IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/03724/B2, 2023/00348/B2
2023/00351/B2 & 2023/00363/B2
[2024] EWCA Crim 969

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 18th June 2024

B e f o r e:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE GOOSE

MR JUSTICE BRIGHT

R E X

- v -

SIMON DAVIES
MARCUS JUSTIN HUGHES
DAMION DARREN MORGAN

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr J Duffy appeared on behalf of the Applicants Simon Davies and Damion Darren Morgan
Mr I Whitehurst appeared on behalf of the Applicant Marcus Justin Hughes

Miss D Wilson appeared on behalf of the Crown

J U D G M E N T
(Approved)

Tuesday 18th June 2024

LORD JUSTICE HOLROYDE:

1. Following a trial in the Crown Court at Stoke on Trent before His Honour Judge Graeme Smith and a jury, the applicants were convicted of conspiracy to launder criminal property and were sentenced to terms of imprisonment. Their applications for leave to appeal against conviction and sentence were refused by the single judge, who gave detailed reasons for his decisions. Davies now renews his application for leave to appeal against conviction, and all three renew their applications for leave to appeal against sentence.

2. The applicants stood trial together with Leon Woolley, Liam Bailey and Nicholas Fern. On count 1, Hughes and Woolley were charged with conspiracy to launder criminal property, namely cash, between 9th March 2020 and 27th March 2021. On count 2, all six accused were charged with conspiracy to launder criminal property, namely cash, between 13th August 2020 and 27th March 2021. The trial suffered some delays and lasted in all about eight weeks.

3. Hughes and Woolley were convicted of both counts. Hughes was sentenced to concurrent terms of imprisonment of nine years on count 1 and 14 years on count 2. Woolley was sentenced to a total of five years and six months' imprisonment. The other defendants were all convicted of count 2 and were sentenced to terms of imprisonment as follows: Davies, eight years; Morgan, five years and six months; Fern, five years and six months; and Bailey, three years and six months.

Summary of Relevant Facts

4. Davies and Morgan had no previous convictions. Hughes had two previous convictions: conspiracy to supply Class B drugs, for which he was sentenced in 2005 to 12 years'

imprisonment; and conspiracy to cheat the public revenue, for which in 2008 he received a sentence of five years' imprisonment, to run concurrently with the sentence for the drugs matter. Because of his criminal activity, Hughes had been disqualified as a company director. He had transferred his ownership of a haulage company, Genesis 24 Limited ("Genesis"), into his wife's name. He had, however, continued to operate the company.

5. The prosecution case, proved by encrypted communications between Hughes and a man in Dubai called Johnson, and other circumstantial evidence, was that the defendants had conspired to use Genesis vehicles to transport and deliver very large quantities of cash. The origins of the cash were uncertain, but obviously criminal.

6. In March 2020, Hughes and his brother flew to Dubai, where Hughes was given an EncroChat device as a means of communication with Johnson. He later provided Johnson with contact details for Woolley (the transport manager at Genesis). Hughes and Johnson discussed details of deliveries and amounts to be transported.

7. In June 2020, Johnson alerted Hughes to the fact that EncroChat had been compromised by police investigations. They nonetheless continued their money laundering activities using a different means of communication.

8. Later in 2020, Hughes recruited others into the conspiracy charged in count 2. Bailey was already a Genesis employee working under Woolley. Fern and later Morgan joined the company as drivers. All were involved in the money laundering. Davies was a business associate of Hughes and was considering buying Genesis. Between January and March 2021 he and Hughes arranged deliveries of cash.

Arrests and Interviews

9. On 26th March 2021, police searched Hughes' home where they found more than £60,000 in cash. The police also stopped and searched Genesis vehicles driven by Fern and Morgan. Each was carrying more than £300,000 in cash, packed in vacuum sealed bundles.

10. When interviewed under caution, neither Hughes nor Davies made any substantive reply. Morgan said that he was acting under instructions, and had no knowledge of any criminal activity.

The Trial

11. The trial began in late September 2022. The prosecution had served an opening more than two months earlier. Hughes' convictions were adduced in evidence by the prosecution, as was a finding in 2018 that he had failed to declare his previous convictions when obtaining a licence to operate a haulage company.

