

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

GERARD KEVIN HUGHES, GAVIN MARTIN HUGHES AND
JOSEPH CHRISTOPHER HUGHES

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE

(NUMBERS 1, 2, 3 and 4 of 2015)

Before: Morgan LCJ, Coghlin LJ and O'Hara J

MORGAN LCJ (delivering the judgment of the court)

[1] This is an application by the Director of Public Prosecutions pursuant to section 36 of the Criminal Justice Act 1988 to review the sentences imposed on three co-accused, Gerard Kevin Hughes, Gavin Martin Hughes, and Joseph Christopher Hughes, for offences committed contrary to the Misuse of Drugs Act 1971. The case involves consideration of the appropriate sentencing range for possession with intent to supply significant quantities of class A drugs. Mr O'Donoghue QC and Mr Russell appeared for the Director, Mr Duffy QC with Mr Gibson and Mr S O'Hare for the first respondent, Mr Greene QC and Mr Toal for the second respondent and Mr Macdonald QC and Mr Devine for the third respondent. We are grateful to all counsel for their helpful oral and written submissions.

[2] On 3 November 2014 Gerard Hughes pleaded guilty to:

- a. one count of possession of a controlled drug of Class B, namely cannabis, with intent to supply; and

- b. one count of possession of a controlled drug of Class B, namely amphetamine.

He also pleaded guilty to the following offences on 25 November 2014:

- a. two counts of possession of a controlled drug of Class A, namely cocaine, with intent to supply.

On 20 April 2015 he was sentenced to a determinate custodial sentence of 30 months comprising 15 months in custody and 15 months on licence in respect of the cannabis offence, a custodial sentence of 3 months for the amphetamine offence and concurrently to a determinate custodial sentence of 5 years comprising 2 years 6 months in custody and the same on licence for the cocaine offences.

[3] Gavin Hughes pleaded guilty to the following offences on 9 October and 14 November 2014:

- a. two counts of possession of a controlled drug of Class A, namely cocaine, with intent to supply; and
- b. three counts of possession of a controlled drug of Class A, namely cocaine (X2) and ecstasy.

On 20 April 2015 he was sentenced to a determinate custodial sentence of 4 years comprising 1 year in custody and 3 years on licence.

[4] Joseph Hughes pleaded guilty on 25 November 2014 to one offence of possession of a controlled drug of Class A, namely cocaine, with intent to supply. On 20 April 2015 he was sentenced to a determinate custodial sentence of 3 years comprising 6 months in custody and 30 months on licence.

Factual background

[5] On Tuesday 6 August 2013 police observed a Mitsubishi Charisma in the car park of McDonald's restaurant at Connswater retail park in Belfast. A second vehicle, a Renault Laguna, pulled up close to the Mitsubishi. A single male occupant of the Renault, Gerard Hughes, approached the Mitsubishi carrying a plastic bag which he placed in the Mitsubishi at the passenger side. He then returned to his vehicle and left the area.

[6] Police approached the Mitsubishi and carried out a search of the car. In a plastic Sports Direct bag found behind the driver's seat there were a number of bars of cannabis resin. There were two occupants in the car at the time, both of whom were arrested. They were cautioned and gave no reply. The cannabis resin weighed

5 kg and its value was estimated at £25,000. A search of Gerard Hughes' car also revealed 9.3g of amphetamine.

[7] One of the occupants of the Mitsubishi car was sentenced to a determinate custodial sentence of 2 years, 6 months in custody and 18 months on licence. He made full admissions in interview. He pleaded guilty at arraignment. He gave an account in interview of being under pressure falling short of duress and this was accepted by the prosecution. The other occupant of the Mitsubishi car pleaded guilty to aiding and abetting her passenger by driving the family car to the scene of the collection. She was sentenced to 18 months' imprisonment suspended for 2 years. Her plea was at the first opportunity and the Court found exceptional circumstances in her case.

[8] Gerard Hughes made no admissions at interview and was subsequently admitted to bail. He pleaded not guilty at arraignment on 4 September 2014. His trial was fixed for 4 November 2014 and he pleaded guilty to the relevant counts on 3 November 2014.

