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Neutral Citation Number: [2024] EWCA

IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Case No: 2024/00104/A1



Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Friday 14<sup>th</sup> June 2024

**B e f o r e:**

**LORD JUSTICE WARBY**

**MRS JUSTICE STACEY DBE**

**HIS HONOUR JUDGE JOHN LODGE**  
**(Sitting as a Judge of the Court of Appeal Criminal Division)**

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**R E X**

**- v -**

**DAMILOLA OGUNDEYIN**

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**Mr Y Chandarana** appeared on behalf of the Applicant

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**J U D G M E N T**

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Friday 14<sup>th</sup> June 2024

**LORD JUSTICE WARBY:** I shall ask Mrs Justice Stacey to give the judgment of the court.

**MRS JUSTICE STACEY:**

1. The applicant, Damilola Ogundeyin renews his application for leave to appeal against sentence following refusal by the single judge. He also requires an extension of time for leave to appeal against sentence of four days.

2. On 7<sup>th</sup> December 2023, in the Crown Court at Croydon, the applicant (then aged 40) was sentenced by Her Honour Judge Lowe KC to nine years' imprisonment for supplying a controlled drug of Class A (cocaine) to another, contrary to section 4(3)(a) of the Misuse of Drugs Act 1971 (count 1). He had been convicted by a jury on 18<sup>th</sup> July 2023 but acquitted of one count of possessing criminal property (count 2) and of one count of possession of a controlled drug of Class A (count 4). A further count of possessing criminal property (count 3) was ordered to lie on the file on the usual terms. The sentencing judge was not the trial judge, as the trial judge had sadly died in the intervening period.

**The Facts**

3. On 29<sup>th</sup> July 2022 the applicant was seen leaving his flat at Ascent House on the Beaufort Park Estate in Colindale, North West London with an orange Sainsbury's plastic bag which, when recovered, was found to contain three 1 kilogram blocks of high purity cocaine with a wholesale value of £90,000 and a street value of £300,000. He approached and then got into the passenger seat of a black Mercedes vehicle driven by Ms Lyanne Kandler-Dick, which was outside his house. The car then moved 20 to 40 metres forward and in less than a minute the applicant got out of the vehicle, leaving the Sainsbury's bag in the car. The vehicle was stopped approximately 30 minutes later in Wanstead, East London, where the drugs were

seized from behind the driver's seat.

4. Ms Kandler-Dick pleaded guilty to the supply of Class A drugs found in her vehicle and to a number of other drug related offences. She was sentenced to a total of six years and nine months' imprisonment, having received a 25 per cent discount for pleading guilty at the plea and trial preparation hearing. Ms Kandler-Dick had the wherewithal at her house to cut and package the drugs into street deals and had a history of drug supply offences.

5. The applicant gave evidence at trial that the package had been delivered to his home the previous day by an associate who had asked him to hand it over the following day. He knew nothing of the contents or the drug supply operation. He was travelling back from Nigeria when the package was delivered and was therefore not at home at the time.

### **The Sentencing Exercise**

6. Both the prosecution and the defence had prepared helpful sentencing notes for the judge in advance of the sentencing hearing. The prosecution submitted that the applicant had a significant role as a middle man: he had been holding drugs at his address and had then supplied them on to Ms Kandler-Dick with the expectation of significant financial gain for doing so. The prosecution had established that there were no phone calls or messages that had passed between Ms Kandler-Dick and the applicant, which was suggestive of a third party higher up the drug chain directing those storing and transporting the drugs, co-ordinating where the supplier should meet and when. The case, they submitted, fell towards the top of the category 2 "significant role" range.

7. For the applicant it was submitted that he fell into the "lesser role" category, where the starting point is five years' custody, with a range of three and a half to seven years.

8. The judge considered that the transfer of such a large quantity of drugs in the way described by the observing officers who had had the applicant's house under surveillance was indicative of what she described as a "slick operation". She concluded that the applicant must have acquired the drugs from a source close to the UK supplier because of how the drugs were packaged when he passed them on to Ms Kandler-Dick.

9. The judge noted that the applicant's previous convictions were mainly for dishonesty, driving and being in possession of weapons, but that one conviction from 2007 was significant and relevant. The applicant had been convicted of false imprisonment, causing grievous bodily harm with intent and causing others to engage in sexual activity without their consent. The case concerned the applicant's role in the kidnap and horrific torture and humiliation of two men said to have owed a drug debt of £5,000, which demonstrated to the judge that the applicant had had considerable involvement in the serious business of Class A drugs trade in the past. Mr Chandarana has today explained that it was accepted that the applicant had been an enforcer in that enterprise some 16 or 17 years previously.

10. In applying the Sentencing Council guidelines, the judge concluded that the volume of drugs involved placed the offence at the top of category 2, which gives an indicative volume of 1 kilogram, and assessed the applicant's role as significant, rather than the lesser role contended for by his counsel. She based this conclusion on his closeness to the source of supply and because it was obvious from what was observed by the officers that he was trusted with large amounts of a valuable and risky commodity. She rejected a submission that he was merely a courier, keeper or storer, and also rejected a submission that there was no proven financial gain. This categorisation provided a starting point of eight years' custody and a range of six and a half to ten years.

