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IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2020] EWCA Crim 1429

CASE NO 2018 04003/0392 C5

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 21 October 2020

Before:

LORD JUSTICE MALES

MR JUSTICE SPENCER

HIS HONOUR JUDGE AUBREY QC

REGINA

v

ANDREW NEIL TURNER

LEE JAMES MABBOTT

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MR DEAN GEORGE QC appeared on behalf of the Applicant Turner
MR A STRANEX appeared on behalf of the Applicant Mabbott

J U D G M E N T
(Draft for Approval)

1. **MR JUSTICE SPENCER:** Andrew Turner (now 41 years of age) and Lee Mabbott (now 39) renew their applications for leave to appeal against sentence following refusal by the single judge.
2. On 23rd August 2018, in the Crown Court at Leeds, after a trial lasting some four weeks, they were convicted by the jury of conspiracy to supply a controlled drug of Class A, cocaine (count 2) and conspiracy to transfer criminal property (count 3). Mabbott was also convicted in a separate trial, before a different judge, of conspiracy to supply controlled drugs.
3. Turner was sentenced by His Honour Judge Bayliss QC to a total of 20 years' imprisonment. That was the sentence imposed on count 2. The judge made it clear that the sentence on count 2 reflected the overall criminality of both offences. There was a concurrent sentence of 6 years' imprisonment on count 3.
4. Mabbott was sentenced to a total of 18 years' imprisonment. That was the sentence on count 2. Again the judge made it clear that he was reflecting the overall criminality on the indictment in the sentence on count 2. There was a concurrent sentence of 5 years' imprisonment on count 3 and a concurrent sentence of 12 months' imprisonment on the other indictment.
5. In respect of each of them the judge made a serious crime prevention order under section 19 of the Serious Crime Act 2007 for a period of 5 years.
6. Turner appealed against his conviction as well as sentence. His appeal against conviction was heard by a different constitution of this court on 22nd July 2020 (Hickinbottom LJ, Spencer J and Her Honour Judge Molyneux). In a reserved judgment handed down on 29th September 2020, Turner's appeal against conviction was dismissed: see [2020] EWCA Crim 1241. The Court on that occasion did not deal with Turner's renewed application for leave to appeal against sentence because it was appropriate that his application and Mabbott's renewed application should be heard together by the same court.
7. We are grateful to Mr George QC on behalf of Turner and to Mr Stranex on behalf of Mabbott for their written and oral submissions. We also have the benefit of a very full respondent's notice on sentence from prosecuting counsel at the trial, Mr MacDonald and Mr Hazel-Owram.
8. There were four other defendants in the trial: Michael Lumb, Lee Brook, Justin Choudury and Leslie Yeats. Only a brief summary of the facts is necessary for present purposes. The prosecution case was that between 1st August and 31st December 2016 these two applicants together with Lumb, Brook and Choudury were part of a conspiracy to supply cocaine on a commercial scale (count 2). There was a police operation which involved covert surveillance over a period of months, during which the police intercepted cocaine being transferred and also very significant quantities of cash. The interception of cash led to count 3, the money laundering conspiracy. That conspiracy also ran between 1st August and 31st December 2016 and involved these two applicants, Lumb, Yeats and a fifth man, Hussain, who pleaded guilty.
9. During the operation, the police recovered 8.6 kgs of cocaine. That came primarily from

two seizures. On 31st September 2016 over 7.5 kgs of cocaine were seized from Lee Brook. On 27th October 2016 a kilo of cocaine was seized from a transit van which the prosecution alleged was being driven by the defendant Choudury, although in the event he was acquitted. A striking feature of the case was the purity of the cocaine: the bulk of the cocaine recovered from Brook was of 90-93% purity and another kilo was of 75% purity. This clearly indicated that it was import quality cocaine. The street value of the cocaine recovered in the operation was some £650,000.