[9] On Wednesday 9 October 2013 at 10 pm police stopped a Vauxhall Vectra in Belfast. Gavin Hughes was driving the vehicle and was unaccompanied. When the vehicle was searched a black plastic bag containing 5 compressed cubes of cocaine was found on the front passenger seat of the car. Each cube was individually wrapped in clear plastic and the tops of the cubes had a circle pattern. They weighed 1.27kg at 5% purity. A further search of Gavin Hughes produced a bag of cocaine in his jeans pocket. This weighed 26.44 g at 12% purity. Gavin Hughes was arrested and taken into custody.

[10] The following day, 10 October 2013, police attended the home of Gavin Hughes in Belfast. On arrival police found Gavin's brothers, Gerard and Joseph Hughes. A Toyota Avensis was parked close to the house with the boot and doors ajar and the front door of the property was open. A search of the vehicle revealed bags of white powder, drums of Benzocaine, and the component parts of a hydraulic jack used to press the cocaine into cubes for onward sale. Both men were found to have packets of cocaine on their person. Sitting beside and in the vehicle were 5 x 25g drums of Benzocaine which is used in the illicit drugs' trade to mix with cocaine to bulk up the product and increase profits. It was apparent that the two males were in the process of loading the items from the house into the car.

[11] A black sports bag found in the vehicle contained parts of a hydraulic jack and 7 bags of cocaine. The main body of the jack was found in the boot of the car along with the compression mould used with it. The mould contained a further block of cocaine which had similar markings on it to those seized the previous day. A further block of cocaine was found inside the house along with a metal plate for the jack. A search of the house recovered food mixers, bowls, blades and other items that had a residue of white powder on them.

[12] The drugs recovered from the scene were:

- a. cocaine recovered from the Toyota Avensis weighing 1.98kg at between 4-8% purity;
- b. cocaine recovered from the house weighing 15.95g with 7% purity; and
- c. a bag containing 21 ecstasy tablets found in a kitchen cupboard.

An examination of Gavin Hughes' mobile phones revealed texts and messages consistent with him being involved in the drugs' trade.

[13] During police interview Gavin and Gerard Hughes made no admissions. Joseph Hughes made the case that he had attended the house to obtain clothes for his brother who he knew had been arrested and, on discovering the illicit drugs, he was loading them into the car to destroy them. The prosecution indicated that the total potential street value of the cocaine seized at this location was between £131,741 and £197,738. The benzocaine was valued at £15,000 to £30,000.

Pre-sentence reports and previous convictions

Gerard Hughes

[14] A pre-sentence report on Gerard Hughes prepared in relation to the cannabis charges indicated that substance misuse had been a long-term issue in his life. The Probation Service assessed the defendant's likelihood of reoffending as medium but did not assess him as posing a risk of serious harm to the public. It was of concern that the offence occurred 3 days after the police searched the defendant's home in relation to cultivation of cannabis plants, which resulted in a conviction for that offence. The pre-sentence report recommended a period of community supervision to address the defendant's attitudes to offending, whether in the community or as part of post-custody licence requirements.

[15] The court was provided with an addendum pre-sentence report dealing with the cocaine related offences. The defendant accepted he was found in possession of the drugs but he was insistent that he was not involved in supplying drugs to others. He said that when he became aware of his brother Gavin's arrest, he and his other brother Joseph went to Gavin's house to get clothes for him. He described his shock at discovering quantities of drugs and related material in the house and says he panicked and decided to get rid of the drugs but had not considered how he would do this. The report states that the defendant was keen to portray his actions in the context of being a "caring brother" whose actions were impulsive and not premeditated. He denied having previous knowledge of the drugs or his brother's involvement in them.

[16] The report noted that this seemed implausible given the defendant's past involvement in drugs' offending but noted that the defendant was aware that his minimisation of the offending could be viewed with considerable scepticism by the court. It was of concern that the offences occurred while the defendant was on bail for the offences discussed in the first pre-sentence report. As a result of the further offending the assessment of the likelihood that the defendant would reoffend was changed from medium to high.

