APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 9
HCA/21-429/XC

Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LORD DOHERTY

in

Appeal against Sentence

by

LIAM STEWART

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlater; Adams Whyte
Respondent: Way AD; Crown Agent

1 February 2022

Introduction

[1] The appellant was born in April 2002. On 1 October 2021 at Livingston Sheriff Court he pled guilty at a first diet to a single charge of being concerned in the supplying of MDMA (ecstasy), a class A drug, between 9 March 2019 and 11 August 2019, to another or others and in particular to MW, then aged 15 and 16 years of age. On 5 November 2021 the sheriff

sentenced him to 45 months detention. He has been in custody since then. He appeals against that sentence.

The circumstances of the offence

[2] The agreed narrative was that on 10 August 2019 MW (then aged 16) messaged the appellant asking to buy a gram of ecstasy. The appellant agreed to sell her a gram for £20 and they arranged that she would collect it from him the following day. When MW collected it she was accompanied by a friend, Jessica Higgins, who was aged 15. MW and Jessica left the appellant. Shortly thereafter MW shared the ecstasy with Jessica and they both consumed the drug. Jessica began to feel ill. After some time an ambulance was called. Jessica showed signs of pyrexia and her temperature was 41 degrees centigrade, which can be a sign of ecstasy overdose. She suffered a cardiac arrest and died shortly thereafter despite strenuous medical efforts to save her.

[3] When the police searched the appellant's bedroom they found several grip seal bags of ecstasy, which held 6.24 grams of crystal and 17 tablets. The total value of the drugs found was £250. Mobile phone analysis showed several messages during the period of the libel between the appellant and MW relating to the sale of ecstasy by the appellant and one further message exchange on 9 March 2019 between the appellant and another person discussing the supplying by the appellant of ecstasy to that person.

The appellant's record

[4] The appellant's only previous conviction was for driving without insurance. It is unclear whether that conviction was libelled by the Crown, but it was referred to in the Criminal Justice Social Work Report ("the CJSWR").

The sheriff's decision and reasons

[5] The sheriff concluded that a headline sentence of 5 years' detention was appropriate. He discounted the headline sentence to 45 months because of the guilty plea. In paragraph 6 of his report he observed:

> "The charge was drafted to indicate continuing supply over the period between March and August 2019 because of the finding of such amounts of Ecstasy within the property, and also because analysis of the appellant's mobile phone established numerous conversations over that period with various contacts relating to the sale of ecstasy. The mobile phone also had content of conversations between [MW] and the appellant in relation to drug supply."

[6] In his sentencing statement he stated:

> "MDMA … is a dangerous drug because it has known but unpredictable effects on those who consume it, and there have been all too many cases where it has created a reaction in the body which can lead to severe debility or death. This is not unknown or even rare and those who pedal (*sic*) this drug must be aware of its potential side effects and consequences. The law surrounding such drugs is there to protect people from harm and when the law is broken as in your case by the supply of the drug, you expose those supplied to risk because obviously you are aware that your customer will consume the drug …
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> … [T]his was repeated supply over a period of time, it was not a single unfortunate transaction. It was also a financial transaction, and you are to be regarded as a ruthless drug dealer, selling a potentially lethal product for personal gain, and of course in this case it has to be observed that you were selling to young people, not even adult in some cases."

[7] In paragraph 11 of his report the sheriff noted that the appellant had an apprenticeship and was working, and that he may have ceased to use drugs. However, the sheriff indicated that he found it difficult to accept that the appellant had made positive steps to remove himself from offending or to change his behaviour because he had four outstanding cases for dangerous driving and an outstanding case for possession with intent to supply drugs.

Submissions for the appellant

[8] On the appellant's behalf it was submitted that the sentence imposed is excessive. In the whole circumstances a non-custodial disposal was available and was appropriate. If a custodial sentence was required, 5 years imprisonment is excessive.

[9] The appellant was aged only 16 and 17 during the period of the offence. He was a drug user who had supplied to his peer group as a means of funding his own drug use. This was not a case of an adult dealer preying on young people and children. The quantities of drugs supplied and the money made were modest and low level.

