Neutral Citation Number: [2024] EWCA Crim 1315

Case No: 202201388/9 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM WOOLWICH CROWN COURT
HHJ Jonathan Mann KC
T20207213

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2024

Before :

PRESIDENT OF THE KING'S BENCH DIVISION
THE HONOURABLE MR JUSTICE SAINI
and
THE HONOURABLE MR JUSTICE FOXTON

- -

Between :

(1) CAVAN HANNA	**Applicant**
(2) JAMIE HANNA	**Appellant**
- and -	
REX	**Respondent**

- -
- -

Sean Larkin KC and **Tony Wyatt** (instructed by **Ewing Law**) for the **Applicant** and the **Appellant**
James Thacker KC and **Emilie Morrison** (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date : 9 October 2024

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Approved Judgment

This judgment was handed down remotely at 12.00 noon on 4 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dame Victoria Sharp P. :

Introduction

1. Between 14 and 30 March 2022 Jamie Hanna, the appellant, and his brother Cavan Hanna, the applicant, were tried on drugs and money laundering charges at the Crown Court at Woolwich. For convenience we shall refer to them as the appellants. The trial judge was His Honour Judge Jonathan Mann KC. On 16 March 2022, Cavan Hanna dispensed with the services of his representatives, Jamie Hanna's legal representatives withdrew, and the appellants refused to participate in the trial thereafter. The trial judge decided the trial should continue. On 30 March 2022, the appellants were convicted by the jury on all counts, and on 4 April 2022 received substantial sentences of imprisonment. On count 1, conspiracy to supply cocaine, a Class A controlled drug they were sentenced by the trial judge to 25 years' imprisonment. On count 2, conspiracy to facilitate the acquisition, retention, use or control of criminal property they were sentenced to 10 years' imprisonment, concurrent to the sentence on count 1. Cavan Hanna was also sentenced to 3 months' imprisonment, concurrent for possession of a class A controlled drug, count 3.

2. Three co-conspirators were charged on the same indictment: Daniel Dalligan, a courier who was arrested on 14 June 2020 with £239,870 in cash and Anthony Dominy, also a courier who was arrested on 14 June 2020 with a BQ Aquarius charger pleaded guilty to counts 1 and 2 on 15 March 2024; and Thomas Mercer, a "banker" who had pleaded guilty to count 2 the previous week.

3. Mr Sean Larkin KC (who did not appear below) now appears for the appellants with Mr Tony Wyatt. Mr Wyatt has "re-entered" the case: he had represented Cavan Hanna for part of the proceedings until his services were dispensed with on 16 March 2022. Mr James Thacker KC and Ms Emilie Morrison, appear for the respondents and represented the respondent below.

4. Various grounds of appeal against conviction and sentence were settled on 26 April 2022 by Mr Wyatt on behalf of both appellants. The single judge, Wall J, gave leave to appeal to Jamie Hanna only and on one ground (Ground 3).

5. In giving leave to appeal the single judge said:

> "I grant permission regarding your lack of representation as it is arguable that the judge treated you [Jamie Hanna] and your brother as being in the same position whereas he had dispensed with his representation but your solicitors had withdrawn. You can argue that the judge should have adopted a more cautious approach to continuing with the trial immediately or at all."

6. The appellants now renew their applications for various extensions of time and for leave to appeal against conviction and sentence on the grounds rejected by the single judge. Mr Larkin also seeks to introduce new arguments concerning the fairness of the trial following the departure of Jamie Hanna's legal representatives, on the basis that these matters fall within the scope of existing Ground 3.[1]

[1] There is a procedural issue as to whether Jamie Hanna needs leave to do so or whether these matters are encompassed within Ground 3, but it is common ground that Cavan Hanna needs an extension of time and permission to pursue this aspect of his application.

7. For the reasons that follow, we consider the judge was fully entitled to decide on 16 March that the trial could proceed and that all other grounds advanced on conviction (including those now raised about the fairness of the trial) and on sentence, are not arguable. It follows that this appeal is dismissed, and all other applications are refused.

The facts in outline and the issues at trial

8. The Crown's case in a nutshell was that between 1 March 2020 and 15 June 2020 the appellants (and the three co-accused who had earlier pleaded guilty) conspired together, with others unknown, to supply substantial wholesale quantities of cocaine and conspired to launder the money obtained from supplying those drugs with Mercer. It was said that the operation was professional and highly sophisticated, being jointly headed by the appellants, leading an Organised Criminal Group. It involved dealing in multi kilo quantities of cocaine and hundreds of thousands of pounds on a regular basis and was facilitated through the use of EncroChat telephones.

9. As is now well-known, an EncroChat telephone is a device which can be used to send encrypted, unreadable messages and photographs securely between two contacts on the EncroChat cell network. Each must have given prior consent to be contacted by the other to make contact. Each user of the system is allocated a "handle" so as to remain anonymous to anyone not known to them. There is a "burn-time" fail-safe to clear/delete messages from a handset's memory after a pre-programmed period. The users of the EncroChat system paid substantial sums for the handsets (which had a "dummy" side to give the appearance of being an android device) and for access to what was perceived to be a "safe" network. Users before June 2020 believed it to be impenetrable and therefore freely used EncroChat to conduct organised crime.

10. The nature of the system has been described in a number of decisions of the Court of Appeal (Criminal Division) where it was decided EncroChat derived material was admissible under the law of England and Wales: see *A, B, D & C v R* [2021] EWCA Crim 128 and *Atkinson & Ors v R* [2021] EWCA Crim 1447.

11. To prove the existence of the conspiracies in the present case, the Crown relied on law enforcement agencies in France having lawfully accessed and obtained data from the EncroChat phones which was passed to the UK law enforcement authorities (the National Crime Agency).

12. The Crown attributed the relevant data to five EncroChat handles. The handles "wigglycalm" and then "luckywaffle" (with the nickname "a series of 'X's") were attributed to Cavan Hanna. The handle "muteswamp" (with the nicknames "Fox" and "silver fox") was attributed to Jamie Hanna. The handles "Giddymantis" and "truthfulray" (with the nickname "sleepy") were attributed to Daniel Dalligan; the handle "ownowl" (with the nickname "proof") was attributed to Anthony Dominy; and the handle "timelycrocodile" (with the nickname "toes") was attributed to Thomas Mercer.

13. It is important to note two things at the outset. First, that there was no dispute at trial, or before us that the data evidence from these five handles proved the existence of the conspiracies alleged. This was unsurprising. Discussions on the EncroChat telephones included references to the importation of cocaine, collecting kilo quantities, distributing them throughout England and the mechanics of laundering and moving large amounts of cash. To prove the conspiracies (and correct attribution) the Crown further relied on the guilty pleas of the three co-conspirators, Messrs Dalligan,

Dominy and Mercer. The Crown also relied upon bad character evidence of propensity, namely the appellants' convictions in 2008 for conspiracy to supply Class A and Class B drugs and of laundering the proceeds of drug trafficking. For these earlier offences, the appellants had each received sentences of 14 years' imprisonment.

14. Secondly, that the Crown's case was a very strong one on what was the only issue left for the jury to determine, namely attribution: that is, whether the EncroChat handles were correctly attributed to the conspirators.

15. For Jamie Hanna, the Crown relied on the following evidence to prove that the handle "muteswamp" (with the nicknames "fox/silver fox") was correctly attributed to him:

    i) Evidence found during a search of his flat on 14 June 2020 viz a notepad, which contained the words "silver1971fox" and two charging adapters for a BQ Aquarius device (compatible with an EncroChat phone) and a USB charging lead;

    ii) The fact that the location of the cell that was most frequently used by "muteswamp" was geographically closest to his home address in Dartford;

    iii) An EncroChat conversation on 13 May 2020 (and a similar conversation on 15 May) when "muteswamp" told another EncroChat handle located in Marbella that he intended to go to Dubai or Mallorca once his parole or licence expired in two years. Jamie Hanna was at the time on licence following his release from prison and his licence would have expired on 11 June 2022. In the course of the same conversation, "muteswamp" also sent a photograph of his view. This view was identical to the view from Jamie Hanna's home;

    iv) Evidence that "muteswamp" and Jamie Hanna's conventional mobile phone were co-located and travelled together on a number of occasions to locations which included Dover, St Albans and Watford, as well as to Jamie Hanna's home address;

    v) EncroChat evidence that "muteswamp" and "wigglycalm" were brothers.

16. As for Cavan Hanna, the Crown relied on the following evidence to prove the correct attribution to him of the handles "wigglycalm" and then "luckywaffle" (with the nickname "a series of 'X's"):

    i) Evidence that he had been arrested 2 years earlier at Heathrow Airport with a BQ Aquarius phone which was compatible with EncroChat;

    ii) The fact that the password used to access "wigglycalm" was "Nowayin1402", when 1402 corresponded to the day and month of Cavan Hanna's date of birth;

    iii) The fact that the location of the cell most frequently used by the handle "wigglycalm" and then "luckywaffle" was geographically closest to Cavan Hanna's home address;

    iv) A phone call made by Cavan Hanna on his (conventional) mobile phone to Brian Swann a solicitor, from The Stokoe Partnership (Stokoes), on 5 May 2020 at 11.10am. That call followed the arrest of Warren Bartlett at 10.40am, who was then in possession of £100,000 in cash. Mr Swann subsequently

represented Warren Bartlett at the police station. There were also subsequent EncroChat conversations from "muteswamp" asking if there was "any news on wazer?"

v) Evidence that "muteswamp" and "luckywaffle" were regularly co-located and that "luckywaffle" was also regularly located with Cavan Hanna's conventional mobile telephone. The EncroChat handles were also co-located at a site where Warren Bartlett was arrested;

vi) An EncroChat conversation on the 10 June 2020 which made reference to 14 years, which coincided with Cavan Hanna's sentence in 2008 of 14 years' imprisonment;

vii) Evidence that "luckywaffle" and Cavan Hanna's conventional mobile phone were co-located and travelled together on a number of occasions (including during the Covid lockdown) to locations which included Winchester and Andover, as well as to Cavan Hanna's home address;

viii) EncroChat evidence that "muteswamp" and "wigglycalm" were brothers.

The grounds of appeal and the further applications before the court

17. The Advice and Grounds of Appeal were settled by Mr Wyatt on 26 April 2022. Leave to appeal was sought on the following grounds:

Conviction

Ground 1 (Cavan Hanna): "[the judge] erred in refusing the application to vacate the trial date in respect of Cavan Hanna, made on the 21st February 2022 and again on the 14th March 2022, in order to rectify the effect of the gross negligence of the appellant's previous legal representatives - i.e. the fact that the appellant was unable to rely upon the evidence needed to advance the positive defence that existed on his instruction, due to the fact that the Stokoe Partnership had wholly failed to make any efforts whatsoever to secure said evidence".

