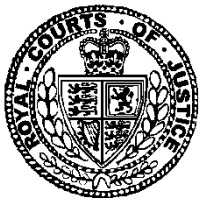

Neutral Citation Number: [2022] EWCA Crim 1330

Case No: 202202431 A3

IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
HIS HONOUR JUDGE GRIFFITH
T20227133

Royal Courts of Justice
The Strand, London
WC2A 2LL

6 October 2022

Before:

LORD JUSTICE STUART-SMITH

MR JUSTICE WALL

THE RECORDER OF DERBY
(HER HONOUR JUDGE SHANT KC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

REFERENCE BY THE ATTORNEY GENERAL
UNDER SECTION 36 OF THECRIMINAL JUSTICE ACT 1988

Between:

REX

-and-

SAM WHICKER

Lucy Organ appeared on behalf of the Solicitor-General
Graham Arnold appeared on behalf of the Offender

Approved Judgment

LORD JUSTICE STUART-SMITH:

1. On 6 July 2022 before the Crown Court at Southwark, having indicated that he would plead guilty at the first opportunity, the offender was sentenced to 4 years' imprisonment for an offence of being concerned in the supply of a controlled drug of Class A, namely cocaine. The Attorney General now seeks leave to refer that sentence to the court on the grounds that it is unduly lenient.

2. The Attorney General is represented before us by Ms Organ, who did not appear below. The offender is represented, as he was in the court below, by Mr Arnold.

3. The offender's conviction arose out of a very substantial conspiracy for the supply of cocaine in the area including Walton-on-Thames and Staines. It was the prosecution case that the conspiracy involved the supply of over 200 kgs of cocaine.

4. We shall in due course look at the sentences that were imposed upon others who were either convicted or pleaded guilty to participation in that conspiracy. It is important, however, to bear in mind at all times that the offender fell to be sentenced for a single count of being concerned in the supply of cocaine. A second charge alleging conspiracy to supply Class A drugs was ordered to lie on the file on usual terms.

5. The facts giving rise to the count of which the offender was convicted are not in dispute and can be shortly stated.

6. The offender acted as a courier, driving 90 kgs of cocaine from Walton-on-Thames to Northolt in his Volkswagen Transporter. This was in the context of the wider conspiracy. He drove the cocaine from Barry Wilkinson in Walton-on-Thames to David Green and Darrell Logan in Northolt and the drugs were stored at Darrell Logan's address.

The facts in more detail are as follows.

7. Operation Bettergates was an investigation into an Organised Crime Group involved in the conspiracy to supply Class A drugs (cocaine). This conspiracy continued between March and October 2020 and was said to involve over 200 kgs of cocaine.

8. During the morning of 29 October 2020 Barry Wilkinson purchased four black and grey Slazenger holdalls, into which 90 kgs of cocaine were placed, and drove these blocks of cocaine from Staines to Walton-on-Thames. Once in the Walton-on-Thames area, Barry Wilkinson transferred the Slazenger holdalls containing the cocaine into a white Volkswagen Transporter (registration number DX67 NNC).

9. During the afternoon of 29 October the offender collected the Volkswagen Transporter vehicle from Mr Wilkinson. After a short exchange between the offender and Mr Wilkinson, the offender drove the vehicle to Sentinel Close in Northolt, where he was met by David Green and Darrell Logan. The offender, David Green and Darrell Logan all congregated at the rear of the Volkswagen Transporter, before Mr Green and Mr Logan took the four Slazenger holdalls containing the cocaine to a nearby address associated with Mr Logan. The offender drove the Volkswagen Transporter vehicle away.

10. A short time later, police officers attended at Mr Logan's address and found the Slazenger bags containing 90 1-kg blocks of cocaine powder with a purity of between

92-95 per cent. Mr Green, Mr Logan and Mr Wilkinson were all arrested that day.

11. The offender's DNA was recovered from the shoulder strap of one of these holdalls and his fingerprint was recovered from a bottle within the Volkswagen Transporter van, of which he was the registered keeper. On 3 November 2020 he purchased a Eurostar ticket to Amsterdam and travelled there that evening. He was arrested on 22 February 2022 at the Premier Inn in Hanger Lane. He had £615 on him. He was interviewed under caution and answered no comment to all questions asked. He was charged on 26 February 2022.

