APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 5
HCA/2024/586/XC

Lord Justice Clerk
Lord Matthews
Lord Beckett

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

IAN SWEENEY

Respondent

Appellant: Lord Advocate (Bain KC); the Crown Agent
Respondent: Ross KC; Paterson Bell (for KM Law, Glasgow)

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28 January 2025

Introduction

[1] On 9 October 2024 at Glasgow High Court, the respondent pleaded guilty to an offence under section 28 of the Criminal Justice and Licensing (Scotland) Act 2010, consisting of involvement in serious and organised crime. The offending included the use of encrypted

communications devices to provide services to individuals who he knew or suspected were involved in serious and organised crime. The activities carried out included the facilitation of cocaine and cannabis supply; the unlawful tracking and tracing of third parties for the purposes of furthering organised crime; and conducting "bug-sweeps" of properties and vehicles to assist persons concerned with organised crime evade detection from law enforcement agencies, all over a period from 29 March 2020 to 15 May 2020.

[2] On 15 October 2024, the respondent was sentenced to a period of 2 years' imprisonment, to be served consecutively to a sentence of 5 years' imprisonment currently being served by the respondent. The Crown appeals the sentence on the grounds of undue leniency.

Facts

[3] The respondent was a service user of an encrypted communication platform named "EncroChat". This platform, widely used by those involved in organised crime, was infiltrated by UK and European law enforcement agencies during 2020.

[4] Investigation by Police Scotland revealed that the respondent had access to an encrypted device and was using the EncroChat platform under the name "bug-sweep". From the data recovered, it was clear that he had developed a reputation within criminal circles as someone who could obtain private information about individuals, including their whereabouts.

[5] Between 29 March 2020 and 15 May 2020, the accused was in contact with over 100 other individuals on EncroChat. During this time, he sourced drugs - cocaine and cannabis - from one person before supplying the drugs to another. He sourced at least 5kg of cocaine with a value of between £40,000 and £43,000 per kilogram.

[6] The respondent also provided a service where he conducted sensitive information checks on third parties. He searched for, and subsequently provided, information to associates about the whereabouts of third parties. On one occasion, the respondent provided information, including addresses, about family members of a third party.

[7] The respondent gave advice to a number of criminal associates about the manufacture of clandestine "hides" within vehicles for the storage and UK wide transport of controlled drugs and money. For example, on 2 April 2020, the respondent gave advice to an associate on how best to store and covertly transport as much as 250kg of cannabis.

[8] The respondent offered "bug-sweep" services to his associates. The respondent used the EncroChat platform to publish a "price list" for such services, across the UK and Europe. The services involved obtaining sensitive information together with offering advice on, and provision of, anti-surveillance measures to avoid detection from law enforcement agencies. For example, on 1 April 2020, the respondent was asked whether he could carry out a "bug-sweep" on 2-3 cars in London at a price of £300 per vehicle. On 15 April, he quoted an associate £1,000 for carrying out a "bug-sweep" in a house. He asserted that he would be using equipment with a combined value of over £100,000 to carry out the "bug-sweep". He knew that the services he was providing was for the purposes of criminal activity with the potential to cause others significant harm.

The 2023 Conviction

[9] On 20 March 2023 at Glasgow High Court, the respondent was convicted after trial of a separate offence under section 28 of the 2010 Act, committed between 13 September 2016 and 23 November 2016, in furtherance of the commission of serious organised crime. He was sentenced to 5 years' imprisonment. The respondent first appeared on petition in respect of that offence on 9 September 2020. He appeared on petition in respect of the 2024

conviction on 30 August 2023. He also had a prior conviction for being concerned in the supply of a class A drug, in the High Court in 2010 for which he received a 4 year sentence.

The Sentencing Decision

[10] The trial judge characterised the offending as "particularly serious" requiring the imposition of a custodial sentence to achieve the sentencing purposes of public protection; punishment; and expressing disapproval of the offending behaviour.

[11] The judge noted that the offending in both convictions was analogous. He considered that, viewed in isolation, the offending before him would have merited a sentence of 7 years imprisonment. However, he had to recognise that the respondent was serving a sentence of 5 years for analogous behaviour, and had those two offences been considered together a headline sentence of 8 years might have been merited. He thus concluded that a proportionate headline sentence in relation to the present matter was one of 3 years. He discounted this by one-third to reflect a plea of guilty by section 76 letter.

