APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 8
HCA/2019/000313/XC

Lord Malcolm
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

STEPHEN BARCLAY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson (sol adv); Paterson Bell
Respondent: Prentice QC (sol adv) AD; Crown Agent

12 February 2020

[1] The appellant was convicted in the Sheriff Court at Hamilton of two charges brought under the Misuse of Drugs Act 1971, charges 2 and 5 on the indictment. On each he was convicted along with his co-accused Damian Morris. Charge 2 was a charge of being concerned in the supplying of cannabis between 11 January and 26 October 2018 at 176 and 178 Townhill Road Hamilton, and elsewhere unknown. Charge 5 was a charge of producing

cannabis between 3 August and 26 October 2018 at the two addresses mentioned. Both offences were committed whilst the appellant was on bail, he having been granted bail at the High Court on 28 March 2018.

[2] The sheriff imposed a sentence of 6 months imprisonment on charge 2 and a sentence of 3 years and 6 months imprisonment on charge 5. He ordered that the sentences were to run consecutively to each other.

The evidence

[3] The appellant was the owner of the flat at 178 Townhill Road in Hamilton. The co-accused was the tenant of that property. 176 Townhill Road was a flat on the same landing and directly across from 178. The co-accused was also the tenant of that property. The evidence against the appellant arose out of searches under warrant carried out on 13 March 2018 and 26 October 2018.

13 March 2018

[4] On this date police officers conducted a search of the property at 178 Townhill Road. No one was in at the time. Items linking both the appellant and Morris to the property were discovered, including the appellant's passport and driving licences. In addition, the items recovered included:

- A block of cannabis resin found on a DVD cabinet in open view with a value of £1400.
- A notebook said to be a tick list found in open view.
- Three sets of scales.
- A bag with cannabis resin valued at £120 found in a kitchen cupboard.

- A jar with 31g of cannabis material worth £200 found on the kitchen worktop.
- Waste cannabis material found in the loft.
- A mobile telephone belonging to the co-accused Morris.

[5] The bedroom in which the appellant's passport and driving licences were recovered had items on the bed and on the drawers. There was men's clothing noticed. It was described as "what you would expect to find in any bedroom being used". Other evidence demonstrated that the appellant had returned from Thailand on 8 March 2018.

26 October 2018

[6] On 26 October 2018 the flats at both 178 and 176 Townhill Road were searched. The flat at 176 had been completely given over to the commercial cultivation of cannabis. A total of 62 growing plants were recovered from different parts of the flat. These were said to have a value of between £12,000 and £37,000. A watering can was recovered from within the growing areas. Subsequent examination of the handle disclosed a mixed DNA profile from three individuals. The profile contained the DNA of the appellant and two other unknown individuals (as agreed by joint minute).

[7] When police officers entered the flat at 178 the appellant and his wife were in one bedroom and the co-accused and his girlfriend were in the other. The items recovered during the search included:

- A bowl containing 56g of cannabis found on top of the cooker hood in the kitchen.
- A jar with cannabis material comprising 27g of tetrahydrocannabinol found on top of the cooker hood in the kitchen.
- A notepad with names and numbers recovered from the co-accused's bedroom.

- A book titled "The Marijuana Growers Bible" found in a drawer in the living room.
- A notepad with references to weights in ounces.

[8] A set of keys was recovered from the bedroom occupied by the appellant. He identified them as his. One of the keys was found to open the door of the flat at 176. A further key was found in a cupboard in the kitchen which also opened the door to this flat. A van which the appellant said he had used, and which he was insured to drive, was parked outside. Inside there were sacks of compost and what the sheriff described as waste products of previous cannabis cultivation. Other items connected to the appellant, including an airline boarding pass, were also recovered from within the van.

[9] In addition to the evidence of the various items recovered, some evidence was led of the result of an examination of the mobile telephone recovered from the co-accused on 13 March. Evidence of seven "WhatsApp" messages relating to the sale or purchase of cannabis was led. Six of these messages were sent in either January or February 2018 and the seventh was dated 12 March.

