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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

JAMES McDONNELL

Before: Higgins LJ, Coghlin LJ and O'Hara J

HIGGINS LJ (delivering the judgment of the Court)

[1] Following a trial before Stephens J and a jury at the Crown Court sitting in Newry the appellant was convicted of the offence of being concerned in the fraudulent evasion or attempt at evasion of the duty chargeable on a quantity of cigarettes contrary to section 170(2) of the Custom and Excise Management Act 1979. The duty chargeable was £1.629,993 in respect of 8.38 million cigarettes. On 25 October 2013 the appellant was sentenced to five and a half years imprisonment. He appealed against that sentence with leave of the single judge on the ground that the sentence was manifestly excessive. At the conclusion of the hearing we allowed the appeal and substituted a sentence of three and a half years imprisonment and stated that we would give our reasons later which we now do.

[2] The appellant pleaded not guilty at his arraignment on 22 March 2012. His trial commenced on 7 September 2012 and concluded on 24 September 2012 when the jury was discharged. A retrial commenced on 10 December 2012 and concluded on 13 December 2012 when the jury were unable to reach a verdict. A retrial commenced on 10 September 2013 and the appellant was convicted on 12 September 2012. In the final trial much of the background evidence was read by agreement, the appellant accepted he was the driver of the articulated lorry but denied knowing he was carrying cigarettes. Thus, the only issue at this trial was whether or not he was knowingly concerned in the evasion of duty.

[3] On 29 June 2010 the appellant, an HGV driver, went to Butterfly Retail Park in Dundalk where he connected an articulated lorry's tractor cab to a trailer carrying a Tex sea container. He was recorded on CCTV doing so. The container contained 8.38 million counterfeit Benson & Hedges Gold Brand cigarettes. The appellant then drove the lorry and container from Dundalk across the border to Bridgeview Industrial Estate in Meigh, County Armagh a distance of about ten miles. He drove the lorry into one of the units in the industrial estate and the roller shutter door was closed behind him. Inside the unit there were a number of people who began transferring the cigarettes from the articulated lorry into smaller box lorries, of which there were two. Customs Officers and police arrived at the Estate and when two of the police officers attempted to gain access to the unit, one of the smaller box lorries crashed through the roller shutter door knocking down one of the officers and dragging another officer under its wheels. The box lorry sped off and was later found overturned and abandoned across the border. It was estimated that there were between six and ten persons in the unit when customs and police arrived. They began to flee. They were called upon by the police to halt but only the appellant and a young person aged 17 years obeyed and they were detained by police. The other persons made good their escape across fields and over the border. The box van that was driven away was found to contain 4.99 million cigarettes and a further 3.39 million cigarettes were found within the unit. The total amount of cigarettes was 8.38 million and they were counterfeit. The total amount of Duty evaded was calculated as being £1,629,993. Neither the appellant nor the young person gave any explanation for their presence at the Industrial Estate when interviewed. It may be inferred that the cigarettes were manufactured beyond the island of Ireland, imported by sea in the Tex sea container which was unloaded at a port on the East Coast and then driven to the retail park in Dundalk prior to transportation across the border for distribution either in Northern Ireland or mainland UK.

[4] The learned trial judge accepted that neither the appellant nor his co-accused were organisers of the criminal enterprise. However he concluded that the appellant –

“played an important role at a crucial stage of the smuggling operation transporting the cigarettes from Ireland to Northern Ireland which clearly indicates that you were a trusted individual within the organisation.”

[5] The learned trial judge then considered *R v Czyzewski* (2004) 1 Cr App R(S) 49 a sentencing guideline case in England and Wales and *R v Grew & Oths* (2011) NICA 11 a decision of this Court. He stated at para 13 that he sought to apply the principles set out in *Czyzewski*. At para 24 he set out the appellant's personal circumstances –

"[24] You, James Francis McDonnell, did not co-operate during the police and customs officers interviews. You were born on 10 November 1971. You are 41. You have had steady employment throughout your life in a variety of jobs. Recently you have been working with your brother in the livestock trade. You are married with two young children. You enjoy a stable family life and a stable life in the community. You regret your involvement in the offence which you still assert was unwitting. You concede that you suspected that what you were requested to do was somewhat "dodgy." The probation board assess, and I agree, that your remorse is centred on the position that you find yourself in, rather than for your involvement in the offence. You have been assessed as a low likelihood of reoffending and as not presenting with a significant risk of serious harm to others. I am certain, given all that has been said in the references, your stable home and working life that you play an important role as a father providing a secure environment within which your children can develop."

