Neutral Citation Number: [2025] EWCA Crim 605

Case No: 202302194 B5 and 202304222 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BIRMINGHAM CROWN COURT
HHJ Henderson
T20217248

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2025

Before:

LADY JUSTICE MACUR DBE
MR JUSTICE LAVENDER
and
MR JUSTICE BOURNE

- -

Between:

DANYAL AZIZ	**Appellant**
- and –	
REX	**Respondent**

- -
- -

Stephen Kamlish KC and Abigail Bache (instructed by Charter Solicitors) for the **Appellant**
James Bide-Thomas and Sebastian Walker (instructed by Crown Prosecution Service) for the **Respondent**

Hearing dates: 3rd and 4th of April 2025

- -

Approved Judgment

This judgment was handed down remotely at 2pm on 9 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

The Hon. Mr Justice Bourne:

Introduction

1. Daniyal Aziz was tried initially alongside 4 other Defendants (the case against one was severed during the trial) on an indictment containing 9 counts.

2. On 2 June 2003, Mr Aziz was convicted by the jury on 2 counts of conspiracy to supply class A drugs (1-2), 2 counts of conspiracy to supply firearms with intent to endanger life (by count 3, 3 Walther Creed handguns and by count 5, a Skorpion sub-machine gun), 2 counts of possessing prohibited firearms (4, 6), 2 counts of possessing ammunition without a certificate (7-8) and 1 count of concealing criminal property (9).

3. He now renews his application for leave to appeal against conviction. He also renews his application for leave to appeal against sentence and for an extension of time of 24 days for that application. Leave was refused by the single judge in respect of both conviction and sentence.

4. An application is also made to vary the notice of appeal in respect of conviction pursuant to Crim PR 36.14(5) by adding a new ground.

5. Mr Kamlish KC, who did not appear in the court below, appeared for Mr Aziz together with Ms Bache who had represented him for part of the trial. We also heard very briefly from Mr Bide-Thomas, leading Mr Walker for the Prosecution.

6. The renewed applications were heard over three and a half hours. Regrettably during the hearing we found it difficult to separate demonstrable fact from assertion. Events around the various case management hearings were not always clearly recorded or recalled and we were surprised not to be shown any records of significant communications between the solicitors and Dr Campbell. Consequently, and unusually in a judgment arising from such a renewed application, we have thought it helpful to set out the facts of the case and the detail of the pre- trial hearings at some length.

Application for leave to appeal against conviction

The facts

7. The Prosecution case on counts 1-8 was based on data which is said to have emanated from the EncroChat cell network. The Prosecution case was that Mr Aziz was the user of the identifier (or "handle") "Lushmace" and sent and received all messages associated with it, whilst his co-defendant Mr Earp was the user of the handle "Kneetown". The Prosecution asserted that evidence of calls and messages passing between them was sufficient to prove the guilt of each defendant on the various counts.

8. Data obtained from the EncroChat network have now been the subject of a number of reported cases. For a recent factual summary, see this Court's judgment in *R v Stokes and others* [2025] EWCA Crim 51, [2025] 4 WLR 14 at [18]-[28] per Holroyde LJ. Briefly, an EncroChat telephone is a specialist device which can be used to send encrypted messages and photographs securely between two contacts on the network which was based on servers in France. That network was until June 2020 believed to be completely secure and, therefore, was widely used to conduct organised crime. In early 2020 the British authorities, in "Operation Venetic", served a European

Investigation Order seeking mutual legal assistance from their French counterparts in respect of messages intercepted from EncroChat handsets located in the UK. French (and Dutch) authorities gathered packages of messages, filtered by country, and sent those emanating from the UK to the NCA. Since June 2020, EncroChat material has been relied on in a number of prosecutions in the UK. Its admissibility has been considered in a number of cases, notably *R v A, B, D and C* [2021] EWCA Crim 128 (Lord Burnett CJ, Edis LJ and Whipple J) and *R v Atkinson and others* [2021] EWCA Crim 1447 (Fulford VP, , Murray and Wall JJ).

9. When arrested, Mr Aziz gave a no comment interview in June 2020 and, at a second interview in March 2021, he gave a prepared statement denying involvement in any unlawful conduct and denying possession or illegal use of an EncroChat phone. By his defence case statement dated 28 September 2020, he contested the admissibility of the EncroChat evidence and put the Prosecution to proof of each element of each offence. At trial he did not give evidence.

