IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/00136/A3
[2022] EWCA CRIM 1255

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 13 September 2022

B e f o r e:

LADY JUSTICE SIMLER DBE

MRS JUSTICE CHEEMA-GRUBB DBE

MR JUSTICE BENNATHAN

R E X

- v -

JORDAN JOSEPH GABRIEL

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Mr R Vardon appeared on behalf of the Applicant

J U D G M E N T

LADY JUSTICE SIMLER:

Introduction

1. On 4 November 2021 in the Crown Court at Manchester the applicant pleaded guilty to a three count indictment. On 14 December 2021 he was sentenced by Dove J to a total of 13 and half years imprisonment made up as follows: on count 1 (conspiracy to possess a prohibited weapon) three years imprisonment; on each of counts 2 and 3 (conspiracy to supply cocaine and conspiracy to supply heroin respectively) ten and a half years' imprisonment to run concurrently with each other but consecutively to the sentence on count 1.

2. A co-conspirator in respect of counts 1, 2 and 3, Nico Logan, also faced additional counts of conspiracy to supply MDMA (count 4) and cannabis (count 5). He was sentenced to a total of 16 years' imprisonment.

3. The applicant now renews his application for leave to appeal against sentence after refusal by the single judge. Mr Vardon, who represented the applicant below, appears on his behalf on a pro bono basis. We are grateful to him for his submissions.

The facts

4. The facts are fully set out in the Criminal Appeal Office summary. We do not repeat them in full here. In short, the conspiracies lasted for four months between March and the end of June 2020. The evidence in the case was obtained mostly from EncroChat discussions. Over the course of the conspiracies the applicant and Logan were involved in sourcing and supplying large amounts of cocaine and heroin, either in bulk or by adding a fee on top for brokering the drugs and supplying them to street dealers. In the course of the conspiracy they acquired a 9mm pistol and ammunition in order to bolster their credentials. Logan was a wholesaler and distributer who operated at a level below those involved in the importation. He sourced the drugs from them and supplied them on. The applicant operated below Logan, albeit, as the judge was to find, he too, was wholesaling and distributing and was involved in

breaking down larger quantities of drugs for onward supply. He was also involved in brokering half kilogram or corner amounts of class A drugs.

5. On conservative estimates, Logan was involved in dealing 3.18 kilograms of cocaine, just over 2 kilograms of heroin, 5,000 ecstasy tablets and 6 kilograms of cannabis. The applicant was involved with at least 1.6 kilograms of cocaine and 2.6 kilograms of heroin.

6. There were numerous examples in the EncroChat evidence of both Logan and the applicant exchanging messages with other users about kilo, half kilo and smaller quantities of cocaine and heroin, and discussing the pricing of kilo and half kilo amounts.

7. Towards the middle of the course of the conspiracy the applicant moved into an apartment in Salford Quays, for which he paid a deposit of £850 and rent of a little over £2,000, both in cash. The police made enquiries of Her Majesty's Revenue and Customs and identified that the applicant had not declared any income in the previous six years.

8. Logan was arrested on 18 March 2021. Expensive clothing, a Rolex watch and cash were seized. The applicant was arrested on the same day. The police seized expensive footwear and cash. At an associated address where the applicant's father was present, a Rolex watch worth more than £10,000 and a hydraulic press were seized.

The sentence

9. The applicant was born on 26 February 1992 and was aged 29 at the date of sentence. He had 25 convictions for 38 offences, spanning the period 2007 to 2021. His convictions for drug offences included simple possession of class B drugs, for which he was fined in 2011; simple possession of class B drugs and possessing a prohibited weapon, for which he received a non-custodial sentence in 2012; simply possession of class B drugs, for which he was fined in 2013; being concerned in the supply of class B drugs, for which he received a suspended sentence in 2017; and most recently, simple possession of class B drugs in 2020. His most recent offences, for which he received custodial sentences totalling 14 weeks imprisonment, were for driving offences and again simple possession of class B drugs.

10. The judge sentenced the applicant without a pre-sentence report. No report was then or

is now necessary.

11. In his sentencing remarks, Dove J observed that, like Logan, the applicant was engaged in wholesaling and dealing in class A drugs in significant quantities, along with the movement of large sums of money. The prosecution's conservative estimates in relation to the amounts of heroin and cocaine were accepted by the judge and came to a total of 4.2 kilograms of class A drugs. The judge regarded that figure, which was close to the indicative 5 kilogram figure for category 1 in the Sentencing Council Guideline as justifying a conclusion that the offending fell into category 1. In terms of role, he assessed the applicant to have had a leading role, but a rung on the ladder below Logan. On the basis of the EncroChat texts the applicant was, he was satisfied, directing the purchase and sale of commercial quantities of drugs, with close links to the supply chain and substantial financial gain in prospect. The level was not at the level of those who were importing substantial quantities of drugs, but nevertheless the judge was satisfied that these were features that demonstrated a leading role. For a category 1A case within the Guideline there was a starting point of 14 years custody, with a range of 12 to 16 years.

12. The judge assessed the conspiracy to possess a prohibited weapon to be a category 3A offence, with a starting point of six years custody and a range of five to seven years. He considered that a serious feature of the case was the fact that the applicant sought to bolster the credibility of his drug supply activity by possession of the weapon.

13. The applicant's previous convictions for involvement in drugs were not remotely on the scale or seriousness of the index offences but were nonetheless treated by the judge as an aggravating feature. The judge recognised that there was personal mitigation available to the applicant but concluded that in light of the seriousness of the offending, it carried limited weight.

