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Case Nos:
202401532 A2
202401534 A2
202401538 A2
202401539 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WARWICK
HIS HONOUR JUDGE POTTER
T20217163

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 July 2024

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE BRYAN
and
HIS HONOUR JUDGE CONRAD KC

Between:

REX

Appellant

-and-

ANTONIO PAUL COUNIHAN

First Respondent

and

LUKE THOMAS NEAL

Second Respondent

and

MICHAEL THOMAS GEORGE

Third Respondent

and

SIMON JOHN WRIGHT

Fourth Respondent

Abigail Husbands (instructed by **the Attorney General**) for the **Crown**
Ben Williams (instructed by **GQS Solicitors**) for the **First Respondent**
Stefan Fox (instructed by **Irwin Mitchell LLP**) for the **Second Respondent**
Merry van Woodenberg (instructed by **Murray Hughman**) for the **Third Respondent**
Philip Bown (instructed by **Cartwright King Solicitors**) for the **Fourth Respondent**

Hearing date: 5 June 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 3 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Stuart-Smith:

Introduction

1. His Majesty's Solicitor General applies for leave to refer four sentences which he regards as unduly lenient. We give leave.
2. The sentences were passed on 27 March 2024 by HHJ Anthony Potter sitting in the Crown Court at Warwick. Each of the four defendants, Michael George, Simon Wright, Antonio Counihan and Luke Neal had pleaded guilty to a single count of conspiracy to steal in circumstances that we shall outline in a moment. The sentences passed by the Judge were:
 - i) Michael George: 21 months' imprisonment suspended for 2 years, with 200 hours unpaid work;
 - ii) Simon Wright: 16 months' imprisonment suspended for 12 months, with 150 hours unpaid work;
 - iii) Antonio Counihan: 16 months' imprisonment suspended for 12 months, with 150 hours unpaid work;
 - iv) Luke Neal: 16 months' imprisonment suspended for 12 months, with 150 hours unpaid work and 25 RAR days.

Factual background

3. On dates between May 2019 and January 2020, these four offenders were variously involved in a conspiracy to steal fibre optic installation equipment to the value of £113,192 from BT Openreach vans across 8 counties of England. In furtherance of that conspiracy there were 34 separate events of theft or attempted theft. The overall conspiracy caused damage to the vans amounting to £149,561 and further substantial indirect losses to BT's business in the region of £127,873. The total value of the direct losses (value of stolen items and damaged caused to vehicles) was £262,754 (allowing for rounding). The total loss including indirect losses to BT's business was £390,627.
4. Each of the 34 theft events shared the same means of operation, namely: (i) the specific targeting of BT Openreach vans parked overnight at secure BT exchange sites; and (ii) holes being cut into the rooves of the BT vans with metal cutters in order to steal from within. A small hole would be cut into the roof to allow the contents of the van to be viewed. If high-value fibre optic kit was seen inside, a larger hole was then made by cutting through and peeling back a section of the roof, which would allow the thief to enter and remove the targeted equipment for onward sale. The proceeds were distributed between the active members of the conspiracy.
5. The parties to the conspiracy had specialist knowledge of the operational workings of BT and of the high demand on the black market for the specialist fibre optic installation equipment. One of the offenders, Mr George, ran a fibre optic installation subcontracting business; and Mr Wright had worked directly as a cable fitter for BT themselves. All four had worked to some degree in fibre optic installation, Mr Counihan and Mr Neal being subcontracted by Mr George as a cable fitters.

6. Whilst the offenders started their criminal enterprise in the West Midlands, their activities spread into Warwickshire, West Mercia, Staffordshire, Derbyshire, Leicestershire, Gloucestershire, Avon and Somerset and Essex.
7. It is not necessary to go through the facts of each of the 34 events, but we refer to a small selection to demonstrate the determination of the conspirators, the damage typically inflicted by a single event, let alone 34, and the evidence that was gradually accumulated to demonstrate the scale of the conspiracy.
8. We take first *events 5 and 6*. Between the evening of 6 and the morning of 7 June 2019, a BT Openreach Fiat Ducato van was parked at the Overseal BT exchange site in Swadlincote. The van was broken into overnight. A large hole was cut into the roof to gain access. Fibre optic installation equipment was stolen: a splicing machine worth £2225; an optical time-domain reflectometer [“OTDR”] worth £2400; a red light generator worth £135; a light source worth £564; a fibre cleaver worth £225; hand tools worth £450; and a labelling machine worth £23. A fibre blowing head worth £1480 was damaged as the offenders cut their way in through the roof. The total value was £7503, with the cost of repair to the van being £3928 (event 5).
9. Also in Swadlincote that same night, a BT Openreach Ford Transit had been parked overnight at the BT exchange site on Swadlincote Road in Woodville. A small hole was cut into the roof, but nothing was stolen: the engineer using the van was a copper engineer who did not carry fibre optic equipment. The cost of repair was £956. (event 6).
10. The mobile phones of both Mr Counihan and Mr Wright were active that night. Cell site mapping showed that their phones travelled together and used masts in the vicinity of these offences before returning to their home addresses early on 7 June 2019. There were then phone calls between Mr Wright’s phone and Mr Counihan’s phone after their return. Their phones were also in regular contact with each other during a period of just under three hours the following morning. Mr Wright and Mr Counihan accepted carrying out these thefts.
11. There was no activity on either Mr George’s or Mr Neal’s phones over the relevant period. Neither accepted involvement in these events.
12. We take next *events 12 and 13*, which were 3 attacks on vehicles in safe compounds in Coventry in July 2019. Andrew Worville left his BT Openreach Transit van at the secure BT site on Green Road in Coventry on 19 July 2019. When he returned to work on 23 July 2019, a hole had been cut in the roof of the van and the following items stolen: a fibre splicer worth £2225; an OTDR worth £2400; two cleavers totalling £450; a fibre blowing head worth £1480; an optical light source worth £564; and hand tools worth £450. The total value of the stolen items was £7569. The cost of repairing the van was £2767. A second BT Openreach van, a Fiat Ducato, also had a hole cut into its roof, and attempts had been made to force the rear doors. Nothing had been stolen, but the cost of repair was £3995 (event 12).
13. On 21 July 2019, a BT Openreach Ford Transit van had been parked at the secure BT depot on Tile Hill Lane in Coventry. A circular hole had been cut into the roof of the van, and the metal pushed in to gain entry. Nothing was stolen. The cost of repairing the van was £4434 (event 13). The offenders were disturbed during the course of this

attempted theft. A witness saw two people breaking into the van, wearing high-viz jackets. They ran. They left a piece of equipment that they had been in the process stealing on the roof of the van; and they discarded other items as they ran away down a residential street, towards a petrol station. Two of the items discarded were a blue BT jacket and a cap. Mr Wright's DNA was found on both of these items. Metal cutters were also found in the BT yard.