Ground 2 (Jamie Hanna): "[the judge] erred in refusing the application to vacate the trial date in respect of Jamie Hanna, made on the 14th March 2022, in order to secure the assistance of expert witnesses on the issue of attribution".

Ground 3 (Jamie Hanna): "[the judge] erred in finding that Jamie Hanna had, on the 16th March 2022, dispensed with his representation by The Stokoe Partnership as part of some manipulation of the system, or indeed at all. The Stokoe Partnership were not 'dismissed' by Jamie Hanna; the Stokoe Partnership withdrew. In circumstances in which a defendant's representative withdraw[sic] following a disagreement and the defendant is left unrepresented for trial, it is an error for a Judge to represent that withdrawal as a dismissal and so voluntary, and to then immediately proceed to trial.

Sentence

Ground 4 (Jamie Hanna and Cavan Hanna): "[the judge] erred in basing sentence on newly served 'expert interpretation' of EncroChat exchanges which substantially increased the perceived weights of cocaine allegedly supplied from the figures as had been relied upon in the 20 months prior to trial. Opportunity should have been given

for these figures to be challenged given the difference they made to sentence, whereas in the circumstances of this case the appellants were entirely unaware of any change in position".

Events before trial

18. Before addressing the grounds of appeal it is necessary to put the decision made by the judge under challenge in Ground 3 in the context of the events leading up to the trial and the appellants' engagement with their former legal representatives (including the *McCook*[2] responses from those representatives to the criticisms made of them, privilege having been waived).

19. These events and the evidence since provided by the appellants' former legal representatives in their *McCook* responses, give the lie to the suggestions underlying the submissions now made on the appellants' behalf; viz, that they were or would have been willing to engage in the trial, but for the "gross negligence" of their former legal representatives, or that those legal representatives were negligent in their conduct of the case or that the judge's approach to the issues he had to decide on 16 March and earlier were unfair to the appellants. Instead, we consider the appellants were well served by those legal representatives, in particular in relation to the instruction of experts – but that individually, and in conjunction – the appellants were, as the judge determined, doing everything they could to avoid the trial and were attempting to manipulate the system to prevent it taking place, including by "disposing" of their legal representation.

20. The appellants were arrested on 14 June 2020 and gave no comment interviews. On 16 June 2020, the case was sent to Woolwich Crown Court. By that stage both appellants had instructed Mr Swann of Stokoes (he was privately instructed for Cavan Hanna). Mr Swann is a highly experienced criminal solicitor, and his firm specialises in cases of this type. Mr Swann asked for the appellants to be produced by videolink at the first Crown Court hearing which was held on 14 July 2020.

21. At the 14 July hearing, various case management directions were made. The Crown was directed to comply with Stage 1 disclosure by 5 August 2020, the appellants were to complete Stage 2 including service of defence statements by 2 September and the Crown was to complete Stage 3 by 30 September. Further it was directed that on 30 September there was to be a Further Case Management Hearing (FCMH). That a legal argument might then have to be considered about the admissibility of the EncroChat material was also flagged on the appellants' behalf.

22. On 20 August 2020, Cavan Hanna instructed James Lewis KC, a highly experienced criminal silk.

23. The Crown served Stage 1 disclosure on 30 August 2020, and an extension of time for Stage 2 disclosure was given to 14 October 2020.

24. For the purposes of the FCMH to be held on 30 September, counsel for Cavan Hanna (including Mr Lewis) produced a "position paper". This said that their client would be asking the court to give directions (including as to disclosure and service of expert evidence) for a preparatory hearing to be heard in January 2021 on the issue of the admissibility of the EncroChat material. The likely admissibility issue was said to be whether the EncroChat material had been obtained by intercepting communications for the purposes of section 4 of the Investigatory Powers Act 2016 and whether the

[2] See: *R v McCook* [2014] EWCA Crim 734.

material should be excluded under section 78 of the Police and Criminal Evidence Act 1984 (PACE). The position paper said that Cavan Hanna had retained two experts: Angus Marshall, a computer expert, and a Paris lawyer, who had begun a preliminary review of the Crown's disclosure.

25. On 30 September 2020, the *first* FCMH, the appellants refused to be produced. At that hearing HHJ Finucane QC made disclosure directions relating to the admissibility issue. Mr Lewis did not press for the date of the preparatory hearing to be fixed, pending the outcome of a hearing listed before Dove J in Liverpool, in a different EncroChat case due to be held on 26 October 2020 to consider the self-same admissibility issue.[3]

26. Cavan Hanna and Jamie Hanna's defence statements were served on 14 and 15 October 2020, respectively. These merely signalled an intention to challenge the admissibility of the EncroChat evidence and contained bare denials of the offending alleged. Cavan Hanna's defence statement was accompanied by 7 pages of disclosure requests drafted by counsel supported (so it was said) by expert reports from Mr Marshall and from the French lawyer retained on Cavan Hanna's behalf.

27. On 27 October 2020, the Crown made the raw EncroChat data available via the Egress system and sought an extension of time to respond to Cavan Hanna's disclosure requests to 5 November 2020. This was granted by HHJ Hales QC. While Jamie Hanna was later to complain that the raw data had not been disclosed *to him*, he was unable to identify any use which he might have made of it, exculpatory or otherwise. On 5 November 2020, the Crown served its response to Cavan Hanna's disclosure requests.

28. On 6 November 2020, a *second* FCMH took place, this time before the eventual trial judge, HHJ Mann QC. The appellants again refused to attend. At that hearing, the trial was fixed for 6 weeks with a commencement date of 28 June 2021. The appellants now withdrew their application for a preparatory hearing. Instead, they sought a *voir dire* to be heard before the trial, on the admissibility issue. The judge refused that request on the ground that this would involve the determination of the precise issues being litigated before Dove J elsewhere. The judge extended the time for the appellants to complete Stage 2 (by serving compliant defence statements) to 11 November 2020, with the Crown to complete Stage 3 by 9 December 2020. He also addressed criticisms advanced by the appellants of the disclosure provided by the Crown on 5 November 2020, ordering the appellants to serve a note setting out those requests which they said had not been satisfactorily answered.

29. On 13 November 2020 that note, settled by counsel, was served. It contained a detailed review and critique of the Crown's disclosure. The Crown served its response to that document on 23 November. On 4 December 2020, a *third* FCMH took place before HHJ Evans QC at which the trial was refixed for 16 August 2021 (to accommodate difficulties faced by the court).

30. On 3 March 2021, Cavan Hanna served an application for prosecution disclosure under section 8 of the Criminal Procedure and Investigations Act 1996. The "Streamlined Device Data Sheets" disclosed by the Crown had obviously been subject to defence review. It was suggested that a number of anomalies had been identified, that Cavan Hanna wished to instruct an expert both to examine the material and to

[3] This ruling, rejecting these arguments on admissibility was later the subject of the unsuccessful appeal in *A, B, D & C v R* [2021] EWCA 128.

provide an opinion on reliability, and that the full data set of original material was required for this purpose.

31. A *fourth* FCMH was fixed for and heard on 8 March 2021 before HHJ Heathcote Williams QC. In its note for that hearing, the Crown said that the additional material sought on behalf of Cavan Hanna would be disclosed by 19 March 2021. By the date of this FCMH, this Court had handed down judgment in *A, B, D & C v R* (on 5 February 2021). The appellants were (accordingly) arraigned and entered not guilty pleas.

32. On 17 March 2021, the Crown disclosed a hard drive of the raw EncroChat data previously disclosed through the Egress system.

33. On 19 March 2021, Cavan Hanna applied to break the trial fixture because Mr Lewis was not available. This application stated that Mr Lewis had "been intimately involved in advising Mr Hanna and in setting the strategy of the case since the outset", including being "closely involved in identifying and instructing expert witnesses." That application was granted, and the trial re-fixed for 28 February 2022.

34. On 29 March 2021, a *fifth* FCMH took place. The appellants were directed to serve any expert report on admissibility by 30 April 2021, with a responsive report from the Crown by 11 June 2021. The appellants were also directed to serve a skeleton argument on admissibility by 25 June 2021.

35. On 5 July 2021, Cavan Hanna's solicitors sent a detailed letter to the court referring to events in other cases in which the admissibility of EncroChat material was in issue, to the evidence served by the Crown in those cases and the view expressed by the court and by Dove J that issues of admissibility in other cases should await the outcome of the Liverpool trial. The letter stated that, for that reason, they had not "formally instructed" an EncroChat expert, and that they would be asking the court to vary the existing directions to reflect that fact.

36. The *sixth* and *seventh* FCMHs took place on 12 July 2021 (before HHJ Gumpert QC) and 16 July 2021 (before HHJ Lees). At the second of these hearings, the fact that the appellants' defence statements were not compliant with the rules was raised. The judge directed that amended defence statements dealing in sufficient detail with issues other than the admissibility of the EncroChat evidence be served by 30 July 2021, and skeleton arguments regarding the admissibility issue by the same date.

37. On 23 July 2021, Cavan Hanna applied to vary the orders made on 16 July 2021 and to defer the date for service of his skeleton argument. That application was refused. In the event, the appellants failed to comply with either order i.e. that they serve the amended defence statements and their skeleton arguments by 30 July. On 3 August 2021, the appellants made a further application to extend the deadline for the service of their skeleton arguments. The application was refused.

38. On 27 August 2021, Cavan Hanna's skeleton argument was served. It challenged the admissibility of the EncroChat material or in the alternative, invited the court to exclude it under section 78 of PACE. No expert evidence was served in support of the application, nor was there any suggestion that such evidence was required.

39. At the *eighth* FCMH held before HHJ Finucane QC on 3 September 2021, the appellants were ordered (again) to serve amended defence statements and to provide their witness requirements by 10 September 2021. Any expert reports were to be

served by 30 September 2021, *with no further extensions*. By the 30 September however, no expert reports had been served.

40. On 7 October 2021, Cavan Hanna's solicitors wrote to the Crown Prosecution Service (the CPS) making various criticisms of the Crown's disclosure, including on the issue of the continuity of the communications data relied upon.

41. On 12 October 2021, the case came before HHJ Mann QC for a mention. At this hearing Mr Lewis raised a number of issues about the telecommunications data. The judge ordered that if the appellants were still pursing any exclusionary applications, then skeletons were to be uploaded by 4 pm on 22 November 2021.

42. On 12 November 2021 (in response to issues raised by the defence) the Crown uploaded a further statement (from DC Berry) with additional data.