10. The evidence of the conspiracy was presented to the jury in the form of a series of incidents or "events", proved by a combination of visual police surveillance and analysis of phone traffic between the conspirators. These were, however, merely snapshots of the conspiracy in operation.
11. The judge said in his sentencing remarks that he was satisfied that Turner was at the very heart of the conspiracy. He was sure on all the evidence he had heard in the trial that Turner was responsible for recruiting participants in the conspiracy and for running the operation. The purity of the cocaine, the judge said, showed that Turner was very close to the source of the original supply. He had the sophistication to distance himself from the "dirty work", as the judge called it; instead, he used others and used what he must have believed were untraceable phones. He supplied vehicles to those working for him in the conspiracy.
12. The judge was also satisfied that Mabbott was at the centre of the conspiracy in partnership with Turner, although he said that Mabbott's role could be distinguished to a limited extent: for example, there was no evidence that Mabbott was involved with the cocaine found in the transit van on 27th October. Mabbott used what he thought was an untraceable phone, and he too was involved in supplying cars to others. The judge specifically rejected the suggestion that Mabbott was not involved in the conspiracy during August 2016 when he was out of the country. Mabbott had kept in touch with Turner in that period on a daily basis.
13. The most significant events presented in evidence - the "overt acts", as the judge called them in his sentencing remarks -- were the seizures of cocaine on 30th September and 27th October.
14. On 30th September, the police stopped a car being driven by Brook in Kirkstone. There were four packages of very high purity cocaine in the car, each weighing nearly a kilo, with a street value of £320,000 to £400,000. When Brook's house was searched, the police recovered a further 3.5 kgs of cocaine, together with dealer bags, a drugs press and benzocaine (a cutting agent), a blender and a mixing jug. The house was plainly being used to process the cocaine. In the aftermath of Brook's arrest, the other conspirators including Turner were in constant telephone communication, desperate to find out what had happened to the very valuable consignment of cocaine which Brook had been carrying. A vehicle belonging to Mabbott was seen by the police driving past Brook's house. The judge was satisfied that this was evidence of the "bosses" (as he described them) worrying about the fact that significant quantities of valuable drugs had been seized by the police.
15. In relation to the episode on 27th October, the prosecution case was that Choudury had been driving a van in which a 1 kg block of cocaine was found of 75% purity, with a street value of £68,000. The driver of the van accelerated away when marked police cars were following him, and the van had been abandoned and the driver made good his

escape. There was an issue as to whether Choudury had been accurately identified as the driver at an earlier stage before the chase. Some hours earlier, Choudury had been seen in that van returning to an apartment block in Leeds. Turner had arrived outside the same apartment block an hour or so later. The van was insured in the name of Turner, albeit, as Mr George reminds us, actually insured by Choudury himself using Turner's details. The judge said that the circumstantial evidence concerning the van, Turner's attendance at the flat and the evidence of the conspiracy generally left him in no doubt that, even if the driver of the van was not Choudury, whoever was driving it was transporting cocaine in the van which was in furtherance of the conspiracy.

16. The final seizure of cocaine took place on 22nd December 2016 at a house in Leeds linked to the defendant Lumb. Only a small quantity of cocaine was recovered (6 gms or so), but in the house the police found scales, a blender, cutting agents including benzocaine, and what was described in evidence as a "bashing kit". The judge was satisfied that this was evidence of the conspiracy operating right up until that date.
17. The conspiracy to launder criminal property (count 3) came to light during the drugs surveillance operation and was part of the evidence of the drugs conspiracy, but it represented separate and additional criminality. On 23rd August 2016, early on in the conspiracy and well before the first seizure of cocaine, the co-defendant Hussain was stopped by the police on the M62 motorway between Leeds and Bradford driving a van which had been modified to install two hidden compartments behind the driver and passenger seats. The police recovered three bags from the van, containing a total of over £109,000 in cash, sorted into bundles of £1,000. Turner's fingerprints were on one of the bags. There was surveillance evidence earlier in the day of Turner giving the bag to Lumb, who must then have passed the bag on to Hussain.
18. On 21st September 2016, the co-defendant Yeats travelled to London in a vehicle which Turner had previously been seen driving. There was surveillance evidence of an exchange with another man in London. The police recovered the bag which Yeats had been transporting. It contained over £59,000 in cash. Mabbott had insured the vehicle and he was also a named driver. There was phone evidence linking Turner to the man in London who Yeats was to meet. Turner was plainly directing operations.
19. On 12th October 2016 Mabbott was himself stopped by the police walking along a street in Leeds accompanying a small child. Mabbott was carrying a large shopping bag which was found to contain several carrier bags with bundles of cash inside amounting in total to over £109,000. A further £3,300 or so in cash was found at Mabbott's home.
20. Turner did not have an extensive criminal record and had no relevant convictions. There was a supportive testimonial from a neighbouring shopkeeper. He had done positive work in the community. Along with his wife, he had responsibility for two very young children. The judge said in terms that he took account of those matters.
21. Mabbott had no previous convictions. He had children too. He had also been involved in charity fund-raising. Again, the judge said in terms in his sentencing remarks that he had taken account of those matters.
22. It was common ground at the sentencing hearing that Turner had played a leading role in the conspiracy for the purpose of the Sentencing Council guideline. Turner spanned all the drugs transactions and was linked to all of the others involved. The judge said he was sure that Turner was directing or organising buying and selling on a commercial scale, with some sophistication. He had influence on others in the chain; he had close

