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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **12/04/2024**

IN THE CROWN COURT FOR THE DIVISION OF LONDONDERRY

THE KING

v

MICHAEL O'LOUGHLIN

SENTENCING REMARKS

HHJ NEIL RAFFERTY KC

Background

[1] The defendant was arraigned on 30 March 2022 and pleaded not guilty to all counts. The defendant re-arraigned on 12 June 2023 and pleaded guilty to all counts save for count 38 which was left on the books. He was jointly charged with his co-accused whose case remains to be tried. Both prosecution and defence are in agreement that this matter can be sentenced irrespective of the outstanding trial for the co-accused.

[2] Before moving to set out the counts and particulars, it is necessary to briefly set out the background to this matter. The defendant was detected as part of the world-wide investigation into the "Encrochat" encrypted telephone network. This matter was listed before me in December 2022 for a Preparatory Hearing under section 29 of the Criminal Procedure and Investigations Act 1996 ("CPIA"). The background to the prosecution can be succinctly set out. This is a prosecution brought arising out of materials obtained by the National Crime Agency ("NCA") through an investigation conducted by French and Dutch Investigators. The investigation involved and centred around the Encrochat digital telephone platform. This was a telecommunications platform that offered its users encrypted telecommunications. In or about early 2020, French and Dutch police services set up a Joint Investigation Team. Leading this team was a Gendarmerie Sergeant Major Decou whose evidence is the subject of a hearsay application which will be dealt with later in this case. I am, at this stage, couching the investigation in neutral terms. It seems that data and material from the Encrochat network was "obtained" during this joint investigation and material which was geolocated to "users" located in the

UK was purportedly "lawfully obtained" under a warrant approved by the Investigatory Powers Commissioner's Office ("IPCO") dated 26 March 2020. This case is the first of several dozen "Encrochat" cases currently before the Crown and Magistrates Courts in Northern Ireland. There has been litigation in England and Wales involving similar issues and there had been an application heard by the Investigatory Powers Tribunal ("IPT") which is empowered under the Investigatory Powers Act ("IPA") with respect to the lawfulness of the TEI/EIO warrant.

[3] It subsequently emerged that section 29 of the CPIA does not, save for limited circumstances, apply in Northern Ireland despite the CPIA being an Act of the United Kingdom Parliament. Save for prosecutions under the Criminal Justice (Serious Fraud) (NI) Order 1988; prosecutions under section 17 of the Domestic Violence, Crime and Violence Act 2002; and applications made under section 44 of the Criminal Justice Act 2003; no provision exists permitting the holding of Preparatory Hearings. This is quite an astounding legislative lacuna since the utility of Preparatory Hearings to enable an expeditious ruling followed by definitive guidance from the Court of Appeal in new or novel cases is clearly obvious and desirable. I then provided a Case Management Ruling setting out how I would deal with the admissibility issue as a Pre-Trial Ruling under the CPIA. I am setting this out in some detail because it is important that the context in which the defendant pleaded guilty is plainly understood because in parallel to this matter case law was being generated in England and Wales which is pertinent "Encrochat" cases. In *R v A, B, C & D* [2021] EWCA Crim 128 the Court of Appeal had rendered its judgement on a Preparatory Hearing in the lead case in that jurisdiction. It had been established that the "Encrochat" material was admissible in Criminal trials as it was "Targeted Equipment Interference" ("TEI") warrant material and therefore admissible in UK courts. "Targeted Interception" ("TI") is not admissible under the Investigatory Powers Act 2016.

[4] However, an application to the Investigatory Powers Tribunal ("IPT") was still extant at that stage. This application sought, inter alia, to impugn the warrant obtained by the NCA/CPS. These were Targeted Interference Warrants ("TEI") served as a European Investigation Order ("EIO"). The applications of *SF & Others v NCA* were determined by the IPT on 11 May 2023. In their several rulings, which I need not go into in detail, the IPT dealt with these issues. It is in that context that the defendant in this case pleaded guilty. For the avoidance of doubt, I have not gone into the numerous twists, turns and arguments as I fully expect more to follow and if I have left out some of the legal nuances I have done so to precis the background simply for the purposes of this sentencing exercise.

Background/Offences

[5] On 13 June 2020 police conducted a search under the Misuse of Drugs Act of a house at 35 Upper Dromore Road Warrenpoint, home of the defendant. A large number of phones and sim cards were seized including DK1 a Suro Carbon BQ phone, DK3 an Android BQ phone and DK4 an unknown mobile phone. A silver

BMW car PFZ 7697 was also seized as well as £545.00 cash and €1065. The defendant was interviewed on 14 and 15 June 2020 but made no comment, he refused to provide the PIN codes for his phone. Subsequent examination of DK1 and DK4 showed that they had an encrypted partition with a 15 digit passcode which was unknown and data could not be extracted from either device nor could an IMEI number be identified. The counts hereafter reflect examination of conversations via the Encrochat messaging service and are broken down into offence types. For completeness I have incorporated the prosecution layout.

[6] The following is based on the prosecution written opening and sets out the counts within their evidential context:

DRUG OFFENCES

[7] The counts involving drug offences are set out below;

- **Count 1** concerned in class A "ecstasy" importation.

  See Exhibit DF18 page 17, messages with rocketpower 28.03.20 from 22:36 – 23:50 –also page 20 messages rocketpower 30.03.20 from 21:00 – 22:11

  Industrialsky and rocketpower discuss obtaining a 10kg package of "Mandy" and that if it works they can do this two or three times a week. Rocketpower refers to "champagne" type. "Mandy" and "pink champagne" are terms used for MDMA (Ecstasy) (see statement S Blair at p.116), they discuss getting this from "flat DPD" meaning from the Netherlands using DPD delivery and discuss the cost of delivery.

