Neutral Citation Number: [2019] EWCA Crim 1106

Case No: 201800665 C2/1280/C2/1283/C2/1285/C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM LEWES CROWN COURT
HHJ LAING QC
T20167496

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2019

Before:

LADY JUSTICE THIRLWALL DBE
MR JUSTICE JAY
and
HIS HONOUR JUDGE MAYO
(THE RECORDER OF NORTHAMPTON SITTING AS A JUDGE OF THE CACD)

- -

Between:

1. JASON LEE CASWELL	**Appellants**
2. LEO ALAN ELLIS	
3. JOHN EDWARD GARDINER	
- and -	
REGINA	**Respondent**

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- -

Mr J Anders (instructed by **Andrew Dart Solicitors**) for the **1st Appellant**
Mr A Harvey (instructed by **Richard Body Law Ltd**) for the **2nd Appellant**
Mr C Surtees-Jones (instructed by **Needham Poulier Solicitors**) for the **3rd Appellant**
Mr D Sullivan and Mr J Atkinson (instructed by **CPS)** for the **Respondent**

Hearing date: 5 June 2019

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Approved Judgment

LADY JUSTICE THIRLWALL:

1. We have all contributed to this judgment.

2. On 13 February 2017 at a Plea and Trial Preparation Hearing in the Crown Court at Lewes, Jason Caswell, Leo Ellis, John Gardiner were arraigned together with Kenneth (Kenny) Kelly, Stephen Kelly, Anthony Hearn, Stephen Gardner and Jamie Winchester. The applicant Gardiner pleaded guilty to three counts of Conspiracy to Supply Class A drugs (heroin in counts 6 and 7 and cocaine in count 8). Just before trial Ellis pleaded guilty to count 3, Transferring a Prohibited Weapon, contrary to section 5(1)(a) of the Firearms Act 1968. Between 30 October 2017 and 10 January 2018, there followed a trial of the outstanding counts before HHJ Laing QC and a jury at the Hove Trial Centre. We set out the detail of the counts below.

3. Eight further defendants pleaded guilty to their roles in distinct conspiracies to supply Class A drugs. They were: Carlton Meldrum, Luke Fitzgerald, Christopher Marsh, Jed Ballard, Pavel Rhyslink, James Dunham, Wesley Long and Scott Gardner. They were sentenced separately.

4. Underlying the indictment were two major and interlinked investigations into large-scale supply of cocaine and heroin in Kent, London and Sussex. Caswell ran an operation from Kent supplying drugs in London and Ellis ran an operation in Sussex. The activity ran from September 2015 to March 2016. It involved two separate organised crime groups. During the course of investigations by two separate police forces, significant seizures of Class A drugs and money were made by police officers. The combination of various police actions disrupted the drug supply business as it was intended to. It placed Ellis and Caswell under considerable pressure due to mounting debts owed to those higher up the drug supply chain. The Crown's case was that the pressure was such that it culminated in a plan to kill their creditors because they were either unwilling or unable to repay their debts.

5. Counts 1 and 2 alleged conspiracies to murder two intended victims: Kevin Wise (Count 1) and a man known to police only as 'M' (Count 2). The defendants Kenny Kelly, Stephen Kelly and Andrew Hearn were also charged with these two conspiracies and were acquitted at trial.

6. Caswell renews his application for permission to appeal against his conviction. We therefore set out he facts of counts 1 and 2 in more detail than the other counts.

7. Ellis and Caswell were covertly recorded discussing drug debts, amongst other things. The debt was put by the Crown in the region of £850,000. Ellis and Caswell used phones which could send encrypted emails using software referred to as PGP ("Pretty Good Privacy").

8. On 25 February 2016 a meeting took place between Kevin Wise, Ellis and Caswell during the course of which Wise demanded the payment of £400-500K for "old work" (i.e. drugs already supplied). Ellis and Caswell assured Wise that the first payment would be made the following Monday in the sum of £150K, with the balance to follow by instalments.

9. By 29 February, the following Monday, it appears that the drugs debt had risen to £850,000. This related to "old" and "new" work. It was the Crown's case that Ellis and Caswell were therefore coming under mounting pressure from their creditors.

10. The Crown relied at trial on email exchanges which took place between the two men between 00:21 and 00:25 on 29 February. These messages constituted clear evidence of two parallel conspiracies to "do", that is to say kill, Kevin Wise and a man known only as "M". According to these messages, "Kenny" would kill Wise and "his pal" would kill "M".