12. All the other defendants were sentenced by HHJ Griffith on occasions before the sentencing of this offender. They all pleaded guilty to their parts in a conspiracy to supply Class A drugs (cocaine) between 1 March 2020 and 31 October 2020. It was said that David Green and Barry Wilkinson were directing a sophisticated and well-organised criminal enterprise to supply over 200 kgs of cocaine.

13. David Green received a sentence of 13 years and 6 months' imprisonment. He was said to be the "top man" in the dock, found to have close links to the source of the drugs. He expected substantial financial reward and had influence over others in the conspiracy. He was sentenced on the basis that he may have worked under the pressure and influence of the EncroChat handle "QPR" but had a leading role. He organised the buying and selling of cocaine on a commercial scale. He used vehicles with concealed compartments. His offending was aggravated by using an EncroChat phone and concealed compartments in vehicles. The drugs recovered had a high purity. He showed remorse and had no relevant previous convictions. He received 25 per cent credit for his guilty plea. The starting point after a trial was said to be 19 years' imprisonment (which was well above the sentencing guidelines).

14. Mr Wilkinson received a sentence of 10 years and 4 months' imprisonment. He was said to be the "next one down in the line" from Mr Green. He was found to have a significant role and to be involved in the management of wholesale supplies of drugs and bookkeeping for the criminal enterprise. He moved 100 kgs of drugs on the last day of the conspiracy. The offending was aggravated by the use of an EncroChat phone. He had no relevant convictions, had good character and showed remorse. The starting point after a trial would have been 15 years' imprisonment (which again was well above the sentencing guidelines). He received 25 per cent credit for his guilty plea.

15. Mr Logan received a sentence of 9 years' imprisonment. He had been looking after 104 kgs of Class A drugs at the time of his arrest and was found to have a role between “lesser” and “significant” because he was working for other people but had an awareness of the scale of the operation. An aggravating feature was the purity of the drugs. He had no relevant previous convictions and his imprisonment would have an effect upon his father, who was unwell. The starting point after a trial would have been 13 years' imprisonment (which again would have been above the sentencing guidelines). He received 25 per cent credit for his guilty plea.

16. Three other defendants who had lesser involvement had also been sentenced by the judge previously. We shall refer in more detail to those sentences and to the judge's reference to them a little later in this judgment.

17. The offender had 38 convictions for 71 offences between 5 December 2006 and 31 May 2019. He did not have any convictions relating to Class A offences or the supply of drugs.

i) Between 2006 and 2016 he had numerous convictions for possession of Class B drugs, dishonesty offences (including burglary), interfering with vehicles, criminal damage, driving offences and failures to comply with court orders.

ii) In 2016 there was an offence of interfering with a vehicle.

(iii) In 2017 there was an offence of a burglary of a dwelling, another burglary which was of a non-dwelling, and one theft of a vehicle.

(iv) In 2019 there was an offence of battery.

18. There was a letter before the court from the offender's mother, which we have read. She described the offence as being "out of character" for the offender but acknowledged that his criminal lifestyle started when he was young. She set out that his childhood had not been easy because she was a single parent and his father was not a consistent male role model. The offender had a promising career in rugby, but he had had a serious moped accident which meant he was unable to play rugby any longer. The offender had a child when he was 19 years old. There was also a letter from the offender's sister (which we have read) setting out that her family supported the offender and believed that he was willing to better his life.

19. At the hearing for the sentencing of the offender, prosecution counsel submitted that when assessing the offender's culpability there were elements of both lesser role and significant role as the offender's role was limited to the transportation of drugs under the direction of others above him in the chain and he had no influence of those above him in the chain. Because of the large quantity of drugs the offender had transported, it was reasonable to infer that he was doing so for significant financial gain; and he must have had some awareness and understanding of the scale of the operation he was involved in. It was submitted on behalf of the prosecution that harm was outside the sentencing guidelines and above category 1 because the offender was transporting 90 kgs of cocaine.