[6] The learned trial judge then considered the appropriate starting point for the appellant for this offence and stated at para 26 -

"[26] In relation to the principal factors identified in R v Jozef Eugene Czyzewski in gauging the seriousness of the offence, the amount of duty involved was £1,629,993.80, the organisation was both complex and sophisticated, you James Francis McDonnell played an important role at a crucial stage of the smuggling operation as the driver of the lorry transporting the smuggled cigarettes and you Arthur Michael Fearon played a less important but all the same a significant role in the distribution of these cigarettes. Neither of you were involved in planning or organising the offence. Neither of you were the controlling mind of this operation. I consider that neither of you personally profited from the operation except by payment for the work that you did. I fix the starting point in relation to you James Francis McDonnell at 6 years."

[7] The learned trial judge then considered the mitigating circumstances in respect of the appellant. These included the absence of previous convictions, the appellant's wife's illness and the effect on his children of any prison sentence. He rejected the contention that observance of onerous bail conditions was a mitigatory factor. He made a modest adjustment for the fact that the appellant had to endure the emotional pressure of three trials, though commented that the appellant could have cooperated with rather than frustrating the criminal investigation. He rejected the contentions that prosecution delay and the appellant's agreement to many prosecution statements in the third trial being read were mitigatory factors. At para 35 he stated his conclusions–

“[35] In relation to you James Francis McDonnell I impose a sentence of 5 years and 6 months. Prior to this offence I have no doubt that due to your stable and reliable character you would have been assessed as a low risk of committing the offence and as presenting no harm to the public. Yet you did commit the offence. You are now, as you would then have been, assessed as a low risk of re offending and as not presenting with a significant risk of serious harm. You do not appear to have insight into the serious damage that this offence causes to others, for instance legitimate traders. In those circumstances I fix the custodial period at one half of the term of 5 years and 6 months. At the end of that custodial period the Secretary of State shall release you on licence. That licence may be revoked.”

[8] The co-accused was sentenced in his absence he having absconded during his trial. After consideration the learned trial judge rightly proceeded with the trial, but postponed sentence until the conclusion of the appellant's trials. He sentenced the co-accused to two years imprisonment having taken into account his youth. He did not fix a starting point in respect of the co-accused but acknowledged that he played a less important but significant role in the distribution of the cigarettes. It was not clear what that role was precisely.

[9] It was submitted by Mr Knowles QC who with Miss Lynch appeared on behalf of the appellant that the sentence imposed by the learned trial judge was manifestly excessive. The Judge was wrong to have focussed on the amount of duty evaded and in choosing a starting point of six years. This did not reflect the role played by the appellant. In addition by reducing the starting point by only six months the Judge gave insufficient weight to the mitigatory factors put forward on behalf of the appellant. It was submitted by Mr Chambers who appeared on behalf of the prosecution that this was a sophisticated and well organised enterprise in which all involved were trusted to perform a role. The

transportation of the cigarettes from Dundalk to Meigh was an essential part of the operation which the appellant was trusted to perform and he was allowed to remain while the unloading of the cigarettes took place. At the Crown Court the prosecution had submitted that the trial judge should adopt the approach endorsed in *R v Czyzewski*. He further submitted that a fair reading of the trial judge's sentencing remarks demonstrated that he did not simply look at the amount of duty evaded and then fix the starting point of six years.

[10] It seems clear from para 26 of the sentencing remarks, quoted above, that the trial judge, relying on *R v Czyzewski*, identified the amount of duty involved and the degree of organisation as principal factors for determination of the seriousness of the offence and that the appellant played an important role at a crucial stage of the criminal operation.