- **Count 3** concerned in the production of class C diazepam (re pill press)

  Exhibit DF18 page 18 messages with "pandaherb" 30.03.20 from 11:28 – 12:42 including images of pill press. [Further messages relating to tablets throughout data, examples page 19 messages "rocketpower" 30.03.20 from 20:56 – 20:58 also page 22 – 24 messages "rathu" "lushforest" and "industrialsky" on 02.04.20. Also to traficante-uno on 22.04.20. Also, page 81 with "bricknose" on 21.05.20 and page 83 "nicesock" on 21.05.20 and finally page 89 with "rookieelf" on 28.05.20].

  See statement of S Blair at pages 117 – 119 showing the two images of the pill press with the description "Blister machine" and "Pill press" respectively and an image described as a "mixer" and would be used to produce and package pills or tablets. There is a discussion about samples, "Pandaherb" states that a third party wants 80k sterling for the whole lab and "industrialsky" asks

"Will he send back a few 100k tabs" or "a kg or 2 of alp." Mr Blair states that "alp" is likely to be an abbreviation of "Alprazolam" being diazepam.

- **Count 4** concerned in class B cannabis supply

  Exhibit DF18 page 21 messages with "absentkangaroo" 18:34 – 20:18

  See statement S Blair at p. 130 – 132.

  There are messages relating to different strains of herbal cannabis namely "Ice cream" & "stardogs" – cannabis strain, a price of 4400 is discussed, it is not clear if this is Euros or Sterling but this is consistent with the wholesale price of 1kg of cannabis from Canada. Industrial sky refers to buying at "42/43" (4,200/4,300 and selling at "44/45" (4,400/4,500) and this is to be supplied in ½ kg blocks.

- **Count 5** concerned in class C diazepam supply

  Exhibit DF18 page 22 messages "lushforest" 02.04.20 at 16:33 – 19:07

  See statement S Blair at pages 133 – 135, there is a conversation about the supply of diazepam referred to by industrial-sky as "Activas" being the name of a pharmaceutical company which produces diazepam. Industrialsky refers to there being 250k (250,000) of them in London at 12p each.

- **Count 6** offer to supply class C diazepam.

  Exhibit DF18 page 22 messages "rathu" 02.04.20 16:30 – 16:48

  Industrialsky sends an image of a bottle of diazepam to "rathu" and states he will have them on Saturday.

- **Count 7** concerned in class A cocaine supply.

  Exhibit DF18 page 22-23 messages "rathu" 02.04.20 at 16:30 to 22:43 and pages 24 – 25, messages "spookysuit" on 02.04.20 at 20:23 to 04.04.20 at 13:04.

  Industrialsky and rathu discuss the availability and price of "100 ricks" costing "44-46" and refer to getting one with "a Crown stamp." Industrialsky states he knows the person involved in the supply. "Ricks" is a reference to cocaine and the wholesale price of 1kg of cocaine would be approximately £45,000. See report of S Blair pages 136 – 140.

- **Count 8** concerned in class B cannabis supply.

  Exhibit DF18 page 23 messages "rathu" 02.04.20 at 16:30 to 22:43 and 03.03.20 at 12:26 – 19:00 and page 29 on 05.04.20 from 23:05 to 06.04.20 at 16:15

  Industrialsky is discussing selling "jackets" in Athlone for 6k and references to "top dutch" and "green" see report of S Blair p.136 – 140.

- **Count 10** offer to supply class B cannabis.

  Exhibit DF18 page 26 messages "miggo" on 04.04.20 from 14:41 to 15:10

  A user called "miggo" is asking industrialsky for "ten jackets cash" and "the price on the greens." Industrial sky says "Into us at 5750" being consistent with the wholesale price of 1kg of cannabis in Euros. See report S Blair at pages 143 – 144.

- **Count 11** offer to supply class A cocaine.

  Exhibit DF18 page 26 - 27 messages "miggo" on 04.04.20 from 14:41 to 15:10 Discussing supply of "a top' which is 46k

  As part of the same conversation as in count 10 "miggo" asks for "at top" and Industrialsky replies "Tops are 46." This is again consistent with the price of £46,000 for 1kg of cocaine, see report S Blair at p.145 – 146.

- **Count 12** offer to supply class C diazepam.

  Exhibit DF18 page 27 messages "miggo" on 04.04.20 from 15:09 to 15:10.

  Miggo asks about the price of Xanax and that a third party "might take 20k of them." Industrialsky states "Ta Athlone and 25 cents on 20k" Xanax is a brand name for Alprazolam (diazepam) and so this relates to the supply of 20,000 diazepam tablets. See report S Blair at p.145 – 146.

- **Count 13** concerned in class C diazepam supply.

  Exhibit DF18 pages 31 -32 messages "rathu" on 13.04.20 from 15:11 to 14.04.20 at 13:44.

  User "rathu" asks industrialsky if he has any tablets and if he can get a tester, industrialsky replies "if you take a 100 you can take the 8k from smalls and

give me 100k" Rathu agrees to take one tub and industrialsky states "Iv 200k left…" they then arrange delivery near the border at Enniskillen.

- **Count 14** conspiracy to supply class A cocaine.

  Exhibit DF18 page 33 messages "bizzo" on 15.05.20 from 13:28 – 17:50.
  D says he has two left if wanted…image send of what appears to be a compressed bock of cocaine received by industrialsky, "bizzo" refers to a price of "45" being consistent with 1kg of cocaine at 45,000 Euro, see report S Blair at pages 152 – 155.

- **Count 15** concerned in class C diazepam supply.

