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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 346



No. 202100649 B1

202100650 B1

Royal Courts of Justice

Friday, 4 March 2022

Before:

LORD JUSTICE WILLIAM DAVIS

MRS JUSTICE CUTTS

HIS HONOUR JUDGE CONRAD QC

REGINA

V

COURTNEY MILLER-CROSS

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Mr. N. Karu appeared on behalf of the applicant.

Mr. B. O'Toole appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

- 1 Courtney Miller-Cross is now aged 23. On 11 February 2021 in the Crown Court at Maidstone he was convicted of two offences of possessing a controlled drug of class A with intent and one offence of possessing criminal property. The drugs in the two counts were crack cocaine and diamorphine. On 22 February 2021 he was sentenced to concurrent sentences of five years, four months' imprisonment in respect of the drugs offences, and a concurrent six-month sentence was imposed in relation to possessing criminal property. He now appeals against both conviction and sentence by leave of the single judge.
- 2 The appellant had previous convictions prior to the trial with which we are concerned. It is appropriate to give the details of those convictions at the outset. On 5 October 2017 he pleaded guilty to possession of a bladed article. This followed his arrest on 28 August 2017 in London. He was sentenced to 12 weeks' detention in a young offender institution. On 1 November 2018 he pleaded guilty to possession of both cocaine and heroin with intent to supply and possession of criminal property, namely just over £1,000 in cash. These offences had been committed on 15 August 2017 in Taunton. He further pleaded guilty to possession of criminal property (around £600 in cash) on 5 September 2017 also in Taunton. Finally he pleaded guilty to simple possession of heroin and cocaine and to possession of a bladed article. These offences were committed on 1 April 2018 in Brighton. The total sentence imposed was 35 months' detention in a young offender institution. The last conviction was on 12 August 2019. The appellant pleaded guilty to offences of being concerned in the supply of crack cocaine and of heroin between November 2017 and March 2018 in Brighton. On several occasions he sold small deals on the street to an undercover police officer. A consecutive sentence of 12 months' detention in a young offender institution was imposed. The appellant was released from custody on 15 April 2020.
- 3 Approximately six weeks later on 27 May 2020 the appellant was in Chatham, Kent. Police officers saw a woman with a child approaching people in the street in Chatham and handing something over to them. The police suspected that the woman was supplying drugs. They spoke to the woman who gave the name Anna. As a result of the conversation with her, the police went into a flat close by where the woman first had been seen. In the living room they found a young child sitting on a sofa. The appellant was sitting at a chair at a table in the same room. He had his back to the officers. When he realised that police officers were present, he stood up. He dropped a mobile phone and something in blue wrapping and shouted "Fuck, fuck, fuck" repeatedly. He was arrested.
- 4 The flat was searched. Crack cocaine with a total weight of just under 20 grams was found there. Also recovered was heroin with a total weight of just under 10 grams. The total street value of the two caches of drugs was somewhere between £3,000 and £6,000. Cash was seized from various points in the property. That included £990 in bank notes found in the appellant's tracksuit trouser pocket. The mobile phone which he had dropped was looked at by the police. They found messages sent and received during May indicative of drug dealing on a not insignificant scale.
- 5 When he was on the way to the police station in the police car, he was recorded as saying:

"I'm in debt by £50,000. I need to pay this off. I was driven down here in a car and been at the address for four days. I have only been out of prison four weeks for drugs supply."
- 6 The appellant in the course of the police investigation was considered as somebody appropriate for referral to the National Referral Mechanism as a potential victim of modern

slavery. He was in due course interviewed by the Single Competent Authority. In January 2021 that Authority decided there were conclusive grounds, on the balance of probabilities, that the appellant was a victim of modern slavery for the purpose of enforced criminality. We observe that via agreed facts the decision was put before the jury as evidence they could take into account in assessing the defence put forward by the appellant under Section 45 of the Modern Slavery Act 2015. Since the appellant's trial, this court has ruled on the admissibility of a decision of the Single Competent Authority and explained that such a decision is not admissible at trial: see *Brecani* [2021] EWCA Crim 731 and *AAD and others* [2022] EWCA Crim 106. Thus, the jury in this case should not have been told anything of the decision made in the appellant's case. That the appellant was able to deploy the Single Competent Authority's decision was to his advantage.

