Neutral Citation Number: [2023] EWCA Crim 1010

Case No: CA-202200845-B1; CA-202201616-B1; CA-202200866-B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM NEWCASTLE CROWN COURT
His Honour Judge Gittens
T20217163 & T20217226

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/09/2023

Before :

LADY JUSTICE MACUR DBE
MR JUSTICE GARNHAM
and
MRS JUSTICE THORNTON DBE

- -

Between :

Regina	**Respondent**
- and -	
John Allcock **Carl McAlindon**	**Appellants**

- -
- -

Mr Matthew Bean (instructed by **Crown Prosecution Service**) for the **Respondent**
Mr Robin Patton (instructed by **Forresters and Co.**) for the **1st Appellant**
Mr Peter Eguae (instructed by **Mckenzie Bell Solicitors**) for the **2nd Appellant**

Hearing dates : 27 July 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 5 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone

who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Note - include here the details of any specific reporting restrictions that have been made by the court. This will have been identified in the Criminal Appeal Office Summary under the Reporting Restrictions heading or from the Court Order. The wording of any reporting restriction must appear in RED TEXT.

Lady Justice Macur DBE :

1. On 18th February 2022, John Allcock, ("JA") and Carl McAlindon ("CM") were convicted of Conspiracy to Supply Class A drugs (Cocaine) and Conspiracy to supply Class B Drugs (Amphetamine) contrary to s.1(1) Criminal Law Act 1977 and s.4(3) Misuse of Drugs Act 1971. JA was also convicted of Converting, Transferring, Removing from England, Wales, Scotland, or Northern Ireland Criminal Property contrary to s.327(1)(c), (d), (e) Proceeds of Crime Act 2002. CM was also convicted of two offences of Possessing Criminal Property contrary to s.329(1)(c) Proceeds of Crime Act 2002.

2. On 29th April 2022 JA was sentenced to a total of 21 years imprisonment and CM was sentenced to a total of 13 years imprisonment.

3. The trial took place between September 2021 and February 2022. This is the appeal against conviction by both JA and CM, and appeal against sentence by JA.

4. There were other defendants. Paul Marrow ("PM") pleaded guilty to conspiracy to supply class A drugs. Two others, who are referred to in one of the grounds of appeal against conviction which alleges inconsistent verdicts, are Michael Vassallo ("MV") who was acquitted of conspiracy to supply class A drugs and Mark Hiscock ("MH"), who was acquitted of conspiracy to supply class B drugs. Baber Azim ("BA") pleaded guilty to offences of supply and possession with intent to supply cocaine.

Background Facts

5. During the course of 2017 and 2018 a specialist police unit, the North East Regional Special Operations Unit, conducted an investigation into two organised crime groups operating in the South Tyneside and Merseyside areas, believed to be involved in the wholesale supply of cocaine and amphetamine. Geoffrey Caine was identified as being the leader of the Merseyside group. JA was identified as the leader of the Tyneside group, with CM and other co-accused acting under him.

6. Police placed suspected individuals under surveillance and gathered 'telephone evidence'. On three occasions the police stopped vehicles being driven by the appellants' co-defendants and found drugs and cash. On 15th September, PM was travelling away from the 'transmitting station', a large warehouse in which drugs paraphernalia was subsequently found, when the police stopped him. Almost a kilo of very high purity cocaine was found secreted in a compartment under the van's flooring. On 17th November MH was stopped by police. Approximately £50,000 in cash was found underneath the base of his car boot. On 12th January another co-accused was stopped by the police. From his car were recovered £1,400 in cash, and a block of cocaine, 81% purity, worth about £40,000 to £50,000 at wholesale value.

