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IN THE COURT OF APPEAL
CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT WARWICK
MR RECORDER BUTTERWORTH T20227079
[2024] EWCA Crim 1505
CASE NO: 2023 02101/03030/03046 B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 3 October 2024

Before:
LADY JUSTICE WHIPPLE
MRS JUSTICE MCGOWAN
HER HONOUR JUDGE ANGELA MORRIS

REX
v
MIRGENT SHAHU
FLORJAN IBRA
ARMAN KAVIANI

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NON-COUNSEL APPLICATION Shahu
MR BEN DOUGLAS-JONES KC appeared on behalf of the Applicant Ibra
MR SEAN KIVDEH appeared on behalf of the Applicant Kaviani
MR TOM WALKLING (CPS Serious Economic Organised Crime and International Directorate)
appeared on behalf of the Crown

J U D G M E N T

LADY JUSTICE WHIPPLE:

Introduction

1. On 8 July 2022 Florjan Ibra pleaded guilty to count 1, which was for conspiracy to import Class A drugs, namely cocaine. On 4 August 2023 he was sentenced to 13 years and 6 months' imprisonment. He now seeks to renew his application for leave to appeal against sentence following the refusal by the Single Judge. We grant leave for that application to be made.
2. On 21 November 2022, Arman Kaviani pleaded guilty to count 1, which was conspiracy to import Class A drugs, namely cocaine, and to count 2, which was for possession with intent to supply a Class A drug, namely crystal methyl amphetamine ('crystal meth'). On 4 August 2023 he was sentenced to 12 years and 9 months' imprisonment on count 1, with a term of 5 years and 3 months' imprisonment on count 2, to be served concurrently. The Single Judge referred his application for leave to the Full Court. She did so on the basis that his application, so it appeared, had been filed out of time. However, on investigation the Criminal Appeal Office has established that the application was made in time and no extension is required. In the circumstances we grant leave for Mr Kaviani to appeal his sentence.
3. On 26 May 2023 Mirgent Shahu was convicted on count 1. On 1 November 2023 he was sentenced to 18 years' imprisonment. He now renews his application for leave to appeal against conviction, that application having been refused by the Single Judge.
4. The co-accused was Robert Ball. He was convicted on count 1 on 26 May 2023 and was sentenced on 1 November 2023 to 18 years' imprisonment. He has not sought leave to appeal.
5. These proceedings were heard at Warwick Crown Court. The trial and sentencing judge was Mr Recorder Butterworth. It will be apparent that although these four accused were sentenced for their involvement in the same conspiracy, the sentencing was split across two hearings, with Ibra and Kaviani both being sentenced on 4 August 2023 and Shahu and Ball being sentenced on 1 November 2023. Counsel have sought to explain the reasons for the

split sentencing; it is not necessary to recite those reasons here. The subtext of the sentencing appeals brought by Ibra and Kaviani is that the Recorder lost sight of the roles played by these four and imposed sentences on these two which were manifestly excessive or wrong in principle (given the disparity with Shahu and Ball).

The Facts

6. In April 2022 a refrigerated shipping container full of bananas arrived in London from Ecuador. Hidden in the roof of that shipping container was 139 kgs of cocaine. The container number ended in '3469'.
7. On 4th April 2022 that container was scanned at London Gateway. The drugs were found hidden in a concealed space in the container roof. Each of the 139 wrapped packages bore a label reading '222'. Each package contained 1 kg of cocaine. An NCA drug expert said that in his opinion, valued wholesale, that cocaine was worth £3,892,000; if the cocaine had been split into smaller deals and sold on the streets to drug users at 139 individual 1-gram deals, then the street value was £11,120,000. The drugs were removed by NCA officers and replaced with identical-looking dummy packages and the container was repaired to make it appear that nothing was amiss.
8. Once resecured, the bananas in the container were delivered to a legitimate customer and on 8 April 2022 the container was returned to the London Gateway. The legitimate cargo had been removed but the dummy packages of drugs were still hidden in the roof.
9. On 11 April 2022 the first defendant (Ball) got in contact with the shipping company. Ball was the owner of a haulage company called Total Logistics UK. He asked the shipping company for four specific refrigerated containers, giving their individual numbers, including the one ending 3469. Ball told the shipping company that he was working for a client who had left perishable goods inside the containers by mistake. Ball then arranged for the containers to be picked up and delivered to somewhere near Tilbury in Essex. He later changed the delivery address to an address near Coventry which belonged to a company called HD Storage Solutions. The four refrigerated containers were taken to HD Storage