10. The Prosecution relied on the evidence of an expert witness, Luke Shrimpton. He explained how the European authorities had caused "implants" to be remotely installed on the Encrochat handsets in April-June 2020, giving access to data from them. The technical details of that operation cannot be revealed by reason of secrecy laws operating in France. In this case Mr Shrimpton accepted that there were times when the implants were not working and therefore they did not capture all of the data, i.e. all of the calls or messages, associated with each handset. However, it did not follow that the attribution of any data to a particular handset was not reliable.

11. Mr Aziz's defence case statement of 28 September 2020 also contained an application for secondary disclosure of material which might reasonably be considered capable of undermining the Prosecution case, namely "(a) Raw telephone data for the 'Lushmace' Encrochat messages so that the veracity of the Crown's schedules can be checked by a defence expert (b) Raw cellsite data for both the 'Lushmace' handle and the number ending '4310' so that the veracity of the Crown's schedules can be checked by a defence expert."

12. Having instructed an expert witness, Dr Duncan Campbell, to consider the EncroChat evidence, the Defence made a disclosure application under s 8 CJIA 1996, supported by a skeleton argument dated 31 March 2022, for the full download of data associated with the Lushmace handle. Further submissions were contained in an addendum skeleton argument dated 27 April 2022.

13. That application was supported by an initial report by Dr Campbell dated 30 June 2022. In that report he contended that the method of "implants" used to collect the messages was unreliable, so that messages could be incorrectly attributed. He explained that the further disclosure was needed because:

> "12.11 Information about the handle "LUSHMACE", alleged to have been used by the defendant, can be expected to be present in all available Operation Venetic evidential packs for every handle which appears to have messaged, exchanged images, or called or been called by LUSHMACE. The defence has been supplied with data only for the Encrochat user handles LUSHMACE and KNEETOWN. The defence has not been

> supplied with data for any other Encrochat handles which exchanged messages with LUSHMACE. This includes the 20 handles listed in Table 1 below" [table provided]
>
> 12.12 If evidential packs are not provided, it is impossible to test the completeness or consistency or accuracy of messages using the methods described here."

14. As would be made clear in due course, the issue raised by Dr Campbell essentially was whether a record of a message going between handles A and B, when seen in data from one handle was also seen in data from the other. If it was not, that could undermine the reliability of the evidence suggesting that the message had indeed passed from or to either of those handles.

15. At paragraph 72 of his report, Mr Campbell added:

> "My experience in checking evidential packages has been that often more than 50 per cent of messages sent or received cannot be verified by finding counterparts in the relevant package. I do not know the explanation for this. Until I prepared a joint expert report with Mr Shrimpton, and Mr Shrimpton further reported as cited above, there was no Prosecution evidence or report acknowledging this extensive problem."

16. On 19 July 2022 the Prosecution served a short report from Mr Shrimpton. He disagreed with Dr Campbell's view that messages may be or have been wrongly attributed to a handle. He noted (at paragraph 12) that Campbell had not analysed as much data as he had been able to analyse. Although he did accept that there was one anomaly (a difference in the number of "orphan keys" identified) that he could not explain, that is a different technical question which has not played any part in the present applications.

17. On 25 July 2022 the experts served a short joint note which stated:

> "Until the Reliability Report and the LUSHMACE version 3 evidential packages are provided to Duncan Campbell, neither of us will know and cannot predict whether we will have to address significant discrepancies, minor discrepancies or no discrepancies as between the two tools. This work has to be complete, and resolved, before we can draft a joint expert report in the form required under Crim PR 19.6."

18. The parties attempted to resolve by agreement the question of what disclosure was needed. Mr Campbell identified 13 "data packages" (i.e. sets of data each of which was associated with an individual handle) which he considered to be necessary, but the Prosecution had only provided 3 of them.

19. The section 8 application was heard before HHJ Rochford on 8 November 2022. He noted that the Prosecution did not object to disclosure of the other 10 packages if they were relevant and that Dr Campbell said that they were relevant. Against that, the judge noted: "The Crown would submit that Mr Shrimpton, their expert, has found above, in

his script, which in some way or other presumably will correct some form of words and thus render this unnecessary, but how that is is not explained." In the circumstances the judge decided to order the disclosure.

20. However, towards the end of that hearing, the Prosecution asked for the disclosure to be subject to 3 practical conditions to protect ongoing investigations. These in summary were that the Defence would provide the National Crime Agency ("NCA") with the "script" (or software) by which Dr Campbell wished to apply to the data packages, that the NCA would then apply that script to the data (in Dr Campbell's presence if he wished) and that it would provide "any reliability report" produced by that process to the Defence but not including the content of any of the messaging.

