APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 13
HCA/23-73/XC
HCA/23-77/XC

Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD PENTLAND

in the Appeal

by

(FIRST) ALASDAIR JAMES FINLAYSON; (SECOND) CAMERON ROSS

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

First Appellant: D Findlay KC, Faculty Services, Edinburgh, for Patterson &co Inverness
Second Appellant: A Ogg Sol. Advocate, Gilfedder & Mciness
Respondent: Way, A.D.; Crown Agent

Appeal Court hearing 25 April 2023

Date of Issue 5 May 2023

Introduction

[1] We heard submissions in these two appeals and gave our decisions on 25 April 2023.

We now provide our reasons in writing.

[2] The first appellant pled guilty in the High Court to two charges under section 4(3)(b) of the Misuse of Drugs Act 1971. The first charge was one of being concerned in the supplying of cocaine between January and August 2020 at a number of locations in the north of Scotland and the second of being concerned in the supplying of cannabis between the same dates at the same locations. The first appellant was sentenced to 9 years imprisonment on the first charge (discounted from 10 years for the guilty plea) and to a concurrent sentence of 32 months imprisonment on the second charge (discounted from 3 years). He challenged the sentence on the first charge on the ground that it was excessive. No appeal was taken against the sentence imposed on the second charge.

[3] The second appellant pled guilty to a single charge of being concerned in the supplying of cocaine between 10 and 12 June 2020. He was sentenced to imprisonment for 23 months, discounted from 30 months.

The first appellant

[4] Based on the agreed narrative the first appellant's involvement may be summarised as follows. He played a significant part in a large-scale operation to supply cocaine and cannabis into the Highlands over a seven month period in 2020. Pursuant to a surveillance operation, he was identified as meeting and exchanging items with suspected English drug dealers, travelling to, from and between various so-called stash sites, intromitting directly with cash and controlled drugs at these sites, and selling controlled drugs to customers. It was also agreed that he engaged others, in particular the three co-accused with whom he pled guilty, to assist him in supplying drugs and laundering the proceeds of crime.

[5] The quantities and values of controlled drugs recovered were substantial. Around 3 kilograms of cocaine was seized from three stash sites. The drugs had a wholesale value of

around £131,200 and a maximum retail value of around £500,000. At the site near Glenglass the cocaine recovered was of a very high degree of purity (76%). A large quantity of boric acid, a known bulking agent for cocaine, was also seized at this site. A total of around 10½ kilogrammes of cannabis was seized. It had a wholesale value of around £62,350 and a maximum retail value of £152,890.

The sentencing judge's approach – first appellant

[6] The sentencing judge explains in his helpful report that he had regard to the Sentencing Guidelines issued by the Sentencing Council for England and Wales on *Supplying or Offering to Supply a Controlled Drug* (April 2021). The judge considered that the first appellant had played a leading role as defined in the guidelines and that his culpability was at a high level. The drugs were for adulteration and onward supply. The offence involved a high level of harm, falling between the first and second categories of seriousness. In terms of the guidelines the starting point for sentence for an accused with a leading role in a supply case involving Class A drugs and category 2 harm is given as 11 years custody, with a range of 9 to 13 years.

[7] The sentencing judge recognised that there were relevant mitigating factors. The first appellant was a user of the drugs he was supplying. He had built up debts to others, who were at a higher level in the supply chain and had been threatened as a result. This, according to the judge, indicated that his continued involvement was to be understood, to some extent, against a background of pressure or intimidation, falling short of duress. The judge noted also that the first appellant had expressed shame, embarrassment and guilt, in particular in relation to the effect of his offending on family members. In these circumstances, the sentencing judge was satisfied that the first appellant's sentence should

be at the bottom of the sentencing range as set out in the guidelines. He selected a headline sentence of 10 years imprisonment. As the appellant had pled guilty shortly before trial, a discount of one year was appropriate.

Submissions for the first appellant

[8] Senior counsel submitted that the first appellant's motivation had not been purely financial. He was himself a drug user and his addiction to controlled drugs left him prey to more powerful and unscrupulous elements. As a result, he found himself in debt and consequently even more vulnerable to those higher up in the distribution network, who might justifiably be regarded as organising the network rather than simply being involved in it. The first appellant had fallen behind with his payments. He received threats, which he justifiably took seriously. As a result, he was vulnerable to exploitation by those who were the actual organisers. These factors placed him in a very different category from those who have some kind of management role in the distribution network.

