

ENGLAND AND WALES / JUDGMENT

McCreesh & Anor, R. v

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Neutral Citation Number: [2010] EWCA Crim 314 IN THE COURT OF APPEAL CRIMINAL DIVISION Case No: 200902380 A8/2009023492 A8 Royal Courts of Justice Strand London, WC2A 2LL Date: Friday, 12th February 2010 B e f o r e: LORD JUSTICE TOULSON MRS JUSTICE COX DBE

- ----- THE COMMON SERJEANT
- HIS HONOUR JUDGE BARKER QC (SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION) R E G I N A v KEVIN TERRENCE MCCREESH FRANCIS XAVIER LENNON
- ----- Computer Aided Transcript of the Stenograph Notes of WordWave International Limited A Merrill Communications Company 165 Fleet Street London EC4A 2DY Tel No: 020 7404 1400 Fax No: 020 7831 8838 (Official Shorthand Writers to the Court)
- ----- Mr P Tully appeared on behalf of Kevin Terrence McCreesh Mr D McGuire appeared on behalf of Francis Xavier Lennon Mr R Lowe appeared on behalf of the Crown
- ----- J U D G M E N T 1. 2. 3. 4. 5. LORD JUSTICE TOULSON: Kevin McCreesh and Francis Lennon appeal by leave of the Single Judge against sentences of three years' imprisonment passed on each of them for conspiracy to contravene section 170(2) of the Customs and Excise Management Act 1979. They were sentenced by HHJ Darwall-Smith at Bristol Crown Court on 7th April 2009, together with a third man, Byrne, who was sentenced to four years' imprisonment. The charge arose from a familiar form of scam. Diesel used in road vehicles (or DERV) carries a significantly higher level of excise duty than the same fuel when used in agricultural or other non-road vehicles. That fuel is known as rebated fuel and it has chemical markers added to it in order to make it apparent that it is rebated fuel and not DERV. The scam involves laundering the rebated fuel to remove the chemical markers and so enabling the fuel to be passed off as DERV. In this case, commercial quantities of DERV were laundered at a site in Ampthill, Bedfordshire, from where it was delivered to a filling station at 177 Harrow Road, Paddington known as The Royal Oak Taxi Centre. It was there sold to taxi drivers at the normal rate for ordinary diesel, enabling the fraudsters to benefit from not having paid the excise duty or appropriate rate of VAT. Four men were charged with the conspiracy. They were the two appellants, Byrne and a man named McNamee. Byrne and McNamee were undoubtedly involved in the organisation of the scam. All four were due to stand trial in February 2008. On 6th February, which was to be the first day of the trial, the appellants changed their pleas to guilty on written bases.

McCreesh's basis of plea set out a number of matters, including: "He was not involved in any organisation of the enterprise whatsoever; his role was limited to that of a driver." His basis of plea also limited his period of involvement to the period between September or October 2005 and May 2006. The period covered by the indictment was from 1st January 2005 to 3rd August 2006. Lennon's basis of plea was to similar effect. He asserted that he was merely a driver who, on being contacted by the organisers, would travel from Northern Ireland, where he and McCreesh both lived, to England to collect a lorry and trailer knowing that it contained rebated fuel, and deliver it to the Royal Oak premises, knowing the purpose for which he was doing it. Each said that he was paid £250 plus expenses on each occasion that he was given driving work. 6. Byrne pleaded guilty on the next day on a written basis with which we are not presently concerned. The trial of McNamee began but it had to be stopped after a few days because of McNamee's ill health. At the time when these appellants pleaded guilty, the expectation was that they would be sentenced within 28 days but sentencing was adjourned to await the outcome of the trial of those who had pleaded not guilty.

