Neutral Citation Number: [2023] EWCA Crim 282

Case No: 202202306 B1, 202202307 B1, 202202323 B1, 202203805 B1, 202203824 B1, 202300009 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT KINGSTON
His Honour Judge Shetty

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 March 2023

Before:

THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE JAY
and
MR JUSTICE BRYAN

- -

Between:

REX	**Respondent**
- and -	
(1) Peter MURRAY	
(2) Danny BROWN	
(3) Stefan BALDAUF	
(4) Philip LAWSON	**Appellants**

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- -

Graham Blower (instructed by **Cobleys Solicitors Ltd**) for **Murray**
Jonathan Green (instructed by **GSG Law Ltd**) for **Brown**
Matthew Radstone and Nick Murphy (instructed by **FMW Law**) for **Baldauf**
James Martin (instructed by **ABV Solicitors**) for **Lawson**
Jonathan Kinear KC, Gareth Weetman and Alex Young (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 1 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Burnett of Maldon CJ:

Introduction

1. At the conclusion of the oral argument, we announced that the applications for leave to appeal against conviction of Peter Murray, Stefan Baldauf and Danny Brown and for leave to appeal against sentence of Peter Murray and Philip Lawson were dismissed. They had been referred by the Registrar.

2. These are our reasons for those decisions.

3. The conviction applications, by various routes, seek to challenge the admissibility or admission of evidence which became available as a result of the French law enforcement agencies in late 2019 breaching a sophisticated encryption phone system known as EncroChat. That was achieved by planting malware on the phones which enabled vast quantities of messages and other data to be harvested from the EncroChat server. It had been marketed as being totally secure. The National Crime Agency ("the NCA") was aware through informal channels of the breakthrough but it was not until June 2020 that the French authorities permitted them to use the data in criminal proceedings. This gave rise to Operation Venetic, the largest police operation of its type in the United Kingdom, channelling unparalleled resources into the prosecution of the most serious organised crime offences.

4. To date, there have been 950 convictions connected to the use in evidence of EncroChat material, the majority on guilty pleas. About 1,800 defendants are awaiting trial in cases where EncroChat evidence is central to the prosecution case. Most are in custody. The substantial delay in dealing with these cases stems, in large part, from the resolution of points of principle in lengthy preparatory hearings. At their heart have been various arguments that the evidence harvested from the EncroChat server is inadmissible by virtue of the prohibition against the use of intercept evidence provided by the Investigatory Powers Act 2015.

5. The key points of principle were resolved by this Court in *R v. A, B, D and C* [2021] EWCA Crim 128 (Lord Burnett of Maldon CJ, Edis LJ and Whipple J, 5 February 2021) and *R v. Atkinson and others* [2021] EWCA Crim 1447 (Fulford LJ, Vice-President of the Court of Appeal, Criminal Division, Murray and Wall JJ, 7 October 2021). In the first appeal it was decided that EncroChat material may be admitted in evidence in criminal proceedings because the relevant data had not been intercepted at the time of transmission but had been intercepted from what was stored on the phones themselves; and, in the second of these appeals, it was determined, on further expert evidence, that "the alternative hypothesis", namely the possibility that the EncroChat material was extracted during transmission, could safely be discounted. Both decisions upheld rulings of the trial judges after hearing evidence.

6. In 2021 a complaint was brought in the Investigatory Powers Tribunal ("the IPT") assailing the legality of the Targeted Equipment Interception Warrant which authorised obtaining the EncroChat material. The hearings before the IPT concluded in December 2022. Judgment is awaited.

7. At para 6 of the judgment in *A, B, D and C*, I noted:

> "If it is intended to repeat this kind of process [i.e. a lengthy preparatory hearing] in other pending cases involving EncroChat material, those involved should not be surprised if the trial judges deal with them rather more briskly."

8. In the case we are now concerned with the various objections to the admission of the EncroChat evidence were taken just before and at trial. But at the heart of the collective defence endeavour was an application that the trial be adjourned to await the outcome of the IPT proceedings and to obtain further expert evidence. We were told that the defendants are happy to remain on remand in custody for as long as that may take. No doubt that is so because the nature of these EncroChat cases invariably involves serious alleged offending which attracts very substantial sentences on conviction. But there is a strong public interest in the swift resolution of criminal proceedings, compatibly with fairness and the interests of justice which include the interests of the prosecution. The defendants in this case, and others, have had years to get their cases in order. Applications for adjournments on the basis that something may turn up will not prosper.

