Neutral Citation Number: [2022] EWCA Crim 846

Case Nos: 202102982 B4
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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
on appeal from
THE CROWN COURT AT LEICESTER
His Honour Judge Brown

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2022

Before :

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE LAVENDER
HER HONOUR JUDGE NORTON
(sitting as a judge of the Court of Appeal, Criminal Division)

- -

Between :

Regina	**Respondent**
- and –	
Mark Thone **Baljit Kandola** **Adam Dooley** **Marc Unsted**	**Appellants** **Applicants**

- -
- -

David Watts for **Mark Thone**
Matthew Anthony Hodgetts for **Baljit Kandola**
Osman Osman for **Adam Dooley**
Ian McLoughlin for **Marc Unsted**
Miranda Moore QC for the **CPS**

Hearing date: 28 April 2022

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JUDGMENT

Mr Justice Lavender:

(1) Introduction

1. Mark Thone appeals with leave granted by the single judge against the total sentence of 10 years and 6 months' imprisonment imposed on him by HHJ Brown in the Crown Court at Leicester on 8 September 2021. Baljit Kandola

appeals with partial leave granted by the single judge against the sentence of 2 years and 6 months' imprisonment imposed on him by the same judge in the same court on 9 September 2021. Mark Unsted and Adam Dooley renew their applications for leave to appeal against the total sentence of 20 years' imprisonment imposed on each of them by the same judge in the same court on 7 September 2021.

2. At the conclusion of the hearing on 28 April 2021 we announced our decision, for which we now give our reasons:

   (1) We allowed Mr Thone's appeal to the extent that we quashed the sentence of 10 years and 6 months' imprisonment imposed on one count of conspiracy to supply a controlled drug of class B and substituted a sentence of 9 years' imprisonment, concurrent with two other sentences of the same length, so that his total sentence was reduced to 9 years' imprisonment.

   (2) We allowed Mr Kandola's appeal to the extent that we quashed his sentence of 2 years and 6 months' imprisonment and substituted a sentence of 20 months' imprisonment.

   (3) We refused the applications made by Mr Unsted and Mr Dooley.

(2) Background

3. In 2017 and 2018 two police operations, Operation Nebule and Operation Buster, uncovered a number of drugs offences. Operation Buster focused on the importation and supply of drugs. Ardeep Takhar led the organised crime group which arranged for the importation of very large quantities of cocaine and class B drugs and their supply on a wholesale basis. The nature of this activity is described in this court's judgment in *R v Takhar* [2020] EWCA Crim 549.

4. Mr Unsted, Mr Dooley and others, including David Moth, were involved in the "downstream" supply in and around Nottinghamshire of drugs supplied by Mr Takhar's group. In addition, Mr Thone manufactured amphetamines for them. Mr Kandola's involvement was limited to one day, 24 October 2017.

5. As part of Operation Nebule, a probe was placed in Mr Moth's car and between 29 September and 25 October 2017 recordings were made of various conversations which were later relied on in evidence. Meanwhile, on 13 October 2017 Mr Thone's home was searched and 111 kg of amphetamine were found. Then on 24 October 2017 Mr Kandola travelled from London to Derby with another defendant, Furhan Mahmood, to buy a quantity of drugs from another defendant, Claire Smallman, which he took back to London by taxi. We have seen photographs of the exchange which took place.

6. On 8 December 2017 Mr Moth, Mr Thone and 5 others appeared before the Nottingham Magistrates' Court and were sent for trial to the Crown Court at Nottingham. The Better Case Management form records that Mr Thone indicated an intention to plead not guilty to the charge of conspiracy to supply amphetamine.

7. On the indictment ("the Nebule indictment") Mr Thone faced two counts: conspiracy to produce amphetamine between 1 March and 8 December 2017 and (count 1) and conspiracy to supply a controlled drug of class B during the same period (count 2). He pleaded guilty to those two counts in the Crown Court at Nottingham on 23 January 2018. Count 2 was subsequently amended to specify that the controlled drug referred to was amphetamine.