Gavin Hughes

[17] The pre-sentence report for Gavin Hughes indicated that he had left school with GCSE and other qualifications. He began to misuse drugs when he was 16 but he believed that his drug use only became excessive following the end of his relationship. He acknowledged that he was addicted to cocaine and ecstasy during the period 2012-2013 but said that he was motivated to address this. The report stated that the applicant had been working with the ADEPT drugs' counselling programme in custody and that he considered his emotional health to be much improved as a result. Probation in Maghaberry prison confirmed that the defendant had passed all 5 drugs' tests since his imprisonment.

[18] In terms of the offending the defendant said that he was abusing drugs and had accrued a debt to dealers that he could not afford to pay. He said he was offered a means to clear this debt by becoming involved in the offence. He said that he was instructed to rent the property at which the drugs were seized and that while he was aware that the house was being used to mix cocaine he was not involved in that process. He said he would then be instructed to bring the drugs to a purchaser and that he had done this on two previous occasions before being stopped by police. He believed this arrangement would last for a few weeks until his debts would be cleared. He also said that his brothers were not involved in this and had only gone to the house to get clothes for him. He said that the ecstasy tablets that were seized were for his own use. He said that he was not thinking clearly about the consequences of his actions because of his own drug use and his relationship ending and that he thought his actions would be an easy way of clearing his debts.

[19] The Probation Officer considered that this case involved organised offending with considerable planning and preparation with the potential for substantial financial gain. It was considered that the court might be sceptical about the defendant's claim that all he hoped to gain was clearance of his £3000 debt. On this basis it was considered that the defendant minimised the extent of his involvement in the offending. The defendant was assessed as a medium likelihood of reoffending although not a significant risk of serious harm to the public. He had made some progress in custody in addressing his drugs' abuse and it was essential that this be continued post release. To this end conditions were recommended in the event the court imposed licence supervision. He had no relevant convictions.

Joseph Hughes

[20] The pre-sentence report on Joseph Hughes said that he left school at 16 without formal qualifications. He joined the Merchant Navy and worked at sea until 2012 when as a result of a road traffic accident he was forced to leave work. He had serious ongoing health issues arising from this accident. He, his partner and child had had to relocate owing to paramilitary threats against him. His involvement occurred because he had been attempting to protect his brother Gavin. He acknowledged the serious consequences of his actions and stated that he fully regretted them and their impact on his family.

[21] He was assessed as posing a medium risk of reoffending. It was not considered that he posed a significant risk of serious harm to the public. The pre-sentence report recommended a period of statutory supervision to address the defendant's attitudes to offending, whether in the community or as part of post-custody licence requirements. He had no relevant record.

Sentencing remarks

Gerard Hughes

[22] For the count charging possession of cocaine with intent to supply on 9 October 2013, count 1 in the second bill of indictment, the learned judge identified as the starting point a sentence of 6 years which would have been imposed had the defendant been convicted after a trial. The defendant had pleaded guilty albeit that his plea was late in the day. The plea had been of value to the prosecution. Accordingly the starting point was reduced to a determinate custodial sentence of 5 years' imprisonment, half of which would be spent in custody and half of which would be spent on licence. In respect of the other count of possession of cocaine with intent to supply on 10 October 2013, to which the defendant also pleaded guilty, the learned judge imposed a concurrent determinate custodial sentence of 5 years on the same basis.

[23] In imposing sentence for the cannabis charges the learned judge accepted defence counsel's assertion that the defendant's involvement in the offending was due to pressure put on him to meet a debt and that he got very little out of it. That was consistent with the fact that no proceeds of crime applications had been made in respect of the defendant. However, the quantity of drugs seized was significant and so the learned judge identified a starting point of 3 years which he reduced to 2 years, six months, half of which would be spent in custody and half on licence. The learned judge imposed a concurrent sentence of 3 months' imprisonment on the possession count.

[24] The sentences imposed for the charges on the two bills of indictment were made concurrent on the basis of two factors: medical evidence outlining the

defendant's addiction problems and the circumstances of the second set of offences in which the defendant's involvement while he was on bail for the first set of offences arose from family loyalty. Thus the effective sentence would be 5 years, half of which would be on licence. The licence period would require completion of a drug treatment programme and the Thinking Skills Programme which required 18 months to complete.

