IN THE COURT OF APPEAL
CRIMINAL DIVISION

ON APPEAL FROM
THE CROWN COURT
202200273/A3
[2023] EWCA Crim 1622

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 22nd November 2023

**B e f o r e:**

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

**MR JUSTICE BRYAN**

**MR JUSTICE FREEDMAN**

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**R E X**

**- v -**

**B H R**
**B M V**

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Computer Aided Transcription 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)

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Counsel appeared on behalf of the Applicant BHR
Counsel appeared on behalf of the Applicant BMV

Counsel appeared on behalf of the Crown

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**J U D G M E N T**
**(Approved)**

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Wednesday 22nd November 2023

**LORD JUSTICE HOLROYDE:**

1. Each of these applicants seeks a reduction in his sentence on the grounds that, after having been sentenced, he has provided important information and assistance to the law enforcement authorities. Neither entered into any formal statutory agreement with a specified prosecutor. The judges who imposed their sentences were unaware that such information and assistance would be provided, and accordingly did not take it into account by way of mitigation. The applicants' cases therefore raise the issue of whether in such circumstances this court has power to hear an appeal against sentence and to reduce a sentence. Their respective applications for extensions of time in which to apply for leave to appeal against sentence have been referred to the full court by the Registrar. Because they both raise the same issue of principle, they have been listed for hearing together, although they are otherwise unconnected.

2. We are satisfied that the risk of harm to the applicants if they are identified as informers necessitates a derogation from the important principle of open justice. Their names have been anonymised in the listing of this hearing, and we order that they must remain anonymous. Pursuant to section 11 of the Contempt of Court Act 1981, we order that nothing may be included in any report of these proceedings which names either of the applicants or which may lead members of the public to identify either of them. In any such report, the applicants must be referred to by the randomly-chosen letters BHR and BMV.

3. The court has been assisted by initial submissions directed to the issue of principle which lies at the heart of the applications. Those submissions were made in open court, and without reference to the facts of the applicants' cases. In this judgment, which addresses the issue of principle, it will be neither necessary nor appropriate to refer to the facts of either case, or to

the identity of the judges concerned or of counsel. Subsequent submissions were made in separate closed hearings as to the merits of the individual applications.

4. This court has considered the issue of principle in a number of previous cases. We have been referred to, and have considered, the following: *R v A and B* [1999] 1 Cr App R (S) 52 ("*A and B*"); *R v K* [2002] EWCA Crim 927 ("*K*"); *R v A* [2006] EWCA Crim 1803, [2007] 1 Cr App R (S) 60 ("*A*"); *R v P and Stephen Blackburn* [2007] EWCA Crim 2290, [2008] 2 Cr App R (S) 5 ("*P and Blackburn*"); *R v H, R v D, R v Chaudhury* [2009] EWCA Crim 2485, [2010] 2 Cr App R (S) 18 ("*H, D and Chaudhury*"); *R v ZTR* (also referred to as *R v Z*) [2015] EWCA Crim 1427, [2016] 1 Cr App R (S) 15 ("*ZTR*"); and *R v Royle*, *R v AJC*, *R v BCQ* [2023] EWCA Crim 1311 ("*Royle*").

5. In *Royle* this court has very recently reviewed the principles relating to the sentencing of offenders who have provided information and/or assistance (hereafter, "assistance") to the law enforcement authorities ("the police"). We shall not repeat all that was said in that judgment. The court referred both to the long-established common law practice of reducing the sentence which would otherwise have been imposed on an offender, to reflect the fact that he has provided assistance to the police as outlined in a confidential "text" provided to the sentencer by the police, and to the statutory procedure which was introduced with effect from 1st April 2006 by sections 71-75 of the Serious Organised Crime and Police Act 2005 ("SOCPA"), and is now contained in sections 74-75 and sections 387-391 of the Sentencing Code under the Sentencing Act 2020. As in *Royle*, we will refer to those as "the text procedure" and "the statutory procedure" respectively, and we will refer to those who provide assistance to the police as "informers".

6. At [13] of its judgment in *Royle* this court summarised the case law as establishing that –

> "… an offender who wishes to receive a reduction in sentence by providing information or assistance to the police must do so before he is sentenced in the Crown Court."

7. The submissions made in the present cases invite this court to consider whether there are, or should be, exceptions to that statement of the law.

