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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/03955/A3
2023/04026/A3

On appeal from the Crown Court at Kingston
(Her Honour Judge Kent)

Neutral Citation Number: [2024] EWCA Crim 990

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 18th July 2024

B e f o r e:

LADY JUSTICE ANDREWS DBE

MRS JUSTICE CUTTS DBE

HER HONOUR JUDGE MUNRO KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

MICHAEL HENRY McDONNELL
RHYS MERVYN HENRY JOHNSON

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Mr E Lucas appeared on behalf of the Appellant Michael Henry McDonnell

Mr B Horne appeared on behalf of the Appellant Rhys Mervyn Henry Johnson

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J U D G M E N T

Thursday 18th July 2024

LADY JUSTICE ANDREWS: I shall ask Mrs Justice Cutts to give the judgment of the court.

MRS JUSTICE CUTTS:

1. The appellant McDonnell appeals against a total sentence imposed upon him of 16 years and three months' imprisonment in the Crown Court at Kingston Upon Thames on 20 October 2023 with the limited leave of the single judge. Such leave relates to the totality of the term imposed.

2. The single judge referred the application of Johnson for an extension of time of four days in which to apply for leave to appeal against sentence to the full court. Johnson was sentenced in total to 16 years' imprisonment at the same court on the same date. We grant the extension of time and limited leave on the same ground as that granted for McDonnell.

3. The appellant McDonnell's sentence was made up in the following way: eight years and six months' imprisonment for an offence of conspiracy to arrange or facilitate the travel of another with a view to exploitation (count 1), of which he was convicted after trial; and seven years and nine months' imprisonment for each of two offences of conspiracy to supply a controlled drug of Class A (counts 2 and 7), to which he had pleaded guilty on 16 February 2022, concurrent inter se, but consecutive to the sentence for the exploitation offence.

4. The appellant Johnson was charged on the same indictment. He was also convicted after trial of count 1. He, too, pleaded guilty to counts 2 and 7. He additionally pleaded guilty to an offence of possession of a controlled drug of Class A with intent (count 3) and to an offence of possessing criminal property (count 4).

5. The appellant Johnson had also pleaded guilty in the Crown Court at Reading, on a separate indictment, to two offences of being concerned in making an offer to supply a controlled drug of Class A to another.

6. On the joinder indictment Johnson's sentence was made up as follows: on count 1, eight years and six months' imprisonment; on count 2, six years' imprisonment consecutive; on count 3, six years' imprisonment concurrent. On count 7 the record sheet from the Crown Court records the sentence as 72 months' imprisonment concurrent. We understand that to be an error to which we will come below. On count 4, the sentence was 18 months' imprisonment concurrent. On the Reading indictment he was sentenced to 18 months' imprisonment on each offence, concurrent inter se, but consecutive to the sentence imposed on the joinder indictment.

7. In each case ancillary orders were made.

8. Other conspirators were sentenced in relation to the exploitation and drugs conspiracies. It is unnecessary for the purposes of these appeals to set out the details of their involvement and the sentences they received.

The Facts

9. On the joinder indictment the case involved a county lines operation to supply Class A drugs (specifically crack cocaine) in Andover, Hampshire in August and September 2021. The drugs operation was to be run principally from London and the home counties but using individuals physically present in Andover in order to supply drugs to users. The operation involved both appellants and three other younger individuals.

10. In furtherance of the drugs supply, the appellants exploited a 15 year old schoolboy, hereafter referred to as "A". They trafficked him from London in order to deal drugs on the streets of Andover on their behalf.

11. In August 2021, A lived with his parents in West London. They discovered in the summer holidays that he had become involved in drugs. They found small plastic bags in his bedroom. Having been confronted by them, A twice ran away and was returned to the family home by the police on 20 and 27 August.

12. In the early hours of the morning of the 29th A ran away again. By this time, he had become involved with the appellants and their co-conspirators. He had sent them a message on 27 August to the effect that he wanted to go into county lines drug dealing. On 2 September 2021, he was taken to the home of a co-accused, Jordan Barnes in Andover for the purposes of him selling crack cocaine.

