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Judgment: approved by the Court for handing down | *Delivered:* **17/05/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

GARY MCKEOWN

_____

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE

(NUMBER 2 of 2013)

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THE QUEEN

-v-

HAN LIN

_____

Before: Morgan LCJ, Higgins LJ and Girvan LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] These cases came on for hearing on the same day. The reference is concerned with the sentence for possession of a commercial quantity of Class A drugs with intent to supply. The appeal arises from the production by cultivation of a large amount of cannabis, a Class B drug. We considered it helpful to identify in this judgment the relevant case law to be considered and the assistance that may be obtained from the Sentencing Guidelines Council. We have also taken the opportunity to address the need to make the sentencing process more transparent:

(i) by giving reasons in a determinate custodial sentence for the imposition of a licence period particularly where it is beyond the minimum period required by the statute; and

(ii) by identifying the starting point for the sentence before making any allowance for a plea in the Crown Court.

DPP Reference (R v McKeown)

[2] Mr McKeown was convicted on 8th January 2013 at Belfast Crown Court of the following offences:

(1) Possession of a Controlled Drug of Class A with Intent to Supply, contrary to section 5(3) of the Misuse of Drugs Act 1971,

(2) Possession of Criminal Property contrary to section 329(1)(c) of the Proceeds of Crime Act 2002,

(3) Possession of a Controlled Dug of Class C, contrary to section 5(2) of the Misuse of Drugs Act 1971,

(4) Possession of a Prohibited Weapon contrary to section 45(1)(f) of the Firearms (NI) Order 2004.

On 12th February 2013 he was sentenced to a total sentence of 2 years imprisonment, comprising 9 months custody and 15 months on licence as follows:

Count (1) 2 years imprisonment (9 months custody and 15 months on licence),
Count (2) 6 months concurrent,
Count (3) 1 month concurrent
Count (4) 3 months concurrent.

The reference is concerned with the sentence on the first count.

[3] The background to the offences is that on Thursday 22nd September 2011 at 20.05 hours, police sighted a silver VW Golf being driven erratically in the Whiteabbey Village area of Newtownabbey. The car came to rest in a parking bay and the police officers spoke to the driver, the defendant. Upon searching the car, police officers located a shower bag on the front seat containing cocaine (254g at 18% purity)(count 1) and £3,000 divided into £100.00 bundles (count 2). The defendant ran off before officers were able to arrest him. The defendant's home address was searched on 23rd September 2011, during which police officers located;

1. 420 diazepam tablets (count 3)

2. An electronic money counter on the kitchen worktop

3. A large bottle containing cash in a hall storage cupboard (total £2,168.36 comprised of £1,145.00 in sterling notes, £944.08 sterling coins and 95 euros in notes

4. CS gas canister from an upstairs bedroom (confirmed to be subject to the Firearms (NI) Order 2004) (count 4).

The value of the cocaine was estimated as being between £10,000 and £15,000.

[4] The defendant was eventually apprehended on 6th September 2012 and arrested for these offences. During the course of a police interview he stated that he had a big drug problem. He stated that part of it, the cocaine, was to be sold, but a big amount of it was to be taken by himself. He stated that he was selling cocaine in order to obtain free cocaine for himself. In relation to the £3,000 located next to the quantity of cocaine, he stated that this money was to pay for the same cocaine and that he was going back to pay when he was stopped by the police. He further stated that this was money that he had lying about and he was getting paid cash in hand for working on the side. When asked what work he was doing, he stated 'anything you put in front of me' but did not refer to any specific job.

[5] The cash in the bottle at his home address was not the subject of any charge. He said that it was money he had saved up over the years for a child with his ex-girlfriend. He stated that the diazepam tablets were all for him and he was consuming about 30-40 per day at that time. There was no charge of supply in relation to those tablets. He had bought the CS spray when he was on holiday years ago in Turkey or Bulgaria as a holiday novelty thing. At the time he was stopped with the cocaine he had just bought the VW Golf for £2,500 with money he was just saving.

[6] Prior to the arraignment and at the sentence hearing it was made clear that the prosecution case was that the defendant was a commercial supplier; it was not accepted that he was just supplying to fund his own addiction. The prosecution did not accept that the £3,000.00 located next to the cocaine in the car was to purchase the same cocaine, particularly considering that the value of the drugs far exceeded the quantity of cash. The reference states that the evidence of the money counter, the other quantities of cash located at the defendant's home address and his cash purchase of a car just prior to 22nd September 2011 was relied upon to support the proposition that the defendant possessed the 254g of cocaine to supply it commercially. Although some of these matters remained in dispute and were not resolved this was not a case where a Newton hearing was necessary. The defendant accepted by his plea that the cocaine was held partly for his own use and partly for commercial purposes and the learned trial judge was entitled to take into account the admissions made in the pre-sentence report which were not disputed.

