



Neutral Citation Number: [2023] EWCA Crim 1293

Case No: 202301410 A5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT PORTSMOUTH
His Honour Judge Ashworth
T20217034

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2023

Before :

LADY JUSTICE THIRLWALL
MRS JUSTICE STACEY
and
HIS HONOUR JUDGE POTTER
(sitting as a judge of the Court of Appeal, Criminal Division)

Between :

CHRISTOPHER KIRKBY
- and -
REX

Appellant

Respondent

Ms Dashani (instructed by Hallinan Blackburn Gittings & Nott) for the Appellant
Mr Ojakovoh (instructed by the Crown Prosecution Service) for the Respondent

Hearing date: 12.10.2023

Approved Judgment

This judgment was handed down remotely at 12.00pm on 6th November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE STACEY :

1. This is an appeal against sentence by leave of the single judge.
2. Following a Newton Hearing which took place over 4 days between the 5 and 7 December 2022, continuing on 31 March 2023 and proceeding to sentence on the same day, in the Crown Court at Portsmouth before HHJ Ashworth, the appellant (then aged 34), was sentenced to a total of 9 years and 6 months' imprisonment on 3 counts of the indictment to which he had pleaded guilty. He received consecutive terms of 5 years imprisonment and 4 and a half years for 2 conspiracies to supply the class C drug alprazolam (with the brand name Xanax) and a 5-year concurrent sentence for one offence of converting criminal property under s.327(1)(c) Proceeds of Crime Act 2002. Not guilty verdicts were entered on a number of other counts on the indictment.

Summary of the facts

3. Between 2014 and 2017, an organised crime group (OCG) was involved in the production, packaging, distribution and supply of alprazolam on a commercial scale. Alprazolam is a benzodiazepine prescription only minor tranquiliser. Its therapeutic use is mainly for the treatment of anxiety disorders. The appellant and two co-defendants, Ward and Durden, all had a leading role in the enterprise. The scale of the production exceeded 6.8 million pills with a street value of approximately £20 million and the ambition was to produce 250,000 pills per day.
4. The conspiracy was formed in August 2014, manufacturing of the counterfeit Xanax of 2mg strength started in May 2015 and by January 2016 the pills were being marketed in packets of 10 in multiples of up to 500. The drugs were sold over both the clearnet and the darknet from a number of different accounts by all leading role defendants both in the United Kingdom and globally. Dark web resellers and agents were recruited in the US and UK. The OCG was paid in cryptocurrency which was laundered through a complex series of transfers and conversions. The prosecution framed the charges as 2 conspiracies. The first (count 1) took place between 2014-2017 involving all three of the leading role co-conspirators. The second conspiracy (count 2) took place after the arrest of Ward on 13 June 2017 and continued until October of that year on the arrest of the appellant, and his co-defendant Durden.
5. Throughout the period the appellant was using his gym and nutrition business in Bedford as cover. The three co-defendants worked closely together with the flow of bitcoin funds from the sale of controlled drugs on the dark web moving freely between them. A "bit café" was set up as a front to launder the proceeds of sale. Durden was focused on producing the pills and Ward mainly on selling and distributing them.
6. The conspiracy was discovered when Pfizer, the owner of the Xanax brand and its legitimate producer, began investigating the source of counterfeit Xanax on the market. They made undercover test purchases from the various profiles and websites operated by the three leading co-conspirators throughout 2016 to mid 2017 when they turned their findings over to the police.

7. On 13 June 2017 Ward was arrested and 200,000 alprazolam tablets with manufacturing and packaging materials were found in premises in Havant.
8. Ward's involvement stopped on his arrest, but sales of the tablets continued. The appellant and Durden formed a separate conspiracy, without Ward, to continue the operation (count 2). Immediately after Ward's arrest the appellant recruited two others to dismantle and clean the main production laboratory in Gravesend and move it to Tiverton, Devon within days of Ward's arrest.
9. The conspiracy came to an end on 5 October 2017 when Durden and the appellant were arrested from their respective home addresses. They were charged and appeared at the magistrates' court on 5 March 2021.