[10] Both the appellant and Morris also faced a charge of being concerned in the supplying of cannabis resin at 178 Townhill Road on 13 March 2018 (charge 3). The sheriff upheld a submission of no case to answer made on behalf of Morris in relation to this charge. The appellant was acquitted of this charge by the jury.

The grounds of appeal

[11] The single ground of appeal against conviction contends that the presiding sheriff misdirected the jury by directing them that the common law doctrine of concert applied. It was contended that these directions ought not to have been given, as the doctrine had no

part to play in a case concerning these particular statutory offences. The appellant also advanced an appeal against sentence, contending that it was inappropriate and excessive for the sentences to be ordered to run consecutively.

The charge

[12] The presiding sheriff provided three reports to this court. The first and third concerned the appeal against conviction and the second concerned the appeal against sentence. In his first report, he explained that the Crown's case against the accused was that they were jointly involved in the supply and the production of a controlled drug. He referred to some of the evidence which implicated each and said, at paragraph 7:

> "In the light of such an amount of evidence that the accused were cooperating together, which was part of the Crown case, it was necessary to explain to the jury the concept of acting in concert."

[13] In his charge he addressed the common law concept of acting in concert before he came to explain the crimes which featured in the case and before explaining to the jury what it would be necessary to establish in order to bring home guilt on such charges. The directions on concert were detailed and lengthy. They ran from pages 17 to 23 of the transcript of his charge. He began by explaining that the charges which remained were brought against more than one person and that meant that the issue of joint criminal responsibility was raised. He went on to explain that:

> "If people do act together in committing a crime then each participant can be responsible not only for what he himself does but for what everyone else does while committing that crime."

[14] Having given these directions, the sheriff then turned to deal individually with charges 2 and 5. In dealing with charge 2 he gave directions which were familiar and correct. He directed the jury that the crime required the accused's active involvement in the

supply chain. He directed the jury that the Crown required to prove that the accused personally was actively and knowingly involved in the operation to supply.

[15] In relation to charge 5 the sheriff explained that the keyword was "produce" and went on to give guidance as to what that term meant. At page 31 he directed the jury as follows:

> "So, again, with more than one person involved on this charge, you might find it helpful to look at the evidence in stages and to decide first of all if there was a production operation because, if that's not proved, the Crown couldn't prove the charge, and secondly decide what each accused did along with the co-accused if you find that they were acting in concert, thirdly decide if the accused was knowingly part of the production operation, and fourthly decide if what was being produced was cannabis."

Appellant's submissions

Appeal against conviction

[16] On behalf of the appellant, Mr Paterson submitted that the common law doctrine of concert did not apply to the statutory charges which featured on this indictment. Attention was drawn to the concession made in the Crown written case and argument to this effect, insofar as a charge of being concerned in the supplying of controlled drugs was concerned. It was contended that the same approach should be taken in relation to a charge of production brought under section 4(2)(a) of the Act.

[17] The direction to the effect that each participant in a case of concert can be responsible not only for what he himself does but for what everyone else does while committing the crime was said to be both incorrect and confusing in the circumstances of the present case. It would have permitted the messages retrieved from the co-accused's mobile phone to be used as evidence against the appellant when it had not been proved that he had any

knowledge of these messages and where it had not been proved that he was party to them in any sense.

[18] It was submitted that the appellant was responsible only for his own actions and that the Crown required to prove that he was knowingly and actively participating in a drug supply operation in relation to charge 2 and in a drug production operation in relation to charge 5.

Appeal against sentence

[19] Mr Paterson submitted that the sheriff was wrong to have ordered that the sentences imposed on each charge should run consecutively. The sheriff had made it clear that the sentence imposed on charge 5 was for the commercial nature of the cultivation. To impose a consecutive sentence for the charge of being concerned in the supplying was effectively to punish the appellant twice for the same conduct. Attention was also drawn to the fact that the appellant had been acquitted of charge 3, which related to the substantial block of cannabis resin found within 178 Townhill Road on 13 March. This seemed to have been overlooked by the sheriff in determining the sentence on charge 2. In these circumstances Mr Paterson invited us to order that the sentences should run concurrently rather than consecutively.

