IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT BIRMINGHAM
HHJ MUKHERJEE T20227108

CASE NO 202403778/A2

Neutral Citation: [2024] EWCA Crim 1655

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 17 December 2024

Before:

LORD JUSTICE WILLIAM DAVIS

MR JUSTICE BENNATHAN

RECORDER OF MANCHESTER
HIS HONOUR JUDGE DEAN KC
(Sitting as a Judge of the High Court)

**REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988**

REX
V
ATIF AHMED QASIM

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MR N HOLLAND appeared on behalf of the Solicitor General.
MR A WEBSTER KC appeared on behalf of the Offender.

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**J U D G M E N T**

(Draft for Approval)

LORD JUSTICE WILLIAM DAVIS:

1. On 16 April 2024, Atif Ahmed Qasim ("the offender") appeared in the Crown Court at Birmingham for a trial on an indictment containing five counts. He pleaded guilty on the first day of the trial to counts 7 and 8, namely conspiracy to supply a controlled drug of Class A. He was tried on the remaining counts and convicted on counts 1, 2 and 3, namely possession of firearms with intent to endanger life.

2. On 25 September 2024 the trial judge, HHJ Mukherjee, sentenced the offender to a total sentence of 12 years 6 months' imprisonment. The sentence in relation to counts 1, 2 and 3 was 8 years' imprisonment, each sentence being ordered to run concurrently. On counts 7 and 8 sentences of 4 years 6 months' imprisonment were imposed. The sentences were ordered to run concurrently with each other but consecutively to the sentences on the firearms counts.

3. His Majesty's Solicitor General now applies for leave to refer the total sentence to this Court as unduly lenient, pursuant to section 36 of the Criminal Justice Act 1988.

4. The offender is aged 26. He was born in March 1998. Between August 2019 and December 2020 there were two conspiracies to supply Class A drugs being conducted via two drugs lines operating in the Birmingham area. Over the course of 16 months around 15 kilos of crack cocaine and 7 kilos of heroin were supplied. Much of the supply was carried out by street dealers working on behalf of those further up the chain. The offender was one of those above the street dealers in the hierarchy. The hub for the transfer of money and drugs was the address in Ward End of the principal conspirators,

two brothers named “Khalid”. They maintained addresses elsewhere in Birmingham where drugs would be stored prior to supply. One so-called stash house was raided in the course of the conspiracy. 280 grams of cocaine and 40 grams of heroin were seized from that house. Another stash provided a larger haul when it was searched, namely 2.1 kilos of cocaine and 517 grams of heroin.

5. Another place where drugs were stored was a BMW car. The offender had purchased this car in April 2020 on behalf of the drugs enterprise. On 10 October 2020, it was parked close to the home of the Khalid brothers. When it was searched, 2091 separate street deal wraps of crack cocaine were found in it together with 10 wraps of heroin. Following the discovery of this cache of drugs one of the drugs lines temporarily was out of action. The Khalid brothers within days were in contact with the offender with a view to him restoring that drug line. The drug line was duly restored shortly thereafter.

6. It was during 2020 the offender was in regular contact with the Khalid brothers. He had a street name of “Tash”. Communications with Tash indicated his involvement with both types of Class A drugs.

7. Also in the BMW car on 10 October were three firearms. There were two handguns. One was a semi-automatic weapon with 32 rounds of compatible ammunition also in the car. The other handgun was a converted weapon capable of firing. It was loaded with three rounds of ammunition. The third weapon was a Skorpion machine gun capable of automatic fire. It was loaded with 16 rounds of ammunition. Each of the firearms was a prohibited weapon. One handgun was in the glove compartment of the car wrapped in

clingfilm, the purpose of which was in part to make it difficult for any police sniffer dog to detect the weapon. The other guns were hidden in the boot of the car. As well as the offender's ownership of the BMW, there was scientific evidence to link him to the car showing that he used it.

8. The offender was not arrested until 7 March 2022. His role had become apparent as the investigation into, amongst other things, the telephones of the leading conspirators developed. When he was interviewed he denied any involvement in the possession of the firearms. In relation to other matters he made no comment.