20. Defence counsel, Mr Arnold, submitted that the offender was unaware of the quantity of the drugs with which he was involved and that the quantity of drugs was less relevant because of his status as a courier. It was not accepted that the level of harm was above the sentencing guidelines. It was submitted that it was relevant that the offender had pleaded guilty and fell to be sentenced for a substantive offence, unlike the other offenders who had pleaded guilty to the conspiracy. The judge was invited to sentence the offender in line with the other couriers in the case. It was submitted that the offender was remorseful, had taken steps to improve himself while in prison and that his age (he then being 31) and lack of maturity were relevant to his offending.

21. The current Definitive Guideline for Drug Offences applies to this offence. It is common ground that based on quantity the present case falls within category 1 for harm. There is an issue (to which we will return) about whether the offender should be treated as having a lesser role or a significant role or as somewhere in between.

22. The guideline indicates that based on a supply of 5 kgs of cocaine the starting point for a category 1 case where the offender has a lesser role is 7 years, with a category range from 6-9 years; where the offender has a significant role, the starting point is 10 years' custody, with a category range from 9-12 years' custody. The starting points apply to offenders irrespective of plea or previous convictions.

23. It is well established that where the quantities involved are significantly higher than the indicative quantity of 5 kgs, that will exert an upward pressure on sentence. This is expressly recognised by the guideline, which states:

> "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 offender's role."

That citation is directly applicable to offenders who take a leading role, but the principle of upward adjustment to reflect quantities that are significantly higher than the indicative quantities listed in the guideline is of general application.

24. Features identified in the guideline as indicating a significant role include (i) expectation of significant financial or other advantage; and (ii) some awareness and understanding of the scale of the operation. Features indicating a lesser role include (i) performing a limited function under direction; (ii) not having any influence on those above in a chain; (iii) very little, if any, awareness or understanding of the scale of the operation; and (iv) expectation of limited, if any, financial or other advantages.

25. In sentencing the offender the judge adopted the following approach.

i) He observed that the offender had committed a lot of offences over the years but that this stuck out "like a sore thumb".

ii) He described the offender's involvement in the supply of 90 kgs of cocaine as an "enormous" amount.

iii) The offender's DNA was found on one of the straps of a bag containing cocaine which must have weighed as much as a holiday suitcase.

iv) There was no evidence that the offender knew exactly how much cocaine he was transporting, but he must have known that each bag contained a substantial quantity of drugs and that he had some awareness of the scale of the operation in which he was involved.

v) The judge found that the offender had either a "lesser role or possibly just touching into significant role".

vi) In terms of harm, the sentencing guidelines stopped at 5 kgs, and he must reflect in sentence that the offender was transporting far more than 5 kgs of cocaine when he sentenced him; but he did not consider that he should sentence outside the sentencing guideline categories as he had with others involved in the conspiracy.

vii) He found that the offender was a "courier" like Messrs Thompson, Glynn and Bradley.

viii) He found that the starting point for the offender should be akin to that for Mr Bradley, who was arrested with a 7-kg concealed consignment and who had been coerced by someone else with a gun.

ix) He found that the starting point was one of 7 years' imprisonment. There were no aggravating features and so he gave the offender credit of 1 year for his personal mitigation and remorse, and then applied a one-third discount for his plea, thereby reaching the sentence to which we have already referred.

26. In the course of his sentencing remarks the judge referred to the fact that he had adjusted the sentences on the three organisers of the conspiracy by 50 per cent. As he explained it, this took into account the longer period of their involvement; but he expressly referred to the fact that the quantities taken into account when sentencing them were much the same as the quantities involved in this offender's operation. He then identified points of similarity and difference between the offender and the other three conspirators who he had sentenced for their lesser roles in the conspiracy.

27. The judge had regarded Mr Carl Thompson as "more than a mere courier" because he had an EncroChat phone. Although he had pleaded guilty to the conspiracy and his proved involvement was in relation to 16 kgs, reference to the sentencing remarks for Mr Thompson show that the judge regarded him as having been involved in the conspiracy for more than just a month and having been involved with moving other drugs in addition to those that had been strictly proved. The judge had reached a starting point of 9 years for Mr Thompson. Reference to his remarks when sentencing Mr Thompson show that this point was taken as being somewhere between a 10-year starting point for a significant involvement with 5 kgs and a 7-year starting point for lesser involvement, again with 5 kgs. He had reduced the notional sentence from 9 to 7-and-a-half years to reflect the fact that Mr Thompson had no previous relevant previous convictions, had withdrawn from the conspiracy before it came to an end and had expressed remorse. The 25 per cent reduction for plea was applied to that figure to reach the sentence of 5-and-a-half years that had been passed.

