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IN THE COURT OF APPEAL
CRIMINAL DIVISION

On appeal from the Crown Court at Luton
(Her Honour Judge Herbert)



Case No: 2023/02394/A5
2023/02395/A5
2023/02422/A5
[2024] EWCA Crim 856

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 9th July 2024

B e f o r e :

VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE BRYAN

MRS JUSTICE THORNTON DBE

R E X

- v -

ZAIN ABDEEN YUSUF
MOHAMMED IMRAN KHAN
IMAD MUSA-HAMID

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr G Smith appeared on behalf of the Appellant Zain Abdeen Yusuf
Mr J Scobie KC appeared on behalf of the Appellant Mohammed Imran Khan
Mr J Rose appeared on behalf of the Appellant Imad Musau-Hamid

J U D G M E N T

Tuesday 9th July 2024

LORD JUSTICE HOLROYDE: I shall ask Mrs Justice Thornton to give the judgment of the court.

MRS JUSTICE THORNTON:

Introduction

1. The three appellants, Zain Yusuf, Mohammed Khan and Imad Musa-Hamid appeal against the sentences for their involvement in an organised criminal gang responsible for the purchase and onward distribution of approximately 987 kilograms of cocaine, along with the transfer of a fully automatic firearm and live ammunition. The offending came to light as a result of French law enforcement agencies obtaining access to the EncroChat encrypted phone messaging network in June 2020.
2. The appellants were each charged with:
 - Conspiracy to supply Class A drugs, contrary to section 1(1) of the Criminal Law Act 1977 and section 4(3)(a) of the Misuse of Drugs Act 1971 (count 1);
 - Conspiracy to sell or transfer a prohibited weapon, contrary to section 1(1) of the Criminal Law Act 1977 and section 5(2A) of the Firearms Act 1968 (count 2); and
 - Conspiracy to sell or transfer ammunition, contrary to section 1(1) of the Criminal Law Act 1977 and section 1(1)(b) of the Firearms Act 1968 (count 3).
3. In addition, Zain Yusuf was sentenced for possessing a controlled drug of Class A with intent to supply, contrary to section 5(3) of the Misuse of Drugs Act 1971 (count 4); and for three offences of fraud charged on a separate indictment. These offences do not feature in the issues raised by this appeal and are not considered further, beyond their contribution to the total sentence which we now turn to.
4. Having pleaded guilty to the offences at varying points during the trial process, the appellants were sentenced as follows:
 - Zain Yusuf – a total sentence of 22 years and six months' imprisonment.
 - Mohammed Khan – a total sentence of 23 years and seven months' imprisonment.
 - Imad Musa-Hamid – a total sentence of 18 years and ten months' imprisonment.

5. For ease of reference, the appellants will be referred to by their surname for the remainder of this judgment. No disrespect is intended in this regard.

The Factual Background

6. The offending took place between 1 January and 19 June 2020. The appellants all utilised the EncroChat phone network to facilitate and supply movement of drugs and money. They used a vehicle professionally fitted with electronically operated smuggler compartments in order to facilitate the supply of drugs. During lockdown the vehicle was made to look like a medical transporter or an ambulance.
7. Members of the group would either organise for others to import the drugs on their behalf or would purchase close to the point of importation. The group would then distribute the cocaine throughout the United Kingdom.
8. The total weight of cocaine estimated to be moved by the group was 987 kilograms. Additional supplies between Yusuf and another member of the gang took the figure to just over 1,000 kilograms, with an estimated street value of approximately £35 million. In her sentencing remarks the judge said that even at the lowest estimate the value of the operation amounted to £13 million.
9. In April 2020, Yusuf asked Khan to source a handgun and ammunition on behalf of a third party. Khan made contact with an associate in Manchester for the supply of the firearm and 50 rounds of ammunition. Musa-Hamid transported the fully automatic pistol and ammunition from Manchester to Luton but was stopped by the police whilst doing so. The gun and 49 live rounds of ammunition were recovered from the hide in the transporter van. The ammunition was capable of being used in the weapon.

Sentencing Remarks

10. The summary of the judge's sentencing remarks that follows focuses on the aspects of the remarks relevant to the issues before the Court.
11. Having briefly rehearsed the facts, the judge explained the structure of the sentences. The sentence for conspiring to supply a prohibited weapon and ammunition to a third party would be consecutive to the conspiracy to supply cocaine. She acknowledged the need to take account of totality when passing consecutive sentences.