8. Mr Moth originally pleaded not guilty to counts 1 and 2 on the Nebule indictment, but on 23 January 2018 he pleaded guilty to counts 3 and 4, which alleged possession of cannabis on 28 November 2017 and 7 December 2017. On 13 March 2019 he changed his plea on counts 1 and 2 to guilty.

9. Meanwhile, pursuant to Operation Buster, on various dates between 21 January and 21 February 2019, Mr Unsted, Mr Dooley, Mr Kandola, Mr Moth and others were sent for trial to the Crown Court at Leicester. The principal counts on the indictment ("the Buster indictment") against Mr Unsted, Mr Dooley and Mr Moth alleged: conspiracy to supply cocaine between 1 January 2017 and 15 December 2017 (count 5); and conspiracy to supply controlled drugs of class B during the same period (count 6). Mr Kandola was only charged on count 6. The drugs to which count 6 related were not identified in the indictment, but at trial it was alleged that they included amphetamine, ketamine and cannabis. Mr Moth pleaded guilty to counts 5 and 6 on 5 March 2019. Then on 29 March 2019 the Nebule case was transferred to the Crown Court at Leicester so that the two cases could be managed together.

10. Between September and December 2019 Mr Takhar and the other defendants involved in the importation of drugs were tried. Following their conviction, they were sentenced on 17 December 2019. The sentences imposed on Mr Takhar and another were subsequently increased by this court, for the reasons set out in the judgment which we have cited. Mr Takhar's sentence was increased to 29 years' imprisonment.

11. A trial of Mr Unsted, Mr Dooley and others began in January 2020, but could not be completed because of the pandemic and the first lockdown. During the trial, Mr Unsted and Mr Dooley admitted to dealing in steroids. Counts were added to the Buster indictment and on 23 November 2020:

    (1) Mr Dooley pleaded guilty to three counts relating to steroids, each of which covered the period from 1 January 2013 and 29 January 2019:

        (a) conspiracy to fraudulently evade the prohibition on the importation of goods (count 7);

        (b) conspiracy to produce a controlled drug of class C (count 8); and

        (c) conspiracy to supply a controlled drug of class C (count 9); and

    (2) Mr Unsted pleaded guilty to count 9 and to two more counts:

        (a) conspiracy to supply a controlled drug of class C, i.e. steroids (count 10); and

(b) offering to supply a controlled drug of class B, i.e. cannabis (count 11).

12. The trial of the appellants, the applicants and others began on 5 January 2021 before HHJ Brown. The Buster indictment had been amended so as to add Mr Thone as a defendant to counts 5 and 6. Mr Thone contended that, as against him, count 6 was an abuse of the process of the court, since it merely duplicated count 2 on the Nebule indictment, to which he had already pleaded guilty. He applied for the dismissal of count 6.

13. There was a hearing on 5 January 2021 to consider this application. The principal response by the prosecution was that count 2 on the Nebule indictment only concerned amphetamine, whereas count 6 on the Buster indictment concerned five class B drugs. Subsidiary points were that there were differences in the indictment periods and in the named conspirators. In dismissing the application, HHJ Brown said as follows:

> "I am satisfied that there are sufficient differences between the two counts as set out by me to justify each count being prosecuted against Mark Thone. I accept Mr Watts' point that if Thone is convicted on the Buster indictment, it would be important for the sentencing judge to have regard to any overlap between the two counts and to take care when sentencing, to ensure that there is no double jeopardy and no double sentencing of Mark Thone.
>
> I anticipate that I will be the sentencing judge for Mark Thone and if I am not, whoever is the sentencing judge should sentence him for all matters and thereby the judge sentencing can ensure that any sentence which he receives reflects his true criminality, by maintaining an overview of both sets of offences, if he is convicted on either count on the Buster indictment."

14. On the same day, 5 January 2021, Mr Thone pleaded guilty to count 6 on the Buster indictment. Then, on the following day, 6 January 2021, Mr Kandola pleaded guilty to count 6. He produced a written basis of plea, in which he contended that on 24 October 2017 he had collected only 900g of cannabis from a woman in Derby. That basis was not agreed by the prosecution.

