IN THE COURT OF APPEAL

CRIMINAL DIVISION

No: 202203553 A4

Neutral Citation Number: [2023] EWCA Crim 420

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 29th March 2023

Before:

LORD JUSTICE WARBY
MRS JUSTICE McGOWAN
THE RECORDER OF THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA
(HIS HONOUR JUDGE EDMUNDS KC)

REX
V
ROBERT ALAN McNICHOL

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Ms K Whittlestone appeared on behalf of the Appellant.

J U D G M E N T
(Approved)

LORD JUSTICE WARBY:

1. On 11 November 2022 in the Crown Court at Carlisle, His Honour Judge Archer passed sentence on the appellant Robert Alan McNichol, otherwise known as Bobby McNichol, for four offences to which McNichol had earlier pleaded guilty.

2. The principal offence, for which the appellant had been arraigned in the Crown Court, was one of conspiracy to supply class A drugs, namely cocaine. The other three offences were possession of cocaine with intent to supply, acquiring criminal property, and failure to comply with a Serious Crime Prevention Order ("SCPO"). The appellant had pleaded guilty to those offences before magistrates, who had committed him for sentence.

3. For the conspiracy, the judge imposed a sentence of 16 and a half years' imprisonment. A concurrent sentence of 12 months' imprisonment was passed for the breach of the SCPO. There was no separate penalty for the other two matters.

4. The appellant now appeals with the leave of the single judge, contending simply that the overall sentence was manifestly excessive.

The facts

5. The facts are that between 27 January and 20 November 2020, the appellant and a co-defendant called Bramley were involved in the regular trafficking of cocaine from West

Yorkshire to West Cumbria. During that period, on at least 26 separate dates, Bramley used a minimum of three different vehicles to travel between those locations. Cell site analysis linked the appellant to this activity. It showed that on 23 of the 26 occasions Bramley made the journey his mobile phone and that of the appellant were simultaneously using either the same cell mast, or ones nearby to another, close to addresses in Maryport and Cockermouth in Cumbria with which the appellant was linked.

6. Bramley's final trip was on 18 November 2020, when he drove from Yorkshire to Cockermouth, where he met the appellant and supplied him with a 1 kilogram block of cocaine. The outer packing was endorsed with the initials "BM", standing for Bobby McNichol. While Bramley waited in his vehicle, the appellant set off to take the cocaine to the home address of another co-defendant called Reid, but he was apprehended by the police before he got there. The drugs were seized and found to contain 80 per cent pure cocaine with a wholesale value of up to £45,000.

7. Forensic examination of Reid's mobile phone revealed WhatsApp messages between him and the appellant during the indictment period that made reference to a total amount of cash of £263,420. The messages indicated that Reid was counting, packaging and storing cash on behalf of the

appellant. A search of Reid's home address recovered a total of £65,185 in cash, which included one bundle of notes of £45,000 contained in a wrapper marked "£45,000". In interview, the appellant admitted that this cash bundle was his money, but he answered no comment to all questions regarding the supply of drugs. He later pleaded guilty, as we have indicated.

Sentencing materials

8. The appellant had 11 previous convictions for 26 offences between 28 April 1995 and 20 May 2011. These included seven drug offences. The most recent of these were two counts of conspiracy to supply cocaine in 2009 and 2010. The total street value of the drugs involved in those conspiracies was some £280,000. On 20 May 2011, having pleaded guilty, the appellant was sentenced for those offences to a total of 12 years' imprisonment, and he was made the subject of an SCPO. Later that year, this court dismissed an appeal against that sentence: [2011] EWCA Crim 3056.

9. The appellant was released from prison in 2017, but remained subject to the 2011 sentence, and was on licence at the time of committing the index offences. He was duly recalled to continue serving that sentence in custody. The commission of those offences put him in breach of the SCPO, which restricted his possession of cash over £5,000 unless

that had been declared to the police.

10. The sentencing judge proceeded without a pre-sentence report. That was by agreement. It is not suggested that he erred in so doing, and nor do we consider that we need such a report in order to deal justly with this appeal.

Sentencing remarks

11. The judge, quite rightly, took the conspiracy charge as the lead offence upon which to pass a sentence reflecting the overall criminality and all the aggravating features of the case. He identified this appellant as playing a leading role in organising the buying and selling of drugs on a commercial scale. Not only was the appellant the most culpable of the defendants, he had also acted with an expectation of substantial financial advantage, and he had close links to the original source. Balancing these factors against others that indicated a significant role, the judge concluded that the appellant's conduct fitted the concept of leading role for the purposes of sentencing.

12. The judge did not assume or find that all the 26 trips involved the supply of drugs in a quantity or to the value of those seized on 18 November, but his conservative estimate was that as many as half the trips involved the supply of drugs, and he considered it safe to infer that the quantity involved was, "significantly higher than," the

indicative starting point for a category 1 offence of 5 kilograms provided for by the Sentencing Council guidelines.

13. There were five aggravating factors: (1) the previous convictions, which affected the appropriate sentence at step one, as the judge put it, "significantly and profoundly"; (2) the fact that the previous offending was itself committed when the appellant was on licence in respect of possession with intent to supply a class C drug; (3) the fact that the current offending was in breach of the SCPO from 2011; (4) the high purity of the drugs seized; (5) the fact that the appellant had involved his uncle in the offending, and by causing the uncle to lose his liberty, harmed the appellant's grandmother, for whom the uncle was a significant carer. Taken together, said the judge, those factors would warrant a significant increase from the sentence on category 1 leading role, which has a range of 12 to 16 years' custody with a starting point of 14 years.