21. It seems that instructions could not be taken at that moment and the Defence indicated that it would do its best to comply. The Judge therefore made an order that disclosure would be given in that way.

22. It transpired that Dr Campbell did not think that the conditions were practicable. Further correspondence ensued. On 23 November 2022 the Defence solicitors emailed the CPS making objections and stating that "this matter ought to be listed once again". Although on 13 December 2022 the CPS indicated that Dr Campbell had now agreed to proceed in the manner suggested, it seems that that was a misunderstanding and there was no agreement.

23. On 14 December 2022 Judge Rochford therefore gave directions. He noted that the first condition was accepted but that the second and third were in issue. He ordered the Prosecution to explain by 21 December why they were needed and both experts by 13 January 2023 to provide reports saying why the second and third conditions were or were not workable and proposing any solution, with a return date of 19 January 2023. It seems to us that those directions were an eminently sensible method of addressing the problem.

24. According to a note provided by Mr Aziz's representatives for a hearing on 13 February 2023 (see below), the matter came back before Judge Rochford on 23 January 2023 (moved from 19 January). The Prosecution, the note said, had not provided the written reasons ordered on 14 December but, before the hearing on 23 January, the writer had spoken to Dr Campbell and "was told that he had had access and the joint report could be expected by 31st January" so the matter was not pursued.

25. Unfortunately, according to the note, that turned out to have been another misunderstanding, curiously similar to the one which occurred on or around 13 December 2022. The reference to a joint report turned out to concern a different joint report on a generic question about differences between the software used respectively by the two sides. Thus an opportunity for the Court to address the deadlock over the conditions was missed on 23 January.

26. Clearly the misunderstanding then became apparent, because there was yet another hearing before HHJ Rochford on 13 February 2023.

27. Counsel's note for that hearing stated that the report on Aziz's case "has not been properly analysed by the defence because the 10 data packages still can't be accessed". That note also informed the Court about a new problem:

> "Those instructing have been told that as a result of all of the work by Mr Campbell in liaising with the NCA and trying to complete his report, the defence funding has now run out and further funds need to be sought from the LAA. This will need to be done before he can complete the report, and unfettered access to the 10 data packages will need to be granted. We are concerned that the trial date in April is now in jeopardy as a result of the Crown frustrating the defence attempts to access data to which they are entitled."

28. It is not clear that those last words were fair comment, given that the Court's order of 8 November 2022 was for disclosure subject to the conditions and the Prosecution at all times was willing to comply with it, though it may have failed to comply with the order to give written reasons for the conditions.

29. According to the Respondent's Notice, HHJ Rochford on 13 February directed that if there remained an issue then the Defence should make a further section 8 application. We are not sure why the problem about the conditions was not tackled on that date though the funding issue is one possible explanation. Be that as it may, this was a second missed opportunity to resolve the deadlock.

30. On 16 February 2023 Dr Campbell and Mr Shrimpton served their joint report on generic software differences.

31. The Defence did not make a further section 8 application, but did request a further hearing to address its concerns about the second of the 3 conditions sought by the Prosecution for disclosure of the data packages. The matter came back before HHJ Rochford on 14 March 2023.

32. That of course was very close to the trial date of 24 April 2023. The Prosecution had made an amendment to its third suggested condition for the disclosure. The judge ordered that it would be assumed that this was agreeable unless the Defence so indicated by 4pm on 16 March. That date was also made the deadline for any further section 8 application, with a response to follow by 23 March. The Defence was ordered to apply promptly for any listing so that any application could be heard before a PTR which was listed for 3 April.

33. Yet again there does not appear to have been a debate, let alone a decision, about any disagreement over the conditions. Again, we are not sure why, though a possible explanation is a lack of input from Dr Campbell due to the lack of funding.

34. Once again the Defence did not make a new section 8 application.

35. Instead, at the end of March 2023 Mr Aziz's team requested the listing of an application to break the fixture of 24 April.

36. Unfortunately the trial judge, HHJ Henderson, was not available on the PTR date of 3 April 2023 and the matter was put back until 17 April, when it again came before HHJ Rochford, one week before the trial was due to start.

37. In a note dated 17 April 2023, Counsel explained that the Defence had not been able to comply with any of the requirements imposed by HHJ Rochford on 14 March. To do so would have needed the input of Dr Campbell, but he was not willing to carry out further work until funding problems were resolved.

