IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2021/02822/A3
[2022] EWCA Crim 247

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 17th February 2022

LORD JUSTICE HOLROYDE

MR JUSTICE HOLGATE

MR JUSTICE SWEETING

R E G I N A

- v –

DONROSS STEVEN RICHARDS

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Mr J Scobie QC appeared on behalf of the Applicant

J U D G M E N T

Thursday 17th February 2022

LORD JUSTICE HOLROYDE: I shall ask Mr Justice Sweeting to give the judgment of the court.

MR JUSTICE SWEETING:

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

2. On 5th August 2021, in the Crown Court at Southwark, the applicant was sentenced to concurrent terms of 12 years' imprisonment on each of two counts of being concerned in supplying Class A drugs, namely cocaine and diamorphine, between April and October 2020, contrary to section 4(3)(b) of the Misuse of Drugs Act 1971. There was a further count of possessing criminal property, contrary to section 329(1)(a) of the Proceeds of Crime Act 2002, which related to the proceeds of sale of some of the drugs, for which he received a concurrent term of six months' imprisonment. The overall sentence was, therefore, 12 years' imprisonment.

3. At a further hearing on 11th August 2021, the case was relisted under section 385 of the Sentencing Act 2020 and the total sentence was adjusted to one of eleven years and three months' imprisonment.

4. At the date of sentence the applicant was aged 31. He had six previous convictions for 17 offences. He had been sentenced for previous drug trafficking offences in February 2009 and August 2011. These offences also involved the supply of heroin and cocaine, and resulted in lengthy custodial sentences. He was a "third strike" offender for the purposes of section 313 of the Sentencing Act 2020, and so subject to a minimum custodial sentence of seven years.

5. Much of the evidence against the applicant consisted of EncroChat logs. EncroChat was a secure, highly encrypted messaging application which ran on specially modified mobile handsets. There was a substantial annual charge to use the service, of around £3,000. Notwithstanding its secure features, the service was infiltrated by law enforcement agencies who were able to obtain access to messages exchanged by its users, one of whom was the applicant. He went by the username (or handle) of "Butterwood".

6. The question of whether the prosecution could rely on material obtained from the EncroChat service was not resolved until judgment was given in other litigation in February 2021. The applicant delayed entering a plea until after that issue had been determined.

7. The EncroChat logs showed the user of the "Butterwood" handle purchasing significant quantities of cocaine and heroin, and then selling on to customers in smaller quantities from a quarter of a kilo upwards. When the EncroChat servers were closed down, the applicant continued to supply drugs, using his mobile phone. A significant part of the dealing made use of conventional messaging services.

8. A search of the applicant's premises uncovered £800 cash in a wallet, £17,800 in a safe, an expensive Rolex watch with an estimated value of £12,500, and designer clothes and luxury items worth many thousands of pounds.

9. From the mobile phone and EncroChat message material, the applicant was involved in the supply of not less than 2.25 kilos of cocaine and 5 kilos of heroin. He was sentenced on this basis.

10. It was not disputed on his behalf that for the purpose of sentencing the applicant fell into category 1 of the applicable Sentencing Council guideline by reason of the amount of drugs which he had been involved in supplying. There were a number of factors which pointed to a leading role. On any view, this was a commercial, wholesale operation conducted over many months with high purity drugs, which placed the applicant higher up the supply chain.

11. The sentencing range under the guideline was 12 to 16 years' custody, with a starting point of 14 years, which the judge adopted as the starting point in the applicant's case. Having identified the starting point, the next step was to consider whether the net effect of the aggravating and mitigating features of the case required an upward or downward adjustment from the starting point, and, if so, by how much. Once that was done and a figure arrived at, the sentence then fell to be reduced to reflect the fact that the applicant had pleaded guilty before trial. That reduction was to be expressed as a percentage, depending upon the stage at which the court determined the guilty plea had been indicated.

12. In the course of her sentencing remarks, the judge set out the considerable aggravating features of the case, including the applicant's previous offending, the length of time over which the supply of drugs had taken place, its obvious high value commercial nature, the proximity of the applicant to the source of pure drugs, and the sophisticated arrangements for distributing drugs and avoiding detection. She also referred to all of the mitigating features identified in the material before her, as well as counsel's submissions. These included personal and prison references, as well as the applicant's family circumstances.