14. The offenders' van had been parked just outside the BT yard on Tile Hill. About 15 minutes after the thieves were disturbed, Mr Counihan's bank card was used to buy a petrol can and petrol at a petrol station on Tile Hill Lane, within walking distance from the BT yard. CCTV showed Mr Counihan in that petrol station. An off-duty BT employee at the depot took a photograph of a man filling the offenders' van with petrol from a can as it was parked outside the BT exchange. The man was identified from the photograph as Mr Counihan. The van he was filling up was registered and insured in Mr George's name. Mr Neal was a named driver on the insurance. Mr Counihan was seen to drive the van away on 21 July 2019.
15. Cell site analysis showed that on the evening of the 21 July 2019, Mr Wright and Mr Counihan's mobile phones were co-locating. Starting near their respective home addresses, their phones then moved to each of the sites of these offences in Coventry. There was no relevant movement of either Mr George's or Mr Neal's mobile phones. Mr Wright and Mr Counihan accepted carrying out these thefts.
16. On 22 July 2019, the day after these thefts, Mr Counihan received £2100 into his bank account from Urban and Wale Fibre Equipment. Half an hour after receiving it, he transferred half of that sum, £1050, to Mr Wright with the title "Simon Wright owed". Later that same day, both Mr Wright and Mr Counihan went on a spending spree at Bicester. Their bank accounts showed that Mr Counihan spent £236 and Mr Wright spent £363 on premium clothing brands. Four days later, Mr Counihan received £2200 from Mr George's company West Midlands Comms Ltd, of which he transferred £719 to Mr Wright. On 22 July 2019, Mr Wright was stopped by police driving the van used in the thefts in Coventry.
17. The police later retrieved a number of text messages sent between Mr Wright and Mr Counihan. Text messages in furtherance of the conspiracy were sent between 4 September 2019 and 4 October 2019. There was discussion of "doing a peel", meaning going to steal. During the messages, they discussed the wearing of high viz jackets and hard hats, a method used in order to try and blend in during the theft on 21 July 2019. They discussed needing to line something up as they have no money, but needing "new snips though": metal cutters had been discarded in the aftermath of being disturbed on 21 July 2019. They discussed "Mick" (Mr George) in relation to using a van. They also referred to Luke (Mr Neal) "taking them tomorrow". They discussed going "snipping later" and having to sort transport. Mr Wright then asked Mr Counihan to get the "snips", as he had sorted the "van". There are also messages where items are requested, and plans formed to steal to order. On 2 October 2019, Mr Counihan sent messages to an associate asking if he wanted a splicer, and discussing fibre optic equipment that was available to purchase. He then sent screenshots to Mr Wright stating that he had been "putting feelers out". They then discussed transport again, and Mr Counihan then sent Mr Wright the locations of BT exchange yards, including maps of the locations. They then discussed the "snips", and that rusty ones are pointless, before discussing the best time to go. They discussed Birmingham

being “smashed up too much”, and that Coventry might be better, referring to earlier offences committed together. They decided not to use Mr Counihan’s father’s car, before receiving messages from Mr Neal about a van.

18. In October 2019 Mr George took on a subcontract to carry out work in Southend and the conspirators moved down to Essex too. Thefts or attempted thefts were carried out overnight on 22/23 October in Leigh on Sea (event 15), 5/6 November in Benfleet (event 16, involving 3 BT vans and event 17), 5/6 November in Romford (event 18 involving 3 separate vans and event 19 involving another van), and between 5 and 7 November in Grays (event 20). 10 vans in all were attacked during this particular spree causing many thousands of pounds damage to the vans and many thousands of pounds of lost equipment. The conspirators then turned their attention back to the Midlands and the environs of Manchester (events 21-28) in November/December 2019, taking time to hit two vans in Bristol (events 29-30) on 3 December 2019.
19. The last two events (33 and 34) in late December/early January included retargeting a van that they had previously attacked (event 11). The van was damaged again though nothing was stolen. But there was CCTV which identified Mr Wright lying across the top of the van cutting a small hole into the roof with metal cutters. On 30 December 2019 Mr Wright sent photographs of the stolen fibre optic equipment by text to Mr Counihan. They discussed the equipment before Mr Counihan sent a message to another contact, to whom they had sold equipment previously, listing items that “a friend” had for sale and discussing committing further offences.

Arrests and subsequent developments

20. Mr George was arrested at Gatwick Airport on 7 January 2020. This caused consternation among the other conspirators, who feared that he would provide information about them. It is clear from exchanges of text messages that the conspiracy was continuing up to that date.
21. On 6 March 2020 Mr Wright was arrested. When interviewed he answered no comment and provided a prepared statement in which he denied the allegations of theft.
22. Mr George was re-arrested and interviewed on 8 March 2020. He confirmed that he had previously worked for BT Openreach as a cabler; however, he had left in 2018 and had since set up his own telecoms business - West Midlands Communications Ltd. He had employed Mr Wright, Mr Neal and Mr Counihan as sub-contractors, and they had worked on contracts for BT Openreach, fitting cables in the ground. Mr George stated that Mr Wright, Mr Neal and Mr Counihan would use his vans for work purposes. Mr George denied presence or involvement in the conspiracy.
23. Mr Counihan was arrested on 28 June 2020. He replied when cautioned that it had nothing to do with him. He answered no comment to all questions in interview. His phone was seized and numerous messages in furtherance of the conspiracy were found.
24. Mr Neal was arrested on 27 July 2020. He replied when cautioned that his dad lived near some of the locations, and that he had worked all over the place. His mobile phone was not found. Mr Neal denied involvement in the conspiracy, denied stealing

from BT Openreach. He accepted that he had worked as a cable fitter in the telecoms industry. He denied being present or assisting others in multiple thefts from BT vans at BT depots, where cell site evidence was supportive of his presence.

25. Mr George was reinterviewed on 7 August 2020. He provided a prepared statement, denying involvement in any of the offences.
26. Police made attempts to contact Mr Wright for further interview but those attempts failed.

The proceedings

27. On 7 July 2021, all four offenders attended Coventry and Warwickshire Magistrates' Court. Mr George indicated a not guilty plea. The remaining offenders gave no indication of plea.
28. On 2 August 2021, Mr Neal indicated that he would enter a guilty plea on arraignment. On 10 August 2021, at a PTPH, Mr Neal was arraigned and pleaded guilty. He sought time to serve a basis of plea. Mr Wright was arraigned and pleaded guilty on a full facts basis. Both were released on unconditional bail to await sentence at the conclusion of any trial. Neither Mr Counihan nor Mr George were arraigned.
29. On 6 October 2021, a basis of plea was uploaded on behalf of Mr Neal.
30. On 18 October 2021, Mr George applied for an adjournment to allow service of papers. He was not arraigned.
31. On 10 November 2021, Mr Counihan was arraigned and pleaded guilty. A basis of plea was uploaded on the same day. He was released on unconditional bail to await sentence at the conclusion of any trial.
32. On 16 November 2021, Mr George was arraigned and pleaded not guilty. A trial date was fixed for 16 January 2023. On 19 December 2022, the case of Mr George was listed for mention by the Court as a defence statement had just been served. We are told that Mr George's counsel took silk after the not guilty plea had been entered. Some delay was caused whilst new junior counsel was found and retained. There was then a further delay caused by a refusal of legal aid, and the failure of an appeal in relation to that decision.
33. On 6 January 2023, Mr George informed the Court that his final appeal against the refusal to grant legal aid had been refused, and that he would need several months to pay his solicitors for the preparation of his trial. The trial date was vacated and refixed for 8 January 2024. On 6 December 2023, his case was listed for plea. He was rearraigned and entered a plea of guilty. He uploaded a written basis of plea. He had indicated to the Crown in November that he would enter a guilty plea.

Basis of plea

Mr Wright

34. Mr Wright entered his plea of guilty on a full facts basis. The other three offenders each entered their pleas of guilty on a written basis.

