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IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202301598/A3

Neutral Citation No.: [2024] EWCA Crim 160

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 7 February 2024

Before:

LADY JUSTICE ANDREWS

MRS JUSTICE CHEEMA-GRUBB

THE RECORDER OF REDBRIDGE
(HER HONOUR JUDGE ROSA DEAN)
(Sitting as a Judge of the CACD)

REX

V

MICHAEL JOHN BURNS

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MS S GARCHA appeared on behalf of the Applicant.

J U D G M E N T

1. MRS JUSTICE CHEEMA-GRUBB: On 22 February 2021, at his PTPH, the applicant (who is now 41 years of age) pleaded guilty to conspiracy to supply cocaine and conspiracy to supply cannabis. He was sentenced on 22 April 2021 by HHJ Potter, sitting at Liverpool Crown Court, to 12 years' imprisonment for the cocaine and 3 years concurrent for cannabis. Confiscation proceedings were pursued and, in April 2022, a confiscation order in the sum of £48,359 was made against him. He renews his application for an extension of time in which to appeal against sentence and for leave to appeal against the custodial sentence.
2. The prosecution arose out of the disruption by Law Enforcement of EncroChat-enabled communications between criminals active in the United Kingdom, between April and June 2020. In summary, evidence of exchanges on the EncroChat phone demonstrated that the applicant was involved in supplying multiple kilograms of cocaine and cannabis and acting as a go-to supplier for several other EncroChat phone users. Messages demonstrated his discussions about the prices, quantities and arrangements for collection and delivery of both cash and drugs. The applicant would travel to collect quantities of cash such as £15,000 or £17,000. He employed sub-dealers below him and told customers that he had large quantities of high quality cocaine available.
3. When arrested and interviewed by the police, he denied any criminality or connection to the EncroChat device attributed to him.
4. The guilty pleas were entered on a basis which was not disputed by the prosecution. The material elements were that the applicant had used an EncroChat handle "Milliondolla". It was accepted that he had played a *significant role* for the purpose of the sentencing

guideline and the prosecution placed him at the upper end of that category. Although he had sought the supply of 30 kilograms of cannabis, the actual quantities sourced and/or supplied during the period of the conspiracy were limited to 4 to 8 kilograms of cocaine and 10 to 15 kilograms of cannabis.

5. The applicant had been acting under intimidation from those to whom he owed a large debt, and his involvement in the conspiracies arose in order to satisfy the debt. The applicant had limited influence over others involved above him in the chain of supply but he had engaged others to work on his behalf.
6. The applicant had three relevant previous convictions for producing cannabis in 2010 and 2011, for which he was sentenced to imprisonment.
7. No appeal was pursued within the 28-days limit set under statute. An extension of 752 days is required. An extension will only be granted where there is a good reason and ordinarily where the offender will otherwise suffer a significant injustice. The interests of justice in the finality of Crown Court judgments are amongst the matters engaged. The Court will examine the merits of underlying grounds before the decision is made on whether to grant an extension of time.
8. We are grateful for the presentation of these applications by Ms Garcha, who appears, funded privately. The application was lodged nearly 2 years after the sentencing hearing because counsel instructed in 2021 provided negative advice on appeal. Ms Garcha, representing the applicant in 2023, when he was being sentenced for another conspiracy to supply drugs, came to the opposite conclusion and drafted grounds which she has developed orally.
9. They can be encapsulated thus: too high a starting point was taken for sentence on the conspiracy to supply cocaine and no or inadequate allowance was made for personal

mitigation.