[7] In June 2008 the defendant was convicted of an offence committed in September 2007, when he was 21 years old, of supplying Class A Drugs (ecstasy). He was sentenced to a combination order comprising 2 years' probation and 200 hours' community service. He also had 7 convictions concerned with motor vehicles. The pre-sentence report indicates that his drug taking began shortly after his mother was imprisoned for a driving incident in which a teenage boy was killed. He had gradually begun to supply drugs to fund his own misuse. With regard to the cocaine and cash found in his car he accepted that this was not the first time he had been involved in such a transaction and that he was a 'runner' for those involved in a larger operation. The author of the report concluded that unlike his previous offence, which followed his mother's conviction, the current offences were the result of a lifestyle choice. He was assessed as posing a medium likelihood of re-offending. A psychiatric report suggested that he had found it difficult to detach himself from his present lifestyle.

[8] The learned trial judge observed that the defendant was commercially involved in the sale of Class A drugs. He noted that the defendant did not learn from the Combination Order which had been imposed for his earlier conviction for Possession of Class A drugs with intent to supply. He took into account the plea of guilty although he noted that the defendant had been caught red-handed and that his response to that was to run away. He had regard to the fact that the defendant was addicted and was assessed as a medium risk of re-offending. He did not consider that this was high grade dealing and selected a term on the first count of 2 years imprisonment of which 9 months would be in custody.

R v Han Lin

[9] This applicant was convicted following a plea of guilty to a single count of producing a Class B controlled drug contrary to s4(2)(a) of the Misuse of Drugs Act 1971 entered at Enniskillen Crown Court on 13th December 2012. On 22nd January 2013 he was sentenced to a determinate custodial sentence of 3 years and 6 months (1 year 9 months in custody and 1 year 9 months on licence).

[10] The applicant was living alone and acting as a gardener in a house which was used for the growing of cannabis. He was not involved in the setting up of the operation and was tending the plants in accordance with instructions. His visa had expired so his immigration status was at best uncertain. There were 673 plants, mostly immature, spread across five rooms. The applicant was sentenced on the basis that the value of the plants was £188,440. He did not have a prior criminal record. The applicant benefitted in the amount of £3,000, which he sent home to his family who were in financial difficulties.

[11] His parents and sister reside in China. At the age of 15 years his family secured an overseas school placement for him in London. He reports that he flew to London in October 2009 where he was issued with a two year student visa. He

indicated that his family had been deceived by the person who organised his placement. He attended a school in Northampton for six months but at that stage his family were unable to pay the fees and he was asked to leave the school. He lived a transient life after that point, working in a Chinese restaurant in Leeds and then in London. He relied on friends. He then became aware that his parents had borrowed the money to secure his visa, tuition and accommodation. Becoming worried that his visa was due to expire in October 2011, he travelled to Northern Ireland and then to Dublin where he worked for 4-5 months. He states he was then approached by a former friend who advised him of more lucrative employment. He was 17 years old at the time of detection.

[12] The applicant informed the probation officer that he was struggling to deal with being in a custodial setting where he has communication difficulties. He said that he believed that he was growing Chinese medicines but the learned trial judge correctly rejected this as implausible. He described his role in tending the plants which the prosecution accepted but did not disclose the identity of anyone else involved. The probation service considered that there was a low likelihood of re-offending in the next 2 years.

[13] The aggravating features identified by the learned trial judge were the professional nature of the operation, its scale and the health of the plants. The mitigating features were the early plea, co-operation with police and the fact that he was 17 years old at the time of arrest. The judge also recorded that the applicant was at the bottom end of the scale in terms of responsibility and therefore culpability. The sentence imposed seems to have been influenced in particular by the scale of the operation.

The relevant cases

Supply

[14] The guideline case on the sentencing of offenders for possession of drugs with intent to supply remains R v Hogg and others [1994] NI 258. The court adopted the principles set out in R v McCay [1975] NICA 5 by Lord Lowry:

> "1. Possession of a drug is less serious than supplying it to another;
>
> 2. Introducing drugs to someone with no previous experience is more serious than supplying drugs to someone who is already using them;
>
> 3. Possessing or supplying L.S.D. or heroin is worse than possessing or supplying cannabis.