Mr George

35. Mr George accepted that he was a party to the conspiracy for events 15-31 only. He was not a part of any conspiracy between 1 April 2019 and 18 October 2019. He joined what was already an active conspiracy and played a role in it between 22 October 2019 (event 15) and 26 December 2019 (event 31).
36. Mr George ran a legitimate business during the relevant period, in which he employed the other offenders, who he had already known well. He was also suffering from a gambling addiction. During the period before he joined the conspiracy he did on occasions purchase second-hand equipment from his co-defendants but he did so in good faith, not knowing or believing the equipment to be stolen. He would sell on that equipment for a profit, not believing it to be stolen. In August 2019 he broke up from his long-term partner of 15 years. Following that, his work suffered, he became depressed and began to drink and gamble excessively and experienced increasing financial problems. In October 2019 he secured a contract to perform work in the Essex area and was frequently working in the Essex area. He learnt about the conspiracy on or about 18 October 2019.
37. By 22 October 2019 Mr George's mental health had deteriorated and he was exhibiting self-destructive behaviour. He had financial issues and cash flow problems because of his gambling. He decided to join the conspiracy.
38. Mr George accepted that he was involved in both the thefts and onward sale of stolen items in relation to events 15-26. He sold on equipment from event 7, knowing it was stolen, four months after it had been stolen. In relation to events 27, 29 and 30, he was not involved in the thefts but he did sell on the stolen property, knowing that it was stolen. He did not accept involvement in events 28 or 31, and had left the conspiracy by the time events 32-34 took place. By then he had met and formed a relationship with his current partner, had stopped drinking and gambling as heavily, and was making efforts to extricate himself from the conspiracy.
39. Mr George was sentenced on his basis of plea.

Mr Counihan

40. Mr Counihan said that he participated as a driver and lookout during events 1-14 and was only involved in the sale of property in relation to event 14. He did not participate in events 15-34. On that basis, the value of items stolen in events 1-14 was £51,045; the value of associated damage was £48,009. There is no estimate of indirect losses specifically attributable to these events. He accepted that he received "a few hundred pounds on average" from the events in which he was involved and where property was stolen. He was sentenced on his basis of plea.

Mr Neal

41. Mr Neal asserted that he had a limited role, under direction, exclusively as a driver, albeit he accepted leaving the car briefly on one occasion (event 32). He played no role in organising the thefts and always performed a limited function under the direction of another/others. He was not involved in the handling or disposal of any stolen goods, nor did he have control over the funds that were generated. He accepted

that he was involved for just over 2 months from around 17 October 2019 to 30 December 2019 and earned approximately £900. He was paid less than other participants because of his subordinate role. He accepted involvement in the following events: 14, 16-20, 24-26, 32-34 and that the total value of items stolen whilst he was present was £24,278.42. We note in passing that the associated damage to the vans involved in those events was just short of £42,000. There is no estimate of indirect losses specifically attributable to these events. He was sentenced on his basis of plea.

Written basis of pleas: general observation

42. There are unusual features of the written basis of pleas that are immediately noticeable. First, there is no suggestion that anyone else was involved in the conspiracy. That has remained the case to this day. Second, there is a significant disparity between the evident sophistication and determination of the actions of the conspirators on the one hand and the degree of responsibility accepted by the offenders in their written basis documents. Third, as an overview, Mr Wright and Mr Counihan were in it from the start but Mr Counihan dropped out about half-way through (after event 14); meanwhile Mr George and Mr Neal joined the conspiracy, which was already up and running, about half way through (at the time of events 15 and 14 respectively); and only Mr Wright was involved throughout. Mr Neal was involved exclusively as a driver under the direction of others; Mr Counihan was also involved primarily as a driver, though he accepted selling property in relation to one event (event 14).
43. It is plain that an aggregation of the written basis of pleas does not give a full picture of the conspiracy, most noticeably in relation to the organisation and direction of the conspiracy. Some aspects obviously invite a degree of scepticism, for example Mr Counihan's statement that he was only involved in the sale of property from one event (cf [17.] and [19] above). However, the three written basis of pleas were accepted without any request for a Newton hearing and the Judge was (and we are) required to approach the issue of sentencing on the basis of and in accordance with those accepted pleas.

Antecedents

44. Mr George and Mr Counihan had no previous convictions. Mr Neal had one related conviction as a youth for criminal damage for which he had received a 3 month referral order. Mr Wright had 6 previous convictions for 6 offences. The latest and most serious was a sentence of 42 months imprisonment imposed on his plea of guilty to a charge of s. 20 wounding on 7 October 2021. He was released on 10 March 2023 and remains on licence until 21 April 2025.

The sentencing hearing

45. All offenders were on unconditional bail throughout.
46. On 26 March 2024, the sentencing hearing took place. Due to a lack of court time, the hearing was adjourned part-heard to 27 March 2024. On the morning of 27 March, the Learned Judge sentenced all defendants except for Mr George. In respect of Mr George, the Learned Judge stated that he needed to further consider the sentence, and

remanded Mr George in custody for the rest of the morning. He then handed down sentence in respect of Mr George later that day.

The Crown's Case

47. The Crown's case was that each offender had played a significant role in the conspiracy. This was a sophisticated commercial venture involving targeted thefts of large quantities of valuable fibre equipment for onward sale. It was common ground that the Guideline for Offences of Theft was the relevant and applicable guideline, albeit in the context of an offence of conspiracy. In its short written Sentencing Note, the prosecution submitted that the offence should be categorised in the case of each offender as an offence of High culpability because of the sophisticated nature of the offence and modus operandi and the need for significant planning; and that it fell within Harm category 1 (above £100,000 for financial loss and other significant harm). On that basis the starting point was 3 years 6 months' custody, with a category range from 2 years 6 months' to 6 years' custody. The maximum sentence for the offence was 7 years custody.

Mr George

48. In accordance with his basis of plea, it was submitted on behalf of Mr George that he ran a legitimate business which employed the other conspirators, who were also his friends. In August 2019, having split up from his long-term partner and facing drink, gambling and financial problems he decided to join the conspiracy. Some of the payments identified by the prosecution (e.g. to Mr Neal) were for gambling purposes as he had excluded himself from gambling websites in an attempt to curb his addiction. As with the other offenders, he had direct knowledge and awareness of the high value of fibre equipment and used their knowledge to target BT vehicles. According to the account he gave to the writer of the PSR, matters started with his employees, Mr Wright and Mr Counihan, breaking into vans without his knowledge; but he joined them later when facing an accumulation of difficulties in August 2019. Having got his gambling and drinking under control it was said that he backed out of the conspiracy shortly before it ended. The total loss attributable to the events where he admitted direct involvement was in the order of £84,000; in addition he admitted a role in selling on the stolen goods from events 27, 29 and 30, which involved a further loss of just over £15,000. On his case, therefore, the total loss with which he had some involvement was in the order of £100,000.
49. He was assessed as posing a low risk of reoffending. The writer of the PSR, while recognising the risk of an immediate custodial sentence, assessed that Mr George could be safely managed in the community under a Community Order.
50. A report from a consultant psychiatrist, Dr Rajput, dating from November 2016, gave a working diagnosis of a moderate to severe gambling disorder. Dr Rajput considered that there may be an undiagnosed attention condition such as ADHD which may be in the way of his recovering. Dr Rajput proposed a cognitive behavioural approach and possible further investigation of his possible ADHD. There is no follow up medical evidence; but Dr Rajput's opinion lends substance to Mr George's submission that he suffers from a gambling addiction.