- 7 The prosecution case at trial was that the appellant voluntarily participated in drug dealing and that whatever his circumstances, nothing or no-one had compelled him to act as he did. They relied on a number of factors: the amounts of drugs and cash found in the possession of the appellant when arrested; his personal characteristics, namely an adult of sound mind, not apparently vulnerable or addicted to drugs; the fact that he was using an apparently vulnerable person, Anna, to sell drugs; the evidence of the telephone messages; his previous convictions.
- 8 The defence case admitted the core facts of the prosecution allegation: possession of the drugs and the cash; messages on the appellant's telephone; association with Anna who had been observed dealing on the street. The appellant raised the statutory defence under section 45(1) of the Modern Slavery Act 2015 which reads as follows:
(1) A person is not guilty of an offence if—
(a) the person is aged 18 or over when the person does the act which constitutes the offence,
(b) the person does that act because the person is compelled to do it,
(c) the compulsion is attributable to slavery or to relevant exploitation, and
(d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.
The appellant had to establish an evidential basis for three propositions: he had been compelled by others to deal drugs; the compulsion was a consequence of him being a victim of slavery or relevant exploitation; a reasonable person in his position would have had no realistic alternative but to deal drugs. Were he able to satisfy that evidential burden, the burden would switch to the prosecution to disprove the defence.
- 9 The appellant gave evidence. The essence of his evidence was as follows. He had been raised in North West London by his mother. He had issues with gangs in that area as he was growing up, though he was not himself a gang member. When he was aged around 16, he was recruited by a man to whom he referred as LLZ. This person was older than him and a member of the Kensal Green Gang which had a reputation for violence. The appellant's evidence was he was scared of LLZ. This man had approached the appellant and said that he needed the appellant to hold something in his house i.e the home that the appellant shared with his mother. The appellant had done what had been asked of him because he felt pressured and did not feel he had a choice in the matter. What he did was to store drugs at his home, which he believed included cocaine. He said that, both at the time and looking back, he did not feel there was anything he could have done to change the situation.
- 10 The appellant told the jury that in 2017 his mother had discovered some of the drugs and flushed them down the toilet. He told LLZ of this, who at the time seemed unconcerned. A little later in 2017, LLZ had arranged for others to collect drugs from the appellant on his

behalf. Those others had taken the drugs. Rather than deliver them to LLZ, they had kept them for themselves. The appellant said that he had told LLZ what had happened. As a result he was stabbed by way of revenge. Due to the stabbing he was on crutches for a considerable period of time. According to the appellant in June and July 2017 there were further episodes of violence. First, he was beaten, dragged into a car and taken to a house and held there because he owed money. Second, in July 2017 associates of LLZ tried to force entry into his mother's house. He was not at the house at the time. He found out about the incident from family members. At some point around this time, his stepfather was threatened with a knife.

- 11 The appellant's case was that, after these episodes of violence, he was told by LLZ that he had no choice but to go to Taunton, where LLZ had a drug line operating. He was to work off the money he owed by selling drugs. LLZ showed him how to sell drugs and how to conceal them. He went to Taunton to sell drugs for LLZ. In August 2017 he was arrested in Taunton in possession of drugs. He was bailed. He began to carry a knife because he was concerned about his safety. A few weeks later he was arrested in relation to that offence, and bailed again. He had further contact with LLZ, who said that he had to go back to Taunton in order to try and carry on working off his debt. He did so, but again was arrested. Following that arrest, bailed once more, he moved to Brighton to carry on drug dealing on behalf of LLZ. The appellant explained that this was the overall course of events which gave rise to the convictions in 2017, 2018 and 2019.
- 12 The appellant told the jury that after he had been released from prison in April 2020, he had further contact from LLZ, who told him that now the debt was £50,000 and that it had not gone away. LLZ said either he could work for him selling drugs or he could get a gun or knife and possibly stab someone. In that context the appellant said he agreed to go to Chatham. He agreed that he had not been dealing directly with LLZ in relation to the activity in Chatham. Rather, his dealings had been with a person called Sef, of whom he was not afraid.
- 13 In relation to the operation in Chatham the appellant said that it was obvious that LLZ had previously used Anna's flat to sell drugs. He continued to do the same. It was almost always Anna who sold to the customers. He said that he received no payment for what he was doing. His motivation was simply repayment of the debt.
- 14 In the concluding part of his evidence in chief the appellant said he had had no choice but to do what he did. Whilst his mother and sister had never been directly threatened by LLZ, he feared that associates of LLZ would go either to his mother's house or his sister's house and would harm them if he did not do what was required. He had no other options available to him but to supply drugs on behalf of LLZ.
- 15 When cross-examined the appellant said that, when LLZ first approached him, he had not said anything to his mother or to his friends because LLZ had told him to say nothing to anyone. He accepted that he had not told his probation officer about being threatened or being asked to supply drugs again. He said that the £50,000 debt had arisen from the drugs his mother had flushed down the toilet, the drugs taken from him in 2017 and the drugs and money that had been on him when he had been arrested, whether in Taunton or Brighton. He was asked about phone messages that were found on the phone which showed he had a managerial function and was not simply acting on instructions. He said that, because he knew the man Sef and was not afraid of him, he was able to be assertive in messages to him in a way he would not and was not to LLZ.
- 16 He called to support his case Kalise Cross, his half-sister. Cross gave evidence about

