



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 4
HCA/2018/000574/XC

Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

IVOR DEVLIN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Macintosh; Faculty Services Limited, Edinburgh for Ward & Co, Perth
Respondent: M Hughes AD; Crown Agent

8 January 2019

[1] The appellant Ivor Devlin is 46 years old. At a first diet on 23 October 2018 his plea of guilty to a single charge on the indictment which he faced was accepted by the Crown. The charge to which he pled guilty was one of producing a controlled drug, namely cannabis at his home address on 23 February 2018. The sentencing sheriff selected a headline sentence of 3 years imprisonment which she restricted to a period of 27 months in

light of the guilty plea and then further reduced this by a period of 14 days to take into account the earlier time spent on remand.

[2] The circumstances of the offence were that on 23 February 2018 police officers attended at the appellant's home address with a view to executing an outstanding warrant in relation to a different matter. Having obtained entry to his property the appellant was found in the living room. In one of the other rooms it was obvious that cannabis was being cultivated. In addition to paraphernalia of cultivation nine cannabis plants were recovered.

[3] The appellant had a list of previous convictions dating back to 1989. The majority of these were for road traffic matters and the remainder were mostly for offences of breach of the peace. Of relevance, there was a conviction in February 2011, on indictment, when the appellant received a sentence of 2 years imprisonment for an offence of being concerned in the supplying of cocaine.

[4] On the appellant's behalf the sheriff was advised that he was unable to work due to an injury to his back and had decided to become involved in cannabis cultivation with the intention of distributing to his friends. By the date of the offence none of the cannabis had in fact been distributed.

[5] In mitigation reliance was placed upon the appellant's personal circumstances. It was explained that he had financial responsibility for two children aged 19 and 10. It was submitted that the number of plants recovered indicated that this was an operation at the lower end of the scale.

[6] In advancing the appeal against the sentence imposed Mr Macintosh submitted that the sheriff had reached certain conclusions which were not sustainable on the basis of the information given to her. He drew our attention to the restricted narrative which had been presented to the sheriff and engaged in an assessment of what the sheriff had made of that

information by reference to her report. He also explained to us that there were certain circumstances pertaining to the appellant which had not been placed before the sheriff but which were nevertheless of relevance. We were told that the appellant's wife had been seriously ill and that she receives treatment for that illness but that in order to provide a degree of comfort to their children the sheriff had not been informed of that matter at the time. Mr Macintosh also informed us that the appellant had a history of service in the army stretching to some nine years during which he had served in Northern Ireland in addition to other locations and again this was something which had not been brought to the attention of the sheriff.

[7] Mr Macintosh asked us to consider the case of *Lin v Her Majesty's Advocate* 2008 JC 142, which the sheriff referred to in her report, and the cases of *Darroch v Her Majesty's Advocate* 2015 HCJAC 40 and *Gorrie v The Procurator Fiscal Haddington* 2014 SCCR 187.

[8] In her report to this court the sentencing sheriff explained that she had regard to what she considered to be the seriousness of the offence and to what she described as a planned and deliberate enterprise which she concluded was able to yield a substantial return. She explained that the circumstances of the offending, which included bypassing the electricity meter in the appellant's home, demonstrated a large scale and deliberate scheme to cultivate cannabis for wider distribution. She explained that, in her view, it was not realistic to suggest that all of the preparatory work had been done with a view to cultivation of nine plants in the longer term. The sheriff also explained that although she sentenced on the basis that the period of the libel was restricted to one day she took into account that what she called "such a large scale operation" would necessarily involve a significant degree of forward planning. With this assessment of the scale of the offending in which the appellant was involved the sheriff took account of the guidance provided in the case of *Lin*.

[9] Having had regard to the typed narrative of the events and the content of the sheriff's report, it is clear that Mr Macintosh was correct to observe that there is no information in either document about the value of the plants recovered or their state of maturity. We also observe that there is no information provided as to the cost or level of sophistication of the growing equipment which was recovered.

[10] We therefore consider that Mr Macintosh was correct to question why the sheriff came to the view that the enterprise was able to yield what she referred to as a "substantial return" and why, in her view, the operation of nine plants constituted what she called "such a large scale operation". By way of comparison, the case of *Lin*, to which the sheriff referred, concerned cannabis which was produced in a house which was almost entirely devoted to its production and in which 849 cannabis plants were recovered. The libel in that case covered a period of a month.

[11] The case of *Gorrie* to which Mr Macintosh drew attention perhaps provides a closer comparison to the sort of enterprise with which the present appellant was concerned. In that case 18 cannabis plants were found growing in a bedroom at that appellant's flat in Musselburgh. The paraphernalia recovered as described in the case report appears to be broadly similar to that recovered from the present appellant's home. In that case the Crown described the paraphernalia as "not the most sophisticated system". Only three of the plants recovered in the *Gorrie* case were mature and they had an estimated value of £450.00. In giving the decision of the court in *Gorrie* the Lord Justice General described the quantity of plants recovered, which was double that of the present case, as a "relatively few cannabis plants".

[12] In the whole circumstances therefore we consider that there was merit in the criticisms advanced by Mr Macintosh and we conclude that the sheriff has misdirected

herself in considering that the appellant was engaged in a large scale operation. Given the absence of any information about the state of maturity or the value of the plants recovered we also agree that the sheriff misdirected herself in concluding that the enterprise which the appellant was engaged in was capable of producing a substantial return. For these reasons we shall therefore quash the sentence selected.

[13] In assessing what, in our opinion, the appropriate sentence ought to be we bear in mind that the appellant's offending was, in terms of the charge to which he pled guilty, restricted to one day. In the absence of any information as to value, maturity or comparative sophistication of the enterprise, we cannot make an informed assessment of any expected return.

[14] In these circumstances we are therefore prepared, as invited by counsel so to do, to proceed upon the basis that the appellant was involved at the lower end of any such cultivation enterprise. Nevertheless, his previous conviction under the Misuse of Drugs Act for being concerned in the supplying of a controlled drug which resulted in a custodial sentence necessarily influences our assessment of the appropriate disposal in relation to the present appeal. The previous conviction is of particular relevance given the appellant's acceptance that he intended to supply some of the cultivated cannabis plant to his friends.

[15] In our opinion, the appropriate headline sentence in all of these circumstances would be one of 18 months imprisonment, which we are prepared to restrict to a period of 14 months in light of the early plea. We have taken account of the short period spent on remand in assessing the headline figure for sentence.