NCN[2021] EWCA Crim 537

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202100437/A1

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 18 March 2021

LORD JUSTICE SINGH

MR JUSTICE WILLIAM DAVIS

MRS JUSTICE FOSTER DBE

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

REGINA

V

LEWIS FERREIRA

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MR W EMLYN JONES QC appeared on behalf of the Attorney General.

MR S STIRLING appeared on behalf of the Offender.

J U D G M E N T

LORD JUSTICE SINGH:

Introduction

1. This is an application on behalf of the Attorney General for leave to make a Reference to this Court, under section 36 of the Criminal Justice Act 1988 ("the 1988 Act"), on the ground that the sentence was unduly lenient.
2. The respondent offender is Lewis Ferreira. He was born on 1 April 1986 and is 34 years of age.
3. In proceedings before the Crown Court at St Albans the offender was charged with five counts as follows: one count of conspiracy to supply a drug of Class A, namely cocaine; secondly, one count of conspiracy to supply a drug of Class A, namely heroin (both contrary to section 1(1) of the Criminal Law Act 1977); third, one count of being concerned in the supply of a drug of Class A, namely heroin; fourth, one count of being concerned in the supply of a drug of Class A, namely crack cocaine (both of those being contrary to section 4(3)(c) of the Misuse of Drugs Act 1971) and fifth, one count of possessing criminal property contrary to section 329(1) of the Proceeds of Crime Act 2002.
4. At a plea and trial preparation hearing ("PTPH") on 9 March 2020 the offender pleaded not guilty to all five counts and the matter was adjourned for trial. The trial date was to be 1 December 2020. At a hearing on 6 November 2020 the offender sought, and received, a Goodyear indication from HHJ Grey, to the effect that if he were to plead guilty to the two conspiracy counts the maximum sentence that the court would impose would be four-and-a-half years' imprisonment inclusive of credit for plea. On 30 November 2020 the offender pleaded guilty to all four drugs offences. The criminal property count was to be left to lie on the file. The judge (who on this occasion was HHJ Lithman QC) deferred sentence until 5 January 2021 although for administrative reasons the case was not re-listed until 18 January 2021.
5. On 18 January 2021 the offender was sentenced by Judge Lithman to a total 2 years' imprisonment suspended for 2 years with no specified requirements attached. For completeness, we should mention that the outcome of the proceedings in the cases of the co-accused was as follows. First, Nathan Garrett (born on 1 July 1996 and 24 years old), who was charged with the two counts of conspiracy to supply Class A drugs. He originally pleaded not guilty but later requested a Goodyear indication. On 30 September 2020, on being told that he would be sentenced to a suspended sentence of imprisonment, he pleaded guilty to both counts. Judge Lithman sentenced him accordingly to 24 months' imprisonment suspended for 2 months concurrent on each of the two counts. No conditions were attached. Secondly, there was Stuart Daisley (born on 9 August 1995 and 25 years old), who was charged with the two counts of conspiracy to supply Class A drugs. He pleaded guilty to both counts at a PTPH and sentencing was adjourned for the preparation of a pre-sentence report. On 6 August 2020 he was sentenced by HHJ Foster as follows: 24 months' imprisonment suspended for 18 months concurrent on each count with requirements to perform 100 hours of unpaid work, to attend drug dependency treatment and rehabilitation activity requirements. Finally, there was Stacey Louise Skeggs (born on 5 October 2000 and 20 years old). She was charged with the two counts of conspiracy to supply Class A drugs. She pleaded guilty to both counts at a PTPH. Sentencing was adjourned for the preparation of a pre-sentence

report. On 6 August 2020 she was sentenced by Judge Foster as follows: 24 months' imprisonment suspended for 18 months concurrent on each count, with requirements to perform 100 hours of unpaid work, to attend drug dependency treatment and rehabilitation activity requirements. Further there was an electronically monitored curfew for 3 months.

