*252 R. v David Colin Eley and Wilfred George Bull

Court of Appeal

22 June 1998

[1999] 1 Cr. App. R.(S.) 252

(Lord Justice Rose (Vice President, Court of Appeal, Criminal Division), Mr Justice Potts and Mr Justice Douglas Brown):

June 22, 1998

Dealing in restricted specimens—conspiring to sell rhinoceros horn acquired before restrictions on sale introduced—length of sentence.

Fifteen months' imprisonment upheld for conspiring to sell rhinoceros horn, which had been acquired before restrictions on the sale of rhinoceros horn were introduced.

The appellants pleaded guilty to conspiring to sell restricted specimens, rhinoceros horn, contrary to the control of the Trade in Endangered Species (Enforcement) Regulations 1985. The second appellant was the owner of a quantity of rhinoceros horn which had come into his possession many years previously, before the restrictions on selling rhinoceros horn came into effect. The second appellant was sentenced to life imprisonment for murder in 1986, and made arrangements for the horn to be stored. He then decided to sell the horn, and caused the second appellant to make inquiries with a view to selling the horn. A person who was approached informed the RSPCA, and inspectors posing as potential buyers entered into negotiations with the appellant and others involved. The two RSPCA inspectors were replaced by two undercover police officers, and arrangements were made for the money to be paid. Eventually the first appellant was arrested. Sentenced to nine months' imprisonment and 15 months' imprisonment respectively, with an order depriving the second appellant of his rights in the rhinoceros horn and an order for the payment of prosecution costs by the second appellant.

Held, the offence of selling or offering to sell restricted specimens was a serious offence; the custody threshold was crossed and a custodial sentence was called for in the case of each appellant. In view of the first appellant's poor health, his sentence would be reduced to six months' imprisonment. The sentence of 15 months' imprisonment imposed on the second appellant was correct, but the forfeiture order would be quashed.

T. Burke for the appellant Eley; *Miss S. Davies* for the appellant Bull; N. Fleming for the Crown.

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DOUGLAS BROWN J.:

The appellant, David Colin Eley, 54, and (as he now is) the appellant, Wilfred George Bull 63, were charged in an indictment with others with conspiracy to sell restricted specimens, contrary to section 1(1) of the Criminal Law Act 1977and regulation 3(1) of the control of the Trade in Endangered Species (Enforcement) Regulations 1985. The restricted specimen concerned was rhinoceros horn.

On July 28, 1997, in the Crown Court at Norwich sitting at Kings Lynn, the appellant Bull pleaded guilty to the indictment. On February 16, 1998, before His Honour Judge Langan Q.C. in the Crown Court at Norwich, the appellant, Eley, changed his plea to guilty after submissions on the law, as did his co-habitee, Elaine Arscott and the appellant Bull's woman friend, Mrs Carol Scotchford-Hughes. A fifth defendant, Paul Rextrew, a solicitor's clerk, was tried and acquitted at the end of the prosecution case.

The appellant Eley was sentenced to nine months' imprisonment which sentence he now appeals with the leave of the single judge. The appellant, Bull, was sentenced to 15 months' imprisonment concurrently with a life sentence which he is serving. He was ordered to pay £700 costs and ordered to forfeit approximately 239 kilogrammes of rhino horn. He renewed his application for leave to appeal against sentence following refusal by the single judge, but we have this morning granted him leave. The two women were sentenced to periods of community service.

The rhinoceros horn in question belonged to the appellant Bull, and it was not challenged by the

prosecution that they were of the order of 40 years of age, or even older, in some cases. It was accepted that they had been bought by Bull, many years ago, and certainly before the 1985 Regulations came into effect. There were in total 128 horns. The expert evidence showed that the minimum number of animals the horns represented were 77 and there might have been a possibility it might have been as many as 128. The majority came from African rhinoceroses but at least seven came from a critically endangered Asian species. There was no evidence as to the legitimate value on a lawful sale of these horns, if that was possible, but the price asked for and obtained in negotiation between Eley and undercover police officers was £12,000 per kilogramme, giving a figure of £2,800,000.

The appellant Bull acquired this collection of horns prior to 1986, in which year he was convicted of murder and sentenced to life imprisonment, which sentence he is still serving. Bull made arrangements for the collection and for safe keeping. Up to August 22, 1985, it was not unlawful to sell or offer for sale rhinoceros horn, though the Regulations that came into force on that date made it an offence to sell or offer for sale any specimen or part of a specimen included in Article 2(a) of the Council Regulation 3626/82/EEC and all rhinoceroses were included in that Article.