12. Only Hughes and Woolley, who were the first two defendants on the indictment, gave evidence in their own defence. Hughes gave an elaborate explanation for the evidence against him. He blamed his brother for the link with Johnson and ran what was in effect a cut-throat defence as between him and Davies.

13. The decisions of the remaining defendants not to give evidence were confirmed on Friday 4th November 2022. On the following morning prosecution counsel, Miss Wilson, posted a tweet on her Twitter account which read:

> "Every time I'm prosecuting and the defendant doesn't give evidence, I'm like: 'Nooo, but I've spent ages preparing the greatest cross-examination of all time'. Coincidentally, it doesn't always work out that way when they do give evidence."

14. On Monday 7th November 2022, submissions were made to the judge that the tweet could have been seen by members of the jury, who would have been left with the impression that the prosecution were in possession of material, not thus far revealed to the jury, which would support the case against those defendants who had not given evidence. That was said to give rise to a risk of prejudice which could not be cured by any direction, particularly in the context of the cut-throat defences as between Hughes and Davies. It was submitted that the jury should be discharged, or that the judge should at least make inquiries to establish whether any juror had read the tweet.

15. The judge declined to take either of those courses. He accepted that anyone involved in the case would know that the tweet referred to it. He commented that it was, to say the least, quite inappropriate for counsel to have posted it at this stage of the trial. He did not, however, consider there was any real risk of prejudice to any defendant who had not given evidence. The judge gave three reasons for that ruling. First, there was no reason to think that any juror would have disregarded his instruction to them not to research the case in any way. Secondly, he did not think the tweet could be interpreted in the way suggested. It was plainly an expression of frustration by an advocate who had prepared what she considered would have been a great cross-examination, but who accepted that it might not have turned out that way. Thirdly, and in any event, any risk could be remedied by his directing counsel to repeat the point in her closing speech so that defence counsel could comment upon it.

16. After the jury had been in retirement for some days, one juror contacted the court to say that she was unwell and would not be able to attend the trial that day. It became clear that other jurors were aware of that fact because they were in communication with one another via a WhatsApp group. The judge rightly informed counsel and heard submissions. He then brought in the 11 jurors who were present and asked each of them to answer some questions in writing. In response, each of the jurors confirmed that they were all in a WhatsApp group,

that it had been used to arrange travel and lunches, and that there had been no discussion of the trial. The judge then sent the jurors home, and reminded them once again that they must not do any research into the case and must not discuss the case amongst themselves, whether personally or by WhatsApp, or by any other means, unless they were in their retiring room.

17. The trial thereafter continued and verdicts were returned, as we have indicated.

The Sentencing Hearing

18. No pre-sentence reports were thought to be necessary, and we are satisfied that none is necessary now.

19. The judge considered the Sentencing Council's definitive guideline for offences contrary to section 327 of the Proceeds of Crime Act 2002. He treated count 1 as having ended effectively in mid-June 2020, because there was no evidence as to how, if at all, that conspiracy continued after Hughes and Johnson stopped using EncroChat. He adopted a cautious approach in assessing how much cash had been transported. There was evidence that the first conspiracy intended to transport £12 million per week, but the judge was not sure that did in fact happen. He therefore treated the amount of cash transported during the first conspiracy as coming within category 2 of the guideline, which relates to the laundering of sums between £2 million and £10 million, and has a starting point based on £5 million.

20. As to count 2, in which all the defendants were involved, there was evidence of regular movements of cash during January, February and March 2021, and about £700,000 was recovered on the day when two vans were searched. The judge was sure that the total amount of cash transported was in excess of £30 million – the amount on which the starting point for category 1 is based – and that the prosecution estimate of £45 million was probably conservative.

21. The judge found Hughes to have played a leading role in both conspiracies, though he accepted that there were others outside the jurisdiction who also played leading roles, and accepted that there was no evidence that Hughes was involved in the offending which underlay the money laundering.

22. The judge was sure that Hughes controlled Genesis and was responsible for involving others, and sure that the cash found at Hughes' home was a benefit from the conspiracies. The second conspiracy had continued for several months and had involved significant planning.

23. The judge assessed Hughes' culpability as high and adjusted the guideline starting points upwards for that reason. He found three aggravating factors: Hughes' previous convictions; the commission of these crimes across borders; and Hughes' attempts to blame others. A small reduction was made to reflect the impact of Covid restrictions during the period when Hughes had been remanded in custody.