11. She concluded that the offence was aggravated by the nature and fact of the applicant's

previous convictions. She did not accept that a document called an "Admission and Contrition Statement" amounted to genuine remorse. Although in that statement the applicant had offered to provide information about the person who had asked him to keep the package for him, the police had rejected his offer.

12. The applicant had also submitted a letter from his 9 year old son pleading for leniency, which the judge considered reflected poorly on the applicant and demonstrated his willingness to do anything to save his own skin, without considering the welfare of his child.

13. However, the judge took on board the impact that the inevitable prison sentence would have on all three of the applicant's young children, as well as his sister and his mother who is in poor health. She also noted that he had made some progress whilst in custody and she gave credit for his having been appointed as a violence reduction representative on the wing which required him to assist in wing activities and to liaise with staff and prisoners. She arrived at a final sentence of nine years' imprisonment.

#### **The Application for Leave to Appeal**

14. The proposed grounds of appeal were lodged four days late, and an extension of time is required. Criminal Procedure Rule 36.4 requires a person who wants an extension of time to apply for that extension of time when giving notice of their application for leave to appeal and to give reasons why the time limit has not been complied with. No application has been made pursuant to Criminal Procedure Rule 36.4; nor has any explanation been given prior to today's hearing. In his oral submissions Mr Chandarana has explained that an error was made in calculating the time limit by wrongly excluding bank holidays. The Criminal Procedure Rules and requirement for notice to be given was also overlooked. He asked us to accept his oral application this morning.

15. We accept Mr Chandarana's explanation. We grant the short extension of time requested and waive the procedural requirements on this occasion to avoid any risk of injustice to the applicant. However, for future reference we emphasise the importance of familiarity and compliance with the Criminal Procedure Rules.

16. There are three proposed grounds of appeal, all of which were refused by the single judge. Firstly, that the judge's starting point was too high (which we understand to mean that the wrong category was identified). Secondly, that too much weight or emphasis was placed on the applicant's historic serious previous conviction. Thirdly, that insufficient credit was given for the applicant's mitigation. We consider the case to be arguable and accordingly we grant leave to the applicant (now appellant).

17. The judge was in the difficult position of not having been the trial judge or of having a transcript of the evidence given to the court.

18. At the heart of this appeal is whether, on the evidence that the jury must have accepted to have convicted him of count 1, but not the other counts, the appellant's role was correctly described as "lesser" or "significant" under the guidelines.

19. It had been proved to the criminal standard only that the package had been delivered when the appellant was away and he had had the package for one night only and it was in his physical possession for just 20 minutes while he took it to the waiting car. We find that it is not possible to infer from the jury's verdict and the evidence in the case that his role was other than "lesser". Furthermore, the prosecution had described the appellant's role as that of a courier, a keeper, or a storer only, which is more consistent with a "lesser", not a "significant" role. Although the quantity of drugs involved was significant, the appellant was close to the UK source on one side and to Ms Kandler-Dick's repackaging operation of the

drugs into street deals on the other, and it was described as a "slick operation", the issue of culpability goes to the appellant's role in the operation and those features alone are not consistent with the appellant having a significant role. In assessing culpability the guidelines provide a non-exhaustive list of characteristics that may demonstrate an offender's role. The prosecution in this case did not suggest any other relevant factors beyond those set out in the guidelines.

20. We accept Mr Chandarana's submission that the evidence does not establish that the appellant had an operational or management function within a chain. The prosecution accepted that there must have been a third party above the appellant and Ms Kandler-Dick directing them in the transaction which explained the lack of direct communication between them, which is not consistent with an operational or management function within a chain. There is also no evidence of the appellant involving others in the operation. Whilst we agree with the judge that it would be fanciful to think that the appellant would receive no financial or other advantage from his role, it has not been proved that any reward or advantage would be significant, which is what is required under the guidelines for a "significant role". It has therefore not been proved that his reward was more than limited, consistent with a lesser role.

21. We also agree that the volume and purity of the drugs supplied do not form the basis for a safe inference of an awareness and understanding of the scale of the operation on the facts of this case.

22. We agree with Mr Chandara's submission that the judge should have placed the appellant's offending into a category 2 "lesser role", with the correspondingly lower starting point and range. She was, however, entitled to place it at the very top of the range because of the aggravating features, namely: the quantity and purity of the drugs; the professionalism of the operation; and the lack of vulnerability or any sense of naivety or exploitation of the

appellant himself. This was not, for example, a case of a drug user being involved to fund his own habit. The mitigation was very limited and the judge was also entitled to be sceptical about the so-called "Admission and Contrition Statement". She was entitled not to make any downward adjustment to the top of the range for the category 2 "lesser role".

23. Accordingly, we allow appeal to this extent. We quash the sentence of nine years' imprisonment and substitute for it a sentence of seven years' imprisonment.

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