[2023] EWCA Crim 801
IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202301407/A4-202301408/A4
202301409/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 27 June 2023

Before:

LADY JUSTICE CARR DBE

MR JUSTICE JAY

MR JUSTICE BUTCHER

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

REX
V

IAN JAMES WHARMBY
CRAIG WALKER
JACOB SMITH

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MR T LITTLE KC appeared on behalf of the Attorney General.
MR R HOWAT appeared on behalf of the Offender Wharmby.
MR R SIMONS appeared on behalf of the Offender Walker.
MR G JAMES appeared on behalf of the Offender Smith.

J U D G M E N T

LADY JUSTICE CARR:

1. There is an order pursuant to section 4(2) of the Contempt of Court Act 1981 in place in respect of the reporting of the name of a co-defendant of the offenders. This co-defendant stands trial later this year. In order to avoid a substantial risk of prejudice to the administration of justice in their other proceedings, we too make an order under section 4(2) of the Contempt of Court Act 1981 prohibiting the reporting of anything, including by way of naming or identification, which connects him directly or indirectly with the events the subject of these criminal proceedings.

Introduction

2. On 30 March 2023 the Recorder of Manchester (HHJ Dean KC) passed sentences on three co-defendant offenders as follows:

   i) Ian Wharmby (now 30 years old) and who pleaded guilty: conspiracy to possess a firearm with intent to cause fear of violence, contrary to section 1(1) of the Criminal Law Act 1977, 28 months' imprisonment; possession of a Class A drug (heroin), contrary to section 5(2) of the Misuse of Drugs Act 1971, no separate penalty; possession of a Class B drug (cannabis) with intent to supply, contrary to section 5(3) of the Misuse of Drugs Act 1971, no separate penalty; possession of a Class A drug (cocaine) with intent to supply, contrary to section 5(3) of the Misuse of Drugs Act 1971, 3 years' imprisonment. The sentence of 28 months' imprisonment was ordered to run concurrently with the sentence of 3 years' imprisonment. Thus, Wharmby's overall sentence was one of 3 years' imprisonment;

   ii) Craig Walker (now 41 years old) and who was convicted following trial: conspiracy to possess a firearm with intent to endanger life, contrary to section 1(1) of the Criminal Law Act 1977, 6 years' imprisonment;

   iii) Jacob Smith (now 22 years old) and who was convicted following trial: conspiracy to possess a firearm with intent to endanger life, contrary to section 1(1) of the Criminal Law Act 1977, 6 years and 6 months' imprisonment.

3. The convictions arose out of events in April 2020 surrounding the purchase of a loaded Glock firearm which had been used recently in two shootings in the northwest of England. Wharmby collected the firearm with the intention of supplying it onwards later that same day; he was prevented from doing so only because he was arrested in the

meantime. Walker and Smith were involved in the purchase of the firearm, both of them knowing that it was to be used at Smith's behest with an intention to at least endanger life. When the police found the firearm at Wharmby's home, they also found a quantity of both cocaine and cannabis which he intended to supply together with some heroin. All offenders used EncroChat to seek to hide their criminality.

4. His Majesty's Solicitor General now applies for leave to refer these sentences, under section 36 of the Criminal Justice Act 1988, on the basis that he regards them as being unduly lenient. We grant leave.

5. The gravamen of the References in relation to all three offenders is the submission that the judge miscategorised the firearm conspiracies for the purpose of the Sentencing Council Guideline for Firearms Offences ("the Guideline"), further or alternatively, the judge failed properly to reflect the nature of the conspiracies in the sentences imposed and in particular, the extent of matters relevant to culpability. In addition, so far as Wharmby is concerned, the judge was wrong not to impose consecutive sentences for the firearms offence as the lead offence or to have increased markedly the sentence for the firearms offence as the lead offence if concurrent sentences were to be imposed. Further, the judge was wrong to accord Wharmby a reduction of a full one-third by way of credit for guilty plea.

6. The offenders each resist the References. The sentences were not unduly lenient, it is said. This highly experienced judge, who had presided over a lengthy trial, was well placed to assess the circumstances of the offending as a whole, including as to the risk of harm. He was also fully aware of the factual and procedural history relating to the timing of Wharmby's guilty pleas and entitled to afford him the one-third credit in all the circumstances.