4. In connection with the offences of supplying and permitting premises to be used, a previous conviction for a similar offence should weigh heavily against the accused;

5. A previous clear record in connection with drug offences is relevant but is not by itself a clear indication against a custodial sentence;

6. In possession cases, and to a lesser extent in cases of supply and permitting premises to be used, a previous criminal record unconnected with drugs is of minor importance;

7. Severe sentences, including custodial sentences of any kind, are of assistance in signifying the community's rejection of drug taking and its hostility to traffickers in drugs and even to those who supply them free of charge;

8. The importation of drugs, especially when done for gain, ought to be very severely punished;

9. One who runs an establishment or organises parties or groups to encourage drug-taking should normally receive a heavy prison sentence;

10. The same principle applies strongly to those who in relation to drugs corrupt young people in this fashion or otherwise;

11. The fact that the offences involve a group or "cell" of people may constitute a circumstance calling for heavier punishment than would be appropriate in purely individual cases."

[15] The court then added some observations of its own:

"(i) The supply of any Class A drugs or their possession with intent to supply should generally be visited with a heavier sentence than in the case of Class B drugs. The legislature has drawn a distinction between them, and the Court of Appeal in England has consistently followed this course. In R v Martinez (1984) 6 Cr App R (S) 364 it was stated that

distinctions should not be drawn between the different types of Class A drugs; (cf also R v Virgin (1983) 5 Cr App R (S) 148). In R v Aramah (1982) 4 Cr App R (S) 407 the court made no distinction within the categories of either Class A or Class B drugs.

(ii) There are several different levels of gravity of involvement in the supply of drugs. In general, the importer of substantial quantities is to be regarded as the most serious offender and should receive the heaviest punishment. Below him is the wholesaler, who supplies the small retailers with drugs for distribution to the public on commercial arrangements which may be straight sale, sale or return or the retention by the retailer of a percentage of the selling price. The next category in descending order of culpability is the retailer who sells to the public for commercial gain. At the bottom of the scale is the person who supplies a small amount without a commercial motive, for example, where cannabis is supplied at a party (see R v Aramah).

(iii) The offenders in drugs cases are generally young people, frequently of good backgrounds and without any previous criminal involvement. Not uncommonly the major suppliers use the services of such people for retailing, as the importers use young people of presentable appearance as couriers, in order to attempt to avoid detection of the traffic. In many cases a custodial sentence can blight a promising career. It is always right for a court to keep such considerations in mind when sentencing, but the importance of deterrence of others and the marking of the community's rejection of drug taking will often prevail and lead to the imposition of an immediate custodial sentence."

[16] The court then summarised its conclusions:

"1. Importation of drugs on a large scale is the most serious offence in this area, and is invariably to be visited with a substantial custodial sentence. We respectfully agree with the guidelines set out by Lane CJ in R v Aramah.

> 2. Supplying drugs is the next in descending order of gravity, with possession with intent to supply a short distance behind. In many cases there may be little distinction between them, for the charge may depend on the stage of the proceedings at which the defendant was apprehended. In all but exceptional cases they will attract an immediate custodial sentence, which may range from one of some months in the case of a small quantity of Class B drugs to one of four or five years or more in the case of supply of appreciable commercial quantities of Class A drugs. We do not find it possible to narrow the range any more closely, for much will depend on the circumstances of the supply, its scale, frequency and duration, the sums of money involved and the defendant's previous record, together with his or her individual circumstances.
>
> 3. More flexibility may be adopted by the sentencing court in the case of possession where there has been no supply of drugs or intent to supply them to other persons. Large-scale possession, even without supply to others, and repeated offending may still require an immediate prison sentence. Possession of Class B drugs may generally be regarded as less heinous than possession of Class A drugs. In many cases of the former at least there will be room to consider a suspended sentence or non-custodial methods of dealing with the offender."

[17] It is clear that the court drew heavily on the decision of the English Court of Appeal in R v Aramah. It is worth noting in this context that in relation to the supply of Class A drugs that court said:

> "It goes without saying that the sentence will largely depend on the degree of involvement, the amount of trafficking and the value of the drug being handled. It is seldom that a sentence of less than three years will be justified and the nearer the source of supply the defendant is shown to be, the heavier will be the sentence."

[18] The submission that an offender's addiction might be taken into account as a mitigating factor was rejected by this court in R v Stalford and O'Neill NICA

(03/05/96). The court approved the statement of Simon Brown J in R v Lawrence 10 CAR(S) 463:

> "We cannot make too plain the principle to be followed. It is no mitigation whatever that a crime is committed to feed an addiction, whether that addiction be drugs, drink, gambling, sex, fast cars or anything else. If anyone hitherto has been labouring under the misapprehension that it was mitigation, then the sooner and more firmly they are disabused of it the better."

