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No. 2008/03780/A4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 6 November 2008

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(Lord Judge)

MRS JUSTICE SWIFT DBE

and

MR JUSTICE MADDISON

R E G I N A

- v -

JAMES GERARD KELLEHER

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Mr N Hinchcliffe QC appeared on behalf of the Appellant

Mr A Colman and Mr H McCann appeared on behalf of the Crown

J U D G M E N T Thursday 6 November 2008

THE LORD CHIEF JUSTICE: I shall ask Mrs Justice Swift to give the judgment of the court.

MRS JUSTICE SWIFT:

1. On 7 May 2008, at the Inner London Crown Court, the appellant, who is 40 years old and has no previous convictions, pleaded guilty on re-arraignment after the jury had been sworn to one offence of conspiracy to deposit controlled waste unlawfully contrary to section 33 of the Environmental Protection Act 1990 (the 1990 Act). On 12 June 2008 he was sentenced to fourteen months' imprisonment. Fifteen counts charging offences of knowingly causing controlled waste to be deposited on land were ordered to remain on the file on the usual terms. The appellant appeals against sentence by leave of the full court.

2. A co-accused, Patrick Anderson, who pleaded guilty at the same stage to the same offence, was sentenced to 22 months' imprisonment.

3. Waste which is designated as "controlled waste" may only be carried and transported by persons who have a relevant licence and may only be deposited at licensed and regulated sites. The appellant and Patrick Anderson were the organisers, over an 18 month period, of a wide scale operation unlawfully to deposit controlled waste material (commonly known as "fly-tipping") onto sites in areas of the north and east of London. Others were involved in the operation in a subordinate capacity. An empty site would be chosen and the locks broken, entry forced and new locks fitted. Sometimes "Health and Safety" and other signs were put up outside to give the impression that the activity was legitimate. There would be a man at the gate in a high-visibility jacket showing lorries onto the site to tip their loads of soil, rubble, concrete and other construction material, while an earth-moving vehicle moved the material to maximise the amount of waste that could be tipped. If those on site were approached or questioned, there would be an attempt to give a plausible excuse for the activity or everyone would quickly disappear. Some of the sites received deposits of only a few lorry loads, whilst others had vast amounts, which cost thousands of pounds to clean up. Each lorry should have gone to a licensed waste site, at a cost of £50 to £150 (depending on the contents) to deposit the waste lawfully. Evidence was collected of dumping at fifteen different sites between the beginning of 2003 and the middle of 2004.

4. In March 2002 the appellant, who ran his own transport business, had obtained a licence in his own name to carry and transport controlled waste. However, he and Anderson used a number of names as a front for their unlawful activities. The most significant of these was Michael (or "Mick") Ryan. Vehicles were registered in that name, although they were in fact under the control of the appellant and Anderson. The contact number given for Michael Ryan in a number of documents was in fact a mobile phone which belonged to the appellant. An application for a waste carrier's certificate was made by the appellant in the name of Michael Ryan. A bank account was opened in the name of Michael Ryan by means of a form completed by Anderson. Cheques drawn on that account were written by the appellant. Account books were kept which provided clear evidence that the business had been run by the appellant and Anderson in Ryan's name.

There was no evidence of any payments having been made to a person called Ryan.

5. In interview, the appellant was adamant that the conspiracy was organised and controlled by an individual called Michael Ryan and that he was merely his assistant. However, it is clear from the transcript of the sentencing hearing on 11 June 2008 (at page 13C-H) that the appellant and Anderson pleaded guilty on the basis of the prosecution case, namely that he and Anderson were the real organisers and used the name Michael Ryan in an attempt to conceal their own criminal activities.

6. During the three year period between November 2001 and November 2004, the appellant received about £311,000 from the Ryan account. The account received over £550,000 from waste companies, of which over £250,000 was withdrawn in cash. The total estimated tonnage of waste dumped at the sites was over 14,000 tons. The estimated cost of removal and clean-up of the sites affected was £347,000.