links to the original source of the cocaine; and he had the expectation of substantial gain. Pausing there, we observe that, leaving aside the additional feature that this was a conspiracy rather than an offence of substantive supply, it followed that the starting point under the guideline (which is based on supply of only 5 kgs of cocaine) was 14 years, with a range up to 16 years. Here the quantity of cocaine was far greater than 5 kgs -- the indicative figure for the starting point in the guideline.

23. The judge was also satisfied that Mabbott had played a leading role for the purposes of the guideline. He was clearly directing or organising the buying and selling of drugs on a commercial scale in a sophisticated operation. He too had substantial influence on others in the chain and the expectation of substantial financial gain. He had a very expensive lifestyle, and he was caught carrying a huge sum of cash. There was a significant credit balance on his current account. The judge noted, based on evidence given in the trial, that he was losing money gambling, in a way that the judge said could only be accounted for by his involvement in the conspiracy.
24. In his sentencing remarks the judge said he had anxiously considered the impact of totality. Rather than pass consecutive sentences for the two conspiracies (the drugs and money laundering) he said he would decide upon the overall length of sentence which was required, having regard to all the offences and the principle of totality. That overall sentence, the judge said, inevitably had to take into account that there were two parallel businesses, one dealing in cocaine, the other laundering money, albeit the money came from the cocaine business. This, the judge said, meant a starting point for the sentence on the lead offence (the cocaine conspiracy) which would be outside the guideline contemplated by the Sentencing Council. That was necessary because the overall criminality in both conspiracies demonstrated that the operation had to be viewed as being on the most serious and commercial scale, not merely because it involved a quantity of drugs higher than 5 kgs but because of the sophistication with which over many months the conspiracy was in operation. The judge then imposed the sentences we have indicated: for Turner the lead sentence of 20 years on count 2 with 6 years concurrent on count 3; for Mabbott the lead sentence of 18 years on count 2 with 5 years concurrent on count 3.
25. For completeness, we should explain that Lumb was convicted on both counts and sentenced to a total of 13 years. Brook was convicted on count 2, and on a separate count of possession with intent to supply. He was sentenced to a total of 9 years' imprisonment. No issue of disparity arises in relation to their sentences as compared with those passed on Turner and Mabbott.

Turner

26. We deal first with the renewed application of Turner. On his behalf Mr George submits, first, that the judge adopted too high a starting point. Mr George says that the quantity of cocaine here (8.6 kgs) was not so far above the indicative quantity of 5 kgs for category 1 as to justify a sentence of the level the judge imposed. It was not a "massive" quantity, in the sense used in some of the authorities in guidance that has been given by this court. Mr George submits that the judge should not have sentenced outside the guideline range for the cocaine conspiracy, the guideline range being up to 16 years for a leading role category A, and that the judge attached too much weight to the fact that it was a conspiracy rather than a substantive offence. He says that the judge failed to give sufficient reasons for sentencing outside the guideline and failed to have proper regard to