an occasion when men had come to her mother's house with knives and guns and kidnapped the appellant and taken him to another part of the country. The appellant had contacted her by telephone and said that one of the kidnappers was going to help him to escape. Cross said that she had arranged for a taxi to collect him. She said that this kidnapping had been reported to the police by the appellant's mother. Men had returned to the appellant's mother's house on more than one occasion in order to intimidate the mother. This also had been reported to the police. Cross said that she had never been threatened by or felt threatened by the appellant's associates. That included a man who had been involved in the kidnapping. Cross said that she knew nothing of drugs being flushed down a lavatory and that she did not know the name LLZ.

- 17 There are three grounds of appeal that have been put forward by Mr Karu. He represented the appellant at trial. We are grateful for his focused submissions, both written and oral. We deal with them not in the order in which he did, but what appears to us to be the logical order. The first ground is that the judge should have stayed the proceedings as an abuse of process. Were that ground to be made out, it would dispose of the appeal. The argument arises in this way. In the course of the cross-examination of the appellant and of his half-sister, the prosecution had challenged the evidence they gave in relation to the occasion when it was said that men had forced their way into the appellant's mother's home. This incident had been the subject of a specific disclosure request prior to the start of the trial. The appellant's solicitors had asked for disclosure of any police report in relation to that event. That was disclosure requested in the Defence Statement. No such report was disclosed. During the trial an application was made under section 8 of the Criminal Procedure and Investigations Act 1996 in relation to that material. No disclosure was forthcoming of any document indicating that any such report of any such event had been made to the police. Prosecution counsel cross-examined on the basis that there had been no such report. The premise of that cross-examination was that the event had not occurred. It was only after the appellant and Cross had given evidence that disclosure was made of material showing that the appellant's mother had indeed reported to the police an event as described by the appellant and his half-sister i.e. when men had forced their way into her house.
- 18 We shall come on shortly to discuss the circumstances in which that late disclosure was made known to the jury. Prior to that, application was made to the judge to stay the proceedings as an abuse of process, the abuse being the failure to disclose relevant material. The judge conducted a *voire dire* in the absence of the jury. The officer in the case gave evidence that the Kent police had asked for details from the Metropolitan Police for any reported burglary at the mother's house, the mother living in North West London. That, of course, was not the gravamen of the mother's complaint. She had not made a complaint of burglary. Unsurprisingly, therefore, when a request was made for any reports of complaints by her of a burglary, the answer came back, "There had been none". This was the explanation for the non-disclosure. So soon as disclosure was asked of any report of some kind of entry into her house, the relevant material was forthcoming.
- 19 It was argued by Mr Karu before the judge that this course of events meant that it was not fair for the appellant's trial to continue. The circumstances fell within the second category of abuse, as described in *R v Maxwell* [2010] UKSC 48. It was said that for the trial to continue would offend the court's sense of justice and propriety. The judge rejected that submission. She identified two key questions running through the authorities. The first question was to what extent was the accused prejudiced by the late disclosure. Her conclusion was that such prejudice as there was could be remedied within the trial process: (a) by the prosecution correcting the position, and (b) by clear directions to the jury. The second question was to what degree was the rule of law and administration of justice

undermined by the prosecutorial failing. The judge concluded that although the disclosure exercise conducted by the police had been seriously flawed, there had been no bad faith. Overall, the position did not meet the requirements of the second category of abuse.

