Neutral Citation: [2017] NICA 20 | *Ref:* **WEI10209**

Judgment: approved by the Court for handing down | *Delivered:* **17/02/2017**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

THOMAS SAMUEL RODGERS

Before: Morgan LCJ, Weir LJ and Keegan J

WEIR LJ (delivering the judgment of the court)

The nature of the application

[1] The applicant applies for leave to appeal against a total sentence of 3 years consisting of a determinate custodial sentence of 1½ years and a similar period on licence imposed upon him on 26 April 2016 by H H Judge Loughran in respect of 5 counts of possessing Class B drugs and one of possessing a Class A drug, in each case with intent to supply. On count 3, relating to the Class A drug Fentanyl, a sentence of 3 years' imprisonment was imposed and on each of the counts 1, the Class B drug cannabis resin, and 8, 9 and 10, relating to synthetic Class B drugs, a sentence of 12 months' imprisonment was imposed. On count 4, relating to the Class B drug herbal cannabis, a sentence of one month's imprisonment was imposed. All those sentences were to be concurrent but consecutive to a sentence of 3½ years imposed upon the applicant on 20 November 2014 for a burglary committed on 1 May 2014 which consisted of a determinate custodial sentence of 1 year and 9 months with a licence period thereafter of equal term.

The circumstances of the present offending

[2] On the afternoon of 16 January 2014, the applicant returned to HM Prison Magilligan after a short period of home leave. On arrival in reception a drugs' dog was used to search him and during the search the dog froze thereby indicating to its handler that it had detected the scent of drugs. A hand-held electronic detector was passed over the applicant's body and as it passed his lower back/buttocks it activated, thereby indicating the presence of something hidden in

his body. However, prison staff did not find anything on the applicant's person. He was then placed in a cell within the Care and Supervision Unit. That evening prison staff conducted another search of the applicant using a hand-held electronic detector but on this occasion it did not activate. The applicant was therefore returned to a different prison cell and prison staff conducted a search of the cell within the Care and Supervision Unit in which he had been initially held following his return to the prison.

[3] During the search of that cell prison staff located a quantity of items believed to be controlled drugs and their nature was subsequently confirmed. The total value of the drugs if sold in the prison is said to have been between £4,680 and £8,310 although the basis for that estimate is not clear. The applicant initially denied knowledge of the discovered drugs but in his police interview of 13 February 2014, he admitted bringing drugs into the prison on his return from home leave. He stated that he did not know what type of drugs he was carrying and that they did not belong to him. He would not, however, say who they did belong to or who he was intending to give the drugs to within the prison because to do so would put his life in danger. When asked whether he was put under duress to carry the drugs, the applicant confirmed that this was so.

The applicant's previous convictions

[4] The applicant is now aged 36 and was 33 at the date of the present offending. By then he had accumulated 90 previous convictions, 65 of which were for burglary. There were 3 previous convictions for drug offences which, judging by the sentences imposed, must have been relatively minor.

Pre-sentence reports

[5] The first pre-sentence report dated 18 November 2014 referred to the applicant's unsettled background, lifestyle and family history reflecting instability and a lack of protective settling factors apart from his extended family. Due to his attitudes towards offending and the instability of lifestyle while in the community, he was assessed as at high likelihood of re-offending. While his involvement in house burglaries involved potential risks to victims should he be confronted, most burglaries were committed during the day when victims were not at home. This did not negate the impact which the offending might have on victims but there was no pattern of pre-meditative violence and he was not assessed as being at risk of posing serious harm. In the second report dated 18 April 2016 the applicant was assessed as still posing a high likelihood of re-offending but notwithstanding the inherent dangers associated with illicit drug use, the applicant was not assessed as meeting the criteria to be categorised as posing a significant risk of serious harm to the public.

The judge's approach to sentencing

[6] The sentencing judge was of the view that, although the applicant claimed that he did not know the nature of the substances he was carrying, it was hard to avoid

the conclusion that he was very well aware that these were drugs because they were in separate packets. The judge referred to the applicant's police interview in which he admitted bringing the materials into prison. Reference was made to his being unwilling to identify those who had exerted pressure on him to bring the drugs into the prison other than saying that he owed money for drugs in the prison and he had been threatened that if he did not bring the drugs in he would be beaten. As an indication of the truth of this claim, the judge referred to the applicant having spoken to prison staff which led to him being placed on a different landing. She also referred to the applicant's concern lest he be seen as a "tout" or informer while still imprisoned. Reference was made by her to the applicant's significant criminal record and to the applicant's licence having been revoked when he was released from prison in April 2014 as a result of committing another burglary on 1 May 2014, within less than a month of his release on licence. The judge further noted that there had been a delay of two years between the commission of the present offences and their coming to be dealt with by her and that this was no fault of the applicant.

