IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/00220/A4
[2024] EWCA Crim 957

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 13th June 2024

B e f o r e:

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

MRS JUSTICE STACEY

HIS HONOUR JUDGE JOHN LODGE
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

B X F

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Miss D Becker appeared on behalf of the Appellant

J U D G M E N T
(Approved)

Thursday 13th June 2024

LORD JUSTICE HOLROYDE:

1. For reasons which will become apparent in the course of this judgment, we are persuaded that it is necessary to depart from the important principle of open justice to the limited extent of anonymising the name of the appellant. We shall refer to him by the randomly chosen letters BXF, and shall avoid referring to any details of the case in question which might serve to identify him. We do so because the mitigation advanced on behalf of the appellant includes information relating to the assistance he has given to the police over a number of years. We are satisfied that the risk of serious injury to him if his identity were to be known makes it necessary to proceed in the way we have indicated. We should make clear it that Miss Becker, for whose submissions on behalf of the appellant we are very grateful, did not appear in the proceedings below.

2. The appellant was one of a large number of defendants sentenced for offences concerned with the supply of controlled drugs. He pleaded guilty to offences of conspiracy to supply a controlled drug of Class A, namely cocaine (count 1) and heroin (count 2). He was sentenced to nine years and six months' imprisonment on each count, to run concurrently.

3. He now appeals against his sentence by leave of the single judge.

4. The conspiracies charged in counts 1 and 2 involved very substantial quantities of cocaine and heroin being brought into this country for onward supply to dealers at different levels. As we have indicated, the judge had to sentence a large number of defendants. They included some who were at the top of the conspiracies, connected to the bringing of the drugs into this country. Others were national or regional suppliers; couriers; and street dealers.

5. The indictment covered the period of more than six months, at a time when the restrictions imposed as a result of the Covid-19 pandemic had had the effect that controlled drugs had become difficult to obtain and prices were accordingly increased.

6. Evidence of the conspiracies was obtained by the police from EncroChat devices used by some of the conspirators, including the appellant.

7. The appellant and one particular defendant (to whom we shall simply refer as "the co-accused") were supplied with drugs by, and made payment to, conspirators higher in the chain. The appellant paid a particular courier to deliver drugs and to collect payments. His EncroChat device featured in those arrangements.

8. The prosecution case was that over a period of a few weeks the appellant delivered a sample of heroin to a co-accused. The co-accused held a quantity of both cocaine and heroin, it being the prosecution case that he did so in effect as agent for the appellant. A few days later, the appellant directed the courier to deliver an ounce of cocaine and money to the co-accused. He later arranged to supply the co-accused with a kilogram of heroin and arranged to buy a kilogram of cocaine, which the courier collected.

9. Some days later, the appellant directed the courier to take a large quantity of cash to the co-accused to pay for the cocaine which had been collected at an earlier stage.

10. The appellant put forward a basis of plea which was not accepted by the prosecution. The judge did not immediately decide whether a *Newton* hearing would be necessary. He left that possibility open, in particular to await the mitigation on behalf of the co-accused. Ultimately, he felt able to sentence without a *Newton* hearing – a decision which was no doubt welcomed by the appellant.

11. The appellant is a mature adult. He had a number of previous convictions. They included, some years ago, offences of possessing cannabis resin. They also included, significantly, offences of supplying Class A drugs, which rendered him liable, by virtue of section 313 of the Sentencing Code, to a minimum sentence of seven years' imprisonment.

12. No pre-sentence report was thought to be necessary, and we are satisfied that none is necessary now.

13. There had been provided to the judge, confidentially, details of information which the appellant had over a number of years provided to the police. Each member of this court has had the opportunity to read and consider that information, and to assess the extent to which it should be taken into account in sentencing in accordance with the principles set out in *R v Royle* [2023] EWCA Crim 1311, especially at [29] to [34].

14. The judge, in his sentencing remarks, addressed the overall facts of the case, as well as the facts relevant to individual defendants. He gave a very clear indication of his approach to what was on any view a substantial and complex sentencing process, including explaining the approach he adopted to the reduction of sentences, having regard to the timing of guilty pleas. It is apparent that the judge had put a great deal of work into the preparation of his sentencing remarks.