Crown's submissions

[20] On behalf of the Crown it was accepted that the common law doctrine of concert has no part to play in relation to a charge alleging that the accused was concerned in the supplying of a controlled drug in contravention of section 4(3)(b) of the Act. The advocate depute submitted that in a charge brought under this provision the person who is so

concerned is a principal offender. In order to prove such a charge the Crown must first demonstrate that there was an ongoing supply operation and then return to consider the activities of the individuals said to be involved. The doctrine of concert plays no part in this process and directions on it would be unhelpful.

[21] However, the evidence demonstrating the recovery of the "WhatsApp" messages from the co-accused's phone was evidence which was relevant to establishing that there was an ongoing drug supply operation. The evidence of the appellant's association with the co-accused at material times could then permit the inference that he too was involved in that drug supplying operation. There was no other evidence led in relation to the co-accused which the direction on concert would have permitted the jury to rely on in relation to the appellant. In these circumstances the advocate depute submitted that no miscarriage of justice had occurred in relation to charge 2, despite the admitted misdirection.

[22] In relation to the charge of production brought under section 4(2)(a), the advocate depute submitted that different considerations arose. He submitted that the concept of concert could well be applicable in circumstances where two or more individuals were charged with a contravention of this provision. Accordingly, the directions to which attention had been drawn did not constitute a misdirection in relation to this charge. This flowed from the requirement to establish that there had been production. In a charge of being concerned in the supplying of a controlled drug it was not necessary to prove that there was any supply.

[23] Despite this submission however the advocate depute explained that the procurator fiscal depute who conducted the trial had not addressed the jury on art and part as a legal concept. His focus was on how to establish to the jury's satisfaction that the appellant was involved, although only found at the locus for one day during the period of the libel. He

had addressed the jury about the various pieces of evidence which indicated that both the appellant and his co-accused were involved jointly in the cultivation together. He had submitted that both of the accused were producers. He had submitted that since both were involved in the cultivation both were also involved in supplying, given the commercial scale of the cultivation.

[24] Having explained that this was the approach which the Crown had taken at the trial the advocate depute then revisited the question of why the sheriff had given any directions in relation to concert. Having done so, he accepted that these directions did in fact constitute a misdirection. He maintained that in light of the evidence available that misdirection had not been material and did not result in a miscarriage of justice.

Discussion

The appeal against conviction

[25] The interplay between the common law doctrine of concert and the terms of section 4(3)(b) of the Act has been the subject of discussion before the court on a number of occasions. In *Clements* v *HM Advocate* 1991 JC 62 at page 68 the Lord Justice-General (Hope) observed that:

> "It seems to follow that each person who participates in the chain of distribution commits a self-subsisting statutory offence."

[26] At page 70 he referred with approval to the observations of Lord Hunter in *Kerr* v *HM Advocate* 1986 JC 41 and observed that:

> "… the wide terms of sec. 4(3)(b) are such that actings which, in a common law context, might be considered to be criminal on the principle of concert are treated here as being criminal acts in themselves contrary to the statute."

[27] Drawing on these observations, in the case of *HM Advocate* v *Hamill* 1998 SCCR 164, Lord Marnoch stated that he saw no room for the application of the common law doctrine of concert in a charge brought under section 4(3)(b) of the Act. Support for Lord Marnoch's view was subsequently expressed by the Lord Justice-General (Rodger) in *Salmon* v *HM Advocate* 1999 JC 67, and then again in the opinion of the court delivered by Lord Coulsfield in *Clark* v *HM Advocate* 2002 SCCR 675.

