Neutral Citation Number: [2023] EWCA Crim 1294

IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202301076/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 26 October 2023

Before:

LORD JUSTICE SINGH

MR JUSTICE JEREMY BAKER

COMMON SERJEANT OF LONDON
(HIS HONOUR JUDGE MARKS KC)
(Sitting as a Judge of the CACD)

REX

V

TOM GREENFIELD

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MR O COOK appeared on behalf of the Applicant.

J U D G M E N T
(Approved)

1. LORD JUSTICE SINGH: This is a renewed application for leave to appeal against sentence. On 19 December 2022, in the Crown Court at Woolwich, the applicant pleaded guilty to three offences on the indictment. On 13 March 2023, in the same Crown Court, he was sentenced by Mr Recorder Turner in the following way. On count 1, which was an offence of conspiracy to supply a controlled drug of Class A, that is cocaine, there was a sentence of 11 years and 3 months' imprisonment. On count 2, which was an offence of conspiracy to supply a controlled drug of Class B, that is cannabis, there was a concurrent sentence of 2 years and 3 months' imprisonment. On count 3, which was an offence of conspiracy to transfer criminal property, there was a sentence of 2 years and 3 months' imprisonment, again made concurrent. Accordingly, that made a total sentence of 11 years and 3 months' imprisonment. Other appropriate orders were made.
2. There was a co-defendant, Nicky Chilvers, who pleaded guilty to those three counts and count 4, that is possession of cocaine with intent to supply, and count 5, that is possession of cannabis with intent to supply. He was sentenced to a total of 9 years and 9 months' imprisonment.
3. The facts can be stated as follows for present purposes. The evidence in relation to the index offending arose out of "Operation Venetic", which had been the infiltration of EncroChat, which was a secure communications system enabling highly encrypted mobile phone users to send secure messages to one another. Those devices typically cost between £1,200 and £1,500. The users were identifiable by a "handle" and the applicant's handles included "Viperpainter" and "Rabidbass". Once the encrypted messages could be read, the Crown's case was that the applicant and Chilvers were involved in the index offending. Count 1 involved the supply of 5 kilograms of cocaine;

count 2 involved the supply of 2 kilograms of cannabis and count 3 concerned a conspiracy to transfer around £100,000 which had been gained from criminal activity. The relevant dates within the conspiracy had included 27 March 2020, when the applicant had arranged the purchase of 2 kilograms of cocaine with another EncroChat user and 28 to 29 March 2020, when the applicant had arranged the purchase of a further 3 kilograms of cocaine.

4. On 7 April 2020, Chilvers delivered £53,000 on behalf of the applicant to another EncroChat user. On 27 April 2020, Chilvers delivered a further £50,000 on behalf of the applicant to another EncroChat user. On 10 June 2020, the applicant directed Chilvers to deliver 2 kilograms of cannabis. There had also been evidence that the applicant had told other EncroChat users that he was about to receive 30 kilograms of cocaine prior to the infiltration of EncroChat data.
5. The applicant was arrested on 31 August 2022. He was interviewed by the police on the same day and answered "no comment" to all questions asked.
6. The applicant was born on 2 February 1986. He was aged 37 at the date of sentence. He had three convictions for five offences, during the period 31 October 2006 to 24 October 2008. His relevant convictions included two drugs offences for which he had been fined.
7. The sentencing court did not have a pre-sentence report. We confirm that we do not consider that one was or is now necessary (see section 33 of the Sentencing Act 2020 or the Sentencing Code).
8. The Sentencing Council has issued a Definitive Guideline on supplying or offering to supply a controlled drug, with effect from 1 April 2021. Although the present case involved a conspiracy rather than a substantive offence, it is common that that Guideline

is relevant. The drugs in this case, so far as count 1 is concerned, fell into Class A. Category 1 harm applied because the amount of the cocaine was 5 kilograms.