- 20 For the appeal to succeed on this ground we would have to decide that the judge's exercise of her judgment was clearly wrong. That would require us to find that she applied the wrong test or that, having applied the right test, she reached a conclusion not reasonably open to her.
- 21 We have come to the conclusion that neither finding is open to us. This was not a case where bad faith could be asserted. There will be cases of non-disclosure so serious that a stay will follow, despite any lack of bad faith. But such cases will be "very exceptional": see *Attorney General's reference No. 2 of 2001* [2003] UKHL at [68].
- 22 This was not a very exceptional case. The judge applied the correct legal principles. The effect on the trial of the non-disclosure was not such that the only reasonable course was a stay. When giving evidence, the defendant had maintained his assertion that men had invaded his mother's home, notwithstanding the misconceived cross-examination. He was vindicated by what followed. The prosecution were required to admit that a complaint had been made to the police. They had to submit to an agreed fact setting out the detail of the report as recorded by the police. In our view, not only was the judge's conclusion reasonably open to her but also it was the only reasonable conclusion.
- 23 The second ground of appeal against conviction relates to various matters raised by the prosecution in the course of the case. It is said that prosecution counsel made comments and/or cross-examined witnesses in a way that was erroneous and made the trial unfair. The result was the appellant did not receive a fair trial. We say straight away that it appears that the core submission that errors were made is well-founded. They were errors which should not have been made. Mr O'Toole who appeared for the prosecution at trial and represented the respondent before us candidly accepted this proposition. What we have to do is to assess whether the cumulative effect of the errors which occurred is sufficient to undermine the safety of the convictions.
- 24 Mr Karu on behalf of the appellants relies on four matters in particular. They are not of equal weight. First, he relies on the fact that, in his opening, prosecution counsel suggested that the appellant had made no attempt to tell the authorities of the situation he was in. That was a highly relevant consideration in relation to the statutory defence. Mr Karu's complaint is that this suggestion was at odds with an agreed fact. This had been agreed by the time the case was opened. The agreed facts were uploaded to the DCS just before lunch on 28 January 2021. Mr O'Toole opened the case during the afternoon of that day. The relevant agreed fact recited what appeared in the appellant's prison records. On 3 March 2020 a prison officer had recorded that the appellant had "...indicated that he did not want to return to his home area because he knows he will be drawn back into his offending lifestyle when he goes back there."
- 25 What the prosecution actually said in opening was that the appellant could have done a number of things to avoid a return to drug dealing, in particular, "perhaps go for help to someone in authority". It may be that it would have been appropriate for counsel to have referred to what was said in the prison records when making that assertion in opening the case. Equally, it appears to us that is what is recorded in the prison records is hardly a request for help. It is common experience that prisoners close to release often will say that they are concerned that, if they return to their home turf, they will fall back into their old

ways. This is not an indication that they fear coercion. Rather, they know that their criminality is more likely to recur in an environment associated with offending. The prisoner in that situation would not suggest that their return to criminality was the result of compulsion. The way the prosecution put it in opening may have been lacking in balance. It did not make the trial unfair not least because the agreed fact was before the jury and Mr Karu could (and doubtless did) made full use of it.