51. Four character references were before the Court. Two, Mr Brill and Mr Pitts were people who work or have worked with Mr George. They spoke of his generous support going beyond the normal for an employer to those who work for him, and his hard work in building up his business. A third was in more general terms while the fourth came from his partner's brother-in-law, who spoke of his support for the wider family, his hard work, and the excitement at the prospect of Mr George and his partner having a soon-to-be born child.
52. The Judge also had a letter from Mr George in which he spoke of the major turnaround in his life, having overcome his gambling addiction and built up his business, which now employs about 30 people. He spoke of the "mental torture" he had experienced during the period since his arrest, not knowing what the future would hold. He attributed the delay in his pleading guilty to his inability to obtain legal aid and his need to raise substantial sums for his legal fees. He made an impassioned plea to the judge not to take everything away, especially as he was about to have a daughter to protect.
53. It was submitted on his behalf that Mr George's case was one of medium culpability with harm at the top of Category 2. Although his plea of guilty came later than the others, it was submitted that he was still entitled to some credit for it.

Mr Wright

54. On behalf of Mr Wright, it was submitted that he was entitled to credit for his plea at the PTPH in August 2021 and his repeated expressions of willingness to support the prosecution ever since then. He asked the Court to take into account that he had served the custodial element of his sentence for section 20 wounding and had responded positively to it. There was a supportive report on his progress from the probation service, which spoke of his consistent engagement as required. He was now in full time employment and a stable relationship; and his fiancé was expecting their first child in July. The writer of the probation progress report considered that it would be "a huge step back in terms of his rehabilitation" if he were now to receive an immediate custodial sentence. He was assessed as being suitable for unpaid work.
55. There were three character references for Mr Wright before the Court. His partner gave the Court her assurance that Mr Wright had "grown and changed into a different person." His life is now law abiding and he has no association with people who commit crimes. A supportive reference from his employer was backed by a letter from the Clerk to his local Town Council who spoke of his voluntary work in a number of projects and of finding him "at all times to be diligent, polite, hardworking and trustworthy". In addition, Mr Wright had written to the Judge stating that his time in prison had given him time to reflect and reform. He speaks of his voluntary work being an opportunity to give something back to the community and help others. He has, he says, truly changed his ways.

Mr Counihan

56. Mr Counihan relied upon his basis of plea and the fact of his guilty plea some 2 ½ years before. He relied upon his lack of previous convictions, the circumstances in which he had lost his boxing career, the steps he had taken to address his gambling addiction (though the PSR said he still had debts of some £25,000 outstanding), his

achievement in obtaining and holding down full employment, and the impact that custody would have on his young son.

57. There were two character references before the Court. A positively heart-rending letter from his partner speaks of the close bond between Mr Counihan and their son and the impact that a custodial sentence would have on both her son and herself. She speaks of the impact of losing his career as a boxer and his achievement in establishing himself in full time employment. She does not condone what Mr Counihan has done but says that it does not reflect his real character. The other reference from someone who has known him for 20 years attests to his “exemplary character” and the impact of the curtailment of his boxing career.
58. Mr Counihan wrote directly to the Court. In his letter he describes how he had risen to be part of the Great Britain Team as a boxer, backed by lottery funding, going into schools to inspire other children to take up boxing. He had decided to turn professional after narrowly missing out on the 2012 Olympics and won his first 8 fights as a professional before disaster struck and a shadow was identified on his brain. He was therefore no longer able to carry on boxing and, as he put it, his life became a complete mess. When he agreed to join the conspiracy he was in a bad place and took a decision he now bitterly regrets.
59. There was a PSR which spoke of his remorse and the impact on him of having lost his boxing career, which included gambling as a misguided form of coping mechanism. He was assessed as posing a low risk of reoffending, a low risk of serious harm to others, and suitable to be managed in the community.
60. It was submitted on his behalf that his culpability was around the overlap of high and medium and that the harm caused should be categorised as being at the threshold between categories 1 and 2.

Mr Neal

61. Mr Neal relied upon his basis of plea.
62. There was a PSR. It referred to his limited academic success and his historic diagnosis of OCD, dyslexia and anxiety, for which he is prescribed sertraline. He was assessed as posing a low risk of reoffending and a low risk of causing serious harm to others. He was assessed as being currently unfit for paid employment because of his anxiety; but he lived with his aged grandmother. He was also assessed as suitable for management in the community pursuant to a community order.
63. Mr Neal had the benefit of character references from his mother and his grandmother, for whom he has been acting as carer. His grandmother describes him as a good boy for whom the offending is out of character. His mother provides more detail about the challenges he faced in education and in the outside world.

The Sentencing remarks

64. The Judge passed sentence on Mr Wright, Mr Neal and Mr Counihan before the short adjournment and on Mr George after it.

65. In his introductory remarks the Judge indicated that he would give the Defendants other than Mr George a full 1/3 credit for their guilty pleas on the basis that in a paper heavy case, they had in fact pleaded at the earliest opportunity. This may be thought to have been a generous approach; but it is not challenged as wrong in principle by the Solicitor General.
66. In a short description of how it worked, he described the conspiracy (accurately in our view) as “highly effective”, a “nationwide conspiracy” and “brutally effective, drawing ... upon the knowledge that [Mr George] and [Mr Wright] had from their previous employment with British Telecom.”
67. Turning to the scale of the thefts and damage he said it was in excess of £200,000 but that did not in any sense reflect the intended loss, because there were many occasions when, having cut a reconnaissance hole in a van they had identified, they found it did not contain the kind of valuable equipment that they had targeted the van in order to steal.
68. He treated each offender, whatever their role, as taking an active part in the conspiracy. He then noted the offenders’ antecedents, making plain that only Mr Counihan had never been involved with the Courts before but not indicating that he took the records of the others as aggravating features.
69. Turning to culpability, he took the view that although there were elements of high culpability because, “by dint of the geographical spread of these offences, there was significant planning ..., and it drew, to some extent, upon the knowledge that certainly two had about the way in which BT operated...”. But only Mr Wright was involved throughout. He regarded this, and his assessment that Mr Wright was not taking a leading role but being directed by others, as being aspects that fell within medium culpability as well. So, he said, the offenders fell between the two stools of high and medium culpability.
70. Turning to harm, he placed the harm, actual or intended, firmly in Category 1. He rejected as artificial the suggestion that he should approach the harm caused by the individual offenders “simply paying regard to the loss that each of you specifically caused, when the intention of the wider conspiracy was to garner far greater amounts of money. So, in summary:

“What that means then is that we are stuck between the high culpability category starting point, which is three and a half years after trial with a range of two and a half years up to six years’ custody, and the starting point for medium culpability category 1 which is two years with a range up to three and a half years.”

The Judge therefore reached a notional sentence before mitigation and reduction for guilty pleas “in the region of 2 ½ - 3 years’ imprisonment.

71. The Judge then turned to mitigation and the fact that “all of your personal circumstances have ... changed since July 2021 when this case was sent to the Crown Court and changed significantly since 2019 when you were all offending with such obvious enthusiasm.”