The Facts

7. We can summarise the facts briefly. The relevant EncroChat messages were set out in detail in a “Sequence of Events” schedule which we have taken into account.

8. On 14 April 2020, Walker and a man in the Netherlands (who is the subject of the reporting restriction above and to whom we shall refer as "AB") were in contact using EncroChat telephones. AB, in discussion with Walker, wanted Smith to use a firearm on his behalf. On 20 April 2020 Wharmby and AB were in EncroChat messaging communication about the use of police uniforms. AB was proposing that others acting on his behalf could pose as police officers in order to gain entry to a property and then inflict violence on the occupants.

9. On 26 April 2020 all three offenders, together with AB, engaged in EncroChat communications relating to the purchase of a Glock firearm from AB at a price of £6,000. The prosecution case, which the jury accepted, was that Smith intended to use the gun to endanger the life of a man known as "Big B" who had assaulted an associate of Smith. Smith asked Walker if he could get a firearm. Walker first contacted an associate asking for a firearm because Smith "wanted a thing because Big B chopped his mate". There was no reply from that contact, so Walker contacted AB, who offered him a Glock for £6,000. This firearm had previously been used in two shootings, one on 24 December 2019 in Liverpool and one on 25 February 2021 in Manchester. Walker went back to Smith with the offer and AB's handle details. Within half an hour of the offer, AB had commissioned Wharmby, and Wharmby had agreed, to collect the firearm the next day in his work van and then to drop it off. Wharmby was told by AB that the firearm was "dirty that need rid now" and that Smith would give him the £6,000.

10. On the same day, Walker and Smith discussed what Smith would do with the firearm. Smith stated that he would "go over and just fill em with lead". Walker asked Smith if he had been in contact with Wharmby, "the kid with the metal". Smith said that he was waiting.

11. On 27 April 2020, Wharmby contacted another co-defendant, Dominic Hughes, by telephone. He then went to Hughes's address, leaving with an Asda carrier bag containing the loaded Glock firearm. He drove home and hid the Glock behind his fridge. Police attended his home just before 7.30 pm, arrested him and searched his home. They found the Glock inside a sock in the Asda carrier bag behind the fridge, along with 1.8 grams of cannabis bush (valued at £20-£40), 11.6 grams of cocaine (valued between £480 and £1,200), ten snap bags of cocaine, weighing 2.72 grams (value at about £300), 0.397 grams of cocaine (valued at about £50) and an EncroChat mobile telephone. They also found the police uniforms that had been discussed between Wharmby and AB on 20 April 2020. Upon his arrest, Wharmby shouted: "Tell Dom I have been arrested" and within about 20 minutes AB had informed Walker of Wharmby's arrest.

12. The evidence was consistent with Wharmby being involved at the material time in supplying cannabis to mid-level dealers and in supplying cocaine directly to Class A users. His EncroChat messaging revealed that he sourced his Class A drugs from EncroChat users of two handles. Wharmby provided a prepared statement in interview under caution, admitting possession of the Glock firearm and stating:

> "I know that I will be charged with possession of the firearm, the ammunition, and possession of all the drugs with intent to supply. I will plead guilty to the firearms offences and to possession with intent to supply cannabis and cocaine. I will offer a guilty plea to simple possession of the heroin as I did not intend to sell the heroin."

13. Walker was arrested on 15 June 2020 and did not answer questions in interview. Smith was arrested on the same day. He provided two prepared statements denying use of EncroChat telephones, denying being in contact with his co-conspirators and denying that his relationship with Walker went beyond knowing that he was a friend of his brother.

14. The Glock firearm was examined and was found to be a Glock 19, 9 mm handgun, loaded with 6 x 9 mm live rounds. It had a barrel length less than 30 cm and a total length of less than 60 cm. It was a prohibited weapon as defined in section 5(1) (aba) of the Firearms Act 1968.

The Offenders' Personal Circumstances

15. Wharmby had four previous convictions, including a robbery conviction as a youth in 2009 and conviction as an 18-year-old in 2012 for assault occasioning actual bodily harm. He first appeared in the Magistrates' Court on 27 April 2020, where he indicated an intention to plead guilty in respect of the drugs offences. In respect of the firearm offence, at that stage charged as possession of a firearm with intent to endanger life, the Better Case Management form stated "likely guilty". The issue identified was "intent to endanger life". The alternative offence of possession with intent to cause fear of violence was not suggested on the form as being an alternative.