[9] It was submitted that the sentencing judge did not give sufficient weight to these significant mitigating factors. The criminal justice social work report confirmed that the first appellant accepted full responsibility for his conduct and did not seek to abdicate this. He confirmed that there were persons who held positions above him. The first appellant was aware of the damage that his conduct would have caused to his family and to his local community. He had ties to his local community. It was clear on the basis of the evidence, as reflected in the agreed narrative, that the appellant was not a high level organiser. A starting point of 10 years was excessive and would have been more appropriate for an individual significantly higher than the appellant in the supply chain.

[10] Senior counsel referred to the outcome of a different prosecution brought against a person who pled guilty to an offence contrary to section 28(1) of the Criminal Justice and Licensing (Scotland) Act 2010, namely being involved in serious and organised crime by organising and facilitating the supply of drugs in the Highlands. It was said that this person was the true head of the organised crime group in which the present appellants played less significant roles. The headline sentence selected by a different judge for that person had been 8 years and 6 months' imprisonment. The sentence imposed on the first appellant was argued to be out of line with that given to the other person.

[11] Finally, it was submitted that the plea of guilty in the present case had a greater utilitarian value for the purposes of a discount than that allowed by the sentencing judge.

Decision – first appellant

[12] While senior counsel made only passing reference to the English guidelines, like the sentencing judge we found these to be of some assistance in identifying the factors that are relevant to assessing the gravity of the present offence and where it sits on the spectrum in terms of culpability and harm. In step 1 the guidelines refer to the culpability demonstrated by the offender's role. We considered that the first appellant's involvement was such that he could be seen to have played a significant rather than, as the judge thought, a leading role. Looking at the factors identified in the guidelines, the first appellant had an operational or management function within a chain and he involved others in the operation. He also had some awareness and understanding of the scale of the operation and some expectation of financial advantage. We noted that he told the author of the criminal justice social work report that he was able to buy a new car and designer clothes, despite being unemployed.

[13] Contrary to the view formed by the sentencing judge, we were not satisfied that the first appellant's involvement displayed the features of a person who played a leading role. There was, for instance, no evidence that the first appellant had an expectation of substantial financial gain, that he was using a business as a cover, that he had close links to the original source of the drugs or that he abused a position of trust or responsibility. Overall, we considered that to say that the first appellant played a leading role in the sense defined by the English guidelines was to overstate the true level of his participation.

[14] In the circumstances, we concluded that the sentencing judge erred in finding that the first appellant played a leading role. We considered that the appropriate categorisation under the English guidelines would be that he played a significant role.

[15] As to the degree of harm caused by the first appellant, we saw no reason to differ from the sentencing judge in his assessment that the case fell between the first and second categories of seriousness in the English guidelines on the basis that it involved between 1 and 5 kilogrammes of cocaine.

[16] For a category 2 case involving Class A drugs and an offender who played a significant role, the starting point under the English guidelines would be 8 years' custody; the category range would be between 6 years and 6 months and 10 years.

[17] Using the English guidelines as a cross check, we were satisfied that the headline sentence selected by the sentencing judge was excessive. Having regard to the first appellant's significant involvement in the drug supplying operation, the quantity and value of the cocaine and the various mitigating factors, we considered that the appropriate headline sentence would be one of 8 years' imprisonment.

[18] The sentencing judge allowed a discount of 10 per cent on the basis that the guilty plea was tendered shortly before the trial. We could detect no error in that approach.

[19] In the case of the first appellant we therefore quashed the sentence imposed by the sentencing judge on charge 1 and substituted for it a sentence of 7 years and 3 months imprisonment.

[20] We would add that we did not attach any weight to the somewhat limited information provided to us about the other prosecution before a different judge brought under section 28(1) of the Criminal Justice and Licensing (Scotland) Act 2010. Neither the note of appeal nor the written case and argument in the present appeal made any reference to the other prosecution. The sentencing judge had no opportunity to respond to this information. It was not possible to draw any meaningful comparison between the sentences imposed in these two different cases.

The second appellant

[21] So far as the second appellant is concerned, on 10 June 2020 he was observed meeting someone along a forestry track in the Glenglass area. As a result, police officers searched the wooded area near to where that meeting had taken place, which led them to detect the Glenglass stash site and to seize the cocaine and boric acid hidden there. The second appellant's DNA was found on the bag containing the boric acid. On 12 June 2020 the second appellant was observed attending at the now empty Glenglass site where he was seen searching for items, and was seen to look panicked. He was heard to use a mobile phone whilst exclaiming and saying that he was unable to "find it". The first appellant was nearby using his mobile phone at this point.

