IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2021/01640/B4, 2021/01641/B4

[2022] EWCA CRIM 1377

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 16 September 2022

B e f o r e:

LADY JUSTICE SIMLER DBE

MRS JUSTICE CHEEMA-GRUBB DBE

MRS JUSTICE COCKERILL DBE

R E X

- v -

KARL PETTITT

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Ms E Mushtaq appeared on behalf of the Applicant

J U D G M E N T

Friday 16 September 2022

LADY JUSTICE SIMLER:

Introduction

1. This is a renewed application for leave to appeal against both conviction and sentence, following refusal by the single judge.

2. On 4 May 2021, following a trial in the Crown Court at Kingston Upon Hull before His Honour Judge Thackray QC and a jury, the applicant was convicted of conspiracy to supply a class A drug (count 1). He was acquitted by the jury of possession of a class A drug with intent to supply (count 2).

3. On 14 May 2021, the applicant was sentenced by the trial judge to 15 years' imprisonment on count 1. The judge imposed a four year Serious Crime Prevention Order and a victim surcharge order of £170. Although the victim surcharge order should not have been made until after the confiscation proceedings, which were at that point postponed, this court will only quash such an order if, exceptionally, prejudice is caused. No such prejudice was caused in this case, and that order is maintained.

4. The applicant's co-accused, Jordan Marsh, had earlier pleaded guilty to conspiracy to supply cocaine, offering to supply cocaine, and offering to supply cannabis. He was sentenced by the same judge to a term of five years' imprisonment.

The facts

5. The applicant operated an antiques shop in Beverley, East Yorkshire. On 10 April 2019, police officers searched his home and his shop. A black rucksack containing two bags of cocaine worth approximately £60,000 was recovered from the shop. On the same day, Marsh was arrested at his home in Beverley. His mobile phone was seized and examined.

6. At trial, the prosecution relied upon evidence of text messages recovered from the telephone belonging to Marsh. The prosecution said it showed that the applicant and Marsh had conspired to supply cocaine. That was the evidence relevant to count 1. So far as count

2 is concerned, they relied upon the recovery of the cocaine from the applicant's shop.

7. In addition to the text messages, which we shall discuss in greater detail when we come to the grounds relied on for leave to appeal against conviction, the prosecution also relied upon Marsh's guilty plea, as evidence of involvement in the supply of cocaine. The jury was told that Marsh had pleaded guilty to the supply of cocaine, rather than to conspiracy to supply cocaine, in order to avoid the inevitable prejudice that would be caused to the applicant, since it was the prosecution's case that this was a closed conspiracy between Marsh and the applicant.

8. So far as the count of possession with intent to supply was concerned, the prosecution relied on the agreed facts relating to the recovery of the cocaine, and on evidence from police officers who recovered the cocaine. The evidence was relied on to rebut the defence advanced by the applicant that the drugs were planted, possibly by the police. The prosecution also relied on fingerprint and DNA evidence found on the packaging of the cocaine, said to match the applicant's left forefinger (albeit that was disputed by the defence expert), and on DNA recovered from the bag in which the cocaine was found.

9. So far as both counts were concerned, the prosecution also sought to rely on a number of other features of the evidence. These included:

> (1) dealer lists recovered from the applicant's home and storage unit. These too are the subject of one of the proposed grounds of appeal against conviction and we shall discuss them further below;
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> (2) inferences that the prosecution sought to draw from the applicant's silence in interview; and
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> (3) the applicant's bad character in the form of his previous convictions for possession with intent to supply cocaine in 1996, and being concerned in the supply of cocaine in 2007, on the basis that that evidence demonstrated a propensity both to commit the offences and also to tell lies.

10. The defence case in relation to count 1 was that the applicant was no part of any

conspiracy. Whilst he accepted that he occasionally bought drugs from Marsh, he maintained that he did not supply cocaine to him or anyone. So far as count 2 is concerned he gave evidence that the drugs were planted, possibly by the police. He accepted that he had once been heavily involved in drug dealing but he maintained that he had ceased any involvement in such criminality following his conviction in 2007. His case in respect of the dealer lists was that they related to historic, pre-2007 offending. So far as the text messages are concerned, his evidence was that he did not know why Marsh had sent the messages relied upon by the prosecution; and in any event, they did not show that he had formed any sort of conspiracy with Marsh. They had innocent interpretations and provided no support whatsoever to the prosecution case.

