APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 49
HCA/2018/000071/XC
HCA/2018/000092/XC

Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MENZIES

in

APPEAL AGAINST SENTENCE

by

(1) MARK ANTHONY SIMPSON

and

(2) LEE DANIEL WALLACE

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

First Appellant: A Ogg (sol adv); Paterson Bell Solicitors for Bruce Short Solicitors, Dundee
Second Appellant: Findlater, advocate; Faculty Appeals Service for Lefevre Litigation, Aberdeen
Respondent: A Brown QC, AD; Crown Agent

6 September 2018

[1] Mark Anthony Simpson and Lee Daniel Wallace appeared for trial at the High Court of Justiciary at Aberdeen on 13 November 2017 along with two co-accused, on an indictment which contained inter alia charges of contravention of section 4(3)(b) of the Misuse of Drugs

Act 1971. On 20 November 2017 both appellants tendered pleas of guilty to two charges in the following terms:

> "(001) between 1 June 2016 and 22 July 2016, both dates inclusive, at; Deer Park, Great Northern Road; Great Northern Road; 355 Hilton Drive; 20 Hutcheon Court, all Aberdeen and elsewhere you ... MARK ANTHONY SIMPSON, STEVEN VIDGEN and LEE DANIEL WALLACE were concerned in the supplying of a controlled drug, namely Cocaine, a Class A drug specified in Part I of Schedule 2 to the Misuse of Drugs Act 1971 to another or others in contravention of Section 4(1) of the aftermentioned Act: CONTRARY to the Misuse of Drugs Act 1971, Section 4(3)(b);
>
> and it will be proved in terms of Section 29 of the Criminal Justice and Licensing (Scotland) Act 2010 that the aforesaid offence was aggravated by a connection with serious organised crime;
>
> and
>
> (002) between 1 June 2016 and 22 July 2016, both dates inclusive, at; Deer Park, Great Northern Road; Great Northern Road; 355 Hilton Drive; 20 Hutcheon Court, all Aberdeen and elsewhere you ... MARK ANTHONY SIMPSON, STEVEN VIDGEN and LEE DANIEL WALLACE were concerned in the supplying of a controlled drug, namely Diamorphine, a Class A drug specified in Part I of Schedule 2 to the Misuse of Drugs Act 1971 to another or others in contravention of Section 4(1) of the aftermentioned Act: CONTRARY to the Misuse of Drugs Act 1971, Section 4(3)(b);
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> and it will be proved in terms of Section 29 of the Criminal Justice and Licensing (Scotland) Act 2010 that the aforesaid offence was aggravated by a connection with serious organised crime."

[2] These pleas of guilty, and other pleas of not guilty, were accepted by the Crown. Having obtained criminal justice social work reports, on 30 January 2018 the trial judge sentenced the first appellant, Mark Anthony Simpson, to 8 years 6 months imprisonment from 20 November 2017, in cumulo, in respect of charges 1 and 2 on the indictment, 12 months of which was attributable to the serious organised crime aggravations. On the same date the trial judge sentenced the second appellant, Lee Daniel Wallace, to 6 years 6 months imprisonment from 20 November 2017, in cumulo in respect of charges 1 and 2 on the indictment, 12 months of which was attributable to the serious organised crime aggravations.

[3] In his reports to this court in respect of each of the appellants the trial judge sets out in detail the extent of the drugs operation in which the appellants were involved over the period of approximately seven weeks contained in the charges quoted above. The upper value of the diamorphine and crack cocaine recovered was in excess of £100,000, and there were items of paraphernalia associated with the drugs trade which were also recovered. It is not necessary for us to recite the full details in this opinion, because both appellants accepted that the aggravation provided for in section 29 of the 2010 Act applied. The trial judge went on to describe how the first appellant, Mark Anthony Simpson, was the person who gave instructions to another man to make deliveries, and who directed the operation in Aberdeen and gave instructions as to what others were to do in relation to the drug activities.

[4] The trial judge in his reports indicated that this was a significant drugs operation which was aggravated by its connection with serious organised crime. Each appellant had pled guilty to being concerned in the supply of two class A drugs for a period of seven weeks. From the consignments found on 22 July 2016 it was clear that a collection of drugs was kept in one location which were then delivered on instruction to 355 Hilton Drive so that a co-accused and the appellant Lee Wallace could then distribute them to buyers at public places in Aberdeen. It was a sophisticated and coordinated operation involving a network of suppliers and what were thought to be safe houses. The appellant Simpson had pled guilty on the basis that he was the controller of this operation for the whole of the seven week period during which he gave instructions to the co-accused and to another man as to how the drugs were to be distributed. The appellant Wallace had pled guilty on the basis that he was one of the people who took the drugs to the end user in various public places. It was clear that he also lived in the property to which the drugs were delivered and made

himself available for the delivery of the drugs. In return he was given accommodation and a supply of both the class A drugs involved. He told the author of the social work report that he was "paid" four times a day in drugs.