  Exhibit DF18 page 37 messages "rathu" on 15.04.20 from 16:33 – 21:58

  Industrialsky tells rathu that he has a million pills coming in and will be able to do them cheaper then.

- **Count 16** concerned in class A cocaine supply.

  Exhibit DF18 page 37 messages "rathu" on 15.04.20 from 22:00 – 22:08

  Rathu is looking for "3 ricks" and industrialsky states "Their into me at 46" rathu asks if they are "stinking smelly shiny flake" and industrialsky tells him that he'll have them tomorrow and they arrange to meet south of the border." See report S Blair at pages 157 – 159, again the description refers to cocaine.

- **Count 17** concerned in class B, amphetamine supply.

  Exhibit DF18 page 36 – 37 messages rathu 15.04.20 from 15:53 – 21:57

  Rathu asks industrialsky for "speed" and industrialsky replies that he has "6 whizz gimme 4,500 for them." See report S Blair at pages 155 – 156, the expert states that "speed" and "whizz" refer to amphetamine which normally retails at £1,200 - £2,000 per kilo to this either refers to six ½ kilo amounts or is a cheap deal for buying six kilos.

- **Count 19** concerned in class B cannabis supply.

  Exhibit DF18 page 38 messages rathu 16.04.20 from 15:35 – 15:48 and page 24 16.04.20 at 23:35 to 17.04.20 at 12:12

  Industrialsky tells rathu he has a few jackets and can pay for them in Dublin and they are "4200 for 10/10 stardogs." Industrialsky then confirms that he

has 5 in "brim" which he later confirms is an address in Birmingham and they arrange for collection.

- **Count 20** concerned in class A cocaine supply.

  Exhibit DF18 page 40 messages rathu on 17.04.20 from 14:05 – 20:34.

  Industrialsky asks rathu if he wants "a box of ricks" and states "Into me at 46 Class they are" Again rathu asks if they are "smelly shiny flake" Industrialsky replies "I've sold 7 today and all happy … one fella very choosy and he gave me 50"

- **Count 21** conspiracy to supply class B cannabis.

  Exhibit DF18 page 44 messages spookysuit on 18.04.20 from 22:42 – 22:47

  Industrialsky tells "spookysuit" that a person referred to as "the chink" has "14 good jackets" and that they can pay in Dublin and he will drop to the transport for 4k and they can get 75/8k on them all day. Spookysuit says he can take 10 or 11 and they then arrange for collection.

- **Count 24** concerned in class A cocaine supply.

  Exhibit DF18 page 44 messages "bizzo" 20- 21/4/20,

  Industrialsky is told by Bizzo that he has "1.5 left" if he wants to grabu it and there are messages re tops (typically cocaine in a larger 1kg block)- bolo & colo (Bolivia and Columbia)

- **Count 26** conspiracy re importation of class B.

  Exhibit DF18 page 47, messages greyheadirl on 21.04.20 at 20.21-21.27
  Discussion of paper (money) in the flat (Netherlands)..discuss problems with transport "tp" "your only on the hook for 14k for a half"

- **Count 28** conspiracy to supply class A cocaine (ricks).

  Exhibit DF18, page 55 messages nicesock on 23.04.20 at 19:47 – 20:46
  "just doing ricks…." They go on to discuss sale of a rick for 45 "E45000"

- **Count 29** conspiracy re importation of class A heroin.

  Exhibit DF18 page 57 messages spookysuit on 26.04.20 19:47 – 20:18
  10 bobs …from the "flat" Netherlands

See report S Blair pages 183 – 185 the reference to 10 bobs is a reference to ten unit of heroin. "Bobs" or "bobby" are common terms for heroin.

- **Count 30** conspiracy re importation of class A cocaine.

  Exhibit DF18 page 57 messages spookysuit on 26.04.20 19:47 – 20:18
  9 whites

  See above, "9 whites" is a reference to nine units of cocaine.

- **Count 31** conspiracy re importation of class B cannabis.

  Exhibit DF18 page 59 messages "industrialsky" on 01.05.20 at 22:27 – 02.05.20 at 10:09.

  15/20 jackets (typically 1kg of herbal cannabis)– herbal cannabis from Netherlands

- **Count 32** conspiracy to supply class B.

  Exhibit DF18 page 69 messages "gizomo" 08.05.20 at 14:55 – 15:15

  I've 18 jackets in Brum (Birmingham)

- **Count 33** offered to supply class A cocaine.

  Exhibit DF18 page 77-78, messages billykid 20.05.20 0951-0956

  Industrialsky sends an image of two blocks of compressed white powder... and tells him "sorting it this week" and that the cost was "28 in the flat" and they discuss prices.

- **Count 34** offered to supply class C diazepam.

  Exhibit DF18 page 73 , messages barnbrack on 17.05.20 at 19:15 to 18.05.20 at 11:29.

- **Count 39** possession of class B cannabis.

  This relates to JM1 0.13 grams of herbal, JM2 0.98 grams of herbal and JM4 3.29 grams of herbal totalling 4.4 grams found during the police search on 13 June 2020 [see pages 97 – 98 depositions].

- **Count 40** possession of class C diazepam.

This relates to DH1 0.78 grams of crushed diazepam powder and DH9 five tablets of diazepam found during the police search.

Financial Offences/Proceeds of Crime Act

- **Count 9** conspiracy to transfer criminal property £51500.

  Exhibit DF18 page 24 messages "rathu" 02.04.20 at 16:30 and,

  pages 9 –10, messages "spookysuit" on 02.04.20 at 20:23 to 04.04.20 at 13:04. Image sent of shrink-wrapped E notes asks if we can get it up tomorrow

- **Count 18** conspiracy to transfer criminal property £17000.

