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THE CASE OF BATMAN AND ROBIN: SENTENCING FOR CONSPIRACY TO SUPPLY DRUGS

The case of Batman and Robin, otherwise known as *R v Kelly and McGirr [2014] EWCA Crim 1141*, has provided further guidance on the approach to sentencing in cases of Conspiracy to Supply Drugs. In particular, focussing on the approach Courts should take when considering purity of drugs when determining the appropriate starting point on the Sentencing Guidelines.

Background:

Kelly (aka Batman) was convicted after trial of Conspiracy to Supply Class A drugs (count 1) in May 2013 and was sentenced to 13 years' imprisonment.

McGirr (aka Robin) pleaded guilty to Conspiracy to Supply Class A drugs (count 1) and Class B drugs (count 2) in October 2012 and was sentenced to 11 years' imprisonment on count 1 and 6 years' imprisonment to run concurrently on count 2.

The evidence in relation to McGirr was that he had been involved in the supply of drugs to Scotland, as well as being involved in the supply of class A drugs in the Merseyside area with Kelly.

McGirr had 17 previous convictions for drugs offences including a previous conviction for Conspiracy to Supply Class A from 2005 for which he was sentenced to 66 months' imprisonment. Having been released from custody in June 2010, McGirr returned to dealing drugs by November 2011, whilst he was on licence.

Kelly was a mixed martial arts fighter, he had run in to financial problems which the prosecution submitted had led to his involvement in the supply of drugs. Kelly had fewer convictions and no convictions for Class A drugs.

The Batman and Robin theme made an appearance following a mobile telephone analysis of another male's telephone where Kelly and McGirr's details were stored respectively as Batman and Robin. Perhaps unsurprisingly the nicknames were used throughout the trial, and from the prosecution perspective, helpfully assisted them in outlining the roles they said both Kelly (Batman) and McGirr (Robin) took in the conspiracy. It was said that both were organisers and responsible for active drug dealing, but Kelly was, to some degree, the more dominant.

The Sentencing Process:

McGirr had been afforded full credit for his plea, leading to the conclusion that the starting point in his case had been 16 years' imprisonment. The Court of Appeal noted that count 2 had been ordered to run concurrently which led to the conclusion that the starting point for count 1 took account of all of the offending.

Kelly on the other hand had a starting point of 13 years' imprisonment for count 1 alone, following his trial.

The sentencing judge, having heard the trial, agreed with the prosecution position when it came to the roles of each defendant; Kelly was Batman with McGirr being his loyal ally Robin.

When looking at sentence the Court of Appeal acknowledged that it was not possible to identify the totality of the offending in the conspiracy counts; by the very nature of conspiracy offences it is often very difficult to value the amount of drugs supplied during the period specified in the indictment albeit that specific quantities may be determined from the available evidence.

For example, in Batman and Robin's case, there was evidence of 1.5 kilograms of high quality and high purity heroin being supplied in December 2011 and 167 grams of high purity heroin being supplied in May 2012. The two amounts representing offending at either end of an extended period of supply.

The sentencing judge approached sentence for Batman and Robin by looking at the two significant quantities of heroin and the very high purity of them. He determined that if broken down to street level "deals" they would have a street value of hundreds of thousands of pounds.

The Sentencing Guidelines were considered. The sentencing judge

looked at the quantities of heroin being supplied. However, he formed the view that when considering the very high purity of the heroin it was necessary to look at how much heroin there would have been at street level purity. As a result, rather than being a category 2 case (based on 1 kilogram of heroin), it was a category 1 case (based on 5 kilograms of heroin).

The sentencing judge concluded that the heroin would have been at least three times diluted; Batman and Robin would therefore have been dealing in at least 5 kilograms of heroin which fell within category 1 of the Guidelines.

The Court of Appeal:

In the Court of Appeal, both applicants argued that the judge took too high a starting point for their respective sentences and the approach taken by the sentencing judges was criticised.

The basis of the criticism was the text of the Guideline itself where it states:

"In assessing harm, quantity is determined by the weight of the product. Purity is not taken into account at step 1 but is dealt with at step 2. Where the offence is street dealing or supply of drugs in prison by a prison employee, the quantity of the product is less indicative of the harm caused and therefore the starting point is not based on quantity."

The Court of Appeal were not sympathetic to the criticism levelled at the sentencing judge. Although the Court highlighted that the level harm related to the starting point of sentence, which in turn was determined by the categorisation of the quantity of drugs, they stated that the quantities within the Guideline were "indicative quantities". Therefore, if an offender was supplying 1.9 kilograms of heroin it did not follow that they would fall outside of category 2. The Court of Appeal determined

that the Guidelines did not define quantity thresholds or minima and were absolutely clear that the purity of the drugs are of high importance when identifying the appropriate starting point.

The Court of Appeal stated:

"...if it were the case that an offender higher up the chain, and therefore more likely to be dealing with Class A drugs at high concentration, were able to get the benefit of a lower quantity in terms of a permanent assignment to category 2, whereas exactly the same consignment of drugs passed down the chain to someone of lesser responsibility and with lesser prospect of gain, who cut the drugs, diluted them and produced a larger quantity, then if that had the consequence that the person with less responsibility, less gain and further down the chain ended in category 1, that would be not merely an injustice, but a misuse of the guidelines themselves."

It was clear from the line of previous authorities, including *McCalla and another* [2012] EWCA Crim 2252, *Khan and Others* [2013] EWCA Crim 800 and *Cooke and Others* [2014] EWCA Crim 53, that purity was a matter to be considered as an aggravating feature rather than when determining the initial categorisation. Although the Court of Appeal indicated that the approach in those cases i.e. identifying the category and then considering purity as an aggravating feature, was perfectly correct, it did not preclude the approach taken by the sentencing judge in *Batman and Robin's* case.

Essentially, the Court of Appeal stated that there was nothing to prevent a sentencing judge from taking into account the purity in assessing and/or confirming the role of the offenders. It was the Court said an "obvious inference" that offenders who deal with

high purity drugs are closer to the centre of operation than those who deal with drugs of street level purity. In addition, it was entirely appropriate for a sentencing judge to rely on the purity of the drugs when considering which category the offending fell within on the guidelines.

Key Points:

1. The quantity of drugs is not the sole consideration when determining the category of offending on the Sentencing Guidelines.
2. The purity of the drugs being supplied remains an integral part of the sentencing process.
3. Purity of the drugs can be taken account as determining the role of the offender.
4. Purity of the drugs can also be relied upon in determining the appropriate categorisation of the offending when considering the sentencing guidelines; there is nothing wrong with a sentencing judge looking at the potential quantity of the drug at street level when considering the category.
5. This approach is unlikely to be confined to conspiracy cases, it can (and most likely will) extend to possession with intent to supply offences.

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