7. The Prosecution relied upon the : (i) guilty pleas of others in respect of the conspiracies; (ii) seizures of significant quantities of high purity cocaine from two of the co-defendants coupled with the pattern of phone and cell site evidence linking them on the day of arrest with the appellants, either directly or indirectly; (iii) seizure of approximately £50,000 cash from another co-defendant coupled with the observation evidence of both appellants in his company in the days preceding his arrest and their actions following his arrest; (iv) both appellants' contact with MV; (v)

observation evidence of JA in the company of Caine and MH at the 'transmitting station'; (vi) items recovered from the search conducted at the 'transmitting station' including the finding of JA's DNA on a contaminated body suit which had been worn near to the process of mixing drugs; (vii) JA's previous conviction from 2012 for conspiracy to supply amphetamine; (viii) EncroChat material which derived from a French police investigation in 2020 in which discussions appeared to relate to the wholesale supply of drugs and the use of various methods to avoid detection when using telephone communications; (ix) financial evidence of wealth in excess of JA's declared income; (xi) CM's possession of a 'spoofer' phone and the contact with other conspirators by that phone; (xii) CM's cash deposit of £10,000 and the significant sum of cash and collectible coins recovered upon his arrest and absent evidence of sufficient legitimate income to account for the sum; and (xiii) his failure to answer questions in interview.

Trial

8. The case put on JA's behalf accepted the use of two contract mobile phones in his own name, but disputed possession or use of other numbers attributed to him, which included one with EncroChat encryption and another that was said to be a spoofing device. CM in evidence accepted the use of several phones attributed to him but disputed the use of a phone characterised by the prosecution as another 'spoofing' phone. They said their contact with each other and other co-defendants were innocent. There were limitations on the circumstantial evidence as to the attribution of phones and the generalised nature of cell site evidence. The spoofer phone (see (xi) above) could not reliably be attributed to CM, although recovered from the bedroom which he occupied in his mother's home.

9. Further, the defence challenged the integrity of parts of the police investigation.

10. A prosecution expert in computer and mobile technology, Angus Marshall, gave evidence in respect of one of the phones attributed to JA, possession of which he disputed. Angus Marshall had liaised with the prosecution telecoms analyst, Darren Irving. The defence relied upon a disclosed email from Darren Irving to Angus Marshall as indicating undue influence in that he invited Angus Marshall to consider re-drafting his report and requested that the email he sent be deleted and not be referred to in evidence.

11. Further, Darren Irving reported that no download had been obtained from one of the numbers attributed to CM, notwithstanding the fact that a check on the police computer system showed that the download had been opened on his password-protected workstation for a short time on one day in December 2019. Thereafter, in December 2021 the defence were provided with a download from the phone's memory consisting of approximately 27,000 pages. A review of the material confirmed that there was no material on the phone which related to the allegations.

12. Evidence from the 'transmitting station' was said to be unreliable. A search warrant for the premises applied for on 24th May was not executed until 31st May. There had been no further surveillance of the premises during this period.

13. A DS Fitzpatrick was initially asked to review the video of the search, and the recoveries, and the findings of the scientific experts and provide expert opinion.

Having submitted his report dated 01/02/19 he was suspended from duty pending an investigation of alleged misconduct in public office in relation to other matters. DC Malcolm replaced DS Fitzpatrick and should have completed his own review. Instead, he produced a report dated 26th August which was wholly based upon or copied from, the earlier work of DS Fitzpatrick. Malcolm only viewed the video the day before he was due to give evidence at trial. Furthermore, his superior, DS Edgar, had previously purported to peer review the statement of DS Fitzpatrick without being able to access the material upon which it had been based. In turn DC Griffiths peer reviewed Malcolm's reports without seeing the search video. Matters only came to light when the defence were provided with disclosure of DS Fitzpatrick's reports.

14. The defence had originally requested disclosure of DS Fitzpatrick's statement on 28/09/21. DC Malcolm gave evidence on 26/10/21. The statement was disclosed to the defence on 08/12/21 and two days later the prosecution also disclosed that Fitzpatrick had been suspended from duty.

15. The funds or property that they may have dealt with (see ix) and (xii) in [7] above were not the proceeds of crime but were from entirely legitimate earnings from employment or business.

Bad character application re EncroChat

16. Counsel for both appellants objected to the admissibility of the material on the grounds that there had been either no or incomplete service of the raw data underlying the messages and late service of continuity evidence to support it, making it impossible within the confines of the trial window to affect a proper analysis or to instruct an expert.

17. The prosecution accepted that the material was served substantially late and that some of the defence counsel were initially unable to access the material on DCS. That situation, once realised, was remedied overnight allowing the defence an opportunity to grasp the nature of the application.

