Neutral Citation Number: [2023] EWCA Crim 42

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202202912/A2

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday 30 March 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE COCKERILL DBE
HIS HONOUR JUDGE TIMOTHY SPENCER KC
(Sitting as a Judge of the CACD)

REX
V
LEE NERVAIS

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MR T FORTE appeared on behalf of the Appellant

J U D G M E N T

MRS JUSTICE COCKERILL

1. This is an appeal brought with the leave of the single judge against sentence. On 27 May 2022 the appellant was convicted of five counts on a six count indictment. The indictment covered conspiracy to cause grievous bodily harm, a conspiracy to kidnap, a further conspiracy to cause grievous bodily harm and two drugs counts of conspiracy to supply cocaine and heroin. He was acquitted of a substantive count of false imprisonment (count 1).

2. On 9 August 2022 before the same judge the appellant was sentenced to 20 years' imprisonment as follows:

   a. Count 3:Conspiracy to kidnap, contrary to section 1(1) of the Criminal Law Act 1977 in relation "Croydon Steve", 12 years' imprisonment;

   b. With;

      i. Count 2: Conspiracy to cause grievous bodily harm with intent, contrary to section 1(1) of the Criminal Law Act 1977 and section 18 of the Offences Against the Person Act 1861 against "Bo", five years concurrent and;

      ii. Count 4: Conspiracy to cause grievous bodily harm under the same provisions in relation to "Croydon Steve", five years consecutive to count 2 but concurrent with count 3.

   c. Counts 5 and 6, the conspiracy to supply a controlled drug of class A, contrary to section 1(1) of the Criminal Law Act 1977 and section 4(3) of the Misuse of Drugs Act 1971, covering cocaine and diamorphine respectively, the appellant was sentenced to eight years concurrent.

   d. He was also ordered to pay the statutory surcharge and made subject to an order for forfeiture of the phones.

The Facts

3. The appellant was, it was found, the user of the "Showygator" handle on the end-to-end encrypted platform Encrochat which he used to facilitate and arrange the commission of serious and organised crimes against the person and class A drugs supply.

Count 2 - conspiracy to cause grievous bodily harm "Bo".

4. The appellant was assigned by "Tornvine" to organise and facilitate grievous bodily harm of an individual referred to only as "Bo". On 1 April 2020 the appellant informed "Tornvine" that he had talked to people about "Bo" and asked whether he wanted "Bo" to be stabbed. "Tornvine" responded that he did and that he wanted "Bo" to know that the

attack was from him. The appellant then informed "Tornvine" that it would be £15,000 for a two-man mission, with £7,000 for each of them and £1,000 to "Showygator". There was a protest on price. The appellant said that they could agree to £12,000.

Counts 3 and 4: conspiracy to cause grievous bodily harm and conspiracy to kidnap "Croydon Steve".

5. On 2 April 2020 the appellant communicated with "Fernandotorres" asking him what the kidnap team should do as they were carrying out surveillance on their intended target. The appellant was told by "Fernandotorres" that "Croydon Steve" had stolen eight kilograms worth of drugs from his courier. The appellant met up with the kidnap team later in the day and they confirmed the agreement that should the drugs be recovered they would receive a third of the value; if not they would receive £15,000 as payment for the kidnap. "Fernandotorres" agreed to this and told the appellant: "*Hopefully your pals can beat a confession out of him, see where bits gone*", to which he responded: "Trust me they will".

6. The Crown relied on the messages between "Fernandotorres" and the appellant to demonstrate the close relationship between the two and that the appellant was "Fernandotorres'" fixer and/or facilitator in this country and his enforcer when matters went awry. The opening for the prosecution in the trial also indicated that the beating which it was anticipated would be given was a severe one.

Counts 5 and 6: conspiracy to supply cocaine and diamorphine to another.

7. On 1 April 2020 the EncroChat handle "Fitquail" contacted the appellant saying: "*My pals asking for bottoms*", to which "Showygator" responded "Dark". Both terms are common terms for heroin. The appellant said he would find out and "Fitquail" asked for the highest quality.

8. On 6 April 2020 "Integraltwig" contacted the appellant asking: "*U still need the bottoms?*" and the appellant asked how much it cost. He was told £16,000, an expected price for a kilogram of heroin and the appellant asked for a picture.