  Exhibit DF18 page 37 messages rathu 15.04.20 from 21:50 – 21:53

- **Count 22** conspiracy to transfer criminal property £22000.

  Exhibit DF18 page 44 messages bizzo on 19.04.20 from 19:05 to 21.04.20 at 17:39.

  If another 25 down the road for you and could do with more white

  Messages re getting 22k sterling and 25k euro, nightmare getting it changed... I could prob do 2/3 more at the weekend…. Any wholesale discount

- **Count 23** conspiracy to transfer criminal property - Euro 25000.

  Exhibit DF18 page 44 messages bizzo on 19.04.20 from 19:05 to 21.04.20 at 17:39

- **Count 27** possession of criminal property £22000 cash.

  Exhibit DF18 page 33, messages khan-genghis on 21.04.20 at 15:22 – 15:23

- **Count 41** conspiracy to convert criminal property £35000.

  Exhibit DF18 page 55, messages "barnbrack" 15.05.20 21:30 to 16.05.20 at 09:00

- **Count 42** conspiracy to transfer criminal property Euro 50000.

  Exhibit DF18 page 57, messages barnbrack on 17.05.20 at 19:15 to 18.05.20 at 11:29

- **Count 43** conspiracy to transfer criminal property £43000.

  Exhibit DF18 page 64 messages barnbrack on 21.05.20 at 06:41 – 08:34

- **Count 44** conspiracy to transfer criminal property £25000.

  Exh SM2 at p.347 – 348 with barnbrack 9/6/20 1250-17.19

Firearms Offences

- **Count 25** conspiracy - re firearms CZ P10.

  Exchange noted showing the defendant actively attempting to source handguns and ammunition specifically 18 x9mm pistols with a discussion as to how these would be packaged and transported.

  Exhibit DF18 page 31 messages fishtastic 20.04.20 15:28 – 16:40

  Defendant asking for a firearm (steel) reply have CZ P10 (handgun)

Conspiracy to cause GBH

- **Count 2** see messages "some cunt got my very good mate and chopped him bad. He's in jail but his moms in the north we need something heavy doing to her"... "get me that address and I'll get the cunt butchered"

  Exhibit DF18 pages 2 – 3, messages with toughglass 28.03.2020 from 20:30 to 29.03.20 at 21:38

Conspiracy to Commit Murder

- **Count 35 re the murder of "johnny"**

  On the messages the defendant initiated the agreement. There is discussion about payment to include a sum of £30000 for the death of "johnny"

  Exhibit DF19 pages 161 to 165 from 13.05.20 at 12:07 to 17.05.20 at 20:53

- Industrialsky to bazzo: He is in no 3 cathur mor now
- Bazzo to industrialsky: Have checkpoint everywhere there now if you want I go there in the night
- Industrialsky to bazzo: Like 8/9 would be best
- Bazzo to industrialsky: That's ok

- Industrialsky to bazzo: We get this bastard
- Industrialsky to bazzo: If you get him I give you 5k bro
- Industrialsky to bazzo: If you can't catch him I can't give you 5k
- Industrialsky to bazzo: He is in the house 100% now
- Bazzo to industrialsky: OK
- Industrialsky to bazzo: And hes smoking heroin
- Bazzo to industrialsky: I go there 9
- Industrialsky to bazzo: So will be very stoned and weak
- Industrialsky to bazzo: Shoot him and I give you 10k
- Industrialsky to bazzo: If he dies I'll give you 30
- Industrialsky to Bazzo: Bastard
- Industrialsky to bazzo: If hes in a wheelchair I give you 10k
- Bazzo to indistrialsky: OK I gonna do my best

Count 36/37 re the murder of "Johnny"

- Bazzo to Industrialsky: I find another guys if you no take him the boys can go there tomorrow night
- Industrialsky to bazzo: Ok bro
- Bazzo to industrialsky: You want
- Bazzo to industrialsky: ?
- Industrialsky to bazzo: Maybe bro. I have somebody going their tonight
- Industrialsky to bazzo: Soon
- Bazzo to industrialsky: OK bro
- Industrialsky to spookysuit: Nearly had Johnny last night. dying cunt that was on the job couldn't put the door in and he was in der
- Industrialsky to spookysuit: Stew injection the cunt needed
- Spookysuit to industrialsky: Well if he doesn't I am coming pal and believed me it be close coffin
- Industrialsky to spookysuit: He be piece of cake to put in a spot. well maybe not now over this but will again.
- Spookysuit to industrialsky: Well these two are ready pal once things get bk moving
- Industrialsky to spookysuit: Ya I get them on the Roscommon job. He's more important.
- Industrialsky to spookysuit: Wheelchair enough for Johnny
- Industrialsky to bazzo: The stupid bastard that went last night fucked up. he was in the house and the guy broke the window to try get him out to shoot him but he went over the back wall.
- Industrialsky to bazzo: I will find out again bro and we do him. Junkies love to talk and I love to listen
- Bazzo to industrialsky: OK bro anything let me know if you give me 30k 100% bro I put him in bed

- Industrialsky to bazzo: OK bro. Money is not the problem but I would like to put him missing if possible
- Bazzo to industrialsky: Yeah
- Industrialsky to bazzo: No investigation is best for all
- Bazzo to industrialsky: Yeah no problem

[8] As can be seen from the paragraph above this is a highly complex sentencing exercise covering five discrete areas of offending. I am obliged to counsel for their submissions and agreement that any sentence in this case will be guided by the principle of totality and ultimately that is how I will construct the sentence in this case. However, given the breadth of the offending it is necessary to examine some of the guideline authorities in these areas before assessing the overall starting point based upon totality.