11. At 12:30 the same day Ellis and Caswell met in Hastings town centre.

12. An examination of subsequent conversations between Ellis and Caswell during the course of the evening of 29 February, caught on a covert monitoring probe (audio recording transcripts 60, 63 and 69, all of which were before the jury), shows that they were discussing in some detail how the killings would be carried out so that neither of them would be implicated. At 18:11 Ellis messaged Caswell that he had a good link to get it done so that it did not come back on both of them.

13. Later that evening, at 23:27 Caswell messaged Ellis saying that he was with him 100%. Ellis asked to be given details of the plan later and said that he had been given the number of people who kill for a living.

14. During the course of the morning of 1 March police officers served Desist Notices/reverse Osman Notices on Caswell and Ellis at the addresses at which they were each staying. These notices were served because police believed that they were involved in a dispute and intended to do harm to others. Both appellants signed the documents to acknowledge the warnings given. Caswell was later to tell the jury that he was concerned the police would arrest him for breach of bail conditions (condition of residence) in respect of two offences of assault with a baseball bat on his neighbour.

15. At 15:00 on the same day, a meeting took place at Pub 31 in Winchelsea. As well as Ellis and Caswell, those attending included Kenny and Steven Kelly, Anthony Hearn and Tamara Callan, Hearn's girlfriend.

16. Less than an hour later, shortly before 16:00, Ellis contacted Jamie Winchester. Winchester then cycled into Hastings carrying a bag and delivered it to Hearn and Callan who were waiting in Cinque Ports Way in a Vauxhall Mokka. Shortly thereafter, when Callan was arrested by armed police, a Tec-9 fully automatic machine gun, silencer and a magazine containing a full clip of ammunition were found within the vehicle. Winchester was found guilty by the jury of firearms offences (see further below), and – as we have already pointed out – Ellis pleaded guilty to transferring a prohibited weapon. Hearn also pleaded guilty to firearms offences including possession of a firearm with intent to endanger life but he told the jury he had the gun for other purposes.

17. Caswell and Ellis were separately arrested by police during the course of the evening of 1 March. Caswell made no comment in interview.

18. In addition to the emails and the probe evidence to which we have already referred the Crown relied on:

    i) Surveillance evidence, timelines, call schedules and photo bundles evidencing contact between Ellis, Caswell and others. They also relied on an expert witness, Mike Kent, who provided evidence about the language of drugs operations, organised crime gangs and PGP phones

    ii) Adverse inferences against Caswell for not mentioning in his no comment interview the facts he relied on at trial and

    iii) His previous conviction for supplying drugs to show a propensity to do so.

19. Count 3 (Transferring a Prohibited Weapon, contrary to section 5(1)(a) of the Firearms Act 1968) concerned a transfer by Ellis and Jamie Winchester of a TEC-9 fully automatic machine-gun. It was the Crown's case (which the jury accepted) that this weapon had been supplied by Jamie Winchester to Anthony Hearn on Ellis's instructions as described above. Hearn and his girlfriend were arrested when the gun was found. Caswell was arrested along with Stephen Kelly and Kenny Kelly the same afternoon at 6pm. Ellis was arrested within 2 hours. He entered a guilty plea to Count 3, but on a basis which the Crown did not accept: Jamie Winchester was convicted by the jury of this count. He was also convicted of possession of ammunition without a Firearms Certificate.

20. The remainder of the counts represented a series of conspiracies to supply heroin or cocaine, or the transfer of criminal property.

21. Count 5 (Conspiracy to Supply heroin) represented a separate conspiracy to supply 2kg of heroin on 27 September 2015, between Ellis, Carlton Meldrum and other persons. Ellis was convicted after trial.

22. Ellis was also convicted by the jury of Count 6 (Conspiracy to Supply heroin). This involved 1kg from the same batch as Count 5 in conjunction with the applicant Gardiner. The facts were that on 14 October 2015, Ellis arranged for Gardiner (described as a trusted drug transporter) to supply to Luke Fitzgerald and Christopher Marsh. Gardiner's fingerprint was found on the packaging of the drugs. He pleaded guilty, as did Fitzgerald and Marsh.

23. Count 7 involved a supply of 3kg from the same batch of heroin by Ellis via Gardiner to Meldrum on the same day as the supply in count 6. Gardiner pleaded guilty at the Plea and Trial Preparation Hearing.