[10] The sheriff's characterisation of the appellant as a ruthless drug dealer, and his assessment of the level and extent of his drug dealing, were not fair descriptions. While the sheriff noted that the appellant was not charged with supplying Jessica, or with culpable or reckless conduct towards her, or with causing her death, he had been heavily influenced by the tragedy and had passed a sentence which reflected it. In effect, he had held the appellant criminally responsible for more than the charge libelled. In doing so he had fallen into much the same error as the sheriff had in *Liam Doyle* v *Her Majesty's Advocate*, Unreported, 16 May 2017, HCA/2017/000143/XC.

[11] The appellant had a difficult and abusive childhood. He had several adverse childhood experiences. He is genuinely remorseful. He has given up drugs, and he has significantly limited his alcohol intake. He has distanced himself from a negative peer group. He and his family moved to Fife from West Lothian in 2020, leaving behind his mother's former partner, who had been abusive. They now have a calmer and more stable home life. He is in employment, having secured an apprenticeship. His employers remain supportive of him. The CJSWR is in very positive terms. The sheriff had been wrong to doubt, because of the pending cases, the very significant positive changes which the

appellant has made to his life. The possession with intent to supply charge concerns cannabis and is said to have occurred in September 2020. At the time the sheriff passed sentence two of the pending matters post-dated the move to Fife, both being dangerous driving charge said to have been committed in March and April 2021. One of those matters had been dropped and the appellant had recently pled guilty to the other. Sentence had been deferred to await the outcome of the present appeal. The sheriff had not given sufficient weight to the appellant's age at the time of the offence. In the whole circumstances a non-custodial disposal had been available and appropriate. In any case, and on any view, a headline sentence of 5 years' detention was excessive.

Decision and reasons

[12] We are in no doubt that the sentence which the sheriff imposed is excessive.

[13] The appellant pled guilty to being concerned in supplying a class A drug over a period of 5 months. We are also mindful that during part of that period one of the persons he supplied, MW, was aged 15, and therefore a vulnerable person. Nevertheless, we are clear that the sheriff erred in several material respects.

[14] We consider first the submission that the sheriff treated the appellant as if he was guilty of more than the offence libelled in the plea which was tendered and accepted. We remind ourselves of the court's observations in *Liam Doyle* v *Her Majesty's Advocate.* In that case the appellant, a first offender, pled guilty to supplying ecstasy to four 15 year old female acquaintances when he was aged 15 years and 9 months. The first offence was committed on 19 March 2016 when, at their request, he supplied ecstasy to two of the acquaintances. After consuming the drug one of them became unwell and was taken to hospital. The appellant knew about that. A week later he supplied six tablets to another of

the acquaintances. This was at her request so that she could consume them with friends at a sleepover. He told the girls to be careful and only to take half a tablet at a time because they were lethal and were the same type which had been consumed by the girl who had been admitted to hospital the previous week. The girl who bought the tablets and two other girls became unwell and were hospitalised. Tragically, the girl who bought the tablets died. By the time of sentencing the appellant had moved to a different area, away from his previous anti-social peer influences, who had been older than him. He was remorseful and determined not to repeat his conduct. He was assisting the police in relation to proceedings against the older person who had supplied him with the drugs. The CJSWR was favourable and it identified suitable possible non-custodial disposals. The sheriff sentenced the appellant to 18 months detention (reduced from a headline sentence of 2 years because of the plea of guilty). He remarked:

> "To my mind, not only has the appellant committed the crime libelled, he has shown a reprehensible degree of recklessness and utter disregard for the wellbeing of the other youngsters to whom he supplied this drug."