Gavin Hughes

[25] The learned judge referred to the defendant's abuse of illegal drugs from the age of 16 and the fact that he had passed all five drug tests since his imprisonment in custody. He had been on remand since October 2013. He had no similar previous offences. The defendant was entitled to full credit for an early guilty plea. The learned judge also referred to the impact on the defendant and his family of the fact that the case involved three members of the same family who were all in jail. There was no proceeds of crime application in respect of the defendant. The Probation Service had not made a finding that he posed a risk of significant harm to members of the public.

[26] The learned judge identified a starting point after trial of 6 years for the possession of cocaine with intent to supply on 9 October 2013. Giving full credit for the defendant's early guilty plea he reduced the starting point to 4 years. In setting the licence period, the learned judge determined that there were materials before him upon which he could consider whether to impose a period of licence in excess of the maximum period of 50%. He referred to the defendant's custody record and treatment documentation which showed that, on admission to prison, the defendant had a drug addiction but had engaged in the ADEPT programme including by completing a pre-course key work session in which a care plan was formed. Further, when he moved to the Drug Dependency Unit he had cancelled his application for bail as he felt his recovery was more important. This indicated that his motivation to address his illicit substance use was very high.

[27] The learned judge also had before him two very impressive testimonials contained in the defendant's ADEPT documentation. One, from a teacher at Maghaberry prison, paid tribute to the defendant's ability to assist other students and to respond to his drugs problem and the other, from a senior officer in the Drugs' Recovery Unit in Glen House, indicated that the defendant was fully committed to his treatment programme, had worked openly and honestly with staff and key workers, and had made major steps necessary for a change in his lifestyle. Therefore the learned judge specified a licence period of 3 years during which the defendant would be required to attend addiction counselling and the Thinking Skills Programme. The same sentence was imposed in respect of the possession of cocaine with intent to supply in his home to which he pleaded on 14 November 2014.

[28] In considering the defendant's culpability the learned judge identified relevant factors as being that there was no proceeds of crime application against the defendant, there was no finding by the Probation Service that the defendant posed a risk of serious harm to members of the public, and, as with Gerard, misplaced loyalty had been an element in the offending. The learned judge also had what he described as significant medical evidence before him. According to a neuropsychological report from Dr Hazel DuSoir the defendant had in 2012 sustained major injuries to his legs and a small right side haematoma with the result that he functioned on an average to below average level. Further medical evidence indicated that he had had serious post-operative complications in that he had had a pulmonary embolism.

[29] The learned judge determined that it would be appropriate to identify a lower starting point for the defendant than he had for the defendant's brothers on the basis of the medical evidence and the fact that the prosecution regarded the defendant as having a lesser role than his brothers. The learned judge identified a starting point of 4 years, 6 months after a contest. Taking into account his plea on the morning of trial which had been regarded by the prosecution as being valuable, the learned judge gave the defendant full credit and reduced the sentence to 3 years' imprisonment.

[30] The judge considered that there were reasons for which he should consider setting a licence period in excess of the minimum period of 50%. The relevant factors were the medical evidence and what the learned judge referred to as "this misplaced sense of loyalty that seems a factor in the case". The defendant had already spent around 3 months in prison and his family had had to relocate. The judge considered that if he were to send the defendant back to prison, it would only be for a short period of time. In all the circumstances he considered that the appropriate sentence was a custodial sentence of 6 months and a licence period of 30 months. The licence period would be subject to the conditions that had been suggested by the Probation Board which included participation in the Thinking Skills Programme. There were various ancillary orders in respect of each defendant with which we are not concerned.

Consideration

[31] This court recently reviewed the guidance on sentencing for supply of drugs in R v Gary McKeown and R v Han Lin [2013] NICA 28. The court approved the guidance in R v Hogg and others [1994] NI 258 that supply of appreciable commercial quantities of class A drugs could attract sentences of 4 or 5 years or more. In Attorney General's Reference No 8 of 2004 [2005] NICA 18 the court approved the Aramah guidelines suggesting that the supply of massive quantities of class B drugs would justify sentences of 10 years for those playing anything more

than a subordinate role. By way of qualification the court also approved the decision of this court in R v McIlwaine [1998] NI 136 which indicates that the higher sentencing range may be reached in this jurisdiction with lower quantities than were suggested in Aramah.

[32] The weight of drugs alone, however, will not determine the sentencing bracket. In Hogg this court indicated that it was not possible to narrow the range of sentencing because much will depend on the circumstances of supply, its scale, frequency and duration, the sums of money involved and the defendant's previous record together with his or her individual circumstances. The aggravating and mitigating factors identified by the Sentencing Guidelines Council can be of great assistance in helping the judge to find the appropriate sentence. It is with that guidance in mind that we approach the individual cases.

Gerard Hughes

[33] This respondent had been detected in relation to the offence of cultivating cannabis on 3 August 2013. It appears that he was reported for that offence and consequently was not on bail at the time of the commission of the cannabis offence on 6 August 2013. He was, however, on bail for the offence of supplying class B drugs when he committed the offences on 9 and 10 October 2013. We recently repeated our support for the principle in R v Richardson (unreported 19/12/97) in R v Hedley that subject to the principle of totality a consecutive sentence will almost invariably follow where further offences are committed on bail.

[34] All parties to this case accepted that there was an absence of guidance for the approach to sentencing for possession of those quantities of class A drugs which constitutes more than an appreciable commercial quantity but less than the massive quantities that might justify a sentence well into double figures. The learned trial judge reached a starting point of six years in this case with a quantity of cocaine in both offences amounted to 3.25 kg. It was submitted that it was a material mitigating factor that the purity of the drugs was somewhere between 4 and 8%. We do not accept that submission. We recognise that where the cocaine is of high purity there may be circumstances indicating that it was intended to be bulked up so that the eventual quantity sought to be placed on the market would be even larger than that obtained. We consider, however, that the bulking up of cocaine with unknown and untested impurities should not generally lead to material mitigation.

[35] It was contended that this respondent had only become involved in order to pay off a relatively modest debt and that his role was essentially that of a courier. We are satisfied that it is impossible to approach the case on that basis. In particular it is clear that this respondent accepted that he was also in possession of the cocaine which his brother was transporting on the evening of 9 October 2013. That demonstrates an intimate involvement with this operation which is only consistent with a minimum of some operational function within the chain. It is clear from the

materials found at the house on 10 October 2013 that this was a highly sophisticated, well-planned and developed wholesaling operation. We accept that the quantities in these circumstances are not sufficient to justify a sentence in double figures but we consider in the case of Gerard Hughes the appropriate starting point for the cocaine offences was eight years. He made no admissions at interview and pleaded at the last moment. He is entitled to some discount for his plea. The appropriate determinate custodial sentence was seven years. On that basis alone the sentence was unduly lenient.

[36] The learned trial judge did not impose consecutive sentences in this case for the cannabis and cocaine offences because, firstly, of the respondent's addiction problems and, secondly, because there was some aspect of family loyalty in connection with the cocaine offences. It is accepted that in light of this court's decision in R v Stalford and O'Neill NICA (03/05/96) addiction cannot be a mitigating factor. We also do not accept that the explanation advanced, family loyalty, can stand up to scrutiny in this case. It provides no explanation whatsoever for the possession on 9 October 2013. The learned trial judge should have considered consecutive sentences subject to the principle of totality.

[37] We do not consider that we should interfere with the starting point of 3 years for the cannabis offence or the sentence of 2 years and 6 months for that offence after taking into account the late plea. If the appropriate sentences had been imposed consecutively that would have produced a total sentence of 9½ years, suggesting a starting point before discount for his late plea of in or about 11 years. We consider that this was not a case requiring a starting point in double figures. Taking into account totality we conclude that a starting point of 9 years was appropriate. Making due allowance for the late plea we consider that the appropriate overall sentence was one of 7½ years. We bear in mind the double jeopardy principle in this respondent's case and accordingly substitute for the sentence of five years a determinate custodial sentence of 6½ years comprising 50% in custody and 50% on licence on counts one and three.

Gavin Hughes

[38] This respondent was responsible for arranging the lease for the premises at Wolfhill Manor Belfast in which a significant part of the drug operation was set up. It is clear that these premises were used for cutting and adulterating the cocaine and subsequently packaging it for sale to others. The respondent claimed that he himself had not been involved in the cutting and bulking up of the drug but admitted that he had been responsible for at least one other delivery. His phone demonstrated an active part in the operation. Given his role in establishing the premises and his active participation in this operation a significant sentence was appropriate.