15. On 11 March 2021 Mr Mahmood pleaded guilty to count 6. Like Mr Kandola, his involvement in the conspiracy was limited to the occasion on 24 October 2017 when drugs were collected from Derby. Mr Mahmood pleaded guilty on the basis that on 24 October 2017 he drove Mr Kandola from London to Derby to collect a consignment of drugs, Mr Kandola purchased multiple kilograms of hexedrone, but Mr Mahmood was not present for the handover. HHJ Brown subsequently sentenced Mr Mahmood on that basis.

16. At the conclusion of the trial:

(1) Mr Unsted, Mr Dooley and others were found guilty on counts 5 and 6.

(2) Mr Thone was found not guilty on count 5.

(3) The Sentences

17. The sentencing hearings took place over several days.

(3)(a) 7 September 2021: Mr Unsted and Mr Dooley

18. Mr Unsted, Mr Dooley, Mr Moth and another defendant, Sukjinder Sandhu, were sentenced on 7 September 2021. The judge said that these four defendants were the main conspirators in the case which he had tried. He said that all of them had drivers, couriers and warehouse staff who worked for them and others who manufactured drugs, such as amphetamine. They described themselves as "the consortium" and they operated like the board of directors in a company, each playing a full and active role as a leading figure in the conspiracy. That was how the prosecution had put their case at trial and, although the defendants did not accept that description of them, the judge was satisfied, having heard the trial, that it was an accurate description of them. On that basis, the judge assessed that each of them played a leading role. Moreover, the judge found that the conspiracy involved at least 20 kg of cocaine and over 100 kg of amphetamine.

19. For count 5, the offence-specific sentencing guideline stated that the starting point for a defendant who had played a leading role in a category 1 offence was 14 years' imprisonment, with a range from 12 to 16 years, but that was based on an indicative quantity of 5 kg of cocaine. The judge considered that the following sentence in the guideline applied in the present case:

> "Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the offender's role."

20. In sentencing Mr Moth, the judge observed that there was a very large measure of overlap between the counts on the Nebule indictment and counts 5 and 6 on the Buster indictment. He accepted a submission that he should give more than 25% credit for Mr Moth's guilty pleas.

21. When sentenced:

    (1) Mr Unsted was 42. Although he had been convicted of 9 offences committed between 2000 and 2015, he had no relevant previous convictions.

    (2) Mr Dooley was also 42. He had been convicted of 4 offences committed between 1997 and 2018, but he had no relevant previous convictions.

    (3) Mr Moth was 47. He had been convicted of 44 offences committed between 1995 and 2017, including offences of possessing cocaine and amphetamine with intent to supply in 2011. He also accepted that he had been supplying drugs for over 20 years.

22. Mr Unsted was given concurrent sentences of:

(1) 20 years' imprisonment on count 5;

(2) 12 years' imprisonment on count 6;

(3) 4 years and 6 months' imprisonment on each of counts 9 and 10; and

(4) 3 years' imprisonment on count 11.

23. Mr Dooley was given concurrent sentences of:

(1) 20 years' imprisonment on count 5;

(2) 12 years' imprisonment on count 6; and

(3) 4 years and 6 months' imprisonment on each of counts 7, 8 and 9.

24. Mr Moth was given concurrent sentences of:

(1) 14 years' imprisonment on count 5, which the judge said would have been 20 years but for his guilty plea;

(2) 9 years' imprisonment on count 6, which the judge said would have been 12 years but for his guilty plea; and

(3) 8 years' imprisonment on each of counts 1 and 2 on the Nebule indictment.

25. The judge imposed no separate penalty on counts 3 and 4 on the Nebule indictment.

(3)(b) 8 September 2021: Mr Thone

26. Mr Thone and three other defendants were sentenced on 8 September 2021. In relation to Mr Thone, paragraph 138 of the prosecution's opening note for sentence stated as follows:

> "To be sentenced for:
>
> a. Operation Nebule:
>
> i. Count 1 - Conspiracy to produce Amphetamine
>
> ii. Count 2 - Conspiracy to produce Amphetamine
>
> b. Operation Buster:
>
> i. Count 6 - Conspiracy to supply Amphetamine"

27. The note went on to identify references in conversations between Mr Thone and Mr Moth to drugs other than amphetamine, namely cannabis, ketamine and MCAT (i.e. mephedrone). However, in describing Mr Thone's role in the conspiracy, which the judge found to be significant, the judge only referred to his involvement with amphetamine.

