

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO: 2023 00679 A5

Neutral Citation Number: [2023] EWCA Crim 1270

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 20 October 2023

Before:

LADY JUSTICE ANDREWS

MRS JUSTICE CHEEMA-GRUBB

HER HONOUR JUDGE DHIR KC

REX

v

JOSHUA ROBERT CURLEY MULLINGS

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR DAVID EMANUEL KC appeared on behalf of the Applicant

J U D G M E N T

MRS JUSTICE CHEEMA-GRUBB:

1. This is a renewed application for leave to appeal against sentence after refusal by the single judge. We have had the advantage of hearing submissions from trial counsel, who has been able to present the arguments fully, despite the lack of several transcripts which he would have preferred to put before the court. As we are confident that counsel has accurately conveyed to the court the essence of the proceedings for which we do not have transcripts, we do not consider it is in the interests of justice for this hearing to be adjourned.
2. We understand that there may well be some outstanding proceedings connected to this case. A section 4(2) Contempt of Court Act 1981 order has already been made, and it should continue.
3. On 16 March 2021, following a trial before His Honour Judge Bond and a jury in the Crown Court at Birmingham, Joshua Mullings – who is now aged 34 – was convicted of four counts on an indictment where others were also charged. Count 1 was conspiracy to possess a firearm to which s.1 Firearms Act 1968 applied; count 3 was conspiracy to supply a controlled drug of Class A; count 5 was a like offence; and count 7 was possessing criminal property. He had previous convictions for wounding with intent, possessing a prohibited weapon, possession of a firearm, and possession of a controlled drug of Class A with intent to supply. He was sentenced to a total of 15-and-a-half years' imprisonment on 6 February 2023, comprising 13-and-a-half years on count 3; 2 years consecutive on count 1; and concurrent terms of 11-and-a-half years on count 5, and 10 months on count 7.
4. With no disrespect to the importance of the application to Mr Mullings, the facts can be summarised briefly. The applicant was involved in a conspiracy to take possession of the firearm in November 2018. The rifle concerned had been stolen in a burglary. It was collected by car under the direction of the applicant. The police stopped the man responsible for transporting it to the applicant, and it was recovered.
5. In January 2019, he agreed to purchase 3 kgs of very high purity cocaine. Although he made the arrangements, he did not handle the drugs himself but directed those concerned, including in the transfer of cash for payment. The applicant's supervision extended to

placing himself in a car near to the location of the transaction. The value of the cocaine on that occasion was around £300,000. The police intercepted the drugs while they were being driven to the applicant's flat, with the driver actually on the telephone to the applicant at the time of his being stopped and arrested.

6. Despite these setbacks, in May 2019, the applicant involved himself in purchasing a kilogramme of cocaine of high purity. This was also intercepted by the police whilst in transit to him.
7. The applicant was arrested in October 2019, and over £4,000 in cash deemed to have been from dealing in cocaine was found at the property.
8. In his extensive written grounds and comprehensive oral written submissions, Mr Emanuel KC challenges the judge's approach to sentence in three respects. We are grateful to him for attending today at his own expense and without expectation of remuneration. First, the categorisation of the conspiracy to possess a firearm in category 1 of the relevant guideline for the substantive offence. Put shortly, the proposed argument is that because the firearm never actually reached the applicant and despite the purpose for which it was undoubtedly sought by him, the judge fell into error by concluding that there was "a high risk of serious physical or psychological harm, or high risk of serious disorder, as the weapon was to be used by you not just for crime generally, but specifically for your intended drug dealing, either to threaten others or to protect yourself and/or your drugs".
9. We consider this to be an unarguable ground. The judge was required by s.59(1) Sentencing Code to follow any sentencing guideline relevant to the offender's case unless satisfied that it would be contrary to the interests of justice to do so. There was no dispute that the weapon was type 2 and culpability was high because the applicant intended to use it for a criminal purpose. Applying the guideline, the final determination of culpability fell into category A. The guideline goes on to require consideration of harm, which is to be assessed by reference to the risk of harm or disorder occurring and/or the actual alarm or distress caused. The guideline sets out a non-exclusive list of potentially relevant considerations, but there is nothing in the guideline to limit the assessment of risk to *immediate* risk. As the

judge went on to say in his sentencing remarks:

"Just because the police were able to seize the weapon before it got into your physical possession does not change that risk of harm. The risk arose as soon as the weapon was on its way to you. The risk is part of your agreement to obtain that weapon for the purpose I have set out."

Mr Emanuel argues that if future risk can be taken into account in this way, there could be no case in which culpability category A is reached than anything lower than category 1 harm could be found.