18. The Judge ruled that the late service of the application and supporting evidence did not prevent sufficient time for proper consideration of the material by the defence team and any nominated expert by the likely time the relevant evidence would be reached and did not prevent further analysis and / or reception of evidence in response, by the close of evidence.

19. The other delays that had occurred in the case had provided substantial opportunity to undertake further work, take instructions, and make necessary applications to the Court. There may have been some limited prejudice caused by the late service but it did not create an unmanageable or substantially prejudicial situation for JA. The delay was not fatal to the application being considered on its merits. It did not prevent cross-examination of the relevant officer about the delay and it did not prevent an expert being instructed assist in the ways outlined by Counsel for JA.

20. The authorities established that the prosecution need not serve every last piece of underlying material, only such as was necessary to underpin that which they sought to establish from the date.

21. The material could demonstrate: (i) attribution of one of the two EncroChat handles to JA; (ii) a propensity for him to be involved in and discuss large scale drug supply at a time subsequent to, but still sufficiently proximate to, the indicted conspiracies; (iii) a propensity to use EncroChat devices and use obfuscation techniques. The jury would be directed that if they could not be sure of (i) then they must ignore the evidence entirely. If it was established that JA was 'using the relevant handle then the material was capable of assisting in rebutting his defence that his contact with Caine and other conspirators were coincidental and innocent. It would be solely for the jury as to whether the material bore the interpretation suggested by the prosecution.

22. The satellite litigation of those issues was not such as would take an undue periods of time or unbalance the jury's deliberations. The fact that there may be a significant quantity of other evidence generally and in relation to the propensities referred to above did not preclude the admission of other such relevant evidence. The concern of the co-accused about prejudice by association could be resolved by clear direction to the jury that the evidence had no relevance whatsoever to their cases and by editing of the material.

23. The admission of the evidence would not have such an affect upon the fairness of proceedings, as against either JA or CM, and therefore it would not be excluded under s.78 Police and Criminal Evidence Act (PACE) 1984.

Ruling on CM's submission of no case to answer

24. Counsel for CM submitted that there was insufficient evidence for a jury to draw the proper inference that the spoofer phone could be attributed to the CM and, as there was no further evidence to demonstrate his knowing participation in the conspiracies.

25. The Judge ruled that the attribution of the phone was a matter for the jury. There was evidence linking CM with the phone. Furthermore, the prosecution was not solely reliant upon linking that phone to the appellant. There was sufficient evidence for a jury to properly consider the prosecution case against the appellant on all four counts. It would be a matter for the jury as to what they make of the respective submissions about inferences that can or cannot be drawn from the material.

Jury Issues

26. The jury were sworn on 28th September 2021 for an estimated 12-week trial. The trial overran. By January 2022 the jury had been reduced to eleven jurors due to one juror having a long-standing holiday booked. During the course of the trial one juror, referred to as Juror 6, experienced significant health difficulties that has led to time being lost. On 19th January he phoned in sick. On that same day the jury, via the foreman, sent a note expressing their concern about the trial overrunning and the toll it was taking on their lives. The letter indicated: "We feel the best course of action is now to continue as a jury panel of 10…", "we feel that Juror 6 has a high sense of public duty and that his desperate to complete his jury service despite obvious and deteriorating personal health"; and "this represents as mood change for the panel, who have been keen for juror 6 to carry on".

27. On 20th January Juror 6 returned to Court but it was agreed by all parties that Juror 6 should be discharged. The judge agreed and reluctantly discharged juror 6.

28. Subsequently that day, one juror, indicated he had not agreed to the contents of the letter and was expressing anger at his fellow jurors. The Judge reminded the jury about the need to work together to reach a conclusion in accordance with their oaths and were told that they would be asked on the following day whether they felt able to do so. On 21st the juror who had indicated his disagreement with the note indicated that he would be able to work with his fellow jurors. A questionnaire for the jury was thereafter drawn up by the parties and the Judge and in response to which all ten remaining jurors unequivocally stated that they were able to work collectively as part of the whole group in their deliberations and remain faithful to their oaths.