28. The starting point in the relevant guideline for a defendant who played a significant role in a category 1 offence was 5 years and 6 months' imprisonment, with a range from 5 to 7 years. However, that was based on an indicative quantity of 20 kg of amphetamine, whereas Mr Thone was in possessive of over five times that amount. The judge said as follows in the sentencing hearing:

> "I have formed – and if it helps you I will tell you what my provisional view is, subject of course to further submissions which you are welcome to make – I have formed the view that because of the quantity of drugs here, he is outside the guidelines for class B. Outside the upper range, I mean. But not by much, but he is.

29. Moreover, Mr Thone's previous convictions constituted a substantial aggravating factor. When sentenced, he was 57 and he had been convicted of 11 drugs offences and one firearms offence. His previous offences included:

(1) supplying cannabis in 2003-4 and producing a class C drug in 2004;

(2) producing a class C drug, possessing cannabis with intent to supply and possessing a shortened shotgun in 2006 and/or 2007; and

(3) supplying amphetamine and possessing amphetamine with intent to supply in 2015.

30. A total sentence of 3 years' imprisonment had been imposed for these last offences and Mr Thone was on licence when he committed the current offences.

31. In the course of the sentencing hearing, the judge said as follows:

> "Although the counts do not deal with identical conspiracies, we had this matter considered when you made a submission to me that count 6 was effectively an abuse of process because it was covered by counts 1 and 2 on Nebule and I rejected your submission.
>
> Nonetheless for that, there is a considerable degree of overlap and I am going to make the sentences concurrent between Buster and Nebule."

32. Then in his sentencing remarks the judge said as follows:

> "Count 1 on Nebule is conspiracy to produce amphetamine. Count 2 on Nebule is conspiracy to supply amphetamine. Count 6 on Buster is conspiracy to supply amphetamine.
>
> Whilst the two indictments do not cover the same facts – they would be duplicitous if they did – I am nonetheless going to take the decision to make the sentences concurrent between the two indictments."

33. The judge imposed concurrent sentences on each of the three counts. In each case, he said that the sentence would have been 12 years' imprisonment, but for Mr Thone's guilty pleas. On counts 1 and 2 on the Nebule indictment he reduced that by one quarter to 9 years, but on count 6 on the Buster indictment he said that he would reduce it by only one tenth, because Mr Thone had only

pleaded guilty at the start of his trial. In fact, the judge reduced the sentence to 10 years and 6 months' imprisonment, which was a reduction of one eighth.

(3)(c) 9 September 2021: Mr Kandola

34. Mr Kandola was sentenced on 9 September 2021. The judge was invited to recuse himself, because he was the judge who had sentenced Mr Mahmood on a different basis to that advanced by Mr Kandola. The judge declined to recuse himself.

35. There was then a *Newton* hearing. A number of facts were agreed for the purposes of the *Newton* hearing. In particular, it was agreed that there was an exchange of bags between Mr Kandola and Ms Smallman at a location in Derby on the evening of 24 October 2017:

    (1) Ms Smallman gave Mr Kandola an orange bag which was agreed to be "similar to a bag for life or similar in size".

    (2) Mr Kandola gave Ms Smallman a light-coloured bag.

    (3) Ms Smallman gave Mr Kandola what was agreed to be "a large black sports holdall approximately 2.5 foot long and 1 foot square in cross-section."