- 26 The second matter relied on traverses the same ground as the issue raised in the abuse of process application. When cross-examining the defendant, the prosecution relied on the fact that there had been no threat to the appellant's family. It was put to the appellant that no incident at his mother's home had been reported to the police. This line of cross-examination was repeated when Kalise Cross gave evidence. We have described in relation to the abuse of process application how late in the day it was appreciated that the proposition underlying this line of cross-examination was misconceived. It was discovered that a report had been made to the police that people had barged into the defendant's mother's address and had threatened those present there. As a result the jury were told about the date of the report and its contents. This wholly undermined the point the prosecution was seeking to make in relation to the incident at the mother's house. Moreover, the outcome would have had the tendency to undermine the prosecution case more generally. As with the point in relation to the agreed fact, disclosure of material undermining a significant element of the cross-examination conducted by the prosecution could be (and presumably was) deployed to substantial effect by the defence in addressing the jury. We do not accept the proposition that the cross-examination would have affected the jury's view of the appellant. By the time they came to retire they must have understood that he had been cross-examined unfairly. This could only redound to his credit.
- 27 Third, it is said that in the Crown's closing speech there was reference made to the defendant being involved in drug supply when he was 12. That was an error but it was corrected by prosecution counsel. In any event, the fact was not relevant directly to the issues in the case. It could not have affected the safety of the convictions.
- 28 Mr Karu argues that the most concerning error relates to something else said by prosecution counsel in his closing speech. It came at the very end of his address to the jury. He said this:
"The Crown's case is that if he was acquitted he could leave this court and carry on with the same kind of behaviour and his family, on his account, would still be at risk, if they ever were at risk. If caught, he'd be in exactly the same position, seeking to claim modern slavery. There might be another trial and they'd say well, you've been on trial in 2021 and made the same point then. You can't make it again now, but who knows? That was the position he would adopt."
The effect of this was to assert that, if the jury were to acquit the appellant, he would be able to return to drug dealing without any issue. It was acknowledged at trial and it is acknowledged before us that this assertion was improper. It was not for prosecution counsel to refer to what may or may not happen in the event of a particular verdict on the part of the jury.
29. In the absence of the jury Mr Karu complained about what had occurred. The judge agreed that the error had been made. She had already directed the jury on matters of law. At the outset of the second part of her summing-up relating to the facts and the evidence she dealt with what had been said by Mr O'Toole in his closing speech. She directed the jury to ignore counsel's comments. She then explained why they should do so in these terms:
"Why do I give you such a direction? Well, the reasons are twofold. First, I have told you already as part of your legal directions that your deliberations -- in your deliberations

you must not speculate, and speculation is something that you must not engage in. Entering into any sort of consideration as to what might or what might not happen in the future, including positive or other choices which might be taken in circumstances which are yet to arise, and indeed may not arise, is by its very definition a matter of clear speculation. You are not permitted to do that, you must not do so. More fundamentally of course, each of you at the very start of this case took an oath or an affirmation and that included a promise as part of that to try the defendant according to the evidence, and to try him on the indictment that is in front of you. You are trying him on the indictment that you have contained in your jury bundle, and you know that concerns offences which are said by the Crown to have taken place in May of last year. That is your role to consider those allegations, those counts, no more, no less. To allow matters to affect your deliberations which do not concern the indictment or the considerations arising in relation to the operation or otherwise of the defence, would be a serious breach of the solemn oath or the affirmation that you took.” It is argued by Mr Karu that these directions were not sufficient to overcome the prejudice that had been created. As he put it to us orally today, the genie was out of the bottle and it would affect the jury's approach. With great respect to Mr Karu, we disagree. The jury was directed clearly and unequivocally. They were told that it would be a serious breach of their oath to pay any regard to what prosecution counsel had said at the end of his closing speech. We see no basis on which to conclude that the jury would have ignored that direction.

- 30 Standing back, there were errors and inappropriate comments at various points of the case on the part of prosecution. This is not something for which the prosecution is to be commended; rather the reverse. However, the question for us is whether the cumulative effect of those matters was sufficient to affect the safety of the convictions. We are satisfied that it was not. The errors were corrected. To some extent the correction of the errors was something which could be used to the appellant's advantage. These convictions were sustained because the jury rejected the appellant's statutory defence. Whilst the matters of which complaint is made had some relevance to that statutory defence, their impact was marginal.
- 31 The third ground of appeal presents a more troubling issue. It relates to evidence given by Kalise Cross. As we have already indicated, in the course of her evidence she said that the appellant's mother had reported to the police that the appellant had been kidnapped. It was evidence led by the defence in examination-in-chief. It was not something that had been said by the appellant either before the trial or during his own evidence. The prosecution applied to call evidence in rebuttal, namely evidence that a search of police records, on this occasion a proper and complete search, had revealed no such report. The application was made on the premise that Cross's evidence on this point had been wholly unforeseen and unforeseeable. They said it was an issue of significance since it went to the state of mind of Kalise Cross.
- 32 The judge in her ruling recognised that the discretion to permit the prosecution to re-open their case had to be exercised with great caution. She acknowledged that the evidence that Cross had given was hearsay. Cross did not say that she had reported something to the police. Her evidence was, “This is what my mother told me that she had done.” But the judge concluded that so long as the jury were directed properly about the possibility that the witness had misunderstood or misheard what she had been told, it would be appropriate to permit the prosecution to call the evidence.
- 33 The judge was put in this position by the prosecution seeking to call this evidence in rebuttal. We do not understand how the state of mind of Kalise Cross was relevant. Her state of mind was immaterial to the issues of compulsion of the appellant or whether there was a realistic alternative open to someone in the appellant's position. Mr O'Toole on