- totality. He makes the point that if, as the judge said, he had taken into account the personal mitigation for Mr Turner then it must follow that the judge had actually started at a higher figure even than the 20 years.
27. Mr George next submits that the judge came to impermissible factual conclusions adverse to Mr Turner and appeared to take into consideration impermissible material in sentencing. That submission relates primarily to the judge's conclusion in respect of the kilo of cocaine seized from the van which Choudury was alleged to have been driving but in respect of which Choudury was acquitted. Mr George submits that the judge should not have taken that into account against Turner. The only safe interpretation for the jury's verdict of acquittal is that they could not have been sure the drugs were part of the conspiracy. One of the reasons for that, Mr George explained and amplified in his oral submissions, was that the case had been left to the jury in respect of Choudury on the basis that even if the jury were not sure he was the driver of the van they could still convict him of the conspiracy.
 28. Mr George also complains that in relation to the roles played by Turner and Mabbott the prosecution had said words to the effect of "What we know is that Turner was at the head". Mr George submits that this could only have been a reference to knowledge based on police intelligence, which was impermissible and should not have been referred to by the prosecution and relied upon by the judge. On this point we say at once that prosecuting counsel in the respondent's notice refute the suggestion that that is what was meant. They say that it was based upon the evidence in the case which the jury had heard. In any event, we note the judge did not refer to this specifically in his sentencing remarks.
 29. Mr George submits that there was no basis to distinguish between Turner and Mabbott to the extent which the judge did, not least when Mabbott was found in possession of over £100,000 in cash and when the judge did not attribute to Mabbott, as he did to Turner, any responsibility for the extra kilo of cocaine found in the van, in respect of which Choudury was acquitted.
 30. In his oral submissions Mr George has developed all these points in some detail and we are grateful to him for that elaboration. But in the end, as he accepted, it really comes down to a question of totality. Mr George pointed out that the guideline says that where the operation is on the most serious and commercial scale involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate depending on the role of the offender. But he submits that however one views it, this was not a case of those massive proportions and that the overall sentence of 20 years was therefore manifestly excessive.
 31. We have considered all these submissions carefully, but we are unable to accept them. The judge had presided over this complex trial for three to four weeks and he had mastered the detail of the evidence. He was ideally placed to assess Turner's culpability and his role. Turner was undoubtedly the senior partner in the conspiracy. We note as a small example that it was Turner who had the largest number of phones which were in use to run the conspiracy. The quantity of cocaine actually recovered was nearly twice the indicative quantity for the starting point in the guideline. The combination of leading role factors as well as the quantity of cocaine itself and its purity amply justified a sentence on count 2 alone which was above the range of 16 years in the guideline. The judge was entitled, in our view, to find to the criminal standard that the kilo of cocaine

recovered from the van on 23rd October was part of the conspiracy, whoever was driving the van and despite Choudury's acquittal. It was a matter for the judge to assess; he had heard all the evidence.

32. The judge was required as well to take into account that this was a conspiracy, not a case of substantive supply. As this court held in R v Khan [2013] EWCA Crim 800; [2014] 1 Cr App R (S) 10, the fact of involvement in a conspiracy is an aggravating feature because each conspirator playing his part gives comfort and assistance to others, knowing that he is doing so, and the greater his awareness of the scale of the enterprise in which he is assisting, the greater his culpability. The judge referred in terms to this principle in his sentencing remarks. Moreover, the reality is that the events which featured in the evidence were, as the prosecution contended, merely snapshots of the activity in the conspiracy as a whole.
33. Furthermore, as the judge spelt out very clearly in the sentencing remarks, he was increasing the sentence on count 2 to reflect the overall criminality of both conspiracies. We accept that often the incidental money laundering aspect of a drugs conspiracy is not charged separately and will form part of the court's assessment of a defendant's role and culpability. Here, however, the money laundering conspiracy was properly charged as separate criminality, and, although overlapping, was nevertheless additional and distinct. That had to be reflected in the overall sentence. As we have already observed, the first seizure of cash (over £100,000) came well before any seizure of drugs. The inference is that there was already a very substantial criminal enterprise in progress as part of the drugs conspiracy or (alternatively) as part of the money laundering conspiracy. Either way it provided ample justification for the judge taking the course he did and imposing an overall sentence which reflected the whole criminality of the two conspiracies.
34. The sole question in the end is whether a total of 20 years' imprisonment for these two very serious conspiracies was arguably manifestly excessive. Personal mitigation can have little weight when defendants embark upon cynical commercial Class A drug supply of this magnitude. We think the judge was fully entitled to pass a total sentence of 20 years' imprisonment. It was just and proportionate. Despite Mr George's attractive and forceful submissions, Turner's renewed application for leave is refused.
Mabbott
35. We turn to Mabbott. Mr Stranex submitted to the judge at the sentencing hearing that Mabbott had played only a significant rather than a leading role, and that submission is pursued before us this morning.
36. In our view it is misconceived. Plainly the judge was entitled on the evidence, having heard the trial, to find that Mabbott played a leading role.
37. Mr Stranex submits, however, that the judge should not have sentenced outside the guideline, i.e. above the upper end of the range for category 1 leading role, 16 years. He submits that in reality the operation lacked the sophistication and complexity which justified elevation beyond the guideline. More specifically in the case of Mabbott, the fact that he was carrying such a large sum of cash, apparently quite casually in the street, suggests that he was not at the elevated level in the conspiracy which the prosecution sought to portray. Mr Stranex submits that the quantity of drugs in this case was not massive and even the purity of the cocaine was not unusual.
38. Mr Stranex submits that the judge was wrong to emphasise Mabbott's gambling as indicative of the level of his involvement and that the judge had not understood the

