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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

REFERENCE BY HER MAJESTY'S ATTORNEY GENERAL FOR NORTHERN IRELAND (NO 5 OF 2003) (RICHARD HERBERT CROWE)

Before: Carswell LCJ, Nicholson LJ and McLaughlin J

CARSWELL LCJ

[1] The offender, now aged 30 years, pleaded guilty on re-arraignment on 29 January 2003 to four counts, one of possession of a Class B drug, one of possession of that drug with intent to supply, one of possession of a Class A drug and one of possession of that drug with intent to supply. He was sentenced by Her Honour Judge Kennedy on 21 March 2003 at Belfast Crown Court to three years' probation on each charge, to run concurrently with another period of three years' probation imposed by His Honour Judge McFarland on 29 November 2002 for drugs offences committed on 17 January 2001.

[2] The Attorney General sought leave to refer to this court the sentences imposed by Judge Kennedy, under section 36 of the Criminal Justice Act 1988, on the ground that those sentences were unduly lenient. We gave leave at the hearing before us on 13 June 2003 and the matter proceeded.

[3] On 6 April 2002 at 4.55 pm police entered premises at 21 Knockburn Park, Belfast, a dwelling house occupied by Robin Clarke and his girlfriend Wendy Ann Jones, by virtue of a warrant under section 23 of the Misuse of Drugs Act 1971. There were two persons in the house at the time, the offender and his girlfriend Julie Ann Gorman. When the offender was searched two items were found on his person, a bag of brown powder behind his belt and another bag of powder in his boot. He also handed over to the police a bag of brown powder which he had had in the pocket of his jeans. The bag of powder from his boot contained 18.16 grams of amphetamine, a Class B drug, and the other two bags contained 26.37 grams and 2.6 grams respectively of heroin, a

Class A drug. The total street value of these drugs was estimated originally by the police at £14,000, but is set out in the reference at £4,000.

[4] The offender denied in interview that the drugs were his. He said that he believed that it was paramilitaries who were entering the house and that he lifted three packages which were on the premises in order to conceal them. He suspected that they were drugs, and hid them because if paramilitaries found him on the same premises as drugs they would have shot him dead. His plea of guilty to the charges was entered on the basis that the intended supply was to the occupier of the house, not to other drug users by way of the usual type of supply for their consumption. Clarke has disappeared and has not been made amenable.

[5] The charges in respect of which he was put on probation by Judge McFarland consisted of three counts of possession of Class A drugs, five counts of possession of Class A drugs with intent to supply, two counts of possession of Class B drugs, two counts of possession of Class B drugs with intent to supply, two counts of possession of Class C drugs and two counts of possession of Class C drugs with intent to supply. The drugs involved included cocaine, diamorphine, morphine, pethadene and methadone, valued at about £5000, which had been the product of robberies of surgeries or pharmacies. The judge originally deferred sentence for six months in order to allow the offender to undergo addiction treatment. When the case eventually came on he decided, after hearing the offender's medical history and his response to treatment, to take what he described as an "innovative approach" by placing him on probation in the hope that it would give him the opportunity to make progress with curing his addiction. He appreciated quite clearly that the offences would ordinarily merit an immediate custodial sentence, but wished to try to break the pattern of drug abuse and reoffending.

[6] The present offences were committed on 6 April 20O2, in the interim period between January 2001, when Judge McFarland deferred sentence, and 29 November 2002, when he placed him on probation. It is apparent from the transcript that on the latter date he was informed of the further charges, but he did not take them into account because they were then being contested. When Judge Kennedy came to sentence the offender in respect of the present offences his counsel stated that Judge McFarland knew about these offences when he decided on probation. It is not clear, however, whether Judge Kennedy appreciated that he left them out of account or whether she was under the misapprehension that he took them into account as offences admitted by the offender and still regarded probation as an appropriate disposition of the case. If the latter were the case, she might well have followed such cases as *R v Duporte* (1980) 11 Cr App R (S) 116 and felt that she should not upset a course of treatment initiated by another court.