28. Mr Stephen Glynn drove a van with a concealed space in it. He did not have an EncroChat phone but was said by the judge to be more involved than the offender although the amount with which he was involved was impossible to say. Mr Glynn had been involved in the conspiracy for only part of its duration. References to his sentencing remarks when sentencing Mr Glynn shows that the judge had assessed him as being "somewhat below" Mr Thompson. He therefore treated him as having lesser culpability, which led to a starting point of 8 years. Although Mr Glynn had previous convictions for violence, they were not treated as an aggravating feature. The identified mitigation was that he had got out of the conspiracy through his own activity, he had expressed remorse and there was a supportive letter from his mother saying that he intended to mend his ways. On the basis of that mitigation the judge had reduced the sentence by 18 months, reaching a notional sentence of 7 years, before applying a 25 per cent reduction for plea.

29. Mr Scott Bradley had pleaded guilty on the basis (accepted by the prosecution) that someone had coerced him with a gun, though not to the point of giving him a full defence. Reference to his remarks when sentencing Mr Bradley showed that the judge considered this made a difference when comparing Mr Bradley with the other two "couriers". He was arrested with a 7-kg consignment. The judge reached a notional sentence of 7 years taking into account the coercion but before applying a further reduction of 18 months for personal mitigation and 25 per cent for plea to reach a sentence of 4 years and 2 months. The starting point of 7 years was below the normal starting point for limited involvement in a category 1 case -- that no doubt reflecting the element of coercion.

30. It will be noted from this summary that no upward adjustment was made in any of the three cases of the conspirators on account of the quantity of drugs involved. This is best explained on the basis that the quantities demonstrated in relation to those three defendants were relatively limited.

31. The judge said that these three comparators gave him a bracket where he should consider how he would fit in the offender's offending. He would not put the offender above someone who was involved in the conspiracy with an EncroChat phone even if that person had 16 kgs and the present offender had 90 (an apparent reference to the position of Mr Thompson). He then said:

> "The real difficulty for you is the very large amount of drugs which, as I say, must have given you some awareness and understanding of the scale of the operation and because of that I am starting at a starting point of 7 years."

The judge then said there were no aggravating features. He reduced the notional sentence by 12 months for the offender's expression of remorse, which the judge rightly put in the context of the offender's extensive previous offending. He then applied a one-third reduction for the offender's plea of guilty.

32. The Attorney General submits that the high purity of the drugs (92-95 per cent) should have been regarded as an aggravating feature. The court below did not identify purity as an aggravating feature and so far as we are aware it was not identified as an aggravating feature by the prosecution although the purity was noted in the prosecution Sentencing Note.

33. Turning to the applicability of the guideline, the Attorney General submits the offender's role straddled "lesser" and "significant" because, as found by the sentencing judge, the offender had an awareness of the scale of the operation because of the amount of the drugs he was transporting. Even if he did not know the exact quantity of the drugs he was transporting, the Attorney General submits that the judge was right to find that he knew he had four bags and that each bag contained a substantial quantity of drugs. The judge was also right to find that there must have been an expectation of substantial financial gain.

34. It is submitted by the Attorney General that the level of harm is above category 1 because the amount of drugs which the offender transported far outstripped the 5 kgs which is the indicative quantity for category 1 harm; and he knew, at least in general terms, the very large amount of drugs that he was transporting in the bags, one of which he was shown to have handled. His role is said to be in contrast with the other couriers convicted of participation in the conspiracy who, though making multiple trips had not transported anything like the quantity that the offender had. On this basis and taking into account the purity of the seized drugs, the Attorney General submits that the proper starting point was therefore above or at least at the very top end of the range for category 1 lesser role and should have been at least 9 years' imprisonment.

35. There is no separate criticism of the judge's decision to reduce the sentence by 1 year to reflect the offender's personal mitigation or of the one-third reduction for the offender's guilty plea. Conversely, there can be no suggestion that these reductions should have been increased. Applying the judge's reductions to a notional sentence of 9 years' imprisonment, the Attorney General submits that the least sentence that could properly have been passed was one of 5 years and 4 months.