13. On 6 September 2021, A was detained by police on entering a convenience store in Andover. He was searched and found to be in possession of 15 wraps of crack cocaine, 28 wraps of heroin and a door key. The police searched the address of the co-accused Barnes in which they recovered from the living room Class A drugs from a coat which also had A's Oyster card in it, together with £960. They also found a piece of paper in the flat with the names and numbers of local drug users on it.

14. An investigation into the drugs supply operation led the police to identify the "P" county drugs line. Telephone data revealed contact between A and the appellant's co-accused. Cell-site data showed the movement of their phones, together with those of the appellants, McDonnell and Johnson to Andover on 2 September. ANPR evidence indicated that they were in McDonnell's car.

15. Later in the evening the appellants moved together back to London, leaving A in Andover. Thereafter, the appellant Johnson was in frequent contact with the co-accused Barnes, when he had not been before. Barnes was also frequently in contact with the drugs line, whilst A was in Andover. Telephone evidence indicated the sale of cocaine and heroin at that time. A's telephone contained a deal tick list, created on 4 September and updated on 6 September.

16. The appellant Johnson was arrested at his home address in Maidenhead on 15 September. The property was searched and a quantity of cannabis and cash were recovered. A key for a property in Stretton Close, High Wycombe was also found. A search of that property uncovered a large amount of Class A drugs, correspondence, and photographs relating to Johnson. £910 in cash was found in a washing powder box. There was a notepad of telephone numbers and wraps of Class A drugs on the microwave and a red hydraulic press in a cupboard in the hallway, with a mould consistent with the creation of one kilogram blocks of drugs.

17. The police also executed a search at the appellant McDonnell's home address in Greenford. The subsequently located the BMW at a car wash in in Harlington. Cocaine and heroin were found in the car.

18. A total of 481 grams of drugs were seized from the properties and vehicles linked to both appellants.

19. The two counts on the Reading indictment concerned an occasion in May 2020 when the appellant Johnson was stopped at Reading railway station by the police and found to be in possession of a drugs line mobile phone which he had used to broadcast messages advertising

the sale of cocaine and heroin. He also had £640 in cash on him.

20. The appellant McDonnell was aged 33 years at the time of sentence. He had six previous convictions for 13 offences between 2006 and 2020. These included two previous convictions for possession with intent to supply Class A drugs (heroin in 2006, and cocaine and MDMA in 2017). He therefore fell to be sentenced for the drugs offences the subject of this appeal as a "third strike" drug trafficker, with a minimum term of seven years' imprisonment, pursuant to section 313 of the Sentencing Act 2020.

21. The appellant Johnson was aged 32 years at the time of sentence. He had seven previous convictions for nine offences. These were for violent and dishonest offences, with one conviction in 2020 for possession of heroin. He was sentenced in May 2022 to 30 months' imprisonment for violent disorder.

22. In sentencing the appellants, the judge observed that the offences were serious, entailing as they did county lines organised drug dealing of Class A drugs, both heroin and cocaine, from London to Andover. They had trafficked a 15 year old child and had exploited him to be a drug runner.

23. In terms of the guidelines, on count 1 the judge placed both appellants within category 3A of the guideline for human trafficking. This afforded a starting point of eight years, and a range of six to ten years' imprisonment. The appellants fell within category A culpability as they had played a leading role in the offence, had an expectation of substantial financial advantage, and there was a degree of planning and preparation.

24. The judge found category 3 harm. She observed that, as is often the case, A, who was aged 15 years, did not recognise that he had been exploited due to his age and immaturity,

and did not recognise the harm caused or the serious risk to which he had been exposed. She took into account that A's behaviour had already changed before he encountered the appellants, but observed that they took advantage of his immaturity and vulnerability. They took him far away from home and placed him in the home of a drug addict where he lived in very poor conditions. In doing so, they exposed A to the risk of serious physical and psychological harm for their financial gain.

25. The judge found an aggravating factor in the previous convictions of each appellant.

26. In terms of counts 2 and 7 (conspiracy to supply Class A drugs), the judge ascribed a leading role within the guideline to both appellants. They were directing, organising, buying and selling on a commercial scale, had substantial links to and influence on others in a chain, and expected substantial financial advantage.