9. At the time of the offending the offender was either 21 or 22. When he was 15, he was cautioned for the possession of an offensive weapon. In 2016 he was sentenced to 6 months' detention for conveying a mobile telephone into a prison. In 2018, he was sentenced to 6 months' detention suspended for 12 months for perverting the course of justice by giving false details when stopped for driving without insurance and at a later court hearing.

10. The judge had letters of support from an erstwhile employer of the offender and from members of the offender's family. The offender himself wrote a letter to the judge expressing his regret for becoming involved in the drugs trade. He acknowledged that he had no-one to blame for that save himself.

11. In sentencing, the judge considered a number of authorities to which he had been referred. They established the following: a conviction for conspiracy involves the

aggravating feature of the offender giving support and comfort to their fellow conspirators; where a conspiracy is proved, the extent of an offender's immediate personal involvement in the supply of drugs is not the sole consideration; where the offending is very serious, mitigating factors may be of less significance than otherwise would be the case; public protection and deterrence play a vital role when sentencing for firearms offences. The judge also referred to *R v Ali* [2023] EWCA Crim 232.

12. The judge found that the offender's previous convictions were significant. In relation to the drugs conspiracy the judge's conclusion was that the offender had sourced the BMW which played an important role in the criminal enterprise. He was closely involved with one of the drugs lines and with its reinstatement in October 2020. He was not someone who sold drugs on the street, that being well below his standing in the criminal enterprise. Although he was not involved throughout the conspiracy period, his involvement lasted a significant time. He knew of the nature and extent of the conspiracies from which he gained financial reward. The judge referred to the evidence relating to Tash.

13. In relation to the firearms, the judge considered that the offender was fully aware that they were to be stored in the BMW car and that their purpose was linked to the drugs trade in which he was involved. The offences were planned. There was some sophistication in the storing and hiding of the weapons. At around the time the weapons were found by the police, participants in the criminal agreement were actively considering the purchase of bulletproof vests. That indicated the possibility of the weapons being used in the course of the drugs enterprise.

14. The judge referred to the relevant guidelines issued by the Sentencing Council. He found that medium culpability attached to the possession of the firearms. This was due to three separate factors: significant role in group activity; some degree of planning; firearm loaded with live ammunition or live ammunition immediately available for use. There was a high risk of death or serious harm. That placed the offences into Category 2B. The judge said that, taking into account aggravating and mitigating factors, the appropriate sentence was 10 years' imprisonment. He reduced that to 9 years to take account of delay and prison conditions with a further reduction to 8 years to allow for totality.

15. In relation to the drugs offences, the judge's view was that the offender played a *significant role*. He determined that the fair and proportionate conclusion was that he had been involved directly in at least 1 kilo of Class A drugs in the period during which he had been involved in the conspiracy. He relied in reaching that conclusion inter alia on the quantity of drugs recovered from the BMW car. That placed the offence in Category 2 harm. The judge said that his starting point was 7 years 6 months. He did not explain why he had departed from the starting point in the guideline, namely 8 years' custody. He then reduced the sentence by 10% for the late plea of guilty, resulting in a sentence of 6 years 9 months. He reduced the sentence thereafter to take account of delay and the prison environment to 5 years 6 months. He finally reduced the sentence to allow for totality. He thereby reached the sentence of 4 years 6 months' imprisonment.

16. The Solicitor General observes that the judge in fact addressed those various elements in the wrong order; the reduction for plea should have come at the end of the sentencing process. However, the Solicitor General accepts that the overall effect of that would not

have such as to affect the question of whether the sentence was unduly lenient. Her argument that the overall sentence was unduly lenient is based on three matters. First, the sentence imposed in relation to the firearms offences failed to take into account the multiple culpability factors which were present. There ought to have been a significant uplift within the category range as a result. Second, the sentence imposed by the judge failed to give any or any proper weight to the aggravating factors in relation to the firearms offences. Third, there should have been little or no downward adjustment to reflect delay and prison conditions.

17. On behalf of the offender Alistair Webster KC (who did not appear for the offender in the Crown Court) submits that the judge made no error in relation to the firearms offences. The sentence reflected the fact that the offender had not been responsible for obtaining the weapons. Moreover, it was appropriate to distinguish the offender from a person who intended themselves to use the firearms. As for the aggravating and mitigating factors, the balancing exercise was one best carried out by the trial judge. The offender's youth and immaturity were significant features. In relation to prison conditions, Mr Webster submits that the judge was wholly correct in his allowance for prison conditions. Insofar as there may be authority to suggest that this factor should not play any or any significant role in relation to lengthy sentences, Mr Webster argues that this runs contrary to the guidance given by the then Lord Chief Justice in *R v Manning* [2020] 2 Cr App R (S) 46.