The Facts

9. On 24 June 2022 in the Crown Court at Kingston upon Thames these four applicants and others were convicted of conspiracy to evade the prohibition on the exportation of a controlled drug of Class A imposed by section 3(1) Misuse of Drugs Act 1971, contrary to section 170 of the Customs & Excise Management Act 1979. The trial had lasted almost four months before Judge Shetty and a jury.

10. On 6 December 2022 they received the following sentences of imprisonment: Stefan Baldauf – 28 years, with 2 years concurrent for entering the United Kingdom without leave contrary to section 24(1)(a) of the Immigration Act 1971; Danny Brown – 26 years; Peter Murray – 24 years; Philip Lawson – 23 years. Another co-conspirator Tony Borg was sentenced to 15 years' imprisonment. He has not sought leave to appeal. At the start of the hearing we directed that the application for leave to appeal against sentence in relation to a further conspirator, Leon Reilly, should be referred back to the Registrar of Criminal Appeals for further directions. Two other defendants were acquitted.

11. In December 2019 a Doosan excavator was purchased at auction and taken to Grays Industrial Estate in Essex. Holes were made in the boom which was then filled with packs of MDMA weighing about 450 kilograms. The cavity of the boom arm was lined with lead to reduce the risk of detection by x-rays or imaging equipment. The excavator was shipped to Australia where MDMA sells for more than it does here. On arrival in March 2020, the authorities discovered the drugs and removed them. They resealed the boom so that there was no trace of their interference, cleared the excavator though customs and kept watch. There was then a fake auction of the excavator which, on the prosecution case, was arranged with the aid and instruction of Reilly and overseen by Baldauf and Brown as points of contact with Australia.

12. The disappearance of the drugs was soon discovered. The initial suspicion of the conspirators was that one or more of them had taken them and betrayed the others. There were exchanges via the EncroChat system about the missing drugs and meetings between conspirators. It was not possible to retrieve any messages from

December 2019, when the excavator was loaded, but messages were retrieved from April to June 2020.

13. Brown was arrested on 15 June 2020 in possession of an EncroChat phone, username "Throwthedice". It was the prosecution case that he played a central organisational role in this conspiracy. There were many examples of Throwthedice apparently being involved in the Doosan exportation.

14. Baldauf was arrested on 15 June 2020. His mobile phone was seized, as well as an EncroChat phone, username "Boldmove". In May and June 2020, Boldmove and Throwthedice were in close contact via EncroChat concerning the missing cargo. Baldauf was seen meeting Brown in person on various occasions during that period. The prosecution also relied on evidence of Baldauf's previous offending to support their case that he was an international drug smuggler.

15. Murray was arrested on 1 October 2020. Scales and heat-sealing equipment bearing traces of MDMA were seized from his yard along with a mobile phone 6666 and an EncroChat phone, username "Leadarrow". The prosecution case was that he drove the drugs from their source to the Grays industrial estate on 19 December 2020. He was seen close by and there were ANPR activations in the area for a van he had hired. There was evidence of his meeting an associate of Brown at a petrol station and of the Leadarrow phone going quiet at a time when Murray was out of the country on holiday.

16. The EncroChat messaging showed that Leadarrow, Throwthedice and Boldmove were in contact in May and June 2020, with each other and with other conspirators, about the auction and the subsequent movements of the Doosan. There was a mass of evidence supporting the reliability of this messaging: for example, of meetings being organised on these phones and then of CCTV evidence showing the attendees present at the appointed time and place, often a coffee bar in Putney.

17. When interviewed under caution, the applicants largely made no comment.

18. In his defence case statement Brown accepted that he was Throwthedice but denied involvement in the conspiracy. He did not give evidence, but it was submitted on his behalf that the EncroChat data was unreliable and misleading and had become corrupted because of the way it had been extracted.

19. Baldauf accepted that he was Boldmove but denied involvement. He gave evidence that at around the relevant time he was involved in a criminal enterprise to import cannabis from Canada. He contended that messages concerning drug trafficking and cannabis had become mixed up with messages about Class A exportation which he had nothing to do with. His case was that the EncroChat data was unreliable and misleading.

