IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT KINGSTON UPON THAMES
(HIS HONOUR JUDGE TREGILGAS-DAVEY) [01MP0217921]

Case No 2023/02371/B3, 2024/00485/B3
2024/00189/B3, 2024/00139/B3, 2023/02806/B3
2024/00143/B3, 2023/02397/B3 & 2024/00159/B3
[2025] EWCA Crim 570

Thursday 3 April 2025

B e f o r e:

LORD JUSTICE HOLGATE

MRS JUSTICE CHEEMA-GRUBB DBE

MR JUSTICE LINDEN

R EX

- v -

YUNI ALEXIS PACHECO MIRANDA
DANIEL STEPHEN OLIVER
ERMAL SHTREZI
FRANK ASANTE
NIGEL ROGERS

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A P P R O V E D J U D G M E N T

A P P E A R A N C E S:

Mr M Paul appeared on behalf of the Applicant Frank Asante

Mr I McLoughlin KC appeared on behalf of the Applicant Ermal Shtrezi

Mr C Whitehouse appeared on behalf of the Applicant Daniel Stephen Oliver

Mr P Marshall appeared on behalf of the Applicant Nigel Rogers

The Applicant Yuni Alexis Pacheco Miranda was not represented and did not appear

Thursday 3 April 2025

LORD JUSTICE HOLGATE:

Introduction

1. On 19 June 2023, following a trial in the Crown Court at Kingston Upon Thames before His Honour Judge Tregilgas-Davey and a jury, the applicants were convicted as co-accused on an indictment which was essentially concerned with conspiracies for the large scale importation and supply of drugs and related offences.

2. There are before the court a series of renewed applications for leave to appeal against conviction and/or sentence following refusal by the single judge.

3. Pacheco Miranda was convicted of two counts of conspiracy to import Class A drugs (counts 1 and 2) and two counts of conspiracy to supply Class A drugs (counts 4 and 5). He was sentenced to 22 years' imprisonment on count 1, which was ordered to run concurrently with 29 years' imprisonment imposed on each of counts 2, 4 and 5. He applies for an extension of time of 50 days in which to renew his application for leave to appeal against conviction, and he renews his application for an extension of time of 25 days in which to apply for leave to appeal against sentence, following refusal by the single judge. After the trial he ceased to be represented by his legal team. We have therefore considered his applications on the papers.

4. Daniel Oliver was convicted of two counts of conspiracy to import Class A drugs (counts 1 and 7), three counts of conspiracy to supply Class A drugs (counts 9, 11 and 12), and one count of a conspiracy to supply Class B drugs (count 13). He was sentenced on count 1 to 22 years' imprisonment, and on each of counts 7, 9, 11 and 12, to 29 years' imprisonment, to run concurrently. No separate penalty was imposed on count 13. He applies for an extension of time of 5 days in which to renew his application for leave to appeal against sentence. He is

represented by Mr Whitehouse.

5. Ermal Shtrezi was convicted of three counts of conspiracy to import Class A drugs (counts 1, 14 and 22), three counts of conspiracy to supply Class A drugs (counts 16, 23 and 24), one count of conspiracy to transfer criminal property (count 17) and one count of possessing criminal property (count 29). He was sentenced on count 1 to 17 years' imprisonment, and on each of counts 14, 16, 22, 23 and 24 to 23 years' imprisonment, to run concurrently. No separate penalty was imposed on counts 17 and 29. He applies for an extension of time of 20 days in which to renew his application for leave to appeal against conviction, and he renews his application for leave to appeal against sentence. He is represented by Mr McLoughlin KC.

6. Frank Asante was convicted of one count of conspiracy to import Class A drugs (count 1), two counts of conspiracy to supply Class A drugs (counts 18 and 21), one count of conspiracy to supply a Class B drug (count 19), and one count of conspiracy to transfer criminal property (count 20). He was sentenced on count 1 to 18 years' imprisonment, and to five years' imprisonment on each of counts 18, 20 and 21. All of the sentences were ordered to run concurrently. No separate penalty was imposed on count 19. He applies for an extension of time of 6 days in which to renew his applications for leave to appeal against conviction (on grounds 1 and 2 only) and for leave to appeal against sentence following refusal by the single judge. He is represented by Mr Paul.

7. On 23 February 2023, after the jury were sworn, Nigel Rogers pleaded guilty to possession with intent to supply Class B drugs (count 27). On 19 June 2023, he was convicted of one count of conspiracy to import Class A drugs (count 1), one count of conspiracy to supply Class A drugs (count 18), one count of conspiracy to supply class B drugs (count 19), one count of conspiracy to transfer criminal property (count 20), two counts of possession with intent to supply Class A drugs (counts 25 and 26), two counts of possession with intent to supply Class

B drugs (counts 27 and 28) and three counts of failing to comply with a Serious Crime Prevention Order (counts 30, 31 and 32). He was sentenced on count 1 to 23 years' imprisonment and on each of counts 18, 20, 25 and 26 to five years' imprisonment, to run concurrently. No separate penalty was imposed on each of counts 19, 27, 28, 30, 31 and 32. He applies for an extension of time of 2 days in which to renew his application for leave to appeal against sentence, following refusal by the single judge. He is represented by Mr Marshall.

8. The question of whether extensions of time should be granted depends upon whether the court decides that all or any of the proposed grounds of appeal are arguable.

9. In addition, a co-accused, Terence Allen was convicted of counts 1, 25, 27 and 28 and was sentenced to a total of 13 years' imprisonment. Another co-accused, William Adams was convicted of count 1 and was sentenced to eight years and six months' imprisonment. There are no outstanding applications for leave to appeal in relation to Allen and Adams.

The Facts

10. During most of 2021 the police had some of the applicants under surveillance as a result of information gathered from EncroChat data. For example, they saw Asante and Rogers meeting a group of men in London between the end of 2020 and February 2021. Those men had convictions for supplying Class A drugs. In February 2021, the police raided the house of one of the men, Roberts, and found a significant amount of heroin. There were meetings to discuss setting up regular importations of drugs. The meetings related to the supply of unlawful drugs and resulted in counts 18 to 21.