Solutions, as Ball had arranged; two arrived on Thursday 14 April 2022 and the others arrived the next morning, 15 April 2022.

10. On the morning of 15 April, Ball met with two other men at Costa Coffee in Kings Heath, Birmingham. One of those men was Shahu. After the meeting, Ball and Shahu travelled to HD Storage Solutions in Ball's car. The appellants (Ibra and Kaviani) also travelled to HD Storage at that time. NCA surveillance officers saw Ibra and Kaviani go on to the roof of the container with the number ending 3469, force open the top with a crowbar and extract the dummy packages. Ball and Shahu stayed on the ground. The four of them were arrested and their telephones seized. NCA officers examined their telephones and extracted relevant information. The three applicants gave 'no comment' interviews, but Shahu and Kaviani handed in prepared statements.

The Prosecution Case

11. The prosecution case in respect of Shahu was that he was a trusted leader of the conspiracy. The prosecution relied primarily on telephone contact and messages between conspirators but also automatic numberplate recognition, CCTV and observations.
12. Shahu liaised between Ball's contact, who was known as 'Asti' or 'A', and the Albanian conspirators. He was present at several meetings between Ball and Asti, and responsible for taking Asti to and from those meetings.
13. On the evening of 14 April 2022, Shahu drove up and down the M6 and M1 motorways looking to intercept the container on its way to the Coventry yard.
14. In the early hours of 15 April 2022, Shahu took Asti from Birmingham to Ball's home in Cheshire to ensure that Ball was not renegeing on the deal he had made with the Albanian conspirators. Later that day, Shahu was trusted to oversee removal of the drugs at the yard in Coventry on behalf of the Albanians. It was clear from the CCTV that Shahu was organising and directing the other Albanians in the removal of the drugs. By his own admission at trial, he was involved in the conspiracy for around two weeks prior to NCA enforcement on 15 April 2022. He was expecting substantial financial reward.

15. The prosecution case in respect of Ibra was that on 5 April 2002 Ibra sent a contact several photos of a block of apparent cocaine. This was not the same as the blocks recovered from the container roof but the photographs evidenced Ibra's involvement in the supply of cocaine at a high level. Analysis of Ibra's phone showed that on 9 April 2022 he took a screenshot of an itinerary showing the passage of the drugs container from South America to London Gateway. He also used his phone to make searches for the consignee of the bananas and for London Gateway.
16. On 13 April 2022 Ibra made contact with Kaviani.
17. On 14 April 2022 Ibra received a video on his phone through an encrypted messaging service. The video showed the metal skin on the roof of a container being levered open with a crowbar to reveal the foam insulation underneath. A partial container number is visible showing 3469. Ibra also used his phone that day to screenshot part of an email sent by Ball to the shipping company quoting "My client GIMA UK Ltd". Later that day Ibra drove to the premises of GIMA UK Ltd in Barking and took photos nearby. The prosecution said that the internet searches and the investigation of GIMA UK showed that Ibra was checking Ball's cover story on behalf of the Albanian conspirators.
18. On the evening of 14 April 2022 Ibra was driven by Kaviani to the Coventry area via the M1 and M6 motorways. That evening a screenshot on his phone records the address of HD Storage Solutions, Coventry.
19. On the morning of 15 April 2022 Ibra contacted Kaviani in order to be driven to the yard at Coventry. Later that morning, Ibra received on his phone two photos of the address of HD Storage, one written by Ball on a napkin, both taken from Shahu's phone. He used his phone to take photos of his journey to Coventry, no doubt to keep others abreast of his arrival time. Once at HD Storage, Ibra photographed the drugs container and was the first man on to the roof of the container. He began the task of removing what he believed to be cocaine from the concealed roof space.
20. The prosecution case in respect of Kaviani was, in relation to count 1, that on 13 April 2022

