



Neutral Citation Number: [2025] EWCA Crim 546

Case No: 202302173 B5 and 202303928 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:

MICHAEL EARP

Appellant

- and -

REX

Respondent

Tony Montgomery (instructed by JD 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

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.

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The Hon. Mr Justice Bourne:

Introduction

1. Michael Earp was tried, initially alongside 4 other Defendants. The case against one, Rizwan Malik, was severed during the trial. Nicole Rhone was convicted on 2 counts and Niah Deen was acquitted on 2 counts with a not guilty verdict also being entered on a third count.
2. On 2 June 2003, Mr Earp was convicted on 2 counts of conspiracy to supply class A drugs (1-2), 1 count of possessing prohibited firearms (4) and 1 count of possessing firearms with intent to endanger life (5, a Skorpion sub-machine gun). He pleaded guilty during the trial to a further count of possessing a prohibited weapon (6) and 2 counts of possessing ammunition (7-8). He was acquitted on counts 3 (possessing firearms, i.e. 3 handguns, with intent to endanger life) and 9 (concealing criminal property).
3. Mr Aziz was also convicted on counts 1-9. In his case we have granted leave to appeal against conviction on 2 grounds but we have refused leave to appeal against sentence.
4. Mr Earp applies for an extension of time (approximately 3 months) in which to renew his application for leave to appeal against conviction and sentence and representation order following a refusal of leave by the single judge. As it will become clear, we find no merit in the applications for permission to appeal and consequently find it is unnecessary to address this point further.
5. Tony Montgomery of counsel appeared for Mr Earp on a pro bono basis. We are very grateful for his submissions.
6. The Prosecution case on counts 1-8 was very substantially 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”.
7. As is now well known, 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 outside the UK. As is now well known, 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, sought mutual legal assistance from their European 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 of Maldon CJ, Edis LJ and Whipple J) 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).
8. In the present case, the jury was satisfied that Mr Aziz and Mr Earp were involved in a conspiracy to supply class A drugs. The trial judge, when sentencing, was satisfied that

the drugs conspiracy concerned at least 180 kg of class A drugs and the case therefore fell above the highest category in the sentencing guideline.

Application for leave to appeal against conviction

9. Mr Earp's proposed appeal against conviction concerns the firearms charges and specifically count 5, whereby he was convicted, as we have said, of possession of a Skorpion sub-machine gun with intent to endanger life, though he was acquitted on count 3, which charged the same offence in respect of 3 handguns.
10. Mr Earp seeks leave to appeal against his conviction on count 5 on the grounds that (1) the judge should have accepted a submission of no case to answer, (2) the conviction on ground 5 is inconsistent with the acquittal on ground 3 and (3) the judge's summing up on count 5 was inadequate.
11. As to ground 1, possession of a firearm with intent to endanger life may be committed either where the defendant himself intends to use the weapon to endanger life or where he intends to enable another person to do so. In the present case the Prosecution relied on the second limb.
12. It was held in *R v Jones (IF)* [1997] 1 Cr App R 46 that "enable" in the second limb means more than just "give the opportunity" and it must be proved that the defendant intends life to be endangered. It is sufficient if the intention is for the firearm to be used in a manner which will endanger life if and when the occasion arises and it is not necessary to show an intent immediately and unconditionally to endanger life: see *R v Bentham* [1972] 3 WLR 398; [1973] QB 357.
13. For Mr Earp, Mr Montgomery argues that there was no evidence that the person using the Kneetown handle intended to pass on possession of any firearm to another in the knowledge that there was an intention to use it to endanger life.
14. The prosecution case was based on the relevant EncroChat messages. There were messages which appeared to refer to the possible use of a firearm to shoot someone. There were also messages referring to firearms being sold, rather than used. Mr Montgomery contends that Kneetown was not party to any of the exchanges of messages on which the Prosecution relied as proof of intent that firearms be used for shooting.
15. On 30 May 2023 the judge refused applications to dismiss by Mr Earp and Ms Rhone. In his reasons he stated that he was also considering the case in respect of Mr Aziz because the arguments applied as much in his case as in the others. He said, in particular:

"The factual background is that there were EncroChat discussions about the obtaining of machine pistols, one of which was in fact recovered by the police and automatic pistols, none of which were recovered. The conversations also included a reference to live ammunition rather than blanks and some live ammunition was recovered. To be sure the various EncroChat users which for the purposes of this argument I took as being correctly identified, there being plainly sufficient evidence from

which a jury could conclude that the EncroChat handle belonged to a defendant the prosecution asserted it does. Some defendants were not specifically involved in specific discussions where, for example, there was a two-way discussion between other defendants, by which I mean EncroChat handle holders.