36. Mr Kandola gave evidence, saying, as he had said in his basis of plea, that he only collected 1 kg of cannabis from Ms Smallman. The judge rejected that evidence, saying as follows:

> "I have seen pictures of the vacuum wrapped cannabis in kilogram blocks, and it is clear to me that bag contains more than a kilogram. I can see for myself the bag is a full bag, it is a shopping bag size and it is, frankly, the size of a small suitcase. Mr Hodgetts makes the point, with force, and I take his point, "Well, you just cannot be sure what is in that bag." He says, "You cannot be sure if it is hexedrone or just cannabis and, if it is just cannabis, how much is in there." I cannot speculate, but I can draw inferences, and the inference I draw is that this man has come out of London to collect a substantial quantity of drugs.
>
> I am satisfied that he is a multi-kilo dealer. I am satisfied that he goes into category 2. I am satisfied that he is downplaying his role to minimise his involvement, no doubt with an eye to [*the*] sentence that will follow. Now, as I approach this analysis, I do so mindful of the fact that it is for the prosecution to prove the basis of plea as they allege it, not for this man to prove his version. It is for them to prove it to the criminal standard and the burden is on them, and the doubt, where there is any, resolves in Mr Kandola's favour. I reminded myself of all that, but I conclude, as I have said, he was dealing with a man who was in receipt of very substantial quantities of high purity import drugs: Sandhu. Having said that – and this is my finding – although I cannot put a number on it, and I do not, it is multi-kilo and it is category 2."

37. Category 2 in the relevant sentencing guideline was based on an indicative quantity of 40 kg of cannabis, whereas category 3 was based on an indicative quantity of 6 kg. It was submitted to the judge that the bags given to Mr Kandola could not have contained 40 kg of cannabis, nor anything like that amount. The judge referred to this submission in his sentencing remarks.

38. When sentenced, Mr Kandola was 44. He had been convicted in 1998 of two offences of supplying and possessing amphetamine. A pre-sentence report assessed him as a low risk of re-offending.

39. When sentencing Mr Kandola, the judge said as follows:

> "You are a category 2. You're a significant role. I take on board this point about 40 kilograms of cannabis. You are below that four year starting point. I am going to say the sentence for you is three years after a trial. I am going to reduce that to thirty months to reflect your plea of guilty and, also, to reflect, as I must in the sentence, the fact that I have read these references. I can see that there is another side to you, and I can see that you have lots of issues in your life, that are not of your own making, which you have been struggling with and which you are, hopefully, coming through now, but the sentence is thirty months with immediate effect."

(4) The Renewed Applications

40. It is convenient to begin by considering the applications made by Mr Unsted and Mr Dooley. In doing so, we recall the guidance given in this court in paragraphs 32 to 35 of its judgment in *R v Khan* [2014] 1 Cr. App. R. (S.) 10, which is relevant to both the applications and the appeals:

> "32. Many conspiracies will involve multiple supply transactions. In those circumstances the judge would be entitled to look at the aggregate quantity of the drug involved.
>
> 33. Of course involvement in a conspiracy may vary for individual offenders within it. One core variant is culpability, which is demonstrated in the guideline by the role of the offender, and which is to be assessed by the non-exhaustive indicative factors set out in the guideline. That will enable the judge to assess the level of involvement of an individual within a conspiracy.
>
> 34. However, 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."

41. Counsel for Mr Unsted and Mr Dooley each submitted that the judge was wrong to find that they played a leading role in the conspiracy and that the judge should have sentenced them on the basis that their involvement in the conspiracy was limited in duration and extent.

42. For Mr Unsted, Mr McLoughlin submitted that there was no evidence that he was involved in the conspiracy before the end of September 2017, that there was no evidence of any drugs in his possession, that he was only linked to one supply of drugs, where the amount involved was 1 kg, that, although he had an Encrochat telephone, there was no evidence that it was used in connection with this conspiracy, that his lavish lifestyle was funded by his dealing in steroids, rather than class A or B drugs, and that the judge was wrong to find that he was a member of the consortium, that he played a leading role in the conspiracy and that he was involved in the supply of 20 kg of cocaine.

43. For Mr Dooley, Mr Osman submitted that he only became involved in the conspiracy in around April 2017, that there was no evidence of him collecting or delivering class A or B drugs, that his involvement in the conspiracy ended in October 2017 and that the judge was wrong to find that his role in the conspiracy was a leading one, rather than between leading and significant, and that he was involved on the supply of 20 kg of cocaine. Mr Osman also submitted that it was unfair for the judge to give Mr Dooley the same sentence on count 5 as, before the reduction for his guilty plea, he gave to Mr Moth, given Mr Moth's long history of drug dealing and his previous convictions.