38. Counsel also quoted from an email from Dr Campbell which said:

> "Your request to address to the January CPS note is (a) unfunded and (b) ridiculous. I explained last week: 'The CPS note from January is utterly irrelevant now, as it is superseded by the Joint Expert Report of 12 February together with the hearings and rulings that have followed. None of it applies.' Is any part of that response unclear?"

39. By its respondent's notice the Prosecution has said that in light of that email, it was now unclear what disclosure the Defence was seeking. That is not our reading of Dr Campbell's email or of counsel's note to the Court on 17 April 2023. It seems to us that (1) Dr Campbell was asserting that there was no longer a need to consider the 3 conditions proposed by the Prosecution (a view which, at the hearing on 17 April 2023, Defence counsel told the Judge was wrong) and (2) the Defence still required disclosure of the 10 missing packages.

40. That was also clear to HHJ Rochford, who ruled as follows:

> "That application is made on the basis that the expert instructed, Mr Campbell, has not had an opportunity to examine more than three of the thirteen packages due to conditions that were placed upon that. I am told that Mr Campbell was instructed as long ago, I think, as October 2021, the Prosecution suggest. Defence do not demur from that date.
>
> Realistically, Ms Bache accepts that with hindsight things might have progressed differently with Mr Campbell, and there have been difficulties with funding, and the relationship between Mr Campbell and those instructing him became, at some stage, somewhat strained – 'fractious' to use the word from the skeleton argument, but is now improved.
>
> The other defendants are either supportive or neutral in respect of the application. I note than an order was made that any application should be uploaded by, I think, 16 March. In fact, the application, which is at Q74, was uploaded this morning. It is said that the absence of a report from Mr Campbell will make it impossible to present the case of Mr Aziz.
>
> Essentially, and putting it at its simplest, in a simplification that is not disputed by Ms Bache, what Mr Campbell seeks to demonstrate, or to explore, is that messages in a sending handset are not replicated in a receiving handset, or vice versa, and, therefore, there is a possibility, or a presumption, that there is some technical difficulty and the Prosecution's case that these

> messages were sent and received can, therefore, be shown to be flawed.
>
> I understand that in the three of the thirteen packages that he has examined, he has been able to find some support for that. He has not explained, to my satisfaction, why it is that he needs to investigate a further ten packages if the basic underlying principle can be established from the three. That is one factor in my judgment.
>
> The other factor is that although, of course, time must be allowed for the case to be presented properly, there has to come a time when a court must proceed to have a trial, and in my judgment, particularly bearing in mind the ethos set out by the Court of Appeal in Murray and Baldauf, that time has now come.
>
> In those circumstances, I refuse the application to adjourn those applications. The case will proceed on 24th."

41. Thereafter it seems that the relationship between the Defence lawyers and Dr Campbell declined to the point where he refused to discuss the case with them at all. At the end of April 2023 Dr Campbell issued a letter before action to Mr Aziz's solicitors for unpaid fees. He indicated that he would comply with his duty to appear at court if called as a witness but that he would not participate in a conference. Therefore the Defence could still call him as a witness but would not know what he would say, and there was no recent report from him on the evidence.

42. In those circumstances Mr Aziz's team decided not to call Dr Campbell to give evidence.

43. We find that decision surprising. Whilst we understand the apparent danger of calling a witness with whom the professional relationship had broken down and who would not co-operate with a conference in advance, Dr Campbell was the author of a report which identified a potential attack on the reliability of the EncroChat evidence and which would have provided a basis for cross-examination of Mr Shrimpton. There was no other evidence which could be used to cast doubt on the EncroChat evidence.

44. Instead, on 5 May 2023, in mid-trial, an application was made on behalf of Mr Aziz to either adjourn the trial or sever him from it, on the ground that he had no expert evidence on which he could rely and that his counsel could not effectively cross-examine Mr Shrimpton, who was to give evidence on 9 May 2023.

45. Mr Aziz has contended that, at that stage, the case of another co-defendant, Rizwan Malik, had already been severed because his advocate was indisposed, so there would be another trial in any event. By its respondent's notice, however, the Prosecution has stated that Mr Malik's case was not severed until 18 May 2023. That no doubt explains why Mr Aziz's counsel in making her application did not rely on the fact that there would be a second trial.

