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IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2023] EWCA Crim 699



No. 202201593 A4

Royal Courts of Justice

Tuesday, 23 May 2023

Before:

LORD JUSTICE WARBY
MR JUSTICE HILLIARD
HIS HONOUR JUDGE FLEWITT KC

REX
V
WAYNE JOHN SIMMONDS

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MR M MILLIKEN-SMITH KC and MR T WYATT appeared on behalf of the Applicant.

THE CROWN were not represented.

J U D G M E N T

LORD JUSTICE WARBY:

- 1 This is a renewed application for an extension of time in which to apply for leave to appeal on sentence following refusal by the single judge.
- 2 The applicant is Wayne John Simmonds, now aged 41. He was one of six men who, in 2021, faced an indictment in the Crown Court at Manchester alleging conspiracy to rob (Count 1), conspiracy to supply a controlled drug of class A (Count 2) and failure to comply with a Serious Crime Prevention Order (Count 3). The applicant and four others pleaded guilty before trial to Count 2. The single defendant charged under Count 3 pleaded guilty. The five defendants who were charged on Count 1 all pleaded not guilty.
- 3 On 3 August 2021 those five were all convicted on Count 1. On 12 November 2021 the defendants were all sentenced by the trial judge, His Honour Judge Tony Cross KC. He imposed terms of imprisonment ranging from 15 to 27 years. The applicant's sentence was one of 23 years, made up of 15 years for the conspiracy to rob and eight years consecutive for the drugs conspiracy. A Serious Crime Prevention order was also imposed.

Extension of time

- 4 The notice of appeal was not filed until 23 May 2022. That was over six months after the date of sentencing, so it was 163 days out of time. It was just three days before the hearing of appeals and renewed applications for leave to appeal against sentence on the part of the applicant's co-defendants, all of whom had filed papers in time. Trial counsel, Mr Wyatt, has explained that he gave positive advice on appeal and within 10 days of the sentencing hearing had drafted grounds and, so he thought, provided these to his instructing solicitors by email. He then heard nothing for months, only to learn that no steps had been taken. The belated filing of the notice of appeal was prompted by learning that the co-defendants' appeals and applications were imminently to be heard. Counsel surmises that there must have been some technical problem with his secure email address. That may be so. We are puzzled that the solicitors instructed seemingly took no steps to follow up the matter. That said, we see the force of the point made that the applicant himself was in no way to blame and should not suffer.
- 5 We take the same approach as the single judge on this matter. We regard this as one of those cases in which the question of whether it is in the interests of justice to extend time ultimately turns on whether there are arguable grounds of appeal. We, therefore, proceed to consider the merits of the application for leave to appeal.

The facts

- 6 The six men involved in the offending were the applicant, who is from West London, four other men who were all part of an organised crime group from Manchester and became known as "the Manchester defendants", and a drug dealer from the Midlands. The Manchester defendants are Christopher and John Sammon, who are brothers, and Gary Betts and Gerard Boyle, who are brothers-in-law. The Midlands drug dealer is called William Skillen.
- 7 It was the drugs conspiracy that began first. Because the focus of the appeal is on the conspiracy to rob, we can summarise the drugs matter very shortly.
- 8 The Manchester defendants used a recycling business at South Manchester Plastics ("SMP") as a front for criminal activities. From about April 2020 they were involved in the wholesale supply of cocaine to other dealers who sold it down the supply chain to end users. The applicant was a convicted drug dealer to whose record we shall come. He had met

Sammon in jail. His role was to supply cocaine to the Manchester defendants for onward sale by them. The Manchester defendants also put the applicant in contact with Skillen in return for a cut of the deals between the two.

- 9 This plot was discovered by the National Crime Agency ("NCA") using covert listening devices installed in the premises at SMP. Recordings from those devices of conversations on Encro-chat mobile phones showed that the Manchester defendants were discussing their trade in cocaine, doing deals, weighing out cocaine, making payment arrangements and splitting the profits as well as bringing together the applicant and Skillen.
- 10 It was during the period of this conspiracy that the four Manchester defendants recruited the applicant to a plan that they had hatched to rob the Davies family, successful butchers and meat wholesalers from Bury. Brian Davies Senior was known locally as a wealthy man from whose house high-value items, together with hundreds of thousands of pounds in cash, had been stolen in the course of a burglary in 2018. In February 2020, Brian Davies Senior was the victim of a violent robbery. He was attacked in the driveway of his home as he was removing shopping from the boot. The car was taken, and on the car key-ring were his house keys. These facts, too, were known in the local area.
- 11 As a result, the Manchester defendants decided to target the Davies family in their home in a robbery. This plot was also discovered by means of the covert listening devices. The conspirators were heard discussing and planning the robbery, how it would be carried out, what they expected to obtain, and what they would do if the Davies' resisted. The applicant had London associates who were equipped to pretend to be the police. The overheard conversations showed that the conspirators eventually decided to use these associates as a means of getting access to the Davies' home under the pretence that they were officers with a warrant to search the home and with the intention of forfeiting cash on the grounds of suspected tax evasion.
- 12 Conversations were recorded on 27 and 28 April 2020 which did not involve the applicant. He was, however, party to a recorded conversation on 7 May. At that time the decision was made that the robbery would take place on 11 May, because the conspirators believed that the Davies family would have the maximum amount of cash at their home following the May bank holiday weekend.
- 13 But the conspiracy was foiled when, on the morning of 11 May 2020, police attended SMP and arrested Boyle, Betts and Christopher Sammon. The applicant was arrested later the same day, and John Sammon some months later.

