APPROVED

NCN: [2021] EWCA Crim 1921
No. 202002977 A4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice

Friday, 5 November 2021

Before:

LORD JUSTICE POPPLEWELL

MR JUSTICE SPENCER

HIS HONOUR JUDGE KEARL QC RECORDER OF LEEDS

REGINA

V

DILLAN TROY KENNEDY

_____

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5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737

CACD.ACO@opus2.digital

MR A. ROXBOROUGH appeared on behalf of the Appellant.

MR P. HODGKINSON appeared on behalf of the Respondent.

JUDGMENT

LORD JUSTICE POPPLEWELL:

1
On 23 October 2020 the appellant pleaded guilty to two counts of being concerned in the supply of a controlled drug of class A, contrary to s.4(3)(b) of the Misuse of Drugs Act 1971: one related to cocaine, the other heroin. On 9 November 2020 he was sentenced to nine years' imprisonment concurrent on each count. The sentence was confirmed following a hearing under the "slip rule" on 23 December 2020.

2
The offences were committed by the appellant running a drugs line over three phones supplying users in the Heywood area. The phones advertised heroin and cocaine as being available 24 hours per day, seven days a week and the indictment period covered the three months April, May and June 2020. The appellant was arrested on 2 July 2020 and his flat was searched. Scales, snap bags, a dealer's list, a machete and two meat cleavers were found, together with the three phones from which texts and photos were recovered revealing the extent of his dealing. Drugs were also recovered by the police, which were valued at £10,000.

3
As part of his drug dealing operation the appellant exploited three vulnerable individuals in the following way.

4
In November 2019 the appellant was released from a 12 month prison sentence and he provided an address at 77 Peel Lane shortly after his release. 77 Peel Lane was in fact the home address of Ian Dodd, who suffered from paranoid schizophrenia and had learning difficulties. Mr Dodd had lived there for six years with the support of community services, including, in particular, psychiatric services. The appellant took over the premises for use as his home and for dealing drugs. He took over the main bedroom and moved the television into it. In March 2020 the local housing authority began receiving complaints from residents about 77 Peel Lane. The appellant had been dealing drugs from the house. In May 2020 Mr Dodd was detained under the Mental Health Act 1983; while in hospital his house had been taken over by the appellant and he was scared to go home: he ended up sleeping rough, having in effect been driven out of his house by the appellant. On 10 June 2020 the housing department secured the property. When a police officer entered the house, she found drugs paraphernalia.

5
Having been excluded from Mr Dodd's house, the appellant then moved on to 49 Bury New Road as a base for his operations. On a visit by a supervising officer, the appellant was found to be there on 26 May 2020 with a gentleman called Fenton Achempong. Mr Achempong also suffered from paranoid schizophrenia and had previously been detained under the Mental Health Act. He also used drugs, which were supplied by the appellant. Mr Achempong appeared on the occasion of that visit to be

doing errands for the appellant and to be doing his bidding. The appellant told the officer that he was caring for Mr Achempong and that they were going to open a business from a garage at the bottom of the garden. Shortly after that visit, the appellant was evicted from that address due to drug dealing taking place from the garage.

6
The appellant then moved into 25 Fletcher Close, which was the home with which Mr Achempong had been provided on his release from detention under the Mental Health Act. The appellant used this address from which to deal drugs. Mr Achempong incurred a drug debt to the appellant which his mother paid off. The appellant asked Mr Achempong how he could become registered as Mr Achempong's carer, no doubt in order to secure the appellant's presence at the property which he continued to use for his drug dealing. On 19 June 2020 Mr Achempong was again detained under the Mental Health Act due to his deteriorating mental health and was taken to hospital. His house was secured, but complaints were thereafter received from local residents that people were still coming and going from the address at all hours, despite the fact that it should have been empty. When a housing officer attended, it was clear that metal sheeting which had been used to secure the address had been removed and entry forced; and that it had continued to be used for drugs.