20. Murray denied that he was Leadarrow. He accepted that the 6666 mobile phone was his. His case was that the EncroChat phone had been wrongly attributed to him. He gave evidence that he had never had an EncroChat phone but that the Leadarrow phone may have been attributable to a man called Colin whom he worked with. He said that Colin accompanied him to Grays on a key date and also borrowed the rented van. He was unable to say where Colin was. He denied knowledge of any drug-

related paraphernalia found at his yard. His case was that he was involved in furniture sales, not drugs, and that he and Brown were friends. He called three defence witnesses to support his case of having worked with Colin.

21. The issues for the jury were relatively straightforward. The first was whether the EncroChat messages were reliable. In Baldauf's case there was also the issue whether messages relating to a different cannabis importation conspiracy had somehow got mixed up with this conspiracy. In Murray's case, the messaging was incriminating but he denied that he was Leadarrow.

The Proceedings Below: Pre-Trial

22. The trial was originally fixed for 30 November 2020, but that date was vacated pending the determination of the admissibility arguments we have already mentioned. On 12 February 2021 the trial was refixed for 10 January 2022. On 21 May 2021 the court directed that any defendant wishing to raise a novel EncroChat admissibility argument should do so in writing by 18 June. Nothing was filed on that date, or subsequently.

23. On 25 November 2021 the court refused Brown's application to put back the trial date until after the outcome of the IPT proceedings. The Court extended the deadline for EncroChat admissibility submissions until 10 December 2021. Again, nothing was filed on that date, or subsequently. Such expert evidence as the defendants had obtained was not relied upon.

24. On 5 January 2022 the Crown was made aware of a report from Professor Ross Anderson, FRS FREng. He is Professor of Security Engineering at the Universities of Cambridge and Edinburgh. He had been instructed by a claimant in the IPT proceedings. Professor Anderson had been instructed at short notice in the second set of proceedings before Dove J at Manchester Crown Court (*R v. Atkinson*) but did not give evidence. On 13 January 2022 the IPT permitted the Crown to disclose Professor Anderson's report in these criminal proceedings. That happened on 27 January. On 28 January the court directed that any expert reports or defence skeleton arguments in relation to EncroChat material be filed by 4 February. Again, that deadline was missed.

25. On 18 February 2022 several defendants made an application to adjourn the trial in light of the Anderson report. They said that his report cast doubt on the Court of Appeal judgments to which we have already referred. They submitted that his findings were new evidence which were directly relevant to the issues in this case and had a bearing on the admissibility of EncroChat evidence generally. At the time the application was being made, the trial date had been put back to 28 February.

26. The judge noted that there had already been several adjournments to await the outcome of litigation in the Crown Court followed by two appeals in this court which had been disposed of. Those judgments determined that EncroChat material was admissible in criminal trials. That position was *prima facie* binding. The only remaining matter was the ongoing IPT proceedings. Having taken all matters into consideration, the judge found that these applications were merely speculative and that there was a clear public interest in trials going ahead. Timetables had been set for the service of expert evidence, yet no expert evidence had been served by the defence.

The state of play concerning Professor Anderson was that he had not prepared a report in relation to *this* case and was not currently accepting instructions. The application to break the fixture and delay the trial was refused.

The Proceedings Below: The Trial Itself

27. On 3 March 2022 (the second day of the trial) Brown applied to adduce a report which he had obtained from a forensic digital expert, Ms Victoria Saunders, in relation to EncroChat evidence. The judge gave a short ruling and indicated that he would give further reasons at a later date. He had read the Saunders report and agreed with the prosecution; it was mainly a review of and an adoption of Professor Anderson's reasoning and conclusions, which she described as "plausible". There was no attempt to form independent conclusions of her own or to address this Court's analysis and interpretation of the legal position. The judge found that this report, which had been served very late, after the start of trial, was simply a vehicle to introduce Professor Anderson's evidence by the backdoor, and was inadmissible.

28. After the judge's brief ruling had been given, counsel for Brown submitted that there could be no reasonable objection to extracts of the Saunders report being read, dealing with her own examination of the handset and findings, and excluding her opinions on Professor Anderson's report. Whilst there is no serviceable transcript of the judge's ruling, the parties have been able to prepare an agreed note of what he said. In his ruling the judge noted that the handset that related to Brown had been recovered at the time of his arrest in 2020. Almost two years had passed since then and expert analysis could have been carried out at any time. In addition, the report was served late and not in compliance with Part 19 of the Criminal Procedure Rules. Given that it appeared that Ms Saunders had been instructed in early December 2021, the judge did not accept that it should have taken so long for this matter to be looked into. The judge rejected the application to introduce any of her report into evidence.

