

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 202300890/A5
[2023] EWCA Crim 625

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 16 May 2023

Before:

LORD JUSTICE COULSON

MR JUSTICE GRIFFITHS

HIS HONOUR JUDGE BATE
(Sitting as a Judge of the CACD)

REX

V
LORIEN WHYTE

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 H BENTLEY appeared on behalf of the Appellant.

J U D G M E N T

LORD JUSTICE COULSON:

Introduction

1. The appellant is now 52. On 27 October 2022, in the Crown Court at Harrow, he pleaded guilty to two offences of conspiracy to supply a controlled drug of Class B. Count 1 related to cannabis, count 2 related to ketamine. On 16 February 2023, he was sentenced by HHJ Thompson to a total of 7 years 6 months' imprisonment. He appeals against that sentence with leave of the single judge.

The Facts

2. Count 1 related to a conspiracy to supply cannabis. Between 22 March 2020 and 1 June 2020, the appellant purchased large quantities of cannabis from a wholesaler, Anthony Kendle, and then sold it to others for onward supply. The prosecution expert found that the appellant's communications during the period of the conspiracy were consistent with the receipt and supply of at least 318 kilograms of cannabis; the defence expert thought the quantity could have been as much as 343 kilograms.
3. Count 2 related to a conspiracy to supply ketamine. The messages that were intercepted concerned the supply of 10 kilograms of ketamine. There were a number of messages over a number of days but, as was noted at the time of the sentencing, it is not clear whether a deal eventually took place.

The Sentencing Exercises

4. On count 1, by reference to the applicable Sentencing Guidelines, the quantity of the cannabis involved made this a category 1 offence. The judge said that the appellant was organising the buying and selling of drugs on a commercial scale and found the appellant played a *leading role* in that operation. That gave a recommended starting point of 8 years' custody, and a range of between 7 and 10 years' custody. The judge also said that there had to be an upward adjustment because of the amount of drugs involved.
5. For the same reasons, in respect of count 2, the judge found that the appellant played a *leading role*. The amount of drugs again put it within category 1, although the judge accepted that there was no evidence that those drugs were in fact supplied. She said that she would pass a sentence on count 1 which reflected the appellant's offending as a whole, including the ketamine conspiracy, and then pass a concurrent sentence in respect of count 2. She said she expressly bore in mind the principle of totality.
6. The judge identified as an aggravating factor the appellant's use of the Encrochat device to communicate with his suppliers and those to whom he was selling the drugs. She did not, however, regard his previous convictions for simple possession of cannabis (many years before) as an aggravating factor. As to mitigation, the judge made plain that she had read all the positive character references, and taken into account all that she had been

told about the appellant.

7. The judge said that, after a trial, the sentence that she would have passed was one of 10 years' imprisonment. Because the appellant had pleaded guilty at the plea and trial preparation hearing, she reduced the sentence by 25 per cent, to arrive at a term of 7 years 6 months.
8. Kendle was sentenced, with others, for his part in a separate conspiracy to supply cannabis which overlapped with the conspiracy involving the appellant. The different judge who sentenced Kendle had specific regard to his basis of plea. He took as his starting point 9 years, because he said Kendle was playing a *leading role*, but then decreased that to 7 years to take into account Kendle's mitigation and personal circumstances. He then reduced the 7 years by 25 per cent to reflect Kendle's guilty plea, so as to arrive at a sentence of 5 years and 3 months.

The Appeal against Sentence

9. Three criticisms are made of the sentence imposed upon the appellant. Those three points have been made with admirable concision by Mr Bentley this morning. The first complaint is that the judge failed to move down within the range in the Sentencing Guidelines to reflect the features of a *significant role*, rather than a *leading role*, which existed in the appellant's case. The second complaint is that the judge failed to pay sufficient regard to the appellant's mitigation. The third complaint is that there was a wide disparity in the appellant's sentence when compared to that imposed on Kendle. We deal with those three criticisms in that order.

The Nature of the Appellant's Role

10. On behalf of the appellant, Mr Bentley submitted that this case did not fit neatly within the descriptions of *leading* and *significant roles* in the Sentencing Guidelines and that there were features of the appellant's role that were broadly equivalent to a *significant role* rather than a *leading role*. He said that ought to have been reflected in the judge's characterisation.
11. We do not accept that submission. There are a number of reasons for that. First, the characteristics identified in the Guidelines are intended simply to be indicative, to act as a guide. They are not exhaustive. So, it is wrong in principle to talk of 'fitting within' the descriptions in the Guidelines. Sentencing, in our view, is a much more flexible exercise than that.
12. Secondly, in our experience, it is very often the case that those at the top or towards the top, of any drugs conspiracy, can point to particular features of the role they played and argue that it was indicative of a *significant role* rather than a *leading role*. In some respects, one would expect that, given that a *leading role*, particularly in the smaller conspiracy, will often encompass elements of both.

