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IN THE COURT OF APPEAL  
CRIMINAL DIVISION



CASE NO 202300010/A5  
[2023] EWCA Crim 646

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Wednesday 24 May 2023

Before:

LORD JUSTICE COULSON

MRS JUSTICE FARBEY DBE

MR JUSTICE CONSTABLE

REX

V

MARK JOHN SHERGOLD

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MR A DAVIS appeared on behalf of the Applicant.

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## J U D G M E N T

### **LORD JUSTICE COULSON:**

#### ***Introduction***

1. The applicant is now 46. On 27 September 2021, in the Crown Court at Newcastle-upon-Tyne, the applicant was convicted of one count of conspiracy to supply Class A drugs (cocaine) and two counts of possessing criminal property. On 9 December 2022 he was sentenced by the trial judge (HHJ Mallett) to 15 years' imprisonment for the drugs conspiracy with two short concurrent terms on two counts of possessing criminal property. His two co-conspirators, Cairns and Waterhouse, both pleaded guilty to the conspiracy charge and were sentenced to shorter periods of imprisonment at the same time.
  
2. The application for permission to appeal against that sentence was refused by the single judge. It was renewed to the Full Court, although there was a delay of 7 days in making that application. In the circumstances that are explained in the papers, and in particular due to the problems with gaining access to the prison where the applicant was held following his conviction, we grant the necessary short extension of time.

#### ***The Facts***

3. This was a sophisticated cocaine conspiracy: a county lines operation. The indictment identified a period between 18 October 2018 and 15 January 2019. The investigation included covert surveillance, telephone and forensic evidence.
  
4. The applicant was, on any view, a key player in the conspiracy. Particular incidents which featured in the evidence included the following:
  - (a) On 19 October 2018 the applicant was seen to collect Cairns from his home and take him to another address where Cairns handed over a suspicious package to another individual.
  - (b) On 27 October 2018 Waterhouse travelled from Oldham to Sunderland, where he met Cairns and delivered a package. Waterhouse was later seen to collect a package from the boot of the car driven by the applicant, and it transpired that that bag contained cash.
  - (c) On 11 January 2019, Cairns was observed in a parked vehicle with its lights switched off. The applicant pulled up at speed in a white Audi and entered the passenger seat of Cairns' car for a few minutes before departing in his own car.
  - (d) On 14 January 2019 Waterhouse travelled to the northeast where he made a delivery to Cairns and was later seen making a further exchange of cash with the applicant. On that occasion Waterhouse was stopped by police whilst driving south on the A1 and found with 2 kilograms of cocaine and a bag with £16,000 in cash. Cairns was found on that day with almost 4 kilograms of cocaine at his home in Sunderland. In addition, a small additional quantity of cocaine and £2,000 in cash was found at the applicant's home also in Sunderland. He had £800 in cash on his person and there were two packages of cash totalling over

£2,500 at his mother's address. The various amounts of cash gave rise to counts 2 and 3, the counts of possessing criminal property.

### ***The Sentencing Exercise***

5. When she came to sentence the applicant, Cairns and Waterhouse, the judge had the benefit of having presided over the trial of the applicant. The knowledge and insight thus acquired inform her sentencing remarks. She concluded that, on the evidence, the applicant had played a *leading role* in the conspiracy. In particular, she said:

"To return to the conspiracy more directly, and the relative sophistication of it, Shergold's role is demonstrated by the fact that, for example, you used a number of different vehicles, at least four, including hire cars, and I do find that that was to seek to evade detection, and that money was also passed through accounts. A witness was called, in the jury's opinion and mine, to give false evidence about this. Six kilos of cocaine was recovered with a wholesale value of approximately £200,000, and that it must be noted was the quantity of drugs recovered only on the single day that the defendants were arrested.

Mark Shergold's lifestyle was, in my view, indicative of an ability to fund a lavish lifestyle, without any legitimate income being disclosed to HMRC. Equally importantly, during the course of the trial I had a good opportunity to form a view on Mark Shergold's character and his business methods. Both Cairns and Waterhouse had made admissions in interview that were relatively consistent with their basis of plea...