The Criminal Justice and Licensing (Scotland) Act 2010

[5] Sections 28 and 29 of the 2010 Act provide as follows:

> "**28. Involvement in serious organised crime**
>
> (1) A person who agrees with at least one other person to become involved in serious organised crime commits an offence.
>
> (2) Without limiting the generality of subsection (1), a person agrees to become involved in serious organised crime if the person –
> (a) agrees to do something (whether or not the doing of that thing would itself constitute an offence), and
> (b) knows or suspects, or ought reasonably to have known or suspected, that the doing of that thing will enable or further the commission of serious organised crime.
>
> (3) For the purposes of this section and sections 29 to 31 –
> 'serious organised crime' means crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of serious offences,
> 'serious offence' means an indictable offence –
> (a) committed with the intention of obtaining a material benefit for any person, or
> (b) which is an act of violence committed or a threat made with the intention of obtaining such a benefit in the future, and
> 'material benefit' means a right or interest of any description in any property, whether heritable or moveable and whether corporeal or incorporeal.
>
> (4) A person guilty of an offence under subsection (1) is liable –
> (a) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine or to both,
> (b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both.
>
> **29. Offences aggravated by connection with serious organised crime**
>
> (1) This subsection applies where it is –

(a) libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with serious organised crime, and
(b) proved that the offence is so aggravated.

(2) An offence is aggravated by a connection with serious organised crime if the person committing the offence is motivated (wholly or partly) by the objective of committing or conspiring to commit serious organised crime.

(3) It is immaterial whether or not in committing the offence the person in fact enables the person or another person to commit serious organised crime.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by a connection with serious organised crime.

(5) Where subsection (1) applies, the court must –
(a) state on conviction that the offence is aggravated by a connection with serious organised crime,
(b) record the conviction in a way that shows that the offence was so aggravated,
(c) take the aggravation into account in determining the appropriate sentence, and
(d) state –
(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
(ii) otherwise, the reasons for there being no such difference."

Submissions before this court

[6] For the first appellant, Simpson, Ms Ogg submitted that the trial judge selected a period of 7 ½ years which was then increased by 1 year to reflect the aggravation that the offence was connected with serious organised crime. This involved an element of "double counting" since commission of the offences inherently involved organised criminal activity of a serious nature. The imposition of a further period of 1 year's imprisonment was excessive. Although section 29 of the 2010 Act required the sentencing judge to take into account the aggravation, it also recognised that there may be circumstances where it is inappropriate to impose a separate or increased penalty – see section 29(5)(d)(ii). Most

drugs offences, and particularly contraventions of section 4(3)(b) of the 1971 Act, fall within the definition of serious organised crime provided by section 28(3) of the 2010 Act. It was not disputed that the aggravation applied in this case, and it was on this basis that the pleas of guilty were tendered, but the circumstances which gave rise to the aggravation were the same circumstances which constituted the offences. The trial judge's justification for the additional penalty, contained in paragraph [17] of his report in the Simpson appeal, relied on circumstances already used to justify the selection of the sentence imposed for the substantive offences, namely that the appellant was involved in directing the operation involving the three other individuals. There were no separate or distinct circumstances offered to justify the imposition of separate penalty. There was therefore an element of "double counting"; the issue was what weight should be given to the aggravation when the principal offence involved the same considerations.

[7] On behalf of the second appellant, Wallace, Mr Findlater adopted the submissions made on behalf of the first appellant. The nature of the supplying network in this case, and its apparent sophistication, were relevant to the fixing of sentence in respect of the contraventions of the Misuse of Drugs Act. The trial judge in his report referred to there being a "sophisticated and coordinated operation involving a network of suppliers and what were thought to be safe houses"; these were factors which were relevant to the contraventions of the 1971 Act. It was necessary, when sentencing in respect of contraventions of section 4(3)(b) of that Act, to consider the nature of the supplying and the circumstances in which the appellant was concerned in the supplying. These were factors which the trial judge took into account when selecting 5 ½ years as the appropriate sentence.

[8] The trial judge stated (at paragraph [13] of his report to this court):

> "I took the view that the court should impose a significant sentence on the appellant reflecting his role not only as a runner but as the occupier of the house to which the drugs were brought for onward distribution. The sentence also required to reflect the aggravation of the connection with serious organised crime. Accordingly I imposed a cumulo sentence of 6 ½ years imprisonment which I increased from 5 ½ years due to the aggravation."

This, it was submitted, amounted to an error of law. There was no requirement to reflect the aggravation. The supplying of two class A drugs with two other people for profit in and of itself triggered the aggravation. The nature of the offence itself constituted, for the purposes of the 2010 Act, serious organised crime. That was what the appellant was sentenced for in the selection of the sentence of 5 ½ years for the misuse of drugs offences. To add on an extra year because of the nature of the offence was erroneous and excessive. The 2010 Act (and in particular section 29(5)(d)) envisages the possibility that there will be no difference to the sentence imposed even with the aggravation being present. There might be cases in which the crime or offence was not itself inevitably within the definition of serious organised crime – for example, an assault might properly be said to be aggravated by a connection with serious organised crime. However, it was excessive to impose an additional penalty for the aggravation when the principal offence itself was inevitably connected with serious organised crime, and this element had been taken account of when reaching sentence on the principal offence.