46. A skeleton argument in support of the application of 5 May said that Mr Aziz accepted using the Lushmace handle but not that he was its sole user, and added:

> "The issue that he relies upon is the flaws in the method by which the messages were captured and stored that could have led to:
>
> (i) Messages missing that could provide context to the messages advanced by the Crown; and
>
> (ii) Messages wrongly attributed to having been sent by the Lushmace handle when they could have originated elsewhere."

47. We have read the transcript of the hearing of the application on 5 May 2023. The Prosecution argued that the application was speculative and was based on the mere hope that "in due course, Duncan Campbell will provide a report that substantiates some hopes or expectations that Mr Aziz has".

48. HHJ Henderson pointed out that Mr Aziz had at no time stated which messages he did or did not accept were from or to him. Counsel pointed out that Mr Aziz had the right to remain silent and put the Crown to proof of its case. The judge agreed with that proposition, but commented that that approach nevertheless did not make the adjournment application an attractive one. At the end of the argument the judge said that he would not grant the adjournment. He added that reasons would follow, but no further reasons have been provided.

49. Mr Aziz then dis-instructed his counsel and solicitors. According to the Prosecution, his decision to do so was announced on 9 May 2023, day 9 of the trial, immediately before Mr Shrimpton was due to be called to give evidence. His co-defendants Michael Earp and Rohan Baig also announced that they had sacked their advocates on the same day.

50. HHJ Henderson told all the Defendants that he would listen to an application to transfer legal aid but that he was unlikely to accede to it, their move having the hallmarks of Defendants trying to manipulate the proceedings, an assessment which we consider was well open to him. He warned them about the difficulties of acting in person, while explaining that he would make reasonable accommodations for them and invited them to consider reinstating their previous representatives.

51. On 10 May, Earp and Baig reinstated their representatives. Mr Aziz did not. He handed the Judge a letter, stating that he was unhappy with his team's decision not to pursue an argument that the EncroChat evidence was inadmissible and that he could not proceed without evidence from Dr Campbell. According to the Prosecution, he did not in fact make an application to transfer legal aid.

52. Mr Shrimpton in fact gave evidence on 11 May 2023. Mr Aziz did not ask him any questions in cross-examination.

53. As we have said, Mr Aziz did not give evidence. Nor did he call Dr Campbell.

54. Mr Aziz's case is that the judge unfairly refused to grant him time to find new solicitors who would not be in dispute with Dr Campbell, only offering him an opportunity to re-instruct his previous representatives, who were embroiled in that dispute. Thereafter he represented himself.

55. Mr Aziz now complains that it was, in effect, the judge whose decision deprived him of any expert evidence with which to contradict Mr Shrimpton and which could have been placed before the jury.

56. He also complains about several aspects of his treatment as a litigant in person during the rest of the trial. We return to those below.

Grounds 1-3

57. By the first ground, Mr Kamlish contends that HHJ Rochford's decision of 17 April 2023 was an unfair reversal of his decision of 8 November 2023, there having been no change in the need for Dr Campbell to have access to the 10 missing data packages. He submits that the decision disregarded the facts that (1) the Prosecution expert had had the advantage of analysing all the EncroChat material whilst Dr Campbell had not, and (2) the Defence, without further funding, could not ask Dr Campbell whether a case could be built on his findings from the 3 disclosed packages.

58. The first ground is linked to the second, by which it is contended that HHJ Rochford's refusal to adjourn the trial on that date was unfair because it left Mr Aziz without expert evidence in support of his defence, making a fair trial impossible.

59. The third ground contends that HHJ Henderson's refusal to adjourn the trial on 5 May 2023 was unfair for the same reason and also that the lack of reasons for that decision left Mr Aziz unable to challenge the ruling during the trial.

60. Each of these grounds is based on the overarching proposition that Mr Aziz could not have a fair trial without being able to rely on expert evidence from Dr Campbell or another expert witness. Counsel argue that the lack of expert evidence was not his fault and that he was stymied by the Prosecution's refusal to provide all the relevant data without imposing conditions and by the legal aid funding difficulties and the consequent breakdown in the relationship between solicitors and expert.

61. Although we are not convinced either that the Prosecution was at fault or that the lack of further input from Dr Campbell prevented the Defence from making the appropriate application at the right time, we have decided that the overarching proposition is arguable. Although there is no application to admit fresh evidence, Dr Campbell's initial report identified a potential answer to at least some of the EncroChat evidence and, as a result of the events which we have described, Mr Aziz was left unable to advance that answer.