The Facts

6. For present purposes the facts can be summarised briefly as follows. In the summer and autumn of 2018 the offender controlled "a county lines" drug dealing operation. He had the possession of the SIM card for a mobile phone number known as "the P line", a number he would use to send out bulk texts offering Class A drugs to addicts in Welwyn Garden City and on which he would then receive their orders. He would then deploy local drug addicts to conduct street deals of Class A drugs on his behalf.
7. As part of the investigation the offender's home in Watford was searched. The police seized a large number of designer men's trainers and shoes for the total approximate value in excess of £5,000. Police also seized drug dealer lists and "tick sheets" which contained the names and numbers of known drug addicts in the Welwyn Garden City and Hatfield areas of Hertfordshire.
8. As was the case with the phone seized from the offender on 13 August 2018, so the P line drugs phone seized on 9 November 2018 was analysed and found to contain messages indicative of drug supply with bulk texts being sent and incoming messages from drug users making contact to place orders for crack cocaine and/or heroin.
9. The offender was interviewed on three occasions and largely made no comment.
10. The essential facts are largely agreed on behalf of the respondent but the following further observations are made by Mr Stirling. First, the offending in relation to counts 1 and 2 related to a single day, that is 9 November. Secondly, in relation to counts 3 and 4, the bulk text messages related to a period of a month in October and November. The Crown described it as "not a large scale line". Third, the offender's co-defendants were willing participants in the conspiracy. The offender does not accept they were vulnerable. The evidence tends to suggest that Garrett was operating at a similar level, although perhaps slightly below that of the offender.

Antecedents

11. Between 2005 and 2017 the offender had 17 previous convictions for a total of 43 offences though none for drugs offences. His most serious conviction was for arson for which he had been sentenced to 6 years' imprisonment in April 2011 with a 4-year extended licence period. This was still extant at the time of the present offending. He was recalled to prison for breaching the terms of his licence.

Relevant Sentencing Guidelines

12. It is common ground that the Definitive Guideline issued by the Sentencing Council, applicable to offences of this kind, would lead to the following suggested range of sentences. This was street dealing of category 3. It is accepted for present purposes that although there may have been elements of a *leading role* on the part of this offender he was, at the very least, one who had a *significant role* in the operation. Mr Emlyn Jones QC does not seek to go behind that for present purposes. In such cases, even for

a single offence, the Definitive Guideline suggests a starting point of four-and-a-half years' custody and a category range of three-and-a-half to 7 years. Account of course must be taken of other factors such as those which aggravate an offence and those which mitigate it. Account must also be taken of any guilty plea.

Relevant Court Proceedings

13. After the Goodyear indication had been given by Judge Grey, after the hearing on 6 November 2020, the defence requested a listing in order for the offender to be re-arraigned, although in the event this was not achieved before the 20 November deadline referred to by Judge Grey and the matter came before Judge Lithman on 30 November 2020. On that date the offender was re-arraigned on counts 1 to 4 inclusive and pleaded guilty. Those pleas were acceptable. Count 5 was directed to lie on the file. The facts were opened and prosecution counsel made further submissions as to the categorisation of the offences, maintaining that the offender had been in a *leading role*. Defence counsel invited the court to consider deferring sentence and made two principal submissions in support: first, that the offender had already spent 14 months in custody since the commission of the offences albeit not on remand but because he had been recalled on licence; and secondly, that since his release he had moved to Wales with his partner and found employment. There were references from his employers commending his work ethic.
14. The judge deferred sentence until 5 January 2021 and made the following remarks:

> "... if in January you come back and you have continued to be of good behaviour, to have a stable domestic life, assuming things are settled, which I hope they are, with your partner, then I will impose ... a custodial sentence which I will then suspend. If, however, there is a snip of bad behaviour, either domestically or in the broader community, then I'm afraid whereas you might have had a sentence of a couple of years, which would be suspended, the custodial part of your sentence would ... then reflect the Goodyear indication that Judge Grey gave you, which would be that the four and a half years was the maximum. And that, even allowing for a guilty plea – and that would be the maximum that would bind me, I would take that view. So, in other words, you could end up with something around four years, rather than a sentence that is suspended, when you return in January."

15. For administrative reasons the case was not listed until 18 January 202,1 again before Judge Lithman. Defence counsel informed the court that the offender had "kept out of trouble... [and] kept to the terms of the deferment". The judge asked if "the Probation Board" had anything to add and the probation officer indicated that they did not. The judge then passed sentenced saying:

> "Well, as I said on the last occasion, if you behaved yourself, I would suspend your sentence and I'll keep to my side of the bargain as well. So the sentence that I pass is, on each count, of two years, suspended for two years and unless I'm encouraged or

invited to, I don't propose to add any other aspects of that order..."

Jurisdiction

16. Very fairly Mr Emlyn Jones QC, in a note filed with this Court before the hearing, has drawn our attention to the issue of whether the Court has jurisdiction to consider an application under section 36 of the 1988 Act in circumstances where the Crown Court deferred sentence and the period of deferment has expired.
17. Section 36, so far as material, provides:

> "(1) If it appears to the Attorney General—
>
> (a) that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient; and
>
> (b) that the case is one to which this Part of this Act applies
>
> he may, with the leave of the Court of Appeal, refer the case to them for them to review the sentencing of that person; and on such a reference the Court of Appeal may—
>
> quash any sentence passed on him in the proceeding; and in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with him."