27. The judge found harm to be at the top end of category 3. In so doing, she observed that this was county lines drug dealing. The total weight of Class A drugs at 481.717 grams was three times the indicative weight for category 3, and the police found a press for compacting one kilogram blocks of drugs in Stretton Close. The "P" line was busy; it supplied 50 to 100 deals a day. This categorisation afforded a starting point of eight years and six months, with a range of six years and six months to ten years' imprisonment. The judge found an aggravating factor in the exploitation of a child to assist in drug-related activity.

28. The judge placed the offence on the Reading indictment concerning the appellant Johnson alone in category 3 "significant role". She described it as "street dealing". This afforded a starting point of four and a half years, with a range of three and a half to seven years' imprisonment.

29. As each appellant was to be sentenced for more than one offence, the judge made specific reference to the totality guideline. She adopted the approach set out therein by determining the appropriate sentence for each individual offence by reference to the applicable sentencing guideline, and then determined whether there should be concurrent or consecutive sentences. She then adjusted the sentence to reach what she described as a total sentence which was just and proportionate for each appellant.

30. The judge determined that consecutive sentences were appropriate for the exploitation and drugs conspiracies, as these were distinct and separate offences. She stated that she had taken care not to double count because of the overlap between count 1 on the one hand and counts 2 and 7 on the other.

31. In sentencing the appellant Johnson, the judge specifically took into account his mitigation. Taking that and the aggravating factor into account, she sentenced him to eight years and six months' imprisonment on count 1. On counts 2 and 7, the judge concluded that the notional sentence after trial would have been one of 12 years' imprisonment. She afforded 25 per cent credit for Johnson's guilty pleas, which reduced the notional sentence to one of nine years' imprisonment. On count 4 (possession of criminal property (the cash found at the time of his arrest)), the judge placed the offence within category 6A of the relevant guideline. She elevated what would have been harm category B to harm category A, because the underlying offence was drug supply. This afforded a starting point of one year, with a range of 26 weeks to two years' imprisonment. Taking mitigating and aggravating factors into account, the judge came to a notional sentence after trial of two years' imprisonment. She again afforded 25 per cent credit for Johnson's guilty plea and imposed the sentence of 18 months' imprisonment.

31. The judge reached a notional sentence after trial of five years' imprisonment for each of

the offences on the Reading indictment. Affording 25 per cent credit for the guilty plea, she came to a sentence of three yeas and nine months' imprisonment.

32. The judge then turned to the question of totality. She imposed a sentence of eight years and six months' imprisonment on count 1, and then reduced the sentence on count 2 from nine to six years' imprisonment and ordered that sentence to run consecutively. On the joinder indictment, she imposed six years' imprisonment on count 3 and 18 months' imprisonment on count 4, both to run concurrently.

33. The judge did not say in her sentencing remarks that she had reduced the sentence on count 7 to one of six years from the nine years' imprisonment she had originally reached. The record sheet from the Crown Court therefore records a sentence of 72 months' imprisonment on that count. It seems to us – and indeed it is also the view of the appellant's counsel – that the failure to pronounce the sentence of six years was an oversight on her part. It is plain from the judge's sentencing remarks that she intended to reduce the sentences for both counts 2 and 7 to six years' imprisonment. We direct that the record in relation to count 7 is amended accordingly.

34. On the Reading indictment, the judge reduced the sentences from three years and nine months to 18 months' imprisonment, concurrent with each other, before ordering that sentence to run consecutively to the other terms. By this route she came to the overall sentence of 16 years' imprisonment.

35. In sentencing the appellant McDonnell, the judge found no particular circumstances that would make it unjust to impose the minimum term of seven years' imprisonment upon him for counts 2 and 7 by reason of his previous convictions for drug dealing. She specifically took his mitigation into account.

36. As with the appellant Johnson, and for the same reasons, the judge came to a sentence of eight years and six months' imprisonment for the exploitation offence in count 1. On counts 2 and 7, she came to a notional sentence after trial of 13 years' imprisonment. Johnson had pleaded guilty to these offences on the day of trial. The judge afforded him ten per cent credit for those pleas and reduced the sentence to 11 years and eight months' imprisonment on each.

37. As the judge intended to make the sentence for the drugs offences consecutive to the sentence on count 1, she reduced the sentences on counts 2 and 7 by almost exactly four years, to terms of seven years and nine months' imprisonment, to run concurrently with each other. By this route she came to the sentence of 16 years and three months' imprisonment imposed.