24. Count 8 was a Conspiracy to Supply cocaine. On 20 November 2015, a co-accused, Jed Ballard, provided a bag containing 2kg of cocaine to Pavel Rhyslink. Jed Ballard was driven away from the drugs deal by Gardiner. Ellis was in telephone contact with Ballard up until the transfer of the drugs. Ballard was arrested shortly afterwards and his home address was searched. While the police were there, the appellant Ellis came to the address and was searched. One of the phones he was carrying was a PGP device containing encrypted emails between him and Caswell related to drug dealing and other drug-related pictures and messages. Ellis pleaded guilty to this count.

25. Count 9 concerned Ellis, along with James Dunham and Wesley Long in a conspiracy to supply 2kg of cocaine on 23 February 2016. As in Count 6, Ellis was directing trusted associates over the telephone. He pleaded guilty to this count.

26. Count 10 represented a transfer by Caswell on 25 February 2016 of just under £43,500 which were the proceeds of drug trafficking. Scott Gardner was due to exchange a large amount of cash for drugs, but he was intercepted by police. Messages between the appellants Ellis and Caswell showed that they were both concerned about the loss of the money and having to re-arrange the payment. Ellis pleaded guilty to this count.

27. Count 11 (Conspiracy to Supply cocaine) was left to the jury as an 'overarching' conspiracy involving Caswell and Ellis and other persons not named over a 4-month period. Evidence was presented of call patterns, covert recordings and messages in which Caswell was referred to by a nickname "Blonde/Blondie" (a name by which he accepted he was known). Ellis pleaded guilty to this count.

28. Caswell was convicted of counts 8, 10 and 11 and Gardiner was convicted after trial of count 8.

Sentence

29. On 23 February 2018, the appellants and applicant were sentenced as follows:

Caswell. Counts 1 and 2, conspiracy to murder: life imprisonment with a minimum term of 14 years.
Count 8, conspiracy to supply cocaine: 14 years' imprisonment
Count 10, transferring criminal property: 3 years' imprisonment.
Count 11, conspiracy to supply cocaine: 16 years' imprisonment
All sentences to be served concurrently.

Ellis. Counts 1 and 2: life imprisonment with a minimum term of 14 years.
Count 3 transferring a prohibited weapon: 10 years' imprisonment, concurrent with all other sentences
Counts 5, 6, 7 conspiracy to supply heroin, 14 years' imprisonment on each concurrent
Counts 8 and 9, conspiracy to supply cocaine: 8 years' imprisonment on each concurrent
Count 10, Transferring criminal property: 2 years' imprisonment
Count 11, conspiracy to supply cocaine: 16 years' imprisonment
All sentences to be served concurrently.
Gardiner was sentenced on counts 6 and 7: conspiracy to supply heroin to 6 years' imprisonment on each count concurrent and on count 8, conspiracy to supply cocaine: 9 years' imprisonment. All sentences to be served concurrently.

30. Caswell and Ellis have been granted leave to appeal sentence. As we have said, Caswell renews an application for leave to appeal the convictions on counts 1 and 2 after refusal by the Single Judge. Gardiner renews his application for leave to appeal sentence, after refusal by the Single Judge.

Caswell: Renewed application to appeal convictions of conspiracy to murder

31. We are grateful to trial counsel, Mr Anders, who appeared pro bono on this aspect of the hearing. Before turning to the grounds of appeal, we summarise, briefly, the applicant's defence which he developed in evidence before the jury, having made no comment at interview.

32. The applicant and Ellis both accepted what they had written in their email exchanges and what could be heard on the probe. Both were adamant that this was, effectively, drunken banter which was short lived and which they had no intention of carrying out. It was Caswell's case that he was not involved in dealing with drugs anymore, having set up his own legitimate business after his last prison sentence. Any drugs debts were Ellis's, not his. He was trying to mediate between Ellis and his suppliers, whom Caswell knew, to try and help Ellis. At the same time, he was aware that there was a plan to kidnap Ellis so as to get the money from him in some way. Ellis had previously been kidnapped for the same reason. Finally, the point was made on his behalf that killing Kevin Wise or M would not expunge the debts – so there was no point to it.

