IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202300786/A5

[2023] EWCA Crim 966

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 12 July 2023

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE TURNER

SIR ROBIN SPENCER

REX

V

KIERON MARK WEBSTER

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MR S KHAN appeared on behalf of the Applicant.

J U D G M E N T

1. MR JUSTICE SPENCER: This is a renewed application for leave to appeal against sentence following refusal by the single judge.
2. On 13 February 2023, in the Crown Court at Preston, the applicant (now aged 35) was sentenced by HHJ Archer to a total of 17 years and 1 month imprisonment for offences of conspiracy to supply controlled drugs of Class A, cocaine (count 18) and Class B, cannabis (count 19). That was the sentence for the Class A conspiracy; for the Class B conspiracy the sentence was 22 months concurrent. The applicant had pleaded guilty to those counts some 10 months earlier on 12 April 2022. His guilty pleas came only on the second day of his trial. The delay in sentencing him was unfortunate and Mr Khan has explained why that was.
3. The grounds of appeal, in short, are first, that there was an unfair disparity between the length of the applicant's sentence and the sentences passed on two other co-defendants. Second, that the judge wrongly assessed the quantity of cocaine involved in the applicant's conspiracy, and consequently started too high under the Sentencing Council guideline. Third, that the judge gave insufficient credit of only 5 per cent for the late guilty pleas. We are grateful to Mr Khan for his written and oral submissions.
4. There were originally 12 defendants charged in the indictment. The disparity argument is based on the sentences for two of those co-defendants, Neil Arkwright and Philip Jenkinson. We shall explain and address the disparity argument in due course, but first, it is necessary to summarise briefly the relevant factual background in relation to the roles of the applicant and those two co-defendants.
5. The indictment alleged interlinked conspiracies involving the purchase and onward

supply of large quantities of cocaine and cannabis by criminals based in Lancashire in 2020. The global conspiracy was encapsulated in counts 1 and 2, which reflected the purchase and supply of at least 10 kilos of cocaine and 18 kilos of cannabis over the indictment period. Arkwright and Jenkinson pleaded guilty to those two counts.

6. The counts to which the applicant pleaded guilty (counts 18 and 19) were effectively sub-conspiracies to supply cocaine and cannabis. The applicant was a wholesale customer of Arkwright and Jenkinson. He purchased the drugs from them on credit. At one stage he owed them £56,000. Like Arkwright and Jenkinson, the applicant used encrypted EncroChat devices to conduct his criminal activity.

7. Most of the cocaine was sourced by Arkwright and Jenkinson from suppliers in Manchester and it was then mixed with adulterants.

8. The overarching conspiracy was charged as taking place between January and June 2020. The applicant's initial involvement in the conspiracy began whilst he was still in prison serving a lengthy sentence for conspiracy to supply cocaine, heroin and cannabis. In 2014, he had been sentenced for those offences to 80 months' imprisonment. On his release in 2017 he breached the terms of his licence and was recalled to prison. He was eventually released on 17 April 2020, after serving the balance of that sentence, or part of it, and released again on licence.

9. There was evidence that before his release he had already arranged for another defendant, Maurice Bragg, to work for him. Bragg was the applicant's cousin and substantially older. As of 11 March 2020, 5 weeks before his release, the applicant already had an extensive customer base on the outside. By then, he and Bragg already owed Arkwright and Jenkinson nearly £47,000 for cocaine. It was through Bragg that Arkwright purchased an EncroChat phone for the applicant, charging the applicant £1,400 for the

device. The applicant was given the phone on the very day he was released from prison.

10. Until then the activity in the sub-conspiracy was being conducted through Bragg. On his release from prison the applicant took more direct control of the operation. He began to call in debts. Initially the applicant was living in a hostel in Blackburn and subject to a curfew as a condition of his licence. He acquired a vehicle. He was communicating regularly with Arkwright, Jenkinson, Bragg and others using his EncroChat phone. The applicant would give Bragg instructions on how to split and distribute the wholesale quantities of cocaine which were being purchased, usually 9 ounces at a time (255 grams). In the 2 months following his release from custody, the applicant purchased over 3 kilos of cocaine with the assistance of Bragg. By June, they were also purchasing cannabis. On 5 June 2020, a kilo of cannabis was collected from a co-defendant (Boult) for some £5,500.
11. The prosecution calculated that the minimum total value of cocaine purchased by the applicant was £203,000. The evidence for this came from the EncroChat messages which recorded the running totals of money owed for the cocaine the applicant had received. On this basis it was calculated that he received approximately 5 kilos of cocaine in total. It was a mixture of high purity cocaine referred to as “tops”, valued at £5,800 per 125 grams and lower purity “squash”, valued at £4,000 per 125 grams. Thus, the price of a kilogram of cocaine equated on average to some £40,000. We should add that those valuations were based on what the police had deduced to be the sort of quantities in which the applicant himself was dealing.
12. Eventually a warrant was executed at the applicant's home address on 4 October 2021. He was not present but was subsequently stopped in his vehicle on the A6 in the Morecambe area. He was in possession £405 in cash. A Rolex watch was found at his

home. He gave a “no comment” police interview.

