

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 18/01/2013

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

ASHOK KUMAR

His Honour Judge McFarland

- [1] The defendant was convicted by a jury of conspiring to evade customs duty and being concerned in carrying dutiable goods with intent to defraud, both offences being contrary to Section 170 of the Custom & Excise Management Act 1979. He was jointly charged with his 35 year old daughter. The jury were unable to return a verdict in respect of the counts in relation to her, and on the application of the Crown, she is to be re-tried later this year.
- [2] On the 17th August 2010 Kumar's daughter was stopped on the A1 adjacent to Banbridge. In the back of the van she was driving, Customs officials found large cardboard boxes containing numerous packets of cigarettes bearing the Golden Eagle brand. A carton of Palace branded cigarettes was found in the front of the van. The number of cigarettes seized was 310,200, and the estimated loss to HM Revenue and Customs is £63,767.28. This figure includes ad valorem duty, specific tobacco products duty and VAT. The American Eagle brand is believed to be manufactured in Vietnam, and the origin of the Palace brand is unknown. Neither brand is licensed for sale in the United Kingdom. A month earlier Kumar had been involved in introducing a man who had purchased the van and Kumar had been driving the van two hours earlier that day at a filling station at Sprucefield, Lisburn at the start of the A1. The clear inference from the evidence heard in court was that he drove the van southwards to an unknown location. His daughter

followed the van in Kumar's own car, the cigarettes were then loaded into the van from an unknown source, and Kumar's daughter drove it northwards to the location where she was stopped. Kumar drove his car just ahead of the van in a scouting mode. There was regular telephonic traffic between both vehicles, and at or about the time the Customs officials stopped his car, Kumar attempted to send a text message "Pigs stop" to his daughter.

- [3] Kumar has a relevant criminal record both in relation to offending of this nature and other offences for trade mark infringement. In September 1994 he was guilty of 16 offences of fraudulent use of a trademark. In February 2004 he was guilty of possession of 1 ¼ million dutiable cigarettes with intent to defraud, and in August 2002 he was guilty of possession of 441,240 cigarettes in similar circumstances. On each occasion he received a suspended sentence from the Crown Court, the operational period of the final sentence expiring in March 2010, 5 months before the offences being dealt with now.
- [4] Offending of this type and to this extent is particularly serious for a number of reasons. First, there is clearly a substantial loss to the Exchequer, both in relation to the stated loss of duty and tax, as well as the loss of tax and rates generated through the legitimate taxation of genuine wholesale and retail outlets. Secondly, there is a strong health and social policy behind the imposition of tax and duty on cigarettes, primarily to deter purchase of cigarettes and other tobacco products. Evasion of the duty undermines this policy. Thirdly, the sale of cigarettes through genuine retail outlets is regulated to prevent sale to under aged consumers. Fourthly, the profitability of the genuine retail outlets is substantially undermined by this illegal activity. Fifthly, the unregulated importation of illicit cigarettes bypasses the normal quality control provisions and may expose the ultimate user to not only the well-known and documented adverse impact from tobacco and nicotine consumption, but other toxic additives. Finally, this criminal activity at this scale is normally associated with criminal elements in society who are closely associated with major criminal gangs, many with a direct or indirect link with paramilitary groups. The World Health Organisation Framework Convention on Tobacco Control adopted a new treaty in November 2012, and its representative stated – "*The elimination of all forms of illicit trade in tobacco products, including smuggling and illegal manufacturing, is an essential component of tobacco control.....Illicit trade in tobacco products is a global problem. It undermines health objectives, imposes additional strain on health systems and weakens tax and other measures designed to strengthen tobacco control. It leads to substantial revenue losses to governments around the world but generates vast financial profits for illegal traders. These are often used to fund transnational criminal activity.*" There is a clear public interest in suppressing this type of activity.
- [5] There are no guideline cases determined by the Court of Appeal in relation to the evasion of duty. The English Sentencing Council has published Guidelines in May 2008 and October 2009. The May 2008 guidelines cover a

large number of different types of offences, and were primarily created to assist Lay Magistrates. The Magistrates' jurisdiction is limited to a maximum sentence of a level 5 fine (£5000) and 6 months imprisonment. The specific guidance for this type of offending is covered at pages 68A – 68D. The Sentencing Council groups a variety of offences together in this category, the common element being defrauding the public revenue. The October 2009 Guidance is in respect of fraud and includes a section on Revenue Fraud. It is a guideline more relevant to Crown Court cases.

