



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 38  
HCA/2023/328/XC

Lord Doherty  
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD BOYD OF DUNCANSBY

in

APPEAL AGAINST SENTENCE

by

JAMIE RICHARD JOHN WAUGH GEORGE

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

**Appellant: Duguid KC; Levy & McRae**  
**Respondent: Bergin, ad hoc; Crown Agent**

13 October 2023

[1] The appellant pleaded guilty at a continued first diet to culpable and reckless behaviour to the danger of life. The charge narrates that for a period of about 4½ years between 2017 and 2021, he culpably and recklessly supplied the public with a dangerous substance, namely 2,4-Dinitrophenol (DNP) for human consumption, which he knew would

be consumed and well knowing that the substance was unsafe for human consumption, injurious to health and potentially lethal if ingested, and he did this to the danger of life.

[2] The sheriff sentenced the appellant to 37 months in prison, discounted from 4 years for the early plea.

[3] The ground of appeal that passed the sift is that it is arguable that the duration of the prison sentence is excessive.

## **DNP**

[4] DNP is a synthetic benzene-related chemical that has been used in the manufacturing of dyes, wood preservatives, photographic developers, explosives and insecticides. In a dried state it presents as a yellow powder. It is not a licensed medicine but has increased in popularity as a supplement for weight reduction, fat burning and body sculpture. It is available from online vendors via the internet. DNP causes energy to be released as heat rather than being stored. This process can reduce body fat. Users however face a high risk of severe toxicity. The effects can include kidney and liver failure, myocardial ischaemia or infarction, circulatory shock, and coma convulsions. Cardiac arrest can occur in more severe cases. Once these effects have started to develop they are very difficult to treat and death may occur in spite of the best possible medical treatment. Although toxicity is especially common after overdose, severe and even fatal adverse effects have occurred when DNP has been taken in the recommended doses. Longer-term effects of chronic use include nerve damage affecting the hands and feet, cataracts and deafness. Skin coming into contact with the powder will be stained yellow and skin rashes may occur. Numerous deaths from the use of DNP have been recorded and reported in the press.

### **Circumstances of offence**

[5] As a result of intelligence received officers from Food Standards Scotland (FSS) and the local authority attended at the appellant's home address on 18 July 2018, armed with a warrant. They conducted a search and a number of items were seized. These included a bag of red/black capsules; £1490 in cash; and a Royal Mail Special Delivery slips notebook with a list of 11 names showing 142 transactions, with self-adhesive postal tracking numbers against each entry. The list, dated 12 April 2018, appeared to be a record of DNP being posted out to customers both within the UK and internationally. A sealed foil packet labelled as DNP containing 50 red and yellow capsules was recovered. The label identified it as plant food coming from PPUK Research Chemicals. It stated that the product was sold for research purposes only and should only be used in a lab environment. If consumed the reader was directed to consult a doctor. In block capitals the label warned "NOT FOR HUMAN CONSUMPTION". The appellant's mobile phone was also seized.

[6] The appellant's garden shed was searched. The floor, walls and contents were heavily contaminated and stained with yellow powder. Quantities of powder were seized along with equipment and paraphernalia with which to process and package DNP.

[7] Later the same day the appellant was issued with a Remedial Action Notice requiring him to cease the manufacture or distribution of products containing DNP for human consumption from his home address.

[8] Subsequent investigation traced a number of people who had bought DNP from the appellant. They were either known to him through the gym he operated as a business or had responded because of adverts or information in internet chat rooms. A friend of the

appellant had assisted him to make up capsules and he had been paid by the appellant for his services. The friend had himself consumed DNP tablets and had an adverse reaction which resulted in him being hospitalised overnight. The appellant was aware of this.

[9] During the period January 2017 to July 2018 the appellant frequently posted multiple large letters and small parcels predominately to UK addresses but also to international destinations, including Europe, Asia, USA and Australia. The appellant told postal staff that the contents were either vitamins or computer parts.

[10] The appellant made regular bulk purchases of empty food grade capsules, pouches and containers. Over 100,000 capsules were purchased in the period up to July 2018.

Information from the appellant's mobile phone included advice from the appellant to another person on fat burners, DNP and other substances. He recommended taking DNP and said he used two per day and lost 1lb per day. Within the notes on his iPhone was an entry headed "Disclaimer 17/08/2017 Jack Smith's Research Chemical Shop". It listed DNP for sale in quantities of 10x200mg, 20x200mg and 50x200mg. The prices given equate to £1 per capsule.

[11] The appellant was arrested on 30 October 2018 and interviewed by police officers. In the course of interview he said that he was aware DNP was classed as a poison and was not safe for human consumption. He was aware of the dangers of taking it, including that the lethal dose was not known. He claimed that the money recovered was holiday money withdrawn from ATMs over a period of time, and that the notebook entries related to clothes, video games and audio equipment which he sold online. He claimed that he only bought 20,000 capsules and that he had taken as many as 50 tablets in one day.

[12] On 21 April 2021 the appellant sent an undercover police officer a list offering to sell DNP 50x75mg for £25. The officer asked about recommended dosage. The appellant replied to the effect that with 75mg there would be no side effects and that he would never up it. Capsules containing DNP were then sent to the officer.

[13] Further search warrants were executed on 23 June 2021. It was clear from the items recovered during that search that the appellant had continued to trade in DNP after the issue of the remedial action notice in July 2018 and after his arrest on 30 October 2018.