18. Subsection (8) gives effect to the supplementary provisions contained in schedule 3 to the Act. Schedule 3, so as far material, provides:

> "Notice of an application for leave to refer a case to the Court of Appeal under section 36 above shall be given within 28 days from the day on which the sentence, or the last of the sentences, in the case was passed."

19. The meaning of "sentence" is as set out in section 50 of the Criminal Appeal Act 1968:

> "(1) In this Act 'sentence', in relation to an offence, includes any order made by a court when dealing with an offender including, in particular— ... [it is unnecessary for present purposes to set out the particular examples which are then set out]."

20. In Attorney-General's Reference No 22 of 1992 (R v Thomas) (1993) 14 Cr App R(S) 434, this Court decided that a deferred sentenced is a sentence within the meaning of section 36 of the 1988 Act. That issue was revisited and was the subject of full argument in Attorney General's References Nos 36 and 38 of 1998 (R v Dean L and Jones) [1999] 2 Cr App R(S) 7, in which this Court confirmed that to be the position in law. In giving the judgment of the Court, at page 10, Lord Bingham CJ said:

> "At first blush it is an affront to common sense that a court should be held to be passing sentence when it is expressly and deliberately making a decision to defer sentence to a date not more than 6 months ... in the future. The force of this point is, however, undermined by consideration of what in reality happens when a court defers sentence. Where such an order is made the court lays down certain conditions, which may relate to reparation, the voluntary undergoing of treatment, employment, abstention from criminal activity or any other relevant matter clearly prescribed by the court, and the clear understanding is that, if the defendant complies with those conditions, he will not be sentenced to custody on the date to which sentence is deferred: see R v George (1984) 6 Cr App R(S) 211. Thus although the court, when deferring sentence, has made and announced a decision not to pass sentence on that occasion, it has in practice committed itself to a sentencing strategy any departure from which, in breach of the understanding indicated, would found a successful appeal by the defendant."

21. At page 11 Lord Bingham continued:

> "Until the enactment of section 36 of the 1988 Act, a defendant could expect that, subject to the limited provisions of section 47(2) of the Supreme Court Act 1981 [as it then was] and its predecessors, a sentence once passed would not be increased. Any statutory provision affecting the liberty of the subject would ordinarily, in case of ambiguity, be construed in favour of the subject, and this would suggest that any doubt about the Attorney General's right should be resolved against him. In this instance, however, we do not conclude that the Attorney General's construction is disadvantageous to the offender. If sentence were deferred in a case where it very plainly should not have been, it would not be in the interests of the offender if the Attorney General were obliged to wait until the deferment date and (assuming compliance by the offender with the prescribed conditions) the imposition of a non-custodial penalty before invoking his power to seek leave to refer the sentence imposed on the deferment date to this court. Nor would it promote the public policy plainly underlying section 36, which envisages the taking of prompt steps by the Attorney General to seek leave to refer unduly lenient sentences to the court.
>
> The present case is a good example: if Dean L's sentence is to be increased, it is better for him that this should occur sooner rather than later."

22. At page 12 the Court concluded that the Attorney General has power under section 36 to

seek to refer to this Court an order made in the Crown Court deferring sentence.

23. It is clear therefore that this Court would have had jurisdiction to consider an application by the Attorney General if it had been made in respect of the decision on 30 November 2020 to defer sentence. It does not follow, however, that this Court lacks jurisdiction to consider an application which has been made after the deferment period has expired. That situation was considered by this Court in a Attorney General's Reference No 118 of 2004 (R v Barrett) [2004] EWCA Crim 3220; [2005] 2 Cr App R(S) 18, in which the issue of principle was expressly not determined (see the first sentence of paragraph 21 in the judgment given by Kennedy LJ). It was, however, stressed that it would normally be good practice to make the application as soon as possible and not to leave it until the deferment period has expired (see paragraphs 18-22, in particular paragraphs 19 and 20).
24. We have reached the firm conclusion that this Court does have jurisdiction to consider an application under section 36 in circumstances such as the present. The sentence which was passed on 18 January 2021 clearly falls within the scope of section 36 on its true construction. There is nothing in the statutory context or purpose to suggest otherwise. That said, the jurisdiction is no doubt to be exercised sparingly in the interests of justice, for the reasons of public policy set out by this Court in cases such as L and Jones and Barrett.
25. In the circumstances of this particular case we do consider that it would be in the interests of justice for this Court to exercise that jurisdiction. In particular, we bear in mind that the deferment period was very short (intended to be from 30 November 2020 until 5 January 2021). We note also that no specific requirements were attached to that deferment. The respondent could not in those circumstances reasonably have expected that an unduly lenient sentence would not be corrected.

