APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 47
HCA/2018/000058/XC

Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MENZIES

in

APPEAL AGAINST SENTENCE

by

BARRY O'NEIL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C Mitchell; Capital Defence Lawyers, Edinburgh (for S Grady Solicitors, Glasgow)
Respondent: A Prentice, QC; Crown Agent

14 June 2018

[1] Barry William O'Neil pled guilty to an amended charge 2 on the indictment with the consequence that his plea was to a contravention of the Misuse of Drugs Act perpetrated between 1 March and 31 March 2013 at or near Crow Road, Glasgow and elsewhere to the prosecutor unknown in that while acting along with the other named accused he was concerned in the supplying of cocaine in contravention of section 4(3)(b) of the Misuse of

Drugs Act 1971. The offence was aggravated by a connection with serious organised crime in terms of section 29 of the Criminal Justice and Licensing (Scotland) Act 2010.

[2] The sentencing judge selected a headline sentence of 8 years imprisonment of which 1 year was attributable to the aggravation. The sentence was reduced to 7 years 4 months to take account of the guilty plea. A travel restriction order was also imposed in terms of section 33 of the Criminal Justice and Police Act 2001 for a period of 2 years prohibiting the appellant from leaving the United Kingdom. In this appeal the appellant does not challenge the level of discount afforded or the period selected to reflect the aggravation. He contends that the headline sentence in respect of the drug supplying charge of 7 years (before the aggravation) was excessive in light of the nature of his involvement, his limited record with no previous convictions for drugs offences, his lack of offending since 2013, the positive terms of the criminal justice social work report which assessed him as being at medium risk of re-offending, and the fact that he was working full time and in support of his family before being sentenced. The sentence was also said to be excessive by comparison with other cases. The appellant also contends that the travel restriction order should not have been imposed.

[3] The agreed narrative presented to the sentencing judge described how the appellant acting on behalf of the organised crime group came to be involved in a drugs transaction with another established drugs dealer by the name of Robert Allan. An arrangement was entered into between the organised crime group and Mr Allan that he would take delivery of 2 kilos of cocaine with a wholesale price of £45,000. He was to make payment to the group once he had sold the drugs. Mr Allan made contact with the appellant using the telephone number which he had been given by the organised crime group and arranged to meet him on a day in March 2013 at Crow Road, Glasgow. On the arranged day the appellant met Mr Allan and handed him car keys, directing him towards a small, dark coloured car. The appellant told Mr Allan

that the drugs were in a concealed compartment between the registration plate of the vehicle and the compartment was operated by means of a lever underneath the bonnet. He also informed him that there were documents for the car in the glove compartment which he could use in the event of being stopped by the police. The appellant stated to Mr Allan "You better not fuck this up". Thereafter Mr Allan encountered various problems and renegotiated his arrangement with the organised crime group so that he returned one of the 1 kilo packages of cocaine and agreed to pay £30,000 for the other. During the following weeks he was visited by the appellant on two separate occasions during which the appellant demanded the money due.

[4] In his report to this court the sentencing judge explains that he was aware of the nature of the appellant's plea, of his record of previous convictions and of the time which had passed since this offending. The trial judge observed that the appellant had made a choice to seek out a means of addressing the financial difficulties which he had encountered through gambling by deliberately arranging to become involved with the organised crime group and with their drug dealing operation. He concluded that the appellant's culpability in relation to the 2 kilos of cocaine extended beyond a single day of acting as a courier. He observed that from what he had been told the appellant must have sought out the persons from whom he obtained the drugs and the car within which they were concealed. He noted that the appellant was privy to the knowledge of the unusual and sophisticated concealment and also of the fact that there were documents in the car to be used if Mr Allan was stopped by the police, all of which he communicated to Mr Allan. The appellant was then involved in taking steps to follow up the debt.

[5] The sentencing judge considered that it was of some note that the appellant had received a community payback order in 2012 for possession of a knife in a public place but

that this had not deterred him from deliberately seeking out an opportunity to commit a crime as serious as that described in charge 2. He recognised that the sentence which he selected was a significant one and explained that he did not accept that the appellant had merely acted as a courier of a substantial consignment of cocaine. His involvement extended beyond that in the ways described to him in the narrative.

[6] In her submissions to the court today Ms Mitchell maintained that the appellant's involvement in the drug trafficking operation was that of a courier on a single day followed by a request for payment for the drugs on two occasions. No threats were involved. The appellant did not feature in the extensive surveillance operation carried out over a number of years after the date of the offence in March 2013 and he has not offended since then. The sentencing judge failed to attach sufficient weight to these mitigatory factors and to the terms of the criminal justice social work report, which was said to be in positive terms and which assessed him as a medium risk of reoffending. The appellant had a good work record and supported his wife and four children.

[7] Counsel drew our attention to the recent case of *Alexander Connelly & Gary Corkindale* v *HM Advocate* 2017 HCJAC 42 in which the court held in the circumstances of that case that the appropriate starting point for the first appellant who was concerned with the supply of diazepam, a class C drug with a maximum street value of about £370,000, and had no analogous previous drug related convictions, was 5 years and the appropriate starting point for the second appellant, who was concerned in the supply of a variety of class B and class C drugs with a combined maximum street value of over £400,000 and who had one previous conviction in 2012 for supplying amphetamine, cocaine and cannabis resin for which he received a sentence of 3 years imprisonment was 8 years.

