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Neutral Citation No. [2023] EWCA Crim 933

IN THE COURT OF APPEAL  
CRIMINAL DIVISION



CASE NO 202301767/A2

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Tuesday 18 July 2023

Before:

LORD JUSTICE DINGEMANS  
MR JUSTICE BUTCHER  
MRS JUSTICE CUTTS DBE

REFERENCE BY THE ATTORNEY GENERAL UNDER  
S.36 OF THE CRIMINAL JUSTICE ACT 1988

REX  
V  
MATTHEW CLARKE

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MR N HEARN appeared on behalf of the Attorney General  
MR D BENTLEY appeared on behalf of the Offender

J U D G M E N T

LORD JUSTICE DINGEMANS:

### **Introduction**

1. This is the hearing of an application by His Majesty's Attorney General for leave to refer to this court a sentence which the Attorney General considers to be unduly lenient. The respondent, Matthew Clarke is 43 years old. On 25 January 2023 he entered a guilty plea to one count of conspiracy to supply a class A drug of cocaine. On 16 March 2023 he entered a guilty plea to a conspiracy to conceal, convert, disguise or transfer criminal property. On 28 April he was sentenced to nine years' imprisonment in the Crown Court at Manchester.
2. It is submitted on behalf of the Attorney General that the sentence should have been substantially increased to reflect the amount of drugs involved in this conspiracy and to reflect the use of sophisticated encrypted devices (there was an EncroChat phone used in this case) and to reflect the sentences in similar cases such as R v Sarasli [2022] EWCA Crim 693.
3. It is submitted on behalf of Mr Clarke that the Attorney's submissions fail to reflect the elements of lesser role found by the judge, there is no linear correlation between amounts and sentences, that this judge reflected the criminality and role of Mr Clarke, and that Sarasli established no principles of law and the factual situations were different.

### **Factual Circumstances**

4. So far as the factual circumstances of this offence are concerned, Mr Clarke used an encrypted EncroChat phone with the handle "Gingerspeaker". He acted under the direction of another individual who was using a phone with the handle "Magiccheetah" who would direct him to collect and deliver cocaine. One example of this activity from the conspiracy period, and we have had an opportunity to consider various transcripts,

occurred on 26 March 2020. On that date arrangements were made by "Magiccheetah" for Mr Clarke to collect 30 kilograms of cocaine with a proportion of the cocaine to be delivered to other members of the conspiracy who were all using EncroChat phones. On 26 March Mr Clarke was directed to wait in Manchester. He was then provided with a postcode in Birmingham. He travelled to Birmingham by car and collected the 30 kilograms of cocaine and over that afternoon and on the following days he met with several other members of the conspiracy at different locations to supply them with significant quantities of cocaine. One supply was 18 kilograms. During the course of the eight week conspiracy 150 kilograms of cocaine was collected and distributed by Mr Clarke in this way and distributed to other members using EncroChat phones.

5. So far as the money laundering was concerned, Mr Clarke was asked by an individual using the EncroChat handle "Mr-Inappropriate" to "get 100k off bongo for me an put 45k to pass someone for a watch for me matr". The following day the same individual sent Mr Clarke contact details of an individual who could provide a suitable watch and he was asked to put aside £45,000 for the purchase. Mr Clarke was paid £300 for his role in handling the cash and making arrangements for the payment. On other occasions Mr Clarke, again under the direction of "Mr-Inappropriate" would use cash to purchase EncroChat phones.
6. On 20 October 2022 police officers attended Mr Clarke's address. Mr Clarke was not at home. The property was searched and drugs packaging was found in a wardrobe with a drugs tick list in a drawer. Later in the morning Mr Clarke attended Manchester Police Station. He was arrested on suspicion of conspiracy to supply class A drugs and associated money laundering offences. He was interviewed but answered "no comment".

## **Mr Clarke**

7. Mr Clarke has no previous convictions and as already related, is 43 years old. He had worked for a petrochemical engineering company for about 22 years from the age of 16. However he was made redundant. He is married and has one adult son and is step-father to a daughter. There was no pre-sentence report before the court given the amount of cocaine involved but a large number of character references were provided. Those showed that Mr Clarke was a hardworking person with a strong commitment to his family. Many references spoke of his extreme remorse about the situation in which he had placed his family. A letter of support from Mr Clarke's wife highlighted that he had become withdrawn and depressed after being made redundant, had begun to drink heavily and use cocaine, and then he had started gambling. That letter highlighted that Mr Clarke had been attending courses in prison.
8. Mr Clarke was charged on 20 October 2022 and appeared at Manchester City Magistrates' Court. He did not indicate any plea and was sent to the Crown Court. On 25 November 2022 he appeared at the Crown Court in Manchester for the pretrial preparation hearing. At that stage his legal representatives had encountered difficulties in seeing the defendant in custody and so Mr Clarke was not arraigned and the court indicated that credit for a guilty plea would be preserved. That was what led to the situation on 25 January when he entered a guilty plea to count 1. The matter was adjourned for a basis of plea to be provided and for the Crown to consider whether count 2 would be pursued. They confirmed that it would be and Mr Clarke pleaded guilty to that count also.
9. There was a basis of plea which was amended following representations from the Crown and that provided the background that Mr Clarke had been employed as a petrochemical

engineer. He had lost his job. He did not receive any redundancy payment, due to the company's dire financial position. The loss of his employment had an impact on his mental health and caused him to misuse drugs and alcohol and to gamble. That led to drug and gambling debts. He was offered courier work which he did not believe to be unlawful at the outset but the basis of plea recorded this: "With hindsight, he now accepts that he was incredibly naïve when accepting this work but was grateful for the work in order to support his family financially. It soon became obvious to the defendant, based on the instructions he received, that he was being used as a courier in the supply of controlled drugs but failed to dislocate himself from the situation."