43. On 15 November 2021, Cavan Hanna's legal team sought more disclosure from the CPS.

44. On 23 November 2021, a *ninth* FCMH was held before HHJ Mann QC. Additional disclosure had been provided on that day. Directions were made moving the trial to 14 March 2022, and a two-day hearing for legal argument was fixed for 20 and 21 January 2022. Counsel for the appellants informed the court that this legal argument would relate to issues of continuity of the EncroChat material, rather than its admissibility *per se*. On that basis, the Crown was directed to upload a note setting out its position on continuity by 4pm on 30 November 2022, and all outstanding defence statements and witness requirements were directed to be served by 7 December 2021.

45. On 8 November 2021, Cavan Hanna's legal team served a skeleton argument in which it was argued that the EncroChat material should not be admitted because the continuity of the communication data had not been established. On 29 November 2021, the Crown's note on continuity was uploaded to the Digital Case System (the DCS).

46. On 11 January 2022, Cavan Hanna's counsel, Mr Lewis and Mr James Matthews advised Cavan Hanna in writing that the proposed objections to the admissibility of the EncroChat material were not properly arguable. We have not been provided with a copy of that advice, but there was no attempt before us to argue either that it was wrong, or to identify a viable means of challenging admissibility. On 12 January 2022, Mr Swann wrote to the CPS seeking further disclosure and seeking access for an expert to inspect a co-defendant's telephone.

47. According to Mr Swann's account in his *McCook* submission, which we accept, it was this advice (from Mr Lewis and Mr Matthews) that led Cavan Hanna to withdraw instructions from his legal team.

48. It is now suggested on his behalf, that Cavan Hanna made additional criticisms of his lawyers. These were said to include their failure to follow his instructions and to obtain expert cell site evidence to challenge the Crown's case linking the use of the EncroChat devices to the appellants. However, no evidence of this, or examples of these purported additional failures have been provided.

49. To the contrary, Mr Swann's uncontradicted *McCook* submissions demonstrate the extent of the work Stokoes were doing during this period in an endeavour to find and

instruct experts to contradict the Crown's case; and that the various complaints about Stokoes' conduct of the case were unfounded. In summary:

i) Cavan Hanna had instructed Stokoes not to seek cell site expert evidence until the issue of admissibility was resolved. In the event, that issue was resolved at about the time Cavan Hanna withdrew Stokoe's instructions. Stokoes did obtain cell site evidence for Jamie Hanna, but it was not deployed because leading counsel advised that it would not be helpful.

ii) Stokoes did instruct an expert witness in encrypted telecommunications and forensic computing, Mr Marshall, but as further material was served by the Crown, it became apparent he could not assist.

iii) In addition, a report was obtained from a Mr Peter Sommer in respect of a number of EncroChat cases on the reliability of the material. In the conference on 15 March 2022 referred to at para 68 and following below, it was noted that Mr Sommer's evidence had not been well-received in a Nottingham trial.

iv) Following the judgment of the Court of Appeal in *A, B, D & C*, approaches had been made to a number of potential experts, none of whom were able to assist.

50. In the event, at some point in January 2022 (whilst Stokoes were still instructed), Cavan Hanna contacted a different solicitor, Mr Scott Ewing of Ewing Law, and Mr Ewing agreed to take over his case. It is submitted to us that Ewing Law agreed to do so "on the basis that a reputable firm such as The Stokoes Partnership had been instructed for 18 months and despite the breakdown of the relationship and Cavan Hanna's criticisms the case would have effectively been prepared for trial." We have no doubt however that in taking over the case, Ewing Law did not have a good sense of the strength of the prosecution case, the avenues which Cavan Hanna's lawyers had already explored and the unsuccessful outcome of those efforts.

51. On 13 January 2022, the case came before HHJ Mann QC again for a mention. The judge was told that Cavan Hanna had now withdrawn instructions from his legal team. The judge confirmed that the legal argument fixed for the following week (20 and 21 January 2022) and the trial would go ahead. Stokoes continued to represent Jamie Hanna however; and his counsel told the judge that he might be challenging the EncroChat evidence on continuity grounds, but the matter was currently under review.

52. On 14 January 2022, Mr Swann informed the CPS that Jamie Hanna would not now be pursuing any legal objection to the admission of the EncroChat evidence, so that the legal argument fixed for the following week was no longer required. He said further however, that responses to Mr Swann's letter of 12 January 2022 (see para 46 above) were still required. On 18 January 2022, a response was provided.

53. On 17 January 2022 (a Monday) Mr Ewing visited Cavan Hanna in custody. At 9.46pm that evening, Mr Ewing logged onto the DCS for the case for the first time. On 20 January 2022, Cavan Hanna's signed authority for the release of his files to Ewing Law was provided to Stokoes. We are told that Mr Ewing was not aware of the hearing fixed for 20 and 21 January 2022, but in any event, by then, Cavan Hanna's previous legal team had informed the court that the admissibility challenge was not now being pursued.

54. At some point thereafter, Ewing Law retained Mr Wyatt as counsel for Cavan Hanna. The Advice and Grounds settled by Mr Wyatt suggest that he was working on the

case for part of January and the first two weeks of February, and regularly taking instructions, including preparing detailed disclosure requests. As to this:

i) As will be apparent from our summary, Stokoes had reviewed the Crown's Stage 1 disclosure and pursued the issue of disclosure on a number of occasions. No further disclosure requests were served after Ewing Law and Mr Wyatt were instructed, nor were we pointed to any category of material which it is said should have been sought but was not sought;

ii) Files from Stokoes reached Ewing Law on 11 February 2022. It has been suggested that the files showed that Stokoes had not undertaken sufficient work to prepare the case for trial. We are unable to reconcile that suggestion with the clear and continuous activity undertaken by Stokoes to which we have referred. The fact that work done may not have identified a viable defence for Cavan Hanna is not a basis for criticising Stokoes' efforts. Further, the suggestion now made that "nothing had been done" to secure expert evidence, is inconsistent with the facts. As noted above, Mr Marshall and a French law expert had been retained, as had a cell site expert for Jamie Hanna. Efforts to obtain other experts had been to no avail;

iii) The Grounds further refer to "the nature of the positive defence to be advanced by Cavan Hanna i.e. that the Crown's evidence of attribution was wrong, that co-location could not be taken as read, that cell-site location of EncroChat phones was flawed, that Encrochat data was incomplete and in many instances inaccurate and that none of this could be checked in the absence of the original product." It is readily apparent however that issues of this kind were pursued. Further, two years on from the settling of these grounds, Cavan Hanna's legal team have been unable to point this court to any material which it is said should have been obtained by Stokoes and which would have assisted Cavan Hanna's defence.

55. At this point, it is necessary to detour to a challenge brought before the Investigatory Powers Tribunal (IPT) to the legality of warrants obtained under the Investigatory Powers Act 2016 in connection with EncroChat material. The individuals bringing that challenge (they did not include the appellants) served expert reports from the late Professor Ross Anderson[4] raising issues as to the manner in which the EncroChat evidence was obtained: a first report dated 5 January 2022 raised a possibility that EncroChat material had been obtained by intercepting communications for the purposes of the Investigatory Powers Act 2016, and a further report dated 8 February 2022 expressed that conclusion "with more force". In reasons for an order it made on 9 February 2022, the IPT granted permission to adduce Professor Anderson's reports in evidence, on the basis that such evidence was capable of being regarded as materially different in its effect from the evidence before Dove J in the Liverpool criminal proceedings.

56. Professor Anderson's first report was disclosed to the appellants' legal teams on 20 January 2022, and his second report on 17 February 2022. Thereafter, both Stokoes and Ewing Law sought to retain Professor Anderson or obtain similar evidence from another expert, without success. It is not suggested by Mr Larkin that Stokoes could be criticised because they did not know of his work prior to January 2022; or for the steps they then took to obtain expert evidence to the same effect.

[4] Professor Anderson sadly died on 28 March 2024.

57. On 18 February 2022, Stokoes applied on behalf of Jamie Hanna to break the trial fixture, saying that Professor Anderson's reports would allow Jamie Hanna to challenge the admissibility of the EncroChat material, but that Professor Anderson had stated he would not take on any new work until the case before the IPT had concluded. It was suggested that the trial should be adjourned to await the outcome of the proceedings before the IPT.

58. On 19 February 2022, Mr Wyatt for Cavan Hanna wrote to HHJ Mann QC stating that Cavan Hanna would also be applying to break the trial fixture. That letter criticised the preparation of the case by Stokoes, stating that they had not done sufficient work to leave Cavan Hanna ready for trial. On 21 February 2022, HHJ Mann QC refused both applications.

59. On 3 March 2022, Mr Trevor Burke KC together with Felix Keating were instructed to represent Jamie Hanna at the trial. In his *McCook* response, Mr Burke states that when he read the papers, he concluded that Jamie Hanna faced "a formidable prosecution case." Mr Burke made it clear to the judge on the opening day of the trial that the timing of his instructions presented no difficulty.

60. On 10 March 2022, at 7.58pm, Jamie Hanna's legal team filed a further application to break the fixture, stating that an adjournment was necessary to enable Jamie Hanna to adduce evidence to similar effect to the Anderson reports. The application was accompanied by a table summarising the efforts which Stokoes had made to obtain such evidence since becoming aware of those reports.

Events at the trial

14 March

61. The first day of the trial was 14 March 2022. Neither Cavan Hanna nor Jamie Hanna attended; both informed prison officers completing refusal forms that they had been advised by their legal teams not to attend. The legal teams for both appellants have confirmed that these statements were untrue. Mr Wyatt said that he had been told that both Cavan Hanna and Jamie Hanna were refusing to attend. This incident is informative, both because it demonstrates the extent to which the appellants were co-ordinating their activities, and because their untruthful account of their reasons for not attending, confirms the lack of *bona fide* engagement in the trial process.

62. Mr Wyatt renewed Cavan Hanna's application to break the fixture, suggesting that the "gross negligence" of Stokoes had left Cavan Hanna unprepared for trial and referring to evidence which was emerging in relation to EncroChat material before the IPT and in other cases. The judge challenged that suggestion on the basis that the new legal team could not take the case on, and then withdraw two months later because there was insufficient time to prepare. Mr Burke renewed Jamie Hanna's application to adjourn the trial because, it was said, of the need for time to obtain an expert to adduce evidence along the lines of the Anderson reports. Both applications were refused, on the ground that they were, essentially, re-runs of applications already made and rejected by the judge.