12. She then addressed credit for the guilty pleas, explaining that Yusuf and Khan pleaded guilty to the conspiracy counts on the third occasion that they appeared before the Crown Court. Delays in pleading guilty were in part due to awaiting the outcome of litigation concerning whether or not EncroChat phone evidence was admissible against defendants. She rejected submissions on the appellants' behalf that they were entitled to 25 per cent credit and instead gave a 20 per cent reduction. Musa-Hamid did not plead guilty until after the beginning of the trial, partway through the opening on day three. Accordingly, he would be given five per cent credit for plea.
13. The judge took into account that none of the appellants had any previous convictions, the many positive character references, the positive use of their time whilst on remand, and the fact that they had spent a lengthy period in custody, some of it during times when there was a particularly difficult prison regime because of the Covid restrictions.
14. She then turned to the conspiracy to supply Class A drugs and the relevant guideline. She observed that in relation to harm the top category of the guidelines related to a quantity of five kilograms, and that sentences of 20 years and above may be appropriate. That is a statement of obvious relevance in a case such as this, involving approximately 1,000 kilograms. She rejected submissions advanced in relation to the evidence as to the weight of drugs an individual appellant was involved with on the basis that the fact and extent of the conspiracy to which each of the appellants lent their assistance could not be ignored. All three appellants knew something of the scale of the enterprise, particularly Khan. This was a large scale; professional operation and it was intended to bring in extremely high profits to those involved.
15. Turning to address roles in the conspiracy, she concluded that Khan had a leading role. He was, she said, an extremely important cog in the conspiracy. Yusuf also played a leading role, albeit on a smaller scale. Musa-Hamid was a highly trusted and well paid courier. His role was significant, although the judge accepted there were also elements of a lesser role, before concluding that, on balance, his role was significant.
16. With regard to the conspiracy to supply a firearm and ammunition, Yusuf had requested the firearm and ammunition and set the ball rolling. Khan made arrangements through his criminal contacts and used his own courier. Musa-Hamid lent significant assistance in the

transfer of the money, and also for the advantage of retaining his position as the highly trusted, highly paid courier. Assessing culpability as a whole, the judge placed Khan and Yusuf in medium culpability, with Khan at the higher end. Musa-Hamid's culpability was also medium, but at the lower end, given that he was acting under direction.

17. She considered harm to be category 2. Whilst it was not a large scale commercial transaction, the use of EncroChat phones and the van with the hide, which suggested sophistication, could not be ignored. The appellants all knew that this was closely linked to other serious criminal activity. There was only one gun, but there were 49 rounds of ammunition.
18. Drawing matters together, in relation to Khan the sentence for the conspiracy to supply drugs was, before mitigation, 25 years and six months' imprisonment. After taking into account the personal mitigation, the minimum sentence after trial would have been 22 years' imprisonment. He was entitled to 20 per cent credit for his guilty plea, which reduced the sentence to 17 years and seven months' imprisonment. In relation to the firearm and ammunition, the minimum sentence, before mitigation, would have been 12 years and six months' imprisonment. After taking into account mitigation, the sentence would be reduced to 10 years; and after 20 per cent reduction as credit for the guilty plea, to 8 years' imprisonment. Because the sentences, although concurrent with each other, were ordered to run consecutively to the sentences for the drugs conspiracy, the sentence on the two counts was reduced to 6 years' imprisonment. The total sentence was, therefore, 23 years and seven months' imprisonment.
19. In relation to Yusuf, the sentence for the drugs conspiracy, before mitigation, was in the region of 22 years and six months' imprisonment, reduced to 20 years for mitigation, and then to 16 years, taking account of 20 per cent credit for the guilty plea. For the two counts in relation to the firearm and ammunition, a concurrent sentence of 7 years and seven months' imprisonment was imposed, reduced to take account of totality to 5 years and six months' imprisonment, which was ordered to run consecutively to the sentence of 16 years' imprisonment. For possession of a controlled drug of Class A with intent to supply, the sentence was 5 years' imprisonment, to be served concurrently. For the convictions for fraud, the sentence was 12 months' imprisonment, to be served concurrently with each other, but consecutively to the sentences for the drugs offences. The total sentence was 22 years and six months' imprisonment.

20. For Musa-Hamid, in relation to the conspiracy to supply Class A drugs, the sentence before mitigation was 16 years' imprisonment. There was, the judge said, plenty of mitigation, which reduced the sentence to 13 years and then reduced by a further five per cent to 12 years and four months' imprisonment. For the firearm and ammunition, without taking into account mitigation, having regard to the aggravating factors, the sentence would be 11 years' imprisonment, reduced to 9 years and six months, and then to 9 years, taking account of five per cent credit for the guilty plea. The further reduction for totality took the sentence to 6 and a half years' imprisonment, making a total sentence of 18 years and ten months' imprisonment.

The Grounds of Appeal

21. All three defendants advance the ground of appeal that their sentences for conspiracy to sell/transfer ammunition are unlawful on the basis they exceed the maximum sentence permitted by law. Leave was granted by the single judge on this ground for all three defendants.

