IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202202058/A2

[2023] EWCA Crim 1635

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 30 November 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE FARBEY DBE
THE RECORDER OF LEEDS
HIS HONOUR JUDGE KEARL KC
(Sitting as a Judge of the CACD

REX
V
DARREN JOSEPH MIDGLEY

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

MR DANIEL JONES appeared on behalf of the Applicant

J U D G M E N T

MRS JUSTICE FARBEY:

1. On 12 January 2022 in the Crown Court at Manchester before His Honour Judge Field KC, the applicant, then aged 43, pleaded guilty to one offence of conspiracy to supply a controlled drug of class A to another, contrary to section 1(1) of the Criminal Law Act 1977. The supplied drug was cocaine. On 6 June 2022 he was sentenced by Mr Recorder Blakey to a term of imprisonment of 15 years, less 180 days spent on remand in custody. He renews his application for leave to appeal against sentence following refusal by the single judge.

2. After the decision of the single judge, the applicant instructed fresh counsel and solicitors. He applies for leave to vary the Notice of Appeal and to advance fresh grounds settled by Mr Daniel Jones who appears before us on his behalf and who also applies to file fresh evidence in the form of a psychological report. We are grateful to Mr Jones for his helpful submissions.

3. We turn to the facts. The prosecution case was that the applicant had used an encrypted telephone to conduct conversations with suppliers, customers and couriers through an EncroChat platform in order to supply cocaine. He had used the handle "BigLobos". There were a number of chat threads between the applicant and others where a minimum of eleven-and-a-half kilograms of cocaine was obtained by the applicant for onward supply to others, although one kilogram was immediately returned due to its poor quality.

4. There were numerous other chat threads containing discussions relating to the possible importation of drugs, pricing structures and other evidence of drug supply. In addition, the messages showed that the applicant had purchased three expensive watches and was storing money at an unidentified address. The messages are in short consistent with sophisticated, large-scale dealing in what we understand to be kilogram blocks of cocaine.

5. The applicant was arrested at his home address on 7 December 2021. Following his arrest his home was searched. Police recovered £5,000 in cash, a burner phone, an iPhone and expensive items such as watches. There were extensive renovations going on at the property consistent with benefiting from the proceeds of drug dealing.

6. The Recorder sentenced the applicant on a written basis of plea in which the applicant agreed that he bought 11.5 kilograms of cocaine during the indictment period which ran from 30 March 2020 to 6 June 2020. He agreed that he was a wholesaler acting autonomously rather than under the control of another. He accepted that he had been involved with the supply of cocaine prior to the indictment period.

7. In his succinct sentencing remarks the Recorder made plain that he was sentencing the applicant only for supply during the indictment period and only in relation to eleven-and-a-half kilograms. He applied the Sentencing Guideline for the Supply of a Controlled Drug. As regards culpability he concluded that the applicant had a leading role in the conspiracy. As regards harm he took into consideration that the indicative weight for Category 1 harm is five kilograms of cocaine. The starting point for the offence was therefore 14 years' custody. The category range was 12 to 16 years' custody.

8. By way of mitigation the Recorder took into consideration that the applicant had no relevant previous convictions, as well as personal mitigation such as his troubled life.

9. Having considered these matters, the Recorder concluded that he should sentence the applicant outside the guideline which in context means outside the category range. In reaching that conclusion the Recorder took into consideration the period of offending, the sophistication employed to carry out the offending, the substantial rewards received, the multiple supply transactions, and the amount of cocaine that the applicant admitted he had supplied. He took into consideration that the applicant had played a part in a wider conspiracy which on well-established principles increased the seriousness of the offending: see R v Khan [2013] EWCA Crim 80, paragraph 35.

10. The Recorder said that had this been a contested trial the sentence would have been 20 years' imprisonment. Affording the appropriate 25 per cent discount for the plea (given at the plea and trial preparation hearing) the sentence was reduced to 15 years.