8. It is convenient to consider the principal cases briefly in chronological order, beginning with *A and B*. The appellants in that case had pleaded guilty to drugs offences. They had both provided assistance to the police before they were sentenced, which was taken into account by the sentencing judge in accordance with the text procedure. Both had continued to provide assistance during the period of more than two years between the date of sentencing and the hearing of their appeals. This court made a further reduction in their sentences to reflect the fact that they had continued to supply information which had proved to be more valuable than the judge could have expected.

9. At page 56, the court set out five principles relating to the sentencing of informers, explaining the reasons why account will be taken of assistance given and reasonably expected to be given in the future. Omitting references to case law cited by the court, the fourth and fifth principles were stated as follows by Lord Bingham CJ:

> "(4) If a defendant denies guilt but is convicted following a contested trial without supplying valuable information to the authorities or expressing willingness to do so, the Court of Appeal Criminal Division will not ordinarily reduce a sentence to take account of information supplied to the authorities by the defendant after sentence. … The reason for this general rule is clear: the Court of Appeal Criminal Division is a court of review; its function is to review sentences imposed by courts at first instance, not to conduct a sentencing exercise of its own from the beginning. Thus it ordinarily relies entirely, or almost entirely, on material before the sentencing court. A defendant who has denied guilt and withheld all cooperation before conviction and sentence cannot hope to negotiate a reduced

> sentence in the Court of Appeal by cooperating with the authorities after conviction. In such a situation the defendant must address appropriate representations to the Parole Board or the Home Office.
>
> (5) To this general rule there is one apparent, but only partial, exception. It sometimes happens that a defendant pleads guilty and gives help to the authority, for which help credit is given, explicitly or not, when sentence is passed. In such a case the sentencing court will do its best to assess and give due credit for information already supplied and information which, it is hoped, will thereafter be supplied. But it may be that the value of the help is not at that stage fully appreciated, or that the help thereafter given greatly exceeds, in quality or quantity or both, what could reasonably be expected when sentence was passed, so that in either event the credit given did not reflect the true measure of the help in fact received by the authorities. … In such cases this court does, as it should, review the sentence passed, adjusting it, if necessary, to reflect the value of the help given, and to be given, by the defendant."

10. That guidance was cited in *K*, in which Latham LJ, giving the judgment of the court dismissing the appeal, said at [18]:

> "The appellant himself has indicated that he was prepared to assist. The information that we have makes it clear that no such assistance was given to the authorities until after the appellant had been sentenced. That was the appellant's own decision. It follows that there was no submission made to the judge that any credit should be given to the appellant by reason of assistance that he might be able to give to the authorities. That was, as we have said, a deliberate decision taken by him and his legal advisers and after a careful consideration of the position. We fully understand why that might have been considered an appropriate course. However, it must follow that as far as this court is concerned there can be nothing which this court can criticise about the sentence which was imposed by the judge on the material which was before him. On the basis that this court is a reviewing court, it would normally follow that this court could not interfere with the sentence that was passed on the basis of matters which postdated the sentence passed by the judge."

11. In *A* the appellant was convicted of drugs offences and sentenced after a trial. He had put forward a defence of duress based on the actions of another man, Watson. At the time of

his sentence, the 2005 Act was not in force. Watson was later arrested in connection with the same drugs offending, and A gave important evidence against him. A then appealed on the basis that his sentence should be reduced because of the assistance he had provided. His appeal was allowed. Latham LJ, giving the judgment of the court, referred to *A and B*, and *K*. Both those cases, he said at [7], showed that this court –

> "… is, generally speaking, a court of review and, accordingly, that material which arises after the sentencing judge has imposed a sentence will not normally permit an appellant to reopen what was otherwise, at the time of sentencing, a proper sentence."

12. Latham LJ went on, however, to refer to section 11(3) of the Criminal Appeal Act 1968, which empowers this court to quash a sentence if it considers that the appellant should be sentenced differently for an offence for which he was dealt with by the court below. At [9] he stated:

> "It is plain from that section that, despite the general rule, the court is not precluded in exceptional cases from taking into account material which has arisen subsequently. We would wish, however, to reiterate that the remarks made by Lord Bingham in relation to defendants who deny guilt and subsequently decide to improve their position by giving information remain valid. But that is not this case. Quite the opposite. This is a case where the appellant has maintained the same account as to the substance of his involvement in the drug trading in question from the beginning and carried it through into the evidence he gave at the trial of Michael Watson."