11. On 23 October 2021, a cargo ship from Colombia arrived at the London Gateway Port. A consignment of broom handles and mop heads destined for Pamper Cleaning, a small cleaning

company based in Kent, was collected and transported to the Darent Industrial Estate, Erith. On 25 October 2021, Rogers (a sales director of Pamper), Miranda, Oliver, Shtrezi and Allen (the owner of Pamper) were unloading the broom handles when police and the National Crime Agency arrived and arrested them. Asante and Adams were arrested at their respective home addresses that day. The consignment consisted of just short of 10,000 broom handles, a number of which had been coated with cocaine.

12. Police searches recovered three EncroChat devices which contained material that related to other conspiracies to import and supply cocaine and other controlled drugs, addressed in subsequent counts on the indictment.

13. At the Pamper Cleaning offices various drugs were seized during a search of the premises. Police seized cash and two counting machines from Shtrezi's home address. A phone ("the Lynd9" phone) was located in his bedroom.

14. The prosecution case was that from early January 2021 until 25 October 2021 there was an agreement between the conspirators to import cocaine from Columbia or South America into the UK hidden in broom handle and foodstuffs. The conspiracy was directed by Rogers, Miranda and Oliver from afar. Rogers used the company he worked for as cover, and Miranda, who is Spanish speaking, was a link between Oliver and Rogers and the sources in South America. Shtrezi and Asante were to be significant outlets, Shtrezi for cocaine imported on broomsticks and Asante for cocaine imported with foodstuffs.

15. The prosecution evidence attributed the EncroChat phones to Miranda, Oliver and Shtrezi. The phone data showed that they had been involved in other conspiracies to import and supply controlled drugs from South America into the UK, Europe and Australia. Given his previous convictions, Asante had a propensity to supply Class A drugs, and had been associated with

known drug dealers in London in late 2020 and early 2021 (counts 18 to 21). The searches of Pamper Cleaning and various homes resulted in the seizures of drugs, phones and cash (counts 22 to 29).

16. Rogers was also in breach of a Serious Crime Prevention Order (counts 30 to 32).

17. When he was arrested, Miranda had no phone on him. He said that it was at home. On 10 May 2022, the police found a phone on the industrial estate in undergrowth adjacent to where a vehicle had been parked and in which Miranda had been sitting on the day of his arrest. The phone was protected by a PIN. A section 49 notice was served on Miranda on 22 June 2022. He said that he could not remember the number. Ultimately the police were able to gain access to the data on the phone but only after the prosecution had closed its case. This gave rise to a dispute about the admissibility of the material and whether the jury should be discharged. The judge ruled that a restricted amount of this material should be admitted and gave directions for the further conduct of the trial. This ruling is one of the main issues raised in two of the applications for leave to appeal against conviction.

18. In relation to count 1, the prosecution relied upon police observations of the meeting on 24 February between Rogers, Asante and two other men (who had convictions for supplying drugs). The meeting took place in London. A discussion was overheard about arrangements for the importation of drugs into the UK in foodstuffs. The plan was to start small and then to build up to quantities of 200 kilograms.

19. The Criminal Appeal Office Summary sets out the sequence of calls and meetings between the applicants and their associates over the ensuing months and also the arrival of a sample of mops delivered from Columbia to Pamper Cleaning. Pamper Cleaning placed a further order for mops and poles. Through to the arrests in October 2021, there were police observations,

both audio and visual, of meetings in London and Kent, telephone calls and messages in relation to the cocaine-coated broom handles and the preparations for the importation of cocaine in foodstuffs.

20. The prosecution also relied upon:

- Evidence of the logistics for the importation of the brooms and mops;
- Orders placed by Pamper Cleaning between January 2019 and late October 2021 for mop heads and broom handles;
- The cocaine on at least 580 broom handles;
- The finding of Miranda's mobile phone and the downloaded material from that phone; and
- In relation to counts 2 to 17, EncroChat evidence.

21. Other aspects of the prosecution's case and the cases of the respective applicants are summarised in the Court of Appeal Office Summary and need not be repeated here.

22. At the close of the prosecution case, a submission was made on behalf of Asante that he had no case to answer on count 21. The judge ruled that he did. We will address that when dealing with Asante's application for leave.

Ruling on the Re-Opening of the Prosecution Case and the Admissibility of Phone Download Material

23. The judge's ruling was given on 20 March 2023. He referred to the finding of the phone attributed to Miranda and that no PIN had been provided to the police, notwithstanding a section 49 notice (see [17] above).

24. On 14 March the court and the defence were notified that the PIN had been cracked. The download of the phone amounted to chats and a number of videos occupying over 200,000 lines. Much of the material was in Spanish and had to be translated. The prosecution applied to adduce evidence from the download as admissible and relevant. The application was

opposed by the defence.

25. By 14 March the cases for Rogers and Asante had been concluded and Miranda was in the middle of being cross-examined. Shtrezi, Oliver and Hunt were yet to give evidence.

26. In his ruling the judge said that the court had not sat since 14 March so as to allow the defence teams time to deal with the disclosure. Because Miranda was in the middle of cross-examination, the judge had given permission for his legal team to speak to him about the contents of the new material. Representation orders had been extended to allow a second counsel for Rogers, Oliver and Hunt to assist in dealing with the new material. Mr Paul for Asante and counsel for Alan did not seek second counsel because it was agreed that the downloads did not impact in any way on Asante and did so only barely on Allen.

27. The judge referred to the written submissions he had received and the case law cited. He also referred to relevant passages in Archbold and Blackstone. He said that outside the area of rebuttal evidence, the discretion to allow the prosecution to re-open its case to call additional evidence would only be exercised in rare cases. The court had to be vigilant in the exercise of that discretion to avoid injustice to a defendant. This was not a case, however, where the prosecution had kept evidence "up their sleeve" or had sought to repair an omission from the prosecution evidence which had been led.