16. On 27 May 2020, Wharmby pleaded guilty to the drugs offences and was not arraigned on the firearm offence. An application to dismiss the firearm charge was indicated, but an offer of a plea to the offence of possession of the firearm, contrary to section 5(1) (aba) of the Firearms Act 1968 was made. On 12 August 2020, the raw EncroChat data was served on the offenders. Wharmby's application to dismiss was heard and rejected on 12 October 2021. Immediately upon the dismissal of that application, on the same day, Wharmby pleaded not guilty to the offence of conspiracy to possess a firearm with intent to cause fear of violence. He was then re-arraigned 8 weeks later and pleaded guilty formally on 2 December 2021. At trial he was acquitted of conspiring to possess a firearm with intent to endanger life.

17. A pre-sentence report was available for Wharmby. It stated that he had made a conscious decision to offend. He had been couriering for pro-criminal associates. While he expressed regret, the author stated that he was more preoccupied with the consequences of offending for him personally. He had separated from his partner, with whom he had a young son with health issues, during his time on remand. A psychological report recorded him as being of low average intelligence and having an abnormally high level of compliance. There was a character reference from his ex-partner, and he had written a letter of remorse. The prison report before us indicates some positive but also some negative behaviour in custody, including the possession of unauthorised articles such as cannabis.

18. Walker had eight previous convictions for a total of 19 offences. These included a conviction in March 2020 for an offence of production of cannabis. A psychiatric report confirmed that Walker suffered from autism. It recorded that he had had an unhappy childhood and had been involved in a life-threatening incident involving a shooting in 2019.

19. Smith had two previous convictions, both from 2020, and the second of which was for possession of an imitation firearm in a public place. That offence had been committed in 2019 and related to an imitation wooden-handled revolver found at his feet in a motor vehicle, for which he received a sentence of 6 months' detention. A prison report before us suggests recent positive behaviour but also some problems in the past, again with the possession of unauthorised articles and involvement in an assault.

The Sentence below

20. The judge adjourned sentence in order to consider his decisions on these three offenders. For Walker and Smith, he placed harm in category 3 for the purpose of the Guideline. He stated that, although Smith had in discussion with Walker indicated an intention to shoot an individual, the extent to which that was bluster or exaggeration was difficult to judge. He indicated at various stages that he could not be certain that shooting was Smith's specific intention. The judge stated that quite a lot of what had been said was likely to be exaggeration.

21. For Walker, who was not the intended recipient of the firearm, it seemed to the judge that Walker was unsure that Smith would use the gun in the way suggested.

22. For Wharmby, the judge placed harm in category 3 for the purpose of the Guideline. He stated that the drugs offending could be considered to require consecutive sentences, but it was overall criminality that mattered, and the judge said he would pass concurrent sentences. After trial, the sentence on the firearms offence, he said, would have been 3½ years. After trial on the drugs offences, the sentence on the possession with intent to supply cocaine would have been 4½ years. He afforded Wharmby a full one-third credit for all of his guilty pleas including for the firearm offence, as to which he said this:

> "Although not as explicit in terms of intent as it might have been, in effect Wharmby indicated a guilty plea at his sending hearing in July 2020 and the entry of his guilty plea was only delayed to December 2021 in relation to the firearms matter because this is an EncroChat case and specific circumstances surrounded the entry of pleas in many EncroChat cases. Full credit is appropriate if a little generous to Mr Wharmby."

The Parties' submissions

23. We are grateful to all four counsel for their helpful written and oral submissions.

24. Mr Little KC, for the Solicitor General, submits that the sentences imposed on all three offenders for the firearm offences were unduly lenient. The overarching submission is that there were here two sets of conspiracies with different levels of intent but with everyone playing an important part. Mr Little suggests that a careful reading of the judge's sentencing remarks reveals that the judge in fact made a finding that Smith did intend to fire at an individual, in which case this could only be B2 offending for the purpose of the Guideline. In any event, the Guideline, submits Mr Little, focuses on substantive offences and it is important that the custodial terms in the Guideline are not "pulled down" simply because conspiracies are involved. On the facts of this offending, the individual cases had to be looked at "top down".