7. Despite the basis on which he had pleaded guilty, in his interview with the author of the pre-sentence report the appellant continued to claim that he had been acting under the instructions of Ryan and had played a minor part in the conspiracy. Within that limited context, he accepted that the offences had been fuelled by greed and selfishness. He expressed regret and remorse and a determination not to re-offend. He voiced concern as to how he would cope with a period in custody. He was the sole earner in his family and was concerned that he would lose his home, as the mortgage would not be paid. He was also concerned about the long-term impact on his relationship with his children. He said that he would have to close his business and two employees would lose their jobs. The author of the report concluded that there was a low risk of the appellant re-offending. A Community Order with an unpaid work requirement was recommended; or, if the court considered that a custodial sentence must be imposed, it was suggested that a Suspended Sentence Order with requirements might be considered.

8. In sentencing the appellant, the judge observed that the case was at the extreme end of fly-tipping. It had become an operation which was almost industrial, and certainly commercial, in its scale. He had no doubt that immediate prison sentences were called for, for what he described as "such flagrant, eyes open, wrongdoing". He referred to the large quantities of waste deposited, the length of time over which the activity had continued and the estimated cost of the clean up. Sophisticated devices and disguises were used to give the appearance of lawful dumping, along with some concealment of the offenders' tracks. Moreover, the offending had continued even after the appellant and Anderson had been interviewed by the police (the appellant in November 2003) about their activities.

9. The judge considered that the appellant and Anderson had played an equal part in the conspiracy. However, he made a distinction between them on the basis of Anderson's previous convictions, five of which related to fly-tipping. Anderson was sentenced to 22 months' imprisonment. The judge indicated that he had given a small discount from the maximum sentence of two years' imprisonment for the very late plea. The appellant was sentenced to fourteen months' imprisonment. He was given the same discount for the very late plea of guilty, but a further

allowance was made for the fact that he had no previous convictions and the burdens which his conviction and sentence would place upon him.

10. The Grounds of Appeal contend that the sentence was manifestly excessive and/or wrong in principle in that it failed to give proper weight to factors including the appellant's personal mitigation and good character and to the absence of aggravating features, including, but not limited to, the absence of material of a dangerous or offensive nature or waste which had a long-lasting effect on the environment. The appeal is now directed at the judge's starting point of the maximum sentence of two years and at the level of distinction which he drew between the appellant and his co-accused, Anderson.

11. Section 33 of the 1990 Act, so far as relevant, provides:

"(8) Except in a case falling within subsection (9) below, a person who commits an offence under this section shall be liable --

- (a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding £20,000 or both; and
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both."

12. Subsection (9) of section 33 refers to "special waste". The maximum sentence for unlawfully depositing special waste is, on summary conviction, imprisonment for a term not exceeding six months or a fine not exceeding £20,000 or both, and, on conviction on indictment, to imprisonment for a term not exceeding five years or a fine or both.

13. Section 62(1) of the 1990 Act provides that, if the Secretary of State considers that controlled waste of any kind is or may be so dangerous or difficult to treat, keep or dispose of that special provision is required for dealing with it, he shall make provision by regulations for the treatment, keeping or disposal of waste of that kind. Waste in respect of which such Regulations have been made is defined by section 75(9) as "special waste".

14. The Clean Neighbourhoods and Environment Act 2005 (the 2005 Act) increased the maximum penalties for depositing waste which is not classed as "special waste". It provides that, for offences committed after the commencement date (7 July 2005), the maximum penalty in respect of both special and controlled waste is, on summary conviction, twelve months' imprisonment or a £50,000 fine and, on conviction on indictment, five years' imprisonment or a fine or both. Since the appellant's offence was committed before 7 July 2005, he fell to be sentenced under the provisions of the 1990 Act.

15. Section 3 of the Criminal Law Act 1977 restricts the maximum custodial sentence for conspiracy to commit an offence or offences to the maximum term provided for the relevant offence. Thus, in the present case, the maximum custodial term available to the judge was two years.