7
The third person exploited by the appellant was Mr Barakat Ali. He first came across the appellant in May 2020 when he witnessed the appellant shouting outside a neighbour's house and being aggressive. A few days later the appellant saw Mr Ali and apologised to him. He then gave Mr Ali a cannabis joint and would do so on a number of occasions after that when they met. On one occasion the appellant pulled over in his car to speak to Mr Ali and Mr Ali saw that in the back were a machete and a baseball with nails embedded. On 7 June 2020 the appellant turned up at Mr Ali's home address. He said he had been thrown out of his house. He went into Mr Ali's home and said to him "Look after this, if anything happens to it Tommy Warde is involved and you know what will happen." He then handed Mr Ali four packets of cocaine (four ounces) and instructed him to hide the drugs in his rectum. Mr Ali did as he was told. Later that night the appellant phoned Mr Ali and asked him if he needed anything. Mr Ali told the appellant he was in pain. The next morning Mr Ali called the police. They attended and told Mr Ali to retrieve the drugs. While Mr Ali was in his bathroom trying to retrieve the drugs, he was in so much pain that the officers called for an ambulance. While this was happening, the appellant was outside the property throwing pebbles at the window trying to attract Mr Ali's attention.

8
The drugs were retrieved and the police left. Later, the appellant turned up and banged on the door. Mr Ali was frightened and called the police. The appellant left before the police arrived. The appellant turned up again at the property with a group of people who were carrying weapons. Mr Ali again called the police and, once again, the appellant left before the police arrived. Due to concerns for his safety, Mr Ali was told to pack a bag and he was taken to a safe location.

9
The appellant was aged 26 at the date of sentence. He had seven previous convictions for 12 offences committed between 2009 and 2019. They included robbery, criminal damage, possession of class A and class B drugs, affray, and possession of a bladed article. In September 2015 he was sentenced to two years' detention in a Young Offenders' Institution for conspiracy to supply a controlled drug of class B.

Sentencing

10
Prosecuting counsel prepared and uploaded an Opening Note for Sentence. It referred to there having been about 17,000 calls on the three drugs line phones. It placed the offending in category 2, asserting that the quantity of drugs which could be inferred from the number of telephone calls was 1kg, and that that figure was also supported by the drugs paraphernalia, messages sent daily advertising the lines as providing a fast and reliable service 24/7, and photographs on the seized phones of large wads of money, which looked to be in the thousands of pounds. The prosecution note also placed the appellant as having had a leading role on the basis that he had a substantial link to, and influence on, others in the chain, including using Mr Achempong and Mr Ali; and that he had an expectation of substantial financial gain.

11
The prosecution also relied on messages from the recovered phones of the appellant offering rates on deal quantities of 0.85g (£60), a tenth of an ounce (£110), an eighth of an ounce (£200) and a quarter of an ounce (£360); and an offer of half an ounce at an unidentified price.

12
In sentencing the judge said that the scale of the operation could be assessed from the 17,000 calls over a period of three months, which showed that although not all of the calls would have ended in sales and drug deals, this was a large scale operation, which put it in category 2. As to role, the appellant had a leading role because the quantity of drugs and number of calls meant that he could not have been dealing all the drugs on his own; in addition, he had involved Mr Ali in the enterprise to conceal drugs and, moreover, he had an expectation of substantial financial gain. The judge identified four aggravating features. The first was the appellant's record which included an offence of conspiracy to supply cannabis. The second was the targeting of the premises of vulnerable people in the way we have described, one of whom (Mr Dodd) had effectively been driven out of his home. The third was the appellant's use of weapons. The fourth was that the offences were committed in breach of a conditional discharge which had been imposed for possession of drugs. The judge imposed no separate penalty for that breach of the conditional discharge. The judge treated as mitigation that the appellant would be separated from his family in prison, but observed that there was very little personal mitigation. She gave a discount of 25 per cent for the guilty pleas which had been entered at the PTPH and imposed a sentence of nine years. It is apparent, therefore, that she would have passed a sentence of 12 years after a trial, which is within the range for a category 2 leading role offence of 9 to 13 years and is one year above the starting point for that category of 11 years.

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Thereafter, the defence complained that there was no evidence of the number of calls made on the seized phones and persuaded the judge to arrange a further hearing, purportedly under the slip rule (now s.385 of the Sentencing Act 2020). At that hearing the defence were given a second opportunity to challenge the prosecution estimate of the amount of drugs involved.