28. In *R v Munnery* (1992) 94 Cr App R 164, the court stated that a trial judge must be left with some degree of freedom to deal with problems which might arise during a trial, but that a substantial departure from the normal order of a trial, which was sacrosanct, to meet unpredictable challenges during a trial, unless justice really demands, is likely to cause confusion and hardship. Justice is what matters, both justice to the public represented by the prosecution and to a defendant. For example, in *R v Patel* [1992] Crim LR 739, the judge had

decided that the strong probative quality of the new evidence far outweighed the prejudice to the defendant in the lateness of the material.

29. The later the application is made in a trial the less likely a judge is to accede to it, although it remains a matter for discretion. The judge has to consider whether allowing the re-opening would result in an unfair trial. He also referred to *Jolly v DPP* decided on 31 March 2000.

30. The judge here was careful to note that each of the cases cited to him was fact specific. He had to consider whether the admission of new material would deprive a defendant of a fair trial in the circumstances of the case.

31. The judge assessed the new evidence in respect of each defendant and the relevance to the issues in the counts and the evidence given up to that point. He noted that the overarching concern of the defence was that "the amount of material that has been disclosed is so large that they cannot properly assimilate all of it to make proper decisions and certain tactical decisions about, for example, whether to call their clients and/or what questions to ask".

32. The judge concluded that in the light of the chronology of the handling of the phone material, the evidence had only just come to light and that no fault was to be attributed to the prosecution or any defendant. The judge said the material “is highly relevant and highly probative to count 1, in respect of establishing the conspiracy, in respect of the roles of Rogers, Miranda, Oliver and Shtrezi. It is also relevant to the identification, the attribution of 'Nimbledagger' as Miranda in respect of counts 2 to 6".

33. The judge said that defence had been given extra resources and seven days in which to consider the material. He considered that this was sufficient to "appreciate the nature of the evidence" and that there would still be further time during the trial given that the jury was not

expected to retire to consider their verdicts for a further seven weeks. The defence juniors would have sufficient time to analyse the material. If at some point it appeared that there was exculpatory evidence that should be admitted, it would be admitted. If the material turned out to be such that the judge had been wrong to continue the trial after allowing new material to be adduced, applications to discharge the jury could be made and would be granted. The judge did not accept that defence counsel could not

> "… ultimately comprehend all of the disclosed material. I accept that it will involve difficult decisions, difficult tactical decisions, but that is often the case in trials."

34. Shtrezi and Oliver had not yet given evidence and they would be able to deal with the material in examination in chief, cross–examination and re-examination. Other defendants could reopen their cases. Miranda had been given access to his legal team to discuss the material and, as it was his phone, he must have known the substance of the material and the extent to which he had been taken by surprise must therefore be limited. If Rogers wanted to give evidence about this material then he could.

35. The judge said that another significant safeguard was that the amount of evidence that could be adduced was in the court's discretion and would be significantly limited to avoid the effect of the material becoming disproportionate. The overriding objective of the Criminal Procedure Rules that cases should be dealt with justly was being met. The judge went on to consider whether the material should be excluded under section 78 of the Police and Criminal Evidence Act 1984, but concluded that it should not. He said:

> "Any prejudice caused to any defendant, it seems to me, is far outweighed by the probative value of the material".

He said that it was arguably the most probative and relevant evidence in the case. The judge referred again to the sufficiency of the safeguards he had put in place. He then added that he would allow more time. The case would not recommence with the jury until 23 March 2023.

36. The judge then went through the categories of material listed in the skeleton argument for the Crown and identified what he was prepared to allow. He disallowed a number of items.

37. The judge restricted the amount of material that could be provided under other items. He noted that if new material was to be adduced the fall-back position of the defendants was that the jury should be discharged. The judge refused so to order. The trial had been ongoing for 14 weeks; it involved 13 counsel; the defendants were in custody; and a fresh trial would be unlikely to be held during 2023. There was an important public interest in the trial being concluded. There were safeguards in place to deal with the material and the trial process was sufficiently robust to allow for the admission of "limited amounts of material found on Miranda's iPhone, thereby giving a full picture about the available evidence without rendering the trial unfair for any of the eight defendants".

38. Subsequently, the prosecution provided for the court a 43 page schedule of material. When reformatted it amounted to 63 pages. It contained 2,000 messages. When the trial resumed DC Payne gave evidence about the material on which the prosecution relied. That took about 1 day.

39. Miranda then resumed his evidence. He disavowed his earlier testimony. He accepted that he had acted as an international drugs smuggler under the handle "Nimbledagger". He had known that the broom handles were coated in cocaine. He now said that he had been acting under duress. He was cross-examined for the purposes of showing that the messages referred to business transactions and did not indicate duress.

40. We are very grateful to counsel for the applicants for their clear and helpful submissions, both written and oral. We are also grateful to the prosecution for their submissions in the Respondent's Notices.

Miranda: Application for leave to appeal against conviction

41. In proposed grounds of appeal settled by Mr Crowther KC, it is said that:

> (1) The judge erred in permitting the Crown to adduce new evidence during the cross examination of the applicant which:
>
> > (a) Caused the applicant's evidence to be fractured and the new material given undue prominence;
> >
> > (b) The Crown ignored the parameters of the judge's ruling which allowed more material to be adduced and rendered the process unfair; and
> >
> > (c) Left the applicant unable to deal with exculpatory material; there was no disclosure of the complete download and insufficient time to absorb the information.
>
> (2) The judge erred in failing to discharge the jury;

42. Mr Crowther explained very clearly in his Advice why he advised Miranda against taking any point on severance of the indictment, the day to day management of the trial, Miranda's opportunity to have his case heard, or any criticism of the legal directions given by the judge. He also made it plain that the judge's summing up of the evidence was balanced and fair.