But, the reality of this case is that this was a single, on the face of it, relatively small group of people working together and the fact that defendant X was not involved in a particular conversation on EncroChat does not significantly cut across the probability that the group as a group were involved in the same activity with the same knowledge. This aspect of the case is, of course, a matter of intent and intent is generally spelt out by inference rather than by a declaration of intent. Although, again, it is to be noted that some of the comments could be taken as having a pretty clear intent to endanger people's lives.

To be guilty of these offences there would have to be an intention to behave in such a way as would, in fact, to the defendant's knowledge endanger life. The most likely interpretation of the various exchanges is that the group had a machine pistol for its own purpose in the sense that they were going to use it rather than sell it on. Although there was plainly discussion at a later stage about selling it on the interchange, in particular, in relation to the context where on the prosecution's case Danielle Hussain went to collect the gun from Nicole Rhone's house and Michael Earp returned it the following day, bearing in mind the EncroChat discussion can be interpreted as a specific requirement the gun was loaded is sufficient evidence to produce a case to answer in respect of all of those defendants on each of those counts."

16. By its Respondent's Notice the Prosecution argues that, on its case, Mr Earp was a key part of Mr Aziz's drugs enterprise. Although Kneetown was not party to messages from Lushmace making references to using firearms against others, the Prosecution case was that not all of the Encrochat messages had been recovered, that Aziz and Earp did not exclusively communicate over Encrochat and that Earp was a sufficiently trusted lieutenant that he would have known (and intended) the purpose of holding the firearms, namely for use in a manner which would endanger life if and when the occasion arose. Also, there was evidence suggesting that when Mr Earp attended an address on 26 April 2020 to pick up the Skorpion, he knew that that was what he was picking up and that when he attended on 27 April 2020 in connection with the Skorpion, he had earlier that day been asked to load it up with ammunition. His DNA was found on the ammunition box stored at his cousin's address containing the same type of bullet as was found loaded in the magazine of the Skorpion, which was consistent with his knowing that the Skorpion was loaded with live ammunition and so was not being used just to scare others. The Prosecution contends that it was open to the jury to be sure that Mr Earp

possessed this highly dangerous weapon, ensured it was loaded and fetched it at short notice on the instructions of Aziz, with whom he supplied large quantities of class A drugs, so that it could be used in a manner which would endanger life.

17. Mr Montgomery responds that, in addition to Mr Earp's exclusion from the significant EncroChat conversations, there was evidence in the messages of his being distrusted and therefore of the group not being monolithic. He also points out that the judge was wrong to say that the arguments of no case to answer applied equally to Mr Aziz, given that Mr Aziz, unlike Mr Earp, was party to the key messages. The evidence, he submits, was ambiguous, leaving open, for example, the possibility that his client was merely reckless as to the endangerment of life, which would not suffice for an offence requiring intent.
18. Ground 2 is not developed in the written grounds of appeal. The ground is simply that because there was no difference in the evidence relating to intent on grounds 3 and 5, the jury's decision to acquit on one and convict on the other cannot be explained.
19. The Prosecution points to material differences between the evidence on the two counts. In relation to count 3, the Prosecution's case was that Earp was directed by Aziz to collect 3 handguns and they were obtained without ammunition. They were never recovered by police. Count 5 related to the Skorpion sub-machine gun which was an inherently more dangerous weapon. It was stored in Earp's cousin's home, loaded with ammunition, and there was DNA evidence to connect Earp with the ammunition. Earp's activity in dropping off and picking up the weapon and the messages relating to it left open the possible inference of his knowing and intending that it would be used.
20. In our judgment there clearly was evidence on which a jury could reasonably convict on count 5 and evidence which differentiated count 5 from count 3. The especially dangerous nature of the Skorpion sub-machine gun and the fact that it was stored loaded with ammunition, together with the fact that DNA evidence linked Earp to the ammunition, were indeed material differences from count 3. They were facts or evidence from which a properly directed jury could draw the necessary inference. Earp's exclusion from relevant messages may have weakened that case, while his status as a trusted lieutenant may have strengthened it, but it was a case which could be left to the jury.
21. For those reasons we conclude that grounds 1 and 2 are not arguable.
22. By ground 3, Mr Montgomery criticises the judge's summing up on this part of the case.
23. First, he makes the point that, although the judge told the jury they need not be satisfied of an intention to kill, he did not say that an intention to cause fear of violence or an intention to cause injury short of intending to risk killing the other person would not suffice, nor that possession of the firearm being reckless as to endangerment of life would not suffice.
24. Second, he contends that the judge should have reviewed the relevant EncroChat messages on which the Prosecution relied, making clear that Mr Earp relied on his not having been party to them, but he did not do so.