Production

[19] There is no guideline case concerning the production of drugs. That is unsurprising given the range of circumstances in which the offence can be committed. There is, however, guidance in R v Xiong Xu and others [2007] EWCA Crim 3129, a decision of the English Court of Appeal. The court noted that typically in such operations there would be one or more workers tending the plants in the particular premises, carrying out the ordinary tasks involved in growing and harvesting the cannabis. They would usually have little or nothing to do with the setting up of the operation, but would simply carry out their tasks on the instructions of those running the operation. They would often be illegal immigrants, who were being exploited because of their vulnerability. Above the workers in the hierarchy were those who played a greater part in the operation, making arrangements for the plants to be brought in and the crop to be distributed. They might be involved in more than one operation and in making payments such as rental payments. They could be described as managers. There would then be others who had played a part in setting up the operation by obtaining the premises, the workers and the equipment with which to carry out the operation. They could be described as organisers. Finally there would be those who controlled a substantial number of such operations.

[20] The court suggested a starting point of 3 years' imprisonment for those at the lowest level before taking into account any discount for a plea and any mitigation factors. We accept, as did the learned trial judge, that starting point. It should be noted that not only does this represent the sentence on a contest for a person with no previous convictions but it also takes into account the vulnerability of the offender by reason of his immigration status. There should be no further discount for that vulnerability.

[21] The attention of the learned trial judge was drawn to the decision of the English Court of Appeal in R v Auton and others [2011] EWCA Crim 76. There the court was considering the appropriate sentences in small scale but well-planned cultivation usually taking place in the defendant's home, garage or unused

buildings. The methodology generally employed included hydroponic cultivation and intensive artificial light. This court implicitly recognised the assistance which the guidance in Auton provides in R v Stephen O'Brien [2011] NICA 74 while determining that the exceptional facts of that case limited the assistance to be derived from it.

[22] We do not consider, however, that Auton was of any assistance in this case. As Lord Justice Coghlin said in O'Brien, Auton was a case concerned with the appropriate sentences for well-planned and resourced small scale cultivation operations. The culpability in those cases is in substantial part derived from the degree of professionalism shown in the preparation. In those circumstances the scale of production is also a material factor as the defendant is responsible for that scale.

[23] The learned trial judge in this case did not, however, have the opportunity to consider the decision of the English Court of Appeal in R v Nguyen Hai Doon [2011] EWCA Crim 1604. That was a case in which the appellant had pleaded guilty to looking after a warehouse of cannabis plants with three others. He had no involvement in setting up the operation or managing it. He lived on the premises. There was sophisticated cannabis production equipment found on site and the quantities were enormous with a street value of between £1 million and £2 million. The court indicated that although scale and sophistication were relevant factors they were likely to be of less weight in the case of mere gardeners than they were for those with operating or management functions. The court considered a starting point of 4 years 6 months appropriate in that case, allowed the appeal and imposed a sentence of 3 years detention.

Sentencing Guidelines Council

[24] We have examined the Definitive Guideline of the Sentencing Guideline Council on drugs offences published in February 2012. We are satisfied that the factors related to culpability are of assistance in the assessment of culpability in this jurisdiction as are the quantities in respect of the category of harm. We wish to make it clear, however, that where very large quantities are involved a different approach may be taken for the reasons set out in R v McIlwaine [1998] NICA (11 March 1998). We also consider that the factors influencing seriousness are appropriate factors to take into account in the sentencing process.

[25] The Definitive Guideline suggests starting points and ranges depending upon the category of harm and the nature of the role into which the offender falls. There are, however, dangers with that approach. In many instances there will be competing considerations affecting the offender's role and inevitably considerable variation even within each category of harm. We consider that in attempting to categorise each case in the way suggested in the Guidelines the judge may be distracted from finding the right sentence for each individual case. Guidelines and guidance in this jurisdiction are intended to assist the sentencing judge without

trammelling the proper level of discretion vested in the sentencer. This is not to say that the Definitive Guideline does not provide useful assistance in identifying aggravating and mitigating factors and indicating appropriate ranges of sentencing worthy of consideration depending on the precise circumstances of the individual case.

Conclusion

Han Lin

[26] In Han Lin it was common case that he was a gardener with no responsibility for setting up the operation. The quantity was certainly significant although in an offence of this type the amount is often substantial. The learned trial judge increased the sentence significantly because of the quantity but for the reasons given in Nguyen Hai Doon, to which she was not referred, we do not accept that such an increase was warranted. We consider that the starting point should have been three years imprisonment.