The steroid conspiracy

10. Quite separately the appellant had been involved in a conspiracy to import and produce steroids from 2012 to November 2016 which ended when he was arrested and interviewed by the Monmouthshire police along with 17 others, none of whom were involved in the alprazolam conspiracies. He was charged with importation and production of anabolic steroids (class C) and given unconditional bail on 10 May 2017. In March 2018 he pleaded guilty on a basis of plea to 4 counts of conspiracy to contravene customs and excise through the importation of steroids, being concerned in the production of class C steroids, conspiracy to supply class C steroids and conspiracy to launder the proceeds of crime. His basis of plea which had sought to minimise his involvement to a six-month period in 2012 and explain away his use of his gym business as cover for the conspiracy was not accepted and he pleaded guilty on a full facts basis before the Newton hearing took place.
11. The appellant had imported steroids on 20 occasions between 2012 and 2016 and used his website CheaperPharma.com to supply steroids. He had used his nutrition and gym business to take delivery of a pressing machine and other goods from China. He had engaged another co-conspirator to produce steroids for him, sending him recipes and ingredients, advice on how and where to buy manufacturing equipment and how to conceal one's internet identity.
12. The appellant was sentenced to 40 months imprisonment on 20 July 2018 and was released from prison on a tag on 7 November 2019. Some others in the steroid conspiracy received longer sentences.

Co-defendants in the alprazolam conspiracies

13. All three leading role defendants in the Xanax conspiracies were similarly aged in their mid-30s. Ward had no previous convictions and neither of Durden's two previous convictions in 2008 were relevant.
14. The appellant initially submitted a basis of plea that challenged the volume of drugs supplied and the price at which they were sold. It was not accepted by the Crown and the appellant conceded the points. However, the appellant and his co-defendants continued to challenge the prosecution expert's assessment of harm caused by the conspiracies.

The sentence

15. The sentencing hearing for the appellant, Ward and Durden took place over 4 days. Expert evidence from both sides was required to resolve the challenge by the appellant and his co-defendants to the level of harm caused by the quantities of drugs involved in the conspiracies.
16. The judge accepted the evidence of the prosecution expert, Dr Langford. Alprazolam was significantly more toxic than other benzodiazepines, such as diazepam. 10mg constituted a harmful dose risking toxic effects from a wide range of harmful common side effects. There were also risks of more severe adverse effects, possibly death, particularly when used by naïve users of the drug or when mixed with other depressant drugs such as opioids or alcohol. Dr Langford's evidence was that as well as recreational use, alprazolam is used in sex crimes to render a victim very drowsy or unconscious so that they are unaware of or unable to prevent a sexual assault with the amnesiac effect lasting for up to 8 hours. 200 fatalities linked to alprazolam were recorded in the UK between 2015-2019.
17. The recommended therapeutic dose of alprazolam is between 0.5mg to 1.5mg and the manufactured alprazolam tablets were predominantly 2mg with some much stronger tablets marketed as "Red Devils" at 5mg strengths. However, for the purposes of his calculations Dr Langford assumed the 2mg pills were predominantly produced with their lower level of potency. The judge accepted Dr Langford's evidence that 6.87 million alprazolam tablets had the potential to harm over 1 million individuals and that under the sentencing guidelines the harm fell above category 1. He rejected the evidence of the joint defence expert, Dr Guirguis.
18. The judge found that the production of nearly 7 million 2mg tablets was:

“an industrial scale operation, particularly when it is organised in an industrial way with the purchase of and use of a pill press in organised premises..... [It was] way in excess of category 1 by a factor of up to 10 times in relation to the nearest comparator of heroin. So, these amounts are not category 1, they are vastly in excess of category 1.”
19. He concluded that this was a case where sentences above the top of the category range of 8 years for a leading role after trial would be justified. There is no criticism of that conclusion.
20. The prosecution sentencing note observed that the defendants may find themselves at different levels within the leading category role. They all had roles where they directed or organised the buying and selling of drugs on a commercial scale. They all had close links to others in the chain and close links to the original source. They all had the expectation of substantial financial or other advantage. The appellant used his gym and fitness supplement business as a cover and Durden opened a bitcoin business as a front for money laundering. Ward recruited others to sell on his behalf with 2

people supplying for him across the UK and 3 in the US. The appellant recruited co-defendants Pascal and Turner for the count 2 second conspiracy after the arrest of Ward.

