



Neutral Citation Number: [2024] EWCA Crim 1397

Case No: 202403253 A4, 202403254 A4 & 202403255 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT PORTSMOUTH
HIS HONOUR JUDGE ASHWORTH

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2024

Before :

LORD JUSTICE BEAN
MR JUSTICE BOURNE

and

HER HONOUR JUDGE DE BERTODANO

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

Between :

REX

- and -

DAVID ROBERTS
MAX ANTHONY ROBERTS
GEORGE BARNES

Ms K Broome appeared on behalf of the Attorney General
Mr G Holme appeared for the first offender (David Roberts)
Mr R Martin appeared for the second offender (Max Roberts)
Mr R A Leach appeared for the third offender (George Barnes)

Hearing date : 25 October 2024

Approved Judgment

This judgment was handed down remotely at 10.00am on 1 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean :

1. By a Final Reference dated 24 September 2024 the Attorney General applied for leave to refer as unduly lenient sentences imposed on three offenders, David Roberts, Max Roberts, and George Barnes by His Honour Judge Ashworth at Portsmouth Crown Court on 12 August 2024. The sentences were imposed following a trial of the three Offenders and others on drugs conspiracy charges, which we are told lasted 28 working days.
2. The relevant lead counts on the indictment were as follows. Count 2 charged David Roberts, together with two other offenders not the subject of the Reference, with conspiracy to supply cocaine between March 2020 and April 2021. David Roberts was convicted and sentenced to 9 years imprisonment. Count 8 charged David Roberts, Max Roberts and George Barnes with conspiracy to supply cocaine between September 2019 and April 2022. All three were convicted. The sentences on David and Max Roberts were 9 years imprisonment (in David's case concurrent with the sentence on Count 2); George Barnes received a sentence of 2 years imprisonment suspended for 2 years with orders for 100 hours unpaid work and a rehabilitation activity requirement of 25 days.
3. The Offenders were also convicted on some lesser charges. In Max Roberts' case these were supplying cannabis (Count 9), supplying ketamine (Count 10) and possession of criminal property. David Roberts was also convicted of possession of criminal property. All these resulted in concurrent sentences of 1 year's imprisonment. George Barnes was convicted of supplying cannabis which resulted in a concurrent suspended sentence of 1 year's imprisonment with the same requirements as on the cocaine charge.
4. The trial was one of a series at the Crown Court in Portsmouth following the authorities obtaining access to EncroChat messages between drug dealers. We were not told about the convictions recorded against and sentences imposed on other defendants save that Stephen Lyons, a co-defendant in the trial that gives rise to the Reference, was sentenced to 22 years' imprisonment. He was sentenced at a separate hearing from the three respondents to this Reference.

The facts

5. The Offenders were involved in a commercial operation to supply cocaine over a lengthy period of time in the Emsworth area of Hampshire where they lived. The First and Second Offenders sourced half kilogram to one kilogram amounts of cocaine and then sold them on as ounces and part ounces, at profit, to a close-knit group of associates and friends. Over the duration of the conspiracy they supplied approximately 15 kilos of cocaine. The Third Offender was involved in street dealing at the request of the Second Offender for a shorter period of time. The Second Offender also supplied ketamine. The Second and Third Offenders were involved in the supply of cannabis together.

6. The prosecution of the Offenders arose out of the discovery that the First Offender purchased two kilograms of cocaine in April 2020 from individuals further up the supply chain. Those individuals used the EncroChat messaging service. The data was cross-referenced with the First Offender's conventional telephone data.
7. A search warrant was executed at the First Offender's address on 8 April 2021, where he also lived with his son, the Second Offender. A quantity of cocaine was found along with a deal list and cash. The First Offender claimed the cocaine was for his personal use but the quantity found was more consistent with being for the supply of cocaine. The arrests and seizures led to a financial and drugs inquiry. The financial investigation revealed that they were living a cash rich lifestyle.
8. A mobile telephone found in the Second Offender's bedroom was examined and messages revealed that he had been dealing in cocaine, cannabis and ketamine for a lengthy period, and in particular that he was involved in dealing cocaine with his father. The people that he was dealing to appeared to be linked to the deal list found on 8 April 2021.
9. A mobile telephone recovered from the Third Offender was examined and revealed messages which demonstrated he was supplying drugs from the end of April 2021.
10. On 5 April 2022, police stopped the Second Offender's car as it was driving through Leigh Park. The vehicle drove towards Waterlooville and was pulled over by the Police Officers in Stakes Road. The Third Offender was in the front passenger seat. A man called Harry Guilbert was in the rear nearside passenger seat. All three got out of the car when challenged by police. While the police were speaking with the Second and Third Offenders, Harry Guilbert ran off. When the police looked inside the car, they saw a paper Moss Bros gift bag in the footwell behind the driver's seat. Inside it was a clear plastic bag that was open and contained a white powder. The Second and Third Offenders were arrested. The white powder was later found to be just under half a kilogram of cocaine valued at between £20,150 and £48,850. The Moss Bros paper bag was forensically examined and found to have the fingerprints of both the Second and Third Offenders on it.