- [6] The Guidance on Revenue Fraud (at page 30) is based on the familiar formulaic approach of the Sentencing Council, with suggested starting points based on the nature of the offence and the amount of money to be obtained or defrauded. It is further suggested that the presence of aggravating factors and mitigating factors may result in greater or lesser sentences within the suggested range. Should these factors be of exceptional significance the case could be dealt with in a higher level of seriousness. The relevant table is at page 30.
- [7] Although not necessarily desirable for every type of offending, when judges are dealing with offences created by legislation applying throughout the United Kingdom and when the offending has a national and international aspect to it, a consistent approach throughout the United Kingdom is appropriate. I therefore consider the Sentencing Council guideline is of merit when considering sentencing in this jurisdiction. It is however important that there must remain a degree of discretion within the formulae suggested. In cases of this nature the overall level of culpability should be assessed by consideration of the amount of tax evaded, the period of time the evasion took place, the efforts made to conceal the fraud, whether others were drawn in and corrupted, the character of the defendant, the defendant's personal gain, his plea and the amount recovered (see Attorney-General's Reference Nos 86 and 87 of 1999 [2001] 1 Cr App R (S) 141)
- [8] Co-operation with the law enforcement agencies remains a very important factor. Admission of one's guilt at interview followed by a plea of guilty at arraignment should attract an appropriate reduction in sentence in accordance with Article 33 of the Criminal Justice (NI) Order 1996. This would normally be in the region of 33%. This percentage may increase should the co-operation extend to assisting the law enforcement agencies, either formally under the provisions Sections 73 and 74 of the Serious Organised Crime and Police Act 2005 or under the principles set out by the Court of Appeal in R -v- McQuillan & McCormick [1997] 9 BNIL 84. Recognition of the co-operation and a plea of guilty may also be dealt with by way of suspended sentence. A suspended sentence may also be appropriate for persons with a lesser role, who plead guilty at an early opportunity, show remorse, and have a clear criminal record. Each case, and each defendant, would have to be considered on its own facts.

[9] The aggravating factors in this case are –

- Kumar clearly had a major role in the movement of these cigarettes and in the conspiracy. All the evidence points to him being at the centre of the conspiracy, with an intention on his part to reap the rich rewards from this criminal activity.
- He involved his daughter, a 35 year old lady of good character, in his criminal enterprise, exposing her to arrest and charge, although at this stage her exact involvement is to be determined by the jury. It was clear from her conduct during interviews with Custom officials she was a lady wishing to be more forthcoming, but restricted by some misguided sense of familial loyalty.
- Kumar's criminal record is indicative of a person deeply involved in this type of criminal activity. The record clearly demonstrates that he has failed to change his lifestyle in response to lenient sentences imposed on him in the past.

There are no mitigating factors in this case.

[10] The fraud in this case was professionally planned by Kumar, an offender who has a notable record for this type of offending and has not changed his attitude to offending despite three earlier suspended sentences. He is to all intents and purposes a professional criminal. The loss to the Exchequer places the case in the third category dealing with cases between £20,000 and £100,000. These factors I have mentioned place this case at the highest level in relation to seriousness and therefore within the highest category suggested by the Guidelines. In addition the aggravating factor relating to the involvement of his daughter places the case at the higher end of the suggested scale. He will therefore serve a sentence of three years, of which eighteen months will be the custodial term, and eighteen months will be the licence period. This is a concurrent sentence in respect of each count. No recommendations are made to the Department of Justice as to licence conditions, as it is in a better position to consider such conditions nearer the time of his anticipated release.