11. So far as the text messages recovered from Marsh's phone are concerned, many of those messages were admitted as agreed evidence, but there were five contested messages. These were as follows:

> (1) Message 750 – Marsh to the applicant: "Alright pal I'll come to the shop tomozz with my mate that runs it about for me aswell an well have a chat an sort summat out better for both of us init" The applicant replied with a thumbs up emoji.
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> (2) Message 752 – Marsh to the applicant: "Yh like I said pal if you can lay it on I'll just get it off you an stop getting it off my mate then both of us are winning mate but year I'll see you tomorrow at around 3:30 if okay mate". The applicant relied with a thumbs up emoji.
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> (3) Message 753 – Marsh to O'Donnell: "I've told him half 3 so make sure ya up bro".
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> (4) Message 883 – From Marsh to O'Donnell: "That guys phone got nicked but he just rang me told me to ring him at 10 he needs to see me".
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> (5) Message 967 – Marsh to unknown number: "Look on hull daily mail that guy who I get my stuff off got raided this morning both of his houses an his shop he been locked up for money laundering [two heart emojis]".

The prosecution submitted that the messages showed Marsh and the applicant arranging the supply of cocaine. Messages 750, 752, 753 and 883 were said not to be hearsay evidence

because they were not sent with the intention of persuading the recipient of the truth of the matter stated. They were admissible pursuant to section 118(7) of the Criminal Justice Act 2003 ("the 2003 Act") as statements made by a party to a common enterprise. Message 967 was not hearsay because it was not relied upon for the truth of the matter stated.

12. Ms Mushtaq, who was trial defence counsel and who appears on this renewed application, submitted that the messages were inadmissible hearsay relied upon for the truth of their contents. Moreover, message 883 amounted to double hearsay. In any event, none of the messages were admissible pursuant to section 114(1)(d) of the 2003 Act, and it was unfair to admit them in circumstances where Marsh did not give evidence at the trial and so there could be no assessment by the jury of his credibility.

13. In his careful ruling on the admissibility of this evidence, the judge considered R v Twist [2011] EWCA Crim 1143, and concluded that messages 750, 752 and 753 contained statements relevant to the matter in issue as they appeared to be statements discussing an arrangement to supply drugs. They were not hearsay because Marsh did not send them with the intention of making the recipient believe the truth of the matters stated. Moreover, the parties already knew about the arrangement. But even if they were hearsay as Ms Mushtaq had submitted, they were admissible pursuant to section 114(1)(d) of the 2003 Act; they were reliable and of substantial importance to the case. Although Marsh could give evidence, it was unrealistic to expect him to be called.

14. Message 883 was evidence of an arrangement to meet and did not amount to hearsay. Even if it were hearsay, it too was admissible pursuant to the same gateway.

15. Message 987 was not hearsay because the recipient already knew that the applicant's house had been raided. Marsh did not send it with the intention of making the recipient believe the truth of the matter stated. But in any event, again, if it were hearsay, as Ms Mushtaq had submitted, it was admissible pursuant to the same gateway.

16. Having reached those conclusions, the judge addressed the question of prejudice. He declined to exclude the messages and concluded that they were relevant, highly probative and

properly admissible in the case.

17. Turning to the dealer lists, again there were rival submissions before the judge as to the admissibility of the dealer lists. They had initially been admitted on the basis that they were directly relevant to the two counts. However, during the course of the evidence of the prosecution expert, DC Russell, it emerged that they were written prior to the indicted period. When that became clear, there was an application made initially to discharge the jury, but that application was abandoned in favour of an application which sought to exclude the evidence.

18. The prosecution argued that the evidence reflected lists written between the period 2017 and 2019 by reference to the values attributed to the drugs, which were more consistent with the period closely linked to the indictment period and not more historic. They were admissible bad character evidence because they formed important explanatory evidence, or alternatively, because they were evidence of propensity.

19. Ms Mushtaq maintained that the lists related to historic offending pre-2007. They were not therefore directly relevant to any of the charges before the court. They could, therefore, only be admissible as non-conviction bad character evidence, and on that basis they ought to be excluded. They had little probative value and were highly prejudicial.

20. The judge concluded that there was sufficient evidence to suggest that the dealer lists related to the period between 2017 and 2019 and were capable of suggesting a propensity to supply cocaine in the period immediately before the indictment period, and at a time when the applicant denied any such dealing. He concluded that they were potentially relevant and probative, and that it would be for the jury to determine their scope and relevance, including to reach such conclusions as they needed to about the dates of the dealer lists.