16. There are no sentencing guidelines applicable to environmental offences. Our attention has, however, been drawn to Advice to the Court of Appeal issued by the Sentencing Advisory Panel (SAP) on 1 March 2000. That Advice, entitled "Environmental Offences: The Panel's Advice to the Court of Appeal", pre-dated by five years the 2005 Act and therefore took no account of the increase in the maximum penalties effected by the Act.

17. Paragraph 6 of the SAP Advice identified those factors which tend to enhance the culpability of a defendant and thereby to aggravate the seriousness of the offence:

- "(a) the offence is shown to have been a deliberate or reckless breach of the law, rather than the result of carelessness;
- (b) the defendant has acted from a financial motive, whether of profit or of cost-saving, for example by neglecting to put in place the appropriate preventative measures or by avoiding payment for the relevant licence;
- (c) the defendant has failed to respond to advice/caution/warning from the relevant regulatory authority;
- (d) the defendant has ignored relevant concerns voiced by employees or others;
- (e) the defendant is shown to have had knowledge of the specific risks involved, eg when he has knowingly dumped 'special' waste;
- (f) the defendant's attitude towards the environmental authorities was dismissive or obstructive."

18. Paragraph 7 identified further aggravating factors relating to the actual or potential extent of the damage. They are:

- "(a) the pollutant was noxious, widespread or pervasive, or liable to spread widely or have long-lasting effects;

- (b) human health, animal health, or flora were adversely affected, especially where a protected species was affected, or where a site designated for nature conservation was affected;
- (c) extensive clean-up, site restoration or animal rehabilitation operations were required;
- (d) other lawful activities were prevented or significantly interfered with."

19. Paragraph 9 refers to aggravating factors specifically relating to the offence of fly-tipping: depositing waste of a dangerous or offensive nature, tipping in certain types of location which might present a particular danger and causing the escape of waste into streams. It is not suggested by the prosecution that any of those factors applies in the present case. Mr Nick Hinchcliffe QC, who represents the appellant before this court but did not appear at the trial, submits that this is an important point in the appellant's favour.

20. Mitigating factors which would tend to reduce the seriousness of any of the offences under consideration were identified at paragraph 11 of the SAP Advice as:

- "(a) the fact that the individual defendant played a relatively minor role in the commission of the offences, or had relatively little personal responsibility for it;
- (b) the fact that the defendant genuinely and reasonably lacked awareness or understanding of the regulations specific to the activity in which he was engaged;
- (c) the fact that the offence was an isolated lapse."

Although he did not specifically refer to the matter in argument today, it was indicated in Mr Hinchcliffe's Advice on Appeal, and is evident from the pre-sentence report, that the appellant continues to insist that he played only a relatively minor role in the conspiracy. If that were so, the first of these mitigating factors would apply.

21. Paragraph 12 of the SAP Advice refers to personal mitigating factors which should be taken into account, namely:

- "(a) the defendant's prompt reporting of the offence and ready

co-operation with the enforcement authorities;

- (b) the defendant's good environmental record;
- (c) the fact that the defendant took steps to remedy the problem as soon as possible; and
- (d) a timely plea of guilty."

Mr Hinchcliffe submits that the appellant's guilty plea and his lack of any previous convictions (in particular for environmental offences) are powerful mitigating factors in his case. He argues that his good environmental record is of particular significance since he had held a licence to carry waste since the early part of 2002 and there was no previous evidence of any incident before early 2003.

22. Paragraph 14 of the SAP Advice sets out general guidance in relation to the appropriate sentence as follows:

"We begin our consideration of the choice of sentence with the fine, which should be the starting point for the sentence of both *persons* and *companies* for environmental offences. The fine is generally the appropriate sentence for these offences because:

- (a) the offences are non-violent and carry no immediate physical threat to the person, and
- (b) the offences are generally committed in situations where the defendant has failed to devote proper resources to preventing a breach of the law."