36. Mr Arnold repeats the oral and written submissions that he made to the judge below, which we have read in full. His primary submission to the court below was that there was no evidence that the defendant knew the amount of the drugs he was couriering. In any event he submitted that the weight of the drugs is a secondary consideration when dealing with a courier with limited knowledge and he warned and warns against conflating, as he puts it, the weight of the drugs with the offender's role. He also submits that there is no evidence the offender knew the purity of the drugs, though he does not accept that would be relevant in any event. That said, he accepted before the judge and accepts before us that the quantity of drugs is a serious aggravating factor even if, as he contends, the offender did not know the scale of what was going on.

37. In his written submissions and his submissions to the court below, Mr Arnold was astute to draw attention to the difference between the counts for which the conspirators were sentenced and the count to which the offender pleaded and fell to be sentenced. He submitted below, as he submits to us, that on the facts of this case it is a significant distinction and one that should be reflected in the sentence to be passed on the offender.

38. Before us the central submission which Mr Arnold made and emphasised with considerable power was that the offender was just a courier and that the starting point in his case should not be elevated above those applied for the other couriers. He concentrated upon the limited time that the offender had to appreciate the quantities involved and he characterises the offender's involvement as being that of a "mere courier" for 40 minutes, transporting one consignment from A to B. He therefore submits that the sentence passed by the judge was not lenient but was entirely appropriate.

39. In our judgment there can be no possible criticism of the judge's assessment that the offender knew, at least in general terms, the very large quantity of the drugs that he was transporting. He was aware that he had four large holdalls and that they contained a very substantial quantity of drugs as he had seen them in the back of his van and was shown by his DNA to have handled one of them. The bulk, represented by 20 kgs or more in each bag, must have been apparent to him. The judge was right to describe it as "an enormous amount" or even "four enormous amounts", pointing out that each bag must have weighed about the same as a large suitcase taken on a family holiday by air.

40. There can also be no possible criticism of the judge's assessment that the sheer quantity of drugs in his van must have led to some awareness and understanding of the scale of the operation with which he was concerned. We do not forget for a moment that the operation with which he was concerned was the transportation of 90 kgs of high purity cocaine and not any broader conspiracy. Even so, seen as a single transaction, it is impossible to avoid the conclusion that it was very serious and on a commercial scale. This was not in any sense a "normal" couriering operation, involving 5, 10 or even 15 or so kgs, such as might be entrusted to a "normal" courier either as a single or as multiple transportations. The sheer quantity of the drugs that were entrusted to the offender lead inevitably to an inference that he was trusted with such an amount, that there would have been an expectation of significant financial advantage for him and that he had some real awareness and understanding of the scale of the transportation that he was undertaking. These considerations point towards a conclusion that the offender took a significant role in the operation, albeit that it was limited to transporting the drugs.

41. Factors pointing to a lesser role are relatively slight. It can properly be said that as

a courier he performed a limited role under direction and that he had no influence upon those above him in the chain; but that is all.

42. Viewed overall, it would have been open to the judge to treat the offender as having a leading role, albeit at the bottom end of the category. Although he said in the course of his remarks that the very substantial quantities that the offender was transporting made him "consider the significant role", he did not express a final conclusion about where he placed the offender's culpability by reference to the guideline categories. In our judgment had he done so, the most favourable conclusion he could have reached was that this offending carried characteristics of a leading role with some elements indicative of a lesser role and that therefore, adopting whatever terms he felt appropriate, the offender's culpability either straddled lesser and significant roles, or, as another way of saying the same thing, that the offender's culpability fell either at the top of the “lesser” involvement or towards the bottom of “significant” involvement.

43. Turning to categorisation of harm, 90 kgs is 18 times the indicative amount for cocaine of 5 kgs. That quantity should exercise substantial upwards pressure on any starting point that may be selected. In theory at least, the purity of the cocaine is also relevant to the harm to be anticipated from the onward sale of the drugs to their ultimate users; but we leave that out of account as it was not raised as an aggravating feature in the court below.