Significant role would have a starting point of 10 years and range of nine to 12, a lesser role a starting point of seven years and range of six to nine. I do sentence both Waterhouse and Cairns on the basis that they fall within the lesser role. However, I do think that Cairns' role was significantly further up that range than that of Waterhouse. I find that Shergold was directing this operation with a substantial influence on others, a close link to the original source and an expectation of substantial financial gain, as well as the use of some business, albeit not a legitimate one, as cover. There are some significant role indicators as well potentially, a management function, or significant rather than substantial...financial advantage, and it could be argued some awareness or understanding of the scale of the operation. But, my conclusion is that this is a leading role, and it was also clear from the evidence of Shergold that, in my view, he would not have been accepting instruction, or direction, from anybody else; certainly not from either of his co-accused."

6. By reference to the Sentencing Guidelines, the judge found that this was a category 1 offence because it involved 6 kilograms of cocaine. For a *leading role* in a category 1 conspiracy, the recommended starting point is 14 years' custody with a category range of 12 to 16 years' custody. The judge then identified a number of aggravating factors in the

applicant's case. He had 22 convictions for 60 offences. These included three separate drug offences and a number of convictions for violence including robbery. At the time of his involvement in this conspiracy the applicant, although released from his last period of custody, was still subject to supervision.

7. In those circumstances the judge took account of the aggravating and mitigating factors and made a small increase from the recommended starting point of 14 years to arrive at her term of 15 years' custody. There was, of course, no credit for a guilty plea.

### ***The Grounds of Appeal***

8. There are, on analysis, three grounds of appeal. The first is that the judge was wrong to find that the applicant had played a *leading role*; the second is that the judge failed to give any or any adequate weight to the applicant's personal mitigation; the third was that the sentence was disproportionate to that imposed on Cairns. We deal with those three points in that order.

### ***Ground 1: Leading Role***

9. During the course of his clear and concise submissions this morning, Mr Davis made the point that, whilst the judge may have been entitled to conclude that this was category 1, the largest amounts of cocaine were not found in the applicant's actual possession. That is not, in our view, a good point. This was a conspiracy, so the sentencing judge has to have regard to the amount of drugs seized overall. Furthermore, as the judge said, this was a conspiracy where 6 kilograms of cocaine were found on just one day. Accordingly, in our view, this was plainly and obviously a county lines conspiracy that fell within category 1.
10. So we turn to the question of the *leading role*. Although, he has endeavoured to discharge the burden with the skill that we have mentioned, Mr Davis faced an almost impossible task in seeking to persuade this court to replace the assessment of the trial judge with one of our own, in circumstances where we have not heard the evidence. It has been said many times that it will only be in the most exceptional cases that this Court will take such a course. We can never assess the full evidence and we can never gain great assistance from the sort of 'island hopping' through isolated elements of the evidence which inevitably Mr Davis was obliged to undertake.
11. All that said, in this case we are in no doubt that, not only did the judge make an attribution that she was quite entitled to make but, it seems to us, she made the only attribution possible in all the circumstances. The Sentencing Guidelines say that "one or more of the listed characteristics may demonstrate an offender's role". Amongst the characteristics which may demonstrate a *leading role* are that (a) the offender has substantial links and influence on others in a chain; (b) the offender had an expectation of substantial financial advantage; and (c) the offender used business as a cover.
12. On the evidence, the applicant displayed each of those three separate characteristics, let

alone just one. It was plain from the evidence that the applicant had substantial links to and influence on others in the chain. He was the organiser who controlled Cairns and Waterhouse. The evidence was that they took their instructions from him. If the applicant was acting on the orders of others, he did not say so and he did not identify who those others might be. Indeed, on the contrary, the judge found that the applicant was the type of man who would not have accepted instructions or directions from anyone. Secondly, the applicant not only had expectations of substantial financial advantage, but the large amounts of cash referred to in the evidence and recovered on the day of the arrests made clear that those expectations were bearing fruit.