[8] Counsel also drew our attention to the English Sentencing Council's definitive guideline for drugs offences. Applying the categorisation in that guideline she suggested that the appellant fulfilled a "lesser role" although with some features consistent with a significant role, and that the category of harm resulting from 2 kilos of cocaine was in the lower half of category 2. This, she submitted, resulted in a starting point of about 5 years custody.

[9] We observe, as this court has observed repeatedly when referred to English sentencing guidelines in various areas of offending, that very great care should be taken in looking at such guidelines from a Scottish sentencing perspective. The courts in England and Wales approach the exercise of sentencing in significantly different ways from the Scottish approach and have different disposals available to them in certain circumstances. We are not inclined to place great weight on the definitive guideline relied on by Ms Mitchell in the present appeal. In any event, even if regard is to be given to it as a cross-check (and we do not suggest that this is necessarily appropriate) there are sufficient factors in the present appellant's case which point to him having a significant role that we do not consider that a starting point of 7 years can be said to be inconsistent with the definitive guideline. Nor do we find much assistance from the decision of this court in *Connelly & Corkindale.* While consistency of sentencing is desirable, each case will inevitably turn to a very great extent on its own particular facts and circumstances. In that case the two appellants were concerned in the supply of class B or class C drugs; neither was concerned in the supply of class A drugs as the present appellant was.

[10] We consider that it is misleading to describe the present appellant's involvement in this major drug trafficking operation as merely that of a courier driving a car on one occasion. The car was specially modified to provide a sophisticated safe and concealed compartment for the transportation of drugs. The appellant knew this and knew how access to this

compartment operated. He knew about the documents in the glove compartment which could be used in the event of being stopped by the police. He knew that the drugs were to be collected by Mr Allan and he chased Mr Allan up to pay for them on two subsequent occasions. The wholesale value of the cocaine, a class A drug, was £45,000 and the ultimate street value would have been greater than this. The sentencing judge took account of all the mitigatory features which have been relied on (see paragraphs 27 to 34 and 40 of his report to this court) and we cannot agree with Ms Mitchell that he failed to attach sufficient weight to them.

[11] Letters from the Scottish Prison Service have been provided to this court today indicating that the appellant has been of good behaviour and has responded well to being in custody. We take account of these letters but they do not cause us to change our conclusion as to the appropriateness of the sentencing judge's disposal. We do not consider the starting point of 7 years for the substantive offence before the 1 year aggravation can be said to be excessive. We therefore refuse this aspect of the appeal. The sentence after discount of 7 years 4 months imprisonment will stand.

[12] The appellant also appeals against the imposition of a 2 year travel restriction order in terms of section 33(2) of the Criminal Justice and Police Act 2001. Section 33 of that Act is quoted at paragraph 44 of the sentencing judge's report. It is appropriate that we set it out in full. It is headed:

> "**33 Power to make travel restriction orders**
> (1) This section applies where—
>
> (a) a person ('the offender') has been convicted by any court of a post-commencement drug trafficking offence;
> (b) the court has determined that it would be appropriate to impose a sentence of imprisonment for that offence; and
> (c) the term of imprisonment which the court considers appropriate is a term of four years or more.

(2) It shall be the duty of the court, on sentencing the offender—

(a) to consider whether it would be appropriate for the sentence for the offence to include the making of a travel restriction order in relation to the offender;
(b) if the court determines that it is so appropriate, to make such travel restriction order in relation to the offender as the court thinks suitable in all the circumstances (including any other convictions of the offender for post-commencement drug trafficking offences in respect of which the court is also passing sentence); and
(c) if the court determines that it is not so appropriate, to state its reasons for not making a travel restriction order.

(3) A travel restriction order is an order that prohibits the offender from leaving the United Kingdom at any time in the period which—

(a) begins with the offender's release from custody; and
(b) continues after that time for such period of not less than two years as may be specified in the order.

(4) A travel restriction order may contain a direction to the offender to deliver up, or cause to be delivered up, to the court any UK passport held…"

[13] At paragraph 45 of his report the sentencing judge stated as follows:

"Given the sentence I had decided to impose the qualifications in subsection 1 were met. Accordingly, I had a duty to impose such an order for at least 2 years unless I could find reasons not to do so, which I would require to state. I could find no such reasons."

[14] For the appellant, Ms Mitchell submitted that the sentencing judge had fallen into error in his approach to this exercise. He appears to have considered it was his duty to impose an order for at least 2 years unless he could find reasons not to do so. This, it was submitted, was not what the Act required. The court had to consider first if it was appropriate to make such an order, and thereafter if it determined that it was not so appropriate, to state its reasons for not making the order. In the present case it was submitted that such an order was not appropriate, that is that to do so would be neither necessary nor proportionate. The order was a restriction on the liberty of the appellant and was not justified in the circumstances of this

case. The appellant had not offended since the index offence in 2013. There was nothing to suggest that on his release from his sentence of imprisonment he would become involved in the direct importation of drugs from outside of the United Kingdom nor that he would travel outside the United Kingdom to do so.

[15] We consider that the submissions on behalf of the appellant in relation to the travel restriction order are well founded. The sentencing judge does appear to have considered that he was obliged to impose the order and not to have gone through the first stage of considering whether it was appropriate to do so. For the reasons advanced by Ms Mitchell in her submissions we do not consider that such an order is either necessary or proportionate in this case. For these reasons we do not consider that it is appropriate and we shall quash the travel restriction order. The rest of the sentence will remain unaltered.