44. The harm that would be caused by those enormous quantities of drugs is not affected by the state of the offender's knowledge about the scale of the transaction. The fact that he was aware of the scale of the operation goes to culpability, as explained above. However, the very large quantities of drugs require a significant upward adjustment to a notional starting point because the "normal" starting point for a category 1 offence is based upon an indicative quantity of 5 kgs and the court in this case is concerned with approximately 18 times that amount. It is important in our judgment to recognise at this point the distinction between the single transaction count to which the offender pleaded guilty and the conspiracy counts to which the three lesser offenders who had previously been sentenced had pleaded guilty. As we have identified above, the three lesser offenders had to be sentenced for their limited role in a conspiracy where no specific findings were made that demonstrated involvement in or awareness of the overall scale of the conspiracy or the very large quantities involved. The offender's case was different. Although the count of which he was convicted related to only one transaction, it involved his direct involvement in enormous quantities of drugs. Had he been concerned with a shipment of either 5 kgs or even a few multiples of 5 kgs, it might have been possible to draw a favourable analogy when assessing his overall criminality by reference to that of the other three lesser offenders based on their accepted involvement in the conspiracy, but the enormous quantities with which he was directly concerned place the offender's criminality in a very different light.

45. We consider that the judge's use of the three lesser offenders as benchmarks or comparators was materially and seriously flawed because of his failure to appreciate the full significance of the enormous quantities that this offender transported. Even if one sets aside this disparity, we consider that it was not reasonably possible to conclude by way of comparison that an appropriate starting point for the offender was 7 years for four main reasons.

    i) First, the judge started at the same point that he had taken for Scott Bradley, yet Mr Bradley was sentenced on the basis both that his role was a limited and lesser role, and that he had been coerced into it with the involvement with a gun; there

was no question of upwards adjustment for quantities. In the offender's case there was no question of coercion and his culpability was not simply to be assessed on the basis of a purely limited role. Accordingly, even before applying an uplift for quantities, the notional starting point for the offender should have been significantly above that selected for Mr Bradley.

ii) Second, the judge's approach was inconsistent with the approach he had adopted in relation to Mr Thompson. In Mr Thompson's case (as in the offender's) he identified features indicating a significant role and others more indicative of a limited role. His response in Mr Thompson's case was roughly to split the difference between the starting points for limited and significant roles respectively, leading him to start at 9 years. We are unable to identify any reason why the judge did not adopt a consistent approach in relation to this offender.

iii) Third, we are not able to identify any respect in which the offender had a lesser involvement than Mr Glynn, save that he was being sentenced for one transaction rather than for involvement in the conspiracy as such. Given that the judge had recognised that the correct starting point for Mr Glynn as someone with a limited role and no association with great quantities of drugs was 8 years, we are unable to identify any way in which comparison with Mr Glynn could lead to a starting point in the offender's case of 7 years.

iv) Fourth, as is apparent from what we have already said, the fact that the offender's culpability straddled or had elements of both lesser and significant roles should have exerted upward pressure, resulting in upward movement from the starting point of a lesser role of 8 years.

46. The judge recognised that the quantity went to the question of the offender's awareness but he did not make any adjustment to reflect the enormous quantities that the offender had transported. In our judgment there is no reasonable justification for not doing so in the particular circumstances of this case.

47. For these reasons we are driven to the conclusion that the sentence imposed on the offender, starting as it did from a point of 7 years, cannot be justified. The conclusion that the offender's role straddled the categories of lesser and significant, however that is expressed, provides a strong indicator that the starting point should have been above the starting point of 7 years, or 8 years for a person who has a lesser role. Once the enormous quantities are factored in, there should have been a further upward adjustment.

48. For these reasons, we conclude that the sentence imposed on the offender was not merely lenient but unduly lenient. We accept the submission of the Attorney General that any sentence based on a notional sentence of less than 9 years before personal mitigation and plea cannot be justified as being within the bounds of reasonable leniency. The least sentence that could reasonably have been imposed in our judgment would have been one that started at a notional starting point of 9 years, reduced by 1 year to 8 years for mitigation, and then reduced by a further one-third for plea to 5 years and 4 months.

49. We therefore give leave, quash the sentence of 4 years imposed by the judge and substitute a sentence of 5 years and 4 months.

Thank you both. Mr Arnold, it will come as cold comfort but it could not have been put better.