[11] *R v C* was heard in 2003 and involved a number of different appeals. Prior to this case the leading authority had been *R v Dosanjh* (1999) 1 Cr App R(S) 107. Shortly before the hearing in *R v C* the Sentencing Advisory Panel published advice to the Court of Appeal proposing that sentencing guidelines be issued in respect of the offence of fraudulently evading duty on alcohol and tobacco, taking account of several matters since *R v Dosanjh* was reported. In *R v C* the court, in setting out guidelines for offences involving the evasion of duty on imported goods, followed broadly the Sentencing Advisory Panels approach. At para 6 the Court identified the principal factors relevant to seriousness, namely the level of duty evaded, the complexity and sophistication of the organisation involved, the function of the defendant within the organisation and the amount of personal profit to the particular defendant. It then set out nine features which if present would aggravate the offence. These included where the defendant played an organisational role, was involved in repeated importations or was a professional smuggler. At para 7 the Court identified what might amount to evidence of professional smuggling and at para 9 (i)-(iv) set out with approval the starting points for sentence for a defendant convicted following a trial as suggested by the Sentencing Advisory Panel. At 9(iv) the Court stated –

“when the duty evaded is in excess of £100,000, the length of the custodial sentence will be determined, principally, by the degree of professionalism of the defendant and the presence or absence of other aggravating factors; subject to this, the duty evaded will indicate starting points as follows: £100,000 to £500,000, nine months to three years; £500,000 to £1 million, three to five years; in excess of £1million, subject to the comment we have made earlier where many millions of pounds are evaded, five to seven years.”

[12] Thus the starting points identified in 9(iv) were subject to the degree of professionalism of the defendant and the presence or absence of other aggravating factors. The Court then dealt with four separate appeals. The first was C. He was convicted of two counts of being knowingly concerned in the evasion of duty. Each of the counts related to a consignment of goods which included 2.5 million cigarettes and which were imported on different dates at different ports. The duty evaded was £670,000. C was regarded as an organiser and was sentenced to four years imprisonment on each count concurrent. The Court of Appeal concluded that this sentence was unimpeachable. Two co-accused who were also convicted and whose role was regarded as being of a manual kind were sentenced to two and a half years imprisonment. The next appeal involved Bryan and Mitchell. Bryan pleaded guilty to being knowingly concerned in the fraudulent evasion of duty and Mitchell was convicted of the same offence. Bryan brought 1.25 million cigarettes from France in his lorry for which he was to receive £3000 and Mitchell's role was to assist in unloading the cigarettes. The duty evaded was £164,000. Bryan was sentenced to two and a half years imprisonment which was reduced to nine months and Mitchell's sentence of four years imprisonment was reduced to two and a half years. It was noted that this was a case involving a single trip.

[13] In *R v Dosanjh* the appellant pleaded guilty to being knowingly concerned in the evasion of duty in respect of alcohol brought across the Channel. Between November 1995 and September 1996, he made 82 separate trips using different vehicles and had been stopped on two occasions by Customs officials at Dover. The duty evaded was £164,000. He was sentenced to three years imprisonment. The Court noted the repeated wholesale importations despite two warnings and his history of dishonesty and said that though this sentence was at the top end of the bracket which the Court suggested was appropriate, it was not so manifestly excessive that the Court should interfere. In giving the judgment of the Court Rose LJ offered guidance for sentencing in cases of evasion of duty –

“The courts need to distinguish between three broad categories of offenders: those who import comparatively small quantities on a few occasions; those who, acting on their own, or possibly with one other, persistently import greater quantities, and those in organised gangs, involved in importation on a large commercial scale.

There is, in our judgment, a need for a deterrent element in sentencing, particularly when significant amounts of duty are evaded by repeated organised expeditions, which lead to distribution subsequently on a commercial scale. In those cases, good character and personal

circumstances will be of comparatively little mitigating significance.

In the light of all these considerations, and in an attempt to achieve a greater degree of uniformity in sentencing than has always been apparent hitherto, we suggest the following guidelines by reference to the amount of duty evaded. We stress that these are guidelines only, and that in addition to the amount of duty evaded, many other factors which we have earlier identified in this judgment, have a role to play in sentencing.

Cases involving less than £10,000 will frequently, though not always, properly be dealt with by magistrates (see the National Mode of Trial Guidelines 1995, issued by the Criminal Justice Consultative Council: these are to be found in Archbold 1998, paragraph 1, in particular, subparagraph 42, and *Stones Justices Manual* 1998, Volume I, paragraph 6482). In any event, when the amount evaded is in thousands of pounds, custody will generally be called for, and, on a plea of guilty, sentences up to six months will be appropriate; for amounts between £10,000 and £100,000, sentences between six months and two years will generally be appropriate on a guilty plea; for amounts between £100,000 and £500,000, two to three years on a guilty plea, and up to four years, following a trial, will generally be appropriate; for amounts in excess of £500,000, sentences in the region of four years, increasing to the statutory maximum of seven years, when a million pounds or more in duty is evaded, will be appropriate, following a trial, with a suitable discount for a plea of guilty. In exceptional cases, where very many millions of pounds in duty are evaded, consecutive sentences may be appropriate; alternatively, it may be appropriate to charge conspiracy to cheat, which is capable of attracting higher sentences than those already indicated."