7. We are told by Mr McGuire, who appeared for Lennon, as he does today, that the judge said at the time when the pleas were entered by the appellants that he would give a full discount for plea, despite the lateness of their pleas. The reason for this, and the reason for Mr McGuire's recollection of it, was that there had been some argument about the lateness of production by the prosecution of relevant material and, for that reason, Mr McGuire was anxious to establish that his client had pleaded guilty on the earliest opportunity that he was afforded. The judge cut short the argument by indicating that he was prepared to give a full discount for their pleas. After the trial of McNamee had been aborted, matters went on hold for some months to see if and when he would become fit for trial. In the meantime, the prosecution considered the bases of plea tendered by the appellants. The prosecution disagreed with the appellants' assertions that they were mere drivers. The prosecution contended that they had a significantly greater involvement in the scam than that and it has to be said that there were, on the face of it, good reasons for the prosecution to take that position. The matter came back before the judge for directions in June 2008. In part, this was to consider how the case was to proceed in relation to McNamee, but the judge was also asked to consider whether there should be a Newton hearing. All counsel are agreed that the judge indicated that he did not consider that a Newton hearing would be appropriate but they are unable to recall whether he gave his reason for that view and, if so, what it was. 8. 9.
10. The appellants were next brought back to Bristol Crown Court from Northern Ireland for sentence in November 2008. It seems that by this stage it was apparent to the prosecution that McNamee was never going to be fit to stand trial and so the proceedings against him were stopped.
11. However, when the appellants appeared for sentence, the proceedings had to be adjourned again. This was because on this occasion Byrne announced that he was going to apply for leave to vacate his plea of guilty. The judge put that off for seven days but in the event had to postpone the matter for longer. Mr McGuire says that on this occasion the judge expressed

his regret to McCreesh and Lennon that he was having to adjourn again the sentencing of them, but he stated that they would each be sentenced on the basis of their plea. Mr McGuire's solicitors made a contemporaneous note of that. Mr Lowe, who appeared for the prosecution and has appeared in this court, has said that he has no recollection of the matter but he would not wish to challenge Mr McGuire's recollection, supported as it is by a contemporaneous note.

12. When the matter finally came before the judge for sentencing on 7th April 2009, prosecuting counsel again raised the question whether there ought to be a Newton hearing. He had indicated to defence counsel shortly before the hearing that he was going to seek to raise the matter and suggested that they should therefore be in a position to deal with it, rather than there be yet a further judgment, if the judge on reconsideration decided that a Newton hearing was called for. Counsel for the prosecution raised the matter at the beginning of his opening and said that he invited the judge to consider whether a Newton hearing was necessary or not. He added that those representing the appellants had come in anticipation of having to deal with the issue if SMITH BERNAL WORDWAVE the judge took the view that a Newton hearing is appropriate. There was then the following exchange: "JUDGE DARWALL-SMITH: I do not. MR MORGAN: [counsel for the prosecution] You do not? JUDGE DARWALL-SMITH: No. MR MORGAN: Well, there is nothing more I can say in those particular circumstances. JUDGE DARWALL-SMITH: It seems to me that I can deal with each defendant and his role as is set out in his basis of plea and in your opening. It seems to me. I have to make up my mind about that. MR MORGAN: There is a divergence of opinion, it is fair to say, as between the Crown's position and that of the defence. JUDGE DARWALL-SMITH: Yes, there is, and I shall take that on board. But I can deal with it." 13. In sentencing the appellants, the judge expressed his conclusions and his reasoning for sentencing them tersely. He said as follows: "Kevin McCreesh, you delivered the fuel to the taxi centre on many occasions. You were involved in the plant. You were more than a delivery driver, in my judgment, you were part of the organisation of this factory that converted this fuel from unrebated fuel to a fuel that is for roads. The sentence in your case is one of three years. Francis Lennon, you made deliveries to The Royal Oak and you were arrested in possession of quantities of cash. You paid the landlord of the farm, and the evidence shows that you too had an organisational role in this matter. The sentence of the court in relation to you is one of three years."
14. The judge did not identify the evidence on which he concluded that they had a organisation role. As already mentioned, there was undoubtedly evidence to support that conclusion. There was also the evidence, if it can be called such, of the defendants in their written pleas that they were mere drivers, but the judge had indicated clearly that he did not wish to hear any oral evidence on the subject.