29. During the evidence of PC Shiel, an issue arose concerning his overhearing a comment said to have been made (but denied) by Brown to Baldauf on 18 March 2020. The officer's evidence was that he heard the words "just so you know, it is there", said by the prosecution to indicate that Brown was telling Baldauf of the arrival in Australia of the Doosan. He said this took place at 11:19. The officer was cross-examined by counsel for Brown on the basis that these words were not spoken. During cross-examination, PC Shiel was asked questions about a statement made by PC Ruth Murphy and a surveillance log compiled by an unknown hand, relating to her observations. She had not claimed to have overheard the incriminating comment. The limited point being made in cross-examination was that the log recorded that Brown and Baldauf entered a coffee bar at 11:23 and PC Murphy's witness statement gave the time as 11:38. Counsel's endeavour was not merely to highlight the timing inconsistency. It was to show that PC Murphy's witness statement was the more likely to be correct, calling into question the reliability of the 11:19 timing in relation to the overheard utterance.

30. From the inconsistency in the recorded timing of the defendants' arrival at the coffee bar it appears that counsel hoped to cast doubt on whether the words were spoken although it was not suggested that the officer and the two defendants were in the coffee bar at the same time.

31. PC Shiel was re-examined about the surveillance log with a view to establishing that PC Murphy had given the time of the defendants' arrival to the person responsible for compiling the contemporaneous surveillance log as 11:23 not 11:38. Counsel for Brown objected to this course on the ground that multiple hearsay was sought to be introduced, but the judge overruled that objection.

32. Subsequently, Brown made an application to exclude documentary evidence purporting to prove that an item found in the car in which he was arrested related to an encrypted phone. Officers seized from the car a mobile phone box with the insignia "Diamond Secure" on the cover. Within the box was a void where a phone would have been housed and there was also a phone case and charger. The phone itself was never recovered. The prosecution submitted that this box was probative evidence that Brown had another encrypted phone. Diamond Secure was no longer in existence. The NCA had conducted some research and found archived web pages for Diamond Secure which, it was submitted, supported the case that this item related to an encrypted phone. A witness statement produced the documents. The judge considered the hearsay provisions under section 114(1)(d) of the Criminal Justice Act 2003 ("the 2003 Act") and ruled that the evidence was admissible.

33. Finally, at the conclusion of the prosecution case, counsel for Brown made a submission that Professor Anderson's findings, whilst not evidence in this trial, nevertheless cast considerable doubt on the admissibility of the EncroChat evidence, and that the interests of justice required the judge to exclude this evidence under section 78 of the Police and Criminal Evidence Act 1984 ("PACE"). If upheld, this would require the judge to remove the case from the jury.

34. The judge rejected this argument. The criminal proceedings had started in June 2020. The defence had ample time to instruct their own experts in respect of the EncroChat material. They were not passive observers of what unfolded in Manchester Crown Court and the Court of Appeal. Professor Anderson's reports were not evidence before the court. Furthermore, the judge considered that Professor Anderson's report strayed beyond giving evidence about technical matters and entered the arena of legal interpretation. The judge concluded, relying upon the two judgments of this court, that the EncroChat material was admissible and he did not consider that there was any unfairness, still less such unfairness that would justify its exclusion under section 78 of PACE.

Sentence

35. The judge remarked that this was sophisticated offending by an organised and well-connected international drugs network, with a carefully thought-through method of smuggling, with the use of EncroChat phones and other encrypted networks to allow the major players to communicate with each other to avoid law enforcement. The only motive was potentially huge profit.

36. This case concerned almost 500 kg of MDMA, with a total street value of approximately £37.5 million. In relation to the question of harm, the judge noted that Category 1 under the Guidelines is based on a quantity of 5 kg, and that the Guidelines further provide that:

> "Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the offender's role."

37. In circumstances where defendants had either not given evidence or their account had not been accepted by the jury, it fell to the judge to ascertain, to the criminal standard of proof, each offender's respective role.

38. The judge concluded that Baldauf was an experienced drug exporter and importer with contacts here and abroad. Baldauf and Brown were at the heart of the conspirators' investigation into how the drugs had disappeared. The former had a leading role. Aggravating factors were his previous convictions and the use of sophisticated technologies to impede detection. The sentence was 28 years.