- evidence correctly in relation to that aspect. In fact the Mabbott's gambling problem had preceded the indictment period by some margin and went back perhaps as far as 2013, although Mr Stranex explained to us that it was correct that there was evidence given by Mabbott himself before the jury that part of the money he was carrying on the relevant occasion represented the proceeds of gambling which he had previously been engaged in.
39. Mr Stranex submits in his written argument that the sentence for the money laundering (5 years) was in itself too high in any event.
 40. Mr Stranex developed his points in the grounds of appeal in his oral submissions this morning, focusing, as we say, on the question of whether the judge had assigned too elevated a role to Mabbott.
 41. Again we have considered all these submissions carefully, but we are unable to accept them. For the reasons we have already explained in relation to Turner, the judge was ideally placed to assess Mabbott's role and culpability. His sentence was 2 years lower than Turner's because he was somewhat junior to Turner in responsibility in the judge's assessment. That was a matter solely for the judge to decide, and he was entitled to reach the conclusion he did. He gave the concrete example that there was no evidence linking Mabbott directly with the seizure of the kilo of cocaine in the van on 27th October. As the judge mentioned in his sentencing remarks, Mabbott's legitimate earnings were in the region of only £18,000 a year. Despite that, there were signs in the evidence of a lifestyle which belied such a small, limited, legitimate income.
 42. For the reasons we have already explained in relation to Turner, the judge was entitled to take into account that the quantity of cocaine which was recovered was well above the 5 kgs indicative quantity for the starting point of 14 years in category 1. The judge was entitled to reflect the fact that this was a conspiracy rather than an offence of substantive supply. The total sum involved in the money laundering conspiracy was some £280,000. The judge was right to place the money laundering conspiracy into category 4A of the relevant Sentencing Council guideline, where the starting point of 5 years is based on £300,000. Mabbott's concurrent sentence of 5 years reflected the fact that the money laundering offence too was a conspiracy. His total sentence of 18 years properly reflected his overall criminality.
 43. We are quite satisfied that it is not arguable that his total sentence was manifestly excessive. It was just and proportionate. Mabbott's renewed application for leave is likewise refused.

Victim surcharge order

44. There is a small technical issue which we should mention before leaving the case, although it is not raised in the grounds of appeal. We note that the judge made an order that the victim surcharge provisions under section 161A of the Criminal Justice Act 2003 would apply. The Crown Court has recorded a victim surcharge of £170 for each of the applicants. These orders were made at the sentencing hearing despite the fact that confiscation proceedings were still to take place. The making of a surcharge order before the conclusion of confiscation proceedings is precluded by the provisions of section 15(2)(ca) of the Proceeds of Crime Act 2002, which states that, where sentence is passed before the hearing of postponed confiscation proceedings, "...the court must not ... make an order for the payment of the surcharge". However, this Court held in R v Bristowe [2019] EWCA Crim 2005, at [17], that: "...if the order is made during the

postponement period or at the time when sentence is passed, the surcharge will not be quashed unless, exceptionally, the final outcome of the case means that the circumstances and justice of the case makes this necessary".

45. It is not suggested on behalf of these applicants that they have suffered or will suffer any prejudice as a result of the surcharge order, and, if necessary, appropriate adjustments could be made at the confiscation hearing. We are told that confiscation has already been dealt with in the case of Mabbott but remains to be dealt with in the case of Turner.

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