Guidelines

Drugs

[9] There are numerous sentencing guidelines on drug offending in Northern Ireland. *R v Hogg & Others* [1994] NI 258 dealt with a number of so-called street dealers and adopted the analysis of Lowry LCJ I in *R v McKay* [1975] NICA 5. In more recent times these principles have been reaffirmed in cases such as *R v Stalford & O'Neill* Neutral Citation CAR(S)463. Furthermore, in *R v McKeown & Han Lin* [2013] NICA 28 the Court of Appeal sought to consolidated and confirm the principles and approaches to be adopted by Courts in Northern Ireland. Paras 14, 15, 16 and 17 of that judgement set out, so far as is possible, the issues and guidelines to be adopted in drugs cases:

> ***"The relevant cases***
>
> ***Supply***
>
> [14] The guideline case on the sentencing of offenders for possession of drugs with intent to supply remains *R v Hogg and others* [1994] NI 258. The court adopted the principles set out in *R v McCay* [1975] NICA 5 by Lord Lowry:
>
> "1. Possession of a drug is less serious than supplying it to another;

2. Introducing drugs to someone with no previous experience is more serious than supplying drugs to someone who is already using them;

3. Possessing or supplying L.S.D. or heroin is worse than possessing or supplying cannabis.

4. In connection with the offences of supplying and permitting premises to be used, a previous conviction for a similar offence should weigh heavily against the accused;

5. A previous clear record in connection with drug offences is relevant but is not by itself a clear indication against a custodial sentence;

6. In possession cases, and to a lesser extent in cases of supply and permitting premises to be used, a previous criminal record unconnected with drugs is of minor importance;

7. Severe sentences, including custodial sentences of any kind, are of assistance in signifying the community's rejection of drug taking and its hostility to traffickers in drugs and even to those who supply them free of charge;

8. The importation of drugs, especially when done for gain, ought to be very severely punished;

9. One who runs an establishment or organises parties or groups to encourage drug-taking should normally receive a heavy prison sentence;

10. The same principle applies strongly to those who in relation to drugs corrupt young people in this fashion or otherwise;

11. The fact that the offences involve a group or "cell" of people may constitute a circumstance calling for heavier punishment than would be appropriate in purely individual cases."

[15] The court then added some observations of its own:

> '(i) The supply of any Class A drugs or their possession with intent to supply should generally be visited with a heavier sentence than in the case of Class B drugs. The legislature has drawn a distinction between them, and the Court of Appeal in England has consistently followed this course. In *R v Martinez* (1984) 6 Cr App R (S) 364 it was stated that 7 distinctions should not be drawn between the different types of Class A drugs; (cf also *R v Virgin* (1983) 5 Cr App R (S) 148). In *R v Aramah* (1982) 4 Cr App R (S) 407 the court made no distinction within the categories of either Class A or Class B drugs.
>
> (ii) There are several different levels of gravity of involvement in the supply of drugs. In general, the importer of substantial quantities is to be regarded as the most serious offender and should receive the heaviest punishment. Below him is the wholesaler, who supplies the small retailers with drugs for distribution to the public on commercial arrangements which may be straight sale, sale or return or the retention by the retailer of a percentage of the selling price. The next category in descending order of culpability is the retailer who sells to the public for commercial gain. At the bottom of the scale is the person who supplies a small amount without a commercial motive, for example, where cannabis is supplied at a party (see *R v Aramah*).
>
> (iii) The offenders in drugs cases are generally young people, frequently of good backgrounds and without any previous criminal involvement. Not uncommonly the major suppliers use the services of such people for retailing, as the importers use young people

of presentable appearance as couriers, in order to attempt to avoid detection of the traffic. In many cases a custodial sentence can blight a promising career. It is always right for a court to keep such considerations in mind when sentencing, but the importance of deterrence of others and the marking of the community's rejection of drug taking will often prevail and lead to the imposition of an immediate custodial sentence.'

[16] The court then summarised its conclusions:

'1. Importation of drugs on a large scale is the most serious offence in this area, and is invariably to be visited with a substantial custodial sentence. We respectfully agree with the guidelines set out by Lane CJ in *R v Aramah*.

2. Supplying drugs is the next in descending order of gravity, with possession with intent to supply a short distance behind. In many cases there may be little distinction between them, for the charge may depend on the stage of the proceedings at which the defendant was apprehended. In all but exceptional cases they will attract an immediate custodial sentence, which may range from one of some months in the case of a small quantity of Class B drugs to one of four or five years or more in the case of supply of appreciable commercial quantities of Class A drugs. We do not find it possible to narrow the range any more closely, for much will depend on the circumstances of the supply, its scale, frequency and duration, the sums of money involved and the defendant's previous record, together with his or her individual circumstances.

3. More flexibility may be adopted by the sentencing court in the case of possession where there has been no supply of drugs or

> intent to supply them to other persons. Large-scale possession, even without supply to others, and repeated offending may still require an immediate prison sentence. Possession of Class B drugs may generally be regarded as less heinous than possession of Class A drugs. In many cases of the former at least there will be room to consider a suspended sentence or noncustodial methods of dealing with the offender.'
>
> [17] It is clear that the court drew heavily on the decision of the English Court of Appeal in *R v Aramah*. It is worth noting in this context that in relation to the supply of Class A drugs that court said: "It goes without saying that the sentence will largely depend on the degree of involvement, the amount of trafficking and the value of the drug being handled. It is seldom that a sentence of less than three years will be justified and the nearer the source of supply the defendant is shown to be, the heavier will be the sentence."