24. In those circumstances, the judge concluded that if the offences had stood alone, the sentences would be nine years' imprisonment on count 1 and 13 years' imprisonment on count 2. Taking account of totality, he imposed the total sentence of 14 years' imprisonment to which we have referred.

25. Morgan was held to have played a significant role in count 2. Although he had done some other work for Genesis and had received no benefit beyond his wages, he had been employed "almost exclusively for the purposes of transporting this cash". We understand that Morgan had left other employment as a driver in order to work for Hughes at Genesis. He had acted under direction, and the nature and extent of his role indicated medium culpability.

The judge held that the appropriate sentence was six years' imprisonment, before taking into account Morgan's previous good character, which reduced the sentence to five years and six months' imprisonment.

26. As to Davies, the judge found that the evidence supported the prosecution's allegation that Davies was responsible for counting the cash. He did not appear to have been under the direct control of Hughes, but he had travelled to Dubai with Hughes on one occasion and had provided information to him. The judge assessed his culpability as being at the overlap between high and medium. The judge took an adjusted starting point of eight years and six months' imprisonment, reduced to eight years, because Davies had no previous conviction.

27. We turn to the submissions made to this court. We are grateful to all counsel for their assistance. We are, as always, particularly grateful to those who have been good enough to appear pro bono.

Davies: Application for Leave to Appeal against Conviction

28. In the written grounds of appeal against conviction it was submitted that Davies' conviction is unsafe for three reasons. The first of those reasons related to what was said to be deficiencies in the disclosure by the prosecution. Mr Duffy (who did not represent Davies at trial, but represents him before this court today) asked for, and was given, leave to abandon that first ground.

29. The two grounds of appeal which remain, and which Mr Duffy has argued on the applicant's behalf, are these: first, that the judge should either have carried out a more detailed investigation than he did, or should have discharged the jury, when prosecution counsel tweeted something which could have been seen by one or more jurors; and secondly, that the judge should have carried out much more detailed investigations than he did when it

was learned that the jury were communicating via a WhatsApp group.

30. We have reflected on those submissions and on the respondent's submissions resisting the application.

31. In support of the applicant's case, Mr Duffy suggests that so far as the tweet was concerned, the jury should have been asked whether any of them used Twitter, and, if so, whether they had seen anything relating to the case. The course to be taken by the judge thereafter would no doubt have depended upon the answers received.

32. As to the WhatsApp group, Mr Duffy acknowledges that the judge did carry out an investigation, but submits that the judge should have carried that investigation further than he did, and in particular should have asked to see one or more of the jurors' mobile phones in order to read for himself the exchanges on the shared group.

33. Miss Wilson, for the respondent, submits that each of these grounds requires a good deal of speculation and essentially invites this court to take the view that the jurors could not be trusted to carry out the instructions they were given by the judge.

34. In relation to the first point argued by Mr Duffy relating to counsel's tweet, we respectfully endorse the observations of the judge as to the obvious risks inherent in any counsel entering into social media communications about an ongoing trial. Should a similar situation unhappily arise in any other case, we would not recommend judges to follow the course of requiring the offending comment to be repeated in a closing speech so that other counsel might criticise it. However, we agree with the judge that this tweet, although unwise, was no more than a wry comment upon life at the Bar. There was no reason to think that any juror would have seen it, and positive reason to think the contrary, because of the instructions

which the judge had given in conventional form that the jury must not conduct any research into the case. Even if any jurors had chanced to see it, we cannot accept that they would have placed upon it the sinister interpretation for which the applicant contends.

35. In those circumstances it was unnecessary, and would have been inappropriate, to make any inquiry of the jury. The proposition that the tweet gave rise to an evident need to discharge the jury is untenable.

36. As to the second of the grounds argued by Mr Duffy, we emphasise that there was no evidence of any jury irregularity and therefore no need for the judge to embark upon the process set out in what is now Part 8.7 of the Criminal Practice Directions 2023. Provided that they comply with the instructions invariably given to juries not to discuss or communicate about the evidence, save when they are all together in the privacy of their room, jurors can of course talk to one another about matters unrelated to the case and about matters linked to the case, such as their travel arrangements. It is, in our view, unrealistic to suggest that jurors may do so by individual messages or phone calls, but not by some form of group messaging. To take an obvious example, a juror who had been absent from court through ill-health might well want to inform all other jurors, as a matter of courtesy, of his or her progress towards recovery.

