Neutral Citation No. [2013] NICA 59 | *Ref:* **GIR9017**

Judgment: approved by the Court for handing down | *Delivered:* **24/10/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

BETWEEN

THE QUEEN

v

PAUL McATARSNEY

_____

Higgins LJ, Girvan LJ, Maguire J

The Judgment of the Court

Introduction

[1] The appellant, Paul Vincent Joseph McAtarsney, was charged with four counts on a bill of indictment of 5 August 2010, namely:

(a) Count 1 dishonestly using electricity, contrary to section 13 of the Theft Act (Northern Ireland) 1969;

(b) Count 2 production of a controlled drug of Class B, contrary to section 4(2)(a) of the Misuse of Drugs Act 1971;

(c) Count 3 possession of a controlled drug of Class B, namely cannabis, with intent to supply, contrary to section 5(3) of the 1971 Act;

(d) Count 4 possession of a controlled drug of Class B, namely cannabis, contrary to section 5(2) of the 1971 Act.

[2] On arraignment on 2 September 2010 the appellant pleaded guilty to Counts 1, 2 and 4. Between 11 and 14 February 2011 he was tried on Count 3 and he was

convicted on that count. In respect of Count 2 relating to the production of cannabis he was sentenced to a total sentence of one year nine months with a determinate custodial sentence of 10 months 2 weeks and a licence period of 10 months 2 weeks. He was sentenced to 18 months' imprisonment on Count 3 concurrently with sentences on the other counts. Accordingly, he received a somewhat heavier sentence for the offence of production. The single judge granted leave to appeal.

[3] On the hearing of the appeal Mr Campbell appeared on behalf of the appellant and Mr McGrory QC, the Director of Public Prosecutions ("the Director"), appeared on behalf of the prosecution with Mr Tannahill.

Factual Context

[4] On 25 September 2009 police went to the appellant's address at 23 Sydenham Drive, Belfast. A large number of cannabis plants were found growing. The premises had been adapted as a cannabis factory with heaters, watering systems and extractor ducts. It was the Crown's case that in view of the number of plants and the amount of money which had clearly been expended on adapting the premises the inevitable inference was that the appellant intended to supply drugs.

[5] Expert evidence was given by Mr Alan Arnold MRSC, a senior scientific officer at FSNI and a chartered chemist and member of the Royal Society of Chemistry. He received for analysis a number of items gathered at the scene. These comprised samples of plants from a rear bedroom (TD5), samples from a propagator in the rear bedroom (TD6), samples from a large plant in the rear bedroom (TD7), samples from a front bedroom (TD8) and yellow tablet pieces in white paper (an item which was not relevant to any of the charges). Item TD5 contained dried green plant material consisting of leaves and stems. Item TD6 comprised green plant material consisting of leaves and stem. Item TD7 contained similar material as did TD8. A representative sample was taken from each item. Each was subjected to a microscopic examination and a chemical analysis. Each of the items examined was identified as containing cannabis. Cannabis is a Class B drug whether it is cannabis resin or herbal cannabis. Cannabis resin is a more concentrated form of cannabis. It is a resinous material which is produced at the flowering and fruiting top of a cannabis plant. It can be compressed into blocks of pliable brown appearance. Herbal cannabis is to be found in the stems and leaf material of the plant itself. It is not as concentrated in the active constituent of cannabis, THC, as cannabis resin. The samples examined constituted herbal cannabis. Laboratory experience shows that a gramme of herbal cannabis can produce approximately 5 cigarettes on average. Herbal cannabis can also be smoked in pipes. In cross-examination the witness accepted that there were no buds or flowering heads on any of the samples. He accepted that the THC in the flowering heads/buds massively outranks what is found in the leaves and stems. A person who is routinely smoking cannabis will find that he requires more cannabis or a stronger version to achieve the same effect. A person who has never smoked cannabis will by dint of lack of tolerance receive a higher "hit". The habitual user will generally seek a higher active concentration of

THC or more of it. A female plant has a more than marginally higher concentration of THC than a male plant. A flowering head is only found on female plants. The habitual long term smoker of cannabis would ideally like the product of a female plant with a flowering head. Someone planting cannabis would not know from the seed whether the resultant plant would be male or female. The witness stated that the photographs taken of the plants in the house did not show flowering or fruiting tops. Some of the plants were a metre high and at that level of maturity one would expect to see flowers or fruit if they were female plants. Accordingly, it was more likely than not that the plants were male.