[7] The judge observed that the authorities demonstrate that deterrent sentences have to be imposed on those who bring drugs into prison. She made reference to the mitigating factors identified by the applicant's solicitor, namely that the applicant was placed under pressure, that he had little awareness of the nature of the drugs, that he did not gain anything financially other than payment of the debt owed by him to the drug suppliers. She referred to both of the pre-sentence reports noting the applicant's difficult family history and how his lifestyle and personal circumstances reflected instability. In addition, she commented on the favourable progress he had made in prison by earning enhanced status and working with a treatment agency to address his drug addiction.

[8] Proceeding to sentence, the judge indicated that had the applicant pleaded not guilty, she would have imposed a 4 year sentence on the most serious count, namely the possession of the Class A drug with intent to supply. She however reduced the sentence to 3 years due to his early admission of guilt. In respect of the other counts she proceeded to sentence the applicant as set out above making all sentences concurrent with each other but consecutive to the sentence for the burglary that he was already serving. The judge expressed the view that this was "a lenient enough" sentence given that there was a possession of Class A drugs with intent to supply but that she had taken into account the considerable delay and the fact that, had the applicant been sentenced earlier, there might have been some time earned that might be taken into account. She was not however impressed by the fact that when she came to sentence the applicant he was already serving the sentence for burglary so that he had accrued no remand time for the present offences. On this aspect she said:

> "… but that, of course, is your own fault. It has nothing to do with this Court because you knew very well that if you committed any further offence while you were on licence your licence was liable to be revoked and you then did commit a further offence and that's why you have no time served against the present offences."

The grounds of the application

[9] The applicant's counsel, Mr Ward, who appeared on this application but not at the sentencing hearing, accepted in a realistic preamble to his well-focused written and oral submissions that:

> "It must be accepted that drugs are a blight on the prison system and that deterrent sentences are required for those that attempt to bring drugs into a prison setting."

He contended, however, that the appropriate level of sentence must still be determined on the basis of drug class and quantity. Against that background, he submitted that the sentence passed by the judge was wrong in principle and manifestly excessive. In support of this submission he relied upon the following propositions:

(1) The sentencing judge selected too high a starting point as a basis for the sentence imposed.

(2) The sentencing judge did not give the applicant sufficient credit for his admissions during interview and his pleas of guilty entered at arraignment.

(3) Having identified a starting point, the sentencing judge erred by not explaining why the applicant was getting less than full discount for his plea of guilty.

(4) The sentencing judge did not have any, or any adequate, regard to the principle of totality.

(5) The sentencing judge did not make any reduction to the sentence to reflect the culpable delay in bringing the case before the court.

(6) The sentencing judge did not give the applicant any or any adequate credit for personal mitigation.

Mr Ward developed his propositions as follows.

Starting point

[10] It was submitted that the starting point of 4 years identified by the sentencing judge was simply too high. Although the applicant had brought a variety of drugs into the prison only a very small proportion of those were of Class A. The vast majority of the drugs were Class B drugs and for that reason it was suggested that the starting point ought to have been significantly less than 4 years. However, as Mr Ward developed his oral submissions he was disposed to accept that a

significantly higher starting point is appropriate in cases of attempted or actual smuggling of drugs into a prison. Given the quantities in this case, his estimate was that the starting point might have been 2 to 2½ years if the offending had been in the community but because it involved importation into prison, that starting point might instead be 3 to 3½ years.

The sufficiency of the credit allowed for the plea.

[11] It was submitted that the sentencing judge should have afforded the applicant full credit for his admissions during interview and his plea of guilty at arraignment. Mr Ward said that it might be inferred from the sentence passed that the sentencing judge applied a reduction of 25% to reflect the plea of guilty. However, as she had made no specific reference to this during her sentencing remarks, it was impossible to ascertain how or why she had arrived at this percentage. One possible explanation was that the level of credit was reduced to reflect the fact that the applicant was caught red-handed. Although Mr Ward accepted that in certain circumstances a court may adopt this course, he submitted that it would not have been appropriate for the court to apply such a reduction in this case, particularly as there was a "workable defence" open to the applicant based upon duress.

The alleged failure to apply the totality principle

[12] It was submitted that the failure of the sentencing judge to apply the totality principle meant that the applicant was effectively serving a sentence of 5½ years. It was submitted that if this case had been dealt with alongside the burglary matter in November 2014, a sentencing judge dealing with both would not have been likely to impose such a lengthy sentence. It was accepted that the sentencing judge was quite entitled to impose a consecutive sentence but if doing so ought to have made an adjustment to the length of that sentence to reflect totality.