37. Mr Duffy submits that the particular vice of a means of group communication such as WhatsApp is that it would increase the temptation for an individual juror to engage in communication which was with all other jurors, albeit not in the privacy of their room. We agree with Miss Wilson that the courts are entitled to assume that jurors will obey the instructions they are given, and it seems to us that the suggestion that jurors may have been discussing the evidence via this means of communication was purely speculative. The judge dealt with the matter appropriately. He having done so, there was absolutely no basis for him

simply to disbelieve the jurors' reply and insist upon further inquiries. Nor is there any other basis for saying that more should have been done.

38. For those reasons, all of which were also put forward by the single judge (albeit in different terms), Davies' application for leave to appeal against conviction fails.

The Applications for Leave to Appeal against Sentence

Hughes

39. It is submitted by Mr Whitehurst on behalf of Hughes that the sentence of 14 years' imprisonment on count 2 was manifestly excessive for five reasons:

> 1. The judge imposed the statutory maximum sentence in circumstances which did not amount to the most serious criminality;
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> 2. The judge increased the starting point disproportionately when considering the aggravating factors and when determining that Hughes played a leading role;
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> 3. Insufficient weight was given to the impact of Covid on those in prison;
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> 4. There was disparity between Hughes' sentence and those on Davies and Woolley; and
>
> 5. The judge gave insufficient consideration to the principle of totality.

40. Mr Whitehurst has developed those written submissions orally before us today. He emphasises that Hughes' role was essentially one of facilitating criminal activities by others

and did not involve any participation in the underlying crime. He particularly draws to this court's attention the age of the previous convictions which were taken into account and the difficulties of life for those remanded in custody during the Covid pandemic.

41. Miss Wilson has assisted us by explaining that Hughes' previous convictions similarly related to the use of a haulage company of ostensibly legitimate nature for criminal purposes. She has also assisted us with what might be referred to as the dynamics of the trial. As we have said, only two of the accused gave evidence. Miss Wilson suggests – and we have no reason to doubt – that Hughes came across as a dominant character. Woolley, in contrast, came across as a weak man, faced with grave difficulties of finding any alternative employment during the Covid period, who essentially turned a blind eye to the criminal nature of instructions given to him by Hughes.

42. Morgan, however, had been recruited "almost exclusively" for the purposes of delivering stolen cash and in that way could also be distinguished from Woolley.

43. Reflecting on these submissions, we emphasise (by no means for the first time) that this court is generally concerned with the totality of the sentencing in a particular case, rather than with its precise structure. Although they overlapped in significant ways, there can be no doubt that the conspiracies charged in counts 1 and 2 were separate offences, the second of which added very substantially to the criminality of the first. The judge might have imposed consecutive sentences. He chose instead, sensibly, to impose concurrent sentences, with the sentence on count 2 reflecting the overall criminality. The judge made clear that if it had stood alone, he would have passed a sentence on count 2 which was less than the statutory maximum. It is, therefore, wrong to treat count 2 as if it were a sentence for the second conspiracy alone, and on that artificial basis to criticise it as wrongly imposing the statutory maximum.

44. As to the other points argued, we see no basis for challenging the finding that Hughes played a leading role in the conspiracies. He plainly did. The fact that others abroad also played a leading role, and might well have received longer sentences if tried and convicted at the same time, is nothing to the point. The judge, in our view, made an appropriate reduction to reflect the Covid-related difficulties when remanded in custody for crime committed during the Covid pandemic, and gave sufficient weight to totality. Having presided over a lengthy trial, the judge was in the best position to assess the relative culpability of the various defendants and we see no basis on which his decisions can be criticised.

45. The difference in sentence between Hughes and Woolley may well be explained in the way Miss Wilson suggests. But even if it could be said that Woolley – or any other defendant – may have been fortunate not to have received a longer sentence than he did, it would not follow that Hughes' sentence should be reduced. We see no force in the argument based on suggested disparity.