R v Wright

[6] On 5 May 2011, subsequent to the conclusion of the trial in the present case, the Court of Appeal in England delivered judgment in R v Wright [2011] 2 Crim App R 15 in an appeal against conviction for possession of a controlled Class B drug with intent to supply, contrary to Section 5(3) of the Misuse of Drugs Act 1971. In that case the police discovered a large number of cannabis plants and related equipment at the appellant's home. The appellant maintained that he was growing the cannabis for personal use only and on that basis pleaded guilty to production of a Class B controlled drug contrary to Section 4(2)(b) of the 1971 Act. The Crown added a count of possession with intent to supply. The expert evidence established that the cannabis plants which were 3 to 4 weeks old were 2 to 3 months from maturity and the Crown accepted that when they were discovered there was no usable or saleable cannabis in the plants. The appellant asserted at trial that there was no case to answer as there could not have been an intention to supply something which did not exist. The judge rejected that submission. The Crown contended that the issue of intent had to be regarded as a continuous one and that it would be a perverse interpretation of the statute to hold that a defendant could not be convicted of possession with intent to supply unless the cannabis plants had reached maturity and were suitable for harvesting. The appeal was allowed on the basis that there was no doubt that the appellant was in possession of the cannabis but to come within Section 5(3) the intention to supply had to be an intention to supply the thing of which the defendant was in possession and there was no suggestion that the appellant had intended to supply the immature plants of which he was in possession at the material time. The intended supply was the supply of the harvested product, not a supply of the plants as they existed in the appellant's possession at the time of their discovery. It could not, therefore, be said that the appellant was in possession of cannabis with intent to supply within the meaning of Section 5(3). Secondly, such an approach was neither unreasonable nor one that could give rise to concern. The core offence was the production of cannabis and the seriousness of that offence depended (*inter alia*) on whether the cannabis was being grown for the appellant's own use or for supply to others. That question could be resolved within the sentencing process for the offence of production, if necessary by a Newton hearing. It was unnecessary to add a count of possession with intent to supply in order to determine the purpose for which the cannabis was being produced or, therefore, the

seriousness of the offence of production. The Court of Appeal accordingly quashed the conviction on the second count.

[7] At paragraph 19 of the judgment of the court given by Richards LJ the court stated:

> "There is no doubt that the appellant was in possession of cannabis as defined in the statute. That aspect of counsel's submissions is plainly correct. But we agree with the submission for the appellant that to come within Section 5(3) of the 1971 Act the intention to supply must be an intention to supply the thing of which the defendant is in possession. There was no suggestion in this case that the appellant intended to supply the immature plants of which he was in possession at the material time. As the full court said in granting leave, the usable part of each plant would have been the flowering heads but since these plants were in their infancy there were as yet no flowering heads. The case against the appellant was that he intended to grow the plants to maturity and then to harvest a crop from them and then to supply the harvested crop or some of it to others. Thus the intended supply was the supply of the harvested product of the process of cultivation, not a supply of the plants as they existed and were in his possession at the time to which the charge related."

The Parties' Arguments

[8] Mr Campbell in his argument stated that the defence at trial had presented its case on the basis that the applicant intended the drugs produced to be for his own personal use. It has, therefore, been implicitly conceded that if the Crown could establish that the applicant had a future intention to supply the harvested product, he would be convicted. Counsel contended that the *ratio* in Wright showed that the concession was wrongly made. He argued that by applying Wright to the facts of the present case it was established that the appellant's conviction was unsafe.

[9] The Director argued that the issue would arise in other cases given the present practice of the Public Prosecution Service to charge both offences of cultivation of cannabis and possession with intent to supply when sophisticated indoor growing facilities were being used. Central to the ruling in Wright was the acceptance by the Crown that there was no useable or saleable cannabis present in the young plants being cultivated and the time span for growth to maturity was a matter of months. In the present case it was not accepted that there was no useable and suppliable cannabis in the relevant plants. The evidence showed that the

material recovered and tested was herbal cannabis. It was clear that there was active ingredient in the material identified. The question whether the defendant intended to supply the herbal cannabis was a question of fact for the jury and the judge had properly and fully directed the jury on the point. The Director contended that Wright was wrongly decided. All intentions by definition relate to the future. In any event it was open to the court to substitute the offence of attempted possession with intent to supply (see Section 3A of the Criminal Appeals (Northern Ireland) Act 1980).

