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IN THE COURT OF APPEAL
CRIMINAL DIVISION



Case No: 2023/00132/A4, 2023/01263/A4
[2023] EWCA Crim 1613

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 28th November 2023

B e f o r e :

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE BRYAN

MRS JUSTICE HILL DBE

R E X

- v -

MATTHEW WHARLOW
TOBY POOLE

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

Mr T Schofield appeared on behalf of the Appellant Matthew Wharlow

Mr R Canning appeared on behalf of the Appellant Toby Poole

J U D G M E N T
(Approved)

Tuesday 28th November 2023

LORD JUSTICE HOLROYDE:

1. On 10th January 2023, in the Crown Court at Leicester, His Honour Judge Mooncey sentenced the two appellants, and more than 20 other men, for their respective roles in a large-scale drugs conspiracy. The appellant Matthew Wharlow had pleaded guilty on 23rd June 2022 to conspiracy to supply a controlled drug of Class A, namely cocaine. He was sentenced to ten months' imprisonment, which was ordered to run consecutively to a sentence which he was already serving. The appellant Toby Poole had pleaded guilty on 8th June 2021 to the same offence. He was sentenced to six years and eight months' imprisonment.

2. Each appellant now appeals against his sentence with the leave of the single judge.

3. Purely for convenience, and intending no disrespect, we shall refer to the appellants and others by their surnames only.

4. The broad facts of the case can be briefly summarised. The conspiracy period charged in the indictment ran from 1st March 2020 to 22nd September 2020. A group based in Leicester, some of whom used EncroChat devices, bought very large quantities of cocaine and sold it to other cocaine dealers. Those at the head of the group, including Julien, were responsible for buying and selling the cocaine, including the purchase of 20 kilograms of the drug in one transaction alone. Other co-conspirators arranged for the storage and distribution of the cocaine. Customers of the group, including McLeary, Arkate and Raja, were supplied by, and made payment to, nominated conspirators. The appellant Wharlow, and a co-conspirator Lees-Rowe, were couriers for McLeary. The appellant Poole was a courier for Arkate and Raja.

5. Wharlow pleaded guilty on the basis that he acted as a courier for Lees-Rowe on an occasion in April 2020, when Lees-Rowe arranged for him to travel to Leicester, collect one kilogram of cocaine from Julien, and convey the drugs to McLeary in Nottinghamshire.

6. In September 2021, Wharlow had pleaded guilty in the Crown Court at Harrow to offences of conspiracy relating to the importation and supply of cocaine, and money laundering of the proceeds of selling it, between March and June 2020. He accepted that he had acted as a courier for Lees-Rowe on a number of occasions, and had received payment for each trip. In all, he was involved in delivering drugs and collecting money on five occasions. The total weight of the cocaine involved was 78 kilograms. He asserted, but the prosecution did not accept, that he had not initially been aware of what he was delivering and that when he became aware he did not know the precise quantities.

7. On 14th March 2022, again in the Crown Court at Harrow, Wharlow was sentenced to concurrent terms totalling ten years and nine months' imprisonment. That total term reflected a sentence for the importation offence of 12 years, before a reduction for his guilty plea on the day of trial. The concurrent sentence for the conspiracy to supply cocaine was nine years and six months' imprisonment. We note that under the relevant sentencing guideline, the term of 12 years represents the bottom of the category range for a "leading role" and the top of the category range for a "significant role" in a category 1 substantive offence of supplying a controlled drug.

8. We understand that an application was made to transfer the Harrow proceedings to Leicester so that all matters against Wharlow – and indeed Lees-Rowe – could be dealt with by one court at the same time. That application was unsuccessful for reasons of practicality relating to the numbers of different co-defendants in the two sets of proceedings.

9. The appellant Poole pleaded guilty on the basis that he made three trips, for which he was paid by Raja. He travelled to Leicester, Toddington and London. He delivered one kilogram of cocaine on one occasion, delivered half a kilogram on another occasion, and collected cash on the third occasion. He accepted that he had also supplied smaller quantities of cocaine for Raja on two other occasions, so that in total he was directly involved in the delivery of more than 1.5 kilograms of the drug. It was admitted that on each occasion when he acted as a courier, he was given Raja's EncroChat device, which he returned after completing his journey. He asserted, but the prosecution did not accept, that he had no awareness of the wider conspiracy.

10. At the sentencing hearing, there was no pre-sentence report in relation to either of the appellants. None was thought necessary then, and we are satisfied that none is necessary now.

11. Wharlow is now aged 32. Before his involvement in the two drugs conspiracies, he had no recent or relevant previous convictions.

12. Poole is now aged 45. His previous convictions included one in 2012 for an offence of producing cannabis, which the judge regarded as significant when sentencing for this offence.

