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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NOS 202202867/A1 & 202202868/A1

NCN [2022] EWCA Crim 1815

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 17 November 2022

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION

LORD JUSTICE HOLROYDE

MRS JUSTICE FOSTER DBE

THE RECORDER OF LIVERPOOL

HIS HONOUR JUDGE MENARY KC

(Sitting as a Judge of the CACD)

REFERENCE BY THE ATTORNEY GENERAL UNDER

S.36 OF THE CRIMINAL JUSTICE ACT 1988

REX

v

EWYN SAIN DENECKER

MARIO BARCELA SALA

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR B HOLT appeared on behalf of the Attorney General

MISS C MADDOCKS appeared on behalf of the Offender Denecker

MR M ALDEIRI appeared on behalf of the Offender Sala

J U D G M E N T

1. THE VICE-PRESIDENT: Ewyn Denecker and Mario Sala pleaded guilty to offences of conspiracy to supply controlled drugs of class A. For convenience only, and meaning no disrespect, we shall refer to them by their surnames. Denecker was sentenced to a total of three years' imprisonment; Sala to a total of three years six months' imprisonment. His Majesty's Solicitor General believes those sentences to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1968, for leave to refer the case to this court so that the sentencing may be reviewed.

The facts

2. The indictment alleged that Denecker and Sala conspired together between 1 June 2020 and 10 March 2022 to supply to others crack cocaine (count 1) and diamorphine (count 2). They pleaded not guilty at a plea and trial preparation hearing in the Crown Court at Portsmouth on 11 April 2022 and their case was fixed for trial on 5 September 2022. Sala filed a defence statement in which he denied any involvement in drug dealing. However, from about July onwards there were discussions between counsel which resulted in a hearing on 26 August 2022, that being the earliest date at which all involved could attend. Both men pleaded guilty to both counts at that hearing.
3. The charges related to the supply of class A drugs in the Havant area. The drugs were sold via the "gypsy deal line", so-called because the person operating the line referred to himself as "the gypsy". Over the 21-month period covered by the indictment, the gypsy line operated on a total of seven different mobile phone numbers, and the evidence showed that the SIM cards linked to those numbers had been used in a variety of handsets.
4. Gypsy line phones were used to send bulk text messages to the contact list of customers, typically stating what drugs were available for sale. During the period covered by the indictment, the gypsy line phones collectively sent a total of 26,666 such bulk messages.
5. It was the prosecution case that Sala was "the gypsy", and that Denecker was his assistant. The SIM card for the first of the gypsy line numbers, used in July and August 2020, was registered to an address which Sala had given when stopped by the police in March 2020. Six other handsets were shown by call data to have housed at different times both a SIM card attributed to Sala and one or more SIM cards linked to a gypsy line number.
6. Denecker was stopped by the police on 30 September 2020. He was driving a car in which was found a Lucozade bottle containing 29 wraps of cocaine and 19 wraps of heroin. Sala's fingerprints were found on two of the wraps. Denecker was also in possession of two mobile phones. One had exchanged many calls with one of the gypsy line numbers and had received from that number a series of messages listing 15 postcodes in the Havant area. The prosecution submitted that it could be inferred that Sala, operating the gypsy line, was directing Denecker as to the addresses to which he should deliver drugs. They derived support for that submission from the fact that similar lists of postcodes sent from gypsy line numbers were found on a phone seized from a woman arrested in February 2021 on suspicion of being concerned in the supply of class A drugs.

7. From the date of that police stop onwards, Denecker was under police investigation and must have known that he was liable to be prosecuted at some point.
8. Sala was arrested on 17 March 2021 on suspicion of being concerned in the supply of drugs. He had two phones with him. One contained the SIM card operating one of the gypsy line numbers, the other had previously housed the SIM card linked to another of the gypsy line numbers. He too was released under investigation.
9. Denecker was again stopped by the police on 5 January 2022. He had a mobile phone which had exchanged over 1,000 text messages with gypsy line numbers.
10. Both men were arrested on 10 March 2022. Sala had a mobile phone which had housed two of the gypsy line numbers. He had a second phone, the packaging for which was found at Denecker's home. ANPR and cell siting evidence supported the assertion that Sala was the principal operator of the gypsy line. Cell siting evidence showed that four of the gypsy line numbers, and to a lesser degree also a fifth, had frequently used "bed and breakfast" cells in the vicinity of the address at which Sala was arrested. The remaining gypsy line numbers had used bed and breakfast cells in the vicinity of addresses used by Denecker at the time when those numbers were active.
11. An estimate was made, by analysis of the gypsy line call data, of the total quantity of drugs supplied during the period covered by the indictment. This was done by estimating that at least one-quarter of the bulk messages sent would have resulted in a sale of the amount of heroin and crack cocaine expected to be bought by a drug user. On the basis of those assumptions, the total quantity sold would have been about six kilograms of class A drugs.