behalf of the respondent was not able to provide any convincing rationale for admitting the evidence in relation to Cross's state of mind. It may be that the judge in reality was concerned with the credibility of the witness. The difficulty with that approach is that the evidence called in rebuttal had at best an extremely marginal impact on that issue. The evidence of Kalise Cross was that her mother had told her that she (the mother) had reported the incident of kidnapping to the police. The fact that there was no police record of any such complaint of itself did not deal with what the witness had said. The witness's evidence was simply that her mother had told her something. The absence of any police report potentially was relevant to the credibility of the mother – who was not a witness – but not otherwise. Whatever was reported by the mother was a matter to which the mother had to speak, if anyone. The correct response from the prosecution to the evidence given by Cross should have been to say that it was hearsay evidence of no value at all.

- 34 Having admitted the evidence the judge had to direct the jury as to its effect. She did so in these terms:
“When Kalise Cross gave evidence to you, she said that Mr Miller-Cross's mother had telephoned the police to report that he had been kidnapped. You have heard evidence this morning that following Miss Cross's evidence, PC Shove conducted checks and no such report was found. As this evidence only came to light after Miss Cross had finished her evidence, the prosecution were permitted to recall PC Shove and he was then asked questions which you heard today.
How should you approach that issue? There are likely to be three issues that you will wish to consider in particular. First, whether a report is being made, sorry, whether a report was made to the police but that it has simply not been found. Two, whether Miss Cross was doing her best to relay to you what she had been told by Mr Miller-Cross's mother, but if she had been given wrong information by Miss Miller or had misunderstood the information provided to her or three, whether she gave evidence which was wrong. You must of course not speculate when you are considering this issue. In line with my earlier directions, before you draw an inference which incriminates the defendant, you must first have considered and rejected all non-incriminating alternatives.”
- 35 This direction did not engage sufficiently or at all with the question of the relevance of the evidence to the jury's deliberations. What the judge meant by the third issue she identified is not clear. The jury were asked to consider the possibility that Kalise Cross's evidence “was wrong” without any assistance as to what that meant. At its highest the evidence meant that Cross had lied when she said that the mother had told her that a report had been made to the police. The jury should have been directed about the very limited relevance of this lie. The reference to an inference incriminating the appellant was not appropriate. We can understand why the judge had difficulty in crafting a direction. In reality the evidence was irrelevant and inadmissible.
- 36 In those circumstances, we consider that the judge was misled into admitting this evidence in rebuttal. Insofar as it had any marginal relevance the judge should not have exercised her discretion to admit the evidence. In reaching that conclusion we are satisfied that, when exercising the discretion in the way she did, the judge fell outside the bounds of what was reasonable.
- 37 However, we then have to ask whether the admission of the evidence and the terms of the direction thereafter given by the judge mean that the convictions are unsafe. We have come to the conclusion that these matters do not affect the safety of the convictions. The jury were fully and properly directed on the core issues in the case. Had the appellant satisfied the evidence burden which lay on him to establish the three criteria set out in section 45(1) of the Modern Slavery Act 2015? If so, had the prosecution proved that one or more of the

criteria did not apply to the appellant? Whether a kidnapping had been reported to the police and/or whether Kalise Cross had lied about being told something by the appellant's mother had little or no bearing on those issues. Moreover, this was a strong prosecution case both on the issue of compulsion and, if there had been compulsion, in relation to what realistically was open to the appellant. The jury had to determine whether the appellant was under compulsion in relation to his activity in Chatham. The evidence of the text messages and the circumstances involving Anna and the flat militated strongly against compulsion. The appellant's own evidence meant that he had open to him realistic options which could have extricated him from drug dealing which he declined to take e.g. engaging with his probation officer. The admission of irrelevant evidence about what had or had not been reported by the appellant's mother does not undermine the strength of the case as a whole.

