Neutral Citation Number: [2020] EWCA Crim 1465

Case No: 201902839/A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Worcester Crown Court
HHJ Cartwright
T20170140

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2020

Before :

LORD JUSTICE GREEN
MR JUSTICE JULIAN KNOWLES
and
HER HONOUR JUDGE WENDY JOSEPH QC

- -

Between :

R on the application of the Environment Agency
- and -
David Ronald LAWRENCE

(Transcript of the Handed Down Judgment.
Copies of this transcript are available from:
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7414 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Ms Samantha Riggs (instructed by **Pro Bono**) for the **Appellant**
Mr Tim Pole (instructed by **Environment Agency**) for the **Respondent**

Hearing date: Friday 17th January 2020

Judgment
As Approved by the Court

Her Honour Judge Wendy Joseph QC :

Introduction

1. This is the judgment of the Court.

2. There is before the Court a renewed application for permission to appeal following refusal by the Single Judge. At the conclusion of the oral hearing we decided that since an issue of broader significance arose about sentencing in cases of environmental damage that we would reserve judgment in order to consider carefully the points arising. We have concluded that the appropriate course is for us to grant leave to appeal but, for the reasons we set out below, the appeal is dismissed.

3. On 9th January 2019 in the Crown Court at Worcester the Applicant pleaded guilty to:

    - Count 1 being the officer of a company which committed an offence contrary to regulation 38(2) and 41(1) of the Environmental Permitting (England and Wales) Regulations 2010 (an incident in December 2012)

    - Count 2 being the officer of a company which committed an offence contrary to s33(1), s33(6) and s157 of the Environmental Protection Act 1990 (the same incident in December 2012)

    - Count 3 a like offence to Count 1, relating to an incident in June 2013

    - Count 4 a like offence to Count 2, relating to an incident in June 2013.

4. On the 4th July 2019 he was sentenced on Count 1 to a fine of £270, Count 2 no separate penalty, Counts 3 and 4; 9 months imprisonment suspended for 24 months with 180 hours of unpaid work on each concurrent.

The Facts

5. We turn to the facts which we can summarise as follows.

6. The Applicant was the operations director and technically competent person within Lawrence Skip Hire Ltd, a family business. The company occupied huge premises at The Forge on the outskirts of Kidderminster below which ran a canal, and adjacent to which was a site of special scientific interest ("SSSI"). The nature of the business was to receive payment from those who used its facilities to dispose of their waste, and to make further profit by extracting and selling on some of that waste. What was unsaleable had to be disposed of at a cost to the company.

7. The company needed and obtained an Environment Agency permit which required it to put in place a management system to identify and minimise the risk of pollution. An obvious major risk of pollution was that of fire because contaminant-laden smoke would very likely affect the town and fire water the adjoining canal and site of special scientific interest. Some measures were put into place, but they were wholly inadequate to prevent what followed.

8. By mid-2012 the company had become financially strained. To avoid the cost of disposing of the unsaleable waste off site, a practice had developed of allowing it to

remain on site. The accumulations were in what the sentencing judge described as vast quantities. The Applicant must have been aware of these accumulations since they were in his plain sight on a daily basis, and the tonnages were recorded in the business records.

9. On occasions alarmed employees pointed out the volume was such that, it could not all be kept, as required, within buildings. Following neighbours' complaints of the smell and an increase in vermin, in the late summer of 2012 the Environment Agency visited and pointed out to the Applicant the risk of self-heating fire breaking out.

10. In September 2012, the company's insurers inspected and gave the site its worst risk assessment. In October 2012 the Environment Agency gave advice about the dangers. In November 2012 they brought fire officers to the site. Despite all this, the warnings were not acted upon and on 12th December 2012 a fire broke out. Fifteen firefighting appliances and eight firefighting jets were used to tackle it. It took more than a week to extinguish and the fire service remained on site for 9 days. Thousands of gallons of water mixed with combustion products from the waste created fire water. It required a great deal of work by the Environment Agency to block this from the SSSI, but some had to be diverted into the canal. Drainage pipes on site had been left broken so that when rain followed and mixed with the remaining pollutants, more fire water ran into the canal.

11. The Applicant undertook to learn the lessons of this disaster and a plan was put in place. However, and despite assurances to the Environment Agency, waste began to build up again and matters were not addressed.

12. Further warnings from the Environment Agency and the employee responsible for health and safety were ignored. And on 16th June 2013 another major fire broke out. Five thousand tonnes of waste were burning. Thick black smoke drifted across the locality necessitating Public Health England to advise people to stay away from it. Fifteen fire appliances attended, and the fire continued for many weeks. It was the second biggest fire-fighting operation in Hereford and Worcester in the previous 28 years. In the course of dealing with it, large quantities of highly polluted water, described as a toxic soup of chemicals, ran into the canal. This lowered oxygen levels and about 3,000 fish died. Chemical-laden smoke caused at least '*significant*' adverse effect on air quality in the local area which included a primary and a secondary school. The fire was not finally extinguished until August after the building was demolished.