18. The approach this Court must take in relation to any application pursuant to section 36 of the 1988 Act remains that set out in *Attorney-General's Reference No 4 of 1989* [1990] 1 WLR 41:

> "A sentence is unduly lenient, we would hold, where it falls

> outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate."

19. We shall deal with each of the arguments raised by the Solicitor General by reference to the need for her to show that the judge fell outside the range of sentences reasonably open to him. However, we also must look at the position cumulatively. It is the total sentence which had to be assessed against the criterion of reasonableness. In that exercise we must give full weight to the fact that the sentencing judge was the judge who had heard the trial in relation to the firearms.

20. The firearms offences were serious. There were three separate culpability factors which we have identified. That feature justified an upward movement from the starting point of 10 years. The fact that the offender did not intend to use the weapons himself was of limited significance. He was involved in the drugs trade in which the weapons were to be used if and when the situation arose. Where a weapon's function is to support an unlawful activity in which the individual is playing a full role, that individual's culpability, in the circumstances of this case, will be much the same as those who might use the weapon.

21. The aggravating factors were substantial. As well as the offender's previous convictions which the judge considered to be significant, the offences were aggravated by the fact that there were three separate firearms, all of which were prohibited weapons. The judge did not explicitly refer to those matters as aggravating the offence, even though they appear within the relevant Sentencing Council guideline.

22. The possession of a machine gun was especially serious. The gravity of three prohibited weapons of this type being available for use on the streets of Birmingham cannot be overestimated. As the jury found, they were in the possession of the appellant with intent to endanger life.

23. The judge said that there was mitigation, in that the offender had not been to custody previously. Strictly that was not correct given that he had served a period of detention albeit when he was much younger. The judge also referred to the offender's youth and said that he was "described as lacking maturity". By reference to the factors mentioned by the judge and taking into account those matters he did not mention, we are satisfied that the aggravating factors plainly outweighed the mitigating factors. No other conclusion is reasonable. Looked at in the round and before any reduction for delay or the conditions in prison, we conclude that a sentence in the region of 12½ years would have been appropriate to reflect the overall offending in relation to the firearms. Thus, we conclude that the argument of the Solicitor General in relation to the firearms offences has merit.

24. The Solicitor General does not submit that the starting point (better described as the sentence after trial and before reduction for plea) of 7 years 6 months for the two drugs offences was unduly lenient. The judge gave no indication of as to why he did not take the starting point as identified in the relevant guideline (8 years' custody) and make an upwards adjustment to allow for the offender's participation in a conspiracy and for the supply of two types of Class A drugs. On the face of it, the sentence before reduction for plea ought to have been at least 8 years by reference to the guideline. However, taken

alone such leniency as was exercised by the judge in that respect was not undue leniency.

25. Whether the overall sentence is unduly lenient, including the sentence for the drugs offences, depends on the resolution of the submission in relation to delay and prison conditions. As for delay, the offender was arrested in March 2022. The proceedings against him were part of a substantial prosecution which led to a number of trials. He was a relatively late entrant into the process. In the context of a case in which at least 17 individuals were indicted, principally in relation to drugs conspiracies, it was inevitable that the offender's case would not progress as quickly as it would have done if he had been charged alone. Added to that, in the early stages of the proceedings, the effect of the pandemic on criminal trials was still being felt which added to the overall delay. The offender was arraigned in May 2022 when he pleaded not guilty to all counts. It was not until almost 2 years later that he pleaded guilty to the drugs counts. His conviction on the firearms counts followed a trial. In those circumstances, we consider that there was little scope for the judge to make any reduction in the sentence to allow for delay. In the context of a case of this kind the period between arraignment and trial was not so substantial as to justify anything other than a very modest discount. The judge, with respect to him, did not explain why he concluded that delay was a significant factor. In our judgment, it was not.