9. On 17 April EncroChat handle "Annoyedbaker" sent an image to the appellant. It was the prosecution case that this was an image of cocaine. The appellant asked: "*What they cuz*" and was told "tops" (i.e. cocaine). The appellant asked how much it would cost and was told £39,000 as it was the best quality. Again this is the expected price for a kilogram of cocaine.

10. On 8 May 2020 the appellant's EncroChat handle contacted "Alarmingknee" and asked what tops was going for. He was told £37,000 and he responded: "Ok."

11. On 10 May 2020 "Integraltwig" sent two images of kilogram blocks of cocaine and external wrapping with "NKT" written on it.

12. On 22 May 2020 the appellant asked "Annoyedbaker" if he had any "tops" and then within a minute also asked "Alarmingknee" if he had any "tops".

13. On 2 June 2020 the appellant asked “Alarmingknee” if he had any “tops” and was given a price of £36,000.

14. On 4 June 2020 “Alarmingknee” contacted asking if he was looking for “tops”. The appellant asked whether a picture could be supplied. Later in the day “Alarmingknee” sent a photograph of a kilogram of cocaine with a Mercedes stamp.

15. The appellant had six convictions for 13 offences between 13 May 2002 and 25 May 2016. These included possession of a bladed article in 2002 and 2013, possessing an offensive weapon in 2002, affray in 2016 and offences of simple possession of controlled drugs. He had received custodial terms of 22 months' imprisonment for non-dwelling burglary in 2011 and four months' imprisonment for the affray in 2016.

The sentencing remarks

16. The sentence imposed was carefully considered by the judge. A pre-sentence report was sought and initial sentence hearing took place on 5 August. The author of the pre-sentence report concluded that the appellant posed a high risk to the public. Full submissions were made. Ultimately it was accepted that it would be appropriate to impose a consecutive sentence for the drugs conspiracies on the basis that the resulting sentence would be of sufficient length to avoid the necessity of imposing an extended sentence.

17. The judge then adjourned to reflect on the sentence and its construction. The hearing was then relisted on 9 August, at which hearing he imposed a determinate sentence of 20 years' imprisonment composed of 12 years for the offences of violence and eight years for the drugs offences.

18. In his sentencing remarks the judge dealt first with count 2, conspiracy to commit grievous bodily harm in relation to “Bo”, concluding at page 3D that the appropriate sentence for that offence was five years. He then dealt with count 4, conspiracy to commit grievous bodily harm in respect of “Croydon Steve”. At page 14 he concluded that that too should attract a sentence of five years consecutive to count 2. He then turned to the kidnap charge, saying at page 4F that it was the most serious of the offences of violence and he would treat it as the lead offence and not the offences of violence. The judge then outlined the facts, noticed the absence of guidelines for the kidnapping offence and considered the authorities to which he was referred, which were not those now prayed in aid. At pages 4 to 5 he noted the need for a reduction to reflect the inchoate nature of the offence and the need also to reflect the criminality of the other offences being sentenced concurrently and the aggravating factors. Having considered those he concluded at page 16:

> *“Taking all of that into account, in my judgment, the appropriate sentence on Count 3 conspiracy to kidnap, is one of 12 years' imprisonment to run concurrently with the sentences on Counts 2 and 4.”*

19. It is this conclusion which is the primary focus of the appeal.

20. On counts 5 and 6, the drugs offences, the judge noted the starting point totality and reached a starting point of eight years. No complaint is made of the eight year sentence per se, however it is said that when it was ordered to run consecutively to the violence and the sentence for the offences of violence that sentence of eight years reflects insufficient reduction for totality overall.

21. Permission was given in this case by the single judge on the basis that it was properly arguable that in the circumstances of the offending the sentence imposed on count 3 was itself manifestly excessive and that a total custodial sentence of 20 years paid insufficient regard to totality.

Discussion

22. Before us this morning and represented by Mr Forte, for whose clear and succinct submissions we are most grateful, it has been argued that the judge too took high a starting point for the main sentence on the conspiracy to kidnap, that 12 years could not be justified and was manifestly excessive.