13. The Applicant's insurance had lapsed after the first fire so that when the second fire broke out there was no applicable insurance and when in September 2013 the company entered into insolvency procedures, the public purse ended up paying all the vast costs.

The Sentencing Guidelines

14. The Sentencing Council's Definitive Guideline on Environmental Offences (as it relates to individuals) is applicable to the sentencing exercise in this case. It identifies levels of culpability as deliberate, reckless, negligent and low or none. It defines '*reckless*' as involving actual foresight or wilful blindness to the risk of offending and the risk nevertheless taken. It defines '*negligent*' as committing an act or omission

which a person exercising reasonable care would not have committed. As to harm, it provides categories 1-4 in descending levels of seriousness. Category 2 sets out five examples of relevant harm (1) significant adverse effect or damage to air or water quality, amenity value or property (2) significant adverse effect on human health or quality of life, animal health or flora (3) significant costs incurred through clean up, site restoration or animal rehabilitation (4) significant interference with or undermining of other lawful activities or regulatory regime due to the offence (5) risk of Category 1 harm. Category 3 involves similar criteria where the adverse effects, costs and risks are at a lower level.

15. As to Counts 1 and 2, the judge found that the facts fell at the top of Category 3. Assessing culpability as negligent, he took as a starting point that this was a Band D fine. He recognised the aggravating feature arising out of the nearness of the site of fire to Kidderminster itself and to two schools and to the SSSI. He took the appropriate multiplier and upon the basis that the Applicant was not in work, imposed a fine of £270 on Count 1 with no separate penalty on Count 2. Of this the Applicant makes no complaint.

16. The judge then embarked on the same exercise in relation to Counts 4 and 5. The evidential landscape and his conclusions therefrom included the following features. After the first fire, the risks must have been very apparent. The attendant risks included to the health of a very large number of people in the locality, especially children in two nearby schools who would inevitably be exposed to chemically-contaminated smoke. There was an equally obvious risk to the flora and fauna in the canal and SSSI, on the Applicant's doorstep. There were the vast costs of dealing with a fire and the Applicant's knowledge that he had no insurance to cover it. There was the inevitable diversion for lengthy periods of the resources of the fires service and of the Environment Agency. These were startlingly plain risks, and in due course each came to pass.

17. The judge then set about applying these factors to the Guideline. Assessing the overall picture, he found the culpability to have been highly reckless. As to harm, he found no category 1 features but that all five Category 2 criteria were met. The Applicant now makes no complaint of any of this.

18. The judge's next task was to interpret these findings within the context of the Guidelines. It is clear from his sentencing remarks [4H] that he had earlier indicated that he regarded the cumulative effect of Category 2 harm features as having the potential to raise the overall harm into Category 1. Miss Riggs, who represented the Applicant then as she does now, submitted that was not an approach permitted within the relevant Guidelines. The judge rejected that submission. In sentencing [6E-F] he said:

> "I have considered those submissions carefully and I have had regard to the fact that other sentencing guidelines relating to other types of offences do specifically state such an approach can be adopted …. I have had regard to the fact that within these very Guidelines it is clear that aggravating features applied to a particular category of harm can elevate that harm into a higher category. It seems to me that it would be inconsistent if the authors of the Guideline had intended that

> coinciding harm factors could not elevate harm to a higher category but … aggravating features could'."

19. Accordingly, having found recklessness towards the upper end, and harm within Category 1 he took "*…a starting point of 6months with a range of up to 12 months*" (see sentencing remarks page 7, paragraphs [7C-D]). He arrived at a provisional sentence of 10 months. He then at 7D-E identified aggravating features:

- That the offences leading up to the first fire … had already been committed
- The location near to the town, schools, the SSSI and the canal
- That the offending was over an extended period
- That identified risks had been ignored.

20. The judge said at 7F: "*... those aggravating features ... elevate the provisional sentence to 15 months imprisonment*". He noted mitigating features of positive good character, the devastating effect the matters had exerted upon a family business built up over 2 or 3 generations. He allowed 10% credit for the late guilty pleas. He reduced the 15 months to 9 months suspended for 2 years and imposed a requirement of 180 hours unpaid work.

The Ground of Appeal

21. The sole ground of appeal, advanced by Miss Riggs, is that the sentence was manifestly excessive because the judge erred in the way he applied the Guideline. Her argument may be distilled thus: (i) The judge at step 3 of the Guidelines determined the offence at the top of Category 2 harm, but then aggregated the features of harm to move it into Category 1; (ii) it was impermissible to do so; and (iii), since reckless Category 2 harm gives a starting point of a band F fine with a range up to 6 months imprisonment, and reckless Category 1 harm gives a starting point of 6 months with a range up to 12 months imprisonment, the judge's analysis led him to far too high a sentence.

22. Miss Riggs submits that having identified at step 3 that the harm fell within Category 2, he should then have moved to step 4 which provides that "*Having determined the category, the court should refer to the starting points within that category range. The court should then consider further adjustment within the category range for aggravating and mitigating features'*. Thus, she argues, the judge wrongly conflated steps 3 and 4, and step 3 does not permit the use of multiple features of harm to move the matter to a higher category range. She supports this argument by pointing out that whilst other guidelines specifically permit this, there is no such specific permission in this guideline. We should also point out there is no prohibition either.