62. We are not persuaded that ground 1 or ground 3 is arguable or that either would add anything of significance. Ground 1 fails to recognise that the order of 8 November 2022 was for disclosure subject to the Prosecution's 3 conditions and ground 3 is met by the answer that nothing had really changed between 17 April 2023, when the application to break the fixture was dismissed, and 5 May when HHJ Henderson refused to adjourn the part-heard trial, although it is regrettable that no reasons were given for that refusal and that the judge was not reminded that reasons had not been given.

63. By an application made on 22 July 2024, counsel for Mr Aziz sought to add a further ground of appeal arising from a decision handed down by the Court of Justice of the EU on 30 April 2024 in *Criminal proceedings against MN* (Case C-670/220).

64. *MN* concerned the use in a German court of EncroChat data obtained via a European Investigation Order. German courts, like those in the UK, treated the evidence as admissible and took the view that, whilst infringements of EU law in the obtaining of the evidence were conceivable, priority would be given to criminal prosecution in view of the seriousness of the offences concerned. The European Court was asked to consider, among other things, whether, having regard to Directive 2014/41 (which requires Member States to ensure that legal remedies equivalent to those available in a similar domestic case are applicable to investigative measures indicated in a European Investigation Order), that approach infringed the EU law general principles of equivalence and effectiveness. In that context, the Grand Chamber ruled at [131]:

> "… Article 14(7) of Directive 2014/41 must be interpreted as meaning that, in criminal proceedings against a person suspected of having committed criminal offences, national criminal courts are required to disregard information and evidence if that person is not in a position to comment effectively on that information and on that evidence and the said information and evidence are likely to have a preponderant influence on the findings of fact."

65. Mr Kamlish submitted that although, following the UK's departure from the EU, that Directive did not apply to this case, nevertheless the UK courts have adopted and applied the principle of effectiveness. On that basis he submits that the reasoning in *MN* should also lead, or have led, to the exclusion of the EncroChat evidence in the present case. That is because, for the reasons set out under grounds 1-3 above, Mr Aziz was unable to have the data analysed by his expert witness.

66. The Court pointed out to Mr Kamlish that, between 31 December 2020 and 31 December 2023, paragraph 3(2) of schedule 1 to the European Union Withdrawal Act 2018 provided:

> "No court or tribunal or other public authority may, on or after IP completion day [i.e. 31 December 2020] —
>
> (a) disapply or quash any enactment or other rule of law, or
>
> (b) quash any conduct or otherwise decide that it is unlawful,
>
> because it is incompatible with any of the general principles of EU law."

67. In response, Mr Kamlish submitted that he nevertheless relies on a general principle in international law, recognised in Article 6 of the ECHR, that a defendant is entitled to a fair trial in which he can challenge the evidence.

68. It seems to us that paragraph 3(2) provides a complete answer to any reliance on the European Court's decision in *MN*. Mr Kamlish's fallback position demonstrates that the new ground, in reality, is just a re-statement of his submission that Mr Aziz in this case was denied a fair trial. That submission is the basis for ground 2, on which we have granted leave.

69. We conclude that the new ground is not arguable. We refuse leave for it and for its addition by amendment to the Notice of Appeal.

Grounds 4-6

70. By ground 4, Mr Kamlish argues that the trial judge's refusal to permit a change of representation on 9 May 2023 was unfair and unjustified, having the effect that the only choice offered to Mr Aziz was to re-instruct the firm which at the time was being sued by his expert witness of choice. It is said that he decided to persist in representing himself because returning to the same solicitors would not resolve the issue which had arisen with Dr Campbell.

71. By ground 5, it is contended that the Prosecution should not have been allowed to devote part of its closing speech to the case against Mr Aziz, as a litigant in person, or to do so in the terms that they did.

72. By ground 6, it is contended that the Court and the Prosecution failed in their duty to ensure that Mr Aziz as a litigant in person was at all times in possession of all case papers, an adequate record of the evidence and assistance in understanding the expert evidence.

73. In respect of ground 4, we do not consider it arguable that the Judge exceeded the permissible scope of his discretion to refuse to permit a change of representation. As we have said, he was entitled to conclude that the sacking of Mr Aziz's legal team was unjustified and was an attempt to manipulate the proceedings. It coincided with the same step being taken by his co-Defendants, though they thought better of it once the Judge had explained the position to them. It was also reasonably open to the Judge to conclude that appointing a new legal team (even if feasible within a short time) would not have solved the expert funding problem, and therefore would not have solved Mr Aziz's problem of lack of evidence without the need for a lengthy adjournment which would have required the jury to be discharged.