63. The submissions made at the start of 14 March reveal that Mr Burke was in the course of arranging a video conference with Jamie Hanna for the following morning, which Mr Burke would participate in from court. Mr Wyatt too envisaged having a video call with Cavan Hanna. Mr Burke suggested that a jury should be empanelled on 14 March in the appellants' absence, for the case to resume at 2pm the following day

when the jury would return. He clearly contemplated that by the time the case had begun, Jamie Hanna would have come to court. There were also exchanges between Mr Wyatt and the judge, in which Mr Wyatt suggested that he and Ewing Law would have to withdraw if there was no adjournment, and their client refused to engage with the trial. (Reference was made to the fact that the legal team would be in difficulty in representing Cavan Hanna "in his absence", and if Cavan Hanna did not attend, the legal team "would have no choice in what we have to do.").

64. During the hearing Mr Burke received information that the video call had been fixed for 2pm on 15 March 2022. The judge moved the time for the jury to return to 10.00am on 16 March. A jury was duly empanelled, and then sent away to return at that time. The hearing was listed as part heard to resume at 10.00am 15 March "with all parties to attend, including … all four defendants". Following the departure of the jury, Mr Wyatt mentioned that a video conference with Cavan Hanna had now been arranged for 9.45am. The judge made it clear that he would list the case for 10.00am but not call it on, with all defendants and counsel to be there *"emphatically",* and with the Crown's bad character application to be heard "right between the two conferences".

65. Later that evening, Mr Swann sent an email to Mr Burke alerting him to the fact that he had received a telephone call from Jamie Hanna that evening. In that call Jamie Hanna had said they were in the position they were in because no report had been obtained from an EncroChat expert and "he is saying he would want the jury to know that his lawyer has let him down in not getting him an expert. I told him we have videolink tomorrow."

15 March

66. On 15 March 2022, the appellants refused to attend court, both informing prison officers completing refusal forms, "video link and not court". Jamie Hanna was later found by the prison authorities to have disobeyed a lawful order to attend court. Though it is now suggested on the appellants' behalf that they were told by their legal teams that they need not attend court as video hearings had been arranged, in view of the subsequent exchanges between Bench and Bar on that day (see para 67 below) we regard that suggestion as highly improbable.

67. At 11.30am, the case resumed before the judge. Daniel Dalligan and Anthony Dominy were re-arraigned and pleaded guilty. The judge had an exchange with Mr Wyatt about the appellants' absence. The judge made it clear that he would treat both appellants as having deliberately absented themselves. No member of either legal team suggested that their clients had been told that they need not attend because of the video conferences scheduled to take place. The judge told both legal teams that if the appellants did not attend the following day the issue of trying them in their absence would arise.

68. The video conference between Mr Burke, Mr Keating, Mr Swann and Jamie Hanna began that afternoon at 2.15pm. We have a full and contemporaneous note of the conference taken by Mr Keating; and also Mr Burke's *McCook* submission, the content of which is consistent with that note.

69. It is clear from this evidence that Jamie Hanna went into the consultation with a set agenda: that of criticising Stokoes' preparation of the case, along the same lines as the criticisms Cavan Hanna had earlier made when he sacked Stokoes in January 2022. Jamie Hanna began by reading a series of criticisms from a sheet of paper. These

included suggestions that Mr Swann had lied to him, had deliberately withheld evidence from him (this appears to be a reference to raw data disclosed by the CPS through the Egress system in October 2020) and had failed to obtain expert evidence. He made what he must have appreciated was the impossible demand that Mr Swann should tell the court that he had not properly prepared the case. Mr Swann, understandably, said he could not do so. Jamie Hanna also suggested that he expected Mr Burke to put forward the criticisms he was now making of Stokoes at the trial. He was told by Mr Burke that he (Jamie Hanna) was "the only person" who could make those complaints. Mr Burke set out four options. Jamie Hanna could represent himself; he could not turn up and allow the trial to proceed in his absence; he could retain the current team who would do their best; or he could sack the current team, but the judge would not adjourn the trial. Mr Swann made it clear that in the face of the criticisms which Jamie Hanna was making, he was being left with no alternative but to withdraw. Mr Burke warned Jamie Hanna that if he insisted on maintaining that he had lost confidence in his lawyers, he was close to losing his legal team, and if Stokoes withdrew, counsel felt they would have to withdraw as well. Jamie Hanna said, "this isn't me sacking anyone" but to Mr Swann: "you're not prepared to withdraw?" and "I want [Mr Swann] to withdraw. I'm willing to sit it out unrepresented being the victim of all this, that's what I'm prepared to do".

70. We conclude that Mr Burke's *McCook* assessment of the situation was correct. Mr Burke said he knew Mr Swann to be an "experienced and entirely competent solicitor" and was unaware of any criticisms of him before the conference. It was absolutely clear that Mr Swann had done nothing wrong. It became "increasingly clear" what Jamie Hanna wanted: "Faced with the inevitability of a trial and an almost certain conviction, and no prospect of an adjournment, Mr Hanna wanted his solicitor to accept he had misled his client and the court and withdraw, leaving Mr Hanna [in a position where he could say he had] no lawyers to represent him through no fault of his." Jamie Hanna was advised in the clearest terms that if he maintained his criticisms of Stokoes they would have no choice but to withdraw, and the counsel team would have to go. With the benefit of that advice, Jamie Hanna said he wanted Stokoes to withdraw, and he was willing to "sit it out, unrepresented, being the victim".

71. At 15.38pm, Mr Swann spoke to the SRA Ethics Team who advised him that if his client would not sack him but insisted on making criticisms of his legal representatives as part of his defence, which were not accepted, then Mr Swann was obliged to withdraw. In an email exchange later that evening, Mr Swann passed this advice on to Mr Burke. Mr Burke said that Mr Swann should withdraw subject to what Jamie Hanna said in court tomorrow; and that he and Mr Keating would also withdraw. Mr Keating had also taken advice from the Bar Council Ethical Enquiries line. It is evident from this email exchange (as well as the conference note) that it was contemplated that Jamie Hanna would come to court the following day.

16 March

72. On the morning of 16 March 2022, Cavan Hanna was brought to the court building but not brought up. Jamie Hanna however was not brought to court. Mr Wyatt was told by Mr Burke at court that the conference with Jamie Hanna the previous day had not gone well, and that Mr Swann had received advice from the SRA, and that the legal team had now withdrawn.

73. Mr Ewing says that whilst he was at court, he received a call from Jamie Hanna, on Cavan Hanna's phone, in which Jamie Hanna said he had been willing to attend court

and repeating his criticisms of Stokoes. After that call had taken place, Cavan Hanna wrote a letter to the judge from the cells. In it, he said he was dismissing his legal team because Stokoes had left them in a despicable position, and Jamie Hanna had not been produced at court; he said he would not now participate in the trial or attend court.

74. It is now suggested by Mr Larkin that this letter was an impromptu response to Jamie Hanna's absence. We are unable to accept this. First, this stance was clearly in contemplation on 14 March. Secondly, because of what Mr Wyatt told the judge when the trial resumed, namely that his instructions were that Cavan Hanna had attended [the court building] that day to tell the judge that he would not be participating in the trial. We are satisfied instead, that it was a calculated decision, furthering a strategy of delay and obstruction first put in play when Cavan Hanna sacked Stokoes in January 2022.

75. When the trial resumed at 10.45am the judge told the lawyers then present about Cavan Hanna's letter. The judge made it clear that he did not know at that stage whether Jamie Hanna's non-attendance was deliberate. At no stage did anyone say to the judge that Jamie Hanna had wanted to come to court. Mr Burke told the judge that his instructions and those of Mr Keating had been withdrawn and that he was satisfied, as was the SRA, that the position taken by Stokoes was appropriate. The judge asked Mr Burke: "your instructions have been withdrawn by …. the Defendant?" Mr Burke said "yes". The judge released all defence counsel from the case at 10.50 am. And they withdrew.

76. There was then discussion between the judge and prosecuting counsel as to the future conduct of the case. The judge was initially of the view that the case could not begin until 17 March, because the reasons for Jamie Hanna's absence were unclear. However, as confirmed by the court log, the judge received confirmation in the course of the morning, and after the defence legal teams had left court, that Jamie Hanna had deliberately refused to attend court. On that basis the judge concluded that any application for the trial to proceed in the appellants' absence was easier because "that's three days in a row". The judge described the appellants as individuals who had deliberately absented themselves from the trial and who had "chosen not to be here and/or dismissed their counsel".

77. The hearing was adjourned for a short period. When it resumed, the prosecution applied for the trial to proceed in the appellants' absence. The judge referred to the appellants' deliberate absence from court on 14, 15 and 16 March, and to the fact that he had been told that they had both withdrawn their instructions to their legal teams that morning. He gave a detailed ruling on proceeding in their absence. Given the nature of the complaints now made about the judge's decision, it is helpful to set out the ruling in full.

> "Before me today, the trial continues in the case of Cavan Hanna, Jamie Hanna, Daniel Dalligan and Anthony Dominy. Last week, I think Thursday of last week, so two of three days before this trial was due to start, the case was listed so that Mr Mercer could be rearraigned and plead guilty, which he did and his sentence has been adjourned pending the outcome of this trial. The jury were sworn on Monday of this week and put in charge of these four appellants, but the trial was adjourned to today to allow further instructions to be taken. I should add that this trial has been, as it were, waiting to be tried for almost two years. On Monday, Daniel Dalligan and Anthony Dominy appeared, as you might expect, from custody. Cavan Hanna and Jamie Hanna did not attend. I