[10] It is clear on any analysis of the drug offending in this case that the defendant was heavily involved with a network of others in offences concerning/offering to supply and in respect of counts 29, 30 and 31 importing Class A, B and C drugs on a significant scale. His significant involvement in these offences must place him towards the upper end of sentences in this area. Whilst acknowledging the "health warning" provided by the Northern Ireland Court of Appeal regarding the England and Wales sentencing guidelines it is nevertheless of note that with respect to the importation of Class A drugs in particular the sentencing starting points after a contest for a leading role range from eight years six months to 14 years dependent upon quantity.

Financial Crime/Proceeds of Crime Act Offences ("POCA")

[11] There has been, at times, a tendency amongst sentencers to regard these offences or offences of this type almost as "make-weight" offences. That is to say, that sentencers have tended to fix culpability upon the drugs offences and then sentences the POCA offences concurrently. This approach, however, has in certain cases had a tendency to under assess the significance of this area of criminal activity. In *R v Cooper & Others* [2023] EWCA Crim 945, Edis LJ observed:

"[10] The approach to sentencing in this type of case was considered by this court in *R v Greaves* [2020] EWCA Crim 709; [2011] 1 Cr App R (S) 8, *R v Alexander and Others* [2011] EWCA Crim 89; [2011] 2 Cr Ap R (S) 52 and *R v Randhawa* [2022] EWCA Crim 873. Those decisions show that there is a broad spectrum of cases involving the combination of 2002 Act offences and other underlying, primary, offending. At one end of the spectrum, the 2002 Act offence does not involve any additional culpability or harm and does not aggravate the seriousness of the primary offence. At the other end, the offending contrary to the 2002 Act is markedly distinct from the primary offending and involves significant additional culpability and harm, aggravating the primary offence to an extent that would not otherwise be reflected in the sentence for that offence if considered in isolation. The decisions in those cases illustrate the operation of the principle of totality in this context:

(1) Where the 2002 Act offence adds nothing to the culpability and harm involved in the primary offence then there should be no additional penalty: *Greaves* at [24], *Alexander* at [11]. In such a case it is appropriate to impose concurrent sentences, with no upward adjustment.

(2) Where the 2002 Act offence involves additional criminality (whether increasing the culpability or harm, or both) beyond that involved in the other offences for which sentences are imposed, an additional penalty should be imposed: *Greaves* at [24], *Alexander* at [13], *Randhawa* at [21]. The seriousness of the additional criminality is to be assessed by reference to the culpability of the offender and the harm caused by the 2002 Act offending. In such a case the sentencing judge may either impose concurrent sentences with an appropriate upward adjustment, or consecutive sentences, often with a downward adjustment.

[11] It is thus important, in each case, to identify whether the 2002 Act offence involves additional culpability and/or harm, and, if so, the extent. Examples of cases where there is such an additional factor include those where the 2002 Act offence:

(1) Takes place over a different period from the primary offending.

> (2) involves additional or different criminal property, beyond the proceeds of the primary offending.
>
> (3) makes it more difficult to detect the primary offending.
>
> (4) involves dealing with the proceeds of the primary offending in a way which increases the risk that victims will not recover their losses, or that confiscation proceedings will be frustrated.
>
> (5) creates additional victims. This may arise where the proceeds of the primary offending are used to make further transactions which are then thrown into question, resulting in loss to the innocent parties to those transactions: *Randhawa* at [20].
>
> (6) involves additional planning or sophistication, extending the culpability that might otherwise attach to the primary offending.
>
> (7) assists in the continuation of offending. In this regard, in *Alexander* at [13] Moses LJ drew attention to "the pernicious nature of money laundering and its capacity for enabling the proceeds of drug dealing to be not only concealed but to assist in the continuation of such crimes" (referring also to *R v Linegar* [2009] EWCA Crim 628 *per* Aikens LJ at [18]).
>
> [12] Conversely, where the 2002 Act constitutes nothing more than the continued possession of the proceeds of the primary offence, then there is unlikely to be any additional culpability or harm beyond that reflected in the primary offence. In that event, it would be wrong in principle to impose any additional penalty. If an immediate custodial sentence is imposed for the primary offence this principle requires a sentence for the 2002 offence that runs concurrently with it."

[12] It is properly observed that in this case there are significant movements of money. Possessing, transferring and converting significant sums of money per Moses LJ is testament to "the pernicious nature of money laundering and its capacity for enabling the proceeds of drug dealing to be not only concealed but to assist in the continuation of such crimes." What is clear from the facts of this case that the financial offending was part of an overarching and relatively sophisticated criminal scheme centred around buying/selling/importing drugs. All whilst using encrypted telecommunications.

Firearms Offence

[13] I will deal with this offence briefly. The guidelines provided by *R v Avis* [1998] 2 Cr App R(S) 178 are well known and do not require to be set out herein. It is of note that this defendant's effort to obtain a CZ P10 9mm pistol came to nothing. Equally, there is, to say the least, an unhappy correlation between organised crime, drugs and the possession of firearms. However, in the context of this case it may be the offence which is lower in the order of magnitude to the other offences which the defendant faces. Nevertheless, it is of some weight in the overall assessment of culpability.

Conspiracy to Commit GBH/Conspiracy to commit Murder

[14] This is by far the more difficult sentencing area in this case. I need not deal with the conspiracy to commit GBH beyond noting that it was on the same "victim." Beyond indicating and established animus to that victim the sentence for that GBH offence will inevitably be subsumed by the sentence for the conspiracy to commit murder. That offence will be the focus of the next paragraphs.