25. So far as Walker and Smith are concerned, the submission for the Solicitor General is that this was category B2 offending. Ignoring any findings of bluster or exaggeration, which Mr Little says he does not need to interfere with, there was an ongoing dispute here between two groups. The reality is that the firearm was being obtained in the context of serious organised crime, with a purpose of intending to endanger life and in circumstances where there had been earlier violence.

26. As a fallback, Mr Little submits that for Walker and Smith it had to be the top end of B3 offending, particularly given the presence of multiple culpability factors. The sentences for both Walker and Smith fell below the starting point for B3 offending of 7 years, even though Smith, for example, had a previous conviction for possession of an imitation firearm.

27. As for Wharmby, Mr Little takes no issue with the approach of the judge to the sentences for Wharmby's drug offences. However, again so far as the firearms offence was concerned, the correct categorisation was B2 offending for the purpose of the Guideline. But the focus for Wharmby is on the overall seriousness of his offending. This was an offence where possession was involved and there was a constellation of culpability factors. Further, there should have been consecutive sentences imposed for the firearms and drug offending. However characterised, a total sentence for the firearms offence, following trial, of 3½ years for Wharmby was simply inadequate. The failure to impose a consecutive sentence was also inconsistent with the Totality Guideline. There was no connection here between the drug dealing and Wharmby's possession of a firearm. The judge's approach in imposing a concurrent sentence in this case in essence meant that Wharmby received no separate or additional custodial sentence for what was extremely serious firearms offending. It is submitted that that was wrong in principle. Finally, the judge was wrong to accord Wharmby a reduction of a third for the firearms offence since

Wharmby had not unequivocally indicated a guilty plea to that offence at the first reasonable opportunity.

28. For Wharmby, Mr Howat submits that the sentence was not unduly lenient. The judge correctly categorised the firearm offending after a thorough review of the evidence following a three-week trial. He was entitled not to be sure to the criminal standard of proof that the basis for categorisation for B2 offending was made out. Reliance is placed on *R v Maynard-Ellis & Leesley* [2021] EWCA Crim 317 at [34]. Category B3 offending carries a starting point of 2 years. The judge went up to 3½ years before applying credit for guilty plea. He did not apply an overly mechanistic approach. There was substantial mitigation, given that Wharmby was the father of a young boy with serious disabilities and the breakdown of his relationship with his partner. He had been on remand almost entirely in Covid conditions. He had been released from custody on the day of sentence, having served 2 years and 11 months in custody already. He is now, we are told, in full-time employment as a supervisor for a flooring installation business.

29. Mr Howat submits that the imposition of concurrent sentences could be justified because the judge deemed the firearm offending to be a one-off situation involving connections between the same names and with an extremely limited involvement. The judge was entitled to take matters in the round. He was, suggests Mr Howat, also entitled to give full credit for guilty plea on a fact-specific basis by reference to his in-depth knowledge of the procedural history of the case. Mr Howat points to the fact that in his submission there was no exacerbation in terms of costs or delay arising out of the timing of Wharmby's guilty pleas.

30. For Walker, Mr Simons submits that Mr Walker was effectively a conduit for Smith's intended possession of the firearm. Not every case involving a loaded firearm falls within category 2. The judge was entitled to form the view on the evidence that Walker wanted a firearm ready for use if and when occasion arose, as opposed to having an immediate or unconditional intention to endanger life. Thus, this could be a B3 case. The judge would not have overlooked the fact that the firearm was prohibited and had been discharged in previous criminality or that EncroChat devices were used. There was mitigation through a lack of relevant previous convictions, delay and Covid conditions in prison. Again, it is suggested that we should take account of the fact that Walker has been on release since 16 June 2023. In so far as the judge could be seen to have made observations as to Smith's intended use of the gun to shoot an individual, his observations are contradictory in parts. However, fundamentally, had the judge indeed found that Smith intended to fire at an individual, he could never have placed Walker and Smith's offending in category B3.

31. For Smith, Mr James adopts the submissions made for Walker, and also submits that the judge was clearly entitled to categorise the firearm offence as B3. The judge took care to avoid impermissible speculation. The sentence was severe for a 22-year-old and Smith

was only 19 at the time of the offending. In no way, it is suggested, could the sentence for Smith be categorised as unduly lenient.

