



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 32
HCA/2023/325/XC

Lord Pentland
Lord Boyd

OPINION OF THE COURT

delivered by LORD PENTLAND

in

APPEAL AGAINST SENTENCE

by

ALISTAIR DOUGLAS

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg, solicitor advocate, Renfrew Defence Lawyers
Respondent: Miller, AD (ad hoc), Crown Agent

30 August 2023

Introduction

[1] The issue in this appeal is whether the sentence of 5 years and 3 months imprisonment imposed on the appellant was excessive because it offended against the principles of comparative justice. The headline sentence selected for the appellant was 6 years; for each of his two co-accused (Mullen and Gilmour) the headline sentences were 10 years.

The facts and the guilty pleas

[2] The material facts may be briefly summarised. All three accused were involved in serious organized crime relating to the supply of controlled drugs and the possession of firearms. Mullen operated at a higher level in the group than both co-accused and pled guilty to a charge (charge 6) of directing them to commit serious offences involving drugs and firearms. The appellant and Gilmour pled guilty, though in different terms, to a charge (charge 5) of being involved in this criminal activity by agreement with Mullen. Gilmour and Mullen also pled guilty to a charge (charge 7) of conspiracy to murder a man, who appeared to be affiliated to a rival crime group.

[3] In terms of his plea to charge 5 the appellant accepted that during the period from 27 March 2020 to 1 June 2020: (a) he was concerned in the supplying of diazepam, cocaine and diamorphine; (b) he was in possession of an encrypted electronic device for the purpose of communicating about serious organized crime; and (c) he delivered a package containing a handgun and ammunition to Gilmour.

[4] As we have explained, Gilmour also pled guilty to charge 5, though in somewhat different terms. He accepted part (a) with the addition of the drug etizolam; accepted that he too was in possession of the type of electronic device referred to in part (b); and instead of part (c) accepted that he had in his possession and control a handgun, a shotgun and ammunition for the purpose of using them to commit acts of violence.

Previous convictions

[5] The appellant had no previous convictions. Gilmour had a substantial record extending to convictions for supplying drugs and attempted murder. He had served a

sentence of 8 years imprisonment. Mullen had a limited record; it included, however, a conviction for three charges of assault, two being to severe injury, resulting in consecutive prison sentences of 5, 12 and 18 months.

The approach of the sentencing judge

[6] The sentencing judge took into account that the appellant had played a lesser role in the activities of the organised crime group than Gilmour and Mullen, that he was not involved in the conspiracy to murder which was the subject of charge 7 and, unlike them, had no previous convictions.

[7] The charge to which the appellant pled guilty was, however, serious in that he played a significant part in the activities of a serious organised crime group by acting as a courier in respect of controlled drugs, including cocaine and diamorphine, and a package which turned out to contain a handgun and ammunition. The extent of his activity in transporting drugs was illustrated by the numerous instructions to him from Mullen about the collection and delivery of drugs. The extent of the group's involvement with diamorphine was illustrated by the recovery of 1.5kg of this drug in Gilmour's possession on 1 June 2020 and Mullen's subsequent message to the appellant on 4 June 2020 that it belonged to their organised crime group. The fact that this group was prepared to murder someone who appeared to be affiliated with a rival organised crime group made their activities even more sinister and dangerous and even though the appellant was not involved in the conspiracy to murder, his wilful blindness to what was in the package he delivered to Gilmour did not alter the fact that he was responsible for transporting within the group an operational firearm which could be used as a murder weapon. All of this indicated a high

level of culpability. The level of potential harm resulting from the supply of these drugs and the delivery of the gun and ammunition was high.

[8] The judge selected the same headline sentence of 10 years for Gilmour (10 years on charge 7 and 8 years concurrent on charge 5) and Mullen (10 years on charge 7 and 8 years concurrent on charge 6) as Gilmour had a more serious record but Mullen operated at a higher level in the group; these two factors balanced each other out. In relation to the appellant, the sentence had not only to reflect the principle of comparative justice relative to the co-accused but also the serious nature of the criminal activity in which he had been involved.

[9] Taking all relevant factors into account, the judge decided that an appropriate headline sentence in the appellant's case was 6 years imprisonment. That sentence was discounted, to reflect a plea at the trial diet, to 5 years 3 months and was backdated to 19 May 2023, being the date he pled guilty and was remanded in custody.

Appellant's submissions

[10] It was accepted on behalf of the appellant that a lengthy sentence of imprisonment was inevitable, but it was submitted that the headline sentence selected by the sentencing judge was excessive, having regard in particular to the appellant's limited role, his lack of previous offending and his personal circumstances, in respect of all of which he compared favourably with both co-accused. We were reminded that Mullen operated at a higher level in the group than the others and that the appellant and Gilmour had pled guilty to being involved in criminal activity by agreement with Mullen. Gilmour had also pled guilty to being concerned in the supplying of an extra drug (etizolam) and to having possession of a sawn-off shotgun for violent purposes. The appellant played no part in the conspiracy to

murder. Moreover, he had no criminal record, whereas each of his co-accused did have significant records. Reference was also made to the appellant's personal circumstances; his wife having died, he brought up three sons, one of whom suffered from long-term illness; the appellant was his carer. The appellant suffered from a number of medical conditions. He acknowledged that he had made a very bad decision by agreeing to become involved with the others. In all the circumstances, the principle of comparative justice had not been observed, resulting in an excessive sentence being imposed on the appellant.

Analysis and decision

[11] We have given careful consideration to all the submissions advanced on behalf of the appellant, but we are not persuaded that the sentence imposed on him was excessive. The offence to which he pled guilty was undoubtedly serious. He played a significant role in the activities of a serious organised crime group. His level of culpability was high, as was the potential for serious harm to be caused by what he agreed to do. The headline sentence for the appellant was 40 per cent lower than those selected for his two co-accused, the sentences for each of whom appear to us to have been relatively lenient. We consider that the differential adequately reflects the differing degrees of criminality and the differences in the respective criminal records of the three accused. While the principle is an important one (*Armstrong v HM Advocate* 2021 JC 227), the question of comparative justice as between various accused on the same indictment can only be approached on a somewhat broad basis. Attempting to draw fine distinctions is not appropriate or helpful. At the end of the day the focus for this court must be on the question whether the sentence imposed on the appellant was excessive in the whole circumstances. We are satisfied that it was not.

[12] The appeal is refused.