[12] In his appeal report, the judge states that the Note of Appeal was wrong to suggest that he concluded that the 2024 conviction ought to have been prosecuted on the same indictment as the 2023 conviction. Rather, he required to take into account the sentence that the respondent was already serving and ensure that the sentence about to be imposed was both fair and proportionate in that context. That exercise required an assessment of the totality of the respondent's offending and the period over which it was committed. It was clear, from *Ibbotson* v *HMA* 2022 SCCR 265, (para [5]) that, in circumstances such as those pertaining in the present case, the interests of justice do not require both sentences to duplicate the same sentencing purposes.

[13] Had there been no guilty plea and the case proceeded to trial, at least seven court days would have been required. The respondent pleaded guilty by way of section 76

indictment. Applying the discretion open to the trial judge, a discount of one third was appropriate.

Submissions

The Crown

[14] The headline sentence of 3 years' imprisonment did not fully achieve the relevant sentencing purposes of (i) the protection of the public; (ii) punishment of the respondent; and (iii) expressing disapproval of the offending behaviour.

[15] As highlighted in *Simion* v *HM Advocate* 2023 SLT 647, the real effect of *Ibbotson* was that the total punishment for two offences of rape equated to 9 years' imprisonment. Ibbotson had not offended prior to the first of the two rapes. The respondent in the instant case had several previous convictions, one of which was directly analogous and the other was partly analogous to the present offending.

[16] The respondent pleaded guilty to a charge containing four distinct forms of criminal conduct. He went to significant lengths to avoid detection by using an encrypted communication platform to conduct his business. The offending spanned more than 6 weeks. The offending was calculated and deliberate, performed with the objective of personal financial gain, at the risk of the safety of other persons and in the knowledge that the services were being provided for the purposes of serious and organised crime. In selecting a headline sentence of 3 years' imprisonment, the trial judge failed to take into account these factors and consequently under-estimated the seriousness of the offence. The respondent had nine previous convictions, of which two were analogous.

[17] The trial judge erred in treating the matter as though he was sentencing the respondent for both the 2023 conviction and the 2024 conviction. There was only one matter

before him- the 2024 conviction. Fairness did not require the 2024 conviction to be treated as though it ought to have been prosecuted alongside the 2023 conviction. Although the offences were charged under the same statute, that was the extent of their connection. The offences were committed more than 3 years apart.

[18] The fact that a plea was tendered by section 76 letter did not automatically entitle the respondent to a one-third discount: *Geddes* v *HM Advocate* 2015 SCCR 230 at para 21. The delay between first appearance and the tendering of a section 76 letter was 12 months, with plea discussions only commencing some 8 months after the respondent appeared on petition, by which time a significant amount of preparatory work had already been undertaken. Early pleas in cases involving only police witnesses should attract, at most, a token discount: *Gemmell* v *HM Advocate* 2012 JC 223; 2012 SCCR 176 at para [46]. Here, the significant majority of witnesses whom the Crown would have cited, had the case proceeded to trial, were police officers.

The Respondent

[19] The judge took the correct approach by (i) considering the appropriate sentence for the totality of the 2024 conviction and the 2023 conviction, (ii) subtracting the period of 5 years' from that total; and (iii) making an appropriate allowance for the use of section 76 procedure. The Crown was wrong to suggest that the trial judge concluded that the 2024 conviction ought to have been prosecuted on the same indictment as the 2023 conviction. Instead, the trial judge had simply had regard to the totality of the offending when arriving at the headline sentence. The trial judge had sufficient information to carry out that exercise.

[20] The judge took proper account of the relevant sentencing guidelines. When assessing the seriousness of the offence, the judge took into account all matters which were highlighted by the Crown. It was for him to assess the weight to be given to those.

[20] The disclosed material in the case was significant. From the commencement of discussions between the Crown and the defence it was understood that the matter would be resolved by way of a plea. The respondent's incarceration limited opportunities for consultations. A discount is afforded to reflect the utilitarian value of a plea: *Gemmell* v *HM Advocate.* The trial judge did not err in discounting the headline sentence by one-third.

Analysis and Discussion

[21] At the time of sentence for the current offences, the respondent was serving a sentence of imprisonment for an analogous offence committed more than three years previously. That is clearly a factor which must be recognised by the sentencing judge, who will require to address whether the sentence about to be imposed should be made consecutive to the sentence currently being served, and, if so, whether the sentence should be attenuated in any way to reflect the totality principle.