29. The jury retired on the afternoon of 15th February. In the late afternoon of 16th February, when the judge wished to discharge the jury for the day, he was informed that one of the jurors was upset and did not want to come into court, although subsequently she did. On 17th February the Judge invited submissions and subsequently provided guidance to the jury showing respect for other's opinions.

30. There was no application to discharge the jury by counsel for any defendant at any time.

Grounds of Appeal

31. JA pursues ten grounds of appeal against conviction, which may be conveniently grouped under the headings: jury issues; misconduct in police investigation; disclosure failure; and legal misdirection. JA is represented by Mr Patton.

32. CM pursues eight grounds of appeal, some of which mirror those of JA, and which may be conveniently grouped under the headings: legal misdirection; inconsistent verdicts; wrongful admission of bad character evidence against JA; rejection of submission of no case to answer; disclosure failure; and abuse of process related to police misconduct. CM is represented by Mr Eguae.

33. The prosecution have filed a Respondent's Notice in each appeal. The prosecution is represented by Mr Bean.

Discussion:

Jury Issues

34. We have indicated the basis of the 'jury issue' in paragraphs [26] to [30] above. We can deal with the grounds of appeal which relate to this matter in very short order. We are in no doubt from the description given by Mr Patton that Juror 6 was demonstrably unwell on occasions during the trial. There can be no issue that, even if the trial had not been considerably overrunning its time estimate, that he was rightly discharged for his own welfare, let alone the efficacy of the trial process.

35. The criticism of the contents of the jury note, which inaccurately suggested that the entire jury considered Juror 6 to be compromised, is disproportionate to the facts ascertained on further inquiry. Specifically, Juror 5 was not suggesting that other members of the jury were seeking Juror 6' removal for nefarious purposes. The judge's management of the jury situation was sensitive and appropriate.

36. The part of the transcript which deals with the reported upset of Juror 12 would again indicate that the relevant ground of appeal elevates this matter unduly. The report of the usher was apparently not borne out by the observations of Juror 12's demeanour when she did come into court. It is speculative to assume that she felt "under pressure from other jurors". The judge's guidance the following morning was well pitched and explicit.

37. Furthermore, we iterate, no application was made to discharge the jury at any time by any counsel. This indicates to us that the issues were not felt by counsel at the time to compromise the integrity of the trial. We reject Mr Patton's submission to the effect that either he knew he would be a lone voice, or else he knew his submission would not succeed. The trial process is not to be treated as a rehearsal, nor is an appeal to this Court to be regarded as a second bite at the cherry.

38. The assertion that the jury reached inconsistent verdicts in relation to JA and CM is based upon the asserted lack of cogency in the circumstantial evidence and the jury verdicts returned in respect of MV and MH. We deal with the judge's asserted error in refusing the submission of no case to answer made on behalf of CM below, but note that no such submission was made as regards JA. This was entirely realistic. In paragraph [7] we deal with the nature of the prosecution case against JA and CM. The cogency of the evidence having regard to the defence challenge to the reliability of phone number attribution, the integrity of the search of the 'transmitting station' and the identification of the proceeds of crime were for the jury to decide in the context of the burden and standard of proof.

39. The verdicts returned in relation to MV and MH will only be inconsistent with those returned in the case of JA and CM if the evidence against each defendant was the same. It was not. Both Mr Patton and Mr Eguae highlight that evidence upon which the prosecution relied in relation to JA and CM which equally applied to MV and MH, for example that MH's DNA was identified upon examination of a protective suit within the 'transmitting station'. However, they fail to address the several other aspects of the evidence against JA and CM. Significantly, as indicated above, there was evidence to support the link between JA and PM, who pleaded guilty to the conspiracy, and evidence that the latter had made several trips to the 'transmitting station' after contact with JA. There was evidence to link JA and CM to BA who pleaded guilty to possession with intent to supply cocaine. The surveillance and telephone evidence was different. The observed association between JA and CM was different in frequency and nature. Notably, no counsel submitted that the judge should direct the jury that the verdicts in relation to all defendants should be the same. (See: *Longman and Cribben (1981) 72 CR. App. R. 121*).