Discussion

32. References under section 36 of the Criminal Justice Act 1988 are made for the purpose of the avoidance of gross error, the allaying of widespread public concern at what may appear to be an unduly lenient sentence and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type (see *Attorney-General's Reference No 132 of 2001 (R v Johnson)* [2002] EWCA Crim 1418; [2003] 1 Cr App R(S) 41, at [25]). As was emphasised recently in *R v Mohammed Arfan* [2022] EWCA Crim 1416 at [34], sentencing is an art and not a science and leniency itself is not a vice. For appellate interference to be justified the sentence in question must be not only lenient but unduly so. We remind ourselves that the hurdle is a high one.

33. The minimum five-year sentence provisions that apply pursuant to section 311 and schedule 20 of the Sentencing Act 2020 to various firearm offences do not apply to conspiracy offences (see *Attorney-General's Reference No 48 and 49 of 2010* [2010] EWCA Crim 2521; [2011] 1 Cr App R(S) 122). However, the Guideline was relevant for the purpose of section 59 of the Sentencing Act 2020 (by analogy with the analysis in *R v Kazim Ali Khan & Ors* [2013] EWCA Crim 800; [2014] 1 Cr App R(S) 10, at [22] to [28]), although with less normative force, given that these were conspiracy offences. The individual's level of involvement within the conspiracy needs to be evaluated but the court is entitled to reflect the fact that the offender has been part of a wider course of criminal activity. That is an aggravating factor, since the offender gives comfort and assistance to others knowing that he is doing so.

34. Against this background, we turn to consider the position of the offenders individually. But we recognise at the outset and accord due respect to the advantage of the judge over this Court, both in terms of understanding and assessing the evidence and the full circumstances of the offending, and in terms of understanding of the background procedural history.

Wharmby

35. We turn first to the criticism of the judge's assessment that Wharmby's offending involved category 3 harm for the purpose of the Guideline. There is no dispute that this was medium culpability offending.

36. The Guideline confirms that harm is assessed by reference to the risk of harm and/or actual harm caused. When considering risk, relevant considerations may include the location of the offence, the number and vulnerability of people exposed and the accessibility and visibility of the weapon. Category 2 harm in the Guideline includes high risk of death or severe physical or psychological harm. Category 3 harm is alarm or distress caused and all other cases not falling within categories 1 or 2.

37. We do not see any proper basis for interfering with the judge's conclusion that he could not be sure that there was a high risk of severe physical or psychological harm so far as Wharmby was concerned, and that this was a case of harm that did not fall within categories 1 or 2 harm. It is to be remembered that Wharmby was acquitted of conspiracy to possess with intent to endanger life and the judge made no finding when sentencing that Wharmby knew that the Glock was loaded.

38. Within category B3 however, it has to be noted that there were at least two culpability factors in play, namely that the firearm in question was loaded and that there was some degree of planning. This merited some increase from the starting point for category B3 offending.

39. And that is not an end of the matter. The judge also had to consider aggravating and mitigating factors, and also the drug offending. The aggravating features not implicit in the applicable starting point of 2 years, alongside the central feature that this was a conspiracy, in our judgment, are (i) the firearm was prohibited and had been used and discharged in previous criminality, and (ii) the use of EncroChat devices to hide what was serious criminality. Wharmby's previous convictions carried no significant weight given their age and nature. There was limited mitigation in the form of Wharmby's personal circumstances, as we have already identified above. Even taking account of the relevant mitigation, the relevant culpability and aggravating factors, in our judgment, meant that a significant uplift of a starting point of 2 years before credit for guilty plea was necessary. A term of at least 3½ years' imprisonment before that credit was fully justified.

40. There is then the question of the drug offending and totality. Was the judge right to impose concurrent sentences on the drugs and firearm offending? In our judgment, he was not. The Sentencing Council Guideline on Totality states that consecutive sentences will ordinarily be appropriate where offences arise out of unrelated facts or incidents. One example given is:

> "Where the defendant is convicted of drug dealing and possession of a firearm offence. The firearm offence is not the essence or the intrinsic part of the drugs offence and requires separate consideration."