[14] *R v Dosanjh* and *R v C* were the principal authorities from the Court of Appeal in England and Wales at the time this Court heard *R v Grew & Another* and *R v Mackle & Others* reported together at (2011) NICA 31. These were appeals against confiscation orders made following convictions for being concerned in the fraudulent evasion of duty in respect of five million cigarettes. The appellants were each given a sentence of imprisonment which was suspended. Grew and his co-accused were present when the cigarettes were recovered, two of the Mackle brothers were present to unload the cigarettes in their case and their brother was stated to have some organisational role. Therefore, in respect of only one appellant was there an aggravating factor present and none of the appellants in either case could be described as a ringleader. It was submitted on behalf of the prosecution that as the appellants had appealed the confiscation orders the Court of Appeal could review the lenient sentences of imprisonment which were imposed in each case. While the Court acknowledged that it had the power to increase the sentences imposed, the circumstances were not exceptional and it would be unfair for the Court to take that course of action. Girvan LJ giving the judgment of the Court noted that the sentences were lenient and commented at para 44 –

“[44] However, having regard to the quantity of the smuggled goods, the degree of organisation involved in the enterprise and the amount of duty evaded we consider that a lengthy custodial sentence should be the norm. We are not convinced that the circumstances of these cases were sufficiently exceptional to justify the leniency shown by the sentencing judges in suspending the sentences. This type of smuggling activity represents a heavy drain on the public exchequer, involves complex and expensive investigation, and results in criminals making substantial profits at the expense of the public and legitimate trade. Accordingly, we consider that it should normally attract a substantial deterrent custodial sentence.”

[15] A defendant may be concerned in the evasion of duty contrary to section 170(2) of the Customs and Excise Management Act 1979 in countless different ways, depending on the nature of the criminal enterprise and the chargeable goods involved. On conviction on indictment a person guilty of an offence contrary to section 170(2) is liable to a penalty of any amount or to imprisonment for seven years or to both. The original maximum term of imprisonment was two years but this was increased to seven years in 1988.

[16] The known facts in this case suggest an organised criminal enterprise of some complexity. The cigarettes were manufactured overseas and brought by sea

to a port on the east coast of Southern Ireland from where they were unloaded and then transported to the Retail Park in Dundalk. The appellant's role was to drive the container across the border to the industrial estate at Meigh where the cigarettes were to be unloaded into smaller vans and then transported from there to elsewhere within the United Kingdom. The purpose of the enterprise was illegal profit on cigarettes which were counterfeit and on which no duty was paid. A financial investment in the manufacture, purchase and transportation of the cigarettes would be necessary for the venture to succeed. Someone or a small group, with access to funds, would be at the centre of this enterprise which as it progressed would have involved a number of other personnel engaged to carry out specific tasks mostly of a manual nature, for example drivers, loaders/unloaders or look-outs where necessary. These latter persons might be described as 'helpers'. Those at the centre of the operation would be the persons to benefit most from the illegal profits. The helpers are usually paid a specific sum for their assistance though there is no evidence in this case that the appellant was so paid. Where such an enterprise results in a charge under section 170(2) of being knowingly concerned in the evasion of duty, all of those involved are liable to a maximum term of imprisonment of seven years and the criminality and culpability of each has to be evaluated within that term of imprisonment. As Vice President Rose pointed out in *R v C* the prosecution may have the option of prosecuting an offence of Cheating the Public Revenue, the maximum sentence for which is Life Imprisonment. The gravamen of the offence contrary to section 170(2) is the fraudulent evasion or attempted evasion of duty. Thus the amount of duty evaded is undoubtedly a useful yardstick by which to gauge the seriousness of the criminal enterprise. However there always remains the evaluation of the culpability of each of those involved in relation to the duty evaded and their proximity to that evasion and the benefit derived from it. Undoubtedly those at the centre of the operation are closest to the benefit from the evasion of the duty. In *R v C* the Vice President, adopting the suggestions of the Sentencing Advisory Panel, stated that a starting point of five to seven years would be appropriate where the duty evaded is in excess of £1 million. This starting point is heavily qualified by the first part of the para where he stated that the length of the custodial sentence will be determined principally by the degree of professionalism of the defendant, (not the enterprise), and the presence or absence of other aggravating factors. The professionalism involved would normally relate to those at the centre of the enterprise; those who planned and funded it. Other factors may influence the length of the custodial sentence. That sub-para (iv) is heavily qualified can be verified by para 10 where the Vice President reminded sentencers that his proposals were guidelines not a straitjacket and that they could move upwards or downwards by reference to aggravating or mitigatory factors. The authority provided by *R v C*, based as it is on the Sentencing Advisory Panel's is not binding on courts in this jurisdiction, though as has been said often by this Court in the past, this Court will take note of the principles and factors which emerge from such Guidelines, but not necessarily adopt the type or length of sentence which they recommend.