21. Ward fell to be sentenced for counts 1 and 3, and also acquiring criminal property (count 4), further offences of offering to supply class B drugs (codeine phosphate and dihydrocodeine (counts 5 and 6), as well as a further class C drug (diazepam, count 7) and possession with intent to supply class C drugs diazepam (count 12).
22. In his sentencing remarks the judge noted that Ward had accepted his guilt in interview with the police and was the first in the conspiracy to enter a guilty plea at the plea and trial preparation hearing. The money laundering offence (count 3) involved £2,225,000 bitcoin and assets in his case. He supplied internationally and recruited resellers in the UK and the US and was involved in the production and packaging at the premises in Havant, purchasing materials and dealing in both class C and B drugs. The judge looked at the offending in the round and considered totality. He considered it would be justifiable to move outside the top of the range (8 years) for the class C offences. The class B selling would have a starting point of eight years on its own. However, he took the view that including a reduction of 25% for the plea with a significant reduction for good character, his admissions and his references, that concurrent sentences of 5 years in custody would be the lowest sentence commensurate with the seriousness of the offences in counts 1, 3, 4, 5 and 6. He imposed concurrent sentences of 3 ½ years on count 7 and 2 ½ years on count 12.
23. For Durden the judge noted that he continued in the conspiracy after the arrest of Ward and his involvement spanned the entirety of the period up until October 2017. He found that although he had been the first to join the appellant in the conspiracy and was a persistent member of the OCG, his role was not as pronounced as that of the appellant. There were no relevant aggravating previous convictions. Another distinguishing feature between the appellant and Durden was that he had assisted the police in the early recovery of substantial proceeds and, but for that, the judge indicated that Durden would be receiving a sentence more akin to that of the appellant. He stated that the sentence would have been eight years after trial with a 20% reduction for his guilty plea and imposed sentences of six years and five months concurrently on counts 1, 2 and 3.
24. For the appellant the judge considered his case was very different. The offence was spawned out of the fact that he had been arrested and bailed for class C drug production, sale and distribution and had recently served a sentence for very similar behaviour in the steroid conspiracy. He had continued with the alprazolam conspiracy in count 1 whilst on bail for the steroid conspiracy. A further aggravating factor was his persistence in the enterprise after the arrest of Ward. He co-opted others and arranged for the destruction of the Gravesend laboratory and the clean up operation in an attempt to stop the police from investigating and to avoid detection. He first took the pill press to his gym in Bedford, then moved it to Tiverton where he set Turner up to continue production. Unlike Ward, he had provided no assistance in the recovery of the money. The judge concluded that because of the severe aggravating features of the appellant's previous convictions, being on bail, the attempts to conceal and put off the police, the starting point for the sentence had to be in excess of eight years and that consecutive sentences should be imposed on counts one and two properly to represent the offending behaviour.

25. He reminded himself that the sentence should not be disproportionate, as the principle of totality applied, and the appellant had recently served a custodial sentence for similar offending. He was also mindful that if the appellant had been sentenced for these matters at the same time as he had been sentenced for the steroid conspiracy in 2018, his sentence would have been proportionately reduced. He therefore strove to keep the overall sentence proportionate and not excessive. He concluded that after a trial, the sentence would have been 11 ½ years.
26. The appellant's guilty plea had come late in the day – 4 months after the case had first been listed for trial and only shortly before the date fixed for the adjourned hearing. The appellant was entitled to 10% deduction for his guilty pleas. The judge passed a sentence of five years on count one, a consecutive sentence of 4 ½ years on count 2, and a concurrent sentence of five years on count 3 (from a starting point of seven years).