Sentencing materials

- 14 Two aspects of the sentencing materials before the judge are of some relevance.
- 15 First, the applicant's antecedent history; this shows eight previous convictions for 14 offences of which four were recent and relevant. In February 2009 he was convicted of one count of conspiracy to supply class A drugs, namely cocaine, and one of money laundering. He was sentenced to a total of 11 years' imprisonment. In December 2014, shortly after his release on licence from an earlier sentence, he took part in a conspiracy to supply amphetamine and a single offence of possessing cocaine with intent to supply. Having pleaded guilty to both of those offences, he was sentenced to a total of eight years' imprisonment. At the time of his arrest for the index offending in May 2020 he was on licence from that sentence. He was duly recalled to serve the remainder of that sentence in custody.

- 16 Secondly, there was a victim personal statement from Brian Davies Junior. He described his father as 82 years old, retired and not in good health, growing increasingly frail. He stated:

"Knowing what these men were prepared to do and the violence they were prepared to commit shocked me and my family ... If the plan had gone ahead, both me and my dad believe this could have killed him due to his frailty. I am shocked, all of us, and this would have completely devastated my family."

Sentencing remarks

- 17 The judge treated the conspiracy to rob as the principal offence. He observed that the covert recordings from SMP indicated that robbery of the Davies family had been in contemplation by the Manchester defendants for a very long time indeed. He said that recordings of the five defendants discussing the crime in April and May 2020 indicated clearly that the issue had not been whether there would be a robbery but when and how it would be carried out. The evidence made clear, however, that the recorded conversations at SMP were not the only occasions on which the robbery had been talked about. There had been discussions on other occasions by telephone and in person.
- 18 The judge had said he was satisfied that the defendants' criminal connections had led them to the Davies family which they all knew to be successful and wealthy, with expensive assets, including cars and jewellery, as well as large amounts of cash. Each of the defendants believed that they could become wealthy from crime. The judge referred to a conversation in which Boyle had estimated there would be half-a-million pounds of cash in the house, and Betts and Sammon had spoken of how the gang would be able to get "loads of cash" from the safe or hidden in a safe room "once you have given them a good hiding".
- 19 The judge referred to submissions on behalf of Sammon and Betts, adopted by counsel for the applicant and others, that in substance the plan was one for theft by deception. The submission, said the judge, was that violence was not part of the final plan, having been ruled out once the scheme became to use a bogus police team. The judge described this submission as "rather naïve". He said the idea that a conspiracy "became a cold and calculated crime" whereby the bogus police officers would turn up and all would proceed without violence was a "nonsense" which ignored the reality of crime.
- 20 The judge referred to evidence of what Betts had said about what he might do to extract information as to where the cash was stored. Betts had spoken in one of the recorded conversations of cutting off an ear, using a blow torch on the balls, and of how much an iron on the chest hurts. The judge also mentioned a suggestion by the applicant that Mr Davies might be brought to SMP to be interrogated. The judge further observed that the defence submission, as he described it, was inconsistent with the defendant's conviction for conspiracy to rob, which inevitably involved an attempt to inflict or threaten violence. He was satisfied that "the people recruited to the crime" were "determined criminals who would have gone to any lengths to achieve their aims".
- 21 Turning to the sentencing guidelines for dwelling robbery, the judge identified the offence as in Category 1A with a starting point of 13 years' imprisonment and a range of 10 to 16 years. Culpability was high as significant force was contemplated, involving the use of weapons, there was significant planning and preparation, and each conspirator had a leading role. The judge held that at least four of the seven guideline factors for high culpability were present. As to harm, the judge was satisfied that it was in category 1 because serious physical harm was contemplated, severe psychological harm had in fact occurred (that is, to Brian Davies Senior) and, in any event, very high-value goods were targeted. The

aggravating factors identified by the judge were that the offence would be prolonged, involving detention, the use of disguise and that, in the applicant's case, he was on licence. Those factors justified an uplift from the category starting point. The only mitigating factor was that the offence was not carried out, but that was only due to the intervention of the NCA and the police, who could wait no longer.