15. There are essentially two grounds of appeal. The first is that the judge erred in principle in sentencing the appellants on the basis that they had organisational roles in the scam, contrary to the express terms of their written bases of plea but having refused SMITH BERNAL WORDWAVE to hold a Newton hearing. The second ground of appeal is that there was unacceptable disparity between the sentences passed on the appellants and the sentence passed on Byrne.
16. McCreesh is aged 29 and was of previous good character. Lennon is aged 48 and had committed some previous motor related offences but had not committed any offence of dishonesty. They were positive testimonials to the character of each of them. Byrne, by contrast, had a previous conviction for a similar offence of defrauding the Customs and Excise. He had a larger role because he was unquestionably involved in the organisation of the enterprise and moreover his credit for his plea of guilty was significantly diminished by his unsuccessful attempt to vacate that plea. For all those reasons, it is submitted that if the appropriate sentence for Byrne was four years' imprisonment the appropriate sentence for the appellants should have been significantly less than three years imprisonment.
17. We deal first with the question of principle. We have been assisted by having the submissions both of the appellants and of Mr Lowe for the prosecution. We have been referred to various authorities and to the relevant passage in Archbold. With one exception, we do not think it necessary to refer to the authorities individually because the principles are clear. 18. 19. If (a) the defendant pleads guilty on a written basis setting out his version on matters of fact which go to the nature of the offending as distinct from matters merely amounting to personal mitigation, (b) the prosecution disagrees with the defendant's version and
- (c) the difference is material, ie it will affect the judge's decision on sentence, fairness to the prosecution and the defence requires that there should be a Newton hearing unless the judge has formed the view from his reading of the papers that the defendant's version is incredible. In that case, he is entitled to indicate the view which he has formed at that stage but fairness requires that he should give the defendant the opportunity, if he chooses, to advance evidence or argument in support of the defendant's version. If the defendant does so, the judge must give a ruling to explain, however succinctly, his reasons for accepting or rejecting the defendant's version. If the judge takes the view at the outset that no Newton hearing is needed because the difference will not affect his sentence, he should say so in unambiguous terms and he must then sentence the appellant on the written basis put forward by the defendant. In the present case, those principles were not followed. The judge, in saying that a Newton hearing was not appropriate, did not do so on the basis that he had formed the view from the papers that the appellant's version was incredible, and that therefore he considered that a hearing would be unnecessary unless the defendant wanted in the face of that indication to give evidence or argue in support of that version. On the contrary, he indicated that he would make up his mind which version of the facts he considered the right one on the material which was before him. It is not altogether clear

whether he indicated that he regarded the difference between the prosecution and defence versions as immaterial to the question of sentence, although it is undisputed that he had in November 2008 stated that he would sentence the appellants on the basis of their written pleas. The one point about which all parties agree is that the judge was clear and unambiguous throughout that there was not to be a Newton hearing. In those SMITH BERNAL WORDWAVE circumstances, fairness required that he sentence the appellants on the basis of their written pleas.

20. Mr Lowe has properly drawn the court's attention to the decision of this court in *R v West* [2007] EWCA Crim 801, which was a case of conspiracy to supply heroin. The defence put forward a written basis of plea according to which the appellant's involvement in the conspiracy was strictly limited. The prosecution said that it contested that version. The report shows that the judge, in declining to hold a Newton hearing, said that he "could come to his own conclusion on the material before him" and that is precisely what he did. In passing sentence, he rejected the basis of plea. This court held that in so doing he was in error. He should have held a Newton hearing. In the present case the judge fell into the same error of saying that he would make up his mind as to the proper findings of fact on the material before him while stating that a Newton hearing was not appropriate. 21. It follows that we must address the question of sentence on the basis of the appellant's written pleas, however fortunate they may be in that regard. As already mentioned, each appellant was of previous good character or, in the case of Lennon, effectively of previous good character. They had, through no fault of their own, had to wait a period of 14 months between pleading guilty and being sentenced. During that period they had come over from Northern Ireland to Bristol expecting to be sentenced on certainly one, and possibly more than one, occasion. Although their roles were described as being merely drivers, it would be wrong to regard that as a minor or unimportant role. This was a large scale scam. The judge concluded that the total amount of duty evaded was at least in the region of a million pounds. The appellants, on their basis of plea, which must for present purposes be accepted, were each only paid £225 plus expenses on each occasion but they were willing to come to England whenever requested in order to carry large loads of laundered fuel to Paddington, knowing exactly why they were doing so. In our judgment, the appropriate sentence for each of them on conviction would have been two years' imprisonment. They were entitled to a full discount for their guilty pleas on the indication given by the judge at the time when they pleaded guilty. Accordingly, the appropriate sentence in the case of each of them should have been 16 months' imprisonment.
22. We will therefore allow the appeals to the extent of quashing the prison terms passed on them and will substitute sentences of 16 months' imprisonment in each case, less days spent on remand. SMITH BERNAL WORDWAVE

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