44. An appellant who seeks to challenge factual assessments made by a judge who has heard all of the evidence at a trial faces a high hurdle. For instance, the judge in this case had heard all of the recordings of Mr Moth's conversations in his car, including any conversations with the applicants and any conversations in which they were mentioned, and had been able to consider the significance of those recordings in the context of the whole of the evidence in the case. Having considered all of the submissions made on behalf of the applicants, we are not persuaded that it is arguable that the judge was wrong his assessment of their role in this conspiracy.

45. As for the comparison with Mr Moth, it may be that Mr Moth was fortunate not to receive a longer sentence, but that does not give either of these applicants a ground of appeal. A disparity in the sentences imposed on co-defendants will only give rise to a ground of appeal if right-thinking members of the public would consider that something had gone wrong with the administration of justice: see *R v Fawcett* [1973] 5 Cr. App. R. (S.) 158. Apparent leniency to one offender is no ground for reducing a proper sentence imposed on another: see *R v Wilson* [2018] 1 Cr. App. R. (S.) 25.

(5) Mr Thone's Appeal

46. What we have just said is sufficient to dispose of Mr Thone's grounds of appeal insofar it was contended on his behalf that 12 years' imprisonment before reduction for guilty plea was manifestly excessive in his case. At the hearing, Mr Watts quite properly accepted that, viewed in isolation, 12 years' imprisonment before reduction for guilty plea was not manifestly excessive in Mr Thone's case, but he submitted that there should have been a distinction between Mr Thone's sentence on count 6 and the sentence which the judge said that Mr Moth would have received on count 6 if he had not pleaded guilty. However, even if we assume that Mr Moth's sentence was lenient, that does not give Mr Thone a ground of appeal. (For what it is worth, we also note that the judge said that he would give Mr Moth full credit for his guilty pleas. On that basis, the sentence of 9 years' imprisonment which the judge imposed on Mr Moth on count 6 was equivalent to 13 years and 6 months before the reduction for Mr Moth's guilty plea.)

47. Mr Thone's second ground of appeal concerned the reductions in his sentences by reason of his guilty pleas. There were two aspects to this ground. First, it was submitted that Mr Thone's sentences on counts 1 and 2 on the Nebule indictment should have been reduced by one third, rather than one quarter, because Mr Thone made full admissions to the police when interviewed. What matters, however, is whether Mr Thone indicated an intention to plead guilty at the first hearing, i.e. the hearing in the magistrates' court on 8 December 2017. Paragraph D1 of the guideline on Reduction in Sentence for a Guilty Plea states as follows:

> "Where a guilty plea is indicated at the first stage of proceedings a reduction of one-third should be made (subject to the exceptions in section F). The first stage will normally be the first hearing at which a plea or indication of plea is sought and recorded by the court."

48. Paragraph D2 then states as follows:

> "After the first stage of the proceedings the maximum level of reduction is one-quarter (subject to the exceptions in section F)."

49. None of the exceptions in section F are relevant. Mr Watts submitted that Mr Thone was not asked to indicate a plea in the magistrates' court, but there was no evidence that there was such a departure from the usual practice in the magistrates' court and, after the hearing, we have seen the Better Case Management form, which confirms that Mr Thone indicated an intention to plead not guilty. It follows that the maximum level of reduction was one quarter.

50. The second aspect of this ground of appeal is that it is submitted that the sentence imposed on count 6 on the Buster indictment should have been reduced by one quarter rather than one tenth. The basis for this submission is that, by the end of the trial, it was apparent that there was a total overlap between that count and counts 1 and 2 on the Nebule indictment.

51. In the unusual circumstances of this case, we see force in this submission. The judge acknowledged in his sentencing remarks that there was a considerable

degree of overlap between count 6 on the Buster indictment and counts 1 and 2 on the Nebule indictment, but he did not identify any specific respect in which count 6 on the Buster indictment involved offending which was not covered by counts 1 and 2 on the Nebule indictment.