- 22 The judge drew no distinction between the Manchester defendants in this context. Each was sentenced to 18 years' imprisonment for his part in the conspiracy to rob. The applicant's case was distinguished from theirs. He received a lesser sentence of 15 years as he had "a slightly lesser role so far as the violence was concerned" although his offending was aggravated by a breach of licence. The judge said the drug offence would have attracted a sentence after a trial of 17 years but after reduction for a guilty plea and moderation of the totality that became eight years consecutive.

Grounds of appeal

- 23 As we have said, the target of the appeal is the sentence for the conspiracy to rob and its overall impact on the sentence as a whole. The first 10 of the written grounds of appeal boil down, on analysis, to the proposition that the sentence for that offence was wrong in principle or manifestly excessive because the judge misinterpreted the nature of the conspiracy or the applicant's role within it, or both. The judge is said to have consequently mis-categorised the applicant's culpability and the level of harm. The contention advanced in writing was that, on a correct analysis of the evidence, the applicant's culpability was at level B and the harm intended was at the upper end of the category 3, or at worst the lower end of Category 2. Further, it was said that the judge was wrong to conclude that there were sufficient aggravating factors to merit upwards adjustment from the category starting point.
- 24 In summary, the argument was (and to a large extent it remains) that although the Manchester defendants may, at one stage, have engaged in a conspiracy involving sophisticated planning and preparation, and an intent to use force and weapons, all of that was before the applicant was recruited. By the time he became a party to the conspiracy on 7 May 2020, it had become a specific plan to use a fake police team to deceive the Davies family into allowing what was described as "confiscation" of the money in the safe. In one of the written submissions this was described as a "robbery by artifice". The applicant, it was said, was not part of any significant planning or preparation in respect of that plan, nor did he play a leading role in that plan. That plan, it was said, did not involve an agreement for significant violence, nor did it have the aggravating factors identified before the judge. It did not contemplate a prolonged, eventful detention, nor is this a case of particular gravity.
- 25 In support of these contentions, reliance was placed on transcripts of the Crown's cross-examination of Christopher Sammon which were said to show that the judge's findings went beyond the case that the Crown was able to make at trial.
- 26 In oral argument today Mr Milliken-Smith KC, who leads trial counsel Mr Wyatt, has put matters rather differently. He has focused on four main points. The first is that the sentencing judge rightly acknowledged that the applicant's role in respect of violence was a lesser one than that of his co-conspirators, but failed properly to reflect this in the sentence imposed. Secondly, a similar submission is made in respect of planning. The argument is that the sentencing judge should have reflected the limited nature and duration of the applicant's involvement in the planning, which stood in stark contrast to that of the Manchester defendants. Thirdly, it is argued that the sentencing judge gave too much weight to the fact that this offence was committed by the applicant in breach of his licence. Fourth and finally, it is said that the overall sentence infringed the principle of totality. The

over-arching argument is that the sentencing judge wrongly blurred the distinction that should have been made between the separate and distinct roles of the Manchester defendants on the one hand and this applicant on the other within the conspiracy.

- 27 Written ground of appeal no. 11 raised a separate and distinct point, namely that the judge erred in failing to give the applicant at least some credit for some of the time he spent in custody before the trial. The applicant acknowledges the general principle in s 204ZA(4) of the Criminal Justice Act 2003 that credit is not to be given for time spent in custody serving another sentence. Counsel points out however that here the trial date was put back from 19 April 2021 to 23 June that year on the application of the Sammon brothers. The applicant did not support that application and had no control over that matter. He submitted that his sentence should be reduced accordingly.