The sentencing hearing

12. As we have said, there had been discussions between counsel prior to the hearing on 26 August 2022. Counsel then appearing for the prosecution had prepared a sentencing note in which he suggested that under the Sentencing Council's definitive guideline relating to substantive offences of drug supply, this was a Category 3 case in which Denecker played a significant role and Sala a leading role.
13. Both men are now aged 33. Both have previous convictions, but their previous offending was largely in the form of low-level dishonesty, disorderly behaviour and motoring offences. Neither had been convicted of offending involving class A drugs, although Sala had two convictions for possession of cannabis.
14. A number of testimonial letters and prison certificates had been put forward on behalf of both men, showing their better sides. No pre-sentence reports were thought to be necessary and none is necessary at this stage.
15. Prosecution counsel, in opening the case to the judge, reiterated his suggestion that this was a Category 3 case under the guideline. The judge pointed out that he had to sentence for offences of conspiracy and that the estimated total quantity supplied would fall within Category 1 of the guideline. Miss Maddocks, then, as now, representing Denecker,, acknowledged that it was a matter for the judge but said that her view had been that a sentencing hearing could take place because it had been "agreed between the prosecution and defence that this would be sentenced as a Category 3 offence". The judge said that in view of the agreed approach of counsel he would proceed on the basis of a Category 3 conspiracy.

The sentences

16. Having heard submissions about the respective roles of the defendants, the judge said that

there was no clear evidence which would place Sala in a leading role and concluded that Sala was "at the top end of significant role". He placed Denecker "right in the middle of a significant role".

17. Under the guideline, a significant role in a Category 3 offence has a starting point of four years six months' custody and a range from three years six months to seven years' custody. In Sala's case the judge raised the starting point to five years six months but then reduced it by a year to reflect the personal mitigation. In Denecker's case he took the guideline starting point, which he reduced by nine months to reflect the personal mitigation. He then reduced each of the sentences by 20 per cent to reflect the guilty pleas. Thus he imposed concurrent sentences on each of the two counts of three years' imprisonment in Denecker's case and three years six months' imprisonment in Sala's case.

The submissions

18. On behalf of the Solicitor General, Mr Holt submits that those sentences were unduly lenient. Relying on the principles stated in R v Stewart [2016] EWCA Crim 2238, Mr Holt submits that he can properly depart from the concession made by prosecution counsel below that the offending fell within Category 3 of the guideline. He acknowledges that in cases such as Attorney General's Reference No 79 of 2009 [2010] EWCA Crim. 187 and R v Susorovs [2016] EWCA Crim 1856, this court has either refused leave to refer or has made an adjustment to sentence in the offender's favour where a departure from a concession made below has resulted in unfairness to the offender. Mr Holt submits, however, that there is no unfairness in his relying at this stage on the evidence as to the total quantity of drugs, which was estimated in a manner accepted as permissible by this court in R v Akrofi-Daniels [2022] EWCA Crim. 589, and on the inferences to be drawn from the evidence as a whole. He submits that the offending should have been placed in Category 1 and that Sala should have been sentenced on the basis of a leading role, or at least a role at the point of overlap between a significant and a leading role. He accepts that Denecker was properly categorised as having a significant role.
 19. Miss Maddocks submits on behalf of Denecker that the matter only proceeded to sentence "on the understanding that there was an agreed position" on the guidelines and "solely on the premise" that Denecker would be sentenced on that basis. If that had not been agreed, she submits the case would have been adjourned so that a formal written basis of plea could be put forward, and the defence would have wished to obtain expert phone evidence with a view to challenging the prosecution case as to the scope and duration of the conspiracies. Steps had already been taken to obtain such evidence but, Miss Maddock says, had been put on hold because of the agreement as to the basis of sentencing. She submits that it would be unjust now to depart from that agreed approach. On the basis of what had been agreed, she submits that the judge properly considered all relevant factors and imposed a sentence which was not unduly lenient.
 20. Mr Aldeiri, representing Sala in this court as he did below, similarly submits that the experienced judge made no error of law or principle, assessed all relevant factors and passed a sentence which was within the range properly open to him.
 21. We are grateful to all counsel for their assistance.
- Analysis
22. It is apparent from the transcript of the hearing that defence counsel were able to and did make detailed submissions as to the extent of the conspiracies, as to the role of the