Discussion

[10] The case of Wright is cited in Blackstone [2014] B19.53 in somewhat guarded terms:

> "To come within Section 5(3) of the Misuse of Drugs Act 1971 the intention to supply must be an intention to supply the thing of which the accused is in possession (Wright [2011] 2 Crim App Reports 168). It is submitted that Wright was decided on its special facts, namely, that there was no suggestion that the accused intended to supply the immature and unusable cannabis plants that were in his possession."

[11] In reaching its decision in Wright the Court cited with approval what Hughes LJ said in R v Auton and others [2011] EWCA Crim 76. At paragraph 9 of that judgment it was stated:

> "The proper inference as to what the cultivation entailed and what would be likely to happen to the product depends on the facts of each case. In most cases, and not only where the plants have not yet been harvested, it will not be possible to frame a count of possession of identified material with intent to supply. The issue must be dealt with by the judge. As with many other offences, care needs to be taken with assertions advanced by way of basis of plea. It hardly needs to be said that the Crown should accept (i.e. endorse) such a basis only when satisfied that it is proper to do so. To say that there is no evidence to "gainsay" it is rarely discharging the Crown's responsibility: the evidence of the scale of the operation and the implausibility of the explanation may justify the inference that the basis advanced is false whether or not there is independent evidence of actual supply. The judge is not obliged to accept any basis of plea advanced, even if the Crown does, but if

> he does not he must say so. If it is not manifestly unfounded, he will normally give the defendant the opportunity to give or call evidence to justify it, if he wishes on advice to do so. That does not mean that a Newton hearing will be needed in every or even most cases. If, however, the basis of plea is accepted by the judge then on the ordinary principles he must honour it in passing sentence …"

[12] As the Director argued, the facts before the court in the present case differed from those in the case of Wright. There the cultivated cannabis had not reached a suppliable stage of development. In the present case it was open to the jury on the evidence to conclude that the plants had reached a point where there was suppliable herbal cannabis present in the plants and it was open to them to conclude that he intended to supply a product of the plants as usable herbal cannabis. The decision in Wright related to the particular facts as found or conceded in that case and it does not provide authority to show that the conviction in the instant case was unsafe.

[13] In any event we venture to doubt the correctness of the proposition in Wright that for the purposes of Section 5(3) of the 1971 Act the intention to supply must always be an intention to supply the thing of which the defendant is in possession. In that case the court concluded that as the defendant intended to supply the harvested product of the process of cultivation when the maturity of the plants was established, and not the plants in his possession as they existed, no offence could be established under Section 5(3). In this case what Section 5(3) criminalises is:

[A] the possession of cannabis (in this instance herbal cannabis to be found in the cultivated plants which the defendant admitted he had in his possession); and

[B] an intent to supply that or part of that cannabis to third parties.

[14] If, as we are satisfied, the jury was entitled on the evidence to conclude that [A] and [B] were established, we see no reason why the offence under Section 5(3) should not be considered to have been committed. We are unconvinced by the argument that the intention to be proved must be an intention to supply precisely the identified thing of which the defendant is in possession at the time when it comes to the prosecution's attention. If the evidence proves that the defendant intended to provide to other parties herbal cannabis out of that herbal cannabis material in the plants in his possession, there is no reason why the defendant should not be found guilty of having in his possession herbal cannabis, some or all of which he intends to supply to other parties, even if he has to cut up the plant or portions of it before supplying the cannabis available in the plant which is in his possession. If, for example, on 1 January a cannabis grower has cut up plants and/or cut off leaves to provide to others for smoking as herbal cannabis, there can be no doubt that he has in his possession herbal cannabis which he intends to supply. If he is apprehended on 31 December, shortly before he has got round to cutting up the

plants or cutting off the leaves, and if the evidence shows that that is what he intended to do, there is no logical basis for concluding that, while he is clearly in possession of the cannabis in the plants, it cannot be shown that he intended to supply cannabis to third parties because he does not intend to supply the plants but rather the product of the self-same plants which, if he had been apprehended on 1 January, he would simply have made more physically ready for supply.

[15] In the result we conclude that the appeal must be dismissed. Since the question of a cannabis cultivator's intentions in relation to what is to happen to the cultivated plants is something which can be fully explored in relation to a production charge under section 4(2)(a) of the 1971 Act and is something which can be fully explored in relation to the cultivation charge we agree with the views of the court in Wright and Auton that a count of cultivation under section 4 will provide an adequate charge for determining the gravity of the offence in individual circumstances. A separate count of possession with intent will add little to a case. In this case the question raised on the appeal is somewhat academic because the appellant received a higher sentence on the cultivation count, the court clearly having taken account of his intentions in relation to the cultivated cannabis in fixing the appropriate sentence.