received notification from the prison that both appellants had voluntarily refused to attend. On Tuesday, the trial was listed without the jury. Cavan Hanna and Jamie Hanna had the benefit of a video conference with their counsel. I should say that they were required to attend court from custody, but both men again voluntarily refused to attend. Mr Daniel Dalligan and Mr Anthony Dominy both attended, and I was advised by their respective counsels that they wished to be re-arraigned; they were. Both pleaded guilty satisfactorily, so far as the prosecution were concerned, to respective matters on the indictment and like Mr Mercer, their sentences were adjourned pending the outcome of this trial. Cavan Hanna and Jamie Hanna were due to be produced again on day three of the trial, today. Both men have either refused to be produced from prison, or in Mr Cavan Hanna's case, refused to come into court, he having been brought from prison to court and remains downstairs in the cells. I was informed this morning by counsel representing both Cavan Hanna and Jamie Hanna that they had had their instructions withdrawn by their respective clients. In other words, they have been sacked. The solicitors for both either also withdrew or indicated that they had been sacked. The prosecution this morning applied through counsel to try Cavan Hanna and Jamie Hanna in their absence. They rely on the well-known case of *Jones*. They contend, in short, that the appellants have voluntarily absented themselves. They are, in their submission, attempting to manipulate the processes of the court. They have had years to prepare for this case. They have had the benefit, in one case, of representation by Queen's Counsel. In fact, in both cases by representation by Queen's Counsel and had decided to dispense with representation. They contend that a fair trial would still be possible, that they are free to come to court at any time. They have had plenty of time to read the papers, years to read the papers. They know the case against them, which is a strong one and the Court in effect ought not to allow its processes to be manipulated by these two appellants. So, what is the history of this case? Well, this case is EncroChat case. In other words, much of the prosecution evidence stems from interceptions of communications on what were thought to be by some to be encrypted phones. In other words, phones that could not be surveyed by the authorities. In fact, that turned out not to be the case and as a result of a number of disclosures made by the French authorities, the police in the United Kingdom over the past two years, made a number of arrests of appellants, who have been variously involved in drug trafficking and the evidence coming from conversations using these telephones. This is one of those cases. The trial of this case has been adjourned on a number of occasions, in order to allow for the Court of Appeal to determine a number of important issues raised before High Court judges in the first instance and then, as I say, before the full court in relation to the admissibility of this EncroChat material. In both of those cases, the Court of Appeal have unanimously ruled that the encrypted surveyed material is admissible. In January of this year… I should say that as a result of those two rulings, in October of this year, this trial was assigned to me and I indicated that the appellants, having now knowing that the Court of Appeal had twice refused applications in relation to the admissibility of this EncroChat material, the appellants could now have a further opportunity to decide whether or not they wished to fight these proceedings and I gave them a month to decide whether or not they wished to be re-arraigned. When the matter was relisted before me in November, none of those appellants decided to change their pleas, so it was that the matter was fixed for trial. I asked, during the course of discussions with counsel in November, whether or not the issue of the admissibility of the EncroChat material was still likely to be an issue and was told that the admissibility of the EncroChat material was not an issue anymore,

though there may be matters relating to continuity and so it was, I listed the matter for two days in January for submissions to be made in relation to continuity. At that time, James Lewis QC was instructed on behalf of Cavan Hanna… James Lewis QC, on behalf of Cavan Hanna, indicated that in his view there would be no more submissions in relation to admissibility, but there may be submissions in relation to continuity. As I say, I set the matter down for two days for legal argument in January. Just before those two days, I was informed that James Lewis and his junior and his solicitors had effectively been sacked by Cavan Hanna. It was made plain to me that Mr Hanna wished to find other lawyers who would pursue the admissibility of the EncroChat material and that had led to, as it were, the de-instruction of Mr James Lewis, his junior and Mr Cavan Hanna's solicitors. I should say, at that hearing or at subsequent hearings, it was made plain to me that no other defendant was pursuing a continuity point and no submissions were made in that regard. The new solicitors for Cavan Hanna, Ewings Solicitors, had the matter listed for mention at some point before me. It may have been at a hearing relating to an application to extend custody time limits and during that hearing, they applied for the fixture to be broken. Despite the case having been some years old by then, they indicated that they thought that they would not be ready for trial in March, that was about two months' hence and applied for the fixture to be broken. I refused that application. At a subsequent hearing, a further application was made by those on behalf of Cavan Hanna that the fixture be broken because they claimed they were not ready for trial and applications were made by him and others on the basis that there were outstanding proceedings in the IPT and in the constitutional court in France relating to the admissibility of this material, and the fixture ought to be broken pending the outcome of the judgment in the IPT and judgment in another jurisdiction. I refused those applications. On Monday of this week, those on behalf of Cavan Hanna and those on behalf of Jamie Hanna renewed their applications for leave to break the fixture. Cavan Hanna on the basis that they were still not ready for trial and Jamie Hanna, on the basis that I should adjourn the trial to await the outcome of the judgment in the IPT. I refused both of those applications. I should say that there is no clear time when a judgment from the IPT would be given, save to say that it is likely to many, many, many months ahead and the Court of Appeal, having clearly indicated in their respective judgments, that the EncroChat material was admissible, I took the view that the trial needed to proceed. On Monday this week, as I have indicated, Cavan Hanna and Jamie Hanna did not attend voluntarily. They knew of the hearing; they knew of the applications that had been made. In fact, at all previous hearings when they were required to attend, as far as I know, they did so, but on Monday, they both refused to attend. Yesterday, they both refused to attend and today, although Cavan Hanna is here downstairs, he refuses to come into court and Jamie Hanna has again refused to attend. I was told this morning, as I have already indicated, that Cavan Hanna and Jamie Hanna have dispensed with legal representation. All of those counsel have been released. The prosecution, as I say, now apply before me to try the appellants in their absence. I say absence, of course, they are free to attend court if they wish to do so. No-one has stopped them attending. They have chosen to absent themselves. So, taking the case of *Jones* very much in mind, I have to consider whether or not the appellants are represented; whether they can have a fair trial; why they are not here; whether an adjournment would cure the concern and so forth. I take the view that the deliberate absenting themselves of both appellants is designed to either frustrate these proceedings or cause another adjournment to take place. They have had many years to prepare for this case. They have had the very best

> of representation throughout. They have chosen to dispense with representation by counsel and solicitors and have chosen not to come to court today. I can see no valid reason why a fair trial cannot take place. I will act as amicus where necessary. The prosecution will prove through the calling of evidence that which they need, and the jury will be carefully directed. As I have indicated, if both appellants choose to come to court and participate in the trial, then of course they will be most welcome, as is their right. They can make, if they do come to court, representations as they see fit and indeed, cross-examine the witnesses if they wish to do so, but I take the view that the trial can still be fair and will be fair and so the prosecution application pursuant to the case of Jones that the appellants be tried in their absence, is allowed and the trial will proceed…"

78. The judge informed prosecuting counsel of the direction he intended to give to the jury about the appellants' absence and gave that direction when the jury returned to court at 12.18pm. Mr Thacker began opening the case and the court adjourned at 12.58pm.

79. Though parts of the transcript are obviously incomplete, we are satisfied thereafter that Jamie Hanna was in fact brought to court at some point before about 2pm but refused to be brought up. The court log entry of 14.10pm states (apparently reflecting the judge's observations) "Understand that Jamie has now been produced. The option will be given each morning and afternoon as to whether they would like to attend in the courtroom. If they decline, then they can sit downstairs." Given what had happened that morning, and the judge's expressed intention to give the appellants every opportunity to attend their trial, it is not credible that the judge would have been told of Jamie Hanna's arrival without asking whether he intended to come up; still less that Jamie Hanna would have been left languishing in the cells without any inquiry from the officers there about where or when he was to be brought up.

80. Be that as it may, there can be no doubt that Jamie Hanna refused to come up. In a letter from Jamie Hanna to the judge (which was similar in both tone and content to the letter from his brother, demonstrating, in our judgment, a coordination in strategy) and which the judge read into the record the following day, Jamie Hanna complained that he had wanted to be brought to court but had not been listed for production. He continued (sic):

> "On arrival to court I have learned that Stokoe Partnership have withdrawn from this case leaving me abandoned. This adds more evidence to there misrepresentations and failings in this case. Therefore, they have left me with no choice, to make my decision, that I will not get a fair trial as I am incapable of representing myself therefore I will remain in the holding cell and will not be entering the courtroom".

The submissions

81. Mr Larkin's core submission is that the judge was wrong to find that Jamie Hanna had dispensed with his representation by Stokoes as part of some "manipulation" of the system, or indeed at all. He submits that the firm was not "dismissed" but had withdrawn. Further, that when a defendant's representatives withdraw following a disagreement and the defendant is left unrepresented for trial, it is an error for a judge to represent that withdrawal as a dismissal and so voluntary, and to then immediately proceed to trial. In support of these submissions, Mr Larkin relied upon a number of

cases including *R v Jones* [2002] UKHL 5; [2003] 1 AC, *R v Amrouchi* [2007] EWCA Crim 2019, and *R v Trevor* [2008] EWHC 620. He submits that the authorities establish that great caution should be exercised before proceeding in a defendant's absence. Mr Larkin submits that contrary to this cautious approach, the judge rushed to a conclusion that Jamie Hanna was manipulating the system, that he had sacked his lawyers and had deliberately absented himself from the trial; and none of those conclusions were correct. Mr Larkin says that having formed this preliminary view, the judge and the Crown looked for material to support it and did not take into account material that contradicted it. Further there was no pressure of time not least because the trial estimate had shortened as a result of guilty pleas of the three co-accused. Moreover, the prosecution evidence consisted of professional witnesses and documents, and there would have been no disadvantage in having a short delay. He argues that inquiries should have been made of Jamie Hanna by the judge to investigate his precise position.

82. Mr Larkin submits that Jamie Hanna should have been afforded the opportunity to instruct new solicitors within the trial time frame and either retain existing counsel (who he did not criticise) or new counsel. There was no basis for Mr Burke and Mr Keating to withdraw he says simply because their instructing solicitors had withdrawn. He also suggests that Ewing Law (who had just been sacked by Cavan Hanna) could have taken over from Stokoes.

83. Mr Thacker relied strongly upon the context and chronology of events. He accepts that a trial in the absence of an unrepresented defendant should be reserved for rare and exceptional cases but submits that this was just such a case. In particular, he submits that the chronology demonstrates that Jamie Hanna had sought to manipulate the court process by forcing an adjournment, despite the judge having refused the application to break the fixture on three separate occasions. He points out that the judge and the prosecution were told explicitly by Mr Burke in open court that he and his junior were 'withdrawing' because their instructions had been withdrawn. It was on that basis that the prosecution applied to proceed in Jamie Hanna's absence. Mr Thacker says that they could not go behind what was said to the court by experienced King's Counsel. The judge did not distinguish between the appellants as he was told that both men had sacked their legal representatives; and he then reasonably exercised his wide discretion to proceed in absence on that basis properly applying the factors in *Jones*.

84. Mr Thacker further submits that whether Jamie Hanna sacked his legal team or caused them to withdraw by his extensive last-minute criticisms of them, there are strong public policy reasons for endorsing the judge's decision to continue with the trial in the particular circumstances of this case. To do otherwise would allow defendants whose repeated applications to adjourn had failed, to obtain their desired adjournment by dispensing with their legal teams or forcing them to withdraw at the last minute.

Analysis and conclusions on Ground 3

85. We accept Mr Thacker's submissions. In our judgment, when the context and chronology are properly understood, the judge was correct to proceed for the reasons he gave. His ruling shows that he directed himself correctly in accordance with the principles in *Jones* and reached a conclusion well within the ambit of his discretion.