Double Jeopardy

26. Mr Emlyn Jones QC, again fairly, has drawn our attention to the fact that the practice of this Court has changed over time so that this Court generally no longer refers to the principle of "double jeopardy" in the context of section 36. In particular he has drawn our attention to Attorney-General's Reference No 45 of 2014 (R v Rameez Afzal & Ors) [2014] EWCA Crim 1566, which was a judgment given by Lord Thomas CJ (in particular see paragraphs 18-20). Nevertheless Mr Emlyn Jones QC accepts that the principle of double jeopardy may continue to have relevance in cases such as this, where the Court is invited to substitute a sentence of immediate custody where the Crown Court had imposed a suspended sentence order. In that sort of context he acknowledges the continued relevance of what was said by this Court in Attorney General's References Nos 14 and 15 of 2006 (R v Webster and French) [2006] EWCA Crim 1335; [2007] 1 All ER 718 at paragraph 61, where Lord Phillips CJ said:

> "The distress and anxiety is likely to be particularly great where the decision of this court results in a defendant being placed in prison where originally no custodial sentence was employed, where a custodial sentence has been completed, where the defendant is young and immature or where the defendant was about to be discharged from prison. In all of these cases the

> distress and anxiety caused by the double jeopardy is likely to be significant when weighed against the original offending. The authorities show that in such circumstances discounts for double jeopardy tend to be granted that are near the upper end of the range."

Submissions for the Attorney General

27. Turning to the merits of the application under section 36, on behalf of the Attorney General Mr Emlyn Jones QC submits that the sentence imposed was unduly lenient, in that it represented a significant and unjustifiable departure from the applicable guideline issued by the Sentencing Council on Drug Offences. This was the supply of Class A drugs at street level. The respondent played at least a *significant role*, as was conceded on his behalf. Although it might have been argued that the appropriate sentence ought to have been higher, Mr Emlyn Jones QC does not invite this Court to go behind the indication which was given by Judge Grey, namely four-and-a-half years' imprisonment. He submits that a sentence of that order ought to have been imposed although he accepted in oral submissions before this Court that other factors such as personal mitigation would then have to be taken into account. In any event, he submits that since this would inevitably have led to a sentence well above 2 years' custody there would have been no power to suspend it.
28. Mr Emlyn Jones QC also complains that the failure to attach any requirements to the suspended sentence order had the effect of making it less onerous than sentences imposed on the co-defendants whose role in the operation was a lesser role. He also observes that they had pleaded guilty at a much earlier stage of the proceedings. Finally, he submits that the decision to defer sentence for a period of only 5 weeks did not afford the respondent a true or particularly demanding test of his commitment to reform.

Submissions for the Respondent

29. On behalf of the respondent Mr Stirling submits that while the sentence might be considered to be lenient, it was not unduly so. Mr Stirling submits that the respondent had already served a considerable period in custody (14 months) as a result of being recalled to prison to serve the remainder of his previous sentence. That recall was a direct result of the present offending.
30. We reject that submission. The period of custody spent after recall was justified by the serious offence for which the respondent had previously been sentenced. The fact that he chose to commit these present offences while he was on licence meant that he was liable to serve a further period in custody for the earlier offence. That had nothing to do with what was the appropriate sentence for the present offences.
31. Next, Mr Stirling submits that the judge was required to have regard to the sentences imposed on the co-defendants. He also submits that the judge was in the best position to assess their relative culpability.
32. We would observe in that context that it was in fact only Garrett of the co-defendants who had previously been sentenced by this judge. Furthermore, this was not a case (as some are) where the sentencing judge has been the trial judge and has therefore had the opportunity to see the totality of the evidence in a way that this Court cannot do.
33. In oral submissions before this Court Mr Stirling has emphasised that the sentencing

judge will have had what he described as "a good feel for what is right" when it comes to sentence. He also reminds this Court, of course, that guidelines are that - they are not tramlines and are not to be followed slavishly. He also submits that the offender might have a legitimate sense of grievance if his sentence were to be substantially increased now given the way in which Garrett was dealt with. He does not press the point further than it can properly be taken but he does observe that Garrett's sentence was not the subject of any application for leave to make a Reference.