23. Paragraph 27 deals with the option of a community sentence:

"In cases of greater seriousness involving an individual offender, the court should consider whether there may be merit in imposing a community sentence rather than a fine. Since it contains a requirement of reparation to the community, a community service

order may be the most appropriate community sentence, although of course such an order is only available where the offence is imprisonable."

24. Paragraph 29 sets out guidance relating to the circumstances when a custodial sentence might be imposed:

"A minority of environmental crimes committed by individual defendants is so serious that only a custodial sentence can be justified. To cross the custody threshold, a case would need to combine serious damage, or the risk of serious damage, with a very high degree of culpability on the part of the offender. Thus, custody should be considered where:

- (a) the offence is shown to have been a deliberate or reckless breach of the law, or the defendant acted from a financial motive, whether of profit, or of cost-saving; *and either*
- (b) (i) human health has been damaged or put at risk; *or*
- (b) (ii) the pollutant was noxious, widespread or pervasive, or liable to spread widely or have long-lasting effects."

25. Mr Hinchcliffe concedes that it is clear that the offences involved a deliberate breach of the law. Although he argues that, since the waste materials deposited were not toxic and involved no risk of damage to health or long-lasting effects on the environment, and therefore, strictly speaking, neither of the conditions at paragraph 28(b)(i) or (ii) has been met, he concedes that in the circumstances of this case a custodial sentence was appropriate. However, he complains of the fact that the judge used as his starting point the maximum sentence available for the offence.

26. There are few sentencing examples available to Crown Court Judges who are called upon to sentence in cases under section 33 of the 1990 Act. We were referred to R v Tapscott [2007] EWCA Crim 1787, where a sentence of 16 months' imprisonment, together with a two-year disqualification from driving, had been imposed for five offences (together with another offence taken into consideration) of depositing waste from house clearances at various sites in rural and residential areas. This case is, however, of little assistance since the appeal was directed only at the

disqualification and two of the offences (together with that taken into consideration) were committed after the commencement of the 2005 Act. In his Advice on Appeal, Mr Hinchcliffe draws further distinctions between the current case and Tapscott. By reason of the sites where the waste was left and the nature of the waste, there was a risk to wildlife and to the public in Tapscott which was not present in this case. Moreover, a number of the offences were committed on bail.

27. Mr Hinchcliffe also referred us in his Advice to R v O'Brien and Enkel [2000] 2 Cr App R(S) 358. The appellants in that case pleaded guilty to three offences under section 33 of the 1990 Act. They undertook to dispose of 2,000 used lorry tyres which had been left on a site. They rented another site for three weeks, collected the tyres and dumped them there. They made a profit of over £8,000 on the operation. They were each sentenced to eight months' imprisonment. The Court of Appeal quashed those sentences and indicated that a fine or a community penalty would have met the justice of the case.

28. Mr Hinchcliffe accepted in his Advice that the criminality in O'Brien was of a significantly lower order than that in the present case. However, he relied on a passage in the judgment of Goldring J. After observing that the case was "at the lower end of the scale" and that the appellants had seen "a chance to make a quick profit", he continued:

"Having said that, there are some features that need to be taken into account when deciding the appropriate sentence on the facts of this case. Although unsightly, the tyres were not dangerous. There was no long-term effect on the environment.

There were no repeated breaches. It may be the appellants thought they could in due course dispose of the tyres to farmers, although we are a little sceptical about that. Neither has a conviction for an offence of this sort. In the final analysis, albeit at the last moment, they pleaded guilty. It is also the case that they were not the only ones who were involved in these offences.

In our view, this case does not pass the custody threshold."

In his Advice, Mr Hinchcliffe relied on the similar absence of dangerousness and long-term effects on the environment in the present case. He submitted that they rendered a custodial sentence inappropriate although, as we have indicated, he conceded before us that the judge was not wrong in principle to impose a custodial sentence. He points out, however, that the judge's sentencing remarks made no reference to the fact that the type of material deposited was not dangerous and did not have any long-lasting effects on the environment. He suggests that the judge failed to take these matters into account.