86. The context, and the *McCook* submissions from his former legal representatives (Mr Swann, Mr Keating and Mr Burke), show that Jamie Hanna had, in substance, sacked his legal representatives. Contrary to what was said, a number of avenues had been

explored prior to trial in an attempt to attack the EncroChat material, and Stokoes had sought and obtained further evidence. The net effect was clear advice from counsel that the challenge to the admissibility of the EncroChat material was not properly arguable. This was not a case of Jamie Hanna "venting", as Mr Larkin suggests, such that he might have reconciled with his legal team had he been brought to court on the morning of 16 March. Instead, the complaints about Stokoes were manufactured in an attempt to procure Stokoes' withdrawal and an adjournment.

87. In *Jones*, the House of Lords approved, with one exception, the checklist of factors identified by the Court of Appeal below (see *R v Haywood, Jones, Purvis* [2001] EWCA Crim 168; [2001] 1 QB 862), as relevant to the exercise of the discretion to proceed in a defendant's absence. We take the *Jones*' factors (insofar as relevant) in turn. On the present facts, certain of these factors overlap.

(i) The nature and circumstances of the defendant's behaviour in absenting himself from the trial and in particular whether it was deliberate, voluntary and such as plainly waived his right to appear.

88. It is clear that Jamie Hanna could have attended court at any time. He could have represented himself. He could, had he wished, have attended court in the afternoon of 16 March and invited the judge to allow him time to obtain alternative representation. He did not do so, choosing instead to continue to refuse to engage or attend for the entirety of proceedings. We do not find the case of *Amrouchi* to be of assistance given how far away it is on the facts from the present appeal. In that case, Hughes LJ (as he then was) was persuaded that where the defendant was facing a number of different charges in different proceedings, it was not possible to be sure that he had deliberately absented himself from his trial. That is not the case here. There is no doubt that Jamie Hanna knew he was due to appear at his trial. He had deliberately refused to attend court on 14 March, telling a lie to the prison staff as to having been told by his legal team not to attend. The judge adjourned the case on 14 March in order to allow him the opportunity to attend court, giving him the benefit of the doubt and the opportunity if he so wished to make representations to the court about his circumstances. Jamie Hanna informed the court on his arrival on 16 March that he did not want to participate, and wrote a letter stating that he would not do so. He did not appear at court on any occasion throughout the trial nor did he communicate a desire to attend by letter or other means. In those circumstances it is difficult to see what enquiries could have been made of him and on what basis it is asserted on his behalf that he wished to attend as alleged in the skeleton for Jamie Hanna on this appeal. The judge was entitled to conclude, as he did, that Jamie Hanna had deliberately and voluntarily waived his right to appear.

(ii) Whether an adjournment might result in the defendant attending voluntarily and the likely length of such adjournment.

89. On 14 March 2022, the judge adjourned the trial to 16 March in order to allow Jamie Hanna to attend court. On 16 March 2022 Jamie Hanna was brought to court but remained in the holding cells and wrote a letter to the judge to indicate that he would not come up to court. It is clear that he was well aware that the proceedings were a trial and that he could attend if he wished to but was voluntarily waiving that right by remaining in the holding cells or in prison.

90. The suggestion that offering a short delay within the existing trial window was required is wholly unreal. The application to adjourn had been made and renewed on the basis that expert evidence along the lines of the Anderson reports was required.

Jamie Hanna's complaints against Stokoes were that they had left him wholly unprepared for trial. Had there been any substance in either complaint (and we do not accept that there was) a short adjournment would have achieved nothing.

91. In that context it is to be noted that every day thereafter the judge ordered Jamie Hanna to be produced and every day he refused. The refusal notices were read into each day's record and uploaded to the DCS. Had Jamie Hanna attended he would have been able to take part in the trial.

(iii) Whether Jamie Hanna wished to be legally represented at trial or had, by his conduct, waived his right to representation.

92. Following the discussions about withdrawal which we have summarised above, the judge clarified with counsel for both appellants that their clients had been "fully advised of the potential consequences". He was assured in terms that they had. The judge observed that they had both had an opportunity of conferences with very experienced counsel and had decided to act as they had. It is clear from what was thereafter said to the jury that the judge had been left in no doubt that Jamie Hanna had voluntarily dispensed with his legal team. As we have underlined above, the judge (and the prosecution team) reached that view on the basis of what they were told in open court by Mr Burke, who could be expected to choose his words carefully.

93. In any event, on the facts of this case whether Jamie Hanna had sacked his solicitors or criticised them to such an extent that they were left with no choice but to withdraw, was a distinction without a difference. Either way this was a deliberate and calculated action designed to try to bring about an adjournment.

94. For completeness, we also consider Mr Burke and his junior were right to withdraw. Jamie Hanna's case which he wished counsel to advance was that his former solicitors were responsible for failing to prepare his case properly. Counsel knew that these criticisms were without substance and an attempt to manipulate the trial process, and then acted in accordance with advice they had received from the Bar Council Ethical Enquiries line. Jamie Hanna was also well aware that counsel would withdraw if Stokoes were forced to withdraw, as in the event they were.

(iv) The extent of the disadvantage to a defendant in not being able to give his account of events having regard to the nature of the evidence against him.

95. In *Amrouchi*, the Court of Appeal was troubled by the fact that the defence in that case of self-defence depended almost entirely upon the defendant being present to give evidence. In contrast, Jamie Hanna's defence statement served on 15 October 2020 denied involvement in any conspiracy and asserted that the EncroChat evidence was not accepted as accurate or properly attributed and admissibility would be argued. By trial, the only issue was attribution. As we have noted above, the attribution evidence was very strong. As we further describe below, Jamie Hanna was properly informed by a section 35 notice and at the appropriate time of the consequences of not giving evidence. He nonetheless remained absent as he had done throughout his trial. In contrast to the situation in *Amrouchi*, almost all of the material evidence (of attribution) was available to Jamie Hanna from an early stage in proceedings and was not thereafter subject to change, and there was no unfairness in the trial proceeding as it did.

(v) The risk of the jury reaching an improper conclusion about the absence of the defendant.

96. There is no bar to a judge informing the jury of the reason for a defendant's absence at trial. Defendants are informed at PTPH of the possibility of juries being so informed (CrimPR 3.21(2)(c)(iii)). Where an adverse reason exists for the absence of the defendant, a judge must consider whether that reason should be given to the jury. The jury should of course be warned that absence, even when apparently unjustified, is not an admission of guilt and in itself adds nothing to the prosecution case. That is what happened in this case. Jamie Hanna's absence at trial was entirely voluntary and the judge was entitled to inform the jury of that fact. He followed that up with the following appropriate warning, repeated during the summing up:

> "I must give you an important direction about what this means. Not coming into court and not participating by choice, does not mean that either or both appellants are guilty of these allegations or by their absence, more likely to be guilty. Your sworn duty remains to decide on the evidence whether the prosecution have made you sure of their guilt, and that same high standard remains whether the appellants are here in court or not".

(vi) The general public interest in a trial taking place within a reasonable time of the events to which it relates.

97. The judge had to consider the public interest in proceedings being resolved as soon as possible, and where three co-defendants had pleaded guilty and remained in custody awaiting sentence. The judge was understandably anxious to avoid the situation where defendants could force the prosecution to adjourn proceedings where such applications had otherwise been refused. He took the view, and was entitled to, that in all the circumstances justice would not be served by an adjournment.

(vii) Conclusion on Ground 3

98. For the reasons given above, the appeal under Ground 3 is dismissed. We note that the judge's refusal to adjourn the proceedings (to await the outcome of the determination of admissibility issues in the IPT proceedings and/or to enable Professor Anderson to be instructed) has since been confirmed to be the correct approach: see *R v Murray* [2023] EWCA Crim 282. In that case, a number of defendants sought leave to appeal to challenge convictions based on EncroChat material on the basis that their trials should have been adjourned to await the outcome of the IPT proceedings and to obtain further evidence along the lines of the Anderson reports. The Court of Appeal refused the applications for leave, holding that the judge's decision to refuse an adjournment was "unimpeachable", and (at para 48) that:

> "The overall interests of justice, including the public interest, militated against a further adjournment for what in effect would have been an indefinite period on no more than a hope that the outcome of the IPT proceedings might assist. In any event, the issue before the IPT is not the admissibility of the EncroChat material."

99. We turn to the further grounds.

Jamie Hanna's renewed application for permission to appeal against conviction under Ground 2

100. Mr Larkin submits that the judge erred in refusing the application made on 14 March 2022 to vacate the trial date. We can address this complaint quite shortly. Based on the chronology above, this complaint has no merit for essentially the reasons given by the single judge when refusing permission to appeal. By the time of the trial, the only live issue was attribution. That was a factual issue which did not require expert evidence. Admissibility had been authoritatively addressed in two decisions of the Court of Appeal (Criminal Division). In any event, as noted by the single judge and as remains the position even now, no expert evidence has been put forward to challenge the admissibility of the EncroChat material. We refuse the renewed application by Jamie Hanna on Ground 2.

Cavan Hanna's renewed application for permission to appeal against conviction under Ground 1

101. Cavan Hanna complains that the judge should have vacated the trial date as he was not able to advance a positive case based on expert evidence which might have been available to him because of the negligence of Stokoes.

102. This complaint is also without merit. There is no proper basis for the allegations of negligence or inaction by Stokoes. Further, the only live issue for trial was attribution, a factual dispute which did not require expert evidence; and as set out above although the application is littered with (unfounded) criticisms of Stokoes, it is not said that any alleged failing by them other than their failure to obtain expert evidence rendered Cavan Hanna's conviction unsafe. We refuse the renewed application by Cavan Hanna under Ground 1.

Whether Jamie Hanna needs an extension of time to include complaints about fairness of the trial within Ground 3, and the merits of those complaints

103. Jamie Hanna was given leave to appeal on 7 July 2023 on a single and limited ground concerning lack of representation. For the reasons given above, we have dismissed this ground of appeal. However, on 2 October 2024, about a week before the hearing of the appeal a substantial new set of arguments was advanced on behalf of the appellants in what was called an Addendum Skeleton Argument. Nine points were made regarding the fairness of the conduct of the trial. Mr Larkin submits that these arguments are merely developments of Ground 3 and could not have been advanced until the transcripts of the entire trial had been reviewed once they were obtained in early September 2024. These points are also relied upon by Cavan Hanna and Mr Larkin accepts he needs leave for Cavan Hanna to add to his grounds out of time.

104. For the respondent, Mr Thacker argued that the issues of fairness are new and both appellants require an extension of time and leave to appeal.