individual offenders and as to the agreement amongst the advocates as to the categorisation under the guideline. In particular, Miss Maddocks was able to submit, and the judge accepted, that Denecker had not become involved in the conspiracies until August 2020, and then as a result of his own use of class A drugs. Had counsel wished to pursue the possibility of obtaining expert evidence, they could have asked the judge to adjourn the sentencing hearing. An application to adjourn could also have been made in order to put in what was referred to as a basis of plea, although it would in truth have been no more than a note of submissions as to the appropriate basis for sentence.

Whether either of those applications would have succeeded would have been a matter for the judge. However, the apparent suggestion that the defendants could in some way dictate the terms on which they were willing to be sentenced is misconceived. It is for the judge to decide the basis of sentence, taking account of any agreement between counsel but not being bound by it, and any complaint that a different approach would cause unfairness could have been dealt with by an application to adjourn.

23. We can understand why the judge was reluctant to sentence on a basis which was significantly different from that which was agreed between all the advocates, particularly when he was told that counsel had only been willing to proceed to sentencing that day on the agreed basis. However, his first instincts were correct, and it is unfortunate that he was led by counsel into an approach which, with respect to all concerned, was clearly wrong.
24. Sala and Denecker were involved in conspiracies to supply two different types of class A drugs on a substantial scale over a period approaching two years. Neither had been deterred by police stops and arrests during that period, or by the knowledge that they were being investigated for drug offending. Their drug dealing only ended when they were arrested and held in custody. As was observed by Edis LJ in R v Kavanagh [2021] EWCA Crim. 1584 at paragraph 7, the court in such circumstances must take into account the fact that the conspirators intend their conspiracies to continue. The suggestion that they fell to be sentenced on the same basis as a conventional street dealer convicted of a substantive offence of supply was and remains untenable. As was said in R v Akrofi-Daniels [2022] EWCA Crim 589 at paragraph 19:

"The Sentencing Guideline states that the court should consider all offences involving supply directly to users as at least category 3 harm; but nothing in the wording of the Guideline prevented the Recorder from treating the applicant's offences as falling within a higher category if the threshold for a higher category was met."

25. We underline those words. The indication in the guideline as to the approach to be taken to street dealers is not to be relied upon to reach an absurd result, seeking to equate persons running a drug line such as this, over a period of many months, with a conventional street dealer. The threshold for a higher category plainly was met in this case.
26. We are not persuaded that there is any unfairness to the offenders in the Solicitor General now departing from the concession wrongly made in the court below. It was always the prosecution case that the conspiracies had involved substantial quantities of drugs and that Sala was more culpable than Denecker, although of course both shared in the wider

criminality of the conspiracies. As to the estimate made of the total quantity of drugs dealt, it seems to us that the algorithm relied upon by the police officer concerned adopts an appropriately conservative approach. But even if a yet more conservative approach be substituted, the inescapable fact is that substantial quantities of class A drugs were involved. Why else would the conspiracies have continued over so many months?

27. The applicability of guidelines to offences of conspiracy to supply drugs, and the approach to be taken in such circumstances, are well-established: see R v Khan and others [2013] EWCA Crim. 800.
28. In our judgment, being as favourable as possible to the offenders, the total quantity of drugs in which they dealt puts the case at the level which represents the overlap between Categories 1 and 2. The sentences, based as they were on Category 3, were therefore unduly lenient. In fairness to the offenders, we think it right to remain faithful to the judge's assessment that Sala was at the top end of the significant range and Denecker in the middle of that range, and to his assessment of the weight to be given to the personal mitigation advanced in each case.
29. Again being as favourable as we can to the offenders, we think that the least sentences which could properly be imposed before reduction for guilty pleas were 10 years' imprisonment in Sala's case and seven years six months' imprisonment in Denecker's case. The judge allowed 20 per cent credit for the pleas and we shall do the same.
30. We therefore grant leave to refer. We quash the sentences as unduly lenient. We substitute concurrent sentences on each count as follows: Denecker, six years' imprisonment; Sala, eight years' imprisonment.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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