26. We turn to the issue of prison conditions. In *R v Ali* [2023] EWCA Crim 232, this Court considered the impact of the very high prison population on sentencing. The appellant had committed an offence which the sentencing judge had concluded warranted a sentence of 6 months' imprisonment. On appeal that conclusion was upheld. Where this Court departed from the judge was in relation to the decision that the sentence had to be

served immediately. The offence in question had been committed whilst the offender was in prison. There was 16 months between the date of the offence and date of charge. By the time he had been charged the appellant had been at liberty for 6 months. It was a further 10 months before he was sentenced, by which time he had completed his licence with a glowing report from his supervising officer. Those circumstances alone were sufficient to persuade the court that the sentence ought to have been suspended. Any doubt the court had was resolved by the effects of the prison population at the time. At the date of the court's judgment the capacity of the prison system was so stretched that some prisoners were detained, at least for short periods, in police cells. The Secretary of State for Justice had written to the then Lord Chief Justice explaining the position. The effect of the Court's judgment was to state that, when the courts were considering sentencing an offence that crosses the threshold for a short custodial sentence, judges and magistrates could elect to suspend the sentence or to impose a community order instead. In such instances, and while there continued to be extreme pressure on prison capacity, the courts could take into account the impact of the current prison population levels when making that decision. A factor implicit in the letter from the Secretary of State was that there could come a point at which a sentence of imprisonment lawfully imposed simply could not be put into effect because of a lack of prison capacity. That was the background against which this Court gave its judgment.

*27.* Although *Ali* did not wholly exclude longer sentences from its rationale, the point was addressed by this Court in *R v Tripathi* [2024] EWCA Crim 769. That was a case where the offenders had been involved in large-scale importation of cocaine, cannabis and cigarettes. The sentences imposed (15 years and 19 years) were referred to this Court as

being unduly lenient. This Court agreed and increased the sentences significantly. The principal reason for the sentences being unduly lenient was the reduction in sentence that the judge had made because of prison overcrowding. The judge had relied on *Ali* to justify the very significant reductions. It was found that this approach was misconceived in law. The Court said that the principle to be derived from *Ali* was clearly aimed at the 'cusp of custody' cases. That was obvious from a careful reading of the judgment in *Ali.*

28. Mr Webster argues that, insofar as *Ali* is restricted to 'cusp of custody' cases, this is per incuriam in the light of what was said by the then Lord Chief Justice in *Manning.* He cites the passage at [41] and [42] of *Manning:*

> "…In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it otherwise would be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case - currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19.
>
> Applying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended ..."

29. As is well known, this judgment was delivered in the context of the impact on prisons of the pandemic. The case came before the Court as an application to refer a suspended sentence as being unduly lenient. The Court refused the application. It would have been refused irrespective of any issues relating to the pandemic. However, the principles that were expounded in *Manning* were regularly applied whilst the effects of the pandemic

still were significant. What was said with equal regularity during that period was that, where a long sentence was imposed, there had to be cogent evidence of a disproportionately harsh effect on the particular offender before any appreciable reduction in the sentence would follow: see, for example, *R v Whittington [*2020] EWCA Crim 1560.

30. We do not consider that *Manning* provides support for the proposition that sentences of any length should be reduced by reference to prison conditions. In our view, what was said in *Tripathi* about the nature and extent of the decision in *Ali* was entirely correct. Mr Webster goes further. He says that, as a matter of general policy, the longer an individual is held in a malfunctioning and inadequate system, the greater the effect on him can be expected to be. His argument is that the Solicitor General, as an Officer of the government, should indicate the steps that would be taken to improve conditions under which prisoners serving longer sentences will be able to exist. Without such an indication, it is said that no court can be satisfied that a prisoner will not be affected irrespective of the timescale. Mr Webster has drawn our attention to a report by the National Audit Office dated 26 November 2024. In the executive summary the NAO stated that in 2020 HMPPS was failing to provide a safe, secure and decent prison estate. It noted that since autumn 2022 the estate had been operating at near full capacity. Between that time and August 2024 the estate had been operating at between 98% to 99.7% capacity.
31. Mr Webster's argument is that the prison system is in crisis. It has been in that state for some time and that there is no indication that the position will change at any identifiable point in the future. Therefore, the length of any prison sentence should be adjusted to take

account of this factor. By that route Mr Webster argues the judge was entirely correct in the approach he took.