72. The Judge then sentenced the first three offenders in turn. He accepted the significant change brought about by Mr Counihan now having a son which, he said, “makes plain to me the impact to the family if you were incarcerated.” He also accepted that when Mr Counihan offended he was still “processing the loss of a career that you pursued for most of your childhood and into your adulthood” and said it might be thought unsurprising that Mr Counihan “would lose [his] bearings for some time.”
73. Turning to Mr Wright the Judge said that the prison sentence he had served seemed to have achieved its aim because he had time to reflect on how he had lived his life. The Judge expressed himself quite satisfied on the basis of all the information available to him that Mr Wright had changed his ways. He regarded it as significant mitigation that Mr Wright had “finally grown up and realised that the choices you have made hitherto were very poor, did not just impact upon you but they impacted upon all sorts of people, including the man that you assaulted in 2020.
74. Mr Neal had not had life-changing events, but he had (in the judge’s assessment) come to grips with issues of OCD and dyslexia and he had applied himself consistently to the interests of others over the last few years. “That” he said “has been in some sense as significant as the life-changing events that have affected [Mr Wright and Mr Counihan].”
75. The Judge said he bore in mind that all three offenders had pleaded guilty some 2 years before and had applied themselves to reforming their ways while waiting to learn when they would be sentenced and what their sentence would be.
76. On the basis of this mitigation, the Judge assessed the notional sentence after trial to have been 2 years imprisonment, which he then discounted by 1/3 in each case for their pleas of guilty. That led to a sentence of 16 months for each offender.
77. The Judge then considered the Guideline on the imposition of custodial and community penalties. He considered the risk that they posed, which in each case was a low risk. Compliance with court orders did not affect Mr Counihan or Mr Neal; but he took Mr Wright’s cooperation since 2020 to be “extremely focused”, which the judge took into account in his favour. Turning to the impact on others (i.e. family members and others affected by the offender’s imprisonment), he said that he would have regarded this as a “fairly minimal” feature in 2020/2021 and that he would then have considered that the offending could only be marked by an immediate custodial sentence. However, he then said:
- “But today, I consider with all of the delays that I could not justify to the public a delay of over two years in each of your cases and then sending you to immediate custody given the way that you have lived your lives. So you are going to benefit, finally, to that extent, from Mr George’s prevarication over that two-year period and I am going to suspend the sentence in respect of each of you.”
78. He then passed the sentences to which we have referred at the start of this judgment. He did not impose an RAR condition on Mr Counihan or Mr Wright because it seemed to him that they had “absorbed the lessons of the last two and a half years without any assistance and you are in employment and it will not impact on you in

that sense”. He took a different view with regard to Mr Neal in the absence of employment and because, despite the fact that he had been applying himself to the interests of others, his case required some professional input.

79. After a short adjournment, the Judge sentenced Mr George. Despite expressing scepticism about its contents, the Judge sentenced in accordance with the basis of plea. Because of Mr George’s conduct and his having joined later in the conspiracy, the Judge treated him as being on a par with the other three offenders. He regarded Mr George’s gambling problems as meaning very little by way of mitigation. But he identified two ways in which Mr George’s life had changed. First, he was about to become a father and had a partner who was heavily reliant upon him. Second, his legitimate business was successful with a significant number of people (noted in the PSR to be 50 but said by his counsel to be in the region of 30) who were dependent upon him as employees of the business.
80. In Mr George’s case the Judge again assessed the appropriate sentence after trial and taking into account mitigation to be 2 years’ imprisonment. Having given some three months (12.5%) credit for his guilty plea, the Judge said that he had wrestled with the question whether his offending was such and the delay in his accepting his guilt was such that he should go immediately to prison. Once again, the Judge was clear in stating that, if Mr George had been before him to be sentenced in 2021, an immediate custodial sentence would have been imposed “with alacrity”. What appears to have tipped him over to suspending the sentence was the impact that imprisonment would have on his partner and child, though this “tipping point” was in the context of the other substantial personal mitigation which was available to Mr George.
81. The Judge then passed the sentence to which we have referred.

The Solicitor General’s submissions

82. The applicable principles where a court is sentencing individual offenders for an offence of conspiracy are not in doubt. In Khan (Kazim) [2013 EWCA Crim 800; [2014] 1 Cr. App. R. (S.) 10 at [34]-[35], the Court said:

“[34] ... a particular individual within a conspiracy may be shown only to have been involved for a particular period during the conspiracy, or to have been involved only in certain transactions within the conspiracy, or otherwise to have had an identifiably smaller part in the whole conspiracy. In such circumstances the judge should have regard to those factors which limit an individual's part, relative to the whole conspiracy. It will be appropriate for the judge to reflect that in sentence, perhaps by adjusting the category to one better reflecting the reality.

[35] As a balancing factor, however, the court is entitled to reflect the fact that the offender has been part of a wider course of criminal activity. The fact of involvement in a conspiracy is an aggravating feature since each conspirator playing his part gives comfort and assistance to others knowing that he is doing

so, and the greater his or her awareness of the scale of the enterprise in which he is assisting, the greater his culpability.”

83. A conspiracy involving the actual completion of multiple offences may merit a sentence higher than that indicated in guidelines for any one substantive offence but cannot exceed the maximum for the most serious relevant offence: *R v Hanrahan* [2017] EWCA Crim 1256 at [40].
84. It is well recognised that delay in bringing a matter to trial may be a factor to be taken into account in a Defendant’s favour: see *R v Beattie Milligan* [2019] EWCA Crim 2367. However, that is not always the case. Some understanding of the principle may be derived from *R v Gordon* [2022] EWCA Crim 1610 where, at [23], the Court said:
- “The rationale for any reduction in sentence because of delay is that the offender has been punished to a degree simply by having the matter hanging over him for an unreasonably long period of time, with the anxiety which this may cause. Here, the delays in prosecution and sentencing do not appear to have been of sufficient concern to the appellant to prevent him from becoming involved in the drug dealing which was the subject of the second, and then the third, convictions. Nor did he advance any evidence of any particular anxiety in this regard.”
85. There is some evidence of anxiety attributable to the delay in the present case, with Mr George describing the “mental torture” he had been undergoing while waiting to learn his fate. More generally, just as the court in *Gordon* discounted the impact of delay as a mitigating feature where the appellant had gone on to become involved in further drug dealing, it must be acceptable in principle for a court to have regard for the fact that a defendant has made good use of the period of uncertainty to turn their life around as, it is submitted, has happened in the present case.
86. Turning to the question of suspending a sentence of two years’ imprisonment or less, it should not need repeating that regard must be had to the Guideline on the Imposition of Community and Custodial Sentences and that the factors set out on page 8 of the Guideline should be weighed in considering whether it is possible to suspend the sentence. It should also be born in mind that “even if a judge takes the view that appropriate punishment would only be achievable by immediate custody, he or she still has a discretion to suspend if there are sufficient factors against such a course”: see *Hussain* [2019] EWCA Crim 1542 at [21]; and *R v Haywood* [2022] EWCA Crim 476 at [22].
87. Applying these principles, the SG’s submissions may be fairly shortly summarised:
- i) The Judge’s starting point was too low. This was plainly an offence that fell to be considered by reference to category 1A of the theft guideline, because of the significant planning and targeted nature of the nationwide orchestrated thefts which drew on knowledge that the offenders had about the way in which BT operated in their approach to fibre optics. The starting point should have been 3 ½ years with a category range of 2 ½ to 6 years.