[22] In the present case the trial judge relied on the case of *Ibbotson* v *HMA* to conclude that

> "in circumstances such as those which pertain in the present case, the interests of justice do not require both sentences to duplicate the same sentencing purposes."

This is a direct quote from *Ibbotson*, and seems to have been relied upon by the sentencing judge to conclude that the offending before him should be viewed as being apiece with the offending which led to the sentence already being served. In his report, the sentencing judge suggests that this is not what he intended to do, and that he was seeking merely to apply the totality principle. It does seem however, that he went beyond this, when one takes account of his sentencing remarks, viz:

> "The present offence was committed by you between March and May 2020 – that is prior to your first appearance in relation to the matter which gives rise to your

> analogous previous conviction, that being on 9 September 2020, that case not being indicted until the beginning of January 2022.
>
> The analogous offence related to events from the period September to December 2016."

[23] Senior counsel for the respondent submitted that the sentence quoted from *Ibbotson* meant that an individual should not be punished twice for the same conduct: stated thus, this is an uncontroversial proposition. Looking at the comment in *Ibbotson* in its full context it appears that this is indeed what the court intended to convey, in other words, that it was merely intending to state the totality principle:

> "[4] Before proceeding to sentence, the court closely assesses the individual circumstances of each case. That includes considering (a) any existing sentences to which the individual is subject, and (b) the *cumulo* effect of consecutive sentences: see for example *Graham* v *HM Advocate*, 2019 SCCR 19 at para [57].
>
> [5] Approaching the matter on that basis, we conclude that the *cumulo* sentence is not proportionate. The interests of justice do not require both sentences to duplicate the same purposes of punishment, deterrence, protection of the public and rehabilitation."

[24] The facts of *Ibbotson* certainly support the interpretation that it was essentially an illustration of the totality principle: the appellant was convicted, on separate indictments, of two instances of rape, on separate complainers two years apart. At the time of sentencing for the second offence he was already serving a sentence of 5 years for the first, and the court held that a consecutive sentence of 6 years for the second was not overall proportionate. It was, perhaps an oversight in *Ibbotson* that the court did not refer to the Guideline on the Sentencing Process issued by the Scottish Sentencing Council and approved by the High Court of Justiciary with effect from 22 September 2021, which dealt with the totality principle at paras 29 to 34, or the Guideline on Principles and Purposes of Sentencing which identifies the core principle that sentences "must be fair and proportionate". The reference

to duplication of the sentencing purposes is, at best, superfluous. It is also unhelpful and confusing and should be disregarded.

[25] In the present case the respondent was not being punished- or sentenced - twice for the same conduct. He appeared for sentence on different conduct, committed more than three years after the conduct which resulted in the sentence he was already serving. The core details of the most recent offending are summarised above. The offending which led to the sentence already being served involved taking steps which he knew or suspected would enable or further the commission of serious organised crime, by using technology to trace the location of a mobile telephone, and direct an individual to continue with previously arranged plans, all between 13 September and 23 November 2016. The subsequent offending occurred three and a half years later and, whilst it involves a breach of the same statutory provision, it is much more sophisticated, much more organised and operated on a commercial basis, creating considerable risk to the wellbeing of the individuals whose details he traced and sold.

[26] There was absolutely no basis at all to consider that it was necessary to address what might have been an appropriate sentence had the 2016 offending been dealt with at the same time as the 2020 offending. The judge therefore required to consider the nature of the offending before him, assess the seriousness of it by reference to culpability and harm, including potential harm, and determine what would be an appropriate sentence to reflect these factors. He required to consider the extent of any discount which should be applied as a result of the plea. And finally, he had to determine how the fact that the respondent was already serving a sentence should be dealt with. This did not require him to consider the circumstances of that earlier offending, or bring it within some hypothetical overall sentence by combining two quite separate and distinct instances of offending. Had he approached

the matter as he ought to have done, the judge would have identified an appropriate sentence for the offending in question, having regard to its sophistication, extent and severity and in light of the serious nature of the prior convictions, as one of 8 years. The plea came very late in the day in a case where the main witnesses would be police officers and we cannot see that a utilitarian value of more than one-sixth should have been attributed to it, resulting in a sentence of 6 years and 8 months. Reflecting on the fact that the respondent was currently serving a sentence of 5 years, and the effect of making the sentence consecutive, it would have been reasonable to reduce that further and to pass a consecutive sentence of 5 years and 6 months. We shall therefore quash the sentence imposed and substitute such a sentence.