



IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT INNER

LONDON

HIS HONOUR JUDGE D RICHARDS T20237046

CASE NO 202304058/A5

[2024] EWCA Crim 830

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 16 July 2024

Before:

LORD JUSTICE WARBY
LORD JUSTICE WILLIAM DAVIS
HIS HONOUR JUDGE TIMOTHY SPENCER KC
(Sitting as a Judge of the CACD)

REX
V
CHARLIE BIRTCHNELL

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MR I SHEIKH appeared on behalf of the Appellant

J U D G M E N T
(Approved)

1. LORD JUSTICE WARBY: This is an appeal against sentence for conspiracy to supply class A drugs.
2. The appellant is Charlie Birtchnell, now aged 29. On 26 October 2023 in the Crown Court at Inner London he was convicted after a trial of one count of conspiracy to supply cocaine (count 4) and one of conspiracy to supply heroin (count 5). On the following day he was sentenced by the trial judge, His Honour Judge David Richards, to five years' imprisonment on each count concurrent.

The Facts

3. The appellant was indicted and tried with two other defendants, Talvo Barros Balde and Glen Omojowho. Counts 4 and 5 each alleged that these three, together with a named but unindicted co-conspirator whom we shall call "RW" and others unknown had conspired to supply cocaine and heroin. The period of the conspiracies alleged was from May to September 2021.
4. The case centred on two County lines drug lines running from London into Chard in Somerset and a third line operating in the London area. The case against the appellant was concerned with one of the two lines running into Chard, known as the 'Dan line'. This had a phone number ending 125 which was attributed to Balde. When arrested Balde was found to be in possession of a mobile phone handset which had been used to house the 'Dan line'. Other evidence also linked him to that line.
5. The core of the prosecution's case against the appellant concerned his involvement with RW, then aged 16, in September 2021. On 1 September RW went missing from his home in London. He was reported missing by his mother. On 4 September RW was found at an address in Chard in possession of 34 wraps of cocaine weighing 2.4 grams and 52 wraps of heroin weighing 4.04 grams.

6. Examination of RW's mobile phone showed that the 125 line had been saved in his contacts. The 'Dan line' had been in contact with RW on 31 August 2021 and over the early days of September when he went missing.
7. It was later established that in the early hours of 1 September 2021 the phones of RW and the appellant had co-located, both moving together from London to Chard. In addition the evidence showed extensive phone communication between the appellant's phone and the 'Dan line' between May and October 2021.
8. The appellant was arrested at his home in Kennington in London on 19 October 2021. In interview he accepted that he had driven someone to Chard but claimed not to know who that person was or what they were doing or that the person was a minor.
9. The prosecution case, which the jury must have accepted, was that the appellant had driven RW to Chard knowing that RW was going to sell class A drugs.

Sentencing

10. The prosecution and defence agreed that the appellant had performed a lesser role for the purposes of the sentencing guideline. He had 19 previous convictions for 24 offences, including several for class B possession but none for drug trafficking. In mitigation the defence relied on the absence of relevant recent convictions, the impact that imprisonment would have on the appellant's partner and their six-year-old child, and the delay between arrest and the service of postal requisition at the end of January 2023. In that period, it was argued, the appellant had taken steps to address his offending behaviour. There was no pre-sentence report nor do we consider that one was necessary.
11. The case being one of street dealing, the case fell into harm category 3. The judge sentenced the appellant on the basis that although his principal role had been to transport RW to Chard to deal drugs for Balde, that had to be seen in the context of the evidence

which demonstrated what the judge called "close ties" over a period of months between the appellant and Balde and the 'Dan line'. The judge said that the appellant's role began as a lesser one but it was aggravated by the fact that he had been involved in a conspiracy and his conduct in driving a child to Chard was so significant that it elevated his offending out of the category range.

12. In mitigation, the judge took account of the fact that this was the appellant's first conviction for drug supply. The judge said that he took account of the state of the prison population, the two years that had passed between the offending and the sentence, the appellant's family circumstances, and the efforts that he had made to rehabilitate.

13. The judge then said that his starting point for these offences was five years and six months, but that was reduced to five years for the lack of relevant previous convictions.

Grounds of appeal

14. There are three grounds of appeal. Taking them in logical sequence it is said first of all that the increase in sentence to reflect the involvement of a child was excessive, if starting from the lesser role category. Secondly, it is said that insufficient account was taken of the delay in the investigation and prosecution of the case which was described as "inordinate and unjustifiable". Thirdly, it is argued that insufficient account was taken of the appellant's mitigation.