13. The judge made an adjustment from the starting point of one year. For our part, we agree with the single judge that an overall sentence of 15 years properly took into account both the aggravating and mitigating features. The judge then reduced that figure by 20 per cent to 12 years. However, the judge did not explain how she had arrived at that sentence in accordance with the steps we have outlined above. In increasing the starting point by one year, she referred to the aggravating features of the case, and in then reducing that figure by 20 per cent she made references to "mitigating features", as well as the applicant's plea. In effect, she appears to have conflated two separate stages in the sentencing process. As Mr Scobie QC who appeared before us observed, it is not possible as a result to identify precisely what reduction was being given by the judge for the guilty plea if she also took into account mitigation.

14. Following sentence, the case was brought back in front of the judge for an adjustment to the sentence. This was because the defence wished to draw to her attention a communication from prosecuting counsel on 11th March to the effect that "the Crown would concede that a plea at the next hearing was the earliest opportunity in the Crown Court". The judge had not been shown that communication at the hearing, nor had it been uploaded on to the Digital Case System. The judge was invited to review her sentence by accepting that the applicant had entered a plea at the first appearance in the Crown Court on the basis of the concession by the prosecution. The judge acceded to this request and applied a 25 per cent discount, which reduced the overall length of sentence to eleven years and three months' imprisonment.

15. The applicant argues that this leaves unresolved the complaint that the original discount included an element of mitigation, although it might also suggest that the judge intended only to reduce the sentence for plea at the original hearing, despite the way in which she had expressed herself. Mr Scobie's suggested remedy is to increase the discount to 30 per cent. In our view, that would simply compound any apparent error by further confusing reduction for plea with the effect of mitigation on the overall length of sentence.

16. The judge expressed concerns about the terms of the communication from the prosecution. We also share those concerns. It is not part of the function of the prosecution in these

circumstances to "agree" when a defendant could have first indicated a guilty plea. That is entirely a matter for the court.

17. In this case the applicant had chosen to await the outcome of other proceedings, no doubt hoping that they would have a favourable impact on his position. He did not need to wait to receive advice on his plea. He was in the business of supplying Class A drugs for commercial gain, as he was well aware.

18. Exception F1 in the overarching guideline for reduction in sentence for a guilty plea relates to cases where it would be unreasonable to have expected a defendant to enter a guilty plea sooner than was done. It includes the cautionary statement that "Sentencers should distinguish between cases in which it is necessary to receive advice and/or have sight of evidence in order to understand whether the defendant is in fact and in law guilty of the offence charged, and cases in which a defendant merely delays guilty pleas in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal".

19. Commenting on this exception in *R v Plaku and Others* [2021] EWCA Crim 568; [2021] 4 WLR 82, this court observed at [10]:

> "We emphasise the distinction drawn in the latter part of that quotation. Both the proper application of the guideline, and fairness to those who do indicate a guilty plea at the first stage of the proceedings, demand that the distinction be observed. By way of example, a defendant who knows that he is in fact and law guilty of the offence charged, or can be advised to that effect on the basis of the prosecution case against him, is of course entitled to plead not guilty and to challenge the admissibility of the evidence by which the prosecution seek to prove his guilt. He is entitled to plead not guilty and hope that his representatives will be able to persuade the prosecution to accept a guilty plea to a different, less serious offence. But if the admissibility issue is resolved against him, or the prosecution decline to accept any lesser plea, and the defendant then changes his plea, he cannot expect to be given credit for his guilty plea as if it had been entered at a much earlier stage of the proceedings. In such circumstances, the benefits of a guilty plea, identified in section B of the guideline, have not accrued, or have accrued to only a limited extent."

20. In our view, this case is a paradigm example of a situation in which the applicant was not entitled to the full 25 per cent discount, which would have accrued had he entered a plea at his first appearance in the Crown Court.

21. For the reasons set out above, we consider that the original adjusted starting point of 15 years properly took into account the aggravating and mitigating features of the case. The sentence could well have been higher in the absence of personal mitigation. The final reduction of 25 per cent to reflect the applicant's guilty plea was also in the circumstances generous. The applicant has nothing to complain about.

22. For those reasons this renewed application fails and 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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