- ii) There should have been an upward adjustment from the SP in recognition of the fact that this was not a single offence of theft but a conspiracy with 34 thefts or attempted thefts over a 9 month period.
- iii) A further adjustment should have been made to reflect the fact Category 1 harm is indicated in cases where the harm exceeds £100,000. Here the harm exceeded £100,000 by a country mile. The items stolen and damage caused came to more than £260,000; and the indirect losses took the case up to nearly £400,000 without any regard being had to the undoubted fact that, had they been able to, they would have stolen from the empty vans so that the intended damage is significantly higher.
- iv) Had proper regard been given to the aggravating features of the case, the sentences imposed could not have been at a level that allowed them to be suspended.
- v) Too much weight was attributed to the fact of delay caused by Mr George not pleading sooner;
- vi) The Judge gave inadequate attention to the Imposition Guideline. It was inappropriate to rely upon the fact of delay or the imminent arrival of Mr George's new child. No consideration appears to have been given to whether appropriate punishment could only be achieved by immediate custody. That said, in oral submissions, Ms Husbands stated that if the sentences were properly to be set at a level where suspension is possible, she would not wish to make further submissions about the Judge's exercise of his discretion to suspend. In our judgment that was an entirely reasonable stance to adopt.

The offenders' submissions

Mr George

- 88. Since the Judge passed sentence, Mr George's partner has given birth to their child on 17 May 2024. We have read a letter from her which makes plain her very heavy reliance upon Mr George before, during and since the birth.
- 89. It is submitted that the Solicitor General's reference does not give a full and fair picture of the case against Mr George, in two main respects. First, it is submitted that the reference is not true to Mr George's basis of plea and the fact that he was not involved throughout the conspiracy and, during the time that he was, his was a handling role rather than being directly involved in the acts of stealing. Second, the reference does not include matters that go to support Mr George's case that, initially and until about mid-October 2019, Mr Wright and Mr Counihan were acting without his knowledge.
- 90. It is submitted that the Judge was right to characterise Mr George's culpability as falling somewhere between categories A and B and that the proper approach would have been for the judge either to start with harm category A and then to reduce downwards to reflect the fact that Mr George was not involved in the whole conspiracy and his relatively limited role. In persuasive submissions on Mr George's behalf, Ms Van Woodenberg described his involvement as being for ten weeks in a

handling role and withdrawing “after two months of madness.” The factors advanced in mitigation are his previous good character, that he did not offend while on bail for a long time, his gambling addiction and mental health issues at the time of offending, his guilty plea, and the effect both on his partner and their child and also on Mr George’s employees in his legitimate and now thriving business.

91. On this basis, Ms Van Woodenberg submits that it was permissible for the Judge to treat Mr George as being roughly on a par with the other offenders and to hold that, after a trial, and taking into account all aggravating and mitigating features, it was open to the judge to find that the sentence before a modest reduction for his later plea of guilty would have been in the region of two years.
92. If a sentence were to be passed that is capable of suspension, it is submitted that the judge’s exercise of his discretion can be justified and should not be overturned. Attention is drawn to the passage in the Imposition Guideline that “for offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing”: once again, heavy reliance is placed on the impact upon Mr George’s child and partner.
93. We are told, and accept, that Mr George has already undertaken 70 of the 200 hours of unpaid work he was ordered to perform.

Mr Wright

94. On behalf of Mr Wright it is accepted that a starting point of 3 ½ years for the conspiracy as a whole was appropriate. The main thrust of the opposition to the SG’s reference is that strong personal mitigation had accrued to Mr Wright during the 4 years since his offending. Most particularly, he had served the custodial part of the 42 month sentence imposed for the s. 20 offence, and the Judge was entitled to form the view that, in this case, prison had achieved its desired aim of reform and rehabilitation. As it is, he will remain on licence until mid-2025, he has complied with all licence conditions to date, he has gained full time employment, he has a settled home life with Ms Cavalli, who he intends to marry and who is expecting their first child, he has not reoffended and he has taken positive steps to pay back to the community by the voluntary work he has done, as evidenced by Dr Brain.
95. Mr Bown, who represents Mr Wright before us as he did before the sentencing judge, submits that the Judge was not merely entitled but right to place weight upon his “extremely focussed” willingness to assist the prosecution and the Judge’s conclusion that, although he was the only conspirator to be involved throughout, he did so at the direction of others.
96. In these circumstances it is submitted that the Judge was entitled and right to impose a lenient sentence taking into account the progress that Mr Wright had made.

Mr Counihan

97. Mr Counihan’s submissions start by reiterating his basis of plea: he was driver and lookout for the events in which he was involved, and was not involved in selling on the property except in relation of Event 14. Thus his involvement was limited in

duration and the combined value of the thefts and damage for which he accepted responsibility was less than half of the totals for all the conspiracy events. It is submitted that the offence to which Mr Counihan pleaded guilty was only a category 1 case because of the aggregation of the effect of the multiple events with which he was involved, which comes close to £100,000: it was not a conspiracy to commit (or that involved the commission of) multiple category 1 offences. Since Mr Counihan was only involved in some of the events, that had to be reflected in the sentence imposed on him, applying the guidance in *Khan* that we have set out above. Thus a downward adjustment from a 3 ½ year starting point was justified in his case.

98. Furthermore, Mr Counihan had substantial personal mitigation: his lack of previous convictions, his remorse, his positive good character as evidenced by the references to which we have referred, the steps taken to tackle his gambling addiction, his personal circumstances and travails at the time of offending, his devotion to his son and the impact on his son and his partner. Taking these matters fully and properly into account, together with the delay of 2 ½ years and the anxiety that has caused and his credit for plea, it is submitted that the sentence on Mr Counihan is one that the judge could properly justify and impose.

Mr Neal

99. It is submitted that in reality Mr Neal came somewhere between high and medium culpability and that, for that reason an adjusted starting point of between 2-3 years was appropriate. He fell to be sentenced exclusively as a driver who played no role in organising the thefts and always performed a limited function under the direction of others. His involvement was for a period of just over 2 months for which he was paid the modest sum of £900.
100. Reliance is then placed on what is described as “a plethora of mitigating factors”: limited previous convictions despite his age (he being 35 at the time of sentencing), regret and remorse, his personal circumstances living with and caring for his grandmother, the effects of delay (which was not his fault), his mental health at the time, the fact that he is assessed as posing a low risk of reoffending, and his character references.
101. Overall, it is submitted that a notional sentence of 2 years before reduction for guilty plea was appropriate, not least because it would be the starting point for a medium culpability category 1 offence.

Discussion and resolution

102. In our judgment, the correct approach is first to look at the conspiracy overall and then to consider the contributions and culpability of the individual offenders. In looking first at the overall conspiracy, we do so by reference to the theft guideline, bearing in mind at all times that we are not dealing with an offence of theft but with a conspiracy the purpose and consequence of which was the committing of multiple thefts, with the direct and consequential losses that those thefts (and attempts falling within the conspiracy) caused to the victims of the conspiracy. It is of course to be recognised that, although reference is made to the theft guideline, the fact that we are dealing with a conspiracy implies a greater level of criminality than would be implicit in a charge of theft, because conviction (or pleading guilty) to a charge of conspiracy

implies at least some understanding of and agreement to the existence of the conspiracy.