[14] Inspection of the appellant's bank accounts demonstrated over £50,000 of suspicious income, though it was unclear how much of this could be attributed to DNP. The business records for the appellant's business Muscle Hut showed over 2000 transactions between 2020 and 2021 with a turnover in the region of £235,000. A large part of that business related to supplements. A proportion of that was suspected to come from DNP, though it was unclear how much. A Proceeds of Crime statement served on the appellant showed a benefit of over £620,000.

### **The sheriff's approach to sentencing**

[15] The sheriff noted the effects of DNP and concluded that the danger of ingestion of the substance could not be underestimated. There had been a number of recorded deaths. It was clear the appellant knew the dangers of DNP and that the substance was not for human consumption. He had been involved in the supply of this extremely dangerous substance for a period of more than 4 years, notwithstanding the service of the Remedial Action Notice and his subsequent arrest in 2018. The appellant appeared to be the principal

in the operation. He had organised the manufacture and sale of the substance for considerable financial gain and he ran part of the operation through his gym business.

[16] In selecting the appropriate sentence the sheriff noted the lack of Scottish authority. He noted that the substance was not illegal but considered that he could be informed by decisions relating to the supply of illegal drugs in Scotland and by the Sentencing Council for England and Wales' Guidelines on the supplying of psychoactive substances.

[17] The sheriff concluded that the appellant's culpability was significant and that he was reckless to a high degree as to the harmful, and potentially fatal, consequences. He did not consider that the appellant had shown any genuine remorse. The appellant's claim to have only recently come to understand the dangers of DNP was contradicted by the evidence.

[18] He took into account the fact that the appellant had a very limited record, but found there was little else to mitigate the appellant's culpability.

### **Submissions for the appellant**

[19] DNP was not illegal or a controlled drug. Until November 2022 it was widely available for purchase on Amazon. The equation with supply of illegal drugs in Scotland was unfounded; the market for DNP is minuscule, being confined to persons whose interests are in bodybuilding and body sculpting. The number of fatalities in the UK attributable to the use of DNP was 33 over a period of 15 years to 2022. This was very substantially lower than the number of deaths in Scotland from the misuse of controlled drugs.

[20] The sheriff had speculated on the appellant's financial gain without any solid basis. The appellant ran a legitimate business and it was impermissible to speculate on how much

of his turnover could be attributed to the sale of DNP. The Proceeds of Crime statement was disputed. The suggestion that this was a large scale commercial operation was simply wrong. The appellant had no expectation of substantial financial gain; the sales ran alongside his gym facilities.

[21] The sheriff was wrong to consider that assistance could be found in cases relating to the supply of illegal drugs in Scotland. The use of the sentencing guidelines from England and Wales on the supply of psychoactive drugs might be justified but the sheriff had misapplied them. In order to have arrived at a starting point of 4 years the sheriff would have required to conclude that the appellant had a leading role and that the level of harm placed it in category 1, the most serious category. On a proper analysis he had a significant role rather than a leading role, and the harm level was category 2.

[22] The appellant did not have a close link to the sellers and was not abusing a position of trust or exploiting vulnerable persons. There were significant mitigating factors outlined in the Criminal Justice Social Work Report, in particular his lack of previous convictions, his pro-social lifestyle and his financial responsibilities for both his immediate family and for employees of his business. His livelihood was seriously endangered as was the continued employment of 13 of his employees.

[23] Similar cases in England had resulted in one custodial sentence of 28 months (*Jack Finney*, Chester Crown Court, reported in Mail Online 22/12/2021); and one of 9 months suspended for 12 months with 180 hours of unpaid community work and disqualification from acting as a company director for 2 years (*Sean Corrigan*, Carlisle Crown Court, BBC News website 07/02/19).

**Decision**

[24] In the absence of authority we consider that the guidelines from the Sentencing Council of England and Wales on the supply of psychoactive substances provide a useful analogy, subject to the caveat that they are to be used as a check rather than to be rigidly adhered to.

[25] Using the guideline the appellant falls into the "leading role" category. He was the principal person involved in the operation. He directed and organised the buying, processing and selling DNP for a period of over 4 years. It was on a commercial scale. The appellant would also appear to fall within category 1 - large supply indicative of commercial-scale operation. This would give a starting point of 4 years' custody with a range of 3 - 6 years.

[26] An issue of dispute is the scale of the commercial operation. We can understand the sheriff's scepticism that the financial benefit was only £2000 to £3000 per annum given the quantities involved. On the other hand, we doubt whether the financial returns would be as large as the sheriff appears to have assumed. We consider that the Proceeds of Crime statement is an unreliable foundation for an assessment of the financial return. We think it likely that the annual return, while more than that stated by the appellant, did not reach into the tens of thousands in any year of the operation. The operation appears to have been run as an adjunct to his gym business.

[27] Having regard to the range of sentences suggested in the guideline and taking a broad approach we consider that an appropriate starting point in this case is 3 years' imprisonment. Mitigating factors include the appellant's lack of previous convictions and the fact that he provides employment in his otherwise legitimate business venture.



Set against that is his continued supply of DNP in the face of the Remedial Action Notice and his arrest in 2018, and in the knowledge that DNP had caused the friend whom he involved to have a serious adverse reaction requiring hospital treatment.

[28] Balancing these factors we consider that the sheriff's selection of a 4 year headline sentence was excessive. We shall quash the sentence of 37 months' imprisonment and impose a sentence of 28 months' imprisonment, discounted from 3 years.