[9] The only authority in which the court has considered the terms of section 29 of the 2010 Act was *HMA* v *Andrew Steven aka Walton* [2017] HCJAC 7, which was a Crown appeal on the basis of an allegedly unduly lenient sentence. The court refused the Crown appeal. That case involved a very large number of charges, generally under the Firearms Act 1968. The appellant was convicted of a total of about 55 charges. The trial judge took the view that the offences represented a very serious course of criminal conduct over a lengthy period of

time. The offences, which related to the re-commissioning and supplying of prohibited weapons and ammunition which could be easily concealed and carried, were very grave. The judge imposed a sentence close to the maximum in relation to each group of charges, but did not impose that maximum because the appellant was a first offender. Almost all of the charges had contained aggravations in terms of section 29 of the 2010 Act, but the judge did not impose any additional penalty in relation to that, because he had taken into account that aspect of the appellant's offending in the sentences which he imposed on the first and last groups. Counsel for the second appellant commended that approach to the court in the present case.

[10] The advocate depute took no issue with the submissions made on behalf of the appellants. He agreed that the statutory offences by their very nature triggered the aggravation, and that it did not necessarily follow that an increase in sentence would result. He too referred to *HMA* v *Steven*.

Discussion and decision

[11] In most, if not all, cases of being concerned in the supplying of a class A drug contrary to the Misuse of Drugs Act 1971 section 4(3)(b) the offence will be aggravated by a connection with serious organised crime, as that term is defined in section 28(3) of the 2010 Act. The scope and sophistication of the operation to supply such drugs, the part played by the accused in that operation, the period over which he was concerned in that operation, the number, type and value of the drugs in which the operation was concerned, and perhaps other factors, are all matters which fall properly to be considered by a sentencing judge when deciding upon the appropriate sentence to impose for such an offence. It is clear from his careful report to us that the trial judge took into account all of

these factors when determining what sentence should be imposed on each of the appellants for the substantive offences to which they had pled guilty, namely 7 ½ years in respect of Mark Simpson and 5 ½ years in respect of Lee Wallace. No issue is taken in either of these appeals with those sentences, nor with the exercise of assessment which the trial judge carried out in regard to them.

[12] However, with regard to each of these appellants the trial judge then went on to increase that sentence by 1 year due to the aggravation. He set out his reasoning for doing so in paragraph [17] of his report to us in the appeal by Mark Simpson (and in substantially similar terms in paragraph [15] of his report in the appeal by Lee Wallace). In the Simpson appeal he observed as follows:

> "The Note of Appeal states that by increasing the sentence by one year because of the aggravation, I applied some element of double counting. Section 29 of the 2010 Act required me to take account of the aggravation and state the extent of, and the reasons for, the difference in the sentence if the offence not been so aggravated. It seemed to me that since there were 3 other people in this enterprise who had acted together for the purpose of committing serious drug dealing offences over a period of weeks and were directed by the appellant to carry out the distribution of these drugs, an increase in the sentence was merited. I do not accept there was any element of double counting."

[13] We observe that, while section 29(5) requires the court to state that the offence was aggravated by a connection with serious organised crime, and record the conviction in a way that shows that the offence was so aggravated, and take the aggravation into account in determining the appropriate sentence, there is no requirement that the sentence must be increased because of the aggravation. Indeed, in the case of *HMA* v *Steven* to which we were referred, the judge did not impose any additional penalty in relation to the aggravation because he had taken into account this aspect of the offending in the sentences which he had imposed. This approach was not criticised in the opinion of the Appeal Court, which was delivered by the Lord Justice General.

[14] The factors to which the trial judge referred in paragraph [17] of his report in relation to the Simpson appeal (and in paragraph [15] in relation to the Wallace appeal) are factors which had already been taken into account (quite properly) in the setting of the sentences for the substantive offences before aggravation. We do not consider that they can properly be used again to justify the imposition of a further 1 year's imprisonment in respect of the aggravations. There are many crimes and offences which do not, of themselves, necessarily involve a connection with serious organised crime. For example, murders, assaults, threats, abductions, certain firearms offences, and many other criminal activities may occur without a connection with serious organised crime. In such cases, it seems to us very possible that an aggravation in terms of section 29 of the 2010 Act may appropriately result in a longer sentence than that which the court would have imposed if the offence were not so aggravated. We do not suggest that this will necessarily or always result, but it may do so. However, when the same features that are taken into account when setting the sentence for a substantive offence are also taken into account in considering whether to impose a different sentence to reflect the aggravation, it may be more difficult to justify imposing a longer sentence to reflect the aggravation.

[15] In the present two appeals, it does not appear to us that there were any additional factors taken into account in relation to the aggravations which had not properly been taken into account in determining the sentences for the substantive offences. We consider that this does indeed amount to an element of "double counting". For these reasons, we shall quash that part of each sentence (amounting to imprisonment for 1 year) relating to the section 29 aggravation. We shall therefore substitute a sentence of 7 years 6 months imprisonment

from 20 November 2017 for Mark Simpson, and 5 years 6 months imprisonment from 20 November 2017 for Lee Wallace.