39. The judge placed Brown also in a leading role. There was no distinguishing between him and Baldauf, apart from previous convictions, as he had no drug-related convictions. The sentence was 26 years.

40. The judge found that Murray's job was to source and supply the MDMA, to deliver it to the industrial estate and stay there while it was packed into the excavator. He was in communication via EncroChat with Brown and remained in contact with him, including later discussions about what had gone wrong. Although not as important as Baldauf or Brown, his was an essential and leading role. His previous convictions were not an aggravating factor. The appropriate sentence would be 25 years, but personal mitigation, in particular his ill-health, reduced that to 24 years.

41. The judge observed that Lawson was described in EncroChat messages as the fitter. He arranged the welding for the excavator in December 2019. He also arranged for a company to make stickers for the Doosan to cover up the holes created by the welding. The possession of an EncroChat phone with the handle "Cloud" showed that his was not just a passing involvement; he had links to others including Brown and had full awareness of what was going on and was a vital cog in the conspiracy. There were no aggravating factors beyond the EncroChat phone. The appropriate sentence would be 24 years, but personal mitigation reduced that to 23 years.

The Conviction Application

42. The central ground of appeal is that the judge should have adjourned the trial pending the conclusion of the IPT proceedings or to enable Professor Anderson to be instructed to give a formal report in this criminal trial. Alternatively, Ms Saunders' evidence should have been admitted; or that at the conclusion of the Crown's case the judge ought to have exercised his discretion to exclude all the EncroChat evidence under section 78 of PACE, with the consequence that there would have been no case to answer.

43. Some applicants also challenge the judge's ruling under section 114 of the 2003 Act on the Diamond Secure box, and his ruling that PC Shiel could be asked questions in re-examination about the surveillance log.

44. Mr Kinnear KC for the Crown observed in the Respondent's Notice that the applicants have said next to nothing about why the judge was wrong not to adjourn

the trial on 25 November 2021 to await the IPT judgment. The focus both in writing and before us was more on the judge's decision not to adjourn the trial on 18 February 2022 to permit the defence to instruct Professor Anderson. Mr Matthew Radstone for Baldauf submitted that Professor Anderson's report contained novel and potentially important evidence whose existence before 27 January 2022 had not been anticipated. Mr Radstone submitted that Professor Anderson was the "sole eminent expert" who could address not merely the admissibility but the reliability of the EncroChat material. On this latter issue, our attention was specifically drawn to paras 116 and 117 of Professor Anderson's report. Mr Radstone submitted that if the reliability of the EncroChat material could properly be undermined, that might avail his client's argument that the handset had been wrongly attributed to him. Overall, there was a real prospect that had Professor Anderson's evidence been available, the outcome of the case would have been different.

45. Mr Jonathan Green for Brown supported Mr Radstone's argument. He also submitted that the problem arose here because "the French won't tell anyone how they did it". He added that the use of the EncroChat material in this way was in breach of the ACPO guidelines which provide that a criminal defendant should be in a position with expert assistance to replicate any tests which have formed the basis of the Crown's evidence against him. Mr Green further submitted that Ms Saunders was entitled to adopt Professor Anderson's conclusions because she had independently reviewed both his methodology and findings. Furthermore, it was said that Ms Saunders was quite entitled to give evidence of fact as to what she found when she interrogated the Brown phone.

46. Mr Green also developed his grounds of appeal in relation to the Diamond Secure box and the surveillance log.

47. None of the grounds of appeal has any merit.

48. The judge's decision to refuse an adjournment on 25 November 2021 was unimpeachable. The trial had already been adjourned more than once. The overall interests of justice, including the public interest, militated against a further adjournment for what in effect would have been an indefinite period on no more than a hope that the outcome of the IPT proceedings might assist the defendants. In any event, the issue before the IPT is not the admissibility of the EncroChat material.

49. The judge's refusal to adjourn the trial on 18 February 2022 to enable Professor Anderson to be instructed is equally unassailable.

50. We accept that the defence could not have been aware of Professor Anderson's report before the end of January 2022. The only paragraphs in his report to which our attention was drawn as supporting the hypothesis that the EncroChat data may be unreliable do no more than advance a theoretical possibility, unconnected with the substance of the issues in this case. Unusually, in this case Brown's EncroChat phone was recovered in a condition which enabled the material recovered by the French authorities to be compared with that remaining on the phone. It was the same.