[7] The offender has a bad record going back to 1984, mostly for burglary and theft, with some motoring offences. He was convicted of a bad sexual offence in 1992, for which he was sentenced to 13 years' imprisonment. He has received a number of beatings from paramilitaries and a punishment shooting, in consequence of which he claims that he suffers from arthritis in the knees which prevents him from working. He has also received death threats from paramilitaries.

[8] He has lived for some two years with his present partner, who has also been a drug abuser. Both are undergoing continuing treatment to combat their addiction, but she is said to be very supportive of him. He had a very unsettled childhood and was in care from the age of nine, then in training school for periods. His present state of emotional health is fragile. The report of 8 November 2002, which was before Judge McFarland, describes him as having a diagnosis of borderline personality disorder with comorbid substance misuse. He continues to suffer from depression and anxiety.

[9] The factor which weighted most heavily with both Judge McFarland and Judge Kennedy was that the offender was responding to the addiction treatment and staying off drugs. He commenced a course of methadone in May 2002 at the Opiate Clinic. By November 2002, when Judge McFarland placed him on probation, he had been off drugs for six months and was regarded as reasonably stable. That stability was maintained and he remained "clean" between that time and March 2003, when he was dealt with by Judge Kennedy. In the up-to-date reports put before us it was stated that his methadone dosage had been reduced to half and he continued to be drug free. His psychological health had improved somewhat since November 2002, though set back by concern over this reference. Ms Elaine McNally of the community Addiction Team told the probation officer who prepared an addendum dated 11 June 2003 to his pre-sentence report that he appeared to be making significant progress, and that she was impressed with how he was managing his addiction.

[10] In presenting the case before us Mr Morgan QC for the Attorney General acknowledged the force of the principle in *R v Duporte* that a sentencer should not ordinarily intervene to upset the course of a probation order, unless there is reason to do so. He suggested, however, that Judge Kennedy may have been under a misapprehension about the extent to which Judge McFarland had taken into account the fact that the offender had committed further offences in May 2002, during the period of deferment of sentence. He also submitted that the offences were of such gravity of themselves, when taken along with the offender's bad record and propensity to reoffend, that a custodial sentence was the only appropriate disposition, outweighing the rehabilitation factor, when he reoffended in April 2002.

[11] Mr Adair QC submitted in reply that a court could properly depart from the normal pattern of sentencing, which he accepted would ordinarily mean a custodial sentence in a case such as the present, when probation might be effective to break the cycle of offending. He cited to us *R v Adamson* (1988) 10 Cr App R (S) 305, *R v Heather* (1979) 1 Cr App R (S) 139 and *R v Bradley* (1983) 5 Cr App R (S) 363 in support of his submission. He reminded the court that sentencing has been described as an art, that a trial judge is well placed to get the feel of a case and that leniency is not in itself a vice.

[12] We have come to the conclusion that the sentence was a justifiable exercise of the judge's discretion and that we should not upset it. We must emphasise that this case is exceptional and that persons convicted of possession of drugs, particularly Class A drugs, with intent to supply must ordinarily expect a custodial sentence. There are, however, two factors which support the judge's disposition. First, the facts (on the plea put forward and accepted) were unusual, in that the supply was not of the ordinary kind, distributing or passing on drugs for the use of others, but attempting to safeguard them for the benefit of their owner. That is in itself reprehensible and deserving of a criminal sanction, but it is not on the same level as the regular case of possession with intent to supply. Secondly, Judge Kennedy was faced with a defendant who was undergoing a course of probation supervision and addiction treatment, ordered by another judge a few months earlier, which was apparently having some beneficial effect and gave cause for cautious optimism about his future if it were allowed to continue. We agree that the sentence was lenient, but in the circumstances of the case we are not prepared to hold that it was unduly lenient or to quash the judge's order.