41. The firearm here was not the essence or the intrinsic part of the drug offending. Wharmby's important role was to collect a £6,000 dirty firearm and pass it on as part of

the conspiracy. Consecutive sentences, whilst bearing in mind the principle of totality, were appropriate and, in our judgment, obviously so. Put simply, the totality of Wharmby's offending was not reflected in an overall sentence of only 4½ years before credit for guilty pleas.

42. We turn to the final question, namely credit for guilty plea on the firearm offence. The full credit of one-third afforded, recognised by even the judge himself as being "a little generous", was in fact greater than even Wharmby himself had argued for. He had sought credit of "a little less than but close to 25%". Under the Sentencing Council Guideline on Reduction in Sentence for a Guilty Plea section 2D it is stated:

> **"The maximum level of reduction in sentence for a guilty plea is one-third**
>
> **D1. Plea indicated at the first stage of the proceedings**
>
> Where a guilty plea is indicated at the first stage of proceedings a reduction of one-third should be made (subject to the exceptions in section F). The first stage will normally be the first hearing at which a plea or indication of plea is sought and recorded by the court.
>
> **D2. Plea indicated after the first stage of proceedings – maximum one quarter – sliding scale of reduction thereafter**
>
> After the first stage of the proceedings the maximum level of reduction is one-quarter (subject to the exceptions in section F).
>
> The reduction should be decreased from one-quarter to a maximum of one-tenth on the first day of trial ..."

43. We also bear in mind what was said in *R v Plaku & Ors* [2021] EWCA Crim 568; [2021] 4 WLR 82. At [6], this Court emphasised that the Guideline focuses on a time at which a guilty plea is indicated not entered. As set out at paragraphs [15]and [16], a defendant will be asked in a Magistrates' Court in relation to indictable-only offences whether he intends to plead guilty in the Crown Court. His answer should be recorded in a Better Case Management form. We also bear in mind what was said in [27] as follows:

> "In our view, there will be very few occasions when the sentence of a defendant who has not pleaded guilty at the first stage of the proceedings, and who cannot bring himself within one of the exceptions, could properly be reduced by more than one-quarter. It would be wholly inconsistent with the structure of the guideline to introduce an additional sliding scale of reduction between one-third and one-quarter, and we reject the suggestion that such an approach should be routinely, or frequently, adopted. Bearing in mind the infinite variety of situations which come before the criminal courts, and the consequent undesirability of ever saying 'never', we are

> prepared to accept that there may be exceptional circumstances in which a court might be persuaded that an unequivocal guilty plea notified to the prosecution and to the court very shortly after the first court appearance should be treated as tantamount to a plea at the first stage of proceedings and should receive full, or almost full, credit. But such circumstances will be rare."

44. We are of the view that the credit here was inappropriately generous to Wharmby and that credit of no more than 25%, at best, could properly have been accorded to him. Wharmby did not give an unequivocal indication of a guilty plea at the first stage of the proceedings. He did indicate "likely guilty" to the charge of possession of a firearm with intent to endanger life at the Magistrates' Court but that was not an unequivocal indication of a guilty plea to the offence charged and there was no indication of a plea to the lesser offence of possession with intent to cause fear of violence. Nor indeed, did he plead guilty to that lesser offence when first arraigned on it. That happened on 12 October 2021 when he positively pleaded not guilty. His guilty plea was indicated only in mid-November and entered on 2 December 2021. In our view, in no way can it be said that his guilty plea was indicated at the first stage of the proceedings. Whether or not the policy considerations underlying the affording of credit for guilty plea were met, the decision in *Plaku*, amongst others, reminds us of the importance of certainty, clarity and adherence to the principles in the Guideline for Reduction in Sentence on Guilty Pleas. The very maximum credit for plea could not have been more than 25%.

45. Drawing the threads together, first, consistent with the Sentencing Council Guideline on Totality, we consider that consecutive sentences were appropriate for the firearm and drugs offences. We would not interfere with a sentence of 3½ years before credit for guilty plea for the firearm offence alone but would allow only around (a little less than) 25% at most for his guilty plea. We thus arrive at a custodial sentence of 32 months' imprisonment for the firearm offence. We would adjust the sentence of 4½ years' imprisonment for the drugs offending downwards to 4 years for totality. With one-third credit for guilty plea, the appropriate custodial term for Wharmby on the drug offending is again 32 months. Thus, the overall custodial sentence should be one of 64 months or 5 years and 4 months. This is, in our judgment, the minimum sentence which fairly reflects Wharmby's overall criminality relating, as it did, to serious organised crime involving a gun and drugs. In this light, the overall sentence of 3 years' imprisonment imposed by the judge can be seen to be not only lenient but unduly so.