29. Mr Hinchcliffe also relies on the personal mitigation available to the appellant. He points out

that over four years have elapsed since the period of offending ended, during which time the appellant's business has suffered because of his uncertainty about the outcome of the criminal proceedings. He has, it is suggested, shown genuine remorse and pleaded guilty, albeit at a late stage. These factors, together with his good character, should, he says, have led the judge to impose a lesser sentence than in fact he did.

30. The disposal of waste in accordance with the law involves significant costs. Some individuals attempt to avoid those costs by depositing waste at sites which are not licensed for the purpose, or by employing others to do so. Those individuals or companies who are prepared to make a business out of collecting waste and disposing of it unlawfully stand to make large profits at the expense of the environment and of those whose sites have been polluted. As a result, commercial fly-tipping has become a serious problem. Penalties imposed for breaches of the law in this area must therefore be sufficient to deter profiteering of this sort and must serve to protect the public against the risk of damage to health as well as the inconvenience and eyesore associated with unlicensed and unregulated tips. They must also protect landowners against the costs of reinstating their land after unlawful tipping, and the environment against damage consequent upon the indiscriminate deposit of waste materials.

31. The unlawful depositing of waste in this case was carefully organised and continued over an extended period. Considerable efforts were made to conceal both the fact that the activities were unlawful and the identities of the perpetrators. There was abundant evidence that the appellant and Anderson were the organisers of the operation and that the name "Michael Ryan" was a fiction behind which the appellant and Anderson sought -- and, in the case of the appellant, still seeks -- to hide. The appellant's continued insistence that he played a minor part in the conspiracy and acted under Ryan's instructions serves significantly to undermine his professed feelings of remorse and regret. It also provides further evidence of the dishonesty which characterised this conspiracy. The offences were committed for substantial gain and at a considerable cost to others, in particular to the public purse. The appellant persisted in his criminal activities even after he had been interviewed by the police.

32. It is true that the waste material deposited in this case did not give rise to any risk to health or long-term damage to the environment. Many of the types of waste that present such a risk will be the subject of regulations made by the Secretary of State under section 62 of the 1990 Act and will therefore be "special waste" in respect of which, at the time the offence was committed, the maximum penalty was five years' imprisonment. However, there are some materials presenting a less serious hazard which may not fall into the category of "special waste". It is significant that, in 2005, Parliament considered it appropriate to increase the maximum penalties for the deposit of waste which did not constitute "special waste" to the same level as those for "special waste". This strongly suggests that it was contemplated that significant sentences, including significant custodial sentences, were appropriate even in cases where the waste material deposited did not give rise to a real danger to health or the environment. It seems to us that, in the light of this development, the SAP Advice of March 2000 on this point must be regarded with some caution, even when dealing with offences committed before the commencement of the 2005 Act. In particular, although the SAP Advice correctly identified the aggravating and mitigating factors, it is not the case that a

custodial sentence will only be appropriate if all the conditions set out in paragraph 29 are met. A custodial sentence may be appropriate if (as here) the breach or breaches concerned were deliberate, repeated, large scale, highly organised, financially motivated and highly profitable or combined any of these features.

33. We agree with the judge that this was a very serious case of its type. The prosecution proceeded on the charge of conspiracy, rather than on the 15 substantive offences, each of which could potentially have attracted a consecutive sentence. The judge indicated that his starting point was two years, that being the maximum for a single substantive offences. In the circumstances of the case, we consider that he was entitled to do so. The appellant pleaded guilty at a late stage and was entitled to only limited credit (of about one-tenth) for that. The judge indicated that he was giving a further discount for his good character and for the burden of his sentence upon him. He made a clear distinction between the sentence passed on the appellant and that imposed in Anderson's case. In our view, even taking into account the matters urged on us by Mr Hinchcliffe, the sentence cannot be said to be manifestly excessive or wrong in principle. The appeal is therefore dismissed.

34. **THE LORD CHIEF JUSTICE:** Thank you, Mr Hinchcliffe, and Mr Colman, for your excellent written skeleton arguments which enabled us to think about the case long before we came into court. Thank you.