[15] I am obliged to counsel for their efforts in relation to this area. There are some cases which I will refer to and others which I will not although I make it clear I have read and considered them. Some of the cases relate to terrorist conspiracies and/or gang feuds and it is necessary to remind myself that all cases should be considered on their own facts. The prosecution refer me to *R v Caswell & Others* [2019] EWCA Crim 1106 where a discretionary life sentence with a 14 year tariff was imposed. The facts of that case are stark. It was a "clear and settled" plan to murder two men to whom the defendants owed a very considerable drug debt. It had advanced to the point of obtaining a machine gun to carry out what in effect was a gangland assassination. *R v Ashton & Others* [2002] EWCA Crim 2782 is again a very stark case where a 17 year sentence was substituted by the Court of Appeal. Again, the facts involve conspiracies connected with a gang feud where a series of attacks were mounted which culminated in a shooting. Helpfully, the prosecution advance the "General Principles" set forth in Blackstones at A 5.48:

> "The following general principles apply:
>
> The defendant should be sentenced for the offence committed that being conspiracy to murder not murder.
>
> The maximum sentence is life imprisonment, but it is discretionary.
>
> A relevant feature is whether or not the conspiracy was carried out.

> If conspirators desist from completing a crime the reasoning behind same may merit consideration, the reason why a conspiracy ends is material to sentence.
>
> The sentence should reflect participation in the conspiracy as well as individual acts."

[16] Mr Berry KC submits that I should "headline" based upon totality by selecting the conspiracy to murder count. Headlining is an attractive method of sentencing in a multi-offence case and I will come to that in my concluding remarks. He then refers me to several authorities including *R v Sandhu* [2009] NICC 40. That case involved a 10 year sentence after a plea but was influenced by the defendant's professional status. *R v Morgan & Others* [2020] NICC 14 which involved a number of meetings at which Dissident Republicans discussed a number of criminal endeavours. Of interest to this exercise, some conspired to possess firearms and explosives with intent to endanger lives. Mr Berry KC suggests that this is analogous. I am not sure that that is correct given the different offence types. What certainly is sound is his submission in relation to Colton J's comments upon the nature of conspiracy:

> "[56] In considering where this conspiracy lies within the potential range I take into account firstly the context of the conspiracy. Had Blair and his fellow conspirators obtained the necessary explosives or firearms it is clear that their intention would have been to cause death and destruction. That nothing came of the meetings does not undermine Blair's clearly expressed aspirations in the course of the meetings. We are not dealing here with a one-off meeting where there was an element of bravado or loose talk, but a series of meetings with a common theme and purpose. That said, I acknowledge that nothing came of the conspiracy and that the contents of the conversations suggest a lack of sophistication. He and his co-conspirators engaged in preparatory acts which did not move beyond the preparatory stage. No effective steps were taken to advance the conspiracy. Thus, using the language of Lord Lowry, the conspiracy committed in this case, although it led to nothing, went beyond something "of a rather vague nature in a room in a house" but fell well short of the conspiracy he was dealing with in the Crossan case."

[17] What then are the factors that I take into account in assessing this count? The language used in the encrypted messaging is clear. There is a clear conspiracy to commit murder. It is in the context of an animus to "Johnny" as shown by the Conspiracy to commit GBH count. Shooting is mentioned, although no gun is ever

possessed or used. It is in the context of what can loosely be called "the drugs world." Lastly, nothing so far as is known, ever comes of this conspiracy.

Personal Mitigation

[18] The defendant has been on remand from his arrest on 17 June 2020. It is of note that he remained on remand throughout the period of the Covid Pandemic and endured the hardships resulting from incarceration during that period. Despite that, and certainly, post plea of guilty he has engaged with Ad-ept in relation to his own drug use. He has achieved enhanced status which means that he has been subject to drug testing and has remained drug free. He appears to have thrown himself into adult education with considerable zeal and has amassed an impressive number of employability qualifications. He is currently attending a tiling course five days per week and hopes to make this a career. He is 43 years of age. He has a wife and two young children aged five and seven. When discussing his lifestyle and offending he has been unusually candid with PBNI. The probation officer notes that the defendant reflected upon that lifestyle and stated that after his arrest "I was discarded from my arrest and they took everything" and that "His involvement in drugs provided no high life but brought nothing but misery." Perhaps the telling factor in his prison education journey is that he has, in my view, reduced his risk of reoffending assessment – he is now assessed as a medium likelihood of reoffending. I simply note that with his record and these offences, that has to be noted as a positive. It is also, however, to be noted that the defendant has a relevant criminal record. He has been assessed as not meeting the threshold for dangerousness and I accept that assessment by PBNI.

Reduction for a Guilty Plea

[19] I now turn to consider the question of reduction for his plea of guilty. In *R v Maughan* [2022] UKSC 13 the UKSC were called upon to consider the issue of credit for a plea of guilty in Northern Ireland. They reviewed the basis upon which credit for a plea of guilty in criminal law is justified and at para [49] set out and commented upon the "utilitarian" nature of this:

> "49. The sentencing practices applied by the Court of Appeal in Northern Ireland are typical of those applied from time to time in all three jurisdictions over many years. They are justified by the utilitarian approach and the interests of victims and witnesses which have largely been accepted throughout the United Kingdom as the bases for the discount for the plea. They reflect the statutory background and circumstances of that jurisdiction and are well within the area of discretionary judgement available to that court."

[20] In the *R v Toher* [2023] NICA 18 the Court of Appeal in Northern Ireland, having referenced *R v Maughan* went on to state:

> "[44] With these principles in mind we return to the facts of this case. As we have said the applicant cooperated at interview. He also expressed remorse. Mr Harvey candidly accepted that the arraignment could have been adjourned for the expert report. The applicant would then have pleaded guilty at arraignment. The situation is remedied to some extent in that the re-arraignment occurred five weeks later when the expert report came in and well before the trial date. Without wishing to be prescriptive we would suggest that should this type of situation arise in future we think that an adjournment of the arraignment is a possible solution. We do acknowledge that ultimately a decision to adjourn an arraignment will be for the trial judge. Alternatively, the trial judge could record that credit is not lost by virtue of a short period being sought for clarificatory evidence. This case should provide some guidance on the approach going forward."