Sentencing remarks

11. In passing sentence Judge Ashworth said:-

“I am going to address my sentencing remarks and will start by dealing with some general issues..... The first question for me to determine is how large a conspiracy the Emsworth conspiracy, as I decided to describe it during the trial, was. Mr Ruffell, for the prosecution, has attempted to give different ways in which a level of dealing can be determined. It is not a precise science, it cannot be. Sadly, none of these Defendants have actually come forward, having been convicted by overwhelming evidence, to actually explain how big it was or was not. So I have to go on the evidence and drawing common sense conclusions from it. I do not have to come up with a precise figure of how many kilograms passed through the Roberts's household and then onwards to the various dealers

and users. The Prosecution say it is somewhere between 15 kilograms over the period and 31 kilograms.

The top bracket in sentencing for possession with intent to supply, this is a conspiracy charge but I have to have a look at these guidelines, talks about 5 kilograms as being the indicative amount. Mr Ruffell's calculations as regards 15 kilograms I think are reasonable. I am not persuaded that we are looking at the upper end of that bracket, 31 kilograms. The reason I say that is, looking at the Roberts's lifestyle, household, finances overall, whilst I see considerable profiteering, it does not seem to me that it was dealing at that level. But it certainly is dealing, over that time period, that would certainly exceed 5 kilograms, in relation to Count 8, by some margin. So it is a category 1 harm offence.

What are the people's roles in relation to Count 8? This is the conspiracy to deal in Emsworth. Well, as far as David Roberts is concerned, his involvement commences with Count 2, that is the earlier period of time when he was obtaining drugs directly from Stephen Lyons, so this is from March 2020 towards April 2021. But as Mr Ruffell has pointed out, it would appear that his involvement waned over time as Max Roberts took over. Consequently, it looks like he was likely to have been the main runner in this for about eight months until November 2020, and then his involvement reduced as Max Roberts took over.

The scale of what he is involved in can be seen by what I am sure, and I have absolutely no doubt at all, was the obtaining of 2 kilograms from Lyons in, the exact date escapes me again, not on 19 April 2020, Lyons and Morrison were only buying, obtaining kilogram amounts of cocaine and they had, the evidence at trial for them obtaining it that morning is very strong, and then almost immediately being passed on to David Roberts. But that is not necessarily indicative of the remainder of the deals that were being done. In my view, perhaps what is more evidentially helpful is that towards the end, after David Roberts was out of the picture but Max Roberts was obtaining half kilogram amounts and the finances for the obtaining of half kilogram amounts. How often? Difficult to say.

But certainly David Roberts initially had a leading role in Count 2, and I say that because he was buying and selling on at that time what would appear to be more of a commercial scale, substantial links to Lyons and Morrison in the chain, expectation of substantial financial or other advantage. But that involvement changed over time towards the end what would seem to be a lesser role, with Max Roberts sending him messages telling him to get out of whatever storage they had amounts of drugs, and he was described as someone who did the weighing and the packing. So over the period of time in

relation to Count 8, his role would be a significant one on balance. So that lead count for him, Count 8, is harm category 1 and culpability significant. Starting point 10 years, range of 9 to 12.

In relation to Max Roberts, as I have explained, Count 8 is a category 1 offence in terms of the amount of drugs. His role is slightly more difficult. There are elements of a leading role but I would not describe his buying and selling and being on a commercial scale, but I think characterising it as a cottage industry is good advocacy but not a reality. This was providing a borough or a town with cocaine. Parochial is a much better term, and I think Mr Martin coined that. But he does not have substantial links to and influence on others in the chain other than the people below him. He does not have close links to the original source. Did have expectation of substantial financial or other advantage, but neither of the other two, whereas he did have all of the significant roles.

Overall, having seen Max Roberts at trial, I do not think it is fair to characterise his abilities as reaching as far as being a leading role in the supplying on a commercial scale of anything, let alone drugs. Consequently, he has a significant role, harm category 1, and therefore starting point of 10 years with a range of 9 to 12.

