APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 25
HCA/2025/000068/XC

Lord Doherty
Lord Clark

OPINION OF THE COURT

delivered by LORD DOHERTY

in

APPEAL AGAINST SENTENCE

by

ARBER KETUKA

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg, sol adv; MTM Defence Lawyers, Falkirk
Respondent: M Way, AD (ad hoc); Crown Agent

13 June 2025

Introduction

[1] The appellant pled guilty under section 76 procedure to the production of cannabis contrary to section 4(2)(a) of the Misuse of Drugs Act 1971 and to being concerned in the supplying of cannabis contrary to section 4(3)(b). Both offences were committed between 27 April 2023 and 22 June 2023. The appellant farmed cannabis plants in two adjacent first floor flats in Falkirk. He was paid £200 a day for doing it. A connecting opening had been

made in a supporting wall between the flats to facilitate this. Every room in the flats was used for cultivation. There was extensive lighting, ducting, ventilation and watering equipment, including sheeting and hosing. When the police discovered the operation there were 180 plants, which had the potential to produce 15 kilograms of high quality cannabis bud. The maximum value of the cannabis likely to be produced by the plants was £172,800. On arrival of the police the appellant fled by accessing the roof of the property and climbing down from there to the street. The appellant is an Albanian national. Prior to the commission of these offences he had been residing in London.

The sheriff's sentence

[2] The sheriff had regard *inter alia* to the guidance provided in *Lin* v *HM Advocate* 2008 JC 142 and to the Sentencing Council for England and Wales Sentencing Guideline for Production of a controlled drug/Cultivation of cannabis plant. *Lin* indicated that the starting point for "gardeners" involved in relatively large scale operations ought ordinarily to be in the range of 4 to 5 years' imprisonment. In terms of the Sentencing Guideline, the appellant had a significant role rather than a lesser role, and the operation was on an industrial scale, either category 2 or category 1. The sheriff selected a headline *in cumulo* sentence of 42 months' imprisonment which she reduced to 32 months and 2 weeks because of the utilitarian value of the plea of guilty. She backdated that sentence to the date of the appellant's remand in custody, 5 November 2024.

Submissions for the appellant

[3] The headline sentence is excessive. In *Lin* the court observed in relation to the 4 to 5 year starting point (para [11]):

> "Although this range appears to be higher than that currently set in England (where the cases cited to us tend to suggest a starting point of 3 years) we consider that the need to discourage a new development in this jurisdiction justifies that difference."

The commercial production of cannabis in Scotland is no longer a new development. That factor could not now justify higher sentences than in England and Wales. Moreover, since *Lin* the Sentencing Guideline had been issued. In terms thereof the appellant ought to be viewed as having a lesser role, or a role somewhere between a significant role and a lesser role. For those reasons the court may wish to consider referring the case to a court of three judges where the continued applicability of the guideline range in *Lin* could be considered. Besides, *Lin* was a more serious case where there had been 849 plants.

[4] So far as the English Sentencing Guideline is concerned, the quantity of drugs involved here places the appellant in category 2, not category 1. The range for significant role category 2 cases is 2 years 6 months to 5 years and the starting point is 4 years. The range for lesser role category 2 cases is 26 weeks to 3 years and the starting point is 1 year.

[5] In *R* v *Andi Toromani* [2023] EWCA Crim 1302 Mr Toromani had looked after 197 plants capable of producing 10.87 kilograms of cannabis with a maximum value of £58,360. The Court of Appeal considered that his involvement fell between a significant role and a lesser role, and that the amounts produced placed the harm in category 2. The appropriate headline sentence was 3 years' imprisonment, which was reduced to 2 years 3 months because of a guilty plea.

[6] The appellant's role was less significant than Mr Toromani's. His sentence should also be compared to sentences passed on five men in Jedburgh Sheriff Court in January this year for being concerned in the production or supplying of cannabis in Galashiels. The drugs involved there, which were cultivated in two nearby properties, were said to have a

street value of up to £2.4 million. All of the accused pled guilty and their sentences ranged between 18 months and 28 months.

[7] All of these considerations suggested that the headline sentence of 42 months for the appellant is excessive.

Decision and reasons

[8] The appellant pled guilty to two serious offences. The sentence passed was an *in cumulo* sentence for both offences. The issue is whether that *in cumulo* sentence was excessive.

[9] *Lin* remains a guideline judgment for gardeners concerned in relatively large scale production operations. The quantity of drugs there (849 plants) was higher than here, but so was the headline sentence of 5 years. We accept that the relatively large scale production of cannabis is not now a new development in Scotland. While that factor may no longer justify higher sentences being imposed here than in England, the need for deterrence remains given the current prevalence in Scotland of such large scale operations. It is also worth recalling that *Lin* was decided during the period (between 2004 and 2009) when cannabis was classified as a class C drug, whereas it is now a class B drug, and that greater harm is associated with class B drugs than with class C drugs.

[10] Turning to the Sentencing Council Guideline, and culpability, there are factors pointing to the appellant having a significant role. There was an expectation of a significant financial advantage - payment of £200 a day. The appellant must have been well aware of the scale of the operation. Moreover, he seems to have been trusted to be in sole charge of its day-to-day running. On the other hand, there is no indication he had any influence on

those above him in the chain. Weighing these factors, we think it is right to treat him as having a significant role.

[11] Category 1 harm involves an "operation capable of producing industrial quantities for commercial use". Category 2 harm occurs where there is an "operation capable of producing significant quantities for commercial use". In *Toromani* the court considered the operation to be "high up the scale of category 2 cases". The plants there were expected to produce a total of 10.84 kilograms of cannabis with a maximum value of £58,360. Here, the harvest could have been 15 kilograms, the plants were of higher quality, and the maximum street value was £172,800. If the harm is not category 1 it is at the top of the category 2 scale.

[12] We have not obtained any assistance from the information given to us about the Jedburgh Sheriff Court cases. We do not have the narratives for those cases or details of any mitigation which there may have been, and we do not know what the headline sentences were.

[13] In the whole circumstances we are not persuaded that a headline sentence of 42 months was excessive. It is 6 months below the bottom of the range of starting points in *Lin,* and 6 months below the starting point for a significant role category 2 harm case. It is only 6 months more than the headline sentence in *Toromani.* Culpability here was no less than in *Toromani* and the harm here was greater.

[14] Since we are satisfied that the sentence here accords with the guideline in England and Wales, it is not necessary for the determination of this appeal for it to be referred to a larger court where the continued applicability of the guideline range in *Lin* might be considered.

[15] For these reasons the appeal is refused.