Bull decided he wanted to sell the rhinoceros horn and asked Miss Scotchford-Hughes to help him as he was still serving his sentence. She at one time had worked for Eley and she approached Eley for his help.

In April 1996 Eley made enquiries of Christies and Sotheby's about the market for rhinoceros horn but was told there was not one. Miss Arscott had more success and she telephoned the Stock Exchange and was told by an employee that he might be able to find a buyer.

Instead of that, he informed the RSPCA and told them about Miss Arscott's enquiry and an undercover operation was then set in motion, which lasted on and off until September.

In April 18, two inspectors from the RSPCA were introduced to Miss Arscott as potential buyers and there then followed with Bull, who was on temporary home release, a meeting between him, Eley and Miss Arscott and Mrs Scotchford—Hughes. According to Eley, they did not reveal to Bull, at that stage, that they had found a ***254*** potential buyer. Bull did offer Eley a commission for selling a horn. He wanted the reserve price of £10,000 pounds a kilogramme upon which Eley would receive a commission of 10 per cent of the price up to £10,000 and 25 per cent on anything above £10,000 a kilogramme.

At that stage, Eley decided not to take the matter further but the RSPCA officer persisted in trying to contact Miss Arscott and Miss Scotchford-Hughes and made many telephone calls enquiring whether Eley had found a buyer. At the end of July he changed his mind and decided to try to sell the rhinoceros horn. Miss Arscott again rang the Stock Exchange and was put in touch with one of the RSPCA inspectors. This resulted in a meeting between Eley and Miss Arscott and two inspectors pretending to be buyers. Eley wanted to sell 240 kilogrammes of rhinoceros horn at £12,000 a kilogramme.

Negotiations continued throughout August, and two solicitors and an accountant were engaged to superintend the payment of the money. Because Eley had become suspicious of the credentials of the two businessmen, as he thought they were, and discovered that one of them had connections with the RSPCA, two undercover police officers replaced them. Eley told the officers about the arrangements he had made, which were quite sophisticated, for money to be paid into a number of different bank accounts and, having provided four horns as samples, he insisted that cash payment of £30,000 be made on the day the deal was to be completed. This was later arranged for £50,000. In the end, no money was paid over. On September 3, there was a meeting at a hotel in Cambridge, between Eley and one of undercover officers, who showed him £30,000 in cash, which he had brought with him but did not hand over. Shortly afterwards uniformed officers arrived and arrested Eley.

When he was interviewed he said Bull had told him that the horns were over 50 years old and, in those circumstances, it was all right to deal in them. He believed that. He said if the man at the Stock Exchange had said it was illegal to sell the horns, he would not have done it.

In Bull's case, he said he was an antique dealer with a family business and he began collecting horns in 1961 at auctions and country house sales and all but one had been collected by April 1985. One horn was bought by Miss Scotchford-Hughes for £1,400, in 1994, at auction, on Bull's behalf. With it came an exemption certificate, granted by the Department of the Environment under the EEC

Regulations. When he was interviewed, Bull said that he legitimately owned the horns but had no idea that the trade was illegal, as there had been no restrictions on sales before he went into custody.

In Eley's case, turning to his background. He was treated by the judge as a man of good character, as we do. The pre-sentence report recommended a conditional discharge. Before the judge, and indeed before us, were a number of letters from a number of business and professional associates and an impressive letter from a Commander in the Metropolitan Police. The writers of all these letters refer to his honesty and straightforward methods of doing business. The police reference was not a character reference as such, but confirmation that Eley had performed a valuable service to the public in lending his technical skills and equipment to help the police trace stolen motor vehicles. There were also medical reports dealing with problems, amongst other things, that he had depression, hypertension, renal damage and tinnitus.

The judge in sentencing Eley said this:

> "… in my judgment your part in this enterprise was so serious that it can only properly be dealt with by a custodial sentence. It was serious for the following two reasons: first, there was the quantity of rhino horn involved; and secondly, having very carefully read through the whole of the documents in this case and in ***255*** particular the records of your meetings with the undercover officers I am convinced that at the very least you deliberately buried your head in the sand and wilfully refused to investigate whether or not the transaction in which you were engaged was an illegal one."