Davies

46. Davies' grounds of appeal challenge the judge's categorisation of his role and contend that there is unfair disparity between his sentence and that imposed on Woolley. Mr Duffy submits that in the circumstances of this case it was difficult to evaluate the total sums of cash which were laundered and particularly difficult to assess fairly the roles of those lower down the order of seriousness. He points out that in his sentencing remarks the judge expressly acknowledged the difficulty of ascertaining the precise extent of Davies' involvement. In those circumstances, Mr Duffy submits that the judge should have assessed Davies' culpability as medium.

47. There is, with respect, a non-sequitur in this argument. The judge was entitled to find on

the evidence that, whatever the precise boundaries of Davies' role may have been, he brought from outside Genesis a contribution of substantial value to the conspiracy and that his culpability was high. It is further submitted that the evidence did not support the judge's finding as to the amount of cash transported. We disagree. The judge's estimate, made with the benefit of having presided over the trial, was, in our view, appropriately conservative and amply justified. We would add that it was, of course, open to Davies to assist the court with inside information as to the extent of the money laundering and of his role, but he chose not to do so.

48. As to the disparity argument, we repeat that the judge was in the best position to assess the level of culpability of each defendant, and it is apparent from his sentencing remarks that he did so with considerable care. Woolley was an employee of Genesis, directly controlled by Hughes. Davies was not and was, as was submitted to us by Miss Wilson, "a top man" in his own right, albeit not as seriously involved as those abroad.

49. The cases and the mitigation of those defendants were different. Woolley, in particular, had serious, long-term health problems which the judge rightly took into account. Given the contrasts in their respective positions, it is not arguable that right-thinking members of the public would feel that something had gone seriously wrong with Davies' sentence merely because it was longer than Woolley's.

Morgan

50. Morgan similarly challenges the judge's findings as to culpability and harm, and also complains of disparity with the sentence imposed on Woolley. Mr Duffy points to the comparatively young age of Morgan and to the fact that his role was simply that of a driver, who acted on instructions given by Hughes and others, and who received no benefit in addition to the payment of his wages.

51. We reiterate, however, that the judge was in the best position to assess Morgan's criminality and to make a reasonable estimate of the scale of the conspiracy in which Morgan joined. The fact that his role was limited to that of a driver has to be set in the context of the nature of the loads which he was for the most part called upon to deliver.

52. As with the other applicants, the single judge dealt with all these points thoroughly. The applicant has been unable to persuade us to any different view. We conclude, accordingly, that Morgan's grounds of appeal are also not arguable.

Conclusion

53. For those reasons all these renewed applications for leave to appeal fail and are refused.

54. Although we are refusing leave, we have been assisted by submissions from all parties, and the submissions have raised two matters which we need to mention because they are of general importance to applicants and to practitioners. We therefore give leave for this judgment to be cited.

55. The first matter we wish to mention arises from the ground of appeal relating to disclosure, which the applicant Davies abandoned. The written grounds of appeal, which we should make clear were not settled by Mr Duffy, made a number of criticisms of aspects of the disclosure process, but did not say why the suggested deficiencies were said to render Davies' conviction unsafe.

56. We emphasise that an application for leave to appeal against conviction is unlikely to prosper if it consists of nothing more than a generalised grumble about the course taken in relation to disclosure during the proceedings below. It is necessary for the ground of appeal

to identify any alleged error of law or serious procedural defect in the disclosure, and to explain why it resulted in unfair prejudice to the applicant, or otherwise rendered his trial unfair and his conviction unsafe.

57. The second matter is a broader point relating to renewed applications. An applicant may of course wish to exercise his right under section 31 of the Criminal Appeal Act 1968 to renew to the full court an applicant for leave to appeal against conviction or sentence which has been refused by the single judge. Before doing so, however, the applicant and his legal representatives must give proper consideration to the reasons which have been given for the single judge's decision and must reflect on whether a ground of appeal can properly still be argued.

58. The renewal process does not operate as an appeal against the single judge's decision, but the full court may well wish the applicant, or his representative, to address the reasons given by the single judge.

59. As this court has recently observed in *R v Tamiz and Tamiz* [2024] EWCA Crim 200, applicants and their legal advisers should not simply treat renewal of the application as almost an automatic process. If hopeless grounds are renewed without proper consideration, the applicant is at risk of the full court exercising its power to make a loss of time order, whether or not the single judge has given a specific warning of that risk, and whether or not legal representatives have advised in favour of renewal.

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proceedings or part thereof.

Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk