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2010 No. 104696

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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17/131821

R

-v-

CHRISTOPHER CAMERON
&
NORTH LUCAS

_____

Before: Deeny LJ, Treacy LJ, McAlinden J

TREACY LJ *(delivering the judgment of the Court)*

Introduction

[1] Both appellants appeal against the determinate custodial sentence of 4 years imposed upon them by HHJ Grant at Downpatrick Crown Court on 13 June 2018 in respect of Count 1 (Cultivating Class B drug, Cannabis) and Count 2 (Possession with intent to supply Class B drug, Cannabis). Cameron faced two further charges of simple possession of cannabis and cultivating cannabis for which he received sentences of 6 and 9 months respectively made concurrent. In each case the effective sentence was a determinate custodial sentence 4 years (divided equally between custody and licence).

[2] The facts as outlined to the Learned Trial Judge ("LTJ") are set out in the Prosecution Sentencing Note and are helpfully summarised at paragraph 5 of the decision of the Single Judge who refused leave on all grounds save one regarding the sentencing methodology outlined by the LTJ.

Factual background

[3] Both appellants were arrested on 26 January 2017. Both were caught red-handed. Both were found inside 31 Ballygowan Road where cannabis was openly drying on radiators and a harvested crop was drying out in the constructed cannabis

factory in the attic. In addition, Cameron's fingerprints were recovered from a fan in the attic and from a tray lid and silver tape found in the locked shed/outhouse in which another crop of cannabis was actively growing. Cameron was therefore directly linked to both grow sites. Furthermore, there were young plants growing inside his locked bedroom in Belfast. The evidence against Cameron was very strong. Despite the wealth of evidence against both appellants they maintained their denials throughout interview (January 2017), at arraignment (21 February 2018) and right up until the time of trial (2 May 2018). Both were classified as "managers". The Crown did not seek to distinguish between their roles.

Grounds of Appeal

CAMERON

[4] Cameron complains that the LTJ's starting point of 5 years was excessive. We reject that submission. In R v Han Lin & McKeown [2013] NICA 28 the court adopted the English Court of Appeal approach in R v Xu [2007] EWCA Crim 3129 with regard to a 5 year term for a "gardener". However, when dealing with "managers", which it was agreed these appellants were, the court in Xu stated at paragraph 6:

> "The starting point for managers will be somewhere between 3 and 7 years depending on the level of their involvement and the value of the cannabis being produced. Severer sentences may be appropriate for those who control a larger number or network of such operations".

[5] We agree with the Crown submission that a starting point of 5 years cannot be viewed as manifestly excessive bearing in mind:

(i) the sophisticated and professional nature of the operation together with the quantity and potential value of the drugs involved;
(ii) the fact this cultivation was accompanied with convictions for possession with intent to supply an already harvested crop;
(iii) the operation involved two professional cannabis factories along with a third factory almost ready to start a new cultivation;
(iv) young cannabis plants were growing in Cameron's bedroom potentially ready for that third factory.

[6] He also complains at paragraph 26 of his skeleton argument that the LTJ failed to have adequate regard to the enumerated "mitigating features" as defence counsel characterized them. In fact it is clear from the transcript that the LTJ does have proper regard to each of the features identified.

[7] The appellant submits that the mitigating factors ought to have led to a differential, to some degree, between him and Lucas when selecting the starting point. In particular, it is said that the LTJ did not refer to the appellant's lack of criminal convictions which it is submitted is a "significant mitigating factor" which was not properly allowed for in the sentencing exercise. We reject that submission. This is not a mitigating factor – "The absence of a criminal record is not, in any strict sense, a mitigating factor. It denotes the absence of an aggravating factor" – see paragraph 17 of Attorney General's Reference No.6 of 2006 (McGonigle) [2007] NICA 16. The LTJ did have regard to it when he stated "You have a clear record" – see page 81 Lines 7-8 of the transcript.

Discount for Guilty Plea

[8] It was also submitted on Cameron's behalf that there should be a difference in the amount of credit as between himself and Lucas.

[9] Both appellants were arrested on 26th January 2017. Both were caught red-handed. Both were found inside 31 Ballygowan Road where cannabis was openly drying on radiators and a harvested crop was drying out in the cannabis factory in the attic. In addition, Cameron's fingerprints were recovered from a fan in the attic and from a tray lid and silver tape found in the locked shed/outhouse in which another crop of cannabis was actively growing. Cameron was therefore directly linked to both grow sites. Furthermore there were young plants growing inside his locked bedroom in Belfast. The evidence against Cameron was very strong. Despite the wealth of evidence against both appellants they maintained their denials throughout interview (January 2017), at arraignment (21 February 2018) and right up until the time of trial (2 May 2018).

[10] Both appellants therefore approached the case in a similar fashion. There is nothing of any practical difference between them to justify a difference in the amount of discount for Cameron because his indication of a proposed plea on the eve of trial was delivered a short number of hours before Lucas. Certainly there is nothing of a "**gross degree**" or such that could create "… **any sense of grievance or to indicate to a fair minded and right-thinking observer that anything had gone wrong with the sentencing process**" – see R v Murdock [2003] NICA 21.

[11] Both were caught red-handed in the circumstances described above, both are classified as "managers" and the prosecution correctly do not distinguish between their roles.

LUCAS

[12] He too contended that the starting point was too high, that he was a low level manager which was not reflected in the sentence and that the sentence did not accurately reflect the:

(i) guilty plea;
(ii) relative lack of record;
(iii) good employment record; and
(iv) personal vulnerabilities.

[13] It is clear that the sentencing judge took all these matters into account. Bearing in mind the nature of the case personal mitigation was of little weight. As regards the complaint about the excessive starting point of 5 years we repeat what we said earlier for Cameron

[14] As with Cameron the starting point of 5 years is in the middle of the 3-7-year range identified in Xu. It cannot be described as manifestly excessive. Lucas was a "manager" and he accepted that role in the agreed facts.

[15] This submission is based on an assumption that all cannabis factories must contain participants acting in the roles of gardener, manager and organiser. These are not hermetically sealed categories. It is of course possible for participants to carry out multiple roles. An 'organiser' should not be reclassified as a 'manager' simply because he also carried out some of a typical manager's roles. Likewise a 'manager' should not be reclassified as a 'gardener', or receive any less a sentence, because he carried out gardening duties in addition to his managerial duties. Each case is fact specific. Each participant's role is fact specific. Whilst it is common to find vulnerable immigrants in the role of gardeners (e.g. Han Lin) it is equally possible to find voluntary 'managers' also carrying out the lesser role of gardeners simply because his operation is not one that has access to vulnerable gardeners. That was the position in this case. The fact Lucas was tending to the crops does not limit his culpability in terms of his principle role as a manager in the operation. In performing both as manager and gardener he arguably demonstrates his more personal, hands-on and willing involvement in this overall operation.

Approach in determining the starting point

[16] Although this has no impact on our assessment, on the facts of these cases, we note that the sentencing judge, in contravention of the approach mandated in R v Stewart [2017] NICA 1 at para 28 determined the starting point was by reference to aggravating features only with mitigation and credit *then* being deducted from that starting point. However, for the reasons cited in Stewart such an approach is unduly generous. Sentencing judges and prosecutors are reminded of the guidance in Stewart.

Overall conclusion

[17] We are satisfied that the sentences were well within the range identified in Xu and are not manifestly excessive. Accordingly we dismiss both appeals.