[15] The court (Lord Malcolm and Lord Turnbull) allowed the appeal and substituted a community based disposal. In delivering the court's reasons Lord Malcolm observed:

> "[8] Although the sheriff recognised that the appellant was not charged with causing the death of one of the girls, it is hard to avoid the impression that he was heavily influenced by it. In any event, it is clear that he went beyond the terms of the charge to which the appellant had pled guilty and sentenced on the basis of culpable and reckless conduct. In our view, in this context, and as the sheriff implicitly recognised, this is a distinct criminal element over and above unlawful supply. On behalf of the Crown the advocate depute submitted that it is no more than an aggravation which the sheriff was entitled to take into account, but, even if that is correct, in our view it should have been part of the libel.
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> [9] In the tragic circumstances we can understand why the sheriff made these remarks, but it is fundamental that an offender can only be sentenced on the basis of the terms of the charge, and in particular any plea of guilty tendered and accepted in response to that charge. We make no criticism of the prosecuting authority. The terms of a charge are a matter for the Crown, and no doubt for good reason the libel

> did not go beyond the unlawful supply of ecstasy. The appellant did not face a charge of culpable homicide, nor one of culpable and reckless conduct.
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> [10] For these reasons we consider that the sheriff erred in coming to the view that he had no alternative to the imposition of a period of detention. Having regard to the youth of the appellant at the time, the circumstances in which the supply occurred, the fact that he is a first offender, the terms of the report, and the assistance which he is giving to the police concerning the supplier, we consider that the matter can be dealt with by way of the imposition of a Community Payback Order, allied with a supervision requirement and an order for unpaid work …"

[16] We recognise that the circumstances in the present case are not on all fours with those in *Doyle*, but in our view there is a good deal of similarity. We have the strong impression that the sheriff here was heavily influenced by the tragic and fatal consequences of the consumption by Jessica of ecstasy which the appellant had supplied to MW. As in *Doyle*, the sheriff seems to have sentenced the appellant for something which did not form part of the libel to which he had pled guilty.

[17] We turn to consider whether the sheriff treated the appellant's involvement in supplying drugs as being greater than in fact it was. In our view he did. On the material before the sheriff (and, in particular, having regard to the terms of the agreed narrative and the CJSWR), his characterisation of the appellant as a ruthless drug dealer, and his assessment of the level and extent of his drug dealing, were not accurate descriptions of the position. The appellant was a drug user who had supplied to his peer group as a means of funding his own drug use. He was not an adult dealer preying on young people and children. The quantities of drugs supplied and the money which he made were modest and low level. The sheriff's statement that analysis of the appellant's mobile phone established numerous conversations over the period of the libel with various contacts relating to the sale of ecstasy over-stated the position. In fact, the narrative was that the analysis showed several messages during the period of the libel between the appellant and MW relating to

the sale of ecstasy by the appellant and one further message exchange on 9 March 2019 between the appellant and another person discussing the supplying by the appellant of ecstasy to that person.

[18] In addition, the sheriff did not attach sufficient weight to the following factors. The appellant was only 16 to 17 at the time of the offence. He had had adverse childhood experiences. There was a very positive CJSWR. The appellant was genuinely very remorseful for having committed the offence. His mental health had suffered because he blamed himself for the occurrence of the tragedy. He had abstained from drugs and he had distanced himself from his former negative peer group. He was in employment, working as an apprentice. The sheriff ought not to have discounted the positive changes in the appellant's circumstances because of the pending charges. Most of those charges concerned offences alleged to have been committed before the appellant's move to Fife. The only remaining exception is a charge of dangerous driving (by driving too close to road workers) on 29 March 2021. The appellant pled guilty to that charge on 28 January 2022 and sentence has been deferred to await the outcome of this appeal.

[19] We recognise that even on a correct view of the facts the decision between detention and a non-custodial disposal is a difficult one in the present case. However, we are satisfied that the balance ought to come down in favour of a non-custodial disposal. The fact that the appellant has already spent 3 months in detention - the equivalent of a sentence of 6 months detention - reinforces us in that view. Had it not been for the period he has spent in custody and his guilty plea we would have imposed a Community Payback Order with a requirement for unpaid work or other activity of 300 hours. We discount that to 225 hours because of the guilty plea. In view of the time the appellant has spent in custody, we shall reduce that to 100 hours.

Disposal

[20] We allow the appeal, quash the sheriff's sentence, and substitute a Community Payback Order with a requirement for 100 hours unpaid work or other activity in lieu thereof. That work will require to be completed within 12 months of today's date.