43. The Court of Appeal was advised soon after the proposed grounds of appeal and advice were filed, that the applicant was no longer instructing his representatives. He submitted further grounds of appeal of his own composition which it is convenient to address at this point:

> (1) There was prosecutorial misconduct in that the jury were misled and the EncroChat evidence was mixed up;
>
> (2) The defence legal representatives were negligent and had insufficient time to prepare the case;
>
> (3) The judge erred in not severing the indictment;
>
> (4) The judge erred in failing to direct the jury that there was no evidence of conspiracy. The EncroChat evidence was inadmissible as hearsay and therefore no evidence existed of a conspiracy;
>
> (5) The judge was biased towards the prosecutor and instructed the jury to find the applicant guilty. The judge should have allowed the defence to recall witnesses and should have given the defence time to consider the new evidence; and

(6) The judge erred in not ordering the police to hand over a laptop that had exculpatory evidence on it.

44. We have also read submissions sent to the court by Miranda in July 2024 and October 2024. We consider that the advice given by Mr Crowther and the Respondent's Notices demonstrate that all of the additional matters raised by Miranda are unarguable. The prosecution points out that there had been no complaint to the judge by any counsel that the prosecution were misleading the jury. Disclosure obligations were complied with. It is not correct to suggest that the judge demonstrated bias. Counsel did not criticise the summing up. There is no need for us to elaborate further.

45. We have also read and considered two further sets of submissions from Miranda sent to the court towards the end of March 2025, shortly before the hearing. No adequate reason has been given as to why this material was submitted so late. It is not said, for example, that fresh evidence has only recently come to light. Much of the documents address mobile phone downloads. Nevertheless we have considered this material carefully. In large part Miranda elaborates on points that he has made previously. Moreover in the main this is simply his view of evidence or material available at the trial. No doubt those points were made, or could have been made, during the trial. They do not amount to errors in the way the trial was conducted or demonstrate that any of Miranda's convictions was unsafe.

Shtrezi: Application for leave to appeal against conviction

46. Mr McLoughlin KC submits that the judge erred in allowing the prosecution to re-open their case in the middle of Miranda's evidence. The applicant's case on count 1 was tied to Miranda and would be tarnished. Additionally, the new defence run by Miranda then paralleled the applicant's which was presented after Miranda had changed his position. The evidence created unfairness in respect of all counts. However, Mr McLoughlin fairly accepted that the judge directed himself correctly by reference to the relevant legal principles. The challenge is

to the way in which he applied those principles.

Asante: Application for leave to appeal against conviction

47. The proposed grounds of appeal were settled by Mr Paul. Ground 3 was not pursued. Mr Paul's oral submissions placed emphasis upon ground 2, rather than ground 1, which assumed little if any significance in the renewed application.

48. On ground 2 it is said that the judge erred in not acceding to a submission of no case to answer on count 21 at the end of the prosecution case. This contaminated the verdicts on the other counts against the applicant through cross-admissibility. The Crown's expert gave evidence that Asante's DNA was found as part of a mixed profile on or near the knot of a bag which contained another bag which contained wrapped heroin. It was said that this made it more likely than not that he had knotted the bag. However, in cross-examination the expert said that it was no more likely that the DNA was there by touching or direct transfer, as opposed to secondary transfer. It is submitted that a plausible means of secondary transfer was put forward and accepted in the cross-examination of the expert.

49. Originally, Asante advanced a raft of complaints about the judge's management of the trial, some of which are plainly irrelevant. The written proposed ground of appeal was not pursued at the hearing. In our judgment, it was unfortunate that matters of that kind were raised in the first place, but we say no more about it. Instead, it was said in oral submissions that, in view of the strong emphasis placed by the prosecution on Asante's DNA being found on a bag within which 0.5kg of Class A drugs was found, the points accepted by the prosecution expert were an important part of Asante's defence. In this context it is submitted that the fact that a month elapsed between the closing speech for Asante and the jury's verdicts was unfair and made the convictions unsafe. That was too great a gap.

Discussion: The judge's decision to admit the new evidence and to refuse to discharge the jury (Grounds raised by Miranda and Shtrezi)

50. The judge directed himself by reference to the relevant principles in the case law concerning the introduction of additional evidence by the prosecution after the close of its case. He had regard to the relevant factors. The contrary is not suggested. He fully appreciated the need for care in the exercise of his discretion and that such evidence is rarely permitted. He rightly decided that this was not a situation in which the prosecution were to blame for the timing of the production of the new material, or that they had "kept it up their sleeve".

51. Accordingly, the central questions for the judge, as he rightly identified, were whether the probative value of the new material outweighed any relevant prejudice to any one or more of the defendants and whether each defendant could still have a fair trial. In our judgment, the probative value is self-evident. For example, it caused Miranda to change his case and to admit that he had been involved in a conspiracy as an international drug smuggler and was the user of the handle "Nimbledagger". He had not been telling the truth about these matters in his earlier evidence to the court. The fact that the material was so powerful in pointing to Miranda's guilt was in no way prejudicial or unfair in any relevant sense. The issue, instead, was whether there was some other unfairness or prejudice which arguably indicates that the judge exercised his discretion improperly whether in respect of Miranda or Shtrezi.

52. The judge took into account the impact of the material and the burden on the defendants of having to deal with it at the stage reached in the trial. He made additional resources available where necessary. The prosecution say that only one per cent of the download was relied upon and that the chats that were adduced were reduced from 17,536 lines to 1,958 lines. It took only one day of court time for that evidence to be dealt with orally. Mr McLoughlin helped the court further by explaining that the material relating to Miranda in fact concerned no more than 24 chats. As to Shtrezi, the material involved 300 messages taken from only three or four

chats. He accepted, quite properly, that Shtrezi had been able to deal with all the material bearing upon his case and that this had been manageable.

53. In our judgment, the prosecution selected evidence to cover the most important issues and did not occupy an inappropriate or disproportionate amount of court time. There is nothing in the complaint that the prosecution materially exceeded the parameters set by the judge in his ruling for the production of additional evidence. Indeed, no submission was made to the contrary upon which the judge was asked to rule.