14
The defence contended that the judge must have been satisfied that the quantity involved was 1kg, that being the indicative quantity for the starting point in category 2, and it was submitted that there was no admissible evidence from which such an inference could properly be drawn. A challenge was made first to the number of phone calls relied on, namely approximately 17,000. That was derived from a statement of DC Balkwell. His statement was uploaded to the Digital Case System after the

sentencing hearing, but before the slip rule hearing. It contained an analysis from the three phones over a period of two months, which had been increased by 50 per cent to give a three month figure. In fact, the three month figure would have been over 18,000 calls so the 17,000 figure was favourable to the defence. DC Balkwell's statement took these and many other detailed statistics about the call data from a report from a civilian analyst Ms Thomas, who had subjected the phone data to detailed analysis. DC Balkwell's statement was therefore available to the defence at the slip rule hearing, but Ms Thomas's report was not uploaded and was not available. The sentencing judge did not see it, and nor have we.

15
At the slip rule hearing the prosecution relied on a number of points to support the submission that 1kg was a conservative estimate of the quantities involved and that the judge was correct to treat such a quantity as established to the criminal standard of proof. In particular, it was submitted:

(1) Assuming each deal was of a quantity of 0.2g, a total of 1kg would reflect 49 deals per day. That would be two deals per hour over the 91 day period, which it was said was a realistic estimate of the frequency of dealing, given the total number of calls and DC Balkwell's calculation that there were 199 calls per day. The 49 deals per day figure was in fact mathematically erroneous. It should have been 55 deals per day, but that would not affect the thrust of this point. This, it was submitted, was a conservative estimate, because the appellant was regularly advertising quantities of 0.4g and on occasions advertising quantities which were considerably greater.

(2) The prosecution relied on a WhatsApp conversation between the appellant and his supplier, which was said to show that a supply of one and a quarter ounces to the appellant from his supplier was expected to be sold by the appellant within a period of three days. This was in fact a mischaracterisation of the message, which was an indication from the supplier that the supplier expected to be paid within three days for the supply by him of one and a quarter ounces.

(3) The prosecution relied on a reference in one message from the appellant to having three "whips" working, which the prosecution asserted meant three cars being used to distribute the drugs to customers.

(4) the prosecution relied on the photographs of the large amounts of cash.

(5) The prosecution relied on one particular image on the phone showing a whole ounce of drugs being offered for the sum of £1,550.

16
In her ruling at the end of the hearing, the judge confirmed that she was satisfied that 1kg was a conservative estimate of the amount of drugs involved and she confirmed the sentence accordingly.

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In written grounds and oral submissions to us, Mr Roxborough, on behalf of the appellant, has repeated a number of the submissions which he made to the sentencing judge at the original hearing and at the slip rule hearing. He challenges two elements of the judge's reasoning and conclusions. First, he takes issue with the assessment that the appellant played a leading role. Secondly, he disputes that the quantity of drugs involved was 1kg.

18
As to the appellant's role, we have little hesitation in agreeing with the judge that it was properly categorised as a leading role. He was in charge of the drugs line. This was his operation and was on a

considerable scale lasting a considerable time. Moreover, given the scale and length of dealing and the pictures of thousands of pounds on the phone, there was clearly an expectation of financial gain which was substantial in the context of the offence whether it was categorised as category 2 or category 3. The appellant contended that he was acting alone and did not involve others. If that were right, he would be taking all the profit from this extensive operation for himself. In fact, however, there was evidence justifying the judge's conclusion that he used others more junior than him in the hierarchy to carry out the operation. Manning a line 24 hours a day, seven days a week for three months in a way which produces a fast and reliable service would necessarily require more than one person to be involved. A similar conclusion would follow simply from the volume of dealing. Moreover, one witness statement uploaded to the Digital Case System, namely that of Deeliah Jackson, makes clear that the appellant was indeed using runners. The appellant also used Mr Ali in the way we have described above.