he took out temporary insurance on a Toyota Prius which he used to drive Ibra up and down the M1 and the M6 on the evening of 14 April 2022. This was an attempt to intercept the container before it reached the yard and to check on the location that Ball had selected to receive the container.

21. On the morning of 15 April 2022 Kaviani drove Ibra to HD Storage in Coventry. Once at the yard Kaviani followed Ibra on to the container and assisted him in removing the packages from the roof space.
22. The prosecution case in relation to count 2 was that on the evening of 15 April 2021 officers searched Kaviani's home address. They seized a small suitcase from under the bed that held several bags of crystal meth. The total weight was 4.88 kgs. It had a wholesale value of £90,000 and a street value of £500,000.
23. Kaviani's basis of plea was accepted by the prosecution. In it he said, in respect of count 1, the following:
 - (a) He did not know that the drugs were to be imported and he played no part in the arrangements for the importation. He became involved right at the end and after the drugs were already imported.
 - (b) His first involvement was on 14 April 2022 when he climbed up the trailer container to help with removing the drugs.
 - (c) He was recruited by others and acted on the periphery of the offence by driving another co-defendant to Warwick from London and by climbing to the top of the trailer when directed by others. He was effectively used as a spare hand. As such, he performed a limited function under directions.
 - (d) He did not stand to receive any significant financial gain from his involvement in the offence in count 1.
 - (e) Due to his addiction to drugs he had incurred a debt with the same people who were acting as controllers of more senior people involved in drugs.
 - (f) In order to settle this debt and to receive some drugs for his personal use, he was ordered and pressurised and threatened to assist the controllers.
 - (g) He was placed under pressure and threatened by the controllers. On one occasion he was beaten up by them.
 - (h) He had no management or operational authority and never involved or recruited

anyone else. He had no influence on those above him.

(i) He had no awareness of the amount of drugs involved.

24. In respect of the second count concerning the crystal meth found at his flat, he said:

(a) He was a custodian of the drugs, and although he was generally made aware of them, the drugs did not belong to him.

(b) The drugs were concealed in the flat by the same controllers as count 1, who had the keys to his flat.

(c) He did not stand to gain financially from allowing his flat to be used for holding the drugs except, as stated above, to reduce a drug debt.

(d) He never touched or even saw these drugs.

The Defence Case for Shahu

25. Shahu's case was that he had participated in the arrangement for locating the shipment in the belief that it contained illegally imported cigarettes. This was what he was told and he was unaware that the conspiracy was to import Class A drugs. He would not have involved himself had he known the true purpose of the scheme. This was the account in his prepared statement at interview and this was his evidence at trial. He was cross-examined as to lies in his prepared statement, and he explained that errors had occurred due to misunderstandings between him and his solicitor. He is Albanian and did not have an interpreter present at the police station.

Shahu's Application

26. Before us, Shahu renews his application for leave to appeal against conviction. It is convenient to deal with that application now. In Grounds of Appeal dated 25 August 2023 drafted by counsel, he contends that there was prejudiced in the course of the trial such that the conviction is rendered unsafe. In particular it is said:

(1) That the Recorder, in summing up the evidence, made comments he should not have made and failed to remain impartial when reviewing the evidence and issues.

(2) In particular, in his concluding remarks to the jury, the Recorder gave the firm impression that he considered the applicant to be guilty and that their focus should be on the viability of the defence of Ball as co-defendant.