15. We are grateful to Mr Sheikh for his careful and detailed written submissions and for his elaboration of those arguments today.

Assessment

16. We consider the first question to be addressed is whether the judge was wrong to fix on a sentence of five-and-a-half years' imprisonment before reduction for mitigation. As we understand his reasoning, he arrived at that figure by treating the appellant as having

played a lesser role in Category 3 drug dealing and then moving upwards to reflect the conspiracy and the aggravating feature of child exploitation. The end point was, as Mr Sheikh has pointed out, substantially above the lesser role category starting point and within the range for significant role. However, looking at the matter in the round we do not consider that the judge fell into error in this part of the sentencing exercise.

17. In Ajayi [2017] EWCA Crim 2011 this court considered the appropriate categorisation of offenders who take part in County lines operations which often involve the use of young people as couriers of drugs or money. The court noted that this type of offending carries with it the hallmark of professional crime above and beyond that involved in ordinary street dealing. The court observed that: "Those who work within such an operation and who seek to have a lesser role ascribed to them should expect to have those claims (based for example on coercion or lack of awareness of the scale of the operation) examined with care."

18. This appellant's conduct certainly had features of significant role. The judge found as a fact that he was a friend of Balde and that he "knew what was going on". Balde was unable to be involved directly and was keeping away so he had sent the appellant as his agent, said the judge. The appellant had, the judge said, "helped" Balde - in other words he was performing an operational function within a chain. Nor was the appellant's role in driving RW to Chard a one-off spontaneous act. He had involved himself in a conspiracy lasting several months. There was no question of any element of coercion in his case. The judge held that he had no doubt been acting for reward.

19. In these circumstances, the case can properly be viewed as one of significant role or, even if it fell within the lesser role category, then it was at the top end of the range which is equivalent to the four-and-a-half year starting point for significant role. Further, as is

conceded, the facts engaged the statutory aggravating factor of using or permitting a person under 18 to deliver a controlled drug to a third person. They also engaged the additional guideline aggravating factor of exploiting a child to assist in drug related activity, although there was of course an overlap between those factors. Those factors merited a substantial upward adjustment as Ajayi makes clear.

20. Our conclusion on this aspect of the appeal is that in all the circumstances a sentence of five-and-a-half years before allowance for mitigation was severe but not manifestly excessive.
21. Turning to the judge's approach to delay and personal mitigation, we do see force in Mr Sheikh's submission that the judge did not take sufficient account of either. He mentioned both those matters in the course of his remarks but the only reduction he made was the six-month deduction that we have mentioned. That was expressly and exclusively attributed to the appellant's lack of relevant previous convictions. In our judgment that reduction fell a long way short of what was merited on the facts viewed overall.
22. Delay as a reason to reduce a sentence is often relied on but not so often successfully. That is because it is not a mitigating factor in and of itself. As the general guideline on over-arching principles makes clear, delay since apprehension may justify a reduction in sentence if, but only if, it is unreasonable, is not the offender's fault, and it has a detrimental effect on the offender: see Noor [2024] EWCA Crim 714 at paragraphs 69 to 71. Not all delay in criminal proceedings meets those conditions. The extent of the reduction to be given where it does will turn on the facts and is a matter of judgment. Here, it seems the judge concluded that the case satisfied the tests we have mentioned and recognised that a reduction was required but then failed to assess it and factor it in.

23. We can see why the judge reached the conclusion that he did. Although the applicant cannot complain of delay in the proceedings themselves, there was relevant delay before that of over 15 months. No justification for this is apparent nor can blame be attributed to the appellant. Within that period the appellant had taken steps to address his offending behaviour: he had found employment, remained in employment consistently and by early 2023 he had obtained a public service vehicle licence and a full-time job as a bus driver. The belated initiation of proceedings brought an abrupt end to all of this.
24. Those are the matters on which Mr Sheikh has placed most emphasis in his submissions, and rightly so, in our view. We do note in addition, however, that the judge appears to have made no allowance for two other mitigating factors which he said he had taken into account in sentencing, namely the impact of current prison conditions on this appellant and the impact of his imprisonment on his family.
25. Bearing all these matters in mind, we have concluded that the sentences in this case were manifestly excessive. In our judgment the appropriate sentence in this case was one of four years' imprisonment on each count concurrent.
26. We therefore quash the sentences imposed below on each of counts 4 and 5 and substitute concurrent sentences of four years' imprisonment.

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

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