R v D [2010] EWCA Crim 1485

The applicant was arrested some years ago for his involvement in the large scale importation of class A drugs into this country. The evidence of his guilt was clear. The street value of the drugs recovered ran to many millions of pounds. Following his arrest the applicant absconded and lived abroad. He was not re-arrested for some 3 years. He pleaded not guilty and it was not until very shortly before the date fixed for trial that he changed his plea to one of guilty. The judge allowed a discount of just under 20% for the guilty plea.

After this sentence the applicant conveyed some willingness to provide intelligence to the Serious Organised Crime Agency. In the meantime, however, he sought leave to appeal against sentence. When the application was refused, he renewed it, but again it was refused by the Full Court on the basis that the sentence was fully justified.

The applicant provided the authorities with information about the identity of another criminal. He refused to give evidence against him. However investigation of the material the applicant provided eventually produced sufficient evidence leading to a successful prosecution. For present purposes this assistance, as far as it went, was obviously relevant to the calculation of sentence if and when the applicant entered into a written agreement with a specified prosecutor in accordance with the terms of the Act. Following the unsuccessful application for leave to appeal against sentence, the applicant entered into a SOCPA agreement, that is, a written agreement under section 73 of the 2005 Act.

Under the agreement he agreed to provide intelligence about the drug trafficking activities of some 32 individuals and similar details in relation to the criminal activities of 4 individuals suspected of involvement in money laundering and investment of the proceeds of crime in property; full details of his knowledge of methods of concealment and drug transportation routes; any material bearing on these questions; continuous and complete co-operation throughout the subsequent investigations and any prosecutions.

At the same time, he did not agree to give evidence against anyone, and apart from fully admitting his own involvement in the matters which would be investigated, he did not provide the authorities with full and complete admissions of all his own criminal activities.

On the basis of this agreement the applicant provided the information he had agreed to provide. He was de-briefed over a period of 17 days. He provided information relating to a number of individuals and the organised importation of large quantities of class A drugs from South America, which came via Europe into the United Kingdom, together with names and addresses of those involved in the importation of such drugs and money laundering. In addition he provided tactical and strategic intelligence on the methods used by some of the groups involved in organised drug importation and money laundering. The information he provided was accurate, and resulted in a number of inquiries by the authorities as well as some general disruption of criminal activity. No arrests have yet taken place.

The case was restored to the list for a review of sentence. The judge was satisfied that the applicant had fully co-operated with the authorities. He deducted what he described as a further discount from the sentence he had originally imposed to allow for the assistance given by the applicant, which he assessed "in the region of 25%".

Mr David Waters QC on behalf of the applicant submitted the discount was too low, an insufficient reward for the assistance he had provided. Relying on the guideline decision of this court *R v P*; *R v Blackburn* [2008] 2 Cr App R(S) 5 he posed two questions:

"(i) whether in circumstances where an individual provides information of considerable value, does everything asked of them by SOCA and fulfils their end of the "contract" in entirety, they are entitled to the "normal" discount of between 50%-66% of the sentence that would have been passed after a trial.

(ii) is it the case that because the individual has given information which is not of a nature which could readily be converted into admissible evidence to be given from a witness box, and he is accordingly not asked to give evidence, the reduction in sentence should be less than 50%".

These provisions were examined in *R v P*; *R v Blackburn*, and guidance was given about the approach to these questions in the context, not of a review of the sentence of an individual, like the applicant, who had provided assistance after sentence, but of sentences imposed on defendants after they had entered into an agreement governed by the terms of the Act, and who argued that the sentencing court had made insufficient allowance for the assistance they had provided. Unsurprisingly Mr Waters concentrated his attention on a sentence at the end of paragraph 41 of the judgment, which reads:

"It is only in the most exceptional case that the appropriate level of reduction would exceed three quarters of the total sentence which would otherwise be passed, and the normal level would continue as before, to be a reduction of somewhere between one half and two thirds of that sentence".

Mr Waters acknowledged that cases would fall outside this "normal level" and that the court had emphasised that the sentencing decision in each case was fact-specific. Nevertheless he urged that there was nothing to suggest that this was anything other than an ordinary case of its kind. The applicant had complied with the terms of his agreement, and he had therefore earned the normal level of discount. However, the extent of any discount must be based on the value to the administration of justice of the performance by the defendant of his statutory agreement, and not on the simple fact that the agreement, so far as it goes, has been performed.

In this case the applicant performed his agreement, and provided valuable information, but nevertheless it was a limited agreement. He did not describe his own full criminality. He was not prosecuted for it. He did not agree or offer to give evidence against anyone. He declined to give evidence against the criminal he identified when he first approached the authorities with a view to acting as a possible informant. In short, as he was entitled, the agreement he

entered into was much less comprehensive than it might have been, and certainly much less so than the agreement entered into and performed by the defendants in *R v P*; *R v Blackburn*. It would therefore be surprising if he were entitled to the same level of discount. In any event, he is not entitled to be treated as if he had offered to provide evidence, or had provided evidence, merely because, according to his instructions to Mr Waters, he was not invited to do so.

In *R v P*; *R v Blackburn* it was emphasised that particular value attached to the defendant who provided evidence, or agreed to give evidence at any subsequent trial, and if so, it also followed that the defendant would have to admit the full extent of his own criminal activities, and if appropriate, be prosecuted and sentenced for them. In such cases there was not the slightest doubt that his former colleagues or those brought to justice as a result of his efforts would know of his involvement in the process, and where the cases involved major criminal, gangland activity, the consequent risks both to the defendant and to his family would be very high indeed. It was recognised that although the level of risk in this case is not as serious as it can sometimes be, some risk inevitably remains. Again, however, that risk is less serious than that faced by the defendant who has provided a witness statement or given evidence against criminals with similar vicious characteristics.

It is recognised that there may be cases when information and intelligence may be offered which will be of inestimable value to the administration of justice, and the defendant simply cannot provide admissible evidence. Again, it does not necessarily follow that the absence of any arrest automatically renders it less valuable. These are all questions for the assessment of the judge. Finally, the mere fact of delay does not result in an automatic reduction of discount. In the present case the information or intelligence provided by the applicant was provided after he had sought, unsuccessfully, to manipulate the system to his advantage. His co-operation only began after sentence had been imposed on him and he had been in custody for over a year. Naturally he could not be blamed for the delays, which arose after he decided to co-operate, but the delay for which he was responsible diminished the value of the information he provided. To the extent that it has, then the level of discount must be reduced proportionately.

In the result, the answer to the questions posed by Mr Waters are (i) that such an individual is not so entitled & (ii) that the reduction in sentence should not *necessarily* be less than 50% merely because the individual has given information which cannot readily be converted into admissible evidence. As is explained in *R v P*; *R v Blackburn* "what the defendant has earned by participating in the written agreement system is an appropriate reward for the assistance provided for the administration of justice". That, is always fact-specific.

The judge decided that an appropriate allowance for the assistance given was "somewhere in the region of 25%". Despite the careful argument advanced by Mr Waters, no error in the overall result of the review has been shown. Accordingly the application will be dismissed.