22. On behalf of Khan, it is said that that the starting point of 25 years 6 months for the drugs conspiracy is manifestly excessive. The conspiracy to supply/transfer firearms and ammunition should have been categorised as a 3B case. His role was to facilitate the deal. It involved a single firearm with ammunition in an operation over a limited time period where the weapon did not get into the hands of the person who might use it. Thirdly, 25% credit for plea should have been allowed. Fourthly; insufficient credit was given for personal mitigation. The single judge refused leave on these grounds and they are renewed before us.

23. On behalf of Musa-Hamid it is said that he should have been sentenced on the basis of a lesser rather than significant role. The starting point of 16 years for the drugs offences was too high. The judge failed to give any or sufficient regard to the element of duress as mitigation. He should have been sentenced for the firearms offence as lower culpability rather than medium. The firearms offence should have been placed in category 3 harm rather than category 2. The judge's starting point for the firearms offence was too high. The Judge failed to sufficiently reduce the firearms sentence to take account of the principle of totality. The single judge gave leave to appeal on these grounds.

24. On behalf of Yusuf, it is said that, the Judge took too high a starting point for the conspiracy to supply drugs failed to give appropriate credit for plea, incorrectly categorised the harm for the firearms offence and failed to reflect totality.
25. The single judge refused leave in relation to these grounds. Before today we understood there to be no application on his behalf to renew. However, at the hearing today, Mr Smith, instructed on behalf of Yusuf, appeared, having only been made aware of the hearing by co-defendant's counsel shortly before it started. He informed us that the applicant's understanding was that an application to renew had been made. He sought an adjournment in relation to the grounds for which leave had been refused. On inquiry, we were informed by the Criminal Appeals Office that no notification of renewal had been received. Whilst grateful for the presence of Mr Smith, we are not prepared to grant an adjournment. It is wholly unsatisfactory for the issue to only have become apparent at such a late stage and we are not persuaded that the interests of justice require us to adjourn.

Discussion

The sentence for conspiracy to sell/transfer ammunition

26. We deal first with the sentence for conspiracy to sell and transfer ammunition, for which all three appellants were given leave to appeal against sentence. Pursuant to Schedule 6 to the Firearms Act 1968, the maximum sentence for possession, purchase or acquisition of ammunition without a firearm certificate is 5 years' imprisonment, unless the offence was aggravated, which it was not in this case. However, the judge sentenced Yusuf to 5 and a half years' imprisonment, Khan to six years' imprisonment, and Musa-Hamid to 6 and a half years' imprisonment on this count. Accordingly, as conceded by the prosecution, the sentence for each of the appellants is, in this respect, unlawful. This does not, however, affect the total sentence for any of the appellants, as the sentences for conspiracy to supply or transfer ammunition were ordered to run concurrently with the sentence in relation to the firearms offence.
27. We turn next to Musa-Hamid, who was granted leave to appeal against his sentence by the single judge.
28. We see no error in the judge's approach to Musa-Hamid's role in the drugs conspiracy.

She acknowledged that there were elements of both a significant and lesser role in his conduct. Having rehearsed the various factors in play she considered matters in the round, as is entirely proper, and concluded that his role was broadly a significant role. Applying the criteria in the sentencing guidelines for a significant role, the judge was entitled to conclude that Musa-Hamid clearly had an operational role – as a highly trusted and well paid courier - and that he expected significant financial advantage. As a trusted courier responsible for transferring many kilos of cocaine in excess of the category guideline around the country, along with an automatic firearm and an EncroChat phone, his role was not a limited one. It follows accordingly that he must have had, at least, some awareness and understanding of the scale of the operation. In our view any “duress” in bringing him into the drugs operation carries little weight: Being pressed for payment of a debt incurred in a failed business venture, if that is what happened, did not mean the appellant had to resort to dealing in drugs. We note in this regard that the sentencing judge considered his motivation was greed.

29. We are not persuaded that a sentence of 16 years before mitigation, for a significant role in offending of this gravity and scale involving a quantity of drugs significantly higher than the category guideline can be considered excessive.
30. The judge reduced the sentence of 16 years by 3 years to account for mitigation as to which she acknowledged there was ‘plenty’, referring to the absence of relevant previous convictions as well as to Musa Hamid’s background and difficult family issues particularly the death of his mother and the ongoing ill health of his father. As already explained, any duress carries little weight.
31. Turning to the supply/transfer of a firearm, the sentencing judge explained why she rejected the submission that culpability should have been lower rather than medium. Her reasons disclose no error of approach. She was not persuaded that transporting a gun and compatible ammunition from Manchester to Luton for payment is performing a limited function under direction. It could not be said that he was involved through coercion or intimidation or exploitation or that there was little or no planning. He had an EncroChat phone. He had use of a stash van and he decided when to make that journey. He lent significant assistance in the transfer and did it for money albeit only £500, but also for the advantage of retaining his position as the highly trusted, highly paid, courier.