(3) The prejudice caused was such as to render the conviction unsafe.

27. The Single Judge considered these points carefully and gave extensive reasons for refusing the application for leave to appeal against conviction. Mr Shahu has seen those reasons and it is not necessary to recite them here. We agree with those reasons. In any event the evidence against Shahu was very strong indeed and his conviction is unsurprising. Shahu's conviction is not unsafe, even arguably. We refuse Shahu's application.

Sentencing of Ibra and Kaviani

28. At the sentencing hearing on 4 August 2023, the Recorder first considered Ibra's case. The Recorder agreed with the prosecution that Ibra's role in the conspiracy was *significant*. The judge had presided over the trial. He concluded that Ibra's role began at the very start of the conspiracy by the sending of images of what must have been cocaine to someone unknown. Ibra had received film footage of the very container that was to arrive in the UK with these drugs in the roof space. He had repeated contact with Kaviani. It was his view that Ibra had an operational function in the chain with a complete understanding of the scale of the conspiracy. The Recorder allowed him credit for his guilty plea of 25 per cent. Ibra was 30 years old. He had family debts and illness in the family. He had a supportive wife and hopes for the future. He had a relevant previous conviction of acquiring criminal property which was sufficiently serious to attract an immediate custodial sentence. The notional sentence after trial in his case was one of 18 years' imprisonment, which was reduced, to reflect his guilty plea, to 13 years and 6 months' imprisonment.

29. The Recorder then dealt with Kaviani. He noted, on the basis of Kaviani's plea, that Kaviani was only involved towards the very end of this conspiracy. He accepted the prosecution submission that Kaviani's role was lesser because he performed a limited function under direction. His actions included hiring a car and performing the role of a driver; and he had gone up on to the roof of the container. He had no influence on those above him in the chain. He had pleaded guilty to the conspiracy charge at a pre-trial review

hearing. He was 37 years old. The Recorder had read the pre-sentence report and the psychological report of Dr Conning dated 16 December 2022 and recognised from those materials that Kaviani had a pre-existing medical condition which might place him at a higher risk. He had read the letter from the supervising officer on the unit where he was being detained.

30. The Recorder also had to deal with Kaviani for possessing a Class A drug with intent to supply, to which he had pleaded guilty. This was the crystal meth the subject of count 2. The Recorder also put this in the lesser role category because Kaviani had been merely a custodian. The starting point for that offence was 7 years, in a range of 6 to 9 years. The Recorder had regard to totality because he was sentencing for two offences. He concluded that at the time of the offences such impairments or disorders as were demonstrated in the evidence did not reduce Kaviani's culpability. But the Recorder did take into account that Kaviani was suffering from depression, had health anxiety and was vulnerable due to his physical ill-health. He had successfully addressed his drugs dependency while in prison.
31. The Recorder rejected the defence submission that Kaviani was entitled to a 33 per cent reduction for his guilty plea and allowed 25 per cent credit for plea. He took count 1 as the lead offence, with a necessary upward adjustment to reflect count 2. His notional sentence on count 1, taken alone, was 13 years. He increased that to 17 years to take account of count 2. The total (albeit notional) sentence after trial would have been 17 years on count 1. After credit for plea, that sentence was reduced to 12 years and 9 months' imprisonment. On count 2, 63 months' imprisonment was imposed to run concurrently.

Kaviani's Appeal

32. It is convenient to deal with Kaviani's appeal first in order. By Grounds of Appeal drafted by Mr Sean Kivdeh dated 8 November 2023, Kaviani advances four grounds of appeal - in summary, these are:

- Ground 1 - the Recorder erred in exceeding category 1 in the guidelines for count 1.

- Ground 2 - the additional sentence on count 2 was wrong in principle and manifestly excessive.
- Ground 3 - the allowance of 25 per cent instead of full credit was wrong in the circumstances.
- Ground 4 - the Recorder made insufficient allowance for personal mitigation.