33. We have read the summing up. It is a model of clarity and care. The proposed grounds of appeal have reduced to two which are relied on against the backdrop of a general submission that, in essence, the conviction of Caswell could not survive the acquittals of Kelly, Kelly and Hearn. Mr Anders submits that the meeting at the pub in Winchelsea on 1st March was not, on the jury's verdicts, part of the conspiracy, contrary to the Crown's contention. He submits that the jury were clearly unpersuaded that the events of 1st March were relevant or even connected to the alleged agreement. He went on to argue (notwithstanding the fact that they had considered the meeting irrelevant) that the jury would have been prejudiced to a high degree by the evidence introduced into the case about the meeting and other events on that day (Ellis's arrangement of the gun in particular). In his written grounds he submitted that the judge had failed to deal with this issue in her summing up and identified "an absence of an essential prohibitory direction." It was not easy to see what it was the judge should have said by way of "prohibitory direction" and it was not something that Mr Anders pursued with any enthusiasm in oral submissions. It was not something which was raised at trial. It was not necessary.

34. We note that at paragraph 78 when the judge was dealing with the prosecution case, she refers to the fact that the issue of the gun may be central. She summed up the evidence of the exchange of messages between lines 122 and 141 "which were about killing Wise and M and that it will be done by Kenny and Hearn. Caswell and Ellis say this was joke but met Kenny and Anthony Hearn the next day and following the meeting Leo Ellis arranges the supply of something to Anthony Hearn via Winchester". She then said "If you're sure it was the gun which was recovered a short time later by the police from Mr Hearn's car, you may think this is powerful evidence, not only of the existence of the plan but, in fact, the start of it being put into action. If you're not sure it was the gun, then you will need to consider whether the remainder of the evidence makes you sure that there was any actual conspiracy to kill Kevin Wise or 'M'". She had earlier directed the jury that what Caswell and Ellis had said between themselves about the Kellys and Hearn was not evidence against them.

35. In the event the jury were sure it was the gun and convicted Winchester accordingly.

36. The fundamental difficulty with this ground is that the jury did not reject the Crown's case that the events on the 1st March were connected to the alleged conspiracy to commit murder. They were not sure that the other three defendants were involved in the conspiracy, but it does not follow that the events of 1st March were unconnected. On the contrary, as the judge was to say later in her sentencing remarks, the fact that Ellis arranged for the provision to Hearn, through Winchester, of a semi-automatic machine gun which was ready for use, was plainly connected to the conspiracy between Ellis and Caswell. The fact that Hearn was acquitted of the conspiracy did not preclude that finding.

37. This ground is not arguable.

38. The second ground is a complaint about the judge's failure to sum up the defence in two respects. The first that she failed adequately to remind the jury of the fact that the applicant had said that the debt was not his responsibility which would have made it less likely that the purported agreement to murder was genuine and the second that she failed adequately to remind the jury that the applicant was aware of the plan to kidnap Ellis, which made it unlikely that he would have entered into a conspiracy with him.

39. The jury convicted the applicant of serious drugs offences so there was nothing in the point that the debt was not his responsibility. But in any event the judge could not have done more to remind the jury of his defence – repeatedly and in detail beginning very early in the summing up at page 7 "Both defendants say Mr Caswell's only involvement in drugs was to purchase some cocaine for personal use from Mr Ellis occasionally and that he was simply helping mediate between Mr Ellis and the people to whom Ellis owed a lot of money" and later at H "they both say they had been involved in conversations about the debt Mr Ellis owed and which Mr Caswell was helping mediate…and Mr Caswell said on the 1st March part of his reason for meeting Mr Ellis was so that he could have him in a specific place for Ted to have him kidnapped."

40. The judge returned to the defence at page 12 E-H. There is no need to repeat it on this application. There is further reference to it at 17B. His evidence is comprehensively dealt with from page 56 onwards. There is no complaint about this. In the course of his evidence he said that all the contact he had with Ted about kidnapping Ellis was on a phone which had not been found. He later said he had thrown it away. He had retained the PGP phone. He was embarrassed to have set his mate up for a kidnap when he had a reputation for being trustworthy. That was why he had not mentioned it until the second addendum to his defence statement. At page 63 the judge summarised his evidence again and included all the defence points made by Mr Anders in some detail.

41. The summing up was impeccable. This ground is not arguable either. The renewed application is dismissed.

Appeals against sentence
Caswell and Ellis

42. Each advances a single ground of appeal directed to the concurrent sentences of life imprisonment, with minimum terms of 14 years, imposed on Counts 1 and 2. Neither seeks to appeal the sentences imposed on other counts.