13. But most important of all, we do not consider that there was any real difficulty here in arriving at a proper categorisation of the role that the appellant played. There were a number of factors identified in the Sentencing Guidelines as demonstrating a *leading role*, which were present here. It is more than one. The appellant bought cannabis in large quantities from Kendle and then sold the drugs on to others. He sometimes arranged for others to make the deliveries. So he was, on any view, organising the buying and selling of cannabis on a commercial scale. Furthermore, he had close links to Kendle (the Encrochat reveals that), and that is a close link to the original source. That was something that was pointed out by the appellant's own drug expert. We are entirely satisfied that the appellant had an expectation of substantial financial gain given the quantities of cannabis involved. We do not accept that the gain was somehow modest, as Mr Bentley put it at one point this morning. Given the quantities, it was clearly substantial.
14. On the other side of the coin, there was no basis of plea, and this is not a case in which it was suggested that the appellant was running his drug operation for the financial benefit of anyone other than himself. So, in our view, the judge was quite right to conclude that this was a relatively simple case of a drug conspiracy where at least one of the leading roles was played by the appellant. In those circumstances, the judge was quite right, when turning to the Sentencing Guidelines, to find a number of indications that the appellant played a *leading role*. We therefore reject the first criticism of the judge's sentencing exercise.

Mitigation

15. To address Mr Bentley's second criticism that the judge failed to take proper account of mitigation, we consider it necessary, first, to understand how the judge reached the term that she did. We accept Mr Bentley's criticism that the judge failed to explain each step in her calculation. She should have done, so it falls to us to do that exercise now.
16. In relation to Class B drugs, the recommended starting point in category 1, for a person playing a *leading role*, is 8 years' custody with a range of 7 to 10 years' custody. That was the range to which the judge expressly referred. That Guideline is based on an indicative quantity of 200 kilograms of cannabis. In the present case the amount of cannabis was more than half as much again, which justified an uplift from the 8-year starting point. There was also a significant aggravating factor, namely the use of the Encrochat, which would also increase the notional starting point of 8 years.
17. Taking those two matters together, namely the quantity of drugs and the use of Encrochat, we consider that a 10 year starting point would have been justified for count 1. Furthermore, as the judge made clear, the sentence on count 1 was intended to take into account the entirety of the appellant's offending, so it included the ketamine offence. The indicative amount of ketamine in the Sentencing Guidelines for category 1 is 5 kilograms. Here the amount was twice that. Even making allowance for the fact that there was no evidence that this (or any) amount was eventually transferred, the quantity was a significant factor. If the ketamine conspiracy in count 2 had been treated in isolation, it is difficult to see how anything less than a 7 year term (the bottom of the

recommended range in the Guidelines) could have been justified. Just looking at count 2, before taking into account totality, there was a significant sentence of imprisonment to be served.

18. Whilst the judge would have been quite entitled to pass consecutive sentences had she wished, the course she took, on passing one overall term to reflect all the offending, was the better one. To do that, she had to take into account totality. In our view, to reflect the fact that she was considering both offences together, the judge was justified in going outside the Guidelines for a single conspiracy, so to arrive at an overall starting point of, say, 12 years. That took the 10 year term we have identified for count 1 above, and allows an additional 2 years for the appellant's criminality in respect of count 2. That would plainly accord with the principles of totality.
19. As Mr Bentley rightly said, there were mitigating factors to be taken into account before the discount for plea, in particular the appellant's lack of previous convictions and the testimonials as to his good character. In our view, neither of those can be given undue weight, given the scale of the conspiracy. For example, we note that there were, on average, around 1000 Encrochat messages a week for the 10 weeks covered by the indictment. The mitigation could not therefore have led to a reduction in the notional sentence prior to discount for plea of more than, say, 2 years, so that would therefore reduce the sentence back to the 10 year term which the judge identified before the discount for plea.
20. Accordingly, although we consider that the judge ought to have set out those steps in her calculation, we have concluded, in doing that exercise ourselves, that the sentence of 7½ years was justified in the present case. That is however subject to the final argument concerning disparity.

Disparity

21. Mr Bentley's last submission was that there was an unacceptable discrepancy between the sentence imposed on the appellant (7½ years) and the sentence imposed on Kendle (5 years and 3 months). We have considered that submission carefully but, for the reasons that we will set out, we do not accept it.
22. First, the offences charged, and the situations in which the appellant and Kendle found themselves, were not directly comparable. Kendle only faced one count in respect of the cannabis, albeit in respect of much greater quantities. He did not face a separate count in relation to a large quantity of another Class B drug. The appellant was therefore in a different and worse position than Kendle. Moreover, Kendle relied on a basis of plea which, allied to his mitigation justified a significant reduction in the sentence otherwise imposed.
23. Secondly, the test for disparity is whether, having regard to the different sentences, a reasonable person would consider that the appellant's sentence was manifestly excessive

and/or that something had gone wrong with the administration of justice. We do not consider that such a test has been made out here. Whatever points may be made about Kendle's sentence, they cannot affect the conclusion that, although the sentence of 7 years 6 months imposed on the appellant ought to have been explained more fully, it was neither wrong in principle nor manifestly excessive.

24. For those reasons, although it has been attractively argued by Mr Bentley, we dismiss the appellant's appeal.

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