103. Adopting that approach, there can be no doubt that the conspiracy overall fell comfortably within category 1A of the Guideline. Viewed overall, it involved high culpability because of the sophisticated nature of the individual thefts and their overall planning which was significant. While individual roles may have differed (which we will address later), the Judge's observations that the conspiracy was a "brutally effective" venture that was "highly effective" on a nationwide scale were entirely apt. Nor did the harm merely creep into category 1. The losses inflicted by the conspirators were significantly higher than the £100,000 marker above which category 1 was applicable.
104. On that basis the applicable categorisation gives a starting point by reference to the theft guideline of 3 years 6 months with a category range from 2 years 6 months to 6 years custody. We accept that no individual theft approached £100,000 so that, in that sense, this was not a conspiracy to commit multiple Category 1A thefts; but the sheer number of the thefts places this conspiracy above the norm that would be implied simply by reference the aggregate value of the loss inflicted. That said, the Solicitor General's submission that it required an upward adjustment to the starting point from 3 years 6 months needs to be seen in context. The Guideline starting point of 3 years 6 months assumes high culpability, which may be demonstrated by, for example, taking a leading role in a group activity, the sophisticated nature of the offence or significant planning. The sophistication of the offence in this case lay in the identification and planning of the thefts. Once the location of the vans was identified, the cutting into vans and stealing their contents was not of itself particularly sophisticated. But if an individual had been shown to have been highly culpable in all these respects (i.e. taking a leading role in a group activity, the sophisticated nature of the offence and the significant planning), we agree that an upward adjustment to the theft guideline Category 1A starting point should be made because of the overall gravity of the conspiracy, including the large number of individual thefts and attempted thefts. If, for example, an offender had been identified and found to be the controlling mind of the conspiracy and responsible for the significant planning and organisation of the offences throughout, an upward adjustment would have been required in that individual's case and an adjustment to approximately 5 years (or more) would have been justified. We shall refer to this as the adjusted overall starting point, bearing in mind that we are looking to see whether the sentences imposed by the judge were unduly lenient i.e. materially below the bottom of the range of sentence that could properly be passed. It is necessary also to keep in mind at all times, that the adjusted overall starting point is for a person found to be the controlling mind of the conspiracy and responsible for the significant planning and organisation of the offences throughout. None of the four offenders fits that description.
105. There are two features that makes this case difficult and the sentencing exercise undertaken by the Judge unusual. The first is that, as we have just mentioned no one was identified as being the leader of the group activity or the organising mind in terms of planning and execution of the individual events or the conspiracy as a whole. The second is the effect of delay and the fact that, as the Judge found, all four offenders had turned their lives around to a very substantial degree.

106. Before turning to the individual offenders, however, it is important to look at the general approach adopted by the Judge, which we have summarised at [65.]-[71.] above. His assessment of the losses flowing from the conspiracy correctly recognised that the intended loss was higher than the actual loss because of some vans not containing equipment that the conspirators were targeting and rejected the submission that he should simply have regard to the loss that each offender individually caused. Accordingly he concluded that the case was “firmly” a category 1 case. Once again, we understand that conclusion to be a reference to the categorisation of the conspiracy as a whole, having correctly rejected the offenders’ submission that their “harm” should be limited to that flowing from the thefts with which they were directly involved. We find no error in that approach, though we bear in mind the fact that three of the four offenders were only involved for part of the overall duration of the conspiracy as a whole.
107. The Judge rightly treated each of the offenders as taking an active part in the conspiracy without at this stage concentrating on the separate roles that each had undertaken. He then recognised that there were “elements” of high culpability, which we understand to be at least primarily a reference to the overall conspiracy. He also referred to there also being elements of medium culpability, identifying the fact that only Mr Wright had been involved throughout. By this route he arrived at his conclusion that “we are stuck between the high culpability category 1 starting point ... and the starting point for medium culpability category 1.”
108. As a general observation, we consider this to be justified; but it needs to be handled with care. Whether by aggregating the thefts that were carried out or by concentrating on the fact that the offenders were guilty of involvement in a conspiracy, the case clearly fell within category 1 and the sums involved may properly have been taken as exerting upward pressure on any starting point. When it comes to culpability, the Judge was right to identify that there were elements of medium culpability (for all the offenders), namely taking a significant role in a group activity and, to an extent that varied as between the offenders, being involved in some degree of planning. But whether and to what extent there were elements of higher culpability depended upon the specific role and duration of involvement of the individual offenders. Hence the significance of the fact that no controlling mind or master-planner was identified if the Court was to be true to the specific basis on which each of the various pleas were entered.
109. The Judge said that his assessment of being stuck between high and medium culpability, in each case, for category 1, meant that without regard to mitigation and pleas “the kind of category that we are looking at is in the region of two and a half towards three years imprisonment.” He reached this result by reference to the starting point under the guideline for the two categories that he had identified. At first blush, this seems suspect because it makes no allowance for the adjusted overall starting point for the conspiracy as a whole. However, we have come to the conclusion that it was (just) open to the Judge to conclude that a notional sentence after trial but before mitigation or reduction for guilty plea, could have been in the region of 3 years for each offender. Although the scale of the conspiracy as a whole would exert upward pressure on any starting point, the basis of pleas from the three offenders who submitted them demonstrated (a) limited duration of involvement and (b) limited culpability: see [35.] ff above. In the case of the fourth offender, Mr Wright, the

Judge was entitled to find as he did, namely that there were no indicators of him taking a leading role and that he was being directed by others. In our judgment, taking a notional sentence of 2 ½ years could not be justified and taking a notional sentence of 3 years at this point was at the very bottom of the range that was properly open to the Judge. We emphasise, lest there be any doubt, that another judge could have taken a less benign view and reached notional sentences of more than three years before mitigation and reduction for plea without fear of such a notional sentence being criticised as being manifestly excessive. Equally, the prosecution could have challenged the basis of the offenders' involvement by requesting a Newton hearing; but they did not do so. To adopt the language of the reference, settling on 3 years would have been very lenient, but just avoided being unduly lenient.

110. We therefore turn to the offenders in turn. Like the Judge, we will leave Mr George till last.

Mr Wright

111. We have summarised the submissions made on behalf of Mr Wright to the Judge at [54.]-[55.], the Judge's approach at [73.], and the submissions to us at [94.]-[96.] above.
112. Mr Wright had powerful mitigation in four respects. First, there was the fact of delay, for which he was not responsible. Second, he had consistently offered to assist the prosecution. Third, there was the evidence not just that he had changed his ways but of his positive good character in terms of his voluntary work. And fourth, he had since experienced custody and taken the opportunity to sort himself out. The Judge was entitled to say that it seemed that prison had actually achieved its aim. In our judgment, the Judge was entitled to reduce the duration of the three year notional sentence to two years on account of this mitigation. We may raise an eyebrow at the allowance of a full 1/3 for his guilty plea, but our concern that an aggregation of generous assessments may have led to a final sentence that was unduly lenient is alleviated by the fact that, in addition to the imposition of the suspended sentence, the Judge ordered Mr Wright to perform 150 hours of unpaid work in the community.

Mr Counihan

113. We have summarised the submissions made on behalf of Mr Counihan to the Judge at [56.]-[60.], the Judge's approach at [72.], and the submissions to us at [97.]-[98.] above.
114. Mr Counihan's submissions reiterated his limited role both in duration and level of involvement. This, however, has already been taken into account in the Judge's assessment that a sentence after trial before personal mitigation and reduction for plea of guilty would have been in the region of 2 ½ to 3 years, which we have addressed above. However, he had powerful personal mitigation based upon (a) the circumstances in which he came to offend, (b) his previous good character, (c) the impact of the loss of his high-level boxing career, (d) the delay in coming to be sentenced, (e) the fact that he too had turned his life around, tackled his gambling addiction, and secured and continued to hold down full time employment, and (f) the impact that a custodial sentence would have on his partner and young child.