25. The Prosecution respond that it was not necessary for the legal directions to include examples of different intents which would not suffice. Mr Earp's counsel could have given such examples in his speech if he wished, but if they had come from the judge, they could have confused the jury. They also submit that, since the messages were agreed documents and had already been addressed during the lengthy trial and in counsel's speeches, it was not necessary for the judge to review them any further.
26. In our judgment it is not arguable that there was any shortcoming in the summing up which could mean that Mr Earp's conviction on count 5 was unsafe.
27. The elements of the offence were correctly identified in the legal directions. Whilst it was open to the judge to give examples of states of mind which would not be sufficient to make out the offence, it was not obligatory to do so and the omission to do so did not make the conviction unsafe.
28. Similarly, whilst the judge could have decided to review the messages relevant to each count, his decision to do so did not make the conviction unsafe. The summing up came at the end of a fairly long trial which had focused to a very considerable degree on precisely those messages. The messages were contained in documents which were before the jury, so this was not a case of having to remind the jury of what had been said in oral evidence. The jury had heard counsel's speeches dealing with the question of what the messages did or did not prove.
29. We therefore dismiss Mr Earp's renewed application for leave to appeal against conviction.

Application for leave to appeal against sentence

30. The Crown Court did not obtain a pre-sentence report and we agree that a report is not necessary.
31. Mr Earp was 32 at the time of sentencing and was not held to have relevant previous convictions. The judge did not find him to be a dangerous offender.
32. The judge first passed sentence on Mr Aziz, who was 25 years old and was of previous good character and was also not found to be dangerous. In order to understand the sentencing of Mr Earp it is necessary to set out what the judge decided in Mr Aziz's case.
33. Mr Aziz 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.
34. 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.

35. 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.
36. 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”.
37. 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.
38. 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.
39. 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.
40. The judge sentenced Mr Aziz to 24 years for the drugs offences.
41. For Mr Aziz’s firearms offences he considered that these, if standing alone, would merit a sentence of 17 years. Taking totality into account, the judge lowered that sentence to 9 years, to be served consecutively, making a total of 33 years.
42. The judge then turned to the case of Mr Earp and said:

“In relation to Michael Earp, bearing in mind his lower position in the hierarchy, the sentence in respect of the drugs offences is nineteen years, in relation to the firearms offences an additional seven years. Again made up in this way: in relation to counts 1 and 2 nineteen years concurrent, in relation to count 5 seven years, count 4 five years, count 6 five years, count 7 and 8 two years concurrent with each other but all of the firearms offences consecutive to the drug offences, therefore a total of twenty-six years in his case.”
43. It is clear that the judge effectively incorporated what he had already said about sentencing guidelines in relation to Mr Aziz.

44. The judge said that he accepted the Prosecution's categorisation of "the roles of the two male defendants and the appropriate starting points and range". By reference to the Prosecution's sentencing note, that meant that Mr Earp played a "significant" role. He was "Mr Aziz's right hand man", responsible for collecting drugs and delivering drugs, collecting cash and also collecting firearms, including the Skorpion sub-machine gun, with full knowledge of what it was.
45. Thus the sentence of 19 years for the drugs offences was reached, in effect, by considering the sentence passed on Mr Aziz and lowering it to reflect the playing of a significant role rather than a leading role. His consecutive sentence of 7 years on count 5 reflected his conviction on all the firearms counts except count 3. It was to be compared with the sentence imposed on Mr Aziz for the firearms offences i.e. a "starting point" of 17 years reduced to 9 years with regard to totality.
46. Mr Montgomery contends that either it is not possible to identify what starting point the judge took or the starting point must have been inappropriately high. We reject that submission, taking the view that the judge's reasoning is entirely clear when the sentencing remarks for Mr Aziz and Mr Earp are read together.
47. Mr Montgomery also points out that the judge did not make any reference to, let alone any express adjustment for, any of the mitigating factors about which the Court had been told. Counsel had argued that Mr Earp's role was at the lower end of the significant bracket, that he was not just lower but much lower in the hierarchy than Mr Aziz, that he was basically of good character and had character references and that he had expressed remorse.
48. In our judgment, the judge's acceptance of the Prosecution's case as to Mr Earp's role resolved the questions about his role in the conspiracy. The judge was entitled to view Mr Earp as having played a significant role in a very large conspiracy and to pass sentences which were clearly differentiated from those passed on Mr Aziz, but which bore some relation to them. He and Mr Aziz both relied on good character and Mr Aziz was significantly younger than Mr Earp. In those circumstances, we do not find it arguable that character, or indeed remorse, was not taken into account.
49. Standing back, Mr Earp was found to have been the right-hand man in a very large drugs conspiracy and was also guilty of firearms offences including the possession of a sub-machine gun with intent to endanger life. It was inevitable that he would receive a very long sentence when convicted on the main counts on the indictment after a trial. It is not arguable that his sentence was manifestly excessive.
50. We therefore dismiss these applications.