74. As to ground 5, the Prosecution has accepted that it did not make an application for permission to make a closing speech in respect of Mr Aziz, as it should have done under Crim PR 25.9, which provides inter alia:

> "(j) the prosecutor may make final representations, where –
>
> (i) the defendant has a legal representative,
>
> (ii) the defendant has called at least one witness, other than the defendant him or herself, to give evidence about the facts of the case, or
>
> (iii) the court so permits;".

75. We cannot determine what the outcome of such an application would have been. The Prosecution would have pointed out that it was entitled to make a closing speech relating to the co-Defendants and that, since the Defendants were charged with various counts of conspiracy, it would on any view have been necessary for reference to be made to the case against Mr Aziz so that the jury could understand the nature of the alleged conspiracy. It would also have pointed out that Mr Aziz was represented until

day 9 of the trial. It is also well recognised that a Defendant's sacking of his representatives cannot be allowed to operate as a tactic to prevent the Prosecution from making a closing speech.

76. Nevertheless, we note that in the prosecution closing speech counsel made reference to information which had been contained in the skeleton argument that was before the Court on 5 May but which was not in evidence before the jury. This 'error' may have been identified if the proper course had been followed. Whilst it is unlikely that we would have granted permission to appeal on ground 5 alone, we grant leave for it to be argued at the same time as ground 2.

77. Finally we turn to count 6 and the alleged failure to ensure that Mr Aziz as a litigant in person was at all times in possession of all case papers, an adequate record of the evidence and assistance in understanding the expert evidence.

78. The grounds of appeal state at [38:]

> "We apply to adduce evidence from [Mr Aziz] to the following effect on the question of deprivation of case materials:
>
> a. The only case papers his trial solicitors had provided him with were the EncroChat massages [sic];
>
> b. He had no other served or disclosed case papers, such as witness statements;
>
> c. He had a jury bundle but was not permitted to take them with him into the prison because of a metal binder;
>
> d. Neither the Crown nor the judge asked DA what case materials he had or required;
>
> e. He was given the report of Luke Shrimpton, the Crown's expert, the day before he was called to give evidence. Once he had read it he complained to the judge in open court that he did not understand the contents and felt at a disadvantage. The judge did not respond. He said nothing. Prosecuting counsel did not offer assistance or suggest to the court that assistance might be provided by the court explaining the key aspects of the report."

79. Despite that proposed application, we were not shown any such evidence.

80. We have also not been told about any relevant material contained in Court logs, save that the log for 15 May 2023 records that Mr Aziz told the Judge that he was unable to represent himself and was suffering from anxiety. He was given more time to consider the proposed Agreed Facts and to decide whether to agree any of them.

81. We have seen the transcript of the proceedings on 17 May 2023, in between the evidence of the third and fourth Defendants (Rhone and Baig), the day before closing speeches were expected to start. Mr Aziz told the judge that he did not have his notepad, making some reference to "reception at the prison" which the transcript did not capture. He asked whether he could have "the transcript of what's happened so far". The Judge

replied that there would not be time. Mr Aziz then said that he did not feel that he had been assisted. The Judge responded by explaining to him what would happen next and in what order and how he should go about making a closing speech.

82. It was for Mr Aziz to provide evidence of what he was given and when (and we note that he was given the Prosecution's expert report), what, if anything, he lacked and what, if any, effect this had on his ability to represent himself. He should also have identified any requests he made for specific material, other than the request for a full transcript to which we have referred.

83. In the absence of any other evidence, we conclude that ground 6 is not arguable.

84. We bear in mind that Mr Aziz's defence at all times consisted merely of putting the Prosecution to proof. He had already been party to a decision not to use the existing evidence of Dr Campbell as a basis for a challenge to Mr Shrimpton's evidence. The case against him was very largely founded on Mr Shrimpton's report and he was provided with a copy of that. Meanwhile, he had been represented by lawyers for years leading up to the trial and for the first 9 days of the trial, a fact which removes much force from his contention that he needed assistance in understanding the Prosecution's evidence. The Judge justifiably found his sacking of his lawyers to have been an attempt to manipulate the proceedings.

85. In those circumstances we do not consider it arguable that any lack of further measures to help him represent himself was such as to make his conviction unsafe.