14. There were three potentially mitigating factors: (1) the delay in the proceedings, none of which would count as time served under the sentence to be imposed for the index offending; this was a total of two years from the initial guilty pleas to sentence; (2) the fact that the appellant

had taken steps to seek to rehabilitate himself whilst in custody; and (3) the impact of custody during the pandemic, often referred to as "the *Manning* factor".

15. The judge took full account of the second of these factors, but he held that the fact that time spent awaiting sentence would not count was a consequence of the appellant's own conduct and the decision of Parliament, and although in principle the appellant could rely on the Crown's delay in bringing his co-defendants before the court, he could not gain much assistance from that because there would have been significant delay anyway as a result of his own persistence in a false basis of plea.

16. The judge held that the *Manning* factor was of little or no weight. The reason he gave was that the appellant had offended during the pandemic, fully knowing what the consequences might be. We add that the length of the sentence concerned would seem to be another reason for excluding Manning from consideration in this case.

17. Taking into account these factors, the breach of the SCPO and the principle of totality, the judge held that the shortest sentence he could have imposed after a trial was one of 20 years' imprisonment. Addressing the reduction for the appellant's guilty plea, the judge concluded that his persistence in a false basis of plea meant that the

appropriate reduction was one of, "17.5 per cent or thereabouts," which had the effect of reducing the sentence to one of 16 and a half years.

Grounds of appeal

18. For the appellant, Ms Whittlestone makes no complaint of the categorisation, the structure of the sentencing exercise, or the reduction for the guilty plea. She acknowledges the force of the aggravating features of the case, and in particular the previous drug convictions. The submission is that despite all this, the starting point of 20 years after a trial was too high. It is submitted that the increase of six years from the category starting point of 14 years was too great.

19. Ms Whittlestone has submitted today that this was not a case of a serious commercial conspiracy of the kind that is mentioned in the sentencing guidelines, to which we shall come, and that the judge was wrong to treat it with the gravity that he did.

Assessment

20. We have given careful consideration to these submissions, and ultimately concluded that the main submission is well-founded.

21. We see entirely the force of the judge's reasoning as to the aggravating features of this case, which clearly do

justify a significant increase from the appropriate starting point for the offending itself, before consideration of totality and reduction for plea. The fact that the judge did not specify that starting point presents some difficulty of analysis, but in our judgment the notional sentence after a trial of 20 years was, as Ms Whittlestone argues, manifestly excessive. To reach it, the judge must either have taken too high a starting point for the offending, or he must have attributed altogether excessive weight to the aggravating features of the case.

22. The judge was plainly right to place this offending in category 1 and to assess this appellant's role as a leading one. As to that there is no contest. This offending clearly involved a quantity of drugs beyond the category starting point indicative figure of 5 kilograms of cocaine. That, coupled with the fact that this was a long-term conspiracy, would justify an upward movement from the category starting point.

23. It is clear from the authorities that the guideline for supply is applicable to conspiracies. But the guideline itself makes clear that sentences beyond the top of the guideline range may sometimes be called for. It says this:

> "Where the operation is on the most serious commercial scale, involving a quantity of drugs significantly higher than category 1,

> sentences of 20 years and above may be appropriate depending on the role of the offender."

24. In cases of conspiracy involving significantly more than 5 kilograms of drugs, the court does not take a formulaic approach. The sentencing judge is required to form a judgment on the particular facts of the case. We have reminded ourselves of what this court said in R v Greenfield [2020] EWCA Crim 265 [2020] 2 Cr App R (S) 19, and in particular at [33] to [35].

25. Nevertheless, we do not consider that the facts of this case justified an uplift from the starting point to anything more than 15 years. This was a single conspiracy rather than the two or three with which the court was mainly concerned in Greenfield. The quantity of cocaine involved was beyond the indicative starting point, and the judge found significantly so; but on the judge's very fair findings of fact, it involved something rather less than 13 kilograms. We infer that the figure he had in mind was somewhere between 7 and 11. It is not necessary to be precise about these matters, we accept, but that indication is a helpful one for the purpose of assessing the appropriate sentence.

26. Although, as we have said, the judge was right to treat this appellant as playing a leading role, and he

clearly was the most culpable of those before the court, he was nonetheless performing a function within a chain, with others above him, and he had involved others - including his own uncle. There were accordingly features of a "significant" role.

27. The aggravating features of the case would certainly warrant a further upward adjustment. They outweighed any mitigation, which was scant, for the reasons given by the judge. But we would not consider it necessary for this appellant's role in this conspiracy to attract a sentence after a trial beyond the category maximum of 16 years. Applying the reduction of 17.5 per cent, which is not challenged, we would reach a sentence of 13 years and two months.

28. But account must be taken of the other three offences on the indictment. The possession count was subsumed within the conspiracy but the other two were not. Although we might have structured the sentence differently, we do not consider the judge was wrong to impose a one-year sentence for that other offending after reduction for plea. It was separate offending, but the judge was right to reflect it by increasing the lead sentence and passing a concurrent sentence for the lesser offences. In our judgment, allowing at this stage for totality, that would justify

an additional ten months. We thus arrive at a sentence of 14 years for the conspiracy, not 16 and a half.

29. For those reasons, we quash the sentence on Count 1 and substitute a sentence of 14 years' imprisonment. All the other sentencing decisions remain undisturbed, with the result that the total term is one of 14 years.

30. To that extent, the appeal is allowed.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: Rcj@epiqglobal.co.uk