52. Moreover, the principal respect in which the prosecution had submitted on 5 January 2021 that count 6 on the Buster indictment covered wider offending than counts 1 and 2 on the Nebule indictment was that it included class B drugs other than amphetamine, but by the time it came to the sentencing hearing, the prosecution described count 6 as a charge of conspiracy to supply amphetamine and the judge also adopted that description in his sentencing remarks.

53. In our judgment, it appears that the only offending covered by count 6 on the Buster indictment was that to which Mr Thone had pleaded guilty when he pleaded guilty to counts 1 and 2 on the Nebule indictment at the plea and trial preparation hearing. In those circumstances, any sentence imposed for that offending ought to have been reduced by one quarter.

(6) Mr Kandola's Appeal

54. Three proposed grounds of appeal were advanced on behalf of Mr Kandola:

(1) The judge failed to make any findings of fact at the *Newton* hearing.

(2) Alternatively, any such findings that can be inferred were irrational.

(3) The judge ought to have acceded to the application to recuse himself from the Newton hearing.

55. The single judge granted leave to appeal on the first two grounds. Mr Kandola renewed his application for leave to appeal on the third ground, but in the hearing Mr Hodgetts stated that, if we allowed the appeal on the first or second ground, then the third ground was unnecessary. In those circumstances, we need say no more about the third ground.

56. In his ruling following the *Newton* hearing:

(1) The judge did not say that he rejected Mr Kandola's evidence that the drugs which he collected on 24 October 2017 were cannabis. Nor did the judge say that he was sure that they were, or included, hexedrone. He appears, therefore, to have sentenced Mr Kandola on the basis that he collected cannabis.

(2) The judge did make clear that he rejected Mr Kandola's evidence that he collected only 1 kg of drugs. He found that Mr Kandola had travelled from London to collect "a substantial quantity of drugs" and that he was a "multi-kilo dealer".

(3) The judge did not specify how many kilograms of drugs he found that Mr Kandola collected. Indeed, he said that he could not put a number on it.

(4) However, the judge did say that he was satisfied that Mr Kandola's offending fell within category 2 in the sentencing guideline. It is to be inferred, therefore, that he found that Mr Kandola collected significantly more than 6 kg of cannabis, that being the indicative quantity for category 3 offending.

57. On the other hand, it appears from his sentencing remarks that the judge accepted that Mr Kandola collected less than 40 kg of cannabis, that being the indicative quantity for category 2 offending.

58. The basis for the second ground of appeal is the contention that the evidence showed that the two bags handed to Mr Kandola could not have contained significantly more than 6 kg of cannabis. There was evidence of both the dimensions of the bags and the dimensions of a 1 kg package of cannabis. We have also seen photographs of the bags. Miss Moore did not challenge Mr Hodgetts' submission that it was not physically possible for the bags to hold more than 8 kg of cannabis. In those circumstances, we consider that the judge was not entitled to place Mr Kandola's offending on that occasion in category 2 in the guideline rather than category 3.

59. On the other hand, Mr Hodgetts accepted that the judge was entitled to reject Mr Kandola's evidence that he collected only 1 kg of cannabis. It follows that the judge was entitled to find that Mr Kandola collected more than 1 kg. The judge's finding that Mr Kandola was a "multi-kilo dealer" indicates that, as an absolute minimum, Mr Kandola collected at least 2 kg of cannabis.

60. The starting point for a defendant who played a significant role in a category 3 offence is 1 year's imprisonment, with a range from 26 weeks to 3 years' imprisonment. We bear in mind that 2 kg is less than the indicative amount for category 3, but it is also appropriate, for the reasons given in paragraph 35 of the judgment in *R v Khan*, to reflect the fact that Mr Kandola was not convicted of a single, isolated offence, but of being party to a much larger conspiracy. Moreover, his previous convictions, although not recent, were relevant. Taking account also of all of the mitigating factors advanced before the judge, we considered that a sentence of 22 months' imprisonment would have been appropriate if Mr Kandola had been convicted by a jury. He pleaded guilty at the start of the trial, but his basis of plea was rejected following a *Newton* hearing, so that the sentence which he would have received if convicted by a jury falls to be reduced by no more than 5% by reason of his guilty plea. Rounding that up, we reduced his sentence to 20 months' imprisonment.