The delay in the prosecution of the present offences

[13] Mr Ward relied upon the well-established principle that culpable delay in investigating or prosecuting a case may be reflected by a reduction in the sentence that would otherwise have been imposed (see AG's Reference No 2 of 2001 [2003] UKHL 68, per Lord Bingham at para 24). The appropriateness of a reduction will depend on a range of factors such as the length of the delay, the reasons for it and the extent of any prejudice to the defendant. It was submitted that in the present case the delay was substantial as illustrated by the timeline:

16 January 2014	-	Offences committed.
13 February 2014	-	Applicant interviewed and makes full admissions. Case to proceed by way of report pending forensic analysis.
20 June 2014	-	Forensic report completed.

21 August 2014	-	Date when final witness statements obtained.
18 May 2015	-	Summons signed.
24 May 2015	-	Preliminary Inquiry.

Mr Ward submitted that a period of 16 months between the commission of the offences and the issuing of the proceedings was unexplained and unacceptable. This was a straightforward case where the applicant had made admissions during interview and all necessary forensic evidence had been gathered by June 2014. The applicant had remained in custody throughout the period and he had been prejudiced by having to endure two sentencing hearings when it would have been entirely possible, with even a little degree of expedition on the part of the Prosecution Service, for the burglary and the present offences to have been dealt with together in or about November 2014.

Consideration

[14] This Court entirely agrees with the statement of the learned judge that deterrent sentences have to be imposed on those who bring or attempt to bring drugs into prisons and also with the reasons which she gave for that necessity:

> "The authorities show that deterrent sentences have to be imposed on those who take drugs into prison for a number of reasons. First of all, drugs in prison are a form of currency. They have much greater value than they have on the streets. There is a danger to the prison discipline system of having inmates under the influence of drugs, and those who are in prison already sentenced and those who are imprisoned awaiting sentence, may be tempted where otherwise they would not to resume the use of drugs in prison. Very often a time in prison may be a time when someone has an opportunity to look at his or her drug abuse and to take the opportunity in prison to withdraw from that abuse. But if drugs are freely available in prison through the kind of activity in which you engaged, then that opportunity is lost. So, the availability of drugs in prison is capable of defeating what could be one of the better outcomes of prison, namely people being away from drugs and the temptation to use drugs. Of course, drugs in prison can also be the source of injury; injury to prisoners who sometimes under the influence of drugs self-harm; injury to prison staff. So the availability of drugs in prison, which is deplorable, is too prevalent and requires the imposition of deterrent sentences."

[15] This court considers that, precisely because of the sort of factors identified by the judge, the bringing of drugs into a prison and intending there to supply them to others is in principle a more serious offence than the commission of a corresponding offence involving similar quantities and categories within the community. For that reason it is not possible to draw worthwhile comparisons with sentences imposed for such community-based offending. Further, it hardly need be stated that the limited opportunities for concealment of drugs about an offender's person, mean that the quantities capable of being imported in that way are bound to be limited. This court does not consider that the 4 year starting point for these offences and this offender is open to valid criticism.

[16] In relation to the discount afforded for the plea of guilty which, while not expressly articulated by the judge was plainly 25%, the court does not consider that it was insufficient. The applicant did not own up to possession of the drugs when the initial detection was made by the drugs dog or later when the electronic detector was used. Rather he removed and tried to conceal the drugs in the cell in which he had been placed and following their discovery there denied any knowledge of them. It was only when subsequently interviewed by the police that he confessed what he had done. In our view the applicant never had a viable defence to possession and his rather vague suggestion of duress by some unspecified person would not, contrary to Mr Ward's submission, have provided what he optimistically described as a "workable defence".

[17] Where this court does differ from the learned judge is in relation to the omission of any allowance for totality in a situation in which she was imposing a consecutive sentence to that already imposed in November 2014 for the burglary, which had consisted of 1 year and 9 months' determinate custodial sentence and a similar licence period. While it is of course correct, as the judge observed, that the applicant had brought that sentence on himself by committing yet another burglary within weeks of being freed on licence, it nonetheless remains incumbent on a sentencer to ensure that the overall sentence does not offend the totality principle. In this case, moreover, there is the additional circumstance that the investigation for the present offences appears from the chronology to have been completed by August 2014 and yet proceedings were not initiated against the applicant for a further unexplained 9 months. There was subsequently yet further delay. While the judge did say that she had taken account of what she rightly called "the considerable delay" and the fact that the applicant might have been able, had he been sentenced earlier, to accrue some remand time to be taken into account it is not at all clear how or to what extent such account was taken.

[18] In all the circumstances of the present case, this court takes the view that (1) the judge's starting point of 4 years was not outside the acceptable range; (2) that her discount of 25% for the plea cannot be criticised but (3) that no or no sufficient allowance was made for the factors of totality and delay. It accordingly grants leave and substitutes for the sentence of 3 years imposed on count 3, one of 2 years to be served as a determinate custodial sentence of 1 year followed by a licence period of

the same duration to be served consecutively to the burglary sentence. It does not alter the concurrent sentences imposed on the other counts nor the consequential orders.