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As to the quantity of drugs involved, the judge should not in our view have acceded to the invitation to hold a further hearing. The prosecution note for sentence asserted that the volume of calls was 17,000. Had the appellant wished to challenge the number of calls, and contended that it was of importance to the sentencing outcome, he should either have sought an adjournment of the sentencing hearing with a request for the evidence upon which it was based; or he should have made his own assertion that the figure was lower and, if that had not been accepted, there would have had to have been a Newton Hearing. We can readily understand why he did not cause the latter to take place. He would have lost much of his credit for plea if the findings went against him. The same might have followed had he sought an adjournment. Having done neither, he was not entitled to challenge the volume of the calls put forward by the prosecution. He was perfectly entitled to argue that such a volume of calls did not support an inference of 1kg of drugs being dealt, but, conversely, the judge was entitled to proceed on the factual basis of the volume of calls itself, as asserted in the prosecution note for sentence.

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Mr Roxborough submitted to us that if the prosecution were going to make an assertion as to the volume of calls or the value or amounts of drugs being dealt, then that had to be evidentially supported. That is wrong. At a sentencing hearing it is for the prosecution to identify the factual basis on which the judge is invited to sentence. The prosecution is not obliged at that stage to adduce any evidence in support of that assertion. One of the reasons why credit for plea is given is that a plea at an early stage avoids the need for the prosecution to produce and/or marshal evidence from which sentencing is to take place. Of course if the defence challenge the factual basis which the prosecution assert in the opening of the facts for sentence, then that challenge needs to be dealt with; and if it is relevant to the sentence which may be imposed, that may require a Newton Hearing. But it is quite wrong to say that the prosecution are obliged to produce at the sentencing hearing the evidence to support the factual basis upon which the judge is invited to pass sentence.

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The result of the stance taken by the defence, inviting the judge to have a further hearing, was that under the guise of being asked to correct an alleged factual error in relation to the number of calls, the second hearing was used by the defence to develop at length arguments on many aspects of the evidence in relation to the quantity of drugs involved. That was simply not appropriate.

22

Mr Roxborough submitted that the judge should not at this slip rule hearing have relied on the asserted number of calls, 17,000, because DC Balkwell's statement was hearsay and the report of Ms Thomas was not disclosed. This argument too is misconceived. In the absence of a challenge requiring a Newton Hearing, a sentencing judge determining a factual situation is not bound by the rules of admissibility which would be applicable in a trial. This is well established: see R v Smith [1988] 10 Cr App Rep (s) 271.

23
The judge was fully entitled to treat DC Balkwell's statement as sufficient to make her sure that the figures it contained for the volume and frequency of calls and texts were correct. Page 2 of DC Balkwell's statement contains a wealth of detail by way of analysis of the phone data. In the absence of any allegation of bad faith on the part of DC Balkwell, which Mr Roxborough specifically disclaimed, the judge was entitled to assume that what was in his statement reflected what was in the report of the civilian analyst Ms Thomas, whose evidence would have been admissible. Indeed, Mr Roxborough himself said at the slip rule hearing that Ms Thomas's report "no doubt does contain that information"; and "it must do because I suspect the figures are not plucked out of thin air."

24
Mr Roxborough submitted to us that the defence had been unfairly prejudiced in not being able to see Ms Thomas's report because he had not been able to discuss the detail with the appellant. However, the content was fully apparent from DC Balkwell's statement and any discussion which might have been appropriate with the appellant was capable of being conducted on the basis of that information.

25
What we have said so far is sufficient to dispose of this ground of challenge. However, for completeness, we will address Mr Roxborough's arguments based on more detailed points about the quantity of drugs involved.

26
In doing so we would emphasise three aspects of the guideline. First, although the categories have an indicative quantity on which the starting point within each category is based, there is no quantity range for each category. This was an option which was considered and rejected following consultation when the 2012 Guideline (which applies in this case) was introduced. One of the consultation responses which informed that decision was that the quantity of drugs does not always reflect the harm caused by the offence. The indicative quantities identified in the guidelines are, therefore, only four points on a scale. They do not themselves define where the borderline is to be drawn between one category and another, nor do they necessarily define the extent of the harm caused by the offence. In normal circumstances, a quantity of 1kg will justify taking the starting point identified for a category 2 offence, but a lesser amount falling say between the indicative quantity in category 3 (150g) and the indicative quantity for the starting point in category 2 of 1kg may point to somewhere between the starting points for those two categories. Where it lies is not a matter for precise calculation.