In oral submissions Mr Kivdeh abandoned Ground 2 but pressed his remaining three grounds.

33. Those grounds are resisted by the prosecution. The prosecution say that the sentence handed down reflected the enormous quantity of drugs involved in the conspiracy, noting that the guideline envisages sentences in excess of 20 years for this type of commercial importation depending on role. Mr Walkling for the prosecution has advanced those points today.
34. We address the sentence imposed on count 2 first of all. A concurrent sentence of 63 months was imposed on count 2. That accorded 25 per cent credit for plea, as the judge had allowed. Accordingly, the Recorder's notional sentence before credit for plea was 7 years. That is the starting point indicated in the guideline for category 1 of lesser role and is not surprising. One of the points made by Mr Kivdeh which we consider to have merit is that Kaviani should have got 33 per cent credit for his plea to count 2, which plea was entered on the same day and at the same time as the indictment was amended to include count 2 so that it was entered at the first available opportunity. In the circumstances we agree that one-third credit should have been given on count 2. Adopting the same starting point as did the Recorder, that would bring the sentence on count 2 down to 56 months (or 4 years and 8 months).
35. We turn to the sentence imposed on count 1. The Recorder was constrained, as he recognised, by the terms of Kaviani's basis of plea which the Crown had accepted. It was common ground that Kaviani's role was lesser. The starting point for count 1 was 7 years, assuming an indicative amount of 5 kgs of Class A drugs. The range was 6 to 9 years. The Recorder indicated a notional sentence after trial for count 1, if it had stood alone, of 13 years before he started to consider the aggravating effect of count 2 applied to that lead

sentence. We are perfectly satisfied that it was open to the Recorder to go outside the bracket for lesser role given that this was an operation on the most serious and commercial scale, an operation in which sentences of 20 years and above might have been appropriate depending on the offender's role. But we do not understand how the Recorder got to 13 years, which is above even the range for the next category up, namely significant role. In our judgment the uplift was excessive, and we accede to the Ground 1 challenge.

36. We therefore consider what the appropriate notional sentence would be for count 1, if it stood alone. The quantity of drugs involved was very substantial. Kaviani's role, although lesser, had involved some degree of pre-planning, in the form of hiring the car and driving Ibra around. The Recorder noted the available mitigation, as do we. Kaviani has a diagnosis of cerebral venous sinus thrombosis which requires treatment, and, as Dr Conning reports, there are aspects of vulnerability and mental health. He has done well in custody, for which he is to be commended. Taking all relevant materials into account, we arrive at a notional term of 10 years' imprisonment after trial if count 1 stood alone.
37. Count 1 does not stand alone. The sentence on count 1 must reflect the offending on count 2 also. We have already indicated that a sentence of 56 months' imprisonment would be appropriate on count 2 if it stood alone. In order to reflect the gravity of the offending on count 2 (this too was a sizeable amount of Class A drugs) we uplift the sentence on count 1 by a term of 3 years to reflect the count 2 offending before making any deduction for plea. The notional sentence after trial on count 1 is therefore 13 years' imprisonment.
38. The Recorder had discretion as to the credit for guilty plea. He rejected submissions that 33 per cent credit should be given. So far as concerns count 1, we conclude that his reasons are cogent and that his conclusion that a 25 per cent reduction should be made lay well within his discretion. The plea to count 1 was not entered or indicated at the magistrates but was entered later. The Recorder was not in error in allowing credit of 25 per cent. We reject Ground 3.
39. The consequence is that after credit for plea the sentence on count 1 becomes one of 117 months (or 9 years and 9 months).

40. In summary, we allow Kaviani's appeal. We quash the sentence of 12 years and 9 months on count 1 and substitute a sentence of 9 years and 9 months on count 1. We quash the sentence of 63 months on count 2 and substitute a sentence of 56 months on count 2, to be served concurrently.