54. We note that it was not suggested to the judge that the resources provided by the court turned out to be inadequate. The Respondent's Notice has carefully analysed the course which the trial took. It has not been suggested that there was any particular stage during the remainder of the trial when a defendant was not allowed adequate time, or that the judge improperly refused to allow more time when asked to do so. Nor has it been suggested that the pressures were such that a significant point could not be identified during the trial but has been identified subsequently by counsel, such as exculpatory evidence.

55. By way of example, we note that in relation to Miranda the single judge said this:

> "You say that you and your legal team were unable to deal with exculpatory material but, as the judge observed, it was your phone. You would have known what to look for whether it was in Spanish or in English and you could have instructed your legal team accordingly. The Respondent's Notice sets out in detail what was disclosed and when and, in particular, when translations were uploaded. It is clear to me that there is no merit in this ground of appeal and that, if there were, it could have been raised at trial. In your own additional grounds of appeal, you assert that there was exculpatory evidence on your phone but you do not identify anything that was not before the jury. In any case, you were able to advance your new case of duress at trial and rely on material relevant to that."

We agree with those observations.

56. The judge made it plain that he would entertain an application to discharge the jury during the reminder of the trial if a defendant considered that circumstances had arisen which made that appropriate, or that the ruling or conduct of the prosecution caused real prejudice. It appears that no such application was made.

57. For these reasons, as well as for those given by the single judge, we conclude that this proposed ground of appeal is not arguable.

58. We do not accept the applicant Shtrezi's proposition that Miranda's volte face in the face of the new incriminating evidence damaged not only his credibility but also the "concept of duress" for other defendants. Shtrezi did not change his case, as Miranda had done. Shtrezi had always run the defence of duress and continued to do so. There is no reason to think that because Miranda changed tack after he had given his main evidence in chief and adopted the defence of duress (but on a wholly different factual basis), that Shtrezi's defence was prejudiced in the eyes of the jury. The jury was directed on more than one occasion to consider each of defendants and the counts on the indictment separately. Indeed, the relevant questions in the Route to Verdict were put to the jury separately. There is no justification to think that the jury failed to follow those directions. In addition, in his oral submissions we note that Mr McLoughlin very properly did not seek to press this particular line of argument. However, we have dealt with it for the sake of completeness.

Discussion: Assante's application for leave to appeal against conviction

59. The first proposed ground of appeal was originally an amalgam of complaints about the conduct and progress of the trial which suggested that the conviction was unsafe. We are satisfied that the detailed response in the Respondent's Notice demonstrates why the complaints were unarguable. We also consider that there is no merit in the less adventurous variant of ground 1 advanced today in the hearing. The Respondent's Notice sets out very clearly what

happened in the trial after counsel's closing speech to the jury. The judge's summing up followed immediately, and the jury began their deliberations in the usual way, initially for three days. There were then some interruptions for pre-booked holidays and illness. In these circumstances there is no merit in the complaint.

60. The second proposed ground of appeal – now the main proposed ground of appeal – relates to count 21. The judge accepted that there was other evidence which, taken together with the DNA evidence, meant that there was a case to leave to the jury. As the applicant recognises, on one view of the DNA evidence, Asante had handled the outer bag in the area of the knot. But the prosecution's expert witness accepted that that was not itself evidence that he had tied the knot and that the DNA could have been present from secondary transfer. She also accepted that it was possible that this could have happened on one occasion when, according to surveillance evidence, Asante was seen wearing shorts as a passenger in the car of an associate who was a drug dealer. It was submitted that on this basis count 21 could not have properly been left to the jury applying *Galbraith* tests.

61. The problem for Asante is that that possible explanation of secondary transfer proffered solely as a technical possibility in cross-examination of the prosecution's expert did not go far enough. It left an important question: what was Asante doing in the car of an associate who was a dealer in class A drugs? It called for an explanation and none was provided. In any event, the judge took into account not only the lack of explanation for Asante's DNA on the bag in these circumstances, but also evidence of Asante's interaction with another drug dealer, Roberts, and the circumstances leading to the finding of the bag in his property. There was also bad character evidence and cross-admissible evidence from the facts of counts 18 to 20. Taking all the evidence as a whole, there was more than simply the presence of Asante's DNA on the bag. Applying the appropriate test for deciding a submission of no case to answer at the close of the prosecution's case, we consider that the proposed ground of appeal is unarguable.

The judge's sentencing remarks

62. The judge said that the broom handles and foodstuffs conspiracy (count 1) had been a sophisticated operation; genuine foodstuffs had been sourced and sold on to present a "veneer of legitimacy". A "novel chemical process" had been used to coat the broom handles in cocaine that was invisible to the human eye. A false paper and audit trail had been created to demonstrate purported legitimacy and a legitimate shipping company and a legitimate cleaning company had been used for cover.

63. The judge took into account the sentencing guidelines but said that each individual role needed to be assessed with care. He was not employing a "one size fits all" approach. The conspiracies were all large commercial operations and fell "outside and well above" the guidelines. The factors he needed to take into account were the "quantity of drugs supplied or intended to be supplied, the particular role of each offender in the conspiracy, how far up the supply chain he was, the geographical scope of the operation, and the length of the conspiracy".

Culpability

64. The judge said that he was certain, after a four and a half month trial, that the conspiracy in count 1 had been directed by Rogers, Miranda and Oliver (from afar but influentially), and that each had leading roles. Rogers had driven the conspiracy in count 1 forwards; there had been the cover of a cleaning company ordering mops and broom handles and had been involved in the foodstuffs, which had a cover in the onward sale of the foodstuffs imported. Miranda, with Spanish as his first language, had been the go-between for Oliver, Rogers and the source in South America. He had been involved:

> "… with both broomsticks and foodstuffs, close links to the original source in Colombia – for example, one message refers to the cocaine being guarded by the guerrillas, namely, the armed militia, in the jungles of Colombia. He speaks to Ivan in Colombia directly, and sends images of the brooms being coated with cocaine in Colombia. He had an expectation of substantial financial gain. He was directing and organising buying and

> selling on a commercial scale."

65. Oliver had directed, behind the scenes:

> "… buying and selling on a commercial scale, had substantial links and influence on others in the chain and expectation of substantial financial gain."

