IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202103795/A4-202103797/A4
[2022] EWCA Crim 589

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 12 April 2022

Before:

LORD JUSTICE HOLROYDE

MRS JUSTICE FARBEY DBE

SIR NIGEL DAVIS

REGINA
V
JEREMY AKROFI-DANIELS

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)

MS R BROADBENT appeared on behalf of the Appellant.
MS S HOLLAND appeared on behalf of the Crown.

J U D G M E N T

MRS JUSTICE FARBEY:

1. On 6 August 2021 in the Crown Court at Chelmsford before HHJ Turner QC, the applicant (then aged 24) pleaded guilty to an indictment containing four counts. On 27 October 2021 he was sentenced by Mr Recorder Clegg QC as follows: count 1: being concerned in supplying a controlled drug of Class A to another, contrary to section 4(3)(b) of the Misuse of Drugs Act 1971 (crack cocaine), 6 years; count 2: being concerned in supplying a controlled drug of Class A to another (heroin), 6 years concurrent; count 3: possessing criminal property contrary to section 329(1)(c) of the Proceeds of Crime Act 2002 (£1400 in cash), 12 months concurrent; count 4: possessing criminal property (clothing), 12 months concurrent. The total sentence was therefore 6 years. The applicant was at the same time made the subject of a serious crime prevention order (SCPO). He now applies for permission to appeal against sentence and against the SCPO. The application has been referred to the Full Court by the Registrar. When making the referral, the Registrar observed that the court has not previously considered the use of an algorithm in drug sentencing which underpins the applicant's grounds of appeal against sentence.

The Facts

2. The applicant was involved in a county line which operated from London and supplied drugs to the Colchester area. The line was known as the "Panda line". It supplied crack cocaine (count 1) and heroin (count 2). Police identified two phone numbers as the Panda line. The first number was active between 17 August 2020 and 22 February 2021 when it went out of operation. The line then reappeared using a second number that was active between 3 May 2021 and 10 June 2021.

3. On 10 June 2021 the police searched the applicant's home and found the second Panda line phone. They also found £1,400 cash (count 3) and a significant amount of designer clothing (count 4). Phone evidence showed that the first Panda line had regularly used a cell site mast close to the applicant's home and that it had been co-located with other mobile phones known to be used by the applicant. The police attributed both phone numbers to the applicant.

4. No drugs were found or seized during the course of the investigation.

The Prosecution Evidence

5. At the sentencing hearing the prosecution relied on the witness statement of PC Tom Quinn. He had applied an algorithm to billing data from the two Panda phone numbers. The algorithm had been designed by DI Harvey of the Metropolitan Police Service, in collaboration with an organisation called Forensic Analytics. According to the algorithm, the Panda line had supplied in excess of 1.2 kilograms of Class A drugs.

6. The basis of the algorithm is set out in PC Quinn's witness statement. In February 2020, the Home Office published the Dame Carol Black Review of Drugs. Chapter 5 of the

Review deals with information collated from Public Health England on the average daily consumption of both heroin and crack cocaine by Class A drug users. PC Quinn explained that, on the basis of the Black Review's findings, a customer to a drugs line will consume on average a combined total of 0.9 grams (0.4 grams of crack and 0.5 grams of heroin) per day. The algorithm is used to estimate how many customers per day have contacted a drugs line, which allows the police to estimate how many grams of crack and/or heroin would have been sold in a day using the Black Review total average. This is done by using software that applies the algorithm. PC Quinn described the process as follows:

> "The algorithm collates a single list of all of the telephone numbers that appear within a bulk message. This captures the customer base that the drugs line sends adverts to, and accounts for the growth of the customer base over time. As long as the number has appeared within a broadcast list at one point, it is included in the customer base list.
>
> Next, the algorithm identifies every 24 hour period [0000-2359] that the customer has initiated [rather than received] a communication with the drugs line. This would indicate that the customer is seeking to purchase drugs. It does not matter whether it is a single communication that day or 50. This will be given the value of 1 [a customer that day]. Only successful calls [in excess of 6 seconds] are included.
>
> To account for instances of someone responding to the broadcast message asking to be left alone, anyone who has responded on only one day in a given week is also removed. In addition, the algorithm removes any incoming call with a duration of four seconds or less. This ensures that, should the line be off for the day, the algorithm will not include the unanswered incoming calls for that period. Automated SMS replies are stripped from the calculation.
>
> This therefore leaves only those who are in regular communication with the drugs line. Whilst it is an assumption that someone would not request his or her removal from the mailing list multiple times in a week, it is unlikely given the time and cost implication. Furthermore, this volume of customers not accounted for in the equation outweighs this small variance...
>
> Finally, the algorithm provides a total of the daily figure of customers across the entire call data period. With this figure, multiplied by the average daily consumption of a crack and heroin user, it is possible to quantify the volume of drugs sold by the line."

7. In the applicant's case, the algorithm software analysed the call data for both the

telephone numbers used by the Panda line for the period of the data available (17 August 2020 to 31 May 2021). Under the algorithm, there were a total of 1361 customers (wrongly stated as 4000 by the Recorder). Applying the average daily consumption for a single user of 0.9 grams, the total quantity of crack and heroin distributed by the Panda line was estimated at 1.224 kilograms.

