No: 201803723 A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2019] EWCA 183 (crim)

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 5 February 2019

B e f o r e:

LORD JUSTICE FLAUX

MR JUSTICE HOLGATE

MR JUSTICE MURRAY

R E G I N A
v
LIRIDON ARUSHA

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Mr M McAlinden appeared on behalf of the **Applicant**

J U D G M E N T
(Approved)

LORD JUSTICE FLAUX:

1. On 1 November 2016, in the Crown Court at Inner London before Her Honour Karu, this applicant pleaded guilty to an offence of possession of an identity document with improper intent; possession of a controlled class A drug, cocaine, with intent; and various driving offences sent by the magistrates under section 51 of the Crime and Disorder Act 1988.
2. On 3 November 2016, he was sentenced by the same judge to 10 years' imprisonment for possession of cocaine with intent with 6 months concurrent in relation to the false identity document and no separate penalty for the driving offences.
3. The applicant now applies for an extension of time of 642 days in which to apply for leave to appeal against sentence. His application has been referred to the full court by the single judge.
4. The facts of the offending can be summarised as follows. On 6 September 2016, the applicant was stopped by police while in a Volvo motor vehicle near the Hollywood Bowl in Surrey Quays, SE16. He was asked for identification and provided officers with a false Bulgarian driving licence in the name of Nicolay Ivanov. The vehicle was searched with the use of a police dog. Hidden in a side panel in one of the vehicle's doors were 27 individual blocks of cocaine each weighing 1 kilogram. The applicant was arrested for offences of the possession with intent to supply and possession of a false identification document.
5. While en route to the police station the applicant spoke with the police officers. When they told him they thought they had found approximately 28 kilograms of drugs, he corrected them and said, "Not 28; it is 27". He told the officers that the packages

contained cocaine and belonged to him.

6. He later made full admissions during his police interview. He said that he had arrived in the United Kingdom one month earlier and was acting as a drug courier. He had purchased the car for £5,000 and had been employed to transport the drugs by others, although he refused to provide their details. The applicant said that he been waiting for instructions on where to deliver the drugs.

7. He was found in possession of an encrypted mobile phone and had £961 in cash on his person. The drugs had a 95 per cent purity with a wholesale value of between £75,000 and £100,000 and a street value of between £1 million and £2.7 million.

8. The applicant pleaded guilty on a written basis of plea. He claimed to have been illegally trafficked into the United Kingdom in a lorry and to have become involved in this matter as a result of naivety and coercion. He maintained that his role was limited to that of a courier acting under the direction of another, that this was the only transaction in which he was involved, that he had been provided with the car and paid £1,000 to collect the packages at the location where he was stopped by the police, after which he would have been contacted by phone and told where the packages were to be taken. He was made aware that the packages he was collecting contained controlled drugs and initially believed that they were cannabis. However, he accepted that at the time the packages were transferred into his vehicle he became aware it must be something much more than cannabis, namely class A drugs; he had no influence on those above him in the chain of command; his involvement was for a short period of time and the offence was totally out of character.

9. At the sentencing hearing, prosecution counsel, Ms Anson, opened the facts as we have set them out above. She submitted that in relation to role for the purposes of the

sentencing guideline, while on the face of it, it appears that the applicant was performing a limited function under direction, he was clearly motivated by financial or other advantage, operating with others and he had to have some awareness of the scale of the operation given the street value of the drugs and their purity.

10. She then referred the judge to the starting points and sentencing ranges for both lesser role and significant role in the guideline. The judge pointed out that Category 1 in the guideline was for 5 kilograms of class A drugs and this was a significantly greater amount. The judge drew attention to the passage in the guideline which says:

> "Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than Category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender."

11. Ms Anson said that the prosecution could not accept the basis of plea because there remained issues in relation to his knowledge and awareness of the scale of the operation given the street value. The prosecution said that he must have been in a trusted position to be given such a high amount of drugs with such a high street value. Notwithstanding saying this, so far as we can discern neither prosecution counsel nor Mr Aslam, who then represented the applicant, sought a *Newton* hearing, nor did the judge raise any issue as to whether there should be one.

12. In sentencing the applicant, the judge set out the facts, essentially as we have referred to them above. The judge said that she had no doubt that others were involved. The applicant was not at the top of the chain and she accepted that to some extent he had been acting under direction. His guilty pleas were entered on the basis that he fell within a lesser role of Category 1 of the sentencing guidelines and that he had simply been a courier. The judge said that, as she had said to his counsel already, there were certain factors in the case which led her to conclude that his case did not fall solely in the lesser

role category. He had some awareness and understanding of the scale of the operation.

13. The basis of plea said that he initially believed that the packages contained cannabis but by the time they were moved into his vehicle he became aware that they contained class A drugs. He purchased a vehicle which was specifically adapted to conceal the drugs. If he provided the vehicle and drove it to the location where the transfer was to take place and concealed 27 packages in what was a reasonably sophisticated concealment, the judge considered that he was in those circumstances somewhere between the lower part of significant role and the top of lesser role. He must have had some awareness and understanding of the actual scale of the operation. It had been submitted on his behalf that he was receiving £1,000 to collect the packages and he was found in possession of just under that amount. The judge said that it was somewhat surprising that he was paid what he was due before he had completed his task of delivering the packages.

14. The judge noted that the applicant was 23 and had no previous convictions in this country. She then referred expressly to the passage in the guideline which said that sentences of 20 years or more, depending on the offender's role, may be appropriate for cases of an operation on the most serious and commercial scale involving significantly more drugs than in Category 1. She noted that Category 1 dealt with a maximum of 5 kilograms and that this case involved a significantly higher quantity. She then referred to the starting points and sentencing ranges for a lesser role and significant role under Category 1. She said that she had already explained why she had concluded that he did not fall only into the lesser role.