66. Shtrezi and Asante were to be "significant outlets" for the cocaine on the broom handles and hidden in foodstuffs respectively. They had significant roles placed at the top end. They had the expectation of substantial financial gain and had some awareness of the scale of the operation.

Harm

67. From 580 brooms coated in cocaine, 1.19 kilograms of cocaine had been extracted. It was clear that this had been a test run and far larger loads would have followed. The evidence suggested up to approximately 40 kilograms, although the judge accepted that this might be an overestimation, but it did give an idea of the amounts involved. In the phone download there had been talk of 14 kilograms in the second consignment. It was unclear how much cocaine was intended to be imported in the foodstuffs, but the evidence suggested that the expectation was to import significantly more cocaine via this method; that it would build up eventually to 200 kilograms per shipment. The judge accepted that there was no evidence that cocaine had been shipped in foodstuffs and that he had to distinguish between agreements and hoped for imports and hyperbole, but he rejected the suggestion that he could not take account of the conversations to determine the sort of amounts agreed to be imported in foodstuffs. He also referred to section 63 of the Sentencing Act 2020, which allowed him to consider not only the harm caused but what was intended or might foreseeably have been caused. The judge had no doubt that it was intended to be a long term venture with significant shipments of cocaine to be distributed throughout the UK. For the purposes of sentencing, he took the evidence at its most favourable to the defendants, which indicated an agreement to import 40 to 50 kilograms.

68. Counts 2 to 5 showed that Miranda clearly had expertise in handling cocaine. He had contacts very close to the source in South America and contacts for the outlets of the drug. He was an international drugs smuggler and would receive very substantial financial gain. The phone evidence showed that the amounts of cocaine to be imported into the UK, outside of the UK and overseas were "enormous". The bare minimum amounted to around 990 kilograms.

69. Counts 7 to 13 showed that Oliver had been heavily involved in moving large amounts of cocaine to different countries and had an expectation of very substantial financial gain. Given that Rogers mentioned him to Ivan (the South American international drugs dealer), it was evident that he was known and trusted by those in South America. The amounts being imported were enormous. Count 7 related to 700 kilograms; and count 9 related to 280 kilograms. There had been talk of larger amounts and daily trips between Belgium and the UK. The minimum amount of cocaine amounted to about 980 kilograms.

70. Counts 14 to 17 related to Shtrezi, who had brought in and had helped others to bring in cocaine to the UK. In addition to organising transport, he had negotiated the prices for kilo and multi-kilo amounts of cocaine, and clearly had his own couriers. He had undoubtedly received substantial financial profit. Whilst the amounts of cocaine were less than attributed to either Miranda or Oliver, they were significantly more than the entry point for category 1. The amounts on counts 14 and 16 were between 16 and 30 kilograms, which the judge added to the amounts involved in counts 22 to 24.

71. Counts 18 to 21, which related to Rogers and Asante, fell into category 3 street dealing. Both had a significant role; they were motivated by significant financial gain and had an awareness and understanding of the operation. It was described by the judge as a "side line".

72. The judge's evaluation of the remaining offences is sufficiently summarised in the

Criminal Appeal Office Summary and need not be recounted here.

Aggravating Factors

73. Rogers had a conviction for possession with intent to supply cocaine and for being concerned in the supply of cannabis from July 2013. Asante had received a sentence of 23 years' imprisonment for the importation of Class A drugs, which indicated that it had been a very large importation. The judge ignored the suggestion that Miranda had a relevant previous conviction in America as it had not been presented in an admissible form. Oliver had convictions for importation of cannabis from July 1997 and for conspiracy to supply cannabis from 2002. Shtrezi had convictions for concealing criminal property and for participating in the criminal activities of an Organised Crime Group from 2016 which had involved drugs. But, on the other hand, he had no actual convictions for drug offences. The judge treated the convictions of Rogers and Asante as significant aggravating features. The other convictions were relevant only to a limited extent. Shtrezi had been on licence during the commission of the offences charged in counts 14 to 17, which was also an aggravating factor. The use of EncroChat phones by Miranda, Oliver and Shtrezi was also an aggravating feature.

Mitigating Factors

74. The judge acknowledged the ages of the defendants and the impact on various family members but stated that they themselves were to blame. The judge also acknowledged the prison conditions in London but took into account the likelihood of their being moved.

75. The judge took into account the principle of totality.

The proposed Grounds of Appeal against sentence

Miranda

76. These grounds are of the applicant's own composition. He contends that:

(1) There was no evidence that he had imported drugs into the UK or supplied drugs under counts 2, 4 and 5 and that there was no evidence of conspiracy under count 1:

(2) The judge made an error in estimating the amount of drugs in count 1;

(3) The judge had increased the sentence by giving too much weight to the aggravating factors which were unfair, untrue or irrelevant. He had been incorrect to place the applicant in a higher significant role on count 1;

(4) The judge did not give sufficient weight to the mitigating factors; and

(5) The applicant was sentenced for conspiracies that had not been on the indictment.

77. We have also read and considered the further submissions made by Miranda in support of his application, which elaborate on those points and make detailed references to the phone data.

Oliver

78. On Oliver's behalf it is contended by Mr Whitehouse that:

(1) Although the applicant had a leading role on count 1, he was not on a par with Miranda;

(2) Under counts 7, 9 and 11 to 13 the quantities provided by the prosecution were not accepted by the defence and the judge appears to have exceeded those quantities. He treated count 9 as covering a conspiracy to import 280 kilograms of cocaine, whereas the prosecution had estimated 200 kilograms. In the judge's view this brought the total amount to 980 kilograms (similar to the figure in Miranda's case), whereas the correct figure was only 700 kilograms; and

(3) The EncroChat phones should have been subsumed within the seriousness of culpability as a leading role so as to avoid double counting; it was not an additional aggravating feature.