[21] The opening four paragraphs of this sentencing remarks now come into sharp focus. At paragraph 24 of the prosecution submissions the prosecution state "The plea though very late could still properly merit real credit in all the circumstances." I am not convinced that statement fully reflects the circumstances. When properly analysed the defendant in this case faced with "novel" legal issues on admissibility did no more than seek to establish the lawfulness of the evidence which he faced. He and his co-accused were "selected" as the lead case to establish admissibility of Encrochat material in Northern Ireland. When that process hit a legislative log jam the defendant reassessed his position in light of *R v A and Others* and *SF and Others v NCA* and pleaded guilty. By analogy, how different is this to awaiting a report? Which is the situation which Toher faced. In this case, Mr Berry KC in his written submissions pithily asserts "He, to use an expression recently canvassed, 'broke ranks' (by his plea of guilty) and this is a significant factor indicative not just of remorse but also of an intention to try to put this matter behind him."

[22] Having considered the position carefully, there is a need for lawyers to have certainty on the law in order to know how to advise their clients. Following *R v A* and *SF v NCA*, there is now sufficient certainty for clients to be advised upon the state of the law. In *R v Murray* [2023] EWCA Crim 282 the then Lord Chief Justice of England and Wales set out the state of the law and was trenchant in saying "…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." That is a sentiment with which I heartily agree. I have concluded my assertion at the *R v Rooney* hearing that it was still within my discretion to allow full credit for Mr O'Loughlin is, I think, sound and I will do so.

Sentences

[23] I intimated earlier that I accepted Mr Berry KC's submission that given the complexity of offence types that I should adopt a concurrent totality based approach. I note recently that such an approach in a complex multi-offence type case has been approved of by the Court Of Appeal in *R v Playfair* [2024] NICA 21:

> "[74] The judge commented that had he proceeded on the basis of consecutive sentences, he would quickly have reached a starting point in double figures but rather than doing that, he would adopt the headline offence approach and make all other sentences concurrent…
>
> …
>
> [84] The decision of a sentencing judge to impose concurrent sentences, rather than consecutive sentences, in this multi-offence sentencing exercise, was a matter of discretion provided it resulted in a just and proportionate sentence. Such a sentence necessarily entails taking full and proper account of the scale of the offending to include all the aggravating and mitigating factors to arrive at the starting point and then to make the appropriate adjustment for the plea. The judge then has to stand back and satisfy himself that the overall sentence he has arrived at is just and proportionate. If not, he should adjust it accordingly to ensure he arrives at such an outcome."

[24] Were I to adopt a consecutive sentencing approach to first reflect the drug offences – including importation; to sentence the financial crime offences; to then move on to the attempting to possess firearms; and then the conspiracy to commit GBH; and finally, to the conspiracy to commit murder I could easily see a sentence in excess of 20 years. In my view that would not be a correct starting point in this case. Nevertheless, these are serious and grave offences and require deterrent sentencing. The use of encrypted telecommunications is a sinister and sophisticated aspect to this case, and it is clear that these telephones have provided a clandestine means by which serious and organised crime has been conducted. I will headline on Count 29 and 30 – the importation of Heroin and Cocaine – and Count 35 – the conspiracy to murder. I do so to reflect that I have taken into account the totality of the criminality in this case. I have concluded that allowing for the aggravating and mitigating features identified above that the minimum total sentence that I would have imposed had the defendant been convicted by a jury is a sentence of 18 years. Again, for the reasons set out above, I have concluded that it is fair, proper, and utilitarian in this case to allow a full reduction for the defendant's plea in the circumstances in which that plea was forthcoming. Accordingly, on Counts 29, 30

and 35 the sentence will be 12 years which will be split six years custody followed by six years statutory supervision. The following sentences are all concurrent.

Count 1 – 3 years – 18 and 18.

Count 2 – 12 months – 6 and 6.

Count 3 – 12 months – 6 and 6.

Count 4 – 3 years – 18 and 18.

Count 5 – 12 months – 6 and 6.

Count 6 – 12 months – 6 and 6.

Count 7 – 4 years – 2 and 2.

Count 8 - 2 years – 12 and 12.

Count 10 – 2 years – 12 and 12.

Count 12 – 12 months – 6 and 6.

Count 13 – 12 months – 6 and 6.

Count 14 – 4 years – 2 and 2.

Count 15 – 12 months – 6 and 6.

Count 16 – 4 years – 2 and 2.

Count 17 – 2 years – 12 and 12.

Count 19 – 2 years – 12 and 12.

Count 20 – 4 years – 2 and 2.

Count 21 – 4 years – 2 and 2.

Count 24 – 4 years - 2 and 2.

Count 26 - 3 years – 18 and 18.

Count 28 - 4 years – 2 and 2.

Count 29 – 12 years – 6 and 6.

Count 30 – 12 years – 6 and 6.

Count 31 – 5 years – 30 and 30.

Count 32 – 2 years – 12 and 12.

Count 33 – 4 years – 2 and 2.

Count 34 – 12 months – 6 and 6.

Count 39 – 2 months.

Count 40 – 1 month.

Counts 9, 18, 22, 23, 27, 41, 42, 43, and 44 – 3 years – 18 and 18.

Count 25 – 3 years – 18 and 18.

Count 2 – 3 years – 18 and 18.

Count 35 – 12 years – 6 and 6.

Count 36 - 12 years – 6 and 6.

Count 37 - 12 years – 6 and 6.

£50-00 Offender levy and destruction order for the telephones.