Ibra's appeal

41. In Grounds of Appeal drafted by Mr Khadim Al'Hassan dated 29 August 2023 Ibra advances the following Grounds of Appeal:

- Ground 1 - the judge incorrectly categorised Ibra's offending and culpability within significant role when the applicant was being directed by others and the overarching activity was of others higher up the chain.
- Ground 2 - disparity. The judge failed to distinguish the elements of lesser role attributed to the applicant. Even if the judge was correct in placing the applicant slightly above Kaviani, the sentence disparity (being, according to the Recorder, 13 years for Kaviani and 18 years for Ibra) was far too great. That, coupled with it being the same as for Shahu and Ball prior to deduction for guilty plea, was a clear error.
- Ground 3 - the judge failed to take sufficient account of mitigating factors. Ibra's guilty plea was put forward at a very early stage; he had no previous convictions; he was involved in an isolated incident.

42. An Addendum to the Grounds of Appeal dated 20 November 2023 was submitted.

A Skeleton Argument dated 15 July 2024 from Mr Douglas-Jones KC, by that date freshly instructed by Mr Ibra, supported and expanded the original grounds.

43. The prosecution resists those Grounds of Appeal. The prosecution say the Recorder was justified in concluding that Ibra played a significant role. There was no significant disparity with Ball and Shahu, and even if there was, reduction in Ibra's sentence was unjustified. Further, the Recorder took account of all the mitigation. Mr Walking presses these points in oral argument.

44. By Ground 1 it is now argued that Ibra fell at the bottom end of significant role, bordering with lesser role. There were a number of factors which suggested lesser role and put him on the border, namely, that he had a limited function under supervision; he was involved

through exploitation; he had no influence on those higher in the chain; he had an expectation of limited, if any, financial or other advantage. This, so it was argued, was in contrast with Shahu and Ball who were at the top end of significant role, and with Kaviani who was squarely in lesser role.

45. We consider that the judge was entitled to conclude that Ibra occupied a significant role. We are not persuaded that there was any error in that part of the sentence and we have already set out the Recorder's remarks that led him to that conclusion.
46. We are, however, troubled by the Recorder's 18-year notional sentence after trial, which is substantially higher than the top of the category for significant role into which Ibra's offending fell, and exceeds by some margin the top end of the leading role category which sits above it. The Recorder did not explain how he got there. To go as high as 18 years in Ibra's case was, in our judgment, excessive. That said, a significant uplift was inevitable given that Ibra was a trusted operative with an important role in the context of a conspiracy involving enormous quantities of drugs. It was appropriate to uplift the sentence to the category above. There was, in truth, scant mitigation apart from Ibra's credit for plea. His lack of previous convictions and the fact that this was an isolated incident amount to a lack of aggravation rather than positive mitigation on his behalf. His family and health circumstances carried little weight although we have given them such weight as we can. On the basis of all information before us, we conclude that 16 years was the appropriate notional sentence after trial. We discount that by 25 per cent to reflect credit for plea and thus arrive at 12 years.
47. The focus of Mr Douglas-Jones's submissions before us had been on the asserted disparity with Shahu and Ball (looking upwards in the chain) and with Kaviani (looking downwards). We are not persuaded that this appeal should be allowed on grounds of disparity. This court lacks the full oversight of the positions of Shahu and Ball which would enable us to reach a clear conclusion on disparity with those co-defendants. As to Kaviani, it seems to us that he had a very different and substantially less important role than did Ibra, and so for count 1 taken alone there should be a notable gap between the sentences imposed on them.

48. However, for different reasons, which we have endeavoured to explain, we do allow Ibra's appeal on the basis that the sentence originally imposed was manifestly excessive.
49. We quash the sentence of 13 years and 6 months and substitute in its place a sentence of 12 years' imprisonment.
50. We thank counsel for the substantial assistance they have given us.

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

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