10. He acted under the direction of a person called "Magiccheetah" who was above him and "Magiccheetah" directed him to undertake a courier role in addition to other tasks during the relevant period, such as checking brand markings on drugs, counting money or putting money aside to pay another individual. He had been supplied with an EncroChat phone by "Magiccheetah" and any contact that Mr Clarke had with others originated from the instructions given by "Magiccheetah". It was said that any money that Mr Clarke had contact with came from the supply of class A drugs. The money was not his and he did not receive any percentage of profits. He was paid a wage by "Magiccheetah" on each occasion that he carried out a task. That was reflected in the messages where "Magiccheetah" offered more money to pick up a late night delivery.
11. The case was adjourned for sentence and the judge adopted the following approach. He noted Mr Clarke's age and the absence of previous convictions and recorded the circumstances in which he had come to be involved in the drug dealing. He observed that Mr Clarke had carried out this role on 10 occasions during the conspiracy period, collecting and delivering 155 kilograms of cocaine. He accepted that Mr Clarke had not

profited from the onward supply other than being paid a modest fee and that he had been paid an additional £300 for collecting cash and arranging the purchase of a watch. The judge found that the offence fell within harm Category 1 and that Mr Clarke had a significant role. The judge also found that there were a number of features indicating a lesser role: the fact that Mr Clarke acted under direction and had no control over those above him in the chain. He found that those factors and the fact that Mr Clarke did not own the drugs and did not profit from their onward sale, being paid only a fee, meant that the starting point towards the lower end of the category range was appropriate.

12. The judge therefore adopted a starting point of nine years. He found that a significant uplift was required to reflect the fact that the conspiracy related to a significantly larger quantity of drugs than the indicative amount in the sentencing guideline. He increased the sentence to 14 years. Having taken that as the starting point before turning to issues of mitigation, he afforded a two-year discount for personal mitigation: the absence of previous convictions, the remorse and the fact that he put his time in custody to positive use. He gave him 25 per cent credit for his guilty plea and that was how the sentence of nine years came to be imposed. There was a concurrent sentence of two years in relation to the Proceeds of Crime Act offence (which was count 2).

13. A prison report available to us shows that Mr Clarke has continued to do well in custody and is assisting others.

#### **Offence-specific guideline**

14. The Sentencing Council has published a definitive guideline for the offence of supplying controlled drugs. That guideline requires the assessment of the seriousness of the offending should be made by reference to the culpability of Mr Clarke and his role and the harm caused by reference to the amount of drugs. The starting point for Category 1

offences, which are based on a five kilogram amount of drugs, are: leading role a starting point of 14 years; significant role a starting point of 10 years; and a lesser role a starting point of seven years. The category range for a leading role is 12 to 16 years and the category range for significant role is nine to 12 years.

15. This was however a conspiracy. In R v Khan [2013] EWCA Crim 800 it was held by this court that although the sentencing guideline does apply to conspiracy offences, the starting point is to recall that a guideline represents guidance, it is not a rigid framework, it should not be construed like a statute, and judges and practitioners are expected to approach the guideline with a degree of common sense and flexibility. In Attorney General's Reference Nos 15, 16 and 17 of 2012 [2013] 1 Cr.App.R (S) 52 it was said that the categories do not provide some kind of straitjacket into which every case must be squeezed. Few offences and few offenders will match exactly the categories provided. There may be more than one offence involved in which the offender has played different roles. However, a particular individual within a conspiracy may be shown only to have been involved for a particular period, or to have been involved only in certain transactions, or otherwise to have had an identifiably smaller part in the whole conspiracy.
16. We make two further short points. First, involvement in a conspiracy can increase the seriousness of the offending for which the offender is being sentenced but it is very important to have a careful reflection of the actual role carried out by the relevant defendant. Secondly, drugs cause destruction in society by making potentially useful members of society become addicted to drugs who commit crimes to fund their habits.
17. Turning then to look at the specific points made by and on behalf of the Attorney General. The submission that the amount of drugs was not reflected in the starting point

is in our judgment not well-founded. The judge did start at nine years, not 10 years, as indicated by the guidelines but that was because the judge had had regard to the elements of lesser role, albeit finding that there was a significant role carried out by Mr Clarke. The judge then did increase that starting point by some five years, not the increase to 18 years that was argued on behalf of the Attorney but that was reflecting Mr Clarke's particular role in this case. It is right that Mr Clarke did use an EncroChat device but it is apparent that the judge had fully reflected that in making the appropriate findings about the sentence. The judge had regard to how Mr Clarke had become involved in this criminality, how he had been exploited through his naivety, and what his role was as a courier.

18. We consider that this was a sentence which was merciful to Mr Clarke and for those reasons we grant leave to the Attorney so that we can consider whether it is unduly lenient. Having stepped back and considered all the particular factors, in particular the amount of drugs, the actual role carried out by Mr Clarke and the period of the conspiracy, we do not find that this was an unduly lenient sentence. For all those reasons we will dismiss the Reference.

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