27
Secondly, category 3 is the starting point for all street dealing. As was explained by this court in R v Khan[2013] EWCA Crim 800; [2014] 1 Cr App R (S) 10, that although ordinarily an episode of street level supply will involve the very small quantities of drug comprehended by category 4, it was recognised that dealing on the street in even those small quantities involves harmful criminality over and above that caused by the small quantity of drug, and for that reason the Sentencing Guidelines

Council (as it then was) as a matter of principle decided to raise what would otherwise be a category 4 case to category 3. This is an example of the reflection of harm not being solely identified by reference to the quantity involved. Nevertheless, where the quantities involved are greater than the small quantities which are inevitably involved in street dealing, the court should use the guideline by reference to the actual quantities of drugs supplied. The indicative quantities for the starting point in category 3 or category 2 or category 1 can in these cases provide useful guidance on the extent of any increase from the starting point for category 3 which applies in any street dealing case. This too is apparent from the judgment of this court in Khan.

28
Thirdly, where there is a multiple supply over a period of time, quantification of the amounts supplied is often, and of necessity, an imprecise exercise. It is often one of estimation and approximation.

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It follows that in this case the judge did not need to be certain of the precise amount of the drugs supplied by the appellant over the three month period. All that was required was an assessment of the scale of the dealing and of the harm involved, having regard to the indicative starting points in the categories in the guideline as a guide to where to place the offending in terms of harm before considering culpability and other factors.

30
Mr Roxborough criticises a number of the points made by prosecution counsel to the judge at the slip rule hearing and repeated in the Respondent's Notice. They were, he submits, either wrong (as in relation to the WhatsApp message about one and quarter ounces being paid for in three days); or mere assertion (as in "whips" meaning cars); or insufficient in isolation to justify a conclusion that the volume amounted to 1kg (as in reliance upon the volume of calls or estimates of an amounts of deals or evidence about the size of deals or an estimation of the extent of dealing).

31
We do not find it necessary to address those individual arguments separately. Standing back, we have no doubt that the criminality involved in this offending justified taking a sentence after trial of 12 years. This was sustained street dealing of class A drugs 24 hours a day, seven days a week for three months. There must have been many users who had their drugs supplied by this appellant. What is incontrovertible in our view is that the quantities must have been greatly in excess of the indicative figure of 150g for the starting point in category 3. The quantities involved suggested a starting point for harm above the top of the range for category 3 and one which fell within category 2. That is not a matter of precise calculation, but is a conclusion which can safely be reached taking into account the combination of features of the evidence. Those features include the extent of the operation, the duration that it lasted, the size of the deals being offered on the phones in quantities far greater than 0.2g, expressed as they often were in fractions of an ounce up to a whole ounce, the volume of calls and frequency of calls, the amounts of money shown in the pictures on the phone, and individual communications giving a feel for the scale of the operation. For example, one message from the appellant's supplier pressing him for payment said "You're giving me a grand today and 3500 on Friday and 1000 on Sunday, don't even think about being late." It is no answer for Mr Roxborough to say that in relation to each individual piece of evidence it is insufficient in itself to establish the total quantity involved. What matters is the picture painted by the totality of this evidence taken in combination.

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Moreover, where, as here, there were a large number of users who were affected by the appellant's street dealing, that is additionally an indication of a high degree of harm quite apart from what can be treated as harm by reference to the quantities of involved.

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If one took the top of the range for category 3, which is, if anything, overly generous to the appellant, it would give a starting point of 10 years. There were then the aggravating features identified by the judge, including the appellant's record, his use of weapons and the callous exploitation of a number of vulnerable victims to the extent of taking over their homes and leaving one of them sleeping out on the street. These aggravating features required a substantial upward adjustment. There was no real mitigation. A sentence after trial of 12 years would not have been excessive, let alone manifestly so. It follows that the sentence passed of nine years, giving 25 per cent discount for pleas tendered at the PTPH, cannot properly be criticised.

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For all these reasons, the appeal will be dismissed.

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