Misconduct in police investigation

40. The first matter predominantly concerns the actions of DS Malcolm to which we refer in paragraphs [13] and [14] above. Mr Patton and Mr Eguae submit that the taint runs deeper and involves the exhibits officer, DC Walledge who enabled DS Malcolm to view the video on the eve of him giving evidence and DS Edgar who was said to have peer reviewed the initial report of DS Fitzpatrick although he could not have seen the video footage, similarly DS Griffiths who purported to peer review the report of DS Malcolm.

41. DS Walledge was cross examined before the jury. He denied that he was aware that DS Malcolm had not previously seen the video and therefore could not have alerted the prosecution to this fact. Whilst DS Edgar and DS Griffiths' claim of peer review may well have been exposed as inaccurate, if not fraudulent, we fail to see that this advances the appeal of either JA or CM or is evidence of wholescale corruption of the police investigation. DS Fitzpatrick's report was ostensibly abandoned. The prosecution did not seek to defend DS Malcolm's actions on the basis that DS Fitzpatrick's report was accurate and thereby to seek to excuse the plagiarism. They recalled DS Malcolm, without notice to him of the reason why, to be cross examined on the point by Mr Patton and Mr Eguae which exposed his professional misconduct. We do not perceive the actions of DC Walledge as inherently suspicious or indicative of a conspiracy with DS Malcolm to deceive. There is no obvious reason why an exhibits officer should refuse a seemingly reasonable request to refresh his memory from exhibited body cam video footage.

42. It is entirely regrettable that this aspect of the case was further damaged by late disclosure by the prosecution of the reports of DS Fitzpatrick. However, there is no evidence to suggest this failure was deliberate or perverse; once disclosure was made, there was no hindrance to the recall and thorough cross examination of DS Malcolm. Neither Mr Patton nor Mr Eguae submitted that what they describe as "police corruption" amounted to an abuse of process which rendered it impossible for JA and CM to receive a fair trial, or that to allow the trial to continue would be an affront to the public conscience, or that it was necessary to discharge the jury on these grounds. We repeat the comment in paragraph [37] above. Counsel who do not seek to challenge the trial process at the time cannot realistically anticipate that this Court will entertain subsequent challenge unless fresh evidence reveals a different scenario to that which objectively existed in the court below.

43. DS Malcolm's reprehensible behaviour was legitimately and, we have no doubt, thoroughly exposed before the jury. Further, and for completeness, we note the way the judge summed up DS Malcolm's evidence to the jury on this point in terms that, he had "committed police discipline regulations breaches and he may well have committed perjury…". The judge correctly directed the jury that it was a matter for them whether they should disregard his opinion evidence entirely.

44. The next matter under this heading concerns the alleged actions of Darren Irving, a civilian analyst in seeking to influence Angus Marshall, an expert in telecommunications which we refer to in paragraphs [10] and [11] above. The prosecution take exception to the interpretation of the email traffic between the two men as indicating such a malign influence. However, it is unnecessary for this court to descent into this arena. Darren Irving and Angus Marshall were cross examined at length with a view to undermining the integrity of the opinions they expressed regarding call data, encryption and 'spoofer' phones. This is the purpose of cross examination. We find difficulty in these circumstances to understand what complaint is made that is relevant to this appeal.

45. We make similar comment as to the alleged mishandling of the investigation. The defence were able to challenge by cross examination what they referred to as the police deficiencies. This Court does not conduct a judicial review or 'oversight; of police conduct, unless it is in connection with abuse of process arguments, or directly linked to the safety of the conviction. The material and matters drawn to our attention

makes the challenge appear opportune, but upon close examination, it does not advance the appeal for the reasons we give above.

Disclosure failure

46. Mr Bean rightly concedes that the timing of the prosecution's disclosure of various materials was seriously amiss. He assured us, on our express request that he confirms the present position, that he had satisfied himself that all appropriate disclosure had been made, however belatedly within the trial process and that the ongoing duty of disclosure had been observed.