[28] Of course, in any case in which a contravention of section 4(3)(b) is alleged the evidence is likely to demonstrate that the accused was involved in some fashion or another with other persons in the drug supplying operation. The requirements for proof of a charge such as this, and the relevance of association with others engaged in carrying out that operation, were explained with clarity by Lord Coulsfield at paragraph [14] of the opinion of the court in *Clark*. It bears repetition in full:

> "[14] What is clear, and what is made quite clear in the charge, is that the evidence must show that there was a drug-supplying operation being carried out and that the accused person was knowingly playing an active part in carrying it out. If it is shown, as it usually will be, that others were engaged in carrying out the operation, then the accused's association with those others at the times when they were shown to be so engaged, taken in the context of evidence as to his own activities, may be relevant to infer that he was actively and knowingly concerned in the prohibited activity. If it is so established then his guilt does not depend on the application of concert but upon the inference to be drawn from his own actings. Responsibility for the actings of the others is not attributed to him by operation of any legal rule or concept; evidence as to their actings serves to show that the operation was being carried out. His involvement in their actings and his association with them at material times provide material from which an inference may be drawn that he too was actively concerned in the supplying operation."

[29] We therefore agree with the submission presented on behalf the appellant and with the concession tendered by the Crown to the effect that the concept of art and part guilt has no part to play in establishing guilt on a charge brought under section 4(3)(b) of the Act. We agree that the sheriff's directions constituted a misdirection in relation to charge 2.

[30] Since the Crown did not rely on the doctrine of concert to any extent and invited attention only to the evidence implicating each accused individually, we also agree that the directions on concert given by the sheriff constituted a misdirection in relation to charge 5.

[31] In these circumstances we do not require to determine whether or not the appellant was correct in submitting that the common law doctrine could have no application to a charge brought under section 4(2)(a). We would observe though that the structure of section 4, which is headed "Restriction of production and supply of controlled drugs", appears to be almost identical in its treatment of both activities. There may well be force in the view that Parliament has deliberately drawn the whole of section 4 in the widest possible terms so that whilst the act of supply is an offence under section 4(3)(a), any activity which might at common law constitute art and part involvement in that offence, constitutes a self-subsisting statutory offence under section 4(3)(b). On this view, any activity which might constitute art and part involvement in the offence of producing a controlled drug contrary to section 4(2)(a), would constitute the self-subsisting statutory offence of being concerned in the production of such a drug, as is provided for by section 4(2)(b). This would have the attractive advantage of simplifying matters for a jury by avoiding the need for a judge to give directions on concert in the same case, perhaps concerning the same accused, in relation to some charges alleging a contravention of section 4 of the Act but not others.

[32] It remains to be determined whether the misdirections were material and led to a miscarriage of justice. The directions which the sheriff gave when dealing individually with each of charges 2 and 5 were not the subject of any criticism in the appeal. The evidence against the appellant in relation to the production charge was virtually irresistible. His own evidence denying participation was rejected. The only evidence which was identified by Mr Paterson as having been engaged by the directions on concert was the evidence of the

"WhatsApp" messages. Those messages were of direct relevance in the case against the appellant, as they went to demonstrate the existence of a cannabis supplying operation. Given the strength of the evidence to implicate the appellant in the production of cannabis at 176 Townhill Road, it would be an obvious inference that he was concerned in the supplying operation which was separately established. The various other adminicles of evidence recovered on both 13 March and 26 October further underpinned this inference. In all of these circumstances we do not consider that the misdirections complained of were material, or that they resulted in a miscarriage of justice.

The appeal against sentence

[33] The period of the libel specified in charge 5 overlapped by a few months with the period of the libel specified in charge 2. In his second report the sheriff explained that the sentence imposed for charge 5 was for the commercial nature of the cultivation. He also explained that a substantial element of charge 2 related neither to the same drugs nor to the same timeframe as charge 5. This led him to conclude that it was appropriate to order that the sentences should run consecutively. However, when outlining in this report the items of relevance which were recovered on 13 March, the sheriff included the block of cannabis resin and drew attention to its value. He does not mention the fact that the appellant was acquitted of the charge relating to cannabis resin. In these circumstances we cannot be satisfied that the sheriff's reasoning in relation to sentencing was sound and we shall give effect to the appeal against sentence in the manner suggested to us by Mr Paterson.

Decision

[34] For the reasons outlined above the appeal against conviction is refused. We shall uphold the appeal against sentence to the extent of quashing the order that the sentences imposed should run consecutively. We shall order that the periods selected by the sheriff should run concurrently.