13. The evidence showed that between April and June 2020, Arkwright and Jenkinson were responsible for the purchase of at least 10 kilos of cocaine of import purity and 18 kilos of cannabis. This coincided with the first lockdown arising from the Covid pandemic. They had difficulty in securing people to transport the drugs. Jenkins then travelled himself to Manchester in April 2020, collected £41,000 in cash and obtained a kilo of cocaine which he transported back to Morecambe. Two days later Jenkinson collected two separate kilogram consignments of cocaine from different suppliers and brought them back to Morecambe. A week later Jenkinson met an associate in Morecambe and paid £40,000 for another 2 kilos of cocaine.
14. Arkwright and Jenkinson were both arrested on 27 September 2021.
15. The applicant had previous convictions spanning the period 2005 to 2014, mainly for comparatively low-level violence and repeat motoring offences. The sentence of 80 months for conspiracy to supply cocaine and heroin in 2014 was imposed following guilty pleas.
16. There was no pre-sentence report on the applicant, nor was any such report necessary in the circumstances; a very lengthy custodial sentence was inevitable. There were character references from the applicant's partner and others whom he had known for a long time.
17. Arkwright was aged 39 at the date of sentence. He had convictions in 2001 and 2002 which included supplying a Class A drug, ecstasy, for which he had received a community punishment order. He had not previously served a custodial sentence.
18. Jenkinson was aged 37 at the date of sentence. He had a single previous conviction for possession of a Class A drug in 2003, for which he had received a community

rehabilitation order.

19. It can therefore be seen immediately that there was a vast difference between these two defendants and the applicant, in terms of their criminal records and previous involvement in the supply of Class A drugs.

20. Jenkinson was sentenced by the same judge (Judge Archer) on 6 September 2022 along with another co-defendant. We have the judge's sentencing remarks. They were the first of any of the defendants to be sentenced. The judge allowed Jenkinson full credit of one-third for his early guilty pleas. The judge was satisfied that Jenkinson played a leading role in the conspiracy. The quantity with which he had been involved was at least 10 kilos of cocaine. The judge concluded that, after a trial, the sentence would have been 18 years. With full credit for his guilty pleas Jenkinson's sentence was 12 years.

21. Arkwright was sentenced by Judge Archer on the same day as the applicant but earlier in the day and with a group of other defendants. Again, we have the judge's sentencing remarks. Arkwright too was afforded full credit of one-third for his guilty pleas. There was some strong personal mitigation in his case. The judge concluded that after trial his sentence would have been 16 years' imprisonment. With full credit for his guilty pleas, his sentence was 10 years 8 months.

22. It was later the same day that the judge passed sentence on the applicant and Maurice Bragg. The judge said he was sentencing them together because they had been tried together, both eventually pleading guilty during the trial. It had been necessary for them to work together in this drug dealing because the applicant was in prison until his release part way through the conspiracy. The judge regarded the applicant's earlier sentence of 80 months' imprisonment for conspiracy to supply Class A drugs as being of particular significance. The judge said it was staggering that in the context of that sentence, and

having been recalled from licence in 2017, the applicant was organising the supply of drugs from his prison cell. Prior to the applicant's release from prison Bragg was being paid around £300 to £500 a week to transport significant quantities of Class A drugs and to collect large amounts of cash.

23. The judge concluded that the applicant undoubtedly played a leading role in the sub-conspiracies in counts 18 and 19. He was satisfied that the applicant was directing and organising the buying and selling of drugs on a commercial scale with an expectation of substantial financial advantage. The applicant was responsible for at least 5 kilos of cocaine and was involved in a significant cannabis operation. The offending was substantially aggravated by the fact that it began whilst he was serving a sentence for similar very serious offending and by the use of EncroChat phones. The range under the guideline was 12 to 16 years' custody but in the circumstances it was appropriate to move outside that range. Had he been convicted after trial the sentence would have been 18 years' imprisonment. His guilty pleas had come at a very late stage indeed, on the second day of the trial. There could only be minimal credit of 5 percent, reducing the sentence to 17 years and 1 month. The sentence for the cannabis conspiracy would have been 2 years after trial but was reduced to 22 months concurrent after credit for plea.

24. Mr Khan's first ground of appeal, which he developed attractively before us this morning, is disparity. He submits that the judge was wrong to take the same starting point of 18 years for the applicant as he did for the principal defendants, Arkwright and Jenkinson. In fact, as we have already indicated, the starting point for Jenkinson was 16 years not 18 years. Mr Khan points out that Arkwright and Jenkinson were the principal defendants at the head of the conspiracies selling the applicant drugs. Their involvement was over a longer period. They were involved in supplying 10 kilos of cocaine as against 5 kilos for

the applicant.

25. The second ground of appeal, developed by Mr Khanin response to questions from the Court this morning, is that the judge used the prosecution's allegedly flawed methodology to arrive at a figure of 5 kilos of cocaine for the applicant's involvement, whereas the prosecution's own evidence, it is said, showed involvement with less than 4 kilos. In his written submissions Mr Khan accepted that this was nevertheless a category 1 case under the guideline, for which the starting point is 14 years based on an indicative quantity of 5 kilos. Mr Khan repeated that concession in his oral submissions this morning. However, it is said that the judge failed to make a reduction from the starting point of 14 years to reflect what is said to be the lesser quantity.