21. The judge balanced all relevant considerations, having heard all of the evidence that went to the issue of timing and the nature of this evidence, and concluded that the admission of the evidence would not have such an adverse effect on the fairness of the trial such that the evidence should not be admitted. The evidence in these two categories was therefore admitted.

22. At the close of the evidence in the case, the judge gave a conventional summing up, together with conventional directions. The directions included the conventional direction in relation to separate consideration of counts 1 and 2. The evidence was, as the judge directed the jury, different in relation to those two counts. He told the jury that the verdicts need not be the same.

23. The judge also gave tailored directions in relation to bad character and in relation to hearsay. He told the jury that the prosecution relied on evidence in the form of calls and text messages, alleged dealer lists, and also on the drugs that were found at Vanguard. He explained that before the jury could use a piece of evidence to prove a fact, they would have to examine the evidence carefully and decide which parts of the evidence, if any, they were sure about. It was only once they were sure they could use that evidence as a basis for drawing a conclusion that they should do so. If they were not sure about it they should not use it; and they should not speculate about matters about which they were not sure and were not in the evidence,

24. The judge dealt with the text messages, giving the jury clear and careful directions as to how they could use the text messages when deciding whether the conspiracy actually existed and whether the applicant was involved in any such conspiracy. He concluded by saying:

> "Your conclusion about whether or not there was a conspiracy depends on what you make of all of the evidence, not just what was said. If you are sure on all of the evidence that there was a conspiracy you can take account of the evidence of what was said when you are deciding whether or not the [applicant] was involved in it."

25. He also gave a hearsay direction in relation to the messages. He concluded that part of his summing up with these comments:

> "In essence, much caution is required when considering this evidence. If you consider that the defence submission is or may be correct in that Jordan Marsh was simply showing off to his girlfriend as an act of bravado, then you should ignore the evidence. Equally, if you reject the inferences suggested by the prosecution in relation to the text messages between Marsh and [another defendant], ignore them. Even if you are sure that the

> prosecution are correct, you must avoid over-reliance upon the messages. It is merely one feature of the prosecution case and should be considered in the context of all the evidence you have heard."

The appeal

26. In her written submissions, developed with clarity before us today, Ms Mushtaq advanced three proposed grounds of appeal against conviction. In summary, first, the judge erred in refusing to exclude the evidence pertaining to dealer lists and should have done so pursuant to section 78 of the Police and Criminal Evidence Act 1984. The lists could not be conclusively dated. They related to historic offending. On any view they were not directly relevant to any matter in issue in light of the prosecution case that they related to the period 2016/2017 to 2019, before the indictment period. Although it was accepted that the lists were found at the applicant's home and in his storage unit, they were not active lists, and the dispute about their age meant there could be no certainty about their age. In those circumstances, at best they were non-conviction bad character evidence, and it was unfair to admit them because the jury were effectively being asked to investigate and speculate about the lists, so that their admission caused significant prejudice.

27. Secondly, there was an error in the judge's approach to the text messages whose admissibility was disputed. These were either inadmissible hearsay, or, if admissible pursuant to section 114(1)(d), the judge failed to have regard to factors which should have led to their exclusion. Marsh was not called to give evidence, when he should have been called. Realistically, there was no danger of the conspiracy emerging from his evidence, and the fact that he was not called meant there was no opportunity to challenge his evidence in front of the jury.

28. Thirdly the jury's verdicts were inconsistent with the prosecution case and could not be justified on the evidence. The prosecution's case dealt with the evidence on both counts as integrally linked, and the prosecution expert had suggested that the fact that the drugs were recovered from the shop supported the conspiracy because of the text messages that were sent

the day before the drugs were discovered. That meant that these were inconsistent verdicts and for that reason also, the conviction on count 1 is unsafe.