9. In the judge's view the applicant's role fell somewhere between *leading role* and *significant role*. The Guideline recommends a starting point of 14 years' custody for an offence involving Class A drugs which falls into category 1, where the offender has played a *leading role*, with a suggested range of 12 to 16 years' custody. In a case where an offender has played a *significant role*, the Guideline recommends a starting point of 10 years' custody with a category range of 9 to 12 years.

10. In passing sentence in this case, the Recorder said this this was professional "mid-level drug dealing". He concluded that the applicant was relatively high up in the chain of drug dealers. It was accepted, he said, that he was at the bottom end of the *leading* range and the top end of the *significant* range. In any event, the Recorder endorsed that categorisation. Before this Court, Mr Cook, who appears for the applicant, has fairly acknowledged that although this categorisation was not in fact, he submits, agreed on behalf of the offender, nevertheless the Recorder was entitled to reach that conclusion, in particular, as that was the way the case was being put by the prosecution.

11. The Recorder said, in his sentencing remarks, that the applicant had maintained a false persona of respectability whilst pedalling in a significant level of dealing on a wholesale basis. The Recorder took the view that the starting point would have been 13 years' imprisonment, but this should be increased by 2 years to reflect the fact that there had been the use of the EncroChat encrypted messaging service on count 1. Having taken a starting point of 15 years' custody, the Recorder reduced that by 25 per cent to reflect the guilty plea, so arriving at the sentence of 11 years and 3 months' imprisonment. On count 2, the Recorder did not increase the starting point in respect of the use of

EncroChat. The starting point, he said, would have been 3 years' imprisonment. This was reduced to 2 years and 3 months made concurrent. On count 3, the sentence again, the Recorder said, would have been one of 3 years' imprisonment, but again this was reduced to 2 years and 3 months again made concurrent.

12. Mr Cook has sought leave to appeal on three grounds. First, that the Recorder fixed a starting point in relation to count 1 of 13 years which was too high. Secondly, that the uplift of that starting point by 2 years, to reflect the use of encrypted communication, was in itself excessive. Thirdly, that the court failed to reflect properly or at all the applicant's relative lack of antecedents. At the hearing before us, Mr Cook has submitted that the antecedents were very old and that there had been no similar offences recently. He submits that, although he does not abandon ground 3, it should properly be regarded as being bound up within ground 1, in other words, that the failure to take adequate account of this ground resulted in the judge adopting a starting point which was manifestly excessive.

13. Mr Cook makes no complaint about the 25 per cent discount for the guilty pleas. He also acknowledges that, in principle, the judge was entitled to increase the notional sentence on count 1 in order to reflect the offender's global criminality, although to some extent he quibbles with whether count 3 could properly be regarded as being separate. He submits that it should properly be regarded as being bound up in the criminality reflected in count 1. Nevertheless, he does accept that the presence of count 2, which also had to be sentenced for, could be reflected in an increase on the notional sentence to be passed on count 1.

14. In refusing leave to appeal against sentence, the single judge said that she did not accept that any of the three grounds then being advanced were reasonably arguable. She

concluded that the Recorder was correct to conclude that this offender's role fell at the bottom end of the *leading* range and the top end of the *significant* range. Further, the Recorder was correct to have regard to the offender's overall level of criminality. He had had regard to everything that he had heard on the offender's behalf in mitigation, which must therefore have included his limited antecedents. The single judge concluded:

> "... the Recorder cannot be faulted for identifying a starting point of 13 years' imprisonment. Furthermore, the use of the Encrochat encrypted messaging service was plainly an aggravating feature of your offending ..."

15. Mr Cook, acknowledges before this Court, that that was right in principle, although he complains that the extent of the uplift was manifestly excessive. The single judge concluded that the Recorder could not be faulted for applying an upward adjustment for 2 years to reflect the use of EncroChat. In those circumstances, having regard to the applicant's overall offending, she concluded that it was:

> "... not arguable that total sentence of 11 years 3 months' imprisonment is manifestly excessive or wrong in principle."

16. Despite the eloquent and succinct submissions that we have heard from Mr Cook, we respectfully agree with the single judge. Accordingly, this renewed application for leave to appeal is refused.

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

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