26. In his written submissions Mr Khan asserted that the prosecution's methodology was flawed, in that the applicant did not buy the cocaine in kilogram quantities (which the prosecution's calculation assumed); he bought it in smaller quantities which meant he paid more. Mr Khan complains that the judge refused to entertain this submission unless and until the applicant provided a basis of plea so that it could be tested in a Newton hearing. The applicant declined to do so.

27. The third ground of appeal is that the credit for plea should have been 10 percent rather than 5 percent. Mr Khan points out that although the guilty pleas were entered only on the second day of trial, no jury had been sworn and the case had not been opened. There had been a problem with the first jury the day before and that jury had been discharged. It was on the second day, when another jury was about to be sworn, that the pleas were entered. Mr Khan submits that, in these circumstances, the appropriate reduction, applying the relevant guideline, was 10 percent.

28. We have considered all these submissions carefully but we are quite unable to accept

them.

29. Disparity of sentence is always a difficult ground of appeal to advance. There has to be an unfair and inexplicable disparity, such as would lead any right-thinking member of the public, knowing all the facts, to consider that something must have gone wrong in the sentencing process. Here, in complete contrast to that proposition, there are entirely understandable and proper reasons for taking the same starting point of 18 years for the applicant as for Arkwright and notionally for Jenkinson.

30. First, it was a grossly aggravating feature that the applicant began his involvement in the conspiracy whilst he was still serving a sentence of imprisonment, involving his own cousin in doing the work he could not do himself, physically, until his release. Second and separately, the nature and seriousness of the applicant's previous conviction for conspiracy to supply cocaine, heroin and cannabis was itself a gravely aggravating factor. This was in marked contrast to Arkwright and Jenkinson, neither of whom had previously been involved in such serious offending or had even been to prison before. Third, the precise quantity of cocaine involved could never be established with certainty. As the authorities make clear, the fact that the offending is charged as conspiracy rather than a substantive offence of supply makes the offending more serious in itself. Fourth, although the applicant's offending seemed to have commenced in March 2020, whereas the offending of Arkwright and Jenkinson seems to have begun earlier, the intensity of the applicant's activity, before and after his release from prison, renders that distinction insignificant.

31. As for the complaint that the judge wrongly found the applicant to have been involved in 5 kilos of cocaine, like the single judge, we regard the distinction between 5 and 4 kilos as insignificant in the context of a conspiracy where precision is impossible.

32. In the 2 months following his release from prison, the applicant purchased over 3 kilos of cocaine with the assistance of Bragg. There was also plainly a significant quantity of cocaine purchased and supplied on the applicant's instructions before his release from prison. The figure of 5 kilos in total was probably conservative if anything. As the single judge pointed out in refusing leaving, if the applicant wanted to demonstrate that the total quantity he had been involved with was substantially lower than the prosecution alleged, he should have put that forward in a written basis of plea, as the judge invited him to do, so that the matter could be tested at a Newton hearing. He declined to do so. Up to the moment of his very late guilty pleas the applicant was still denying the attribution to him of the EncroChat phone.

33. Quite apart from cocaine there was the cannabis conspiracy. On 5 June,as as we have indicated, a kilo of cannabis was collected from a co-defendant on behalf of this applicant for which £5,500 was paid. The judge made the sentence for the cannabis conspiracy concurrent but he made it clear that the total sentence was intended to reflect the criminality of both conspiracies.

34. Under the Sentencing Council guideline, as a category 1A offence, this conspiracy to supply cocaine fell within the range of 12 to 16 years. For the reasons the judge gave, he was fully entitled to start above that range.

35. As to the ground of appeal based on discount for plea, it is said that it should have been greater than 5 percent. We disagree. It is clear that at an early stage in the proceedings the judge had given all defendants every opportunity to obtain greater credit by entering realistic guilty pleas sooner rather than later. The applicant spurned that opportunity, as the judge observed in dealing with this aspect in his sentencing remarks.

36. The Sentencing Council guideline provides that a maximum of 10 per cent credit should

be allowed for a plea on the first day of the trial and that the reduction should normally be decreased further, even to zero, if the guilty plea is entered during the trial. In the event, the judge allowed 5 per cent, equating to a reduction 11 months. The applicant did not plead guilty on the first day of the trial. On the first day the jury had been selected and the trial would have gone ahead that day but for a jury problem which required a fresh start next day with a new jury. Only then were the guilty pleas entered. The judge was fully entitled to reduce credit by only 5 per cent in those circumstances.

37. For all these reasons, and despite Mr Khan's valiant efforts, we are quite satisfied that it is not arguable that the sentence the judge imposed was in any way excessive or in any way wrong in principle. The judge's reasoning and conclusions cannot be faulted. This sentence was unarguably just and proportionate. The renewed application for leave is therefore refused.

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