10. We are not persuaded that this is a rational approach to the guideline, underscored by an observation that the criminal purpose to which this firearm was to be put in this applicant's case was Class A drug dealing. Other forms of criminal purpose may carry with them less risk of harm being caused. We find no assistance for his argument in **R v Dean** [2022] 1 Cr App R (S) 51 which he cited in his written grounds. As this court recognised in that case, the fact that at the time the weapon was found it was 2 am, and therefore it was unlikely that the weapon was to be immediately used to cause high risk of death or serious physical harm, did not prevent it being a case of high harm. Simply taking a snapshot in time of the moment at which a firearm was discovered or intercepted by the police does not provide an accurate basis upon which to assess harm for the purpose of the guideline. Although deprecated by the court in that case, this is precisely the approach that Mr Emanuel invites us to take. Context plays a part in every judicial determination. To constrain a sentencing judge in that way defies common sense, particularly bearing in mind that the offence for which the applicant was being sentenced was that of conspiracy and the conspiracy in this case was not completed. The judge was applying the guideline for the substantive offence to an inchoate offence.
11. Secondly, Mr Emanuel wishes to argue that although the judge had presided over the trial, his final assessment of the role played by the applicant in the drug-dealing enterprise he was part of was wrong. This ground is based on two things said by the trial judge before he passed sentence, which Mr Emanuel submits demonstrates an error of approach. The trial

having ended in 2021, sentence was adjourned for the completion of connected proceedings; these had not been finished within a year and the applicant's case was listed with others for a Further Case Management Hearing in 2022. At that hearing, it is agreed by the Crown that the judge directed the prosecution to provide a Note for Sentence, and he said words to the effect that the applicant was likely to be in the significant role category, which would attract a term in the order of 9 years' imprisonment or so. The prosecution did prepare and serve the Sentencing Note in good time for the sentencing hearing in February 2023. Mr Emanuel had seen it, and before the applicant was brought up from the cells, Mr Emanuel reminded the judge of the indication as to his view of role he had given a year earlier. The judge told counsel he had changed his mind and now agreed with the prosecution that the applicant's role was a leading one. This signalled clearly to Mr Emanuel that he had to address this issue in his mitigation. However, he complains that at that point the only specific reason the judge gave was a reference to the purity of the drugs concerned. But as is clear from the full sentencing remarks, the allocation of a leading role arose from a close examination of the facts of the case and the judge's conclusions that while the applicant was directing or organising Class A drugs supply on a commercial scale, he was keeping himself sufficiently distant so not to be caught in possession of the drugs, he was utilising his links to others and influence over them in the drugs supply chain, and the inference from all these matters that he had close links to the original source in respect of which the purity of the drugs was important. He also noted that the applicant had an expectation of substantial financial gain for himself from the enterprise. We remind ourselves that 4 kgs of high purity Class A drugs were involved. These features of the case cannot have been a surprise to the applicant or to counsel; indeed most of them were listed in the prosecution's Sentencing Note and Mr Emanuel had submitted a Sentencing Note disputing their significance and urging the court to conclude that the applicant indeed played a *significant* not *leading* role. So the argument he proposes to make in this appeal is that the judge made an error when he changed his mind after the Further Case Management Hearing, having expressed what Mr Emmanuel called "his instinct".

12. Despite Mr Emanuel's able submissions, we are not persuaded that there is any merit in the submission. The judge's ultimate conclusion on role was fully justified and properly articulated. The comment made at the Further Case Management Hearing was not a final determination. The judge expressed a provisional view at the very time that he ordered the prosecution to make *its* submissions as to role. As Mr Emanuel conceded, to test the proposition before the court one need only turn it around: had the judge expressed a view before hearing the parties that the applicant played a leading role would this have rendered a plea in mitigation seeking a lower level of culpability otiose? Of course not. We remind ourselves that the judge heard the trial and was in the best position to assess the role played by each offender. There being no other criticism of the application of the guideline, we refuse leave on this ground also.

13. Finally, Mr Emanuel reminds us of the mitigation available to this applicant and submits that the judge failed to take it into account adequately in reaching his final sentence. We have examined the character references and are alive to the impact on the young family of a father's arrest and subsequent imprisonment. But given the applicant's previous record of offending and the gravity of the offences themselves, such matters could not amount to substantial personal mitigation in his case. We note that the judge took account of the substantial delay in resolution of the applicant's case. Having been arrested in October 2019, as we have said, and not being sentenced until February of this year, he had been in custody throughout the pandemic, for over 30 months, 23 of which were awaiting sentence. He will, of course, receive credit for those days on remand. We do not underestimate the stress of such a delay in knowing what the final period of incarceration would be, but Mr Emanuel accepted rightly that the applicant knew from the time of conviction that he was facing a long imprisonment. The judge made specific reference to the guidance provided by this court in **R v Manning** as to how judges should factor in the impact of prison conditions during the global pandemic, but conspicuously in line with that guidance, the reduction the judge would apply would be slight because of the length of the sentence overall. As he said:

"Although you have waited an extremely long time to be sentenced, the reality is you've been serving a sentence which you always knew was going to be lengthy."

14. This was very serious, repeated and sophisticated offending by a man who knew what the consequences of detection and conviction would be. Having considered the renewed application for leave independently for ourselves, we are in agreement with the single judge and the application is refused.

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

Lower Ground, 18-22 Funnival Street, London EC4A 1JS
Tel No: 020 7404 1400 Email: Rcj@epiqglobal.co.uk