34. Mr Stirling submits that one of the ultimate purposes of the sentencing is of course rehabilitation and indeed protection of the public. He submits that the sentencing judge in this case was well placed to achieve those objectives in the manner which he chose to do recognising, as he does on behalf of the respondent, that it was a departure from what the Guidelines would normally recommend.
35. We reject those submissions. It may be that the other defendants were fortunate in the sentences which they received. In any event how they were dealt with has no bearing on whether the sentence for this offender was unduly lenient. Next, Mr Stirling submits that the offending was old and there had been no previous relevant offending. Further he submits that the judge was entitled to defer for the short period which he did and not to attach any requirements to the suspended sentence order. He also submits (in writing at least) that the judge will have regard to the impact of the current pandemic on prison conditions in accordance with the guidance given by this Court in R v Manning [2020] EWCA Crim 592. We would observe that the judge made no reference to that matter but in any event, in the circumstances of this serious offending, it should have played no significant part.
36. Finally Mr Stirling submits, and Mr Emlyn Jones QC accepts on behalf of the Attorney General, that the respondent did have personal mitigation available to him, in particular the fact that he had obtained employment, he had moved out of the area and had a stable family relationship.

Conclusions

37. In our judgment, the sentence imposed in this case of 2 years suspended for 2 years was so far below the minimum which could reasonably be imposed that it must be regarded as unduly lenient. There could be no question, in a case as serious as this and in view of the respondent's role in the operation of street dealing in Class A drugs, of imposing a suspended sentence order. It has been said by the courts on countless occasions that the illegal supply of Class A drugs such as heroin can kill people. The custodial term which was reasonably required would, on any view, have been far in excess of 2 years.
38. We accept the submission for the Attorney General that the indication given by Judge Grey reflects the sort of sentence which was required in this case even after guilty pleas. We note that the pleas were entered late in the day. That said, the indication given was of the maximum sentence that would be imposed if guilty pleas had been entered. We accept that there is some personal mitigation available to the respondent. We also take into account all the circumstances of this case, including the fact that he will now be sentenced to immediate custody whereas he was given a non-custodial sentence by the Crown Court.
39. In the circumstances we have reached the conclusion that the minimum sentence which was required in this case was 4 years' imprisonment. Accordingly, we grant the

application by the Attorney General and quash the sentence of the Crown Court; we substitute a sentence of 4 years' imprisonment on each of the counts 1 to 4 made concurrent, making a total of 4 years' imprisonment.

LORD JUSTICE SINGH: Mr Emlyn Jones, in those circumstances I envisage that we must make an order requiring the respondent to surrender to the police.

MR EMLYN JONES: If my Lord gives me a moment I think I have the details of the appropriate venue for that.

MR STIRLING: I understand it might be Newport Central.

LORD JUSTICE SINGH: That will be the police station, would it?

MR STIRLING: As I understand it but ...

LORD JUSTICE SINGH: Perhaps that could be checked. Whilst that is being checked, Mr Stirling do you have any submissions to make to us about the due time by which that should be done?

MR STIRLING: I have not any instructions but may I ask for 7 days?

LORD JUSTICE SINGH: No, that is far too long. I had in mind if not later today then certainly tomorrow.

MR STIRLING: My Lord, yes, of course. May I ask for tomorrow then?

LORD JUSTICE SINGH: What we are going to say is noon tomorrow.

MR EMLYN JONES: My Lord, I have found the information I have been given and it is that the nearest custody suite for the purpose of surrender is in Hatfield but I rather fancied my learned knows better...

LORD JUSTICE SINGH: Because he has moved I imagine it is Newport Central.

MR STIRLING: Yes. We did take instructions as to nearest appropriate police station. I am afraid I did not check to see whether it has custody available there. It would seem extraordinary in a town the size of Newport in Wales that it would not have custody.

(The Court conferred with the Court Clerk)

LORD JUSTICE SINGH: Is this something that need take our time now, it surely could be corrected later because I can be contacted by email later today if anything does need to be corrected?

MR EMLYN JONES: Certainly. My Lord what I would suggest is that you make the order for Newport Central, which does on my brief Internet search appear to be a custody suite and then if that turns out not to be appropriate can I please revert to my Lord; and I will do that very quickly.

LORD JUSTICE SINGH: You must do that by the end of business today.

MR EMLYN JONES: I will endeavour to do in the next half hour.

LORD JUSTICE SINGH: We will direct that the respondent must surrender to the police at Newport Central police station by noon tomorrow, that is 19 March.