115. The Judge formed a favourable impression of Mr Counihan, the circumstances of his offending and his subsequent rehabilitation, as is clear from his sentencing remarks that we have summarised at [72.] above. In our judgment, if one starts at a notional sentence of 3 years (for the reasons given above), it was generous but within the realms of reasonable discretion for him to take the view that Mr Counihan’s personal mitigation justified reducing the notional sentence to 2 years (or thereabouts) before making a further reduction on account of his plea.
116. As with Mr Wright, the Judge was generous in allowing the full 1/3 reduction for Mr Counihan’s plea. Once again, however, we bear in mind that the Judge imposed a substantial chunk of hours’ unpaid work.

Mr Neal

117. We have summarised the submissions made on behalf of Mr Neal to the Judge at [61.]-[63.], the Judge’s approach at [74], and the submissions to us at [99.]-[101.] above.
118. Mr Neal was able to rely upon the fact that, according to his basis of plea, his involvement was accepted to be solely as driver acting under direction which meant that, of the four offenders, he could distance himself from any suggestion that he took a leading role or that he was involved in significant planning: his basis included that he played no role in organising the thefts, he had no role in disposing of any stolen goods and he did not have control over the funds that were generated. This limited culpability bears repeating and is relevant to the question whether the sentence imposed on Mr Neal was appropriate even though the Judge decided to treat Mr Counihan, Mr Neal and Mr Wright as being much of a muchness before consideration of mitigation and reduction for plea.
119. It could be said that Mr Neal’s personal mitigation was less powerful than that of the other offenders; but it remained significant. Despite his diagnosed OCD, dyslexia and anxiety, he had stayed out of trouble since the time of the conspiracy and was acting as carer for his elderly grandmother. The Judge was justified in saying that Mr Neal had “applied [himself] consistently ... to the interests of others over the last few years” and to regard that achievement as being generally on a par with the personal mitigation of the other offenders. For these reasons, we consider that the Judge was justified in arriving at a notional sentence of 2 years in Mr Neal’s case. Once again we note the generosity of the 1/3 reduction for plea and the imposition of 150 hours unpaid work.

Suspending sentences for Mr Wright, Mr Counihan and Mr Neal

120. Pausing there, the Judge’s reasoning had brought him to a level of sentence for these three offenders that was capable of being suspended. His sentencing remarks demonstrate that he had the Imposition Guideline well in mind and considered the relevant factors tending in favour or against suspension: see [77.] above.
121. We fully endorse the Judge’s observation that, if they had been sentenced in 2020 or 2021, the offenders would have gone straight to prison. Had they been sentenced

then, they would not have had the opportunity to turn their lives around, which was an essential element of the Judge's reasoning that brought him down to suspendable levels. So the question of suspension would not have arisen. But, even if the Judge had arrived at a notional sentence that was technically suspendable, their absence of mitigation at that stage would have told powerfully against suspending.

122. That said, we also endorse the Judge's decision to suspend for the reason he gave, which we have set out at [77.] above. Initially this may have seemed a counter-intuitive and, frankly, impossible outcome for such serious offending. But the more we have delved into the Judge's reasoning, the more clearly has it emerged that there is a sustainable logic matched by considerable human understanding that supports the result that he reached. He was, in our judgment, entitled to place great weight (as he clearly did) upon the individual and cumulative devastation that would be inflicted both on the offenders themselves and more widely by immediate custodial sentences being passed on offenders who had made such efforts and achieved so much in turning their lives around.
123. We conclude in respect of Mr Wright, Mr Counihan and Mr Neal that the sentences passed were undoubtedly lenient, and at the very bottom of the range that could be justified even on the unusual facts to which we have referred. However, we are not satisfied that the sentences are unduly lenient. Had we felt compelled to find that the sentences were unduly lenient, we would have declined to interfere with what we regard as a humane, if lenient, exercise of judicial discretion in a difficult sentencing exercise.

Mr George

124. We have summarised the submissions made on behalf of Mr George to the Judge at [48.]-[53.], the Judge's approach at [79.]-[80.], and the submissions to us at [88.]-[101.93.] above. We have summarised the basis of Mr George's plea at [35.]-[38.] above.
125. The first question is whether the Judge was justified in treating Mr George in the same way as the other offenders, given the terms of his basis. The fact that he was directly involved from mid-October 2019, with his last involvement being very shortly before the conspiracy fell apart, requires some downward adjustment from the adjusted overall starting point. That said, the value of the items stolen during the time of his accepted involvement was in the region of £100,000 and he must have been aware of the scale of conspiracy once he joined it, a feature that is to be brought into account: see *Khan (Kazim)* at [35].
126. In our judgment, the Judge could not have been criticised if he had decided that Mr George's involvement in selling on stolen materials once he joined the conspiracy, including the sale of goods he knew had been stolen by others some months before meant that his culpability seemed higher than those whose pleas were accepted on the basis that they were merely drivers, with the implication being that they had a lesser organisational involvement. However, it is at this point that the unusual features of the combined written basis of pleas becomes relevant, because (according to the accepted basis of pleas) the conspiracy before Mr George joined involved Mr Wright and Mr Counihan without either being treated as having a distinct leadership role falling squarely within culpability A. To treat Mr George as having a higher level of

culpability after he joined the conspiracy would therefore elevate his responsibility above those who (on the accepted basis) started and ran the conspiracy before he joined. That would, in our judgment, be unfair even though, for obvious reasons, we may share the Judge's scepticism.

127. We therefore conclude, though not without some hesitation, that the Judge was entitled to treat Mr George as being on a par with the other offenders and not to draw a distinction based on his role. That meant that he was able to start (for the reasons that we have given) with a notional sentence before mitigation or reduction for plea of 3 years. Although Mr George could not rely upon the delay as such as a mitigating feature, because he had caused it by delaying his plea, he had used the time to acquire significant personal mitigation by going straight and building a significant legitimate business. The impact of an immediate custodial sentence would therefore not merely be on him and his family but would also be on the 30 or so employees who were dependent upon his for their employment. On any view, a reduction of 12 months for his personal mitigation was generous; but even if the Judge had decided on a slightly smaller reduction, a further reduction of 12 ½% for his plea would have taken him down to suspendable territory.
128. Like the Judge, we have given prolonged and anxious consideration to what would have been the appropriate sentence to be passed on Mr George. We are in no doubt that the sentence he passed was lenient and that the Solicitor General has reasonable grounds for submitting that it was unduly lenient. However, we note that Mr George was ordered to perform 200 hours unpaid work (rather than the 150 hours imposed on the other offenders) and have come to the conclusion that the sentence imposed by the Judge on Mr George, though at the very bottom of the range that could properly have been imposed, just avoids being unduly lenient. If we were wrong about that, we would regard the case as marginal and would exercise our discretion by deciding not to interfere.
129. Standing back, these were lenient sentences which at first sight appear to be far too low. We have, however, gradually come to the view that the Judge's approach to the sentencing of all four offenders was not simply to be described as "humane", though it certainly was. In our judgment the sentences were justifiable, though right at the bottom of the permissible range. We therefore decline to intervene.
130. Before leaving the case, we wish to pay tribute to the contributions of all counsel who appeared before us who, while recognising the difficulties in the case, made submissions that were focussed, concise and helpful.