In relation to Count 2 for David Roberts, in my view that is a leading role at the start, category 2, which is 11 years with a range of 9 to 13. But I find that he is at the bottom end of that bracket in relation to the conspiracy with Lyons and Morrison. In relation to the money, I am not going to go through the categorisation for that. The appropriate sentence will be concurrent and it really reflects the dealing that was going on. For Max Roberts, the cannabis and ketamine, leading role, category 3, and that is a Class B offence, so that the sentencing is a starting point of 1 year.

George Barnes, he is very much at the tail end of this conspiracy, so albeit he was part of the conspiracy, he is at the tail end of it, his is in effect above the role of a pure runner, because he is selling on his own behalf. He has elements of both being a significant and a lesser role. He has got some awareness and understanding of the scale of the operation, but he has got no management function, he has got no pressure or influence above [sic] others and his reward really was limited to meeting his own habit. He does, however, have the characteristics of a limited function under direction, involvement through naivety and no influence on those above in a chain. On balance, a lesser role category 3 starting point of 3 years with a range of 2 to 4.”

12. Addressing David Roberts and Max Roberts he said:-

“On Count 8 in relation to both of you, I find there is a significant role and a category 1 offence. The range is 9 to 12 years. Max Roberts, it is aggravated by the cannabis and ketamine dealing, but there is strong mitigation in your youth. David Roberts, there is really no mitigation. I have read what has been said about you, but I have also seen during the trial where it seemed to be quite clear that you considered yourself to be wholly outside the rules that govern other people’s lives. You had the opportunity to stop your son dealing in cocaine, and the fact that you and he are standing in the same dock speaks volumes as to your parenting of him.

The sentence on Count 8 for both of you is 9 years. There is a concurrent sentence on Count 2 of 9 years for David Roberts and 1 year concurrent on Count 9. Max Roberts, 9 years on Count 8, 1 year concurrent on the other offences. So it is a total of 9 for both of you. You will do up to half of that followed by a period on licence and being subject to the possibility of recall.”

13. Addressing George Barnes he said:

“I am persuaded that yours is a case of lesser role, category 3, in relation to conspiracy of a short duration. The range is 2 years to 4 years. Again, I saw you at trial and despite your rather hollow objections in the Pre-Sentencing Report, I am persuaded that there is, on balance, a greater chance of rehabilitation on the one side than the need for you to receive an immediate custodial sentence as being the only appropriate penalty on the other. So I am going to suspend that 2 year period. You will have that suspended for 2 years. There is unpaid work of 100 hours and there is 25 days of Rehabilitation Activity Requirement. That means that if you commit a further offence in the next 2 year period or fail to comply with those requirements, then it is likely that that sentence will be activated. The only reason in reality I have been able to go this low in those guidelines is because of your good character, which has saved you on this occasion from an immediate custodial sentence.”

Submissions

14. In her forceful submissions on behalf of the Attorney General, Ms Broome submits that both David and Max Roberts played leading roles, albeit at different times within the period of the conspiracy.
15. The judge in seeking to reflect this feature of the evidence ascribed a significant role to both Offenders “on balance”. Ms Broome argued that this was an incorrect categorisation of the Offenders’ roles. The fact that they played different roles within

the period of the conspiracy does not reduce the starting point for determining their culpability. Each played a leading role for a significant period of time.

16. The effect of the judge's categorisation of culpability was that neither of the Offenders running the enterprise were deemed to be ultimately in control of the conspiracy. The correct way to approach this exercise was to categorise each Offender's culpability as leading, accepting that at different times one of them had more control over the sourcing of the cocaine and the organising of the supply to customers than the other, beginning with the First Offender and ending with the Second Offender. The appropriate starting point was therefore Category 1, leading role with a starting point of 14 years' imprisonment and a sentencing bracket of 12 to 16 years' imprisonment.
17. Further, given the quantity of drugs supplied, an increase from the starting point was required to reflect the amount being three times the starting point of five kilograms. If the judge had wished to reflect the changing roles, he was entitled to adjust the uplift downwards or simply not make any uplift.
18. In respect of counts 9 and 10, the supply of Class B drugs, to which the Second Offender had pleaded guilty, the judge appears to have categorised his role as leading but specified a starting point of one year, although this is inconsistent with the starting point for Category 3, leading role and is the starting point for a significant role. The Second Offender was running his own commercial scale enterprise supplying Class B drugs, this was again a leading role. There was no-one else in charge above him. The scale of the conspiracy is reflected in the amounts. The judge fell into error and miscategorised the Second Offender's role. The correct starting point was four years' imprisonment with a category range of two years six months' to five years, which should have been discounted by 25% to reflect the guilty pleas after accounting for aggravating and mitigating factors. Ms Broome accepted, however, that the judge was correct to order the sentences to run concurrently. We do not consider that the evidence before the judge relating to the cannabis and ketamine counts was of such significance as to affect the total sentences which he was required to pass.
19. There were few aggravating features other than the continued running of the conspiracies post arrest and the fact of other drugs being supplied by the Second Offender, if, as was accepted to be sensible, count 8 was the lead offence.
20. Turning to George Barnes, the evidence demonstrated that he had been a customer of the Second Offender and his criminal associates for some time before he became involved in drug dealing. There was evidence that he had been involved in dealing cannabis in 2021, but in 2022 in the three months before his arrest on 5 April 2022 he was regularly dealing in cocaine. It was street dealing, but by the time of his arrest he had become one of the Second Offender's trusted associates. He was found in a car with an open bag that contained half a kilogram of cocaine that (the prosecution submitted) he had touched. This, together with telephone messages, demonstrated that he had some understanding of the scale of the operation and that he was performing an operational function within the supply chain. These features reflect a significant role, albeit at the bottom of the category given the lesser role culpability features also present.