Analysis and conclusion

29. Having carefully considered the proposed grounds of appeal and all of the evidence in the case as it appears from the material we have read, we do not consider that any of these grounds raises an arguable ground of appeal. We are entirely satisfied that the judge made no arguable error in the legal rulings he made, or in the admission of the challenged evidence. His rulings were clear, well-structured and obviously well-reasoned. The relevant legal principles were properly applied to the facts and all relevant considerations were weighed in the balance. The jury was carefully directed as to the use they could properly make of the evidence and as to the approach they should take. In short, we agree entirely with the reasons given by the single judge in refusing leave to appeal against conviction. The single judge observed:

> "(i) The learned judge erred in failing to exclude the evidence of the debtor's/dealer's lists.
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> The judge did not err and there is nothing in this ground. A seized dealer list is admissible per se, as was accepted by you, and is a relevant matter for the jury to hear about in the context of a trial regarding drugs supply. As the judge rightly stated, the evidence was plainly relevant to both charges. You denied possession. You said that either the police or someone else planted the drugs within the business premises, within a rucksack, which you accepted belonged to you and contained some of your personal possessions. In considering that issue, it was plainly relevant for the jury to know that a dealer list was found at your home address and a separate business premises or lockup. It is a matter for the jury to determine the list's nature (including its age), and the weight to give to it. As you state, the issue to consider was whether this evidence ought to be excluded under section 78 of PACE.
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> (ii) During the course of the trial a bad character application was made in relation to the admission of the dealer list (this related to both charges). The judge was right to grant it. The evidence was relevant to an important matter in issue between the defence and the prosecution pursuant to section 101(1)(d), namely propensity, as you denied drug dealing post your release from prison (up to the indictment period) and these lists could be said to show that that was false. As the judge stated, if

> the jury were sure that the dealer lists related to the two or three year period prior to the seizure of the drugs and rejected your account that they related to 2003, they would then be entitled to conclude that you had a tendency to supply drugs between 2016 and April 2019, and that that tendency made it more likely that you conspired with Jordan Marsh. Whilst you maintained that these were dealer lists from your previous prosecution, it was for the jury to determine whether that was so. The judge was right to consider that the admission of the evidence would not have such an adverse effect on the fairness of the proceedings that the court ought not to admit it, which issue he considered carefully, balancing all the relevant considerations.
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> (iii) The learned judge erred in determining that the text messages sought be excluded by the defence did not amount to hearsay; and the text messages relied upon by the prosecution amounted to hearsay and should have been excluded.
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> The judge ruled that the text messages were not hearsay and even if they were, he would have ruled that they were admissible in the interests of justice. His analysis of the relevant issues at pages 11-14 of his ruling cannot be faulted. He took proper account of the relevant authorities, applied them correctly and gave the right answers to the questions which arose. Moreover, he gave the jury a very careful and cautious direction as to how they should use these text messages, which direction was agreed between both counsel. It follows that the judge did not err as alleged on this ground."

We agree with those observations.

30. Nor is the third proposed ground of appeal, that the verdicts on counts 1 and 2 are irreconcilable, arguable. The judge, as we have explained, directed the jury that the evidence on each of the two counts was different and that their verdicts did not need to be the same. Count 1 relied on the evidence of text messages. It is clear from their verdict on count 1 that the jury accepted that these messages showed that the applicant had agreed to supply cocaine to Marsh. Count 2 did not rely on the text messages. This part of the case was based on the cocaine recovered from the shop. The applicant's defence that the drugs were planted was, it is to be inferred, sufficient to provide the jury with doubt. His acquittal on this count was, therefore, wholly distinct from his conviction on count 1.

31. Accordingly, the renewed application for leave to appeal against conviction is refused.

Sentence application

32. We turn therefore to the renewed application for leave to appeal against sentence. The applicant was aged 51 at the date of conviction and sentence. He had three convictions for six offences spanning the period 1996 to 2016. On 17 April 1996 he was convicted of two counts of possession of a controlled drug with intent to supply and was sentenced to five years' imprisonment. On 26 April 2007 he was convicted of being concerned in the supply of cocaine and was sentenced to 15 years' imprisonment. The offending on count 1 put him in breach of his licence period, having been released from that sentence.

33. The judge sentenced the applicant without a pre-sentence report. No report was necessary then; nor is one now necessary.

34. In his lucid sentencing remarks, the judge referred to the dealer lists as powerful evidence of dealing over a two to three year period before the index conspiracy began. He made clear, however, that this formed no part of the charge and that he would sentence only for the criminality charged and proven on count 1. He summarised the facts of the conspiracy on the basis of the evidence that had been adduced at trial and reminded himself of the need to be sure in relation to any adverse conclusions he drew. He found that the applicant played a leading role on the basis of a series of features in the evidence, including a conclusion that substantial financial gain was expected as a consequence of his involvement in the conspiracy. Moreover, the applicant's involvement was in directing, buying and selling on a commercial scale, with substantial links and influence on others within the chain. The judge concluded that this was a sophisticated, planned drug supply business.

