Regina v Nicholas Noonan

No: 200905549/A6

Court of Appeal Criminal Division

4 December 2009

[2010] EWCA Crim 2917

2009 WL 5641134

Before: Lord Justice Moses Mr Justice Irwin Mr Justice Edward-Stuart

Friday, 4th December 2009

Representation

Mr R Pardoe appeared on behalf of the Applicant.

Mr A Marshall appeared on behalf of the Crown.

Judgment

Lord Justice Moses:

1 This applicant appeals against a total sentence of 10 months in respect of fraudulently evading the restriction on the export of elephant tusks and sperm whale teeth, of selling those items and of making false statements and altering or falsifying permits and certificates for the purposes of the same and similar transactions.

2 The application raises two distinct issues. Firstly, as to the level of sentencing in relation to offences of that nature, and secondly, as to the procedure adopted by the judge, which involved rejecting the applicant's account and accepting the prosecution version of the context of the transactions without hearing evidence from the applicant or from any other witness he might have wished to call.

3 We say straightaway that we will give permission to appeal, following the reference by the Registrar, and emphasise that we have given the fullest possible opportunity for everything to be said, both for and against the grounds of appeal in a hearing which has exceeded the estimate by I suppose at least double. That is no criticism of counsel for the applicant.

4 The sentences were passed by His Honour Judge Foster on 16th October 2009 and we say straightaway that he held a detailed and careful hearing, assisted by full material in a note for sentencing, prepared by the prosecution, represented there, as here, by Mr Marshall.

5 The general context, so the prosecution said, of the charges brought against the appellant was that he had been caught by covert agents within the United States who had set up a website to give the appearance of trading in African goods. The prosecution case was he was a trader in the illegal exportation of tusks and sperm whale teeth and had deliberately attempted to ignore and evade proper and necessary regulatory control.

6 There was considerable debate between prosecution and defence as to how the case should proceed. There were suggestions that the appellant would try to strike out the prosecution as being an abuse. That was abandoned. There was then further discussion, which culminated in the appellant's pleas of guilty to most but not all of the counts on the indictment.

7 The offences took place over the space of 1 year, between September 2006 and, when the premises were first searched in June 2007. It is important to note, however, that there were two sets of offences, some later than the others, and the second set of offences occurred only

because the appellant had been allowed after the first search to retain certain items. Officers returned about a year later, in June 2008, seized more goods and they formed the subject matter of further charges. But it would not be fair, or right to regard this appellant as facing charges in respect of conduct, of more than 1 year, and certainly there was no basis upon which, it could be said he had renewed his stock of prohibited goods, after his premises had originally been searched in June 2007.

8 The first count related to the export of an elephant tusk. It was not clear when it had grown on the living animal but it seemed to be in the late 1960s or more likely the 1970s. The tusk came from an African elephant. It was offered by the appellant in an solicited email to the undercover agents on EBay. The appellant, during the course of emails about that export, said that he did not have any permits but that he had not previously had problems because he had described the product as a “faux” tusk. It was bought by the undercover officers for just under $2,000, described as an “ivorine figurine” in the invoice. Count 2 related to two tusks which the applicant listed on EBay. On 10th October 2006 he sent an unsolicited email to the undercover officers. He referred in that email to how he had kept the weight down and disguised the shape of the previous tusk but assured them that he would be more careful next time. He said he was now on first name terms with the customs officer dealing with UPS parcels, since he had taken the view that was a better method and safer method of export than otherwise.

9 There were further discussions on email as how to avoid customs checks, particularly in relation to disguising items, which he said, he had sent to other people. A price was agreed of $2,200, to be paid it is to be noted, outside the scheme of payment within the EBay auction system.

10 The appellant had had conversations by email in relation to other tusks of greater size and weight, which he repeated at about that time. In November, he said he had had six auctions finishing on EBay, which included tusks and whale teeth.

11 Count 3 related to a sperm whale tooth which he listed on EBay on 31st January 2008, asserting there was a Cites certificate and that it was legal to sell. It was sold to the officers in America for something over $150. At the same time, there was a sale of an elephant tusk was offered to the undercover officers (ct 5); it was later sold to somebody else for just over $100.

12 On 13th February 2008, the same day that the tusk, the subject matter of count 5 was sold, the applicant listed what he described as a “pre-ban” pair of elephant tusks. He spoke to the officers by telephone and they discussed the sperm whale tooth, the subject matter of count 3. On 13th March he e-mailed the officers to state that he had acquired “another nice tusk” and to ask them whether they would be interested.