[17] The Sentencing Advisory Panel has now been succeeded by the Sentencing Guidelines Council which has issued new guidance for sentencing in statutory offences of fraud which include fraudulent evasion of duty. These are effective from October 2014. The emphasis has moved from the amount of duty evaded to the amount of benefit obtained or intended to be obtained by the offender or offence. While in some instances the amount of duty evaded and the amount of benefit maybe the same, it is unlikely to be so in relation to the distribution and sale of counterfeit cigarettes. These Guidelines are intended to be applied in conjunction with the Council's Guideline entitled Overarching Principles: Seriousness, which also do not apply in this jurisdiction. They recommend a stepped approach. Step 1 involves determining the offence category by reference to the level of culpability (High, Medium or Lesser for each of which there are various indicators) and the actual intended, or risked loss or harm. Step 2 involves using various tables to reach a provisional sentence and Steps 3-8 the standard steps in any sentencing exercise, for example credit for a guilty plea, the totality principle etc.

[18] There are two ways of approaching sentencing in fraudulent evasion of duty cases. One involves an evaluation of the seriousness of the offence by reference to the amount of duty evaded, fixing a starting point by reference to that and adjusting the final sentence by reference to the role of the defendant taking account of any aggravating or mitigating factors. The other is to assess the role of the defendant in a criminal enterprise involving the evasion of a certain sum of duty and attach a provisional sentence to that role which can be adjusted by reference to any aggravating or mitigating factors. Whichever approach is adopted the role of the defendant in the criminal enterprise is crucial. Where he is a mere helper, uninvolved in planning or funding the enterprise, his culpability is less than those at the centre of the operation. While six or seven years might be appropriate to represent their culpability, such a sentence would by comparison be inappropriate for the mere helper. Allowance has to be made for those more culpable.

[19] While a starting point of six years in this case might reflect the seriousness of the offence, where the offender is a mere helper that figure has to be carefully adjusted to reflect the role played by him. The role played by the appellant was to drive the lorry with the container from the Retail Park in Dundalk across the border to the Industrial Estate at Meigh a distance of about 12 or 13 miles. There is no evidence that his role went beyond that, in particular that he was in addition an organiser, planner or funder of this evasion of duty enterprise. If six years was the correct starting point it was insufficiently adjusted to reflect the role of the appellant. We consider that the role of the appellant warranted a sentence of four years imprisonment. This reflects and takes account of the other circumstances relating to the conduct of the trial and the delay. The learned trial judge reduced the sentence of six years to reflect the personal and other circumstances of the appellant. We considered it would be unfair not to adopt the same approach. Accordingly we reduced the four years to a term of three and

a half years to be apportioned in the usual way half in custody and half on licence.

[20] This Court was invited to provide guidelines for sentencing of evasion of duty offences in this jurisdiction in light of *R v C* and the Sentencing Advisory Panel's suggestions and the Sentencing Guidelines Council's Definitive Guideline for Sentencing in Statutory Offences of Fraud. We do not consider it appropriate in this case to go beyond what we have stated.

[21] The single judge suggested that this Court might wish to give some guidance as to whether this was a single fraud or whether the number of packets of cigarettes made this a multiple transaction fraud and whether the 'peripheral' role of the appellant should be treated as a factor going to the issue of culpability or mitigation. The crossing of the border by a container loaded with a large quantity of cigarettes is a single transaction in relation to the evasion of duty. The role of the appellant must be an issue which governs culpability. It is difficult to see how a criminal act, however peripheral, could be regarded as mitigatory.