47. We are in no doubt that the disclosure process was unnecessarily piecemeal and would have added to the delay in concluding the trial within the time estimate and added to the workload of defence counsel. It resounds to the discredit of the prosecution, but this does not of itself lead to the conclusion that the defence were placed in an irredeemable position in representing the best interests of the appellants. We have already dealt with the matter concerning DS Fitzpatrick, DS Malcom et al. and tangentially in respect of the emails between Darren Irving and Angus Marshall above. That is, this late disclosure was, fortunately, more than adequately accommodated within the trial process. Realistically, there is no complaint that the judge's summing up failed to alert the jury to the defence case in these matters.

48. A separate issue arises from the late service of application to adduce the 'EncroChat' material as evidence of JA's bad character, to which we refer in [16] to [23] above. Remarkably, this ground of appeal is advanced before us more vigorously on the part of CM.

49. The judge's ruling on this point is difficult to fault. He was satisfied that the late notice did not affect the fairness of the trial process. The judge was able to gauge the progress of the trial, could assess the likely time interval before the evidence would be reached and concluded that an expert could be instructed as appropriate. There had been discussions at the outset of the trial between himself, the prosecution and JA's team regarding the recent Court of Appeal authority (*R v A R v A, B, D and C [2021] EWCA Crim 128; 2021 2 WLR 1301 and R -v- A & Others EWCA Crim 1447 [reporting restricted])* on the admissibility of the EncroChat evidence. It was readily apparent from the material served in September 2020 that the material was potentially significant. However, it "became clear in argument that a strategic decision had been made by the Defence, on receipt of that initial material, to await full continuity evidence that render the evidence of the chats admissible; that unless and until it was served no real steps would be taken in preparation to deal with it, including the instruction of any expert, save for initial discussions and confirmation that the Defendant denied the attribution of the chats." The judge did not regard that such an approach was required or justified: "I do not accept that the Defence could simply await that further material before acting or say that, because the raw data had not been provided, the product could be ignored, as the clock ran down." We agree. As it was, the judge noted that Mr Patton "properly acknowledged that it may well have been possible for their nominated expert, who was assisting with a review of the other aspects of encrypted or obfuscation device evidence to be relied upon by the Prosecution in any event, to assist with what material she would need and to return her report to them in sufficient time, if instructed in timely fashion."

50. Consequently, Mr Eguae's submission that the prosecution should only be permitted to rely on an extract of the EncroChat material, if CM was able to verify, by way of analysing wider data, the accuracy of any such extract is unconvincing. The extract upon which the prosecution sought to rely was certainly probative of large-scale drug supply, the issue was whether the handle was rightly attributed to JA. We find no basis to conclude that the judge was unreasonable in the exercise of his discretion either to admit the evidence as evidence of bad character or to refuse to exclude the same pursuant to section78 PACE 1984. For the avoidance of doubt, the judge's direction to the jury regarding the evidence is unimpeachable both as regards the way it may be used against JA, and the fact that it could not be used against CM.

51. Mr Patton's complaint that the prosecution wrongly withheld the report of Professor Ross Anderson is challenged by Mr Bean. That is, he submits that the report provides opinion upon a matter of law on the operation of the Investigatory Powers Act 2016 and the admissibility of 'EncroChat' material obtained as part of Operation Venetie. JA at no time submitted that the 'EncroChat' material was inadmissible by operation of the Investigatory Powers Act 2016. He accepted that the matter was now governed by binding authority and the judge would be required to follow the rulings of the Court of Appeal. (See *R v A, B, D and C* and *R -v- A & Others Supra*.) We agree.

52. Mr Eguae has further complaint regarding the lack of disclosure regarding the download from CM's phone. See paragraph [11] above. The download was not listed on the unused schedule and was not disclosed until the 17 December. The download apparently amounted to over 27,000 pages of data dating back to 2015, including information relating to calls, messages, applications used, and Wi-Fi connections made. It is submitted that CM was prejudiced since his counsel was forced to assimilate it during the Christmas vacation and as the trial proceeded and was prevented from cross-examining "numerous prosecution witnesses in respect of its contents."

53. Mr Eguae has good reason to be disgruntled at late disclosure, and we have already commented adversely upon the prosecution deficiencies in this regard, however, we fail to see in what way CM was disadvantaged. The download was available 30 days before Darren Irving, who had indicated that it had not been obtained, gave evidence. He was appropriately challenged. There was no application to recall witnesses and CM, who gave evidence, did not refer to it.