8. PC Quinn's evidence was that the figure of 1.224 kilograms was a cautious estimate as the algorithm does not take account of a range of factors such as: customers whose numbers are not stored by the drugs line and who do not therefore receive any bulk advertisements sent out by the line; those who place orders solely by text message; those who use another person's telephone (for example, owing to lack of phone credit); and "collective" purchases made by one person on behalf of a number of others.

9. PC Quinn was not an accredited drugs expert witness but the Recorder also had the benefit of a witness statement from DC Sandra Greenway. She described herself as an expert in illicit drugs markets and the supply of illicit drugs. Her witness statement gave an overview of the purchase by price and weight of crack cocaine and heroin. Her evidence was, in our judgment, broadly consistent with - although not identical to - PC Quinn's evidence.

10. There was no dispute before the Recorder that he should apply the Sentencing Guideline on supplying a controlled drug. The prosecution submitted that the weight of the drugs placed the offending within category 2 of the Guideline and that the applicant had had a significant role in the supply. On this basis, the starting point for sentence was 8 years' custody with a category range of 6 years 6 months to 10 years' custody. The applicant accepted that his role had been significant. He submitted, however, that his offending fell within category 3 because he had sold the drugs direct to users as a street dealer. On that basis, the starting point was 4½ years with a category range of 3 years 6 months to 7 years' custody.

Sentencing Remarks

11. In his sentencing remarks the Recorder said that the applicant's offending was far greater than "a classic street dealing case" where the police may observe a person trading a small amount of drugs on the street before an arrest. The applicant had carried out large-scale street supply. He rejected the applicant's submission that under the Guideline the weight of the drugs was not determinative in a street dealing case and that the Guideline did not permit a sentence outside the range identified by category 3. He held that if the weight of heroin and cocaine supplied to customers exceeded the threshold for category 2 offending (1 kilogram), then the sentencing ought to fall within that category.

12. The Recorder took into consideration the algorithm as explained by PC Quinn. He observed that the algorithm did not provide an accurate or exact weight. It could only provide an indication of the level of dealing. It relied on conservative assumptions. It was properly a guide, but no more than a guide, to the size of the applicant's operation.

13. The Recorder took into consideration the aggravating factor that the applicant had previous convictions for possession of heroin and cocaine with intent to supply, for which he had received a term of 3 years' imprisonment in June 2018. He expressed the view that the size of the operation for the new offending together with the applicant's previous drugs convictions would entitle him to make an upward adjustment to the sentence outside the range for a category 3 offence. However the Recorder did not follow that route, deciding instead to place the offending within category 2 of the Guideline. By way of mitigation he took into consideration the applicant's young age.

14. The Recorder concluded that the sentence would have been 9 years' imprisonment concurrently on each of counts 1 and 2 before a one-third discount for the applicant's guilty pleas. On counts 3 and 4 there were concurrent sentences of 12 months' imprisonment, as we have said.

15. The Recorder went on to consider the prosecution application for a SCPO. He concluded that, in light of the fact that the applicant had offended within a comparatively short period since his release from prison, the imposition of the SCPO was proportionate and fair. We shall return to the terms of that order in a moment.

Grounds of Appeal

16. In her written and oral submission Ms Ruth Broadbent on behalf the applicant does not challenge the Recorder's view that the applicant had a significant role but submits that the Recorder should have treated the offending as category 3 offending and not as category 2. The Recorder had erred in relying upon PC Quinn's evidence. Sentencing is a fact-sensitive exercise. Neither the assumption made about how often a customer may contact a drugs line before a purchase nor the assumption made in relation to the average daily weight of purchases stood up to scrutiny. There was a difference between the evidence of DC Greenway (which was in summary that a heroin user purchases 0.4 grams of heroin per day) and the Black Review's finding that average daily heroin use is 0.5 grams per day. Not all heroin users also purchase cocaine so that the algorithm was wrong to add the average use of both drugs to reach the weight of Class A drugs purchased by a single customer on a single day. PC Quinn had neither the expertise nor the knowledge to give evidence about the algorithm and how it operated. The Recorder had not understood the algorithm and had made factual errors in relation to how it operates, such as his conclusion that there had been 4000 sales to customers. A sentence of 9 years' imprisonment before discount for pleas was too high in all the circumstances.

17. On behalf of the respondent Ms Holland accepts that the application of the algorithm is not an exact science. She submits however that it was reasonable for the prosecution to rely on an algorithm which itself is based on a conservative assessment of the activity indicated by the phone data. The Recorder had not made any material errors in his understanding of the algorithm. He was not bound to treat the applicant's offending as falling within category 3 if there was evidence to suggest that the threshold for category 2 had been reached.