[22] In the criminal justice social work report the second appellant claimed that he started using cocaine when he was 18 and within a year he developed an addiction, spending around £1,400 per month on the drug. He said that he was offered the opportunity to do

small jobs for other users in return for drugs for his own use, but that these jobs never materialised. He claimed that he was then told to do a big job, namely to collect a kilo of cocaine from one location and hide it at the Glenglass site. He maintained that he was intimidated into doing this by someone he declined to name. He said that his involvement was limited to dropping off the cocaine at the site on 10 June 2020 and attending on instructions to pick it up two days later.

The sentencing judge's approach – second appellant

[23] The sentencing judge took the view that the second appellant had deliberately and actively involved himself in a large scale drug dealing operation. He was involved in hiding or retrieving drugs and an adulterating agent from the stash site by attending there twice over a three day period.

[24] In sentencing the second appellant, the judge recognised that this type of offence would normally merit a custodial sentence. He had regard to the sentencing guideline issued by the Scottish Sentencing Council on *Sentencing Young People* (January 2022) and to the English guidelines to which we have already referred. In terms of the latter, the judge considered that the second appellant's culpability should be assessed on the basis that his role was relatively minor. The offence involved significant harm in view of the purity and value of the cocaine. On that basis the English guidelines indicated that the starting point should be a custodial sentence of 5 years, with a range of between 3 years 6 months and 7 years. That was broadly consistent with Scottish practice.

[25] There were a number of mitigating factors. The appellant may have been subject to pressure from others. He was addicted to cocaine. He had no previous convictions. He had expressed remorse. He had a good employment record. He suffered from an eating

disorder. He claimed not to have taken cocaine in the years since his arrest. Taking account of these considerations, the sentence should be at the bottom of the identified range.

[26] The judge then turned to consider the Scottish guideline on the sentencing of young people. The appellant was 22 at the time of sentencing and 19 at the time of the offence. He was highly anxious, had type 1 diabetes and bulimia. He had received counselling at the instigation of a former employer and had been referred to adult protection services due to concerns about his mental health. Since his arrest he had distanced himself from pro-criminal peers and had become socially isolated. He had considered ending his own life in August 2022. Overall, the picture was of a somewhat vulnerable and isolated young man.

[27] The judge considered that all this pointed towards a lesser degree of culpability on the second appellant's part than if he had been a mature adult. There was, however, limited scope for reduction of sentence since his culpability had already been assessed at the lowest category in terms of the English guideline on drugs sentencing. While the primary aim had to be to rehabilitate the appellant and reduce the risk of reoffending, in view of the nature of the offence this did not mean that a non-custodial sentence should be imposed. There was, however, a basis for a shorter custodial sentence than would otherwise have been appropriate. At the end of the day a headline sentence of 2 years and 6 months was appropriate. The appellant had offered to plead guilty at a preliminary hearing. The sentence was discounted to one of 23 months to reflect that.

Submissions for the second appellant

[28] On behalf of the second appellant his solicitor advocate reiterated the mitigating considerations. Despite the nature of the offence the circumstances were sufficiently exceptional to allow a non-custodial penalty to be imposed. At the time of the offence the

second appellant was young, immature and vulnerable. He had started to take drugs in order to lose weight. He had a good work record. He had been on bail for 2½ years and had stayed out of trouble during that period. He derived no financial gain from the offence. There was a good opportunity for rehabilitation. He no longer took cocaine and was assessed as presenting a minimum risk of reoffending. A non-custodial sentence should have been imposed with programme and supervision requirements to address the appellant's eating disorder, offending behaviour and addiction issues. He had been assessed as suitable for unpaid work.

Decision – second appellant

[29] We gave close consideration to all that was put forward on behalf of the second appellant. Having done so, we were not persuaded that a non-custodial penalty would have marked sufficiently the nature and gravity of the offence to which the appellant pled guilty. He deliberately chose to become involved in a drug supplying operation. The quantity and value of the cocaine was substantial. The drugs were of 76 per cent purity and had a potential retail value of about £280,000. The appellant actively concerned himself in what he must have realised was a major operation to supply a very substantial quantity of Class A drugs to a large number of people.

[30] The sentencing judge took account of all the relevant considerations relating to the circumstances of the offence and also of the second appellant's personal circumstances, including his young age and other difficulties. We did not consider that he could be said to have erred in concluding that the only appropriate sentence was a custodial one. We had some difficulty in following the judge's analysis of the relationship between the two guidelines to which we have referred but as it happens he substantially modified the period

of custody that would otherwise have been appropriate for an adult offender to reflect all the mitigating factors. The sentence he ultimately selected was not excessive.

[31] For these reasons we refused the second appellant's appeal.