10. We are persuaded that there is some force in the criticism of the judge's approach to sentence in what we apprehend to be one of the earliest cases to be sentenced where the prosecution came about following receipt by the police of EncroChat material.
11. In opening the facts at the sentencing hearing, the prosecution identified, for both conspiracies, three out of six specified elements of a *leading role* for the Sentencing Council Guideline, the organising of buying and selling on a commercial scale, substantial links to others within a chain and the expectation of substantial financial gain. However, in light of all the evidence, the prosecution recognised that the elements of *leading role* were tempered by the fact that the offender was in debt to those higher up the chain and his offending during the period of the conspiracies was to discharge a large debt, which at one stage appeared to exceed £100,000. The prosecution accepted that the applicant had been compelled to remortgage his home to try to satisfy the debt.
12. As we have already mentioned, the applicant accepted that he fell to be sentenced at the upper end of the *significant role* category. For Class A drugs this category provides a starting point of 10 years within a category range of 9 to 12 years. We are not persuaded that the personal mitigation available to the applicant should have led the judge to impose a sentence on the basis of a *lesser role*, where, for example, an offender falls to be sentenced against a background in which he was engaged by pressure, coercion or intimidation and alike. An important feature of this case is that the mitigation of acting under pressure had already been accounted for in a classification of the offender's role as *significant* rather than *leading*.
13. As to harm, there is no dispute that the quantities of drugs involved were roundly within category 1 for cocaine, although they exceeded the category 1 quantities for the cannabis

conspiracy. For cannabis, at the indicative quantity of 200 grams, it is 4 years starting point within the range of 2½ to 5 years.

14. The judge stated in his sentencing remarks that the quantity in count 1 (cocaine) exceeded the indicative amount for category 1. While we agree that the evidence disclosed messages about much larger quantities, the applicant's undisputed basis of plea was that the amount actually obtained and supplied was between 4 and 8 kilograms. The lower end of that range does not of course exceed the indicative quantity.

15. This feature had to be reflected in the assessment of gravity of the conspiracy. Indeed, the judge does appear at one point to have reversed the quantities of drugs involved when he said:

- i. "It is clear you played a significant role at a high end of significant role in the trafficking of large amounts of Class A drugs and a much smaller amount of Class B drugs on behalf of sophisticated organised crime groups...."

16. In fact, it was a much smaller amount of cocaine, not cannabis.

17. The judge rightly identified aggravating features: the actual quantities, particularly of cannabis supplied in pursuance of the conspiracy, the use of the sophisticated and expensive EncroChat devices, the degree of organisation and distribution the applicant was involved in, his previous convictions, as well as the expectation of substantial financial gain. By way of mitigation, the judge recognised that the applicant had been involved through desperation, having run up a large debt at a time when he was not able to obtain work in the offshore electronics industry due to Covid-19. He also made reference to the three character references provided to him, which described the applicant as a family man who had fallen under the influence of bad elements during a period of impecunity. However, he said, aptly, that the consequence of the financial slowdown in

the economy was not an excuse for the applicant's offending which involved being, in his words: "prepared to traffic in misery and death as a means to support themselves and their families through financial straitened circumstances."

18. The sentence of 12 years was the result of a provisional sentence prior to discount for guilty plea of 16 years. As will be apparent, this is at the top end of the category range for sentence in category 1 *leading role*.
19. In our judgment, the overall picture, including the quantities of the respective drugs involved and the aggravating features, justified the sentence for the conspiracy in count 1 at the top of the *significant role* range, namely 12 years. The sentence of 3 years imposed for the cannabis conspiracy cannot be the subject of any complaint. However, we do not see any proper justification for moving outside the category range for count 1. The judge did not provide any such explanation in his sentencing remarks for taking a provisional sentence before discount of 16 years' imprisonment, aside from a reference to lengthy sentences being necessary as a deterrent. We recognise, of course, that deterrence is part of the purpose of sentencing in such cases, and this explains why the sentences indicated by the guideline for these offences are as substantial as they are. The judge also had to have regard to the question of imposing an overall sentence which is just and proportionate.
20. In all the circumstances, we are persuaded that it is appropriate to grant the very great extension of time required. In order to correct a manifestly excessive sentence, we grant leave to appeal and dispose of the appeal in this way. Count 1 is taken as the lead offence incorporating the criminality in count 2. A sentence at the upper edge of the category range of 12 years has to be reduced at step 5 of the guideline by 25 per cent for the guilty pleas.

21. Accordingly, the sentence on count 1 is quashed and replaced by a sentence of 9 years' imprisonment. The sentence on count 2 and the other orders shall remain as before. To that extent, this appeal succeeds.

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

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