43. The judge did not have pre-sentence reports. In our judgment, given the seriousness of these offences and the fact that the judge had presided over a lengthy trial, in which each gave evidence, such a report was unnecessary for the purpose of assessing dangerousness, and we did not require one for the purposes of this appeal.

44. Caswell was 43 at the date of sentence. He had 10 convictions for 18 offences, spanning 1995 to 2016. These included two offences of possessing with intent to supply Class A drugs (in 2002 and 2016), a less serious conviction for possession of Class A drugs in 2015, and in July 2016 a conviction for assault occasioning actual bodily harm and section 20 wounding, for which he received suspended sentences.

45. Ellis was 24 at the date of sentence. He had no previous convictions.

46. In her clear and detailed sentencing remarks, HHJ Laing QC emphasised the level and sophistication of the appellants' drug-dealing. She did not accept the evidence that the appellants were remorseful or had been unwittingly dragged into this activity. In the judge's estimation, their debts were becoming "unmanageable" by late February 2016 and this formed the backdrop to the murder conspiracies.

47. The judge rejected entirely the submission that these conspiracies were "a fleeting idea" that took no real form. In her view, there was a clear and settled plan between them to murder Wise and "M". Both appellants were taking steps to further it until the moment they were arrested by police. The judge recited the evidence we have summarised and rejected the proposition that the early morning email messages on 29 February amounted to no more than "drunken banter". She summarised the key surveillance evidence and highlighted the fact that on 1st March Ellis arranged the transfer of the firearm with ammunition and silencer. Although Caswell was not indicted for a firearms offence on a joint enterprise basis, the judge drew the inference that he was fully aware that this was the plan being put into action. The evidence was that Ellis owned two Tec-9 firearms and had paid £7,500 for them.

48. The judge stated that she did not go behind the verdicts of the jury in relation to those who had been acquitted, but was quite satisfied that both appellants had details of people who killed for a living and were in the process of ensuring that a fully loaded and silenced firearm was available for such killings to take place. Further steps were taken in pursuit of the conspiracies after the disruption notices had been served and continued during the afternoon of 1st March.

49. In the judge's assessment, both appellants were ruthless and dangerous men who showed no remorse. She applied the guidance of the Court of Appeal, Criminal Division (Lord Thomas CJ giving the judgment of the Court) in *R v Burinskas* [2014] EWCA Crim 334. In her view, the central question here was whether the seriousness of these offences was such as to justify a life sentence. In answering that question, the judge identified the key salient features of these cases: parallel conspiracies to murder

two people with the motive being to ease the pressure being placed on them to repay drug-related debts; the intended use of a firearm and professional killers (and in Ellis's case, the ability to provide the firearm and ammunition); the background of very serious and persistent Class A drug dealing; and the persistence in the conspiracies despite the service of the disruption notices.

50. The judge concluded in both cases, which she took care to address separately, that the conspiracies to murder were so serious that a life sentence was justified.

51. In reaching the minimum term the judge referred to the Sentencing Guidelines Council's Attempted Murder Guideline. As she observed, paragraph 5 of Schedule 21 of the CJA 2003 is not directly applicable, and there is no relevant guideline for conspiracy to murder, still less in circumstances where the substantive offence has not been committed. These were not offences of attempted murder, the preparatory actions not being sufficiently proximate to the completed offence, but the gravity of the conspiracy charge required to be reflected in the sentence. The Attempted Murder guideline is not directly applicable but the judge was right to use it as a guide and there is rightly no complaint about it from either appellant.

52. The judge considered that had this been a single conspiracy, the sentencing range would have been 12-20 years' imprisonment. Given that the court was dealing with two, the adjusted starting point, ignoring the other conspiracies etc, was 18 years. In relation to Ellis, the overall sentence in relation to all the drugs counts, taking into account the guilty pleas, would have been 16 years. Totality brought the actual and notional determinate sentences down to 15 and 13 years' imprisonment respectively. The aggregate fell to be halved to reflect the fact that a minimum term was being fixed for the purposes of the life sentence imposed under s.225(2) of the CJA 2003.

53. In Caswell's case, the judge's conclusion was the same but her route to it was slightly different. There were fewer drugs' conspiracies to be taken into account and no firearms offence. On the other hand, Caswell was considerably older and his criminal convictions amounted to a significant aggravating factor.