Submission of no case to answer

54. We cross refer this topic to paragraphs [38] and [39] above. The application made on behalf of CM was decidedly ambitious. It centred upon the attribution of the spoofer phone which CM disputed. However, as the judge correctly identified, the case against CM was not dependent upon this evidence alone and in any event, there was evidence upon which the jury could conclude that the phone had rightly been attributed to CM. We agree with the judge that Mr Eguae's submissions were 'jury points'.

Misdirection

55. CM gave evidence that he had previous convictions for violence, and offences of possession of controlled drugs of class A, B and C between 2002 and 2020. In these

circumstances, Mr Eguae submits in writing that the judge was wrong not to give a modified good character direction in respect of CM in view of the absence of similar convictions and any recent convictions which would indicate a propensity to be involved in an organised crime group drugs conspiracy. However, he realistically conceded in oral submissions that this was a matter within the judge's discretion, and did not pursue the matter further. (See *Hunter (Nigel) & others [2015] EWCA Crim 631; [2015] 2 Cr. App. R. 9. [85]-[88]*). We find no error in the judge's approach on this issue.

56. Mr Eguae also challenges the judge's failure to direct the jury in relation to 'possession' of the spoofer phone. Mr Bean submits that such a direction was unnecessary and would be confusing to the jury. The principal issue concerning this phone were: (i) whether a spoofer sim had been fitted into the phone in September and October 2017 and, if so, (ii) whether CM had used this device at this time. The issue of who, if anyone was in possession of the phone in May 2018, when it was recovered by the police, was a secondary issue. The Judge gave a careful summary of the prosecution and defence cases in respect of the phone that identified the issues the jury had to determine.

57. We agree with Mr Bean that the direction which Mr Eguae contends for was unnecessary in the circumstances of this case. The reasons for the attribution of the spoofer phone to CM's use was but one issue for the jury to consider in determining their verdict in this regard. His use of the phone, rather its 'custody and control', was a matter of fact rather than a constituent legal element of the conspiracy.

58. Mr Patton also submits that the judge should have directed the jury that Perry Caine, Jaime Caine and Anthony Price were not co-conspirators, and their contact with JA could not have been in furtherance of the conspiracy. We do not see the point at issue in this ground having regard to the manner in which the judge summed up the evidence relating to these individuals: "you are entitled to consider the evidence in relation to those others named, their contacts and the suggested links in your deliberations but the fact that they are not named as co-conspirators means that you must do so with particular care because you should be focusing on whether the prosecution have established a conspiracy amongst themselves rather than with those that are not so named. And as I have already warned you, you must distinguish between acts and words done in furtherance of either conspiracy, if you are sure that they were, and those that are not such contact and acts and are just coincidental to them." That direction was entirely proper.

<u>Conclusion</u>

59. The trial was beset by multiple unforeseen problems but also avoidable difficulties. We have no doubt that the patience of judge, jury, trial counsel and defendants were tested to the limit. Mr Eguae, with some justification, used the term a 'chaotic landscape' to describe the evolving picture of police misconduct, asserted interference with expert witness and late disclosure. However, we note the obvious steady hand of the judge in keeping the trial fairly and squarely 'on the road'. The judge's jury management was impeccable. The overrun in the case time estimate meant that failures in timely disclosure were able to be accommodated without prejudice to the defendants. The ammunition provided by the disclosed materials was able to be deployed to its full effect before the jury. As we commented more than once during

the hearing of these appeals, we are not considering the situation where the issues have only just been discovered and comprise 'fresh' evidence.

60. We find no merit in any of the grounds of appeal. The appeals against conviction are dismissed.

Appeal against sentence

61. JA was 52 at the time of sentence. Of his previous 13 convictions, two were 'relevant' to the extant offences, namely Producing a Controlled Drug in 1986 and Conspiracy to Supply Amphetamine in 2012. The judge sentenced JA without a pre-sentence report. We have regard to s.33 Sentencing Act 2020, but agree that such a report was unnecessary and is not now necessary.