Conclusion on application for leave to appeal against conviction

86. Leave is granted on grounds 2 and 5 only and is refused on the other grounds.

Appeal against sentence

87. We now deal with Mr Aziz's application for leave to appeal against sentence, without prejudice to the fact that if his appeal against conviction is allowed then his sentence will of course fall away.

88. The Crown Court did not obtain a pre-sentence report and we agree that a report is not necessary.

89. Mr Aziz sought to apply for leave to appeal against sentence within the time limit. Having been unrepresented at the time of sentence, he instructed his previous counsel on a pro bono basis. She had to obtain information about what had transpired at the sentencing hearing. That, and pressure of other work, caused the application to be submitted 20 days after the deadline. In the circumstances, we would grant the extension of time for the leave application if we were persuaded that the latter had merit.

90. At the time of sentencing, Mr Aziz was 25 years old and was of previous good character.

91. He was found to have played a leading role in a conspiracy to supply large quantities of class A drugs. The Judge accepted the Prosecution's case that the likely minimum quantity of drugs handled by the group in a period of about 3 months was 180 kilograms. That was on the basis that EncroChat messages appeared to refer to or indicate a quantity of just over 90 kilograms and that, given the incompleteness of the

messages and the apparent use of other devices from which data had not been obtained, that figure could safely be doubled.

92. The firearms offences revealed that multiple firearms, including a Skorpion sub-machine gun, and ammunition were obtained by the group to protect their drug dealing business and that these would be used if necessary.

93. The judge noted that the guidelines made clear that the sentence for the firearms offences should be consecutive to the sentence for the drugs offences and that because the drugs and guns offences were closely linked, he must be careful to avoid double counting while also applying the principle of totality. He also noted that there was no evidence that the guns were ever fired and that the guns intended to be re-sold were not machine guns.

94. The sentencing guideline relating to offences of dealing in class A drugs states that where the operation is on the most serious and commercial scale involving a quantity significantly higher than the indicative quantity of 5kg for category 1, "sentences of 20 years and above may be appropriate, depending on the offender's role".

95. In such a case, the upper levels are not constructed on a mathematical basis reflecting precise quantities: see *R v Johnson* [2022] EWCA Crim 1575; [2023] 1 Cr. App. R. (S.) 49.

96. The judge was referred to *R v Mulvey* [2019] EWCA (Crim) 1835, where a starting point of 30 years was applied to a leading role in a conspiracy involving 300 kg of cocaine, and *R v Wright* [2017] EWCA (Crim) 126, where the quantity was 268 kg and the starting point was 24 years for an appellant who played a leading role but did not influence others or direct or organise buying of the drug. He took those cases as setting a ceiling below which adjustment should be made for the smaller quantity of drugs in the present case.

97. He was also referred to *R v Sanghera* [2016] EWCA Crim 94 (40 kg, 27 year starting point for leading role), which he considered was difficult to reconcile with the other cases.

98. The judge sentenced Mr Aziz to 24 years for the drugs offences.

99. For the firearms offences he considered that these, if standing alone, would merit a sentence of 17 years. There is no challenge to that element of his decision. Taking totality into account, the Judge lowered that sentence to 9 years, to be served consecutively, making a total of 33 years. He did not find Mr Aziz to be dangerous.

100. The grounds of appeal rely on the principle of totality, arguing that the total sentence is manifestly excessive. They also challenge the Judge's decision on the quantity of drugs, though it is accepted that at least 80 kg were proved.

101. We find that the grounds of appeal against sentence are not arguable.

102. We perceive no error in the decision as to the quantity of drugs, but even if the case had only concerned the 90 kg which the EncroChat evidence proved, it would have justified a sentence of well over 20 years just for the drugs offences.

103. Given that the sentence for the firearms offences alone would have been 17 years, it can be seen that a substantial adjustment was made for totality.

104. The guideline starting point for a single category A2 firearms offence was 14 years with a range of 11-17 years. Meanwhile the present case involved multiple weapons, including a fully automatic sub-machine gun with ammunition, possessed or acquired in order to further organised criminal activity, and there was an attempt to conceal one firearm by placing it at the address of a vulnerable individual where a child was also present.

105. It is therefore apparent that the notional firearms sentence of 17 years before adjustment for totality was by no means excessive. In view of its reduction to 9 years, it is not arguable that the resulting total sentence was manifestly excessive.

106. In the circumstances we also refuse the application to extend time for this application.

Conclusion on application for leave to appeal against sentence (and extension of time)

107. The applications are dismissed.