Discussion

18. The question for this Court is whether the overall sentence of 6 years after deduction for guilty pleas was manifestly excessive. The applicant had a significant role in a county line operation. The scale of the operation is, in our judgment, readily revealed by the sheer number of messages found on the drugs line: 15,000 over the course of the ten-month indictment period. There was evidence before the Recorder that the drugs line would make bulk broadcasts of stock and prices to customers. The police found customer phone lists at the applicant's home. He had scales, clingfilm and small blades suitable for cutting up drugs for sale. These were the hallmarks of an established and professional drugs business. In our judgment, they cast a bright light on the weight of the drugs that must have been supplied. Even DC Greenway's analysis in our judgment places the offending in category 2.

19. The Recorder was not bound to put these factors out of his mind. On the contrary, his duty was to reach a just and proportionate sentence on the facts of the case. The Sentencing Guideline states that the court should consider all offences involving supply directly to users as at least category 3 harm; but nothing in the wording of the Guideline prevented the Recorder from treating the applicant's offences as falling within a higher category if the threshold for a higher category was met.

20. In determining that the category 2 threshold was met, the Recorder did not regard himself as hidebound by the algorithm. His sentencing remarks make plain that he treated it only as a guide. He recognised the fact-sensitive nature of the sentencing exercise, putting the results of the algorithm into context. His slip in relation to the number of customers was immaterial. If the applicant had wanted to challenge the assumptions made by the prosecution evidence, he could and should have produced evidence of his own. In our view it was reasonable for the Recorder to consider the results of a cautiously operated algorithm as a fair way of approaching the Guideline.

21. For these reasons, the Recorder was entitled to sentence the applicant on the basis of category 2 offending. In light of all the evidence before him, the Recorder concluded that the applicant was guilty of serious professional supply over a long period, having already served a significant prison sentence for doing exactly the same thing. We observe that he was still on licence for the previous offences for at least part of the indictment period. The Recorder's approach is in our judgment unimpeachable.

22. The full one-third discount for pleas that were not indicated at the first opportunity was generous. It is not arguable that the overall sentence of 6 years was manifestly excessive. We refuse leave to appeal against sentence.

The SCPO

23. The schedule of terms of the SCPO was:

> "MOBILE PHONES etc

1. At any time, the defendant shall not own or have regular use of any mobile phone save for a single handset, with a single sim card all registered in his name, the details of which handset, sim card and numbers (including IMEI/serial number and the service provider) have been supplied to Essex Police. The offender has 3 days to notify the police of the acquisition of a mobile phone
2. The offender shall inform Essex police of any password or pin lock used on the mobile phone within 3 days and shall provide it if asked by a police constable.
3. The offender shall not use any biometrics to lock the mobile phone.
4. The offender shall not lend or otherwise permit any other person to use a communication device that he may own, possess or control.
5. The offender must notify Essex Police of any loss, theft or destruction to mobile phone mentioned above within 3 days.

VEHICLES
6. The offender must supply in advance to Essex Police details of any vehicle or vehicles that he intends to own, keep or drive (including make, model, colour and registration number).
7. The offender must inform Essex Police when he ceases to use the vehicle within 3 days of doing so.

NOTIFICATION OF ADDRESS
8. The offender must reside and stay each night at an address he has registered with Essex Police within 3 days of release from prison or if moving to that address, if he intends to stay the night elsewhere he may do so provided that he notifies Essex Police of the address where he will be staying either that day or within 12 hours of the night in question."

24. The copy of the Order that has been provided to the Court states that it comes into force on 27 October 2021 and remains effective until 27 October 2026. This would appear to be an administrative error, given that the Recorder's sentencing remarks say that the five-year order would start on the applicant's release from prison.

25. At any rate Ms Broadbent submits that conditions 2, 4, 6 and 8 of the SCPO are unnecessary and disproportionate. Ms Holland accepts that there should be an amendment to condition 4 to cater for emergencies. Save for that single variation, she submits that the SCPO was lawfully made as there are reasonable grounds to believe the Order will protect the public by preventing, restricting or disrupting involvement by the applicant in serious crime. She submits that save for that one narrow variation the terms of the Order are necessary and proportionate.

26. In our judgment, given the nature and scale of the applicant's activities and his previous convictions for similar activities, the imposition of a SCPO was justified. The conditions within the SCPO are unarguably necessary and proportionate to the risk that the applicant represents save in one narrow respect. We agree that it is necessary for condition 4 to

cater for emergencies. In those circumstances we grant leave to appeal against the SCPO. We allow the appeal, quash condition 4 and substitute the identical condition with the addition of the words *save in an emergency*. To this very limited extent, the appeal is allowed.

27. Finally, we note that the Recorder set a timetable for confiscation proceedings but announced the imposition of a victim surcharge order. As confiscation proceedings were adjourned, the victim surcharge should not have been imposed at that stage. In R v Bristowe [2019] EWCA Crim 2005, para 17, the Court held that although the judge should have postponed the decision on the surcharge until the determination of confiscation proceedings, if the Order is made during the postponement period or at the time when sentence is passed, the surcharge will not be quashed unless exceptionally the final outcome of the case means that the circumstances and justice of the case makes this necessary. We have not been invited to quash the surcharge in the present case.

28. We will direct that the Crown Court record be amended to show the SCPO as we have varied it.

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