IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/03414/B5
NCN: [2024] EWCA Crim 204

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 16th February 2024

B e f o r e:

LORD JUSTICE COULSON

MR JUSTICE HOLGATE

THE RECORDER OF REDBRIDGE
(Her Honour Judge Rosa Dean)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

LEONARD ANDREW DELAPEHNA

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Mr Yogain Chandarana appeared on behalf of the Appellant

J U D G M E N T

Friday 16th February 2024

LORD JUSTICE COULSON: I shall ask Mr Justice Holgate to give the judgment of the court.

MR JUSTICE HOLGATE:

1. On 27th June 2023, following a trial in the Crown Court at Croydon before Mr Recorder Robertson and a jury, the appellant (then aged 61) was convicted of fraudulent evasion of a prohibition, contrary to section 170(2) of the Customs and Excise Management Act 1979. On 4th September 2023, he was sentenced by the judge to 10 years' imprisonment. He appeals against sentence with the leave of the single judge.

2. On 29th January 2020, the appellant was stopped by Border Force officers at Gatwick Airport while walking through the green channel. He had arrived on a flight from St Lucia, having spent the week there on holiday with a woman named Joan Hart. Officers searched two suitcases in the couple's possession. One had a false bottom within which 2 kg of cocaine were concealed. The other held 1.99 kg of cocaine. The appellant and Hart were both arrested. The appellant insisted that neither he nor she knew anything about the drugs. The cocaine had a purity of about 70 per cent, a wholesale value of £140,000, and a street value of about £320,000.CCTV footage from 21st January showed that the appellant and Hart had only two suitcases when they left for St Lucia, but had three suitcases upon their return. In interview the appellant said that the two suitcases containing the drugs did belong to him, but he denied any knowledge of the drugs.

3. The appellant had 15 convictions for 20 offences spanning from August 1976 to November 2011. His only other drug convictions were for possession of a Class B drug in 1981, 1984 and 1989. Most of the offending was committed when he was

either a juvenile or in his 20s. In relation to section 33 of the Sentencing Act 2020, we are satisfied that a pre-sentence report was unnecessary in the Crown Court and is unnecessary in this court.

4. In his sentencing remarks the judge said that the appellant had been aged 58 at the time of the current offence. He had played a significant role in that he had some awareness and understanding of the scale of the drug smuggling operation and an expectation of significant financial advantage. The judge placed the harm in category 2, although the starting point for that category is based on 1 kg of cocaine. He said that the amount was "well beyond the higher end of category 2", and so took what he described as a higher “starting point” of 10 years, before consideration of the aggravating and mitigating factors.

5. The judge said that the appellant had no previous convictions for drug smuggling or offences involving Class A drugs. The convictions for possession of cannabis and other offences had taken place a long time ago, so that the previous offending was not an aggravating factor. There were no other aggravating factors.

6. The judge referred to the mitigating circumstances: the delay in bringing the proceedings; the appellant's age and ill health; the fact that this was an isolated incident; and that there were no relevant or recent convictions. But the judge concluded that because of the public interest in a sentence being passed commensurate with the serious nature of the offence, the mitigating circumstances did not merit any reduction in the length of sentence.

7. We are grateful to Mr Chandarana for his clear, accurate and succinct submissions. In summary, he submits that the sentence was manifestly excessive for essentially two reasons. First, he says that the judge took too high a starting point within the sentencing guidelines. A starting point of 10 years' custody is the appropriate starting point in category 1, within a range of 9 to 12 years, for the importation of 5 kg of cocaine by someone with a significant role. The judge should have placed this

offence at the bottom of the range for category 1, that is 9 years' custody.

8. Secondly, Mr Chandarana says that the judge gave insufficient weight to the appellant's mitigation. This included the fact that prison would be more difficult for the appellant, given his age and ill health. There was also a three year delay in the matter being tried, which was not attributable to the appellant.

Discussion

9. We suspect that it was a slip of the tongue when the judge referred to 5 kg as the "threshold" for category 1 harm. As this court made clear in *R v Boakye* [2013] 1 Cr App R(S) 2, 5 kg is the indicative quantity upon which the starting point of 10 years' custody in the guideline is based. It is not the threshold at which the sentencing range changes from category 2 harm to category 1. The sentencing judge can then adjust that starting point of 10 years, based on the indicative quantity of 5 kg, upwards or downwards to take into account the actual quantity of drugs involved, the nature of the significant role and whether there were several “significant” culpability features.

10. For category 2 harm, the starting point is 8 years' custody, based on an indicative weight of 1 kg, within a range of 6 years 6 months to 10 years. For category 1 harm, the starting point of 10 years' custody, for an indicative weight of 5 kg, lies with a range of 9 to 12 years. There is an overlap between the two category ranges. In addition, the starting point of 10 years for category 1 lies towards the bottom of the range for that category and coincides with the top of the range for category 2. But, as has often been said by this court, the adjustment of a category starting point, before allowing for aggravating and mitigating factors, is not a rigid, mathematical exercise within a grid. It is an evaluative judgment which brings together the nature and degree of both harm and culpability.

11. In the present case the judge did not suggest that the two culpability factors he identified would in themselves justify moving upwards from the starting point. We think that he was correct not to do so. Treating this as a category 1 case, the starting

point is 10 years' custody, where the quantity of cocaine is 5 kg. But here the quantity was 4 kg, and so there had to be a reduction from that starting point to 9 years.

12. Alternatively, the judge treated the harm as falling within category 2. The fact that the sentencing range for category 2 harm reaches up to 10 years provides room for upwards adjustments to the starting point from 8 years, to allow for quantity and the nature and degree of culpability. Plainly the 4 kg of cocaine pushed the harm towards the upper end of the range. But factoring in also the nature and degree of culpability, we consider that the adjustment to the starting point should arrive at 9 rather than 10 years. Given that the quantity of drug lay on the cusp of between categories 1 and 2 harm, whichever approach is taken should and does lead to the same conclusion.
13. We do not consider that the judge was correct to conclude that no adjustment at all was required for the mitigating circumstances in this case. The appellant's ill health, combined with age, makes prison substantially harder for him than, for example, a younger, healthy offender. The appellant was diagnosed in 2019 with chronic obstructive pulmonary disease. He has extensive, severe emphysema in the lungs. Over the last three years his symptoms have worsened. Minimal physical exertion results in shortness of breath. He collapsed during a Code Blue incident in prison on 28th June 2023, suffering from breathlessness.
14. We conclude that the sentence of 10 years' imprisonment was manifestly excessive. We quash that sentence and we substitute one of 8 years' imprisonment. To that extent only the appeal is allowed.

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