13. In *P and Blackburn* this court considered for the first time the statutory procedure, noting that there could be a review of sentence in two situations: where an offender had entered into a written agreement with a specified prosecutor to provide assistance but had thereafter failed to comply with that agreement; and where an offender first decided to provide assistance after he had been sentenced. In each of those circumstances the statute provided for the possibility

of a re-sentencing in the Crown Court and a possible appeal to this court. The court also noted that the text procedure would continue to be used. In that regard, Sir Igor Judge, PQBD, said this at [34]:

> "There will be occasions when a defendant has provided assistance to the police which does not fall within the new arrangements, and in particular the written agreement. He is not thereby deprived of whatever consequent benefit he should receive. The existing 'text' system, verified in the usual way … may still be used, where appropriate, either before sentence is imposed in the Crown Court, or indeed at the hearing of an appeal against sentence. In summary, pragmatism still obtains. The investigative process is not to be deprived of the assistance derived from those who are, for whatever reason, unable or unwilling to enter into the formalised process envisaged in SOCPA …"

14. In *H, D and Chaudhury* the court reiterated the principle stated in *A and B* that the function of this court is to review sentences imposed at first instance. Lord Judge CJ at [4] said:

> "Where … the offender wishes to limit his co-operation to the text regime, it is generally unrealistic for him to anticipate any reduction in sentence on appeal to this court if he has pleaded not guilty and has not set this process in motion by the time the Crown Court has sentenced him."

15. Lord Judge described principle 5 in *A and B* as a recognition of the need in practice for an element of flexibility in the approach of this court where an offender has sought to provide assistance and take advantage of the text procedure before he is sentenced. The court went on to reduce the sentence of the appellant H, who had provided assistance after he was sentenced. H had expressed his willingness to assist before he was sentenced, but for various reasons he had not been provided with an opportunity to do so, and the sentencing judge had not been made aware of the appellant's willingness to assist. The court held, at [24], that a

detailed examination of the facts showed H's case to be "within one of the exceptional cases permitting for flexibility identified by Lord Bingham CJ" in *A and B*.

16. In *ZTR* the appellant was convicted of murder. Some years later, and after the provisions of the 2005 Act had come into force, he provided the police with assistance about matters which had arisen after his conviction. He appealed against the length of his minimum term, which he contended should be reduced because of the assistance he had given. It was submitted on his behalf that the common law should adopt, on the basis of pragmatism and utilitarianism, the principles in the 2005 Act which permitted the reduction of a sentence where assistance was first provided after sentencing. That submission was rejected. Lord Thomas CJ, giving the judgment of the court, noted, at [11], that the facts of *A* showed that the appellant in that case had carried on providing assistance which he had given and agreed to give before he was sentenced. That case was, therefore, not an exception to the general rule that the assistance must be given before sentence.

17. Lord Thomas observed, at [19], that arguments based on pragmatism and utilitarianism had always been present. He continued:

> "We can see no good reason to depart from the established principles. There are also two countervailing considerations. First this court would not be acting as a court of review, but rewarding someone for good behaviour during his sentence. That is not this court's function. Secondly, experience has shown that some may be motivated to manufacture assistance after conviction in the hope of a reduction in a long sentence. Nothing should be done which might encourage this."

18. We note next the relevant provisions of the Sentencing Code. By section 74, an offender who has pleaded guilty may enter into a written agreement with a specified prosecutor to provide assistance in relation to any offence, and the court in sentencing him may take into

account the extent and nature of the assistance given or offered. If a reduced sentence is passed for that reason, but the offender then knowingly fails to give assistance in accordance with his agreement, section 387 enables the prosecutor to refer the case back to the Crown Court whilst the offender is still serving his sentence. The court may then impose a greater sentence.

19. Importantly for present purposes, section 388 provides in material part:

> "**388 Review of sentence following subsequent agreement for assistance by offender**
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> (1) A case is eligible for review under this section if –
>
> (a) the Crown Court has passed a sentence on an offender in respect of an offence,
>
> (b) the offender is still serving the sentence, and
>
> (c) pursuant to a written agreement subsequently made with a specified prosecutor, the offender has assisted or offered to assist the prosecutor or investigator of any offence,
>
> but this is subject to subsection (2).
>
> (2) A case is not eligible for review under this section if –
>
> (a) the sentence was discounted and the offender has not given the assistance offered in accordance with the written agreement by virtue of which it was discounted, or
>
> (b) the offence was one for which the sentence was fixed by law and the offender did not plead guilty to it.
>
> (3) A specified prosecutor may at any time refer a case back to the Crown Court if –
>
> (a) the case is eligible for review under this section, and

(b) the prosecutor considers that it is in the interests of justice to do so.