Shtrezi

79. On behalf of Shtrezi, it is contended by Mr McLoughlin KC that:

(1) There is no challenge to the judge's assessment of Shtrezi's role and culpability. It was a high end "significant role" on count 1 and a "leading role" on counts 14, 16, and 22 to 24. But the judge's finding on the relevant weight of the drugs was contrary to the evidence. On counts 14, 16 and 17 the judge should have found the amount to be 16 kilograms rather than 16 to 30 kilograms; and on counts 22 to 24 he should have found the amount to be 10 kilograms rather than 65 kilograms. This would make a revised total of 26 kilograms.

(2) Insufficient allowance was given for the unfulfilled elements of the

conspiracies.

(3) The uplift beyond the guideline range was excessive, taking into account also the sentences imposed on Miranda and Oliver.

Rogers

80. On behalf of Rogers, it is contended by Mr Marshall that:

(1) Although Rogers accepted that he had a "leading role" within the count 1 conspiracy, the judge erred in holding that the culpability of Rogers was equal to that of Miranda and Oliver. On the evidence, there was a clear distinction between Miranda and Oliver, on the one hand, and Rogers on the other.

(2) On the harm involved in count 1, the judge did not assess the actual and intended operations within the conspiracies fairly and realistically. There was no actual importation in relation to the foodstuffs element of the conspiracy and a relatively small amount of actual importation in relation to the broom handles operation.

Asante

81. On behalf of Asante, it is contended by Mr Paul that:

(1) The sentence on count 1 is manifestly excessive; and

(2) The judge concluded that Assante was only concerned in the foodstuffs element of the conspiracy under count 1. He failed to take into account the inchoate nature of that conspiracy, and in particular the fact that no drugs were imported concealed in foodstuffs. In such circumstances the uplift was excessive relative to the guideline range.

Discussion: the applications for leave to appeal against sentence

82. The judge had the benefit of his close involvement in the trial over a period of more than four months. He had a detailed understanding of the evidence. His sentencing remarks were set out in great detail and with clarity. He directed himself correctly in relation to the sentencing guidelines and case law on drug crimes substantially more serious than the highest categories covered by the guidelines. As this court said in *R v Greenfield* [2020] EWCA Crim 265; [2020] 2 Cr App R (S) 19 at [3], it will not interfere with findings of fact made by a sentencing judge unless he or she has reached a conclusion that no reasonable finder of fact could have made. Where a judge has sentenced many defendants for their roles in a large drugs related conspiracy the Court of Appeal will be similarly slow to interfere with his assessment

of the different roles of the various conspirators and the nature and extent of each person's involvement. That applies *a fortiori* when the judge has been immersed in the detailed evidence given during a lengthy trial. The trial judge is "uniquely well placed" to assess such matters.

83. At [42] in *Greenfield*, the court said this:

> "But when one is considering sentencing for a quantity of drugs which is significantly higher than the guideline categories, the exercise in our view becomes a much more evaluative one in which the quantity of drugs is only one relevant factor, albeit an important one."

84. In our judgment, in the cases of Miranda, Oliver and Shtrezi, the judge was entitled to treat the counts relevant to them within counts 2 to 17 and counts 22 to 24 as the lead offences. Concurrent sentences were imposed for those offences, as well as that on count 1, which was an aggravating feature. Totality had, of course, to be borne in mind. We will begin with those three applicants.

Miranda

85. We entirely agree with the views of the single judge who made the following observations:

> "1. You argue that your sentence was wrong because the judge was misinformed about the charges and you did not import drugs into the UK. These are arguments about your conviction not your sentence. In relation to your appeal against sentence, these arguments are misconceived. In so far as they are relevant to your appeal against conviction, I have dealt with them in refusing you leave to appeal against conviction.
>
> 2. You also say that the evidence from your phone should not have been admitted and you make accusations of 'manipulation' of evidence by the prosecution to mislead the court. Again these are arguments about your conviction and I have dealt with them in refusing you leave to appeal against conviction.
>
> 3. The judge did not sentence you on the basis that you had a high level significant role but on the basis that you had a leading role. There could be no doubt that he was right to do so and your counsel in their sentencing note agreed.
>
> 4. The quantities of drugs which you conspired to import were

> vast. There is no basis for saying that the judge made errors in calculation of the amounts he took into account on count 1. He had plenty of evidence of the intention to import 40 to 50 kilograms [of] cocaine on broom handles and a similar quantity with foodstuffs.
>
> 5. You do not advance any basis on which your sentence on counts 2, 4 and 5 could be argued to be manifestly excessive."

In our judgment, it must be remembered that the judge treated counts 2, 4 and 5 as the lead offences, as he was entitled to do. The quantities of drugs involved for those offences was enormous. The concurrent sentence on count 1 was an aggravating factor in setting the concurrent terms for the lead offences. There is no merit in the criticisms of the sentence for count 1. But in any event the sentence for the lead offences cannot be said to be too long, let alone manifestly excessive.

Oliver

86. The judge sentenced Oliver on the basis that he was "Garcilla" in the EncroChat messages which showed that he was heavily involved in moving large amounts of cocaine to different countries and expected a very substantial financial profit. The judge was well-placed to assess Oliver's role in the conspiracies. He was clearly known and trusted by people who operated in South America either at or very close to the sources. The criticism of the judge's assessment of Oliver's degree of culpability is not arguable.

87. At this very high level of importation there will be bunching in the length of sentences: see, for example, *R v Sanghera* [2016] EWCA Crim 94; [2016] 2 Cr App R(S) 15), and *R v Cuni* [2018] EWCA Crim 6000; [2018] 2 Cr App R (S) 18).

88. At one point it appeared that the argument on the quantity of drugs related to a difference between 280 and 200 kilograms on count 9. But even if no figure could be estimated for that count, on count 7 the quantity was 700 kilograms. Even on that basis it is not arguable that the

sentence was excessive. It goes against the grain of the authorities for distinctions to be drawn on behalf of the applicant between 700 kilograms and the amounts involved in the offending of Miranda. It is important to remember that the court looks at all the relevant circumstances in an evaluative judgment, as the sentencing judge carried out.