51. Professor Anderson's report is directed at other matters. We note that he did not give oral evidence in the IPT proceedings. In any event, Professor Anderson has declined

to accept further instructions in EncroChat matters. There is no possibility of his being instructed.

52. Ms Saunders could not in our view properly give opinion evidence as the mouthpiece for Professor Anderson. Mr Kinnear was right to submit that she had not formed her own conclusion but was tentatively endorsing the plausibility of his findings. To the extent that she purported to give evidence of fact, we accept Mr Kinnear's submission that the anomalies she identified were both minor and explicable on the basis that the phone is designed to delete messages after a short period.

53. Once the judge had correctly refused the application to adjourn the trial for Professor Anderson to be instructed, the section 78 application was bound to fail. Professor Anderson's report was not in evidence. It could not be considered in support of an argument based on prejudice. Given that the EncroChat messaging was exfiltrated in France, we do not think that the ACPO guidelines provide any further support for the argument based on unfairness or prejudice.

54. We also consider that there is no merit in the applicants' subsidiary points. Mr Green submitted that the admission of the archived internet pages in relation to the Diamond Secure system was a "pernicious practice", but the judge in our view carried out a thorough and fair examination of all the considerations bearing on section 114(1)(d) of the 2003 Act. Brown had not advanced a positive case in respect of the box and there was no unfairness in admitting hearsay evidence in these circumstances.

55. There is no merit in the contention that the judge erroneously admitted multiple hearsay evidence in relation to the surveillance log. Once the net of cross-examination had been cast as wide as it was to cover matters outside PC Shiel's knowledge, it was perfectly fair for the judge to permit limited re-examination designed to correct the impression that PC Murphy's timings somehow supported the defence case. In any event, this was a minor issue in terms of the trial as a whole. It is not arguable that this ground of appeal has the potential to render the convictions unsafe.

56. For all these reasons, the proposed appeals against conviction are unarguable and we refused leave.

The Sentence Applications

57. Mr Graham Blower for Murray argued that the judge erred in finding that his role was to source and supply the MDMA. There was no evidence of this. The evidence was that he transported the MDMA to the industrial estate. Secondly, it is said that the judge erred in finding that he had a leading role. Thirdly, it is contended that the judge failed properly to distinguish Murray's role from that of other conspirators. Finally, it is said that the judge gave insufficient weight to Murray's ill-health and poor prognosis.

58. Mr Blower focused on his client's health problems and urged us to adopt a merciful approach. He submitted that the sentence imposed was simply too high, as well as being "too close" to others higher up the chain of involvement.

59. Mr James Martin for Lawson argued that the starting point was too high and did not properly reflect his role, and that there was insufficient distinction between his

sentence and those of others who had been found to be more culpable.

60. Before turning to the individual grounds of appeal against sentence, we remind ourselves of the decision of this Court in *R v. Sanghera and Ors* [2016] EWCA Crim 94 which reviewed earlier jurisprudence such as *R v. Welsh* [2014] EWCA Crim 1027. The principles in *Sanghera* were reiterated in *R v. Cuni and Others* [2018] 2 Cr.App.R. (S.) 18, and in *R v. Wraight* [2021] EWCA Crim 1968.

61. Sentences in excess of 30 years have been considered appropriate in the context of extremely large quantities of drugs (2,000-3,000 kgs). For lower quantities sentences ranging up to 30 years have been considered appropriate. When assessing harm and culpability, and an appropriate starting point, every drugs case will turn on the particular facts of the case or conspiracy. The weight of the drugs involved is just one consideration in the context of harm. By way of example, in *R v. Cuni and others* the case involved weights in the order of 900kg of Class A controlled drugs. In that case the starting point for a defendant playing a leading role was in the order of 28 years.

62. We do not understand it be suggested that the judge erred in principle in the starting point adopted in the present case which was 27 years in relation to those at the top of the conspiracy (Baldauf and Brown), before adjustment for the aggravating and mitigating features relating to them; and then consideration of the sentence to be passed in respect of other defendants.

63. The second general point is that similar disparity arguments to those raised by Murray and Lawson have repeatedly been the subject of consideration by this court including in *Sanghera* at [24], citing with approval what had been said in *Welsh* by Sir Brian Leveson P at [10] to [12]. We consider that those observations are particularly apposite in the context of the sentence grounds.