13. Neither appellant had previously received any custodial sentence.

14. In his sentencing remarks, the judge said that Wharlow had connections with persons near the top of the conspiracy and had played a significant role. He took the view that if this offence had stood alone, it would have merited a sentence in the region of eight years' imprisonment. If, however, it had been dealt with at the same time as the other offences in the Crown Court at Harrow, it would have increased the total sentence by about a year.

Giving credit for the guilty plea to the present offence, the judge concluded that the appropriate sentence was one of ten months' imprisonment, which he ordered to run consecutively to the sentence already being served.

15. The judge found that Poole had also played a significant role. He had used an EncroChat device, and by travelling to Toddington and London, had an awareness of the national reach of the conspiracy. The judge took a sentence after trial of eight years and six months. Giving credit of 20 per cent for the guilty plea, he imposed the sentence of six years and eight months' imprisonment.

16. Wharlow appeals on the ground that the judge fell into error in his application of the Sentencing Council's definitive guideline on totality. Mr Schofield, on his behalf, relies on the fact that in the Harrow proceedings Wharlow had been sentenced for his actions in relation to 78 kilograms of cocaine. He submits that if all matters had been dealt with together, the overall sentence would not have been increased because Wharlow was involved in the movement of a further one kilogram of the drug. He argues, accordingly, that the judge should have ordered the sentence to run concurrently with the existing sentence, and not consecutively to it.

17. We see force in that submission. It is unfortunate that all of Wharlow's offending was not dealt with at the same time, though we understand the reasons why it was not. The judge in the present case had a very difficult task in sentencing so many defendants; and the fact that Wharlow was already serving a substantial sentence was an additional complication. We remind ourselves, however, that the overriding principle of totality, as stated in the guideline, is that the overall sentence should reflect all of the offending behaviour, together with the aggravating and mitigating factors relating to the offences and those personal to the offender, and be just and proportionate. If all matters had been before the court at the same time, this

particular movement of one kilogram of cocaine would have been the third in a sequence of six occasions, all involving very similar conduct by this appellant within a short period of time. Having regard to the very much greater quantities of cocaine moved by Wharlow on the other occasions, and to the fact that the lead offence in his sentencing at Harrow was the importation offence, we accept the submission that the sentence already being served provided just and proportionate punishment for all the offending. We note the judge's indication that if all matters had been dealt with together, there would have been a concurrent sentence for this offence of about seven years' imprisonment. We shall not, however, alter the judge's decision as to the length of the sentence, in order to avoid any possible argument about the effect in these circumstances of section 11(3) of the Criminal Appeal Act 1968.

18. We therefore allow Wharlow's appeal to this extent: we quash the sentence of ten months' imprisonment which was ordered to run consecutively to the sentence already being served, and substitute for it a sentence of ten months' imprisonment which will run concurrently with that already being served.

19. We turn to the appeal of Poole. He challenges the judge's categorisation of his involvement in the offending as a significant role. Mr Canning, on Poole's behalf, submits that under the relevant definitive guideline Poole should have been found to have played a lesser role, not a significant one. He accepts that it was category 2 offending, but notes that the lesser role, which he contends was appropriate, has a starting point of five years' custody and a range of three years six months to seven years; whereas the significant role found by the judge has a starting point of eight years' custody, and a range from six years six months to ten years.

20. By reference to the guideline, Mr Canning submits that four of the characteristics of a lesser role were present: performing a limited function under direction; no influence on those

above in the chain; very little, if any, awareness or understanding of the scale of the operation; and expectation of limited, if any, gain. Mr Canning questions whether any of the characteristics of a significant role was present. He accordingly submits that the judge should have taken the starting point appropriate to a lesser role.

21. The judge was fully apprised of all the circumstances of the case and was in the best position to assess the comparative roles and culpability of the many conspirators. In our view, he was entitled to find that Poole played a significant role. Focusing on the two key points highlighted by the judge in his sentencing remarks, neither the use of the EncroChat device, nor the travelling of appreciable distances to different parts of the country, can be said to reflect a limited function under direction and a lack of awareness of the scale of the operation. They are more consistent with the performing of an operational function within a chain, and with some awareness and understanding of the scale of the operation. We regard the use of the EncroChat device as particularly significant, notwithstanding that it was only loaned to Poole for use during each trip: quite apart from the financial cost to Raja of that device, it would only be entrusted to someone who could be relied upon to keep it secure and to avoid any revelation, whether to the police or to rival drug dealers, of its "handle", or of the information it contained. It would, moreover, serve as a clear indication to the person to whom it was temporarily provided that the person in full control of it was operating at a serious level of criminal activity. As a discrete further point, we are not persuaded by the submission that the sums received by Poole amounted to no more than a modest financial gain.

22. We are therefore unable to accept the submission that the judge mischaracterised Poole's role. Mr Canning realistically accepts that if the categorisation was not incorrect, there can be no successful criticism of the judge's decisions as to the appropriate sentence after trial and as to the appropriate credit for the guilty plea.

23. For those reasons, Poole's appeal fails and is dismissed.

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

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

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