54. In writing, neither counsel sought to criticise the length of the minimum term. Towards the end of his oral submissions Mr Anders suggested, in answer to a question from the court, that the term was, after all, too long. He did not develop the submission further. Mr Harvey did not seek to criticise the minimum term. In our judgment he was right not to do so. It is not even arguably wrong.

55. We turn to the central plank of the appeal in both cases, that the judge erred in concluding for the purposes of s.225(2)(b) of the CJA 2003 that the offences were so serious as to justify the imposition of life sentences.

56. Reduced to their essential elements, the submissions of Mr Anders on behalf of the appellant Caswell – as set out in detail in writing and developed orally – were to the effect that the jury's acquittal of Hearn and the Kelly brothers on Counts 1 and 2 meant that the only fair and safe way to evaluate the conspiracy was that it was short-lived and did not endure beyond 00:25 on 29 February. Thus, so the submission runs, the transfer of the weapon on 1st March could not have been in furtherance of any conspiracy to murder Wise and "M" because Hearn was not a party to it. Any subsequent exchanges between Ellis and Caswell were not in actual furtherance of the

plot. In addition, neither Wise nor "M" were anywhere near the Sussex area on 1st March. Indeed, "M" was never positively identified by the Crown in any event.

57. Mr Harvey's submissions on behalf of Ellis were to similar effect. If, so the submission runs, Hearn and the Kelly brothers are removed from the conspiracy, it must follow that the events of 1 March cannot be connected to the exchange of emails on 29 February. The conclusion must be that the appellants did not involve anyone else in the conspiracy and there is no evidence that they concluded essential details about who would carry out the agreement or how the perpetrators would be remunerated. Additionally, it is said that there is no evidence that the murder of Wise and "M" would have extinguished the indebtedness. Mr Harvey further submitted that Caswell's unchallenged evidence was to the effect that he was a longstanding friend of Wise and that he knew and was on friendly terms with "M" whom he knew lived in Spain.

Discussion

58. There can be no sensible debate as to the applicable legal test governing the determination mandated by s.225(2)(b) of the CJA 2003. The position has been definitively expounded in *Burinskas* at paragraph 22. In short, the sentencing judge must consider:

> "(i) the seriousness of the offence itself, on its own or with other offences associated with it in accordance with the provisions of s.143(1). This is always a matter for the judgment of the court.
>
> (ii) the defendant's previous convictions (in accordance with s.143(2)).
>
> (iii) the level of danger to the public posed by the defendant and whether there is a reliable estimate of the length of time he will remain a danger.
>
> (iv) the available alternative sentences."

59. Our attention was also drawn to the decision of the Court of Appeal in *Liverpool and Bradshaw v R* [2014] EWCA Crim 1001, but in our view, this does not take the matter any further.

60. On analysis, the appellants' submissions advance the case in two slightly different ways, both rooted in the contention that the judge was bound by the jury's verdict; The first is that this was a short-lived conspiracy which effectively came to an end after the last early morning email timed at 00:25 on 29 February 2016. The second is that even if the conspiracy did not come to an end, the appellants did not take any effective steps in furtherance of it.

61. The jury were not satisfied so that they were sure that the three co-defendants were party to conspiracies to murder Wise and "M". Although Kenny [Kelly] was expressly referred to in email communications, this was not admissible evidence against him. The jury clearly had the evidence bearing on the meeting in Winchelsea

at 15:00 on 1st March, as well as the subsequent dropping off of the weapon, but in their estimation this was insufficient to discharge the criminal standard of proof in respect of the involvement of the three co-defendants.

62. In our judgment, there was clear evidence that the conspiracies remained extant after the emails were sent. There was significant, incriminating contact between Ellis and Caswell on several occasions subsequently on 29 February. The judge was entitled to conclude that this contact was in furtherance of the conspiracy and that the appellants had lied about that. The submission that the conspiracy had somehow come to an end at 00:25 on 29 February is unsustainable.

63. As for the second argument, the considerable contact between the appellants to which we have referred demonstrates that they were endeavouring to identify a professional killer who would carry out these murders in a way which could not be linked to them. Whereas it is correct to state that the appellants had not discussed details such as how this individual or these individuals would be paid, or how he or they would seek out the intended targets, the judge was certainly entitled to conclude that on 29 February the appellants were continuing to take serious, purposeful steps in the direction of the desired endpoint.