11. In his amended grounds of appeal supplemented by oral submissions today, Mr Jones asserts without evidence that the applicant received inadequate service from previous solicitors and counsel. Mr Jones submits that the poor service from the previous lawyers had two significant effects. First, the basis of plea was only put forward under pressure from those lawyers and is not correct. The applicant was not aware of the volume of drugs supplied in the conspiracy. The phone with the EncroChat messages belonged to a former friend who was the main user. The applicant had in the past worked for this friend receiving low pay, which was inconsistent with having a leading role. Mr Jones submits that the erroneous basis of plea led the Recorder to impose a sentence that was manifestly excessive or wrong in principle. In particular the applicant should not have been sentenced on the basis of a leading role but at most on the basis of a significant role, as someone who did not organise or direct anything in the conspiracy.

12. Secondly, Mr Jones asserts that the previous lawyers failed to notice that the applicant had cognitive difficulties which ought to have been apparent to them. In support of this assertion Mr Jones applies for leave to adduce fresh evidence, namely a psychological report by Ms Susan Hope-Borland who interviewed and assessed the applicant in around May 2023. The applicant's cognitive difficulties explain why he agreed to an erroneous basis of plea. In addition, his difficulties should have been advanced as personal mitigation requiring a reduction to the sentence.

13. Finally, Mr Jones submits that even on the facts presented to the Recorder, the applicant should not have been sentenced on the basis of a leading role and should not have been sentenced outside the category range. The sentence of 20 years before discount for plea was manifestly excessive.

14. Given the criticisms of his previous solicitors and counsel, the applicant waived privilege and responses to the criticisms were sought. The solicitors failed to respond. Previous counsel responded in detail. We see no reason to reject counsel's response which indicates that the

applicant had ample opportunity before sentence to say that his basis of plea was wrong. There is no evidence, whether in the form of a witness statement from the applicant or otherwise, to support the assertions now made about poor service from the previous lawyers.

15. The basis of plea was drafted by counsel who appeared before the Recorder. There is nothing to suggest that counsel was not satisfied that the basis of plea properly reflected the applicant's instructions. On the contrary, the wording of the basis of plea was amended in relation to the weight of the drugs supply - which indicates that due care was taken to provide the court with an accurate document.

16. Ms Hope-Borland's report concludes that the applicant presents with learning difficulties, has an IQ of 69 and is within the extremely low range of intellectual functioning. The report concludes that information must be imparted to the applicant carefully and the ramifications of his choices need to be carefully explained to him. The applicant told Ms Hope-Borland that this did not happen in relation to the proceedings in the Crown Court. He did not understand the court papers or the choices available to him.

17. While Ms Hope-Borland has doubtless conveyed what the applicant told her, nothing in her report persuades us that there were cognitive or other psychological barriers which prevented the applicant from telling counsel about what he had or had not done in the conspiracy. We discern no good reason to admit the psychological evidence which - even at its highest - would not afford any arguable ground for allowing the appeal.

18. The applicant now says that he was not the owner of the "BigLobos" handle and that he was not the primary user of the EncroChat device. We do not accept that he could not have put forward such an account before sentence if it were true. The evidence to support the attribution of the phone to the applicant appears compelling. We have been provided with no reason to suppose that the phone was used by more than one person.

19. The question for this court on appeal would be whether the sentence of 15 years' imprisonment was manifestly excessive or wrong in principle. The sentencing guideline for drugs supply states that where the 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. The Recorder's conclusion that the applicant had a leading role is not open to criticism. Given the quantity of drugs which the applicant supplied and his part in the conspiracy, he was entitled to sentence the applicant outside the category range and to move to a term of imprisonment of 20 years before plea.

20. For these reasons, as well as for those given by the single judge, the amended grounds of appeal are not arguable. We refuse leave to amend the Notice of Appeal which would serve no purpose and we would refuse leave to appeal.

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