23. Considerable emphasis was placed on the cases of *Saqib* [2022] EWCA Crim 213, *Lunkulu* [2011] 2 Cr.App.R (S) 680 and *Attorney General's Reference Nos 92 and 93 of 2014 (Atkins and Gibney)* [2015] 1 Cr.App.R.(S) 44 and *Attorney General's Reference Nos 102 and 103 of 2014 (Perkins and Champion)* [2015] 1 Cr.App.R.(S) 55. Reference was also made to the more recent case of *R v Smith* [2021] EWCA Crim 1931 where a sentence of nine years was imposed for an offence of false imprisonment, accompanied by some torture including water-boarding of a vulnerable victim.

24. It was said that taken against these authorities the sentence imposed here on count 3 was out of proportion. The thrust of the submission was that the lower sentences in those cases where actual occurring kidnaps or false imprisonments were combined with actual violence indicated that the sentence in this case was manifestly too severe. It was said that in this case the offence was not even in planning towards the upper end of seriousness and that the judge erred in sentencing on that basis and that the court should rather be looking at single figures in this case when no actual kidnap or violence occurred and bearing in mind also the antiquity and lack of relevance of the appellant's previous convictions.

25. It was said the judge took no or no insufficient account of totality in adding that 12 year sentence to the eight years imposed for the drugs offending but was the *fons et origo* of the main offending. Attention was also drawn to the fact that Mr Nervais' recent reports from prison indicate that he has been a model prisoner and has used his time constructively.

26. Attractively as all of these submissions were put, we are not persuaded that they have merit. The main point – "*too high a starting point*" - is, as the single judge noted, a mis-characterisation of the sentencing remarks. As our outline of the sentencing remarks makes clear, the judge did not take 12 years' imprisonment as the starting point for that offence. That was the sentence which he imposed having taken account of all the aggravating and mitigating factors and in particular the need to reflect the overall criminality of all counts 2, 3 and 4. This last point is particularly significant when count 2

(conspiracy to cause grievous bodily harm to Bo, an entirely separate victim) was assessed as justifying a sentence of five years in and of itself and that assessment is not said to be at fault. It is simply wrong to say, as the advice on appeal does, that the sentences on counts 2 and 4 are "*obviously somewhat academic given that they were concurrent to the main count 3 sentence*".

27. The judge would indeed have been at fault had he not adjusted the sentence for the lead offence to take into account concurrent sentencing on two other serious offences of violence, Category 2A GBH conspiracies, each of which attracted five-year sentences and one of which concerned a completely different victim and where the assault which was found was plainly a serious one. The result of 12 years is one which could equally well have been reached or exceeded by sentencing the two offences relating to different victims consecutively.

28. The result therefore is not one which can be called manifestly excessive. As for the authorities which were mainly focused on single offences of kidnap or false imprisonment, these are of no real assistance. Further *Lunkulu* was a manslaughter case considerably pre-dating the Manslaughter guideline The analogies sought to be drawn are false, given the background to this case which we have outlined.

29. As for the eight years for the drugs offences, the complaint here is that eight years is the mid-point for a single offence of this seriousness, neglects to take account of totality given that those offences were being sentenced consecutively to counts 2 to 4. In other words it is said that because of that consecutive sentencing there should have been a greater reduction in this sentence for the drugs offences. However that argument itself entirely neglects the other aspect of totality, that is the need for the sentence on count 5 to reflect the overall criminality of (again) two serious offences; here drugs offences, counts 5 and 6. Either of these could attract a sentence of eight years. In those circumstances, we consider the criticism of this part of the sentence to be equally misconceived.

30. As we have noted, the judge's approach to the sentencing exercise was careful and thoughtful. His remarks were clear and well-reasoned. The result was a sentence which is not manifestly excessive. Accordingly, we dismiss this appeal.

31. We note one point of detail. The judge appears to have imposed the statutory surcharge prior to the outcome of the confiscation hearing. This is technically contrary to the approach indicated in *R v Bristowe* [2019] EWCA Crim 2005. We do not however consider that the circumstances and justice of the case mean it is necessary to quash the surcharge order. The DCS notes reflect the imposition of a surcharge. It will doubtless be drawn to the attention of the judge on the confiscation hearing currently scheduled for 18 April.