[39] During his period in custody this respondent had addressed the drug issues in his life and had undergone work with ADEPT which it was appropriate to

recognise by way of remorse. We consider, therefore, that the starting point in his case was in or about seven years. The learned trial judge gave him full credit for his plea. We do not consider that such credit was appropriate. This man had been caught red-handed on 9 October 2013 and had no credible answer to the charge. He made no admissions at interview. He faced a considerable circumstantial case in respect of the premises at Wolfhill Manor. He is entitled to some credit for his plea but in our view the appropriate sentence in his case was six years. For that reason alone the sentence was unduly lenient.

[40] The learned trial judge decided that three years of the four-year sentence imposed by him should be spent on licence. This court has addressed the issue of the appropriate licence period in R v Gary McKeown and R v Han Lin [2013] NICA 28. Where the judge decides that the licence period should exceed one half of the term of the sentence it is necessary to explain how the effect of the offender's supervision by a probation officer on release from custody for that extended period will protect the public from harm from the offender or prevent the commission by the offender of further offences.

[41] There are undoubtedly courses, such as the sex offenders' treatment programme, which need to be delivered in the community and which have that effect. They will generally be discussed within the pre-sentence report. That will enable the judge to explain the reasons for the decision to impose an extended licence period. Where, however, the programme can clearly be successfully delivered within the licence period available after 50% of the custodial period has been served there is likely to be no sustainable reason for an extended licence period. The extended licence period is not to be used as a means of further mitigation.

[42] There was no basis for thinking that the relevant probation programme could not have been delivered within the licence period in this case. Taking into account double jeopardy we consider that we should substitute for the sentences imposed in his case a determinate custodial sentence of five years of which 50% shall be spent in custody and 50% on licence.

Joseph Hughes

[43] This respondent is clearly distinguishable from his brothers. His plea was accepted on the basis that he was not involved in the organisation of this drug concern and it was further accepted that he may not have known about the nature of the operation until he was taken to the premises at Wolfhill Manor by his brother Gerard on 10 October 2013. His culpability, therefore, arises from his decision to assist Gerard in moving a quantity of drugs of just under 2 kg so that they could subsequently be used by others to supply the drugs. The learned trial judge used a starting point of either 4½ or 5 years. We consider that, if anything, against this background that was slightly high.

[44] At interview this respondent accepted his involvement in the removal of the drugs from the premises into the car but persisted in his account that it was his intention to destroy them rather than to render them available for others. He only pleaded guilty on the day of the trial. The learned trial judge gave him full discount and it was submitted that his late plea should not count against him since the Crown did not indicate until the day of the trial that it would not proceed against him in relation to possession of the drugs found in Gavin's vehicle on 9 October 2013. We do not accept that submission. We consider that the appropriate starting point in his case was four years and because of his limited admissions at interview and his late plea the appropriate sentence was one of three years.

[45] In this case also the learned trial judge imposed a licence period of two years and six months in respect of the three years' sentence given by him. He does not appear to have related that in any way to the statutory test. He relied upon the respondent's medical condition. The medical report indicates that he sustained an injury to his legs and head on 19 October 2012 as a result of which his legs are not as strong as they were. A report from the neuropsychologist suggests that he has difficulty with visual material as a result of mild damage to the right side of his brain. None of these factors explain why there should have been a departure from an 18 month custodial period.

[46] It was submitted on behalf of this respondent that the learned trial judge in fact intended to release him as time served because of his limited role in the operation but in doing so miscalculated the period that he had spent in prison. If that was correct and a sentence of six months or 12 months had been imposed that would unquestionably have been unduly lenient. Taking into account double jeopardy we substitute for the sentence of three years apportioned as six months in custody and 2½ years on licence a determinate custodial sentence of two years comprising 12 months in custody and 12 months on licence.

Conclusion

[47] In each case we have concluded that the sentences were unduly lenient. The substituted sentences shall run from the date on which the original sentences were passed and credit shall be given for any period spent on remand.