105. We consider Mr Thacker is correct. Put shortly, the fairness issues now raised are unconnected to Ground 3.

106. As explained in *R v James* [2018] EWCA Crim 285 at para 3, the Court of Appeal (Criminal Division) must take a strict approach to applications to add fresh grounds (or to substantially develop previous ones) because those applications, if successful, have the effect of bypassing the single judge filter. Further, fresh grounds must be particularly cogent. They must be accompanied by an application to vary the notice of appeal. If there is any doubt as to whether a Ground is "fresh", such an application

must be made and the advocate should address in writing the relevant factors which the full Court is likely to consider in determining whether to allow variation of the notice of appeal and an extension of time for the renewal if required. Jamie Hanna has not complied with these requirements.

107. Looking at the chronology and the expert assistance the appellants had from an early stage, there is in our judgment no good reason for an extension (of about 2 years 6 months) that is required. The original applications for leave were received by the Criminal Appeal Office on 5 May 2022. On 11 July 2022 counsel were invited to perfect the Grounds of Appeal (to be lodged by 26 July 2022). On 27 July 2022, counsel requested an extension of time of two months to lodge perfected Grounds of Appeal and informed the Criminal Appeal Office that William Boyce KC had been instructed but they were awaiting deposit of funds from Cavan Hanna to cover King's Counsel's fees to act. The Registrar directed that Perfected Grounds of Appeal were to be lodged by 20 September 2022 (to take into account the holidays of the legal representatives). On 8 September 2022, the Criminal Appeal Office received an email from Mr Wyatt, which followed a conference that had taken place with Leading Counsel. It was said that Leading Counsel was of the view that there was more to the appeal than contained in the original Advice and Grounds of Appeal. It was also said that a substantial body of work was to be done, including the instruction of an expert witness who should have been instructed in the substantive proceedings. This was the latest time when a transcript of the trial should have been ordered. It was not until February 2024 however that the application for a transcript was made (by then, nearly 2 years after the trial); and a further six months elapsed before the fairness grounds were then advanced.

108. We have not been told why the applications were not made earlier. It is asserted that it only became apparent that the trial might not have been fair when the respondent in its Skeleton Argument for this appeal submitted (on the issue of safety) that the trial had been fair. We find Mr Larkin's submissions in this regard to be difficult to follow.

109. As it is, we consider that no credible or reasonable reason has been advanced for the late request for and review of the transcripts. For the avoidance of doubt however, we do not consider there is merit in any of these new points. In short, the judge and the prosecution ensured that the evidence on attribution was fairly presented, and it is not arguable that the appellants' trial was unfair, or that their convictions were unsafe for the fresh reasons now advanced.

110. We start by making the somewhat obvious point that when a defendant makes a deliberate decision to proceed without representation and to refuse to attend their trial, a judge is under no obligation to provide them with some form of "running commentary" or to put the case in aspic, so that the ordinary developments that might occur during a trial cannot take place (although as it happens in this case, there was little movement in the prosecution case between opening and closing). While a judge has an obligation to ensure fairness to an unrepresented and absent defendant that does not include an obligation to proceed on an artificial basis, so that the ordinary dynamics of a trial are to be ignored (or to permit a defendant to "freeze" the prosecution case by deciding not to participate in the trial). Sight must not be lost of the fact that the defendant has elected to absent himself.

(i) Assistance as to the nature and progress of a trial

111. Mr Larkin submits that the appellants were provided with no assistance in certain respects: in relation to the rulings that were made during the trial, in relation to the additional material that was served, or as to the nature and conduct of the trial. Instead he suggests, they were only provided with a notice under section 35 of the 1994 Act concerning adverse inferences at the end of the trial. Mr Thacker accepts that the appellants were not provided with assistance as to the progress of the trial but submits that it is difficult to see what other course could have been taken in the circumstances. We accept that submission. Where a defendant has dispensed with their legal representation, and non-attendance is voluntary (and appropriate judicial warnings have been given of the disadvantages in not attending trial) a trial judge's options are limited. The judge in this case nonetheless clearly kept the absence of both appellants in mind throughout the trial and acted to ensure fairness. Legal argument for example, was heard whilst the appellants still had legal representation, and steps were taken to ensure up to date trial bundles were always available in the dock; and which the appellants could have examined had they attended at their trial. It is to be noted that Jamie Hanna still had the benefit of a Representation Order for the purposes of Legal Aid, and that order had not been revoked.

112. Further, a section 35 notice in appropriate terms was drafted on 23 March 2022. The appellants received that notice on 24 March 2022. They were aware therefore that the stage of the trial had been reached at which they could give evidence and that if they chose not to do so, the jury could draw inferences against them. They then had a further 4 full days to consider their position and to obtain legal advice if they wished, as the stage where they could have given evidence if they wished to do so was not reached until 29 March 2022. They nonetheless did not attend court, nor did they instruct any legal representative to attend court to make representations on their behalf. This complaint of unfairness is not arguable.

(ii) Cavan Hanna and Jamie Hanna not having sight of important documents

113. Mr Larkin submits there was unfairness in the failure to provide Jamie Hanna with certain documents. In written submissions, he and Mr Wyatt refer to the Crown's skeleton in support of the Bad Character application, and the Crown's Opening Note for Trial and say there is no evidence that Jamie Hanna ever saw these documents. Complaint is also made that witness statements of a number of persons other than those originally served were relied upon and Jamie Hanna was afforded no opportunity to see or deal with this material either.

114. These complaints are not arguable either. The notice of the intention to adduce Bad Character was served on 5 August 2020 and the skeleton argument in support was uploaded to the DCS on 13 March 2022. Mr Burke and Mr Keating served a Skeleton Argument for Jamie Hanna in response on 14 March 2022 and the matter was argued out in court on 15 March 2022, with Mr Burke reporting the outcome at the start of the conference with Jamie Hanna the same day. The Crown's Opening Note was uploaded on 13 March 2022. A further version was uploaded on 16 March 2022 to update the position given the guilty pleas of the co-defendants in the interim. There were no substantive changes to the case against the appellants, of which they had been aware since the summer of 2020 when papers were initially served.

115. The further evidence served in the course of the trial was uncontroversial and no unfairness arose. We address this evidence individually:

i) Further statements of DC Matthew Berry. One of these statements dealt with Covid restrictions at the time of the offending which were matters of public

record and not open to challenge. A further statement was served on 15th March 2022 at a time when the appellants both had legal representation, and no issue was then taken. The statement related to the content on Jamie Hanna's personal telephone (the attribution of which was not in dispute);

ii) Statements of John Cowell. John Cowell is an Acting Detective Inspector with expertise in EncroChat. He was asked to give a statement when it became apparent that certain NCA witnesses were not available. His evidence accords with the content of the statements from those witnesses, which were served on 30 July 2020 and 1 September 2020 respectively;

iii) Statement of PC Andrew Hayes. This statement was dated 24 March 2022 and related to the service of the section 35 adverse inference notices. The need for that statement only arose as a result of the appellants' voluntary absence from their trial; and

iv) Statement of Kelly Ebdon. The statement did no more than put into evidence the guilty pleas of the co-defendants, which was a matter of public record and could not have been subject to sensible challenge.

(iii) Presentation of the Prosecution Case

116. First Mr Larkin argues there was unfairness because there was discussion about which witnesses to call and how to present agreed facts without any recourse to the defence issues or challenges the appellants may have wished to make. Second, he submits that although the principal issue for the jury was attribution, the prosecution repeatedly asserted as a fact that the appellants were the users of the relevant EncroChat handles. Third, Mr Larkin submits it was unfair for an officer who was not an expert, to offer opinions on language in the drugs world (such as slang usage) or methods of drug-trafficking. Fourth, on Day 4 of the trial, the prosecution indicated that they had prepared a summary document of references to drugs and cash. It was not clear which witness created the document, the document was not supplied to the appellants and it suggested a far greater scale of conspiracy (99kg) than had been previously alleged.

117. We do not consider these complaints give rise to any arguable ground of unfairness. The transcript shows that a discussion with the judge took place about which witnesses would be called at trial and recourse was had to the issues raised by the defence in informing that discussion. The judge had already taken time and care to discuss with Mr Thacker how the case would be presented and said it would be appropriate to call the evidence in the way it had been proposed to do when the appellants had enjoyed legal representation. Draft Agreed Facts had been circulated by the prosecution to both defence teams in advance of the trial and their responses confirmed that only minor amendments were required. The judge nevertheless took the view that the Agreed Facts ought not to be read but that, as a matter of practicality and fairness to both sides the appellants' absence did not mean that evidence of every single point had to be called through a live witness. The sensible, fair and practical compromise he arrived at was that the facts which would otherwise have been agreed would be adduced through an officer called by the prosecution.

118. As to witnesses, as Mr Thacker has pointed out, Jamie Hanna had never provided the prosecution with witness requirements. Cavan Hanna had provided a lengthy list of witness requirements on 11 September 2021; but that was at a time when he was pursuing the (subsequently superseded) defence that EncroChat material was inadmissible on the basis of live intercept, and no updated witness requirements were

ever provided. The absence of witness requirements was raised at the outset of the trial when the appellants did have legal representation. Neither Mr Wyatt nor Mr Burke raised any objection to the prosecution's proposal to call a limited number of witnesses. The prosecution were entitled to proceed on the basis of the issues identified from the DCS and other communications from appellants' legal teams; and that is what happened in this case.

119. Mr Thacker accepts that in the course of the prosecution evidence the appellants' names were at times substituted for the EncroChat handles. We do not consider this shorthand approach caused any unfairness. It was made clear to the jury (in the prosecution opening and closing, and in the judge's summing up and route to verdict) that attribution was in issue and the jury could have been in no doubt that the prosecution had to prove it to the requisite standard.

120. The interpretation of the messages by a "non-expert", was not a source of unfairness either. It was not in issue that the content of those messages showed a large scale drugs conspiracy being played out; and we note that it is not now suggested that anything material turned on the evidence given.

121. As for the summary of the quantities of cash and drugs encompassed by the conspiracy, Mr Thacker accepts this document which the jury were given, was not uploaded to the "Trial Documents" section of the DCS and that this was an oversight. This was not an agreed document (there being no one to agree it with); but we see no unfairness in this. In circumstances where the only issue at trial was attribution, it is difficult to see what objection could have been taken to this summary had the appellants been present or legally represented, and no such objection or unfairness was identified to us on the appellants' behalf.

(iv) Reliance on Cavan Hanna's call to Brian Swann

122. Mr Larkin submits there was unfairness in the prosecution being permitted to rely on the call between Cavan Hanna and Mr Swann immediately after the arrest of Warren Bartlett. He says that the call was privileged. Alternatively, he submits that if it was not privileged, the prosecution could have taken a statement from Mr Swann as to what was, in fact, discussed and the context.