[27] This was a case in which the appellant was detected at the property with the cannabis. He was, in effect, caught red-handed. One of the issues debated before us on the appeal was the degree of discount for the plea which had been allowed in the original sentence. As has been common in this jurisdiction the trial judge did not spell out in her sentencing remarks to what level of sentence she was applying the discount and what amount of discount she was allowing. If the appellate process is to work satisfactorily, the sentencing remarks must enable the appellate court to understand why the judge reached his decision. In the interest of transparency we consider that in Crown Court sentences judges should henceforth indicate the starting point before allowing discount for a plea so that the parties and the Court of Appeal, if necessary, can examine the structure of the sentence. Sentencing should be transparent to both the parties and the public.

[28] In this jurisdiction the full discount for a plea is generally in or about one third where an offender faces up to his responsibilities at the first opportunity. In appropriate circumstances it can be higher or a non-custodial rather than a custodial sentence may become appropriate. Where, however, the offender is caught in the act the discount is generally reduced because the plea is the product of his being caught rather than his immediate remorse. However, even in such cases, a plea at an early stage can relieve witnesses, vindicate victims, save court time and indicate remorse. In appropriate cases where offenders are caught red-handed the circumstances may justify a discount closer to the full level of discount.

[29] Having taken into account the discount for his plea and the fact that he was only 17 years old at the time of his detection we reduced the sentence to a determinate custodial sentence of 2 years imprisonment comprising 12 months in

custody and 12 months on licence. The effect was that the appellant was entitled to be released on licence.

McKeown

[30] In respect of McKeown there was again speculation about the starting point that was used in coming to the determinate sentence of 2 years. Our comments on the need to identify the starting point apply generally. In his case there was also an issue about the duration of the licence period. The relevant statutory provision is Article 8 of the Criminal Justice (Northern Ireland) Order 2008.

> "8.—(1) This Article applies where a court passes—
>
> (a) a sentence of imprisonment for a determinate term, other than an extended custodial sentence, or
>
> (b) a sentence of detention in a young offenders centre in respect of an offence committed after the commencement of this Article.
>
> (2) The court shall specify a period (in this Article referred to as 'the custodial period') at the end of which the offender is to be released on licence under Article 17.
>
> (3) The custodial period shall not exceed one half of the term of the sentence.
>
> (4) Subject to paragraph (3), the custodial period shall be the term of the sentence less the licence period.
>
> (5) In paragraph (4) "the licence period" means such period as the court thinks appropriate to take account of the effect of the offender's supervision by a probation officer on release from custody—
>
> (a) in protecting the public from harm from the offender; and
>
> (b) in preventing the commission by the offender of further offences."

[31] The duration of the licence period is dependent upon the assessment by the judge of the effect of probation supervision in protecting the public from harm from the offender and preventing his commission of further offences. It is apparent from the test that the source of the material upon which to exercise the judgment is likely to be found particularly in the pre-sentence report although sources such as expert reports may also be available. When a judge decides to impose a period of licence in excess of the minimum period of 50% of the determinate sentence, he should give brief reasons for that decision which will often include reference to matters contained in the probation or other relevant reports. Where he rejects such a submission he should also give reasons. That is necessary to make the sentence transparent. Although the judge did refer to the reports before him he did not give reasons for his selection of the licence period in this case.

[32] This was a case of commercial supply of Class A drugs. The fact that the defendant himself was addicted to drugs is not a mitigating factor (see paragraph 18 above). He had a previous recent conviction for possession of Class A drugs with intent to supply. That is a serious aggravating factor (see paragraph 14 above). Bearing in mind the statement in Aramah that a sentence of less than 3 years for supply of Class A drugs will rarely be justified we consider that in this case the starting point was at least 4 years' imprisonment.

[33] When intercepted the appellant fled and was at large for a period of approximately one year. He was also caught red-handed. In the circumstances he would have been fortunate to secure 50% of the full discount for his plea. We are satisfied, therefore, that the sentence was unduly lenient. We have concluded that we should interfere with it and having regard to the principle of double jeopardy we impose a determinate custodial sentence on Count 1 of 3 years' imprisonment.

[34] It seems clear from the pre-sentence report and the psychiatric report that this defendant will struggle to avoid a return to his previous lifestyle if he does not receive probation assistance in alcohol and drug counselling. We agree with the learned trial judge that this should be recommended for him as part of his licensing conditions if at all possible. We do not, however, see anything in the pre-sentence report or the psychiatric report to suggest that he should serve less than 50% of the determinate sentence in custody. Accordingly we fix the custodial period at 18 months and the licence period at 18 months. The periods already served on remand and on foot of the original sentence will count towards the custodial period.