Walker and Smith

46. We have not found the question of categorisation of harm so far as Walker and Smith are concerned easy. At first blush it could be thought that a conclusion that possession of a firearm with intent to endanger life must logically always be treated as carrying a high risk of death or severe physical or psychological harm. But the Guideline, by the inclusion of category 3, makes it clear that it is not to be treated as so.

47. The judge's sentencing remarks are, with respect, not entirely clear. On the one hand, for example, he does appear to make an outright finding at one stage that Smith intended to use the Glock to fire at an individual. There are other passages in his remarks which are consistent with such a finding. It is common ground that if that was the case, this could only be category 2 harm. However, at the same time, the judge at various point expresses the view that Smith's indication of an intention to shoot at an individual was mere exaggeration or bluster.

48. Standing back, we consider that the correct position for us to adopt is that the judge did not conclude that he could be sure that Smith intended to use the Glock to shoot at an individual. He was an experienced judge expressly considering where to place harm. His decision to place harm in category 3 could only mean that this was his position. Thus, we are not inclined to interfere with the judge's categorisation of harm for Walker and Smith at B3. That category of offending carries a starting point of 7 years, with a range of 5 to 9 years' imprisonment.

49. However, again, that is not an end of the matter. For both Walker and Smith there are multiple culpability factors, namely significant role, the firearm was loaded, and there was some degree of planning. That is three out of three of the factors identified in the Guideline for medium culpability offending.

50. By way of aggravating features, there is the fact that this was a conspiracy, although care has to be taken not to double count; there was the use of EncroChat to conceal communications and the involvement of a prohibited dirty firearm. As Mr Little put it, the judge had to stand back from the Guideline and assess overall seriousness. Smith also had the additional aggravating feature of a very recent previous conviction for possession of an imitation firearm.

51. Walker had some personal mitigation, as outlined above. However, we are not persuaded in any way by the merits of a double jeopardy argument. Whilst Walker was released on 16 June 2023, he has been aware at all material times of this Reference and thus the possibility of an increased sentence. Smith, by way of mitigation in particular, had his youth. He was only 19 at the time of this offending.

52. Against the starting point of 7 years the judge came down to a custodial term of 6 years for Walker and 6½ years for Smith. We have reached the conclusion that both of these terms were not only lenient, but unduly so. For Walker, a significant increase from 7 years up to around 9 years was merited, taking into account the overall offending and the multiple culpability factors and the relevant aggravating features that we have identified. Even taking into account the mitigation available, it was not appropriate to come down to a term below 8 years' imprisonment.

53. For Smith, the most heavily involved and who, whilst young, had a previous firearm conviction, it was, in our judgment, not appropriate for the judge to come down to a term below 8½ years' imprisonment.

Conclusion

54. For these reasons, all three References will be allowed.

55. For Wharmby, we quash the sentences imposed for conspiracy to possess a firearm and possession of a Class A drug with intent. We substitute the sentence on each with a sentence of imprisonment of 32 months, such sentences to run consecutively to each other. The sentences of no separate penalty on the other two counts of drug offending remain undisturbed. Thus the overall sentence is now 64 months' imprisonment. Wharmby has already served the relevant period in custody, and therefore there are no directions for surrender to consider.

56. For Walker, we quash the sentence of 6 years' imprisonment and substitute it with a sentence of 8 years' imprisonment. Walker will serve two-thirds of this sentence in custody, time spent in custody and on remand to count towards that sentence. When he is released on licence he will be returned to prison if he offends again during that period. For Smith, we quash the sentence of 6½ years' imprisonment and substitute it with a sentence of 8½ years' imprisonment. He too will serve two-thirds of that sentence in custody, time spent in custody and on remand counting towards that period. When he is released on licence, he too will be returned to prison if he offends during that period. We will proceed to make directions for the surrender of Walker and Smith.

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

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