Mr Bull serving a life sentence for the murder by shooting of his wife, had this said about him by the judge in passing sentence:

> "… in my judgment your offence is so serious that it can only properly be dealt with by a custodial sentence. It is serious for the following three reasons: first, the quantity of rhino horn involved. Secondly, your state of mind as acknowledged by your counsel in her frank submission. And, thirdly, the fact that it was you who instigated this attempted transaction and thereby caused others to become involved."

Mr Burke, who appeared for Eley before the judge and appears before us today, made these submissions. He challenged that this was a case which passed the custody threshold. The sentence of nine months' imprisonment, he submitted, was wrong in principle. If it was the correct sentence and not wrong in principle, then it was too long and a much shorter sentence would serve this purposes of the case.

He submitted that the appellant Eley had throughout the meetings with the RSPCA and the undercover officers, as was apparent from the transcript of their conversations, questioned whether the proposed sale was lawful. But they gave equivocal answers, all avoiding giving a straight answer to those questions. He submits that Eley, in those circumstances, had been entrapped by the RSPCA undercover officer, and should receive a substantial discount on that account.

He pointed out, as indeed did Miss Davies for the appellant Bull, that new Regulations came into force in 1997, replacing the 1985 Regulations and, under those Regulations, the sale certainly of part of the catalogue of rhino horn would have been lawful because about 30 per cent of the rhino horn was from South Africa and there is special treatment in those Regulations. In all the circumstances Mr Burke asked the Court to quash the sentence completely or to reduce it.

Miss Davies, in the course of her submissions, accepted that the sentence of 15 months' imprisonment was correct in principle, but submitted, in all the circumstances, that it was too long, but that he, like Eley, had put forward his plea on the basis of recklessness as to knowledge of the illegality, but she accepted that he was in a different position to Eley, because he had the advantage of knowledge of the sale and purchase of the single horn in 1994, which was accompanied by the exemption certificate, so he was on much more notice than Eley that sales of this kind of commodity were now regulated.

But as Miss Davies frankly accepted, her principal submissions were not on the sentence, but on the forfeiture order, and she submitted that whatever exact value of this large quantity of rhino horn (and its exact value could not be known), it was considerably in excess of what the appellant bought and

paid for it in the 1960s and early 70s when he had spent a few pounds here and a few pounds there, and the collection had assumed a much more greater value since. Whatever its actual value, it is now worth many thousands of pounds, and its forfeiture, in circumstances where he claimed to have bought legitimately, was excessive and harsh and could not be justified.

We have considered these submissions anxiously. The offence of selling or offering to sell restricted specimens of endangered species is obviously a serious offence. The fact that new Regulations since 1997 except that prohibition on the sale of parts of Southern live rhinoceroses in no way detracts from the gravity of the offence.

For a single offence under Article 3(1), the penalty is of a fine not exceeding £2,000 on a summary conviction or up to two years' imprisonment and unlimited fine on ***256** indictment. The offence here, of course, was conspiracy to commit the offence under Article 3(1). The quantity of prohibited material was very large. Therefore the sentencing judge was not confined to the maximum sentences in the Article.

In our view, the custody threshold was clearly crossed here, and a custodial sentence was called for in the case of each man. There was considerable mitigation, particularly for Eley, whose character since 1974 has been exemplary. We could not seek in any way to criticise the judge's sentence, which took into account all the considerable mitigation. The judge had here to sentence for an offer to trade in rhinoceros horn of very substantial value, on the illicit market, where the appellant Eley anticipated he would be enriched by many thousands of pounds by way of commission.

At the end of the day, however, Mr Burke has persuaded us that the sentence of nine months' imprisonment need not stand. This is a man in poor health, as the medical evidence before us indicates. In all the circumstances, whilst not saying the original sentence was wrong, we think that justice of the case can now be made by a sentence reduced to one of six months' imprisonment.

So far as Bull is concerned, the sentence of 15 months was, in the judgment of the Court, entirely a correct sentence. He was the main instigator; he would have been the main person to profit from this illicit sale, and the appeal against the sentence of 15 months fails.

So far as the forfeiture order is concerned, in our view, that order cannot stand. The appellant acquired these horns legitimately, at a time when there were no restrictions on possession or sale and he has, by the judge's order, not only been sentenced to a substantial sentence of imprisonment which has affected his life licence release, but been deprived of his own goods, legitimately acquired which, whatever their value exactly, must have a substantial value. In those circumstances, particularly where the judge gave no explanation for arriving at the forfeiture order despite the submissions which were made to him of hardship by Miss Davies, our conclusion is that that order cannot stand. To that extent, these appeals succeed.

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