23. Miss Riggs also argued that to ensure a common understanding of the different categories of harm in the Guidelines they were based on the Environment Agency's Common Incident Classification Scheme which classified incidents and their impact upon the environment. The step up from Category 2 to Category 1 harm, is the difference between "*significant*'" to "*major'"*. She argues, in support of her argument against aggregation, that on the basis of the Agency's Scheme that: "*Just because all*

five harm factors are 'significant' and fall squarely within category 2 is not justification for re-determining that overall harm should be considered 'major'."

24. On behalf of the Environment Agency, Mr. Pole responded that even if the judge did not closely analyse the language of the Guideline in the way for which Miss Rigg contends, that takes the Applicant nowhere. He draws to our attention the case of *R v Thames Water Utilities Ltd* [2019] EWCA Crim 1344 where at paragraph 22 the Court stated:

> "We agree that the judge did not engage fully in a step by step approach as required by the Sentencing Guidelines. We accept that his sentencing remarks failed to set out clearly how he reached [his conclusion]. … Of itself this does not take Thames Water very far. The task of this court is to determine whether a sentence in any given case was manifestly excessive or wrong in principle. … if a judge fails to follow a structured approach … such a failure does not invalidate the sentence… we must move to consider [whether] …the sentence was manifestly excessive."

25. Mr. Pole also drew our attention to the passage at step 4 of the non-exhaustive list of factors increasing seriousness (sometimes called '*aggravating factors'*) and the rubric above them that "*in some cases, having considered these factors, it may be appropriate to move outside the category range"*.

Conclusion

26. We turn to our conclusions. We note that amongst the aggravating features listed, a number could also be classed under step 3 harm such as the location of the offence near housing, schools, livestock or environmentally sensitive sites, repeated incidents of offending or offending over an extended period of time, established evidence of wider/community impact, and an offence committed for financial gain.

27. Of course, if a feature is used by the judge to place wrongdoing in Category 2 harm, or to move it up that category, the same feature cannot be used again as an aggravating feature to elevate the offending into Category 1. However, in our judgement, in this case there were ample findings made by the judge to justify him finding harm at the top of Category 2, with other features available to aggravate the offending well beyond that.

28. Accordingly, we are satisfied that the wording of step 4 allowed the judge to do what he did.

29. However we add this. Even if those words had not appeared in the Guideline, we would not have accepted Miss Riggs' argument. No one committing such offences should think that multiple aspects of his/her wrongdoing, however grave, will receive no punishment simply because they all fall within one category of harm. We do not accept that it was or could ever have been the intention of the Sentencing Council to so limit or constrain the duty of the judge in assessing the features of the case before him/her.

30. With regard to Ms Riggs' submissions about the Environment Agency's Common Incident Classification Scheme whilst we can understand why, in broad policy terms, the Sentencing Council might have taken the Scheme as part of its source guidance, this is not a reason to read the Guidelines as subject to constraints imposed by the Scheme, which was not an instrument designed to address sentencing by the criminal courts. Indeed section 125(1) of the Coroners and Justice Act 2009 itself provides that in sentencing the court must follow any relevant sentencing guideline *unless satisfied that it would be contrary to the interest of justice to do so*. Where the interests of justice require it, the court may step outside the guideline. Courts have stressed over and over that the guidelines are not meant to be a straitjacket. Lord Burnett of Maldon LCJ in *R v Whirlpool UK Appliances Ltd* [2018] 1 WLR 1811 para 12 observed: "*…the guideline assists in an exercise of structured judgment; it is not a straitjacket*". This was cited with approval in *BUPA Care Homes (BNH) Ltd. v R (Upon the prosecution of Her Majesty's Inspectors of Health and Safety)* [2019] EWCA Crim 1691 para 19. The matter was also dealt with more fully in *R v KC* [2019] EWCA Crim 1632 para 45:

> "It is not sensible to seek to construe the Guidelines as if they were a statute. They cannot predict every permutation of circumstances that might arise and there must be a degree of elasticity in the terminology used, and to this extent there is a degree of flexibility in how the Guidelines operate … or simply moving outside of the Category … range in the Guidelines."

31. In our judgement, whether by application of the Guideline or by stepping back and taking an overall view of the total wrongdoing committed by this Applicant, his very high level of recklessness together with the large number of features of harm and aggravation, tempered by his personal mitigation and his very late pleas, mean that this sentence cannot be described in any way as either manifestly excessive or wrong in principle. Indeed, to the contrary we can envisage that some judges, bearing in mind the utmost importance of protecting the environment, might not have suspended the sentence.

32. Accordingly, whilst we therefore grant permission to appeal to reflect the significance of the issue arising, we nonetheless dismiss the appeal.

In the event that we dismissed the application or appeal an application was made by the respondent Agency for costs. As to this we order that the costs of the Environment Agency in the sum of £1500 must be paid by Mr. Lawrence. He may satisfy this order by the making of payments in instalments in the sum of £50 per month when he has finished paying the costs of the lower court.