4 years 6 months for a single substantive offence - should have treated the fact that the offences were offences of conspiracy as an aggravating feature.
30. We agree with the submissions of the Solicitor General that there were also other aggravating features, namely the duration of the offending over a period of nearly 2 months, the use of a drugs line and the fact that two different types of Class A drugs

were being sold. Taken together those features, in our judgment, necessitated a significant move upwards from the guideline starting point in the case of each offender.

31. In Lopez's case, there was the additional very serious aggravating feature that he committed the present offences whilst on licence from a prison sentence for drug dealing. That feature did not apply to Lawrence, but Lawrence committed the present offences in breach of the suspended sentence and a very short time after being fined for a drug related matter. In respect of the suspended sentence, schedule 12 paragraph 8 of the Criminal Justice Act 2003 required the Recorder to order the suspended sentence to take effect either in full or to a reduced extent unless of the opinion that it would be unjust to do so in all of the circumstances. It is not submitted that it would be unjust to do so in Lawrence's case. Subject to considerations of totality, the wholly or partially activated sentence would usually be ordered to run consecutively to the sentence for later offending since otherwise the total sentence might well fail to impose just and proportionate punishment for the overall offending.
32. To set against those aggravating features the Recorder had to consider - and clearly did consider - the matters of personal mitigation. We attach little significance to the point made by Mr Polnay as to the suggested error of principle in the treatment of mitigation as between Lopez and Lawrence. The point of principle which Mr Polnay makes is correct but in the circumstances of this case, we think that it was an instance of the Recorder expressing himself somewhat infelicitously rather than falling into the suggested error. We agree with Mr Sahu that in reality the Recorder made his assessment of the overall culpability of each offender and concluded that they should be treated the same. The personal mitigation was undoubtedly a relevant consideration in each case. But, in our judgment, it could carry only limited weight in the circumstances, that one offender committed these offences in breach of a suspended sentence and the other did so whilst on licence. We, of course, well understand the views expressed by Lopez's family and friends in their letters, and we understand the submissions made on behalf of both offenders as to their present determination to change their lives. But those matters have to be set in the context which we have briefly outlined.
33. With all respect to the Recorder, we conclude that he must have given insufficient weight to the aggravating features, none of which he specifically identified as being an aggravating feature. When all of the aggravating and mitigating features are properly taken into account in the case of each offender, we have no doubt that there must in each case be a significant increase in the sentence above the guideline starting point and not, as the Recorder concluded, a reduction below that starting point. The necessary increase is the greater in Lopez's case because he was on licence at the time and had chosen to re-offend within months of his release from the earlier sentence.
34. Balancing the appropriate aggravating and mitigating factors relevant in Lopez's case, we conclude that the least total sentence which could properly be imposed is one of 6 years' imprisonment.
35. In Lawrence's case, the least total sentence is one of 5 years 3 months' imprisonment. The suspended sentence should in principle be brought into effect consecutively and in

full. But, in our judgment, it can properly be reduced in length to take account of totality. With some hesitation and with a focus on totality, we accept, as did the Recorder by a different route, that the reduction can be sufficient to result in the same overall sentence for both men. We take that view because we accept that the Recorder, having presided over the trial, was in the best position to assess the comparative culpability of the two offenders.

36. For those reasons, we are satisfied that each sentence was unduly lenient. We accordingly grant leave to refer, we quash the sentences imposed below and we substitute the following: in the case of Lopez, on counts 1 and 2, 6 years' imprisonment concurrent; in the case of Lawrence, on counts 1 and 2, 5 years 3 months' imprisonment concurrent. We activate the suspended sentence, we reduce it in length to a term of 9 months' imprisonment, which must run consecutively to the sentences on counts 1 and 2. Thus the total sentence in each case is now increased to one of 6 years' imprisonment.

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

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