21. Although the judge should start from consideration of the overall conspiracy, it was accepted by the prosecution that the judge should have some regard to the length of time of his involvement and role within the conspiracy, namely three months out of 31 months, being supplied parts of ounces for onward supply, so that he could make some money to pay off his debts and have extra income. The prosecution accepted that had he not been charged with a conspiracy, he would have been categorised as Category 3, significant role with a starting point of 3 and a half years' imprisonment.
22. The Judge said in his sentencing remarks that he had seen the Third Offender at the trial. Barnes did not give evidence and had lied in his Police interview about events and his use of cocaine. Moreover, he continued to deny his guilt to the Probation Officer in his pre-sentence report. His only admissions were related to cannabis.
23. The judge determined that the Third Offender played a lesser role and therefore the correct starting point was one of three years' custody. It is not clear thereafter on what basis he reduced the sentence to enable it to be of a term which was eligible to be suspended although there was some mitigation available. Thereafter the judge relied upon the Third Offender's prospect of rehabilitation.
24. The Third Offender was not 'just' a street dealer and the evidence demonstrates his culpability is higher than that of a lesser role given his proximity to the Second Offender, to half a kilogram of cocaine and his understanding of the scale of the operation. The appropriate starting point for Category 3, significant role is four years and six months' imprisonment with a category range of three years six months to seven years. If the Third Offender's role had been categorised correctly and the appropriate starting point taken, it would have resulted in a sentence of imprisonment which could not be suspended. However, Ms Broome conceded that if the reduction to two years was justifiable, the decision to suspend the sentence was a proper exercise of the sentencing judge's discretion.
25. In their Respondents' Notices and oral submissions Mr Holme, Mr Martin and Mr Leach emphasised the fact that the judge had heard all the evidence in a lengthy trial, including observing David and Max Roberts giving evidence and being cross-examined for between one and a half and two days each.
26. For George Barnes Mr Leach asked us to note that there had been no evidence to show that he had been "regularly dealing in cocaine" even over a three month period; only two relevant messages had been found on his phone, each relating to one gram deals. In respect of the half kilo of cocaine found on the back seat of the car (where Harry Guilbert had been sitting before he ran off), there was no evidence that George Barnes had ever touched the cocaine or been in possession of it.

Discussion

27. The Reference challenges sentences imposed by an experienced circuit judge after a 28 day trial, in particular his categorisation of each offender's criminality in accordance with the Sentencing Council guideline on supply of controlled drugs. The Reference contains some 75 paragraphs setting out some of the evidence given at the trial. A draft was sent to defence counsel in the usual way, giving them the opportunity to point out any errors or omissions before the text of the Reference was finalised; and it is not suggested that there are any misstatements of fact in the

Reference. Nevertheless it is difficult for a summary of this kind to capture all the nuances of the evidence in a long trial.

28. Although it is very familiar we should quote from, and emphasise, the introduction to step 1 under the Guideline:-

“In assessing culpability the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories, or where the level of the offender’s role is affected by the scale of the operation, the court should balance these characteristics to reach a fair assessment of the offender’s culpability.”

29. This balancing exercise is a classic example of an evaluative decision. Where it is carried out by a judge who has presided at a contested trial, a challenge to the categorisation made on a Reference by the Law Officers should not be upheld unless this court is satisfied that the judge’s categorisation of the Offender’s role was plainly wrong.

30. The Guideline continues:

“ Culpability demonstrated by the offender’s role

One or more of these characteristics may demonstrate the offender’s role. These lists are not exhaustive.”