32. Nor do we consider that the offence should have been placed in category 3 harm rather than category 2, again for the same reasons given by the judge. The sentencing judge accepted that the guidelines covered offences which encompassed far greater quantities of both weapons and ammunition over very large and even international geographical areas. Nonetheless, whilst this was not a large scale commercial transaction, the sophisticated use of EncroChat phones and the van with the hide could not be ignored. The appellants all knew that the firearm was closely linked to other serious criminal activity. There was only one gun but it was fully automatic and there were 49 rounds of ammunition.
33. The starting point for category 2b is 10 years with a range of 8 – 14 years. The judge specified a sentence of 11 years before mitigation for Musa-Hamid which is well within range and consistent with the 12 years imposed for the other two appellants.
34. Finally in relation to this appellant we reject the submission that the Judge failed to sufficiently reduce the firearms sentence to take account of the principle of totality, given she reduced the sentence from 9 years to 6.5 years to account for totality.
35. We turn to Khan's renewed application for leave to appeal against sentence.
36. A sentence of 25 years and six months' imprisonment for a leading role in offending on this scale is not manifestly excessive. The quantity of cocaine involved was approximately 987 kilograms, which is far in excess of the indicative weight of 5 kilograms for category 1 offending. This was offending on the most serious and commercial scale. It involved a quantity of drugs significantly higher than category 1. The guidelines make clear that sentences of 20 years and above may be appropriate, depending on role. Khan was described by the judge as an extremely important cog in the conspiracy.
37. We do not accept the submission that the firearms offence fell into category 3B. It is said before us on Khan's behalf that his role was to facilitate the deal. It involved a single firearm with ammunition in an operation over a limited time, where the weapon did not get into the hands of the person who might use it. However, in her cogent reasoning, the judge concluded that Khan, like the other appellants, was under no illusion that the firearm would be used for criminal purposes which may result in death or serious injury. The use of EncroChat phones and a vehicle with a hide clearly amounted to significant steps to evade detection. Khan was in control of the operation.

38. For the reasons already given in relation to Musa-Hamid, we reject the submission that harm falls into category 3, rather than category 2.
39. The submission that Khan should have been afforded 25 per cent rather than 20 per cent credit has no merit. As the judge explained, the exception to the general rule about credit of 25 per cent for a guilty plea at a first appearance in the Crown Court is for cases in which it is necessary to receive advice or to have sight of evidence to determine whether a defendant is guilty. The guideline draws a clear distinction between cases where it is necessary to receive advice, and/or see evidence, to determine whether the defendant is in fact and law guilty, and cases where a defendant delays guilty pleas in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal. The former is entitled to full credit; the latter is not. As the judge observed, Khan knew, when the case was listed on the second occasion, that he was guilty of the offences charged, and he had the benefit of advice at that stage from very experienced counsel. It would no doubt have been explained to him that there could be no guarantee that there would not be some loss of credit if he delayed admission of guilt.
40. In oral submissions, Mr Scobie submitted that account should be taken of the context at the time, in particular that the bar were waiting for a relevant judgment on, what he described as, a novel point of law, from Dove J and, subsequently, the Court of Appeal. The appellant pleaded 1 month after the ruling from Dove J at the next hearing. We are not persuaded by these submissions. As the Court observed during the course of the hearing, the case of R v Plaku [2021] EWCA Crim, 568 relied on by Mr Scobie in this respect does not make new law but reflects the distinction drawn in the relevant guideline to which we have referred. The EncroChat judgments to which we were referred concerned the admissibility of the EncroChat evidence.
41. Finally, we have considered the submissions and the material placed before us in relation to Khan's personal mitigation, including the documents relating to the appellant's sister and his prison records which we were taken to this morning. However, we do not consider that they merited a greater reduction than the 3 years and six months afforded by the judge.

Decision

42. The judge's sentencing remarks were meticulous. For the reasons explained above, we

have allowed the appeal only to the extent necessary to correct the error in the sentences imposed for the conspiracy to sell or transfer ammunition, contrary to section 1(1) of the Criminal Law Act 1977 and section 1(1)(b) of the Firearms Act 1968. Accordingly, we quash each appellant's sentence for the offence of conspiracy to sell or transfer ammunition and substitute in its place for each appellant a sentence of 5 years' imprisonment. The overall sentence in respect of each appellant remains unchanged.

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

Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