35. So far as harm is concerned, the judge recognised that determining quantity was not straightforward because the drugs supplied on 9 April were not recovered and the conspiracy was stopped in its infancy. He drew inferences from the text messages. He said that he would avoid a mathematical calculation, but ultimately he concluded that the case did not fit comfortably within either category 1 or category 2, but straddled the two categories. He observed that it was obvious that this was not a case that could possibly fall into category 3. Having reached those conclusions, the judge took a starting point of 12 years' custody as

fairly reflecting the extent and nature of the harm and culpability.

36. He found that there were two serious aggravating factors: first, the applicant's previous convictions; and secondly, his release on licence in 2016 from the sentence of 15 years' imprisonment. There was also, but of much less weight, established evidence of community impact. So far as mitigation is concerned, the judge had regard to the conditions in prison due to the pandemic, albeit he recognised that these were of much less significance in a case where a long sentence had inevitably to be imposed. Otherwise, there were no other mitigating factors, and the judge passed the sentence of 15 years' imprisonment to which we have referred.

37. In both her written and oral submission before us Ms Mushtaq focussed on three asserted errors in the judge's approach. First, the judge erred in his assessment of harm. He should not have based his assessment on the harm that could have been caused had the conspiracy continued; and should not have relied upon any speculative assessment of supplies of up to 5 kilograms within six months. Rather, the judge should have treated this as category 3 offending given that the applicant supplied a low-level street dealer in amounts of approximately 150 grams. Had he adopted that approach, he would have identified a starting point of eight and a half years' imprisonment, with a maximum of up to ten years. Secondly, the conclusions that this was a commercial operation in which there was wholesale dealing was wrong. This was a closed conspiracy which lasted a week at most, and there was no recovery of drugs. Thirdly, the judge should not have relied on community impact. The impact on the community was not directly relevant to the applicant and should not have been taken into account at all.

38. Having considered those submissions, we are satisfied that the judge was fully entitled to conclude that the applicant played a leading role in the conspiracy for all the reasons that he gave. There were many features consistent with a leading role. The judge conducted a careful calibration of the applicant's involvement, and we are quite satisfied that there was ample evidence to support his assessment. Furthermore, it seems to us that it was also open

to the judge in the circumstances of this particular case to determine that the offending fell into harm category 2. Ms Mushtaq submits that no drugs were seized and that the evidence of the scale of Marsh's dealing required assessment in the context of all of the evidence in the case. But there is no arguable basis on which to go behind the judge's assessment that this was category 2 offending.

39. The Sentencing Council Guideline identifies indicative quantities as a means to access harm, save where the offence is supply directly to users (including street dealing). We can see no basis for the submission that this conspiracy involved supplying directly to users. In a case like this where the evidence stems from messages and inferences to be drawn rather than tangible seized drugs, quantifying the amount of drugs involved can be difficult. Despite the acquittal on count 2 and the fact that the dealer lists were accepted as relating to a period before the indicted conspiracy, we consider nonetheless, that the evidence as a whole, fully justified placing this offending squarely within category 2.

40. Notwithstanding that conclusion, we consider that there is force in the submission that, having reached the conclusion that this was a category 2, leading role offence, the increase in the starting point from 11 years to 12 years, before having regard to aggravating features and to the mitigation such as it was, cannot be justified. From the 11 year starting point however, there was an inevitable upward adjustment to be made to reflect the two serious aggravating features, namely the applicant's previous convictions and the fact that he was on licence. In our judgment, an adjustment for these factors properly took the sentence to 13 years' imprisonment but no more. In the absence of any real mitigation, that was the appropriate sentence that should have been passed.

41. For all these reasons we give leave in relation to the renewed application for leave to appeal against sentence. We allow the sentence appeal to this extent only: the sentence on count 1 of 15 years' imprisonment is quashed and we substitute for it a sentence of 13 years' imprisonment on that count.

42. **MS MUSHTAQ:** My Lady, may I ask for a representation order?

43. **LADY JUSTICE SIMLER:** Yes, in circumstances where we have given leave in relation to the sentence application, that is a proper application to make. We grant that application for a representation order for you.

44. **MS MUSHTAQ:** I am grateful.

45. **LADY JUSTICE SIMLER:** We are very grateful to you for the help and clear submissions that you made.

46. **MS MUSHTAQ:** I am very grateful. Thank you.