15. Taking account of all those factors, the sentence after trial would have been 15 years. Giving him full credit for his guilty plea, the sentence was 10 years' imprisonment.

16. It would appear from the Advice of counsel now instructed that after sentence Mr Aslam

gave oral advice. Given that there was no application for leave to appeal at that time, we infer that his advice was against appealing. The appellant has now instructed new solicitors and counsel, Mr McAlinden. The reasons given for seeking an extension of time of 642 days are set out in his advice as follows. Mr McAlinden, was not provided the papers for the case until 28 August 2018. Those instructing him had not represented the applicant at the original hearing. The applicant had not been provided with any written advice on appeal in 2016 or at any time since. Following sentence the applicant became depressed, having been threatened by associates for whom he was working when committing the offences. The applicant had been reluctant to speak out and only recently contacted new solicitors to request advice on any arguable ground of appeal. In those circumstances, the applicant had never had the opportunity to consider his position properly.

17. We do not consider that this is a sufficient explanation for the very considerable delay. There is no real attempt to explain when or why the applicant decided to contact the new solicitors having done nothing for a year and a half. We are not prepared to grant the extension of time sought.

18. However, in any event, even if we had granted the extension of time, we would not have granted leave to appeal for reasons we will set out. Mr McAlinden's primary submission was that since the applicant had pleaded guilty on a specific written basis which was consistent with his having played a lesser role within the guideline, he should have been sentenced only on that basis. For Category 1, the starting point is 7 years with a range of 6 to 9 years. With credit for his guilty plea this should have resulted in a sentence no greater than 6 years' imprisonment. Alternatively, he submitted that even if the judge was right to place the applicant on the cusp between lesser role and significant role, the

judge should have taken a mean starting point between the two roles of eight and a half years. To take a starting point of 15 years, nearly double that, is manifestly excessive.

19. He submitted in his oral submissions that if the applicant was a courier, the amount of the drugs did not make him into something greater in terms of role. Even though it involved 27 kilograms, he was still no more than a courier. He submitted that the judge's approach of putting the applicant into a higher category because of the amount of drugs involved effectively involved double counting. Mr McAlinden submitted that the judge should have had a starting point no greater than 10 years.

20. In our judgment, attractively though these submissions were put, we cannot accept them. As to whether the judge should not have departed from the basis of plea, the judge is never bound by the basis of plea, but if he or she is going to depart from it in whole or in part this should be made clear so that the defence can decide how to proceed - see *R v Underwood* [2004] EWCA Crim 2256, *R v Lucien* [2009] EWCA Crim 2004 and the Criminal Practice Directions 2015, paragraph 7, B7 to B9.

21. In the present case, as we have said, prosecution counsel made it clear at the end of her opening of the facts that the Crown did not accept the basis of plea, essentially because the applicant's role was more serious and his knowledge more extensive than the basis of plea sought to portray. From what the judge said in her sentencing remarks, it is clear that during defence counsel's mitigation the judge did indicate to Mr Aslam that she did not accept that the applicant's role was as limited as set out in the basis of plea.

22. Mr Aslam was thus aware that neither the Crown nor the judge fully accepted the basis of plea. At that point, assuming that the applicant did not want to change his plea, which was not a realistic possibility on the facts of this case, he could have taken one of two courses. He could have sought a *Newton* hearing to resolve the issue of the applicant's

role and called the applicant to give evidence. That may not have been an attractive course for the applicant given that if he lost a contested *Newton* hearing he stood to lose half his credit for the guilty plea - see paragraph F2 of the guideline on reduction in sentence for a guilty plea. Alternatively, he could choose to make submissions on the material which was before the court. It appears he chose the latter course since there is no hint anywhere in the transcripts or in the Advice of new counsel that Mr Aslam sought a *Newton* hearing or complained about the basis on which the judge actually sentenced. In those circumstances, the judge was entitled to sentence without being bound by the basis of plea and in any event it is too late for the applicant to complain now.

23. The fact that the applicant was entrusted with 27 kilograms of cocaine with a substantial street value of possibly up to £2.7 million, which he then concealed in what was, in effect, a specially adapted secret compartment in the car that he had bought, belies any suggestion that he was a mere courier and demonstrates that he did have some awareness and understanding of the scale of the operation. Even in his basis of plea he accepted that when he took over the drugs he knew that the 27 packages were class A drugs. We also agree with the judge that if he were a mere courier, it is surprising to say the least that he was paid before he had completed the task of delivering the drugs.

24. This all suggests a far greater degree of knowledge and involvement than just a lesser role and, in our judgment, puts him well into the category of significant role. In those circumstances, the submission that the judge should have sentenced for this quantity of class A drugs by reference to some mean of the two sentencing ranges is wholly unrealistic. This offending involved more than five times the maximum amount in Category 1. It involved, as the judge said, a reasonably sophisticated concealment.

25. It seems to us that the applicant was involved with a serious operation on a commercial

scale so that the note in the guideline about sentences in excess of 20 years is applicable. A role at the bottom end of significant would not warrant a starting point after trial as high as 20 years but we consider that this applicant's role was such that a starting point of 15 years, whilst severe, cannot be said to be manifestly excessive. There is some analogy here with the cases of lorry drivers importing quantities of class A drugs substantially in excess of the 5-kilogram maximum in Category 1, such as *R v Nunez-Lopez* [2015] EWCA Crim 1451, where this court held that a starting point of 15 years was appropriate. These applications are dismissed.

proceedings or part thereof.

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