Assessment

- 28 Mr Milliken-Smith has not pressed ground 11 in his oral argument today. We can dispose of it very shortly. We accept that despite the general rule we have mentioned, there is a residual discretion to give credit for time spent serving a sentence for one offence before trial for another. But we see nothing in the circumstances of this case to indicate that this applicant was entitled to the exercise of that discretion in his favour. The relatively short adjournment of the trial was simply an incident of case management in a multi-handed case in which the applicant had chosen to protest his guilt.
- 29 Turning to the sentence for conspiracy to rob, it seems to us that the applicant's arguments are either directed at the judge's assessment of the evidence or they are complaints about the weight he chose to give to various matters that played a part in his sentencing decision. In substance, the applicant's case is and has been that the judge was not entitled to reach the conclusions that he did in respect of this applicant.
- 30 We are not persuaded by the arguments about the limited nature of the prosecution case. So far as the judge is concerned, he had presided over the trial and was in an unrivalled position to assess the significance of what he and the jury had read, seen and heard. He gave full reasons for his conclusions. And notwithstanding the able advocacy of Mr Milliken-Smith today, we find ourselves satisfied that the judge was entitled to make the findings of fact that he did and to attribute to the factors he identified the weight that he gave them.
- 31 With regard to the conspiracy, there are two main aspects to the matter. First, was there any proper basis for finding an agreement of the kind identified by the sentencing judge? In our view, there was. The judge's assessment of the case was reviewed by this court when it dismissed the Manchester defendants' challenges to the sentences imposed on them: *R v Boyle* [2022] EWCA Crim 848. Those defendants, according to paragraph 47 of the judgment, accepted that culpability was high. So far as harm is concerned, this court said:

"The judge correctly identified that serious physical harm was contemplated, that serious psychological harm occurred and also that very high-value goods were targeted."

The court thus upheld the overall categorisation of the offending, including:

"In our judgment, there can be no criticism with the judge's evaluation of culpability or harm, and of the identified features and factors within each category."

We agree with that.

32 The next question is: to what extent is the position of this applicant to be distinguished from that of the Manchester defendants? A major premise of the written argument was that the applicant was only a participant from 7 May 2020. That contention rested, however, on the fallacy that the covert recordings were the only relevant evidence as to his role. Not so. As this court said in *R v Boyle*:

"This was not just pre-recorded conversations, this was a conspiracy and the trial judge was able to assess for himself the nature and extent of that conspiracy."

In making that assessment in respect of this applicant, the judge had the assistance of evidence elicited by the Crown from Sammon in cross-examination, that the robbery had been discussed with the applicant well before 7 May. The transcript of the 7 May conversation itself indicates that the applicant had been up to Manchester before and, as Mr Milliken-Smith has accepted today, he became involved between 28 April and 7 May.

33 Having carefully reviewed the transcript of the conversation on 7 May 2020, we are satisfied that this provides a sufficient basis for the judge's findings about the nature of the conspiracy between the parties as it stood at that time. All the points that the judge mentioned in the passages to which we have referred were drawn from that conversation: the cutting off of an ear, using a blow torch on the balls and an iron to the chest. Those things were all said by Betts either to or in the presence of the applicant.

34 It is said that the applicant did not express any agreement with the view that any of those things should happen. That is true. But nor did he object or question what was being said, or say anything to disassociate himself from the clear suggestion that extremely violent methods should and would be used if that was required. On the contrary, he himself spoke of transferring members of the Davies family to SMP for "interrogation" if they failed to identify the location of the cash. The sentencing judge rejected a submission made to him that what Betts had said in the discussion was "just talk".

35 The jury were plainly satisfied that some degree of force was contemplated by this applicant or they could not have convicted him of conspiracy to rob. At the sentencing stage it was for the judge to evaluate the evidence about the degree of violence that was in view. He was entitled to conclude that the plan to which this applicant became a party was one that contemplated not only the acquisition of very high-value goods but also the infliction of serious physical harm in order to secure those goods if that proved necessary, as well as prolonged detention and the other matters identified in the sentencing remarks.

36 It was, in our judgment, fair and reasonable for the judge to conclude that these things were not just matters that the parties were prepared to contemplate as a possibility if things went wrong but a part of the plan to which the applicant became a party. We do not agree with Mr Milliken-Smith's submission that this was a matter of speculation. In our view, the applicant was fairly treated as having somewhat lesser responsibility than his co-conspirators for the violence that was in contemplation. We do not think he was arguably entitled to any more favourable treatment.

37 Turning to additional points advanced by Mr Milliken-Smith today, we do not consider that the judge can be said to have given too much weight to the aggravating feature of this offence that it was committed in breach of licence. We cannot accept that to do that is to punish the applicant twice, given that his recall meant that none of the 18 months that he spent awaiting trial counted to his time being served. That is a consequence of his offending. It does have an impact on the totality. But having reflected on that aspect of the matter, we share the view expressed by this court in *R v Boyle* that the sentencing in this

case, although severe, was not manifestly excessive - in this applicant's case, not arguably so. We do not accept the submission that the aggravating features relied on by the judge, including prolonged detention, were unfairly applied to this applicant.

- 38 In summary, Mr Milliken-Smith's arguments, able though they were, have failed to persuade us that there is an arguable basis for challenging the sentence in this applicant's case. The renewed application is, therefore, dismissed.
- 39 We add only that the judge pronounced the victim surcharge order of £190, but it was not recorded as it should have been. We direct that the record be amended in that respect.
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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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