31. Six factors are listed under the heading of “leading role”. The three which are said to apply in the present case are:-

- i) Directing or organising, buying or selling on a commercial scale
- ii) Substantial links to, and influence on, others in a chain
- iii) Expectation of substantial financial or other advantage

32. Under “significant role” the factors listed include:-

- i) Operational or management function within a chain
- ii) Involves others in the operation whether by pressure, influence, intimidation or reward.
- iii) Expectation of significant financial or other advantage (save where the advantage is to meeting the offender’s own habit) whether or not operating alone
- iv) Some awareness or understanding of scale of operation

33. We will come to “lesser role” in considering the case of George Barnes. It plainly does not apply to either David or Max Roberts. We will start with the case of Max Roberts. The lead count applicable to him was Count 8, the cocaine conspiracy

stretching from 2019 to 2022. The judge found that he did have expectation of substantial financial or other advantage but rejected the other two possible factors under “leading role”.

34. As for substantial links, he found that Max Roberts “did not have substantial links to and influence on others in the chain other than the people below him”. This is criticised on the grounds that it is sufficient to establish a leading role if the offender has substantial links to and influence on people below him. We do not think that such influence as Max Roberts had on people below him meant that the judge was required to categorise him as playing a leading role rather than a significant role.
35. So far as the first leading role factor is concerned, the judge’s remarks are a little cryptic and there may have been an error in transcription. The relevant factor is where the offender has been *directing or organising* buying and selling on a commercial scale. There is no finding by the trial judge that this is what Max Robert had been doing. To say that he was “providing a borough or a town with cocaine” is simply to describe the activity of the supply of drugs. It does not mean that the offender was directing or organising buying and selling on a commercial scale. That left expectation of substantial reward as a leading role factor applicable in his case; but, as the Guideline makes clear, the sentencing judge has to weigh all the factors in the balance to reach an overall categorisation.
36. We turn next to David Roberts. He was charged not just with count 8, which covered 2019-22, but also with count 2 relating to a much shorter period from March 2020 to April 2021. There is no clear finding as to the quantity of drugs involved in that period save that the Offender obtained two kilograms of cocaine from Lyons in April 2020. The judge found that after the end of 2020 his involvement was reduced. It does not seem erroneous to us for the judge to have approached his case on the basis that in relation to the count 2 period he played a leading role and after that, eventually, a lesser role. To have sentenced him as if he was playing a significant role for the whole period seems to us a reasonable rough and ready way of approaching his case. We do not consider that any of the previous decisions of this court cited to us (*Khan* [2013] EWCA Crim 800; *Smith (Shaun)* [2020] EWCA Crim 994; *Hunter* [2022] EWCA Crim 994) precluded the judge from adopting this approach.
37. We reject Ms Broome’s challenge to the judge’s categorisation of the roles of David and Max Roberts and in their cases we refuse leave to refer their sentences of 9 years’ imprisonment.
38. Turning to George Barnes, the judge found that his was a case of lesser role, category 3 in relation to conspiracy of a short duration. The lesser role factors listed in the guideline include:-
 - i. Performs a limited function under direction.
 - ii. Involvement through naivety, immaturity or exploitation
 - iii. No influence on those above in the chain
 - iv. Very little, if any, awareness or understanding of the scale of operation

- v. Expectation of limited, if any, financial or other advantage, including meeting the offender's own habit.
39. The judge found that Barnes was "very much at the tail end of this conspiracy" and that "his is in effect above the role of a pure runner, because he is selling on his own behalf. He has elements of both being a significant and a lesser role. He has got some awareness and understanding of the scale of the operation, but he has got no management function, he has got no pressure or influence above others and his reward really was limited to meeting his own habit. He does, however, have characteristics of a limited function under direction, involvement under naivety and no influence on have the those above in a chain." This led the judge to the conclusion that it was a case of lesser role category 3, in relation to a conspiracy of short duration. Having found that the appropriate custodial sentence was two years he said that the defendant's good character and the desirability of rehabilitation enabled him to suspend it.
 40. The judge did not spell out that he accepted the defence argument that there was no evidence that Barnes had handled or been in possession of the half kilo of cocaine found in the back seat of the car. It seems to us that he must have done. He was entitled, in our view, to categorise Barnes as being in a lesser role and very much at the tail end of the conspiracy. It is less clear how he felt able to move downward from the guideline starting point of 3 years to the very bottom of the category range.
 41. We bear in mind, however, that this was a decision at the end of a long trial; that it is now more than two years since the events in question; Barnes was young, immature and of previous good character; and that it would be a drastic step to overrule the judge's decision *not* to impose an immediate custodial sentence. In Barnes' case we grant leave to refer but we will not interfere with the sentence.