62. The grounds of appeal against sentence concede that the judge was entitled to conclude that the offending fell into category 1 and that it was aggravated by previous Class B conspiracy, but assert that "the sentence of 21 years was manifestly excessive and no allowance was given for his age, the effect on his dependants and totality". It is said the sentence was wrong in principle by reason of an unreasonable disparity in sentence, for CM was sentenced to 13 years for playing a significant role throughout the same conspiracy.

63. Granting permission to appeal, the single judge said: "The judge was entitled to form his own view of your role but it may be arguable that he placed you too high in the structure."

64. In his carefully structured sentencing remarks, the judge concluded that "this was a sophisticated enterprise. It was serious and organised crime" directly connected to the importer of the Class A drugs (Caine). "The totality of the case demonstrated long-term conspiracies to supply industrial quantities of those drugs on a commercial basis. Such was the arrogance and greed that the unlawful trade continued despite the setbacks of two deliveries being intercepted, and that was a significant feature of the case." The evidence able to be derived from the couriers showed the large scale transportation of cocaine across the country. Whilst the precise quantities of amphetamine were more difficult to assess, a good indication of the levels was the 15 kilograms of cutting agent seized from the 'transmitting station'. There was a commercial scale of amphetamine coming to the North-East via Caine. The judge determined the offences to fall within above Category 1 for both Class A and B drugs, but in respect of the Class A drugs it was substantially above the starting point of five kilos and was in the order of 20 kilos or more. Additionally, the conspiracies were over a protracted period of time. The criminal property, the subject of the other counts, was a product of this profitable illegal business warranting a proper reflection of the harmful nature of the underlying offending. The appellants were responsible for two types of drugs, although the judge bore in mind totality. He had some regard to JA's personal mitigation, although his criminal lifestyle had been a matter of personal choice. JA fell to be sentenced for his role as head of an organised crime group. He was in tight control of it. He directed and organised the buying and selling on the most serious commercial scale of the two drugs, with substantial direct links to those both above and below him in the supply chain. He was in close personal contact with Caine. JA gained, and had the expectation of gaining, substantially in a financial sense. He used a number of businesses as cover to appear legitimate and in order to

launder some of the proceeds. He clearly had a leading role in the organisation substantially above the range and starting point under Category 1 of the Guidelines. The sums and profits were substantial. Moreover, he had clear involvement and influence over the possession of sums by his co-accused and was involved in converting, transferring, and removing in and around the UK and abroad criminal proceeds at the very top end of Category 4 under the relevant Guideline. His culpability was the highest, Category A. His position was aggravated by the fact that he was a career criminal with a poor record. He clearly did not learn anything from the sentence of imprisonment he received in 2012 for his substantial involvement in the supply of amphetamine.

65. Mr Patton submits that the prosecution did not name Caine as close to, or effectively, the importer, for there was no evidence to do so. Also, it was difficult to assess the quantity of amphetamine involved in that conspiracy. He contends that the differential between the sentences of JA and CM is unwarranted and that insufficient weight was given to JA's personal mitigation.

Discussion

66. As the single judge said, the trial judge was entitled to reach his own conclusions on JA's role to the criminal standard of proof. He presided over a 22-week trial and we have no basis to disagree with the finding of fact he made. He was not bound by the way the prosecution led their case at trial. We agree with Mr Bean that the quantities of cocaine (all in kilo weights) that was being supplied by the crime group being operated by Geoffrey Caine to JA's crime group enabled the judge to legitimately describe Caine as "effectively" the importer.

67. Mr Patton realistically concedes that the judge was entitled to place the conspiracies in Category 1, leading role. The starting point for Category A drugs is 14 years with a range between 12 and 16 years. However, the sentencing guidelines state that: "where an operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the offender's role."

68. We agree with the judge that the sentence for count 1, as the lead sentence reflecting the additional offences together with JA's leading role called for a sentence higher than the upper range for a Category 1 A offence. We agree with the judge that JA's personal mitigation, deserved little credit in the circumstances.

69. The differential in CM's sentence is easily explicable by the nature of his role (significant), his fewer convictions, and the lesser financial gain. The difference in sentence is justified.

70. JA's sentence was condign to the circumstances as the judge found them to be. It was neither wrong in principle nor manifestly excessive. His appeal against sentence is dismissed.