- 38 It follows that, notwithstanding our view in relation to the rebuttal evidence, we are quite satisfied that these convictions were safe. The appeals against conviction are dismissed.
- 39 We turn to the appeal against sentence. The jury having rejected the statutory defence, the judge had to assess the extent to which the appellant was under pressure, short of the statutory defence. That was not least because a factor affecting culpability within the relevant guideline is whether the offender is "engaged by pressure, coercion, intimidation". Where an offender falls into that category, that is something which indicates that an offender plays a lesser role. Culpability will be reduced. The judge rejected the suggestion that the appellant fell into that category. She concluded that he fell within a significant role within the relevant guideline.
- 40 The core submission in relation to appeal against sentence is the judge fell into error in categorising the appellant in that way. Two points are raised. First, it is said that she was in error when she found that there was no real evidence that the appellant had been coerced into committing the offences for which he had been sentenced in 2018, or indeed, that he had claimed such coercion at the time. Reliance is placed on the sentencing remarks of the judge who sentenced the appellant in the Crown Court at Lewes to support the proposition that the appellant's earlier drug dealing involved coercion. In the course of that judge's sentencing remarks she had to consider culpability in the context of pleas of guilty. The judge said this: "You might well have been prevailed upon, pressurised into joining the operation". Thus, it is said there was evidence that on the previous occasion there had been "pressure, coercion, intimidation". But what the judge in Lewes went on to say was this: "...the extent of your involvement in your culpability, probably it straddles the two categories there. It's not easy to identify your culpability." In our view, that is a slender basis upon which to argue that this judge's assessment of culpability was flawed. The remarks which we have cited do not carry the significance suggested. As a matter of fact, in interview with the police in relation to the earlier matters, when the police had asked whether the appellant had been coerced or pressured in any way, he made no comment.
- 41 We consider that the assessment of the judge in the case with which we are concerned was not predicated on an incorrect premise, which is how it is put in the grounds of appeal. Her assessment of the appellant's role was based on the evidence she had heard in the trial, of which she had heard a considerable amount, in particular from the appellant himself. She was in the very best position to reach a proper judgment about his participation and role.
- 42 This leads us on to the second point. It is said that the judge failed to take into account a number of the matters raised in the course of the trial. They are set out at paragraph 64 of the Grounds of Appeal. We do not propose to deal with them in detail. The judge did. She carried out a close analysis of the way in which it had been argued that the appellant should be placed into a lesser role. She rejected his arguments by reference to the evidence

in the case. This was the judge who had conducted the trial. Having read her sentencing remarks, we cannot begin to say that her analysis was wrong.

- 43 The essence of this case is that in May of 2020 the appellant was dealing at a significant level in two types of class A drugs. He was doing so very shortly after being released on licence. His earlier offences had related to precisely the same type of offence. A further aggravating factor specific to the offences for which this judge was sentencing was that there were young children present where the appellant was preparing class A drugs for sale. The category range applicable to the appellant was three and a half to seven years, the starting point being four and a half years. The aggravating factors required a substantial increase from the starting point.
- 44 Mr Karu cited *Ajayi and Limby* [2017] EWCA Crim 1011 as support for his argument that the appellant should have been placed in a lesser role. We consider that *Ajayi and Limby* does not support his argument: rather the reverse. It is true that, by reference to the particular facts relating to the offence and the offender, the court placed the second appellant into a lesser role. The considerations which applied to that appellant do not apply here. The general principle to be gleaned from *Ajayi and Limby* is that the culpability of someone in the appellant's position with a managerial role in relation to a county line operation will be enhanced. The judge, in fact, reduced the sentence that she would otherwise have passed to allow for the appellant's relative youth and to take account of conditions in prison created by the effects of the pandemic.
- 45 In reality, the mitigating effect of those factors was limited. The appellant was 22. He was not of an age generally falling within the principles set out in *R v Clarke and Others* [2018] EWCA Crim 185. Moreover, where a sentence is of substantial length, the effects of the pandemic will be of limited significance.
- 46 In the round, we look at this sentence, we ask ourselves is there any justification for saying it was manifestly excessive or wrong in principle. We cannot.
- 47 It follows that the appeal against the sentences also will be dismissed.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.