32. We of course accept that there have been concerns in relation to the prison estate, most particularly the male prison estate, for some time. However, the situation at the point at which the Court gave judgment in *Ali* was extreme. The event which triggered the Court's consideration of the conditions in prison was the implementation of Operation Safeguard, i.e. the use of police cells to house prisoners. As is well known, crisis conditions persisted for the next 12 months and more after *Ali* was decided. That led to the introduction in August 2024 of the SDS40 Early Release Scheme. That has released many prisoners after serving 40% of their sentence rather than 50%. At least in the short term that has resolved the gross overcrowding. It certainly resolved the necessity to house prisoners in police cells. The guidance in *Ali* was given to meet a particular crisis. In our judgment, it did not and does not give the courts a general discretion to adjust the length of sentences to reflect the unsatisfactory state of the prison estate. That would not be a proper function of criminal sentencing. In the absence of a highly unusual factual feature, particular to the individual concerned, a criminal judge must sentence according to the ordinary principles of sentencing. Those principles assume that, when a judge imposes a prison sentence, there will be a prison place available for the offender. We note that at the time of *Ali* there was a risk that that was not going to be the case. The standard of prison places provided is not, save in exceptional circumstances, an issue for the sentencing judge. If a prison does not meet appropriate standards, then a prisoner may have a public law remedy against the State. That is the means by which the courts can regulate the standards of custodial provision. It cannot be done by judges adjusting sentences that are otherwise mandated by Parliament and the Sentencing Council.

33. We invited Mr Webster to help us as to what guidance we should give to judges were we to accept his argument. He said that we should indicate that a proportionate reduction should be made in any given sentence. The purpose of the reduction would be to provide an adequate recognition of prison conditions which may vary from time to time. He was not able to provide us with a percentage reduction of the kind that one might see, for instance, in relation to pleas of guilty, or even cases where offenders have given assistance to the police. With great respect to Mr Webster, we consider that all of that demonstrates the overwhelming difficulty with his argument. Sentencing must be consistent. It would be impossible to maintain consistency if that approach were to be taken.

34. Mr Webster also relied on the fact that a number of other defendants in this substantial prosecution were sentenced by the same judge. In varying degrees other defendants had their sentences reduced for prison conditions and delay. We have no information at all about the personal circumstances of any of those people. We know little or nothing about the offences for which they were sentenced. Mr Webster's argument was in effect to say that the Solicitor-General was falling foul of a disparity argument albeit in reverse. With great respect to Mr Webster, the exercise he invited us to engage was impossible. We can only look at the case put in front of us. By reference to the matters known to us, we will assess the leniency or otherwise of the sentence imposed. The mere fact that a particular approach was taken in relation to another defendant tells us nothing. Taking into account all that we have said, we conclude that the judge in this case fell into error when he reduced the sentence - in relation to the firearms offences by 12 months and the drugs sentence by 15 months - to account for delay and prison conditions.

35. As we have explained, the judge's assessment of the firearms offences did not reflect

their seriousness sufficiently. Standing alone, the sentence should have been 12½ years' imprisonment. Even if the so-called starting point for the drugs offences was properly set at 7 years 6 months, the sentence, after reduction for the plea of guilty, should not have been less than 6 years 9 months. We accept that some adjustment to achieve a just and proportionate sentence was necessary and appropriate. The judge referred to this as "the principle of totality". The offending in relation to the firearms was separate and distinct from the drugs offences. Consecutive sentences were justified. However, there was some link between the offences. The inevitable inference was that the firearms were intended to have some part to play in the drugs trade of which the offender was a part. To simply add the two sentences which we say would have been correct together, giving a total sentence of 19 years 3 months, would lead to a disproportionate sentence.

36. For all these reasons, we give leave to refer the sentences imposed in September 2024. We quash all of the sentences. In respect of the offences of possession of a firearm with intent to endanger life, we substitute a sentence of 12 years' imprisonment on each count concurrently. For the offences of conspiracy to supply a controlled drug of Class A, we substitute a sentence of 5 years' imprisonment. Those sentences will be concurrent with each other but consecutive to the sentences for the firearms offences. This is significantly less than the appropriate individual sentence for those offences. The sentence is set at that level so as to ensure an overall sentence that is just and proportionate. That overall sentence will be 17 years' imprisonment.

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

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