123. There was no unfairness here. The prosecution relied on this telephone call as evidence of attribution. The evidence was served prior to trial. The proposed Jury Bundles were served on 10 March 2022 and included that material. The prosecution referred to this evidence at paras 28 to 30 of the Crown's Opening Note and no issue was then taken by experienced defence counsel. We have already referred to this evidence above. In a little more detail, the prosecution's case was that a telephone call had been made from Cavan Hanna's personal telephone to Mr Swann. A message was thereafter sent from "wigglycalm" to "muteswamp" at 17:37:27 on 5 May 2020: "he should be out in a few hours Brian said". That was a response to a message from "muteswamp" to "wigglycalm" at 16:56 on the same day: "and any news on wazer?" . The telephone call and messages were exchanged immediately following the arrest of Warren Bartlett. Against that background the prosecution invited the jury to infer that the telephone call was about Warren Bartlett's arrest and likely release from custody and that this was another piece of attribution evidence for the jury's consideration. The fact of the telephone call was not privileged. The content of the call arose in the messages exchanged between the EncroChat handles. The content of those messages was not privileged. If Mr Swann had, as the prosecution invited the jury to infer,

informed Cavan Hanna about Warren Bartlett's release from custody that would not have amounted to a privileged matter either.

(v) Seizure of a BQ Aquarius handset (without EncroChat) from Cavan Hanna two years prior to the relevant events

124. Mr Larkin submits that the fact that Cavan Hanna had been found in possession of a BQ Aquarius handset (without EncroChat communications) two years prior to the relevant events, was not probative of the charges he faced and was irrelevant. If that evidence was admissible however, it amounted to evidence of bad character, but no bad character application was made.

125. We do not consider there is any arguable substance in this submission. On 23 April 2018, Cavan Hanna was stopped at Heathrow Airport in possession of a BQ Aquarius telephone which contained a KPN (Dutch) SIM card. The telephone was accessed but when analysed there was no data found on it. The prosecution served this evidence on 7 March 2022, referred to it in the Crown's Opening Note and in the proposed Jury Bundle on attribution. No objection was taken by experienced defence counsel to the prosecution adducing this evidence as relevant to the issues in this case. This was not evidence of bad character as possession of such a handset and SIM was not 'evidence of, or of a disposition towards, misconduct on his part…' as defined by section 98 of the Criminal Justice Act 2003. As we have noted above, Cavan Hanna's defence was that he was not the user of the EncroChat handles "wigglycalm" or "luckywaffle" so attribution was the primary issue for the jury's consideration.

(vi) Bad Character

126. The prosecution made a successful bad character application in relation to the convictions and references to end dates of parole in the EncroChat messages. The application had been opposed by the appellants' respective counsel teams. Mr Burke had accepted that the end-date of Jamie Hanna's parole should go before the jury because it was relevant to the prosecution argument that one of the EncroChat conversations could be attributed to him but argued that evidence of his conviction for the underlying offence was inadmissible. Mr Wyatt also adopted that position for Cavan Hanna. The judge ruled that the previous convictions and references to parole in the EncroChat messages were admissible but that the jury should not be told the length of sentence as that would carry the potential for prejudice. Counsel agreed to discuss the correct form of words to use amongst themselves. They did so and Mr Burke and Mr Wyatt said they wanted this matter to go before the jury.

127. In those circumstances, contrary to Mr Larkin's submissions, it is not arguable that there was unfairness in the judge taking the view that "it was the considered opinion of counsel for both of those appellants, that for tactical reasons, for forensic reasons, they would want the material to go in as it stands" **.**

(vii) Informing the jury that Jamie Hanna had "sacked" his legal team

128. Mr Larkin submits that it was unfair for the judge to have informed the jury that Jamie Hanna had "sacked" his legal team when this was not what happened. He also submits this was not relevant and would have prejudiced the jury's view of Jamie Hanna. As we have noted above, we consider that the way in which Jamie Hanna manipulated the departure of his legal representatives amounted in substance to a sacking, and the judge was told as much when Mr Burke said that Jamie Hanna had dispensed with his representatives. Further, the judge was entitled to let the jury know what had happened,

provided the jury were properly directed, as they were, that they must not hold the appellants' absence from the trial against them as evidence of their guilt.

(viii) Section 35 Notice

129. Mr Larkin submits that although the appellants received section 35 adverse inference notices they did not have the benefit of any legal advice and had not been advised by counsel. We reject this complaint. The appellants decided themselves not to take legal advice. There is no suggestion they were prevented from taking such advice.

130. A further complaint is that the statement of the officer, PC Hayes, who had served the section 35 notices on the appellants, contained prejudicial material. That statement which was read to the jury said that the notices were served on them in their cell when they were lying on their beds. Mr Larkin argued that this suggests they had a complete disregard of the legal process. We reject this complaint. The statement was factually accurate, and the jury would not have taken against the appellants based on this simple factually accurate account. Further, the judge's direction to the jury made the legal position clear: "You also heard that both appellants are currently in custody. And you have heard this evidence to explain how they were both reminded of their right to give evidence and the possible consequences of them not doing so. It has no other purpose, and you should not conclude that being in custody means that they are guilty of these offences, or more likely to be so."

(ix) Prosecution closing speech

131. Mr Larkin KC's ninth complaint relates to the fact that the prosecution made a closing speech. He submits there was no discussion as envisaged by Crim PR Rule 25.9 (2)(j) as to whether the prosecution should make a closing speech when the appellants were not represented. Insofar as material, that rule provides as follows:

> "(j) the prosecutor may make final representations, where—
>
> (i) the defendant has a legal representative,
>
> (ii) the defendant has called at least one witness, other than the defendant him or herself, to give evidence in person about the facts of the case, or
>
> (iii) the court so permits…".

132. Mr Larkin referred us to the general rule of practice that where an accused is unrepresented and calls no additional witnesses the prosecution is not entitled to make a second speech: see *R v Mondron* 52 Cr. App. R. 695 and the summary in Archbold (2024) at [4-419]. Mr Thacker also helpfully referred us to *R v Brown* [2022] EWCA Crim 6; [2022] 1 Cr. App. R. 18 at para 54.

133. Mr Larkin's submissions are based on a false premise. As in other instances, the transcript in our bundles appears not to be complete. Mr. Thacker told the court (and this was not disputed by Mr Larkin) that there was discussion between him and the judge about whether the prosecution should make a closing speech. Mr Thacker says the prosecution counsel team was minded not to make a speech because the appellants had no legal representation and had not called evidence. The judge stated that a closing speech would assist the jury and accordingly made a permissive direction within Crim PR Rule 25.9 (2)(j). There is no basis for considering this gave rise to

any arguable unfairness. The closing speech was short. It contained 12 points in relation to Jamie Hanna and 13 points in relation to Cavan Hanna. It was designed to assist the jury who had multiple bundles relating to EncroChat messages, attribution, Graphics and CCTV.

Conclusion on fairness

134. We refuse an extension of time to Jamie Hanna to pursue the complaints about fairness, though for the avoidance of doubt, and as we have made clear, we do not consider any of these new matters raised to be arguable. It follows that Cavan Hanna's application for an extension of time and for leave to appeal against conviction on the self-same grounds is also refused.

Renewed applications for permission to appeal against sentence

135. The principal argument advanced by Mr Larkin is that the judge erred in basing his sentence on the newly served "expert interpretation" of EncroChat messages which substantially increased the perceived weights of cocaine supplied from the figures relied upon in the 20 months prior to trial. He submitted that the increase was from 40kg/60kg to one of 89 kg. Mr Larkin submits that an opportunity should have been given for these figures to be challenged given the difference they made to sentence. He also relies upon evidence more recently served by the Crown in relation to POCA proceedings where the quantity of cocaine in issue is said to be different. We do not consider this ground to be arguable.

136. Prior to sentencing, the prosecution carried out an analysis of the EncroChat messages as well as other content to assess as accurately as possible the amount of drugs involved in order to assist the judge in assessing harm. We were taken to a table (entitled Summary of Offending) which was prepared with reference to the relevant supporting evidence setting out the amounts attributable to each defendant. The case law makes clear that judges should approach the assessment of harm by reference to the quantity of drugs over the entire period of the conspiracy. On the basis of the evidence as it had developed during the course of the trial, the prosecution submitted that as the joint principals in the conspiracy a total of 89kg was attributable to the appellants. The judge, having presided over the trial, was entitled to accept this and was best placed to form a view as to the quantities involved. The fact that in much later POCA proceedings (which have a different purpose) other figures may have been referred to does not undermine the judge's approach.

137. We do not accept Mr Larkin's core submission that the revised figure would have had a "significant impact" on the sentence or taken the appellants into a higher sentencing bracket. The starting point in the Sentencing Guidelines for a defendant falling within leading role – category 1 is 14 years. That is based on 5kg. The judge explained at para 16 of his Sentencing Remarks the basis upon which he proceeded, and in particular why the sentence had to be well in excess of the guideline:

> "Cavan Hanna and Jamie Hanna plainly had a leading role. They dealt in commercial quantities of the highest order and accordingly will have had an expectation of substantial financial advantage. At that level they will have links to others at the top of the chain and they directed others. They will have had close links, inevitably, to the original source. Given the amounts involved (far in excess of 5 kgs) they are both in the highest category of harm, level 1. Other aggravating

> features include their previous convictions in 2009 for identical offences for which they were sentenced, after a plea, to 14 years imprisonment. They were also on licence at the time of this offending. Finally, a further aggravating feature was the use of technology to impede detection. Offending in this top category has a starting point of 14 years with a range of 12-16 years. But offending on this scale exceeds, to a considerable degree, these categorisations and the guidelines indicate that sentences in excess of 20 years may be suitable in the circumstances of cases such as these".

138. Ms Morrison who argued this part of the appeal for the respondent is right to submit that even if the judge had sentenced on the basis of the lower figures of 40kg/60kg this was still so far in excess of the amount envisaged by the Guidelines, that the sentence of 25 years would have been wholly justifiable and not excessive, let alone manifestly so: see for example, *R v Cuni* [2018] 2 Cr. App. R. (S.) 18; and *R v Cavanagh* [2021] EWCA Crim 1584.

139. Of course, had the appellants chosen to attend their sentencing hearing they could have engaged with the process, albeit it is difficult to see what could have been said, on the issue of quantity for example, as they continued to deny that the EncroChat handles were attributable to them. As it is however, the sentence the judge imposed would have been justified on the figures involved prior to their revision. It follows that the applications for leave to appeal against sentence are refused.

Outcome

140. We dismiss Jamie Hanna's appeal against conviction. We are satisfied his convictions are safe. All other applications, including for an extension of time and for leave to appeal against conviction and sentence are refused.