13. Thirdly, as the judge expressly found, the applicant used his business as a cover for his drug operations. The fact that that business too was illegitimate is nothing to the point. The applicant had called evidence as to that business. He said it was providing security to pubs and clubs, as well as unofficial debt collecting and protection services for local businesses. None of the income allegedly raised in this way had been declared to HMRC. The judge was quite entitled to conclude that that sort of cash heavy business was a cover for his drug dealing and the profits thereby made. In the passage that we have cited, she made express reference to, amongst other things, the number of different vehicles used and the money being hidden in various accounts.
14. Finally on this point, Mr Davis made the point this morning that some of the elements of a *significant role* were also apparent. That may be right. In our experience, that is almost always the way in sophisticated drugs conspiracies where the sentencing judge cannot be satisfied that everyone involved in the conspiracy is before the court for sentencing purposes. Accordingly, if it is a case where some of the *leading role* characteristics and some of the *significant role* characteristics are both made out, then it is a balancing exercise for the judge to decide how that balance is best resolved on the facts of the case. That therefore brings us full circle back to where we started: that this was an exercise which this judge was in a unique position to undertake, and we can find nothing wrong with the way in which she went about that task.
15. For those reasons therefore, we consider that the attribution of a *leading role* to the applicant was justified, and we therefore reject the first ground of appeal.

***Ground 2: Mitigation***

16. The suggestion is that the judge ignored any mitigation on the part of the applicant. That is wrong as a matter of fact because the judge spent some time in her sentencing remarks setting out the detail of a number of mitigating factors. They are set out on page 5 of the transcript. It is unnecessary to read those into this judgment. Those factors included the delay and the applicant's personal circumstances. There were also references from, amongst others, prison officers.
17. Dealing with the delay first, that fell into two periods. The first was the delay up to the

trial in September 2021. That delay may have been partly due to the pandemic, although even without it, the applicant's trial, having been arrested in 2019, may not have taken place until late 2020 or early 2021 in any event. So the pandemic-related delay was at most modest, and it arose out of the applicant's decision to contest the trial in any event.

18. The second delay between conviction and sentence were due to issues as to his co-defendants' basis of plea, but of course during that period the applicant was in custody and that counted towards his sentence. It is therefore understandable that the delays themselves cannot be said to have had any specific impact on the applicant. Indeed, in the earlier part of the delay, that is to say prior to September 2021, he was on home detention curfew and, in view of a number of the unhappy events that occurred during that period, it was much better for him that he was there rather than being in custody.
19. As to the personal mitigating factors, the judge properly acknowledged those. But in her calculations, she concluded that they were outweighed, albeit slightly, by the aggravating factors. The aggravating factors included, not only the relevant previous convictions, but also the fact that the applicant had played a *leading role* in this sophisticated conspiracy at a time when he had just been released from prison and was therefore under post-custody supervision. In our view, that was a highly significant aggravating factor.
20. In those circumstances therefore, it seems to us that the judge was entitled to conclude that the aggravating factors just outweighed the mitigating factors, and therefore was entitled to make a small uplift from 14 years to 15 years in the sentence she imposed. The 15 year term years was, of course, still within the recommended range set out in the Sentencing Guidelines.

### ***Ground 3; Disparity with Cairns***

21. We have considered this ground carefully, but we consider that there is nothing in it. It is always difficult to sustain a disparity argument, because an applicant or appellant needs to demonstrate, not only that the offending and the personal circumstances are comparable, but also that the disparity is such that an informed observer would conclude that the two different sentences meant that something had gone wrong with the criminal justice system. On our analysis neither of those factors is made out here.
22. In Cairns' case, his culpability was significantly less than that of the applicant. The judge concluded that he played a *lesser role*. His basis of plea on which he was sentenced demonstrated that he had been involved in the conspiracy because he had accrued a drug debt due to an addiction to amphetamine, and he had acted as a courier and warehouseman in order to pay off that debt. He had no previous convictions and he had pleaded guilty.
23. Accordingly, the respective offending and situation of Cairns, on the one hand, and the

applicant, on the other, simply cannot be sensibly compared. Their sentencing exercises were therefore entirely different. A significant disparity in their sentences was not only understandable but entirely justified. An informed observer would not consider, when comparing those two sentences, that anything had gone wrong with the administration of justice.

24. In those circumstances therefore, although we are grateful to Mr Davis for his clear submissions this morning for the reasons that we have given, the appeal against sentence must be 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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