The appeal

27. In very clear and helpful written and oral submissions Ms Dashani distilled the argument on behalf of the appellant to two grounds: disparity between the appellant and Ward and Durden, and totality. She accepted that the judge was entitled to place the appellant in category 1 harm and leading role culpability. She submitted that treating the commission of these offences whilst on bail for the steroid conspiracy and the steroid conspiracy convictions as separate aggravating features amounted to double counting as they were part of the same offending. In any event they did not justify the disparity between the appellant's overall sentence and those of the other leading co-conspirators and failed to reflect the appropriate application of the totality guidelines.
28. She submitted that Durden, like the appellant, fell to be sentenced for counts 1, 2 and 3 and there was little to distinguish between their roles, yet even after factoring in the different percentage reduction for the earlier guilty plea, his overall sentence was only half that of the appellant.
29. Unlike the appellant, Ward also fell to be sentenced for offering and supplying other class C as well as two category B drugs, although he ceased involvement in production and supply of alprazolam after he was arrested and therefore was not charged under count 2.
30. There was also disparity in treatment of mitigation with considerable credit being given to Ward and Durden for their personal mitigation whilst no mention was made of the impressive references submitted on behalf of the appellant describing his good work in the community and role as a father with five children.
31. For the respondent, Mr Ojakovoh submitted that the sentence was not manifestly excessive and neither ground relied on by the appellant withstood close scrutiny by reference to all the facts and circumstances of the case. Although all three of the defendants sentenced on 31 March 2023 had a leading role in the conspiracy, their roles and level of culpability were different. The aggravating and mitigating features were also different which fully justified the extent of the differences between their final sentences and there had been no double counting. The totality principles had

been appropriately applied – both in relation to the offences to be sentenced that day - and bearing in mind the sentences for the steroid conspiracy.

Analysis and conclusions

32. The sentencing exercise was conducted by the judge who had carefully case managed the case for two years in anticipation of a contested trial. He sentenced the three co-defendants after a four-day Newton and sentencing hearing. He was well acquainted with all the evidence.
33. We focus on the guidelines applicable to counts 1 and 2. They are the lead offences and there is no complaint about the concurrent sentence on count 3.
34. The appellant played a category 1 leading role in counts 1 and 2, each of which has a starting point of 5 years and a category range of 4 to 8 years. It was open to the judge to take one of the offences as a lead offence and increase the sentence on that count to reflect the fact that there were two substantial conspiracies or to impose consecutive sentences on counts 1 and 2. He was required to impose a sentence which reflected the whole of the criminality and was just and proportionate, whichever way it was structured.
35. The very large quantity of drugs involved was a seriously aggravating factor. In addition, the appellant's role displayed five of the six characteristics outlined within the leading role criteria under the guidelines: he directed and organised buying and selling of drugs on a commercial scale, had expectation of substantial financial advantage, had substantial influence on others in the chain of supply, had close links to the original source of manufacturing of the drugs and used his business as a cover for his illegal activities.
36. As well as his previous convictions, there were further significant additional aggravating features namely the appellant being on bail for similar offending at the time of his involvement in these conspiracies, his recruitment of others into the second conspiracy and his concerted attempt to conceal evidence of the first conspiracy by closing down and cleaning the laboratory in Gravesend to avoid its detection following the arrest of Ward. All of these features required a very significant movement upwards and beyond the category range.
37. The mitigation available to the appellant was modest, arising from his domestic circumstances and the other matters raised on his behalf before the sentencing judge.
38. The judge reached a total sentence before reduction for the guilty plea of 11 years and six months. The reduction of 10% for the guilty pleas was generous, given the very late stage at which the appellant pleaded guilty. The resulting sentences were at or slightly below the starting point for a single offence. Notwithstanding Ms Dashani's elegant submissions, we are satisfied that the judge carefully considered the question of totality, as his sentencing remarks demonstrate and in imposing a sentence of 9 years and 6 months he took appropriate account of the sentence already served.
39. We reject the disparity argument. There were significant areas of difference between the appellant and his co-defendants as we have set out in detail above, in particular with regard to role, criminal record and mitigation. In our view the judge was entitled

to conclude that the appellant's role was the most senior in this organised crime group. He was the prime mover and driving force behind the operation. It might be thought that the other two were fortunate in their sentences but that is not the issue. The sentence imposed upon the appellant reflected the whole of the criminality. It was neither unjust nor disproportionate. It was not manifestly excessive. The appeal is dismissed.