38. As we have already said, limited leave to appeal against sentence was granted on the question of totality alone. On behalf of the appellant Johnson, Mr Horne submits that whilst the judge stated that she had regard to the principle of totality, there is no evidence of how that was reflected in her sentence, or how she avoided double counting. Double counting can be found, he submits, in the fact that she ascribed the same aggravating factors to all of the counts upon the indictment. The counts on the joinder indictment are inextricably linked, submits Mr Horne, and the judge was not bound to impose consecutive sentences.

39. In relation to the appellant McDonnell, on totality Mr Lucas submits that there should have been concurrent sentences for counts 1, 2 and 7, which were all founded on the same facts. In making the sentences consecutive, there was, in effect, double counting. The total sentence of 16 years and three months failed adequately to reflect the principle of totality and was excessive in all the circumstances. In support of his submission, Mr Lucas submits that

the judge erred in ascribing the appellant a leading role in the conspiracy on count 1. He submits that the judge fell into error in concluding that because he played a very significant role in the drugs conspiracies, McDonnell must have had a leading role in the exploitation of A, and the evidence did not support such a conclusion.

40. We have reflected on these submissions. We deal first with the question of totality. We are unpersuaded that the judge erred in her approach on this issue. It is plain from her sentencing remarks that she had well in mind the need to impose a total sentence on each appellant that was just and proportionate.

41. Whilst many judges may have passed concurrent sentences for all counts of which the appellants were convicted on the joinder indictment and increased the sentence on a lead offence to reflect overall criminality, we cannot find that consecutive sentences were wrong in principle. As the totality guideline makes clear, there is no inflexible rule as to how a sentence should be structured. If sentences are to be consecutive, ordinarily some downward adjustment is required to arrive at a just and proportionate sentence. That is what this judge did. She substantially reduced the sentences for the drug conspiracies on counts 2 and 7 on the joinder indictment by reason of making the total sentence imposed for them consecutive to that imposed for the exploitation conspiracy.

42. The sole question for this court is whether the total sentences which the judge imposed were manifestly excessive for the overall offending by each appellant. We cannot find that they were. Each appellant had been convicted of trafficking a 15 year old boy. By the jury's verdict, they were involved in moving him from his home to a drug addict's flat in order that he could deliver Class A drugs. It is of no matter that he had been exploited before and was willing to be involved in drug dealing. He was vulnerable and exposed to substantial risk in order that the appellants and the others in the conspiracy could achieve significant financial

gain. The judge presided over the trial and was well placed to determine the role of each appellant. She properly categorised the offence within the guideline, and the sentence imposed was entirely justified.

43. The appellants also played a leading role in a county lines operation to supply Class A drugs in Andover. This finding is rightly not criticised by either appellant. The judge placed harm at the high end of category 3. Given the quantity of drugs involved, in our view she was justified in reaching a notional sentence after trial outside of the category range for a category 3 leading role offence. She afforded appropriate credit in each case and reached appropriate sentences of nine years' imprisonment for the appellant Johnson and 11 years and eight months' imprisonment for the appellant McDonnell. Thereafter, the judge substantially reduced that term by three years in the case of Johnson and four years in the case of McDonnell to reflect totality. In addition, the judge reduced the sentences imposed on the appellant Johnson for the Reading indictment by more than half.

44. Those substantial reductions, in our view, ensured that the total sentences imposed were just and proportionate and far from manifestly excessive for this serious offending.

45. Whilst the judge found the exploitation of A to be an aggravating factor in the drug conspiracies, we are not persuaded, in light of the size of the reduction in sentence for those offences, that she double counted that factor in arriving at the sentences imposed. Nor are we persuaded that she double counted the aggravating factors in relation to the appellant Johnson. The same aggravating factors applied to each of the offences on the indictment, but did not, in our view, on a consideration of the sentencing remarks as a whole, lead to a longer sentence overall.

46. We reject any suggestion that the judge failed sufficiently to explain how she applied the

principle of totality in sentencing either appellant. Her approach could not have been clearer. She specifically took into account the limited mitigation in each case and arrived at sentences which were, in our view entirely justified for the totality of the offending of each appellant.

47. Accordingly, these appeals against sentence are dismissed.

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

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