64. On 1 March, subject to the jury's acquittal of the three co-defendants, it is clear that the appellants were continuing to take active steps to further the conspiracy. These included the meeting at Winchelsea at 15:00, and the recruitment of Winchester by Ellis to transfer the fully loaded and silenced firearm to the motor vehicle under the control of Hearn. As we have said, Ellis and Hearn pleaded guilty to firearms offences and Winchester was convicted. In our judgment, it does not follow from the fact that Hearn was acquitted on Counts 1 and 2 that the transfer of the weapon was not in furtherance of a conspiracy to which Ellis continued to be a party. It is possible that the three co-defendants would be recruited to the conspiracy later; it is also possible that Hearn was retaining the weapon for onward transmission but on any view the judge was entitled to be sure that the transfer of the weapon was an active step in furtherance of the conspiracy involving only these appellants.

65. The commission of the substantive offence was not imminent, but the judge was entitled to conclude that these plans were frustrated only by the intervention of the police.

66. An important part of the judge's assessment of seriousness was her conclusion that these conspiracies came into being against the background of very serious Class A drug-dealing. The nexus between the two sets of conspiracies was firmly established for this clear and obvious reason: by 29 February the appellants' drug-related indebtedness had become, as the judge put it, "unmanageable", the first tranche of £150K was due (and there was no evidence that it could be paid), and it could be no coincidence that on that very morning the appellants were discussing a rather different manner of apparently solving the problem.

67. In approaching the exercise laid down in paragraph 22 of *Burinskas*, it is clear in our judgment that the judge addressed the four relevant considerations in a careful and balanced way. Overall, she reached a conclusion which led to sentences which were neither wrong in principle nor manifestly excessive. It follows that these appeals must be dismissed.

Gardiner

68. This is a renewed application for permission to appeal against sentence. We are grateful to Mr Surtees-Jones who appeared pro-bono. He represented the applicant at trial and supplied a detailed advice and grounds of appeal which we have read. We have also read the psychiatric report of Dr Ley (dated 13 July 2017) and letters from the applicant's parents and other close friends, all of which were before the sentencing judge.

69. Gardiner is now 42. He has previous convictions for possession of cocaine, possession of an imitation firearm and of a prohibited weapon (CS spray) in 2007 for which he received a suspended sentence. This sentence was activated later the same year when the applicant was convicted of driving whilst disqualified. In 2009, he was sentenced to a total of 4 years' imprisonment at the Lewes Crown Court for having an article with a blade or point, possession of cannabis and amphetamine and possession of cocaine with intent to supply.

70. In passing sentence, the judge expressed her dismay that the applicant was "…back before the court for three separate offences". She inferred from the repeated involvement of the applicant in the offences represented on the indictment that he was "a trusted member of this group and therefore within the sentencing guidelines, you were operating at the top end of the lesser category or at the lower end of the significant category at the very least". Mr Surtees-Jones's interpretation of these remarks is that the judge failed to identify which category she believed the applicant fell into when passing sentence. We disagree. We refer to the *Drug Offences Definitive Guideline*. So far as harm is concerned, the weight of the three consignments were all in excess of 1kg (and at over 70% purity, we also observe) which puts each offence into Category 2. Turning to culpability, the categorisation of a significant role produces a range between 6 ½ years up to 10 years, with a starting point of 8 years' custody. Taking into account the applicant's previous conviction for possession with intent to supply of cocaine and the cumulative total of drugs involved, the applicant could expect a sentence approaching 10 years before taking into account his personal mitigation and then credit for plea on counts 6 and 7.

71. There was evidence of the applicant's mental health difficulties before the court. Some of them may have been exacerbated by a road accident in which he was involved in 2003 (well before any of these offences). In addition, there was evidence that the applicant was suffering from a recurrent depressive disorder at the time of Dr Ley's assessment before the trial commenced in November 2017. We are satisfied that the judge gave proper weight to these factors.

72. We have heard submissions as to the credit for plea applied by the judge. Whilst she did not express this in terms of a firm percentage, the sentence of nine years after a trial on count 8 was reduced to 6 years for the two counts to which Guilty Pleas were entered after the first opportunity. This represents a discount of a full one third which may be considered generous given the time the pleas were entered. In our judgment, the judge's provisional sentence before credit for plea of nine years is well within the range open to her having heard the trial and having taken into account – in so far as she thought appropriate – the impact on the applicant's family and the enduring diagnosis of depressive illness. In all of the circumstances, we cannot accept that the

sentences passed were even arguably manifestly excessive or wrong in principle. Accordingly, this application is refused.