89. We do not accept that there was any arguable double-counting in the way in which the judge had regard to the use of EncroChat phones. There is nothing to indicate that the reference to this aggravating feature resulted in a sentence which was manifestly excessive.

90. Accordingly we conclude that it is not arguable that any of the sentences was manifestly excessive or wrong in principle.

Shtrezi

91. In refusing Shtrezi's application, the single judge said this:

> "1. You argue that the judge was wrong to sentence you on counts 22 to 24 on the basis of quantities of cocaine which the messages on the 'Lynd9' phone showed that you intended to import or which you discussed importing rather than on the basis of amounts actually imported. The judge was entitled to take account of the intended harm before the operation came to an end (because of the intervention of the police) and he was sure, taking an overview of the messages, that the intended amount was in the region of 65 kilograms cocaine.
>
> 2, Even on your own case, as set out in the Advice and Grounds, the total imported was 8 kilograms; the identifiable amounts referred to in the 'Lynd9' messages was 10 kilograms; and the 'indicative amount' was 26 kilograms. All of these amounts were very substantially above the quantity on which category 1 harm is based and justified the sentence that he passed. To the extent that you argue that he failed to take account of the fact that the greater amount had not been imported, that has to be seen in the context that that greater amount would have merited an even higher sentence."

92. We respectfully agree with those observations. This is a good example of a case where,

in accordance with *Greenfield*, there is no arguable basis for this court to interfere with the careful evaluation by the trial judge. Furthermore, we note that the overall sentence for the lead offences was aggravated by the concurrent sentence on count 1.

93. It is therefore not arguable that any of the sentences was manifestly excessive or wrong in principle.

Rogers

94. Rogers accepts that the judge was right to find that he had a leading role. In his sentencing remarks, the judge said that he was certain that the count 1 conspiracy was being directed by Rogers, Miranda and Oliver, using the company that Rogers worked for as a cover. The judge made these careful findings at page 6C – 6F of the transcript:

> "Rogers was the most active of all the conspirators. He was the one who continued to drive the Count 1 conspiracy forward. It was, in the main, to his place of work the others went to discuss the progress of the count 1 conspiracy. He spoke directly with Ivan, an international drugs trafficker in South America. He was responsible for recruiting Hunt to deal with the onward supply of foodstuffs which were intended to hide cocaine. He was directing and organising Hunt, Asante, Adams and Allen. There is no evidence he was taking orders from Miranda or Oliver. He was on an equal footing with Miranda and Oliver in terms of the seniority and role in respect of Count 1."

95. The points made in Mr Marshall's written and oral submissions do not provide any arguable basis for the court to interfere with the judge's assessment, or to say that he overlooked some materially significant factor. His findings are inconsistent with the contention that Rogers was merely a "willing and complicit vehicle facilitating" the importation under count 1.

96. So far as harm is concerned, the judge rightly referred to section 63 of the 2020 Act. The conspiracy was clearly intended to last for longer than it actually did. It was only brought to an end prematurely by the intervention of law enforcement agencies. The judge said that he

had no doubt that after ten months of work on the conspiracy the defendants were not going to be content with only two or three imports of broomsticks or foodstuffs. This was intended to be a long-term venture for all of the defendants, to bring significant shipments of cocaine into the UK for distribution throughout the country, and to conceal very large amounts of cocaine which were to be imported pursuant to the count 1 conspiracy. The judge made a reasonable evaluation by making a substantial reduction to his findings on the maximum amounts intended. There are no arguable grounds for criticising the approach that he took.

97. Moreover, Rogers was convicted and sentenced on further counts for which he received concurrent sentences, even though they did not form part of the lead conspiracy. They therefore had to aggravate the lead sentence on count 1.

98. We conclude that it is not arguable that any of the sentences were manifestly excessive or wrong in principle.

Asante

99. Asante renews his application for leave to appeal against the sentence on count 1 only, namely a term of 18 years' imprisonment. The judge sentenced him on the basis that he played a high end "significant role" and that his involvement related to a conspiracy to import 40 to 50 kilograms of cocaine.

100. Mr Paul accepts that if 50 kilograms of cocaine had been imported, a sentence of 18 years' imprisonment would not be open to challenge, even though it is well above the relevant range for a category 1 offence. The criticism is that the judge failed to make a sufficient allowance for the fact that the conspiracy did not reach the stage of importing any cocaine with foodstuffs. However, the judge found, as he was entitled to do that in the covertly overhead conversation which took place on 24 February 2021 involving Asante, Rogers and others, the plan was to

import cocaine concealed in amongst foodstuffs, starting on a relatively small basis but building up to 200 kilograms per shipment. He also found that the plan was to bring in cocaine in foodstuffs on a scale not less than that planned for the broom handles, probably far more, but he decided to limit the estimate to 40 to 50 kilograms in total. Bearing in mind the judge's other finding that this was intended to be a long-term venture, not limited to two or three imports, his evaluation is not open to any arguable criticism.

101. The sentence of 18 years' imprisonment had been increased by the judge by one year to reflect Asante's earlier serious offending for importation of Class A drugs which had resulted in a prison sentence of 23 years. He had been released from that sentence only three years before this conspiracy, and was on licence. We consider that that uplift of only one year could justifiably have been greater.

102. Furthermore, the sentence on count 1 had to be aggravated to reflect the concurrent sentences on counts 18, 19 and 21 for conspiracies to supply Class A drugs.

103. Accordingly, in our judgment, it is not arguable that the overall sentence of 18 years' imprisonment was manifestly excessive or wrong in principle.

104. For all these reasons, each of the renewed applications before the court is refused.

105. Before concluding, we would like to pay tribute to the judge for the careful and detailed sentencing remarks which he delivered. We are confident that the care which he took at that stage also reflected the way in which he handled the trial generally, contrary to the various criticisms which have been directed at him.

106. We would also like to pay tribute to the single judge for the care with which she took in

her clear and helpful reasoning covering a large number of issues.

107. Finally, we are grateful to counsel for the way in which they presented their submissions to the court today, appropriately and efficiently. Thank you.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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