15. In the case of the co-accused, the judge noted that he, too, had used an EncroChat device and had played a leading role. He concluded that in the co-accused's case the appropriate sentence was 12 years' imprisonment, reduced by 20 per cent in view of the guilty pleas, to nine years and six months' imprisonment.

16. The judge described the appellant as a "multi-kilo supplier of cocaine and heroin" and "an EncroChat user". He referred to the appellant's strong links with the co-accused. He noted that some of the messages passing between them showed that the appellant had taken a more responsible role. The two had discussed the possibility of sourcing drugs from abroad, although that had not in the event happened. The judge noted the submission which had been made by counsel then representing the appellant, that the appellant should be treated as being on a par with the co-accused, but commented that the appellant was liable to the minimum sentence provisions of section 313 of the Sentencing Code. Those provisions would have the effect that even if the appellant's role was significantly less than it was, and the quantities of drugs involved were significantly less than they were, the minimum sentence provision would apply.

17. The judge concluded, having regard to all the material which had been before him, that he could pass the same sentence on the appellant as he had done on the co-accused. He therefore again took a provisional total sentence of 12 years' imprisonment, reduced it by 20 per cent to reflect the guilty pleas, and so imposed the sentences of nine years and six months' imprisonment.

18. Miss Becker submits that the judge gave insufficient credit for the guilty pleas. She argues that the appellant, like others who had pleaded guilty at a comparatively early stage, should have received credit of 25 per cent, rather than 20 per cent. She realistically accepts that in some cases that difference may have very little practical effect, but submits that where a substantial sentence is under consideration, the difference is a meaningful one.

19. Next, Miss Becker submits that the judge failed to give sufficient weight to all the mitigation available to the appellant, including those confidential matters known to the judge.

20. There is one aspect of the overall mitigation which Miss Becker frankly tells us was not before the judge. It related to the ill-health of a member of the appellant's family. Miss Becker has explained the circumstances in which the mitigation was presented, and the practical difficulties which counsel then appearing, and indeed other counsel in the case, had encountered in arranging pre-hearing conferences.

21. Grateful though we are for all Miss Becker's submissions, we are unable to accept them. As to the points relating to credit for the guilty pleas, we have already referred to the very large number of defendants whom the judge had to sentence, and to the careful explanation which he gave of his approach to sentencing.

22. We recognise the particular difficulties which those remanded in custody and their legal representative faced during the relevant period and the consequent delays in being able to arrange conferences. There can, however, be no doubt that the judge, too, was fully aware of those difficulties. He was in the best position to assess what credit should be given for the guilty pleas in each of the cases. He was entitled to conclude that in the appellant's case, as indeed in the case of the co-accused to whom we have referred, the appropriate reduction was 20 per cent. We are not persuaded that a greater reduction should be made.

23. As to the mitigation, it is, in our view, clear that the judge took account of all relevant matters. So far as the point now raised for the first time is concerned, it is important to emphasise that an appeal against sentence generally operates as a review of the sentence imposed on the basis of the information which was before the court below, not as a re-sentencing exercise which takes into account additional information and submissions. Even if it were possible for this court to take into account the information which has been provided to us, it could, in truth, carry very little weight. The unfortunate reality is that the undoubted problems which the appellant's offending has caused for his family, and the difficulties which

the family now face in coping without him, cannot carry any great weight against the seriousness of his offending and the inevitability of a substantial prison sentence.

24. In our view, the judge gave full weight to all the mitigation which was before him by deciding that he need not conduct a *Newton* hearing and by sentencing the appellant on the basis to which we have referred. The more serious factual basis for which the prosecution were contending would, in our judgment, have resulted in a sentence of around 16 years' imprisonment, before reduction for guilty pleas. Thus, the approach taken by the judge, equating the appellant's position with that of the co-accused, resulted in a substantial reduction from what would otherwise have been the appropriate sentence. In that way, in our view, the judge properly and sufficiently reflected all the mitigation, including that which was the subject of confidential information.

25. For those reasons this appeal fails and is dismissed.