14. The judge concluded that for the late guilty pleas the appropriate credit was 15 per cent, and he made clear that in fixing the overall sentence, he would take account of totality. The judge passed concurrent terms of ten and a half years' imprisonment for the drug

conspiracies, after credit, and expressly imposed a three year shorter sentence than the Guideline would have suggested for the firearms offence. He said he had made an overall adjustment in relation to all elements to reflect his assessment of the overall criminality in the case and, importantly, to reflect totality.

The appeal

15. In his written grounds of appeal, which were developed orally on the applicant's behalf by Mr Vardon, the sentence is challenged as manifestly excessive. Mr Vardon advanced two central criticisms. First, insufficient credit was given for the guilty pleas. He emphasised the fact that the failure to deal with pleas was at the behest of both defence and prosecution because of the EncroChat litigation then on foot. He submitted that the judge could have been slightly more generous in the credit accorded and suggested that 20 per cent was a more appropriate figure. Secondly, Mr Vardon challenged the judge's approach to categorisation. He submitted that the judge was wrong to sentence the drug offending as a category 1 conspiracy. It was a category 2 conspiracy, and insufficient distinction was made between the applicant and Logan in terms of role.

16. In addition, and since consideration by the single judge, Mr Vardon has sought to vary the grounds and applied to adduce fresh evidence to amplify and support the grounds relied on, in the form of a report from a drug expert, Daryl Jones, dated 10 June 2022. His report was commissioned and paid for by the applicant's family after the sentencing hearing and is directed at the central issue of categorisation. Mr Vardon submitted that the evidence is capable of belief and might afford a ground of appeal. In terms of explanation as to why the evidence was not adduced below, he frankly accepted that he considered the question of categorisation to be a matter of submission and did not consider it necessary to commission an expert report. Such a report is expensive in any event. He submitted that it would be in the interests of justice to admit this evidence under section 23 of the Criminal Appeal Act 1968 as fresh evidence in circumstances where it supports the central question of categorisation.

17. In refusing leave the single judge observed that it was not arguable that the sentence imposed was manifestly excessive and continued:

> "This was, as the experienced judge rightly noted, a serious conspiracy to supply large quantities of Class A drugs. Your role was at the wholesale/supply end. The judge carefully calibrated your involvement, taking into account your lesser role than that of your co-conspirator. It is simply wrong to argue that because your co-conspirator was sentenced as [having a] leading role, you should not have also been considered to occupy a leading role. Checking the facts against the Guidelines there is no arguable error in the conclusion that yours was a leading role, albeit less so. As for the harm figure while below the 5 kilogram total, the amounts in question were closer to that than the indicative amounts for Category 2, and it was not arguably wrong for the judge to have started from Category 1 and adjusted as he did. The judge also carefully considered totality. The sentence of ten and a half years for the drugs offences was far from manifestly excessive, given the other sentences running concurrently, the criminality of which had also to be reflected. As for the credit of 15 per cent for plea it cannot be said that this was arguably contrary to principle; it is plainly a question of judgment. Nor can the 5 per cent difference between 20 per cent and 15 per cent be said arguably to amount to a manifestly excessive sentence."

18. We agree with those observations. This was a four month conspiracy to deal in large quantities of cocaine and heroin, and an attempt to source and acquire a gun. The applicant operated at a level below his co-conspirator, but was also wholesaling and distributing, and involved in breaking down larger quantities of drugs for onward supply. As the judge found, and was entitled to find on the evidence, each was running his own business as a wholesaler, and they formed part of a trade association. There were many features of a leading role, and so much was conceded by counsel. Merely because the applicant was lower in the chain than Logan does not detract from that conclusion. The sentencing judge carefully calibrated the applicant's involvement and plainly took into account the fact that he had a lesser role than Logan. There was ample evidence to support the assessment of leading role made by him.

19. In terms of the judge's assessment of harm, the prosecution case, accepted by the judge, was that the applicant was directly associated with at least 4.2 kilograms of class A drugs.

The EncroChat material showed levels of sourcing and supply in multi-ounce, half kilo and kilo amounts, and the movement of large amounts of money. We see nothing wrong in treating the total weight for the heroin and the cocaine as a global amount in circumstances where the offences were, in reality, a single conspiracy to supply cocaine and heroin, both class A drugs. Furthermore, the indicative quantity at which the sentencing range changes is not a threshold. It is an indication of the general weight relevant to a particular category and a broad indicator of harm, designed to enable a judge to put the case into its correct context. Here, in light of all the evidence available to him, it cannot arguably be said that the judge acted perversely in assessing this as a category 1 case.

20. So far as the fresh evidence is concerned, we are far from persuaded that the report is admissible under section 23 of the Criminal Appeal Act 1968 in all respects. Leaving aside the admissibility of opinions expressed in the report, and, more importantly, the question whether this material might have afforded any arguable ground of appeal, it seems to us that it could easily have been obtained earlier and adduced below if regarded as relevant and necessary. Mr Vardon has been frank in accepting fault, but we remain not satisfied that this amounts to a reasonable explanation for the failure to adduce it. That said, even with the expert evidence, we can see no arguable error in the judge's assessments.

21. The remaining points are also unarguable. The sentence for the firearm offence was appropriate and properly imposed to run consecutively. There were no early guilty pleas either to the conspiracy to possess a prohibited weapon or to the conspiracy to supply class A drugs. They could have been offered earlier but were not because both the applicant and Logan were content to await the outcome of the EncroChat litigation. That was a tactical choice they made and they must take the consequences of that decision. In the circumstances, it was a matter for assessment by the judge to consider the credit to be accorded, and we see no arguable error in his approach. Totality was properly catered for, and in our judgment the judge was entitled to adopt the overall approach he did.

22. For all those reasons, and notwithstanding the crisp, well-focused submissions made by

Mr Vardon this renewed application is refused.

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

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