13 Counts 9, 11 and 12 concerned the falsification and misuse of certificates, for which the CITES and European Commission system provides in order to authorise and control the movements of specimens. The falsified certificates had been posted on the EBay auction site by this appellant in order to prevent the items being removed. He said, when it was put to him he had forged them, he had merely blanked out the details on the certificates that he had obtained, so that he could attempt to show that he was covered for listing items on EBay.

14 Count 7 related to sperm whale teeth which were considered to be trading stock, found at his home on search by the police officers in June 2007, and in June 2008 the applicant was arrested again and there were found further protected specimens, seven sperm whale teeth, the subject matter of count 14. They had been kept for sale back in 2007 and, as we indicated earlier, the fact that they were found later does not show that the appellant continued to keep items for sale. They had merely been missed earlier and he had been advised that he could keep that which had not been seized.

15 That was the way that the counts were laid before the judge. As part of the preparation of the case the defendant had put forward a written document, in which he set out what he describes as the basis upon which he pleaded guilty. In that document he attempted to put in context those offences to which he had pleaded guilty, explaining that he had been a collector, over many years, and had, during the course of accruing items of many different types, purchased some tusks but had in particular kept one tusk which he had bought at an antique fare in Dunstable in the mid 1980s. He had made no attempt to sell that tusk or any other tusks until after he had, in the circumstances to which he then turned, come to sell the particular tusk which had proved to

be his downfall. That tusk he had apparently kept under his bed but his wife did not like it. He suffered a debilitating injury as a result of a car accident, confirmed by the probation officer. He had damaged his knee, lost his job and had been depressed and therefore needed to raise money to supplement his sole source of income, Invalidity Benefit.

16 In those circumstances he had gone on to EBay to Style Africa because he could see that they would be prepared to buy such items. They bid substantially over the market price. Somebody under bid and it was, in those circumstances, he sold to America, where the export was forbidden. Had the under bidder raised his offer, he would not have committed any offence because that bid, so he said, came from Germany.

17 That was, he said, the start of the problem and caused him to continue to enter into these forbidden transactions. He said that he had been asked by the original purchasers, who called themselves Style Africa, whether he had any further tusks for sale. They were only interested in clean ivory that was not carved and for that purpose he said that he had gone to an antique fayre in Kempton and acquired two tusks because of the offer to buy. It turned out that the tusk, the subject matter of count 2, was from an elephant which could have died as long ago as 1691 or at any time up to 1925. This was one of only two items which he bought with a view to sale.

18 Count 3, he said, was a tooth of a sperm whale which he had owned for many years, when he built-up his collection from the time when he was a teenager. There was no evidence as to the date on which that particular sperm whale died. Teeth from the sperm whale are, he said, found from time to time on beaches and could be the product of an entirely natural death.

19 Count 4, he said, was a tusk which had been worked and he had merely made a mistake as to whether it was a forbidden item because the tusk had holes drilled in it, suitable for holding a gong and could only be described as an unworked tusk once the gong had been removed.

20 The subject matter of count 5 was the second tusk he had bought at Kempton, prompted only by an offer to buy from Style African.

21 Count 7 related to a tooth from the collection of teeth that he had built-up from his 14th birthday, as was count 14.

22 He is a man in his mid forties. He had a previous conviction many years before, back in 1988 in relation to conspiracy to supply controlled drugs, but nothing to do, so it might be thought, with these charges. There was personal mitigation relating to his poor health, the difficulties that his wife was suffering from, and indeed the rest of his family since he and his mother cared for their 93-year-old grandfather.

23 The nature of his mitigation and particular in relation to the circumstances in which he said he was led to commit these offences, driven both by poverty and by the instigation of the undercover agents, was disputed by the prosecution. This was not a mere matter of rhetoric. Within the basis of plea, and within the documents furnished to the judge and the defence, was a detailed critique of that which had been put forward in writing on behalf of the defendant. Every proposition of fact which was disputed was set out with the basis of dispute identified. Most of the dispute related to chronology and emailed documents, which the prosecution referred to and which said gave the lie to the account which had been put forward by the defence. It is unnecessary for us to enumerate them. But the defence and, for that matter, the judge can have been in doubt, not only as to which propositions of fact were disputed, but the basis upon which they were disputed and the evidence and its source on which the prosecution relied.

24 The judge, faced with that dispute, made it clear fairly to the defence the approach which he proposed, subject to argument, to take. He said:

> "The general point is this, is it not? …much of the contentions made by the Defendant are uniquely within his knowledge and are therefore not matters susceptible to any hearing?"

In response, fairly, Mr Marshall for the prosecution said that was true of some but not all, and the judge returned in a way that must have made it clear to the defence, not that he had reached any final view but the way his mind was working, so that the defence would know how to deal with the point as to the dispute, when the time came for mitigation to be advanced. Judge Foster said:

> "I take the view, and I will hear what Mr Pardoe says, that I have to take an overall view upon the level of this man's dealings. In the same way as in a drugs case, one takes a view not just of a snapshot of what is on the indictment, but the overall evidence as to what his level of dealing is."

Mr Marshall reminded him that, once that view is taken he is sentenced just for the indictment in the context (as Mr Marshall put it) of what is going on.

25 Thus far there can be no criticism whatever of the judge. Indeed the lengths to which the prosecution had gone to make clear the areas of dispute and the evidence upon which they relied were notably helpful in their particularity, in a way that the defence could know exactly what they faced. Highly experienced counsel, Mr Pardoe, who has exhibited sophistication and skill in his advocacy today, was therefore faced with a by no means unusual dilemma. There was powerful written evidence, to which we shall turn shortly, demonstrating the truth of the prosecution account of what in fact the defendant was up to.

26 The defence thus had to decide whether to seek to argue that the inferences the prosecution sought to draw from those documents were inferences that the judge ought not to take or, in addition to disputing those inferences, to call the defendant and any other witness who might assist, in support of the case that the defendant wished to advance by way of mitigation. Mr Pardoe fully appreciated the dangers he would run were he to call his client or any other witnesses. Any mitigation apart from the bald fact of the plea of guilty which itself might be undermined by a Newton hearing, might altogether be blown away, should he call his client and other witnesses and should they be disbelieved. This is not an unfamiliar dilemma which defence counsel face and we take the view that, sensibly and realistically, Mr Pardoe did all he could do, faced with those circumstances, and therefore sought to argue the case, on the basis that the material advanced by the prosecution.

27 We take the view he had little choice, if he was to serve his client as well as he obviously did serve him. Those documents on which the prosecution relied were, in our view, devastating. We have had opportunity to examine them ourselves. They show the familiarity of this appellant with the very trade with which he was charged. Going back to 2004, there are on his emails, on computers over which he had control, many references to the sale of items such as whales teeth and tusks accompanied by photographs illustrating them, as we have said, going back to 2004 and discussing the difficulty of export without registration or when they are uninsured, including, for example, questions such as: what do you want me to put on the customs form? Or that he would not put "ivory" on the package but something more generic, he had an UPS account and there were no security checks when sending items through UPS and so on. In his transactions with the undercover officers, there were emails in which he boasted of his successful transactions in many items.

28 Mr Pardoe accepted that the inferences that this man was an experienced trader could be drawn from those documents, but, he submitted, the inference should not be drawn because in fact his client was merely boasting or pretending to have a greater experience than might otherwise appear from the terms of those documents.

29 Faced with those documents in full and clear sentencing remarks, the judge made plain the conclusion that he had reached. He recorded the basis of plea and response to the Crown:

> "…the e-mails at about this time paint a very different picture of a person prepared to deal in ivory and with other specimens on offer as well."

In relation to the mitigation, he said:

> "You seek to persuade me that you are not a trader or dealer, but simply an erstwhile enthusiastic collector who has fallen on hard times and has been forced to sell, and in case whose wife did not like the ivory. However, this assertion, it seems to me, is totally inconsistent with the evidence produced by the prosecution and the material which I have seen and read."

In our view, the judge was perfectly entitled to take that view.

30 Mr Pardoe submits that if the judge was to disagree with the basis of plea, it was incumbent upon him to invite the defence counsel to call his client and witnesses, in an attempt to demonstrate that the inferences that might otherwise be drawn from the documents ought not to be drawn. We do not agree. The principles which apply in relation to what are loosely called Newton hearings, have been considered, in many cases and do not require repetition in this. The most important features of those principles set out in cases such as R v Underwood [2005] 1 Cr App R 178 , is that the defence should know that there is an issue between defence and prosecution as the basis of plea. If there is such an issue, we underline, about the offences themselves, the defence need to know about it, and secondly, need to be given a fair opportunity in advance to form a view as to how they are to resolve that dispute. Injustice is caused as the case of *R v Lucian [2009] EWCA Crim 2004* demonstrates, if a judge proceeds to reject the defence account of his part in the offences, without giving the defence any opportunity to know in advance that he may take that view or an opportunity to dissuade him from taking that view.

31 Circumstances which relate to the offence, true Newton situations as they are called in the Blackstone's Criminal Practice 2010 D19.80, must not be confused with a situation where the defendant seeks to give an explanation based on facts peculiarly within his knowledge, which the prosecution may not be in a position to rebut. In those circumstances it will be for the defence to call such evidence as it can to support the account it seeks to give.

32 This case does not fall neatly within either of those two circumstances. It is not possible to say that all the surrounding material upon which the prosecution wished to rely is removed from the circumstances of these offences themselves. But what is plain is that the defence sought to give an explanation of how these particular offences arose, and the prosecution had evidential material on which they could rebut it. That material was provided by the prosecution in advance. The factual basis of their rebuttal, was specified, and it was up to the defence to decide how to deal with it. We reject any notion, in those circumstances, that it was incumbent upon the judge to tell the defence in advance that there was a dispute. That was plain as a pikestaff. It was set out in the documents. Everybody knew there was a dispute about those circumstances. We further reject the suggestion that there was any duty on the judge to invite the defence to call the defendant or any other evidence. Again, it was perfectly obvious that he could do so if he wished. But the danger that he ran would be of being disbelieved and thereby damaging such mitigation as he wished to advance. Mr Pardoe, with characteristic frankness, told us that he did not want a Newton hearing. Of course he did not. If his client had been called, the likelihood is that he would have been disbelieved, so devastating was the impact of all those emails to some of which we have referred.

33 In those circumstances the ground upon which he relies, which seeks to demonstrate a failure by the judge to give the defence a fair opportunity to rebut the inferences the prosecution sought to draw, is unsustainable and we refuse the appeal on that ground.

34 That is however not the only ground. Mr Pardoe submits that the sentence in total of 10 months was unjustified. A custodial sentence of that extent was way out of line, so it is submitted, with sentences in the past.

35 We should observe, before analysing that submission, that the maximum sentence for some of these offences, particularly as to counts 1 to 3, the exportation offences, is 7 years. For selling specimens such as tusks and sperm whale teeth, contained in Annex A of the Control of Trade in Endangered Species Enforcement Regulations 1997 the maximum is 5 years' imprisonment. It is particularly of note that that sentence was increased by regulations coming into force in 2005. Parliament therefore demonstrated its increasing concern at that trade. For the documentary offences of falsifying and altering re export certificates the maximum was 2 years' imprisonment.

36 Mr Pardoe drew attention, as the judge had had his attention drawn, to one of the few authorities in this court, dealing with this type of case, R v Sissen, a decision of this court of 8th December 2000 . The judge acknowledged in his sentencing remarks that that case was different because it concerned the import of live and very rare parrots Lear's Macaw, of which there were only 20 breeding pairs. Nine birds had been taken from the forest in circumstances for which the appellant in that case was responsible. His sentence, in a far more serious case, was reduced from 30 months to 18 months.

37 Generally, such offences as there have been visited with far lower and sometimes it might be thought derisory penalties. We are not in any position to know the facts but we note that before

2005, when the amended regulation were brought in, for the purchase of a Goshawk, a 12-month conditional discharge was ordered by magistrates in Darlington and for similar offences in relation to keeping and transporting endangered species and offering them for sale. In particular, a 2 year suspended sentence was passed by Southwark Crown Court in the case of Elliott for selling elephant ivory, hippo ivory and sperm whale teeth.

38 We regard these sentences as failing properly to reflect the gravity of these offences. Perhaps unlike many offences, a serious deterrent sentence might stop the trade and prevent those who otherwise live law-abiding lives from committing these serious crimes. They are serious crimes, as this court recognise in Sissen . They are serious because they contribute to the illegal market. Without an illegal market there would be no opportunity or need for the capture of these endangered species from the wild. It is the market which feeds the destruction of these species. It is for that reason that significant and serious sentences ought to be passed for this type of offence.

39 In this particular case we must take care to appreciate that apart from a different type of offence many years ago, this is a middle aged man, with particular difficulties and therefore not an obvious subject for a deterrent sentence. But nevertheless the judge rightly identified the gravity of this offending and put it in the correct context. This appellant knew exactly what he was doing. We reject as fanciful any suggestion that he was merely driven to this by the poverty stricken circumstances in which he faced and at the instigation of the undercover agents. He chose to trade in this way and he must face the consequences. A sentence of 10 months will have a severe impact on him, but these offences merited that severe impact.

40 Criticism has been made of the fact that they were made consecutive in some respects when they represented only one course of conduct. In one sense, that is correct. There was only one course of conduct, but we have to have regard to the totality, and whilst the judge might have taken a higher total and made the offences run concurrent, that seems to us merely a question, in the instant appeal, of style. The totality was, in our view, fully justified, and in those circumstances this appeal is dismissed.

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