64. Sir Brian's observations bear repetition:

> "**Insufficient Distinctions in sentence**
>
> 10. A large number of appellants argue that the judge failed adequately to reflect the relative culpability of the offenders with a sufficiently wide range. Judge Aubrey certainly referred to the principle of parity commenting that in cases of this nature there was bound to be an element of 'crowding or bunching' as to length. The word 'crowding' comes from *R. v Brookhouse* [2004] EWCA Crim 3471 in which, having analysed a large number of cases concerned with importation, the court recognised (at para 66): '20 years is clearly justified on the authorities for an important, but secondary, participation in large scale importation of class A drugs. You do not receive, for the reasons which we have indicated, sentences above 30 years, although they might be possible. In between those two points have to be fitted quite a large number of disparate people who clearly are more involved than those who might receive 20 years, but less involved than those who might not receive 30 years. We seem to have a crowding of this kind in the present case.'

> 11. In A*ttorney General's Reference Nos 99–102 of 2004* [2005] Cr App R(S) 82, a 20 year starting point was said to be at the bottom of the bracket for a major organiser of wholesale distribution within this country and, again in the context of importation, Scott Baker LJ in *R v Ali (Farman)* [2008] EWCA Crim 1855 made the point (at para 22) that 'once the … 20 to 30 year bracket is reached, there is a considerable amount of bunching of varied circumstances'.
>
> 12. In our judgment, these observations do no more than reflect the inevitable position which a judge has to confront when seeking to differentiate the role and responsibility of a large number of offenders in the context of the most serious crime in which regard it has to be borne in mind that the penal consequences of conviction extend beyond a custodial term but also include confiscation of the proceeds of crime. Where (as here) quantities exceed category 1, so that sentences of 20–30 years might come into play as explained in the rubric to the guideline, it is an exercise of judgment to scale up the corresponding sentences for those at the bottom rung of leading along with significant and lesser roles in such a way that fairly reflects not only the part played by the offender then being sentenced but also his comparative significance within the offending as a whole. Given the limit beyond which a sentence for this type of offence does not normally extend, it is not surprising that at the highest levels, sentences on different offenders will be nearer to each other than might otherwise be the case."

65. It is unremarkable that the sentences passed in the present case for co-conspirators with leading roles are relatively close to each other.

66. The third general point we make is that Judge Shetty presided over a trial lasting no less than 55 days. He was uniquely well placed, having heard all the evidence, to make findings about the role each defendant played in the overall conspiracy and the different elements of that conspiracy in England and Australia. It is a point that the judge himself noted at the very start of his Sentencing Remarks.

67. With these points in mind, we turn to the individual applications for leave to appeal against sentence.

68. In our view, the judge was entitled to reach the conclusions he did about the role played by Murray. As the judge found, there was evidence that Murray supplied the drugs. The EncroChat evidence itself provided support as did the wider circumstances. Murray's role was clearly a leading one as supplier of drugs on a commercial scale (as a result of which he must have been very well-connected to drug producers higher up the chain, as the judge noted); and his role also went far beyond transporting the drugs to the industrial estate, with close links to the original source and an expectation of substantial financial or other advantage.

69. Equally there is no substance in the suggestion that the judge failed properly to distinguish Murray's role from that of other conspirators. In addition to the general point made above that it is unremarkable that the sentences passed in the present case for co-conspirators with leading roles are close to each other, the judge had express regard to the difference in roles between Murray on the one hand and Brown and Baldauf on the other and was entitled to characterise his role as a leading role.

70. Mr Blower urged us to take a merciful approach in relation to his client's ill-health, about which there is clear evidence. He has cancer. The judge gave a modest deduction from his indicative sentence to reflect this factor, but we cannot agree that he erred in not giving more.

71. Overall, we do not consider any of Murray's grounds is arguable.

72. In relation to Lawson, we do not consider that there is any substance in either ground. The judge accurately addressed Lawson's role in his sentencing remarks. Quite apart from his crucial role in relation to the fitting of the drugs into the digger arm, he continued to be informed by Brown about the machine clearing customs and being transported to auction. He provided information regarding payment to Brown after the auction had finished. Lawson had full awareness of what was going on (belying what the judge called "the significant role narrative") and he had some operational and management function. The judge noted he was a vital cog in the smuggling activity. As the judge also rightly noted, the fact that Lawson had an EncroChat phone indicated the importance of his role notwithstanding that some things may have been kept from him.

73. We reject the disparity arguments in Lawson's case for the reasons we have already provided.

74. Accordingly, we refused leave to appeal against sentence in Lawson's case.