(4) A case so referred must, if possible, be heard by the judge who passed the sentence to which the referral relates.

(5) The court may –

(a) take into account the extent and nature of the assistance given or offered;

(b) substitute for the sentence to which the referral relates such lesser sentence as it thinks appropriate."

20. The practical effect of subsection (2)(b) is that a review of sentence pursuant to section 388 is not available to an offender who was convicted after trial of an offence of murder. In all other cases, the section provides a route by which an offender may seek to enter into an agreement with a view to having his sentence reviewed, and potentially reduced, by the Crown Court on the basis of his post-sentence offer or provision of assistance to the police. Where that route is taken, the decision of the Crown Court may be the subject of an appeal to this court.

21. What, then, is the position of an offender who wishes to seek a reduction in his sentence on the basis of assistance offered or provided for the first time after he has been sentenced, but who – for whatever reason – is unwilling or unable to enter into a formal written agreement with a specified prosecutor? He cannot bring his case back before the Crown Court for a review of his sentence: that would only be possible if the statutory procedure were followed. Can he appeal to this court against the sentence originally imposed? We have reflected on the submissions made to us in that regard. Some of the submissions were focused on what the law should be rather than on what the law is, and in particular on the reasons why it would be desirable in the public interest that the text procedure should be available in such circumstances. We are grateful to counsel for their assistance. Our

conclusions are as follows.

22. First, we regard the case law as establishing a firm general rule that a reduction of sentence pursuant to the text procedure is only available to an offender who provides, or at least offers to provide, assistance before he has been sentenced. As a matter of principle, we can see no distinction in this regard between an offender who has pleaded guilty and one who has been convicted after a trial; and no counsel submitted that any such distinction should be drawn.

23. Secondly, the rationale for that rule lies in the nature of this court's jurisdiction: namely, that on an appeal against sentence it reviews the sentence imposed below on the basis of the information and material which was before the sentencing judge.

24. Thirdly, this court may take into account assistance provided after sentence where it significantly exceeds, in quality and/or in quantity, that which the sentencer took into account in passing sentence (see principle 5 in *A and B*); or where before his sentencing the offender had provided or offered assistance to the police which justified the provision of a text, but for some reason that fact had not been made known to the sentencer (see *H, D and Choudhury* at [6]). In our view, the decisions to that effect are not in truth exceptions to the rule but rather applications of it. They confirm that the text procedure may be used where the later events were an addition to or development of circumstances which were, or should have been, made known to the sentencing judge.

25. Fourthly, neither those decisions nor any other case which has been referred to us supports any wider departure from or exception to the rule. It is often said that this court should "never say never", and we recognise that cases may arise – albeit very rarely – which are wholly exceptional when compared with all other cases involving the provision of

assistance by informers. References in the case law to "the general rule" do no more than recognise that wholly exceptional cases may arise which on rare occasions may justify a departure from the general rule. Such references also recognise that the reviewing function of this court may sometimes extend to the consideration of post-sentence developments, for example where reports available to this court show that a young appellant has made good progress whilst in custody.

26. We have considered a number of submissions to the effect that support for a wider exception can be found in isolated passages from the judgments we have cited. We are unable to accept those submissions.

(i) The confirmation in *P and Blackburn* at [34] that the text procedure may still be used "where appropriate", and the references later in that paragraph to "pragmatism", cannot in our view be regarded as widening the existing rule.

(ii) The judgment in *H, D and Choudhury* at [28] makes clear that before being sentenced the appellant H had offered to assist but, for reasons outside his control, no text was prepared as it should have been and the judge was therefore unaware of an important piece of mitigation which he should have been able to take into account.

(iii) For the reasons explained by the Lord Chief Justice in *ZTR* at [11], the decision in *A* was not in fact an exception to the general rule.

(iv) Under section 11(3) of the 1968 Act, this court is empowered to act if it thinks that the appellant should be sentenced differently for an offence. We are unable to accept the submission that that power can be invoked in

circumstances where no complaint is made about the sentence imposed by the court below (which may, indeed, have been a mandatory minimum sentence), and an appellant is seeking to rely on post-sentence events of which the sentencing judge knew nothing.

