**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2018] HCJAC 42**
**HCA/2018/000050/XC**

Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

**MICHAEL BOWMAN**

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: K Stewart QC; Fitzpatrick & Co, Glasgow**
**Respondent: A Prentice, QC; Crown Agent**

14 June 2018

[1] The appellant appeared on indictment along with eight other accused. The indictment contained 28 charges. Charge number 1 alleged that the accused were involved in serious organised crime and had agreed with each other to do things which they knew or ought reasonably to have known or suspected would enable or further the commission of serious organised crime, contrary to section 28(1) of the Criminal Justice and Licensing (Scotland) Act 2010. The charge then explained the various different types of offending and

conduct which was alleged as part and parcel of the section 28 offence in paragraphs a. through to i.

[2] On 24 November 2017, at a continued preliminary hearing, the appellant's plea of guilty to an amended charge 1 was accepted by the Crown. The plea of guilty which the appellant tendered was to the offence of being involved along with his co-accused, between 16 March 2016 and 20 January 2017, at the addresses specified in charge 1, in serious organised crime and agreeing to do things which he knew or ought reasonably to have known or suspected would enable or further the commission of serious organised crime in that he did agree with others to commit and organise the commission of serious offences namely; the construction of concealed hides in a number of premises and vehicles in which money, firearms and technical and counter surveillance equipment was concealed, all as specified in paragraph d. of the charge; obtaining paraphernalia such as disguises, false documents and passports in order that the true identities of those participating could be concealed, all as specified in paragraph e. of the charge; the lease and use of multiple premises and vehicles in order to store, conceal and transport money, drugs, firearms and other equipment used to further the commission of serious organised crime, all as specified in paragraph f. of the charge; the use of the anti-surveillance equipment, as specified in paragraph g. of the charge, and re-set of motor vehicles, as specified in paragraph h. of the charge.

[3] In the appellant's case there was an aggravation of committing the offence while on bail having been granted bail on 20 December 2016. On 22 January 2017, at an adjourned diet for sentence, the sentencing judge selected a headline sentence of 8 years' imprisonment, to include 6 months for the bail aggravation, and discounted this to a period

of 7 years in light of the plea of guilty tendered by the appellant. The appellant has been granted leave to appeal permitting him to challenge the level of discount afforded.

[4] The trial judge explains why he selected the discount which he did at paragraph 48 of his report to this court. He explains that the plea of guilty was tendered at the fourth preliminary hearing and on the last day before the trial. He considered that in terms of timing this was not materially earlier than a plea at trial. He observed that the appellant had the option of offering a plea by section 76 letter or tendering a plea of guilty at any of the previous preliminary hearings but did not do so.

[5] The trial judge drew attention to what had been said in the case of *Spence* v *Her Majesty's Advocate* 2008 JC 174 at paragraph 10 and said that the court had there made it abundantly clear that "there must be an unequivocal indication of an intention to plead guilty by tendering a plea at preliminary hearing and adhering to it or by section 76 letter". In light of this the sentencing judge concluded that whatever discussions had taken place behind the scenes did not meet these criteria.

[6] In advancing the appeal on the appellant's behalf, Mr Stewart QC submitted that the trial judge had fallen into error in his interpretation of what the court had said in *Spence*. He took us through a history of the procedure in the case in order to demonstrate the effect of that error. He explained to us that the first preliminary hearing in the case was on 4 August 2017. Prior to that date the appellant's representatives met with the Crown and intimated that he was prepared to plead guilty to an amended charge 1 to reflect his role in the offence. This offer was rejected. After that first preliminary hearing there was then further discussion between the appellant's agents and the Crown. On 31 August 2017 a second meeting took place where the same offer was made and again rejected. On 5 September 2017 the Crown wrote to the appellant's agents setting out the terms of a plea of guilty

which it would be prepared to consider accepting from each of the accused. For this appellant the Crown was looking to a plea of guilty on charges 1 and 14. The second preliminary hearing took place on 29 September 2017 at which a further preliminary hearing was fixed for 3 November. Various discussions then took place again after this second preliminary hearing. On 27 October 2017 a meeting took place at which the Crown confirmed for the first time that a plea of guilty from the appellant to an amended charge 1 would be acceptable. The appellant's instructions were obtained and on 2 November it was agreed with the Crown that this plea would be tendered. The preliminary hearing which had been scheduled for 3 November 2017 was postponed. Importantly though, Mr Stewart stressed, the purpose of this postponement was to allow the Crown to continue discussions with the appellant's co-accused and to allow others to continue with trial preparation. The third preliminary hearing then took place on 21 November 2017 but the Crown's discussions with the co-accused had not been completed and a further continued preliminary hearing was fixed for 24 November. It was agreed between the Crown and the appellant's agents that he would tender his plea of guilty at that continued hearing which duly happened.

[7] In light of this history Mr Stewart submitted that the appellant had conveyed an unequivocal indication of his position by 2 November 2017 and that this was the date which the trial judge should have focused on in considering the question of sentence discount, rather than the date on which the plea was actually tendered. He submitted that contrary to the trial judge's interpretation, the court in *Spence* had merely indicated examples of methods by which an accused person could convey an unequivocal intention of his position to the Crown. Mr Stewart sought further support for his submissions from the decision of this court in the case of *Herd* v *Her Majesty's Advocate* 2017 HCJAC 80.

[8] Section 196(1) of the Criminal Procedure (Scotland) Act 1995 provides that:

> "In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account—
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
> (b) the circumstances in which that indication was given."

In the case of *Spence* v *Her Majesty's Advocate* at paragraph 10 the court stated the following:

> "What is required is an unequivocal indication of the position of the offender, *HM Advocate* v *Booth* paragraph 21. Moreover to have value that intention must be adhered to throughout the proceedings and be appropriately vouched. That as we have said can be done after the indictment has been served by tendering the plea and having it recorded at the procedural hearing and adhering to that position thereafter. Prior to the service of the indictment an intention to plead guilty on a restricted basis can be intimated by letter. Such action is indicative of acceptance by the accused of guilt albeit to a limited extent."

We agree with the submission for the appellant that in this paragraph of the decision the court was giving examples of methods by which the unequivocal indication of the position of the offender can be conveyed either to the Crown or to the court.

[9] In so far as the content of the sentencing judge's report appears to indicate that the only methods by which the accused's unequivocal indication can be conveyed for the purposes of section 196 is by pleading guilty, or by section 76 letter, then we would agree that this is an error. The advocate depute accepted that the meeting which took place prior to the first preliminary hearing in August was not, as he put it, a "what if" discussion. It was a discussion at which the appellant's position was conveyed to the Crown. He also accepted that at the 27 October meeting the Crown confirmed that they would accept a plea to the amended charge 1 from the appellant and that his willingness to do that was conveyed to them by the appellant's agents on 2 November.

[10] In these circumstances it seems to us that the appellant did indicate his intention to plead guilty on 2 November at what was the conclusion of a series of bona fide discussions

between his representatives and the Crown, in what was a complex case which would have involved a lengthy trial had resolution not been achieved.

[11] We therefore agree that the trial judge erred in declining to take account of these circumstances for the purposes of section 196 of the 1995 Act. We shall therefore grant the appeal and quash the sentence imposed. In its place we shall impose a headline sentence of 8 years imprisonment which we shall discount by approximately 20% to a period of 6 years and 6 months.