27. We have also considered other submissions suggesting a basis for a wider exception to the general rule. Again, we are unable to accept them. They face the obvious difficulty that *ZTR* provides recent authority, in a judgment given by the Lord Chief Justice, that there is no good reason to depart from the established principles. They face the further obvious difficulty that the first countervailing consideration identified by the Lord Chief Justice necessarily applies to any case in which an offender seeks to invoke the text procedure only after he has been sentenced.

(i) As we have noted, the statutory procedure under section 388 will in most cases be available to an offender who decides, after he has been sentenced, to provide assistance. Parliament has set the limits to that procedure. Parliament's creation of the section 388 procedure, which involves a review in the Crown Court and the potential for an appeal in which this court would act as a court of review, cannot be regarded as justifying an expansion of the text procedure in a way which would require this court to exercise a different function, and which (in contrast to the statutory procedure) could only be available if the offender had not previously appealed against his sentence on other grounds.

(ii) Similarly, rule 28.11 of the Criminal Procedure Rules, which applies where the Crown Court can review a sentence, does not support an expansion of the text scheme. As with rule 28.1, which was considered in *Royle* at [41],

this rule plainly applies only to the statutory procedure. There are no other circumstances in which the Crown Court can review a sentence on the basis of assistance provided post-sentence.

(iii) Submissions seeking to rely on the post-sentence provision of assistance as a form of "exceptional progress in custody" are, with respect, simply misconceived. Under transitional provisions relating to the introduction of the Criminal Justice Act 2003, exceptional progress could be relevant to the determination of the minimum term to be served by an offender convicted of murder and sentenced to life imprisonment; but those very specific provisions do not warrant any wider, general ground of appeal based on exceptional progress.

28. We of course recognise the desirability of encouraging offenders to provide assistance and the pragmatic arguments in favour of enabling them to do so via the text procedure. We accept that there will be cases where, for example, the assistance relates to matters which themselves only arise after the informer has been sentenced, where valuable assistance could be provided by a serving prisoner, and where the risk of a self-serving creation of information can safely be excluded. We also recognise that the decision whether to enter into the statutory procedure may be a very difficult one (though it is far from the only difficult decision which must be made by a prospective informer), and that there may be good reasons why a particular informer does not wish to engage in that procedure, or is not permitted to do so. But these and other pragmatic considerations, however cogent, cannot enlarge the jurisdiction of this court. With all respect to counsel, their submissions were unable to overcome the obstacle presented by the fact that this court operates as a court of review.

29. For those reasons, we conclude that the general rule is as so recently summarised in

*Royle*: an offender who wishes to rely on the text procedure must provide, or at least offer, assistance before he is sentenced. If he fails to do so, he cannot rely on a text as a basis for asking this court to alter a sentence which is unimpeachable on the basis of what was known to the sentencing judge.

30. It follows that an offender who offers or provides assistance for the first time after he has been sentenced, or who is invited to do so, must not be told, or given to understand, that he will be able to engage in the text procedure and to rely on that assistance as the ground for an appeal to this court relying on the text procedure. In such circumstances, the offender may be able to engage in the statutory procedure under section 388 of the Sentencing Code. As to whether any alternative route may be available to him, we have received no submissions about the availability or scope of any application which might be made by the offender to the Secretary of State for the Home Department. It is not for this court to comment on whether the strong public interest reasons urged upon us by counsel militate in favour of such a route being available. Nor is it for this court to comment on the decision of Parliament to exclude from the statutory scheme those who have pleaded not guilty to a charge of murder but have been convicted of that crime.

31. That being our conclusion on the point of principle, the grounds of appeal against the individual sentences fall away. Nothing which we have heard in either the open or the closed submissions is capable of bringing either applicant within the wholly exceptional type of case which might very rarely justify a departure from the general rule. We need say no more, and separate closed judgments would be superfluous.

32. It follows that no purpose would be served by granting an extension of time in either case, since neither appeal could succeed. We therefore refuse the applications for an extension of time and for leave to appeal against sentence.

33. We reiterate our thanks for the assistance we have received from counsel. We emphasise, however, that counsel are not to be named in this judgment. Any reporting which named counsel would run a severe risk of falling foul of our order under section 11 of the Contempt of Court Act 1981.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk

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