IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DAVID THOMAS McILWAINE

MacDERMOTT LJ

On Thursday 19 June 1997 about mid-day the applicant was riding a bicycle in Carrickfergus. He was stopped by police. He was wearing a sports bag across his back. When opened a number of packages were seen. The police suspected that they were drugs. When asked what the bag contained the applicant replied "You know fucking rightly what's in it". When asked where he had got the bag he replied "Somebody gave me it". When asked where he received it he said "I don't know" and "I found it". At interview he denied making these remarks. In the main he failed to reply to questions and gave the police no assistance by saying where he had got the drugs.

Forensic examination revealed that the contents of the bag was in fact drugs – bars of cannabis resin weighing 9.88 kg. That is a substantial amount having a street value of about £100,000.

The applicant was charged with both possession and possession with intent of the drugs which are class B drugs. On arraignment on 21 October 1997 he pleaded guilty to both counts and was sentenced to 4 years' imprisonment on each count.

Mr Gibson appeared on behalf of the applicant as he had in the court below. He submitted that a sentence of 4 years was manifestly excessive. He said everything that could possibly be said on behalf of the applicant. He emphasized that the applicant had pleaded guilty at arraignment which is a most relevant factor as is recognised by Article 33 of the Criminal Justice (Northern Ireland) Order 1996, which provision came into operation on 25 July 1997.

The judicial attitude to drugs cases in this jurisdiction is or ought to be well known. Those who are in possession with intent to supply will face a virtually inevitable custodial sentence. In this case the applicant was in possession of a large and valuable consignment of cannabis resin – enough to make some 50-70,000 cigarettes or joints which could have fuelled the needs of users and could have led to the involvement of first users in this civil drug trade.

It appears to be accepted that the applicant was not a main distributor. He was a courier and couriers play an important, indeed vital, part in the distribution of drugs. We note that Ian Kennedy J said in R –v- King (1987) 9 Cr App R (S) 173 at 174:

> "It is not so that the courier is a lowly person in the organisation. The organiser's position will be a more serious one, but the courier plays a quite vital role".

That case is also of significance in that it emphasises that in the face of the ongoing and growing trade in dangerous drugs the courts will have no hesitation in moving up the level of sentencing for serious drugs offences.

Mr Gibson referred the Recorder to a number of reported decisions and we have considered those cases. As has been said many times before a factual analysis of other sentences is rarely of assistance. Guideline cases are however of value and should ensure a consistency of approach. To use the words of Drake J in R –v- McDonald (1990) 12 Cr App R (S) 457 at 460:

> "As has been said many times, guidelines are guidelines and no more and the court in each individual case has to determine, having regard to the guidelines, what is the proper sentence to be passed on the particular defendant who is appearing",

The case is also of interest in that it recognises that the failure of a person in possession to assist the police by disclosing his source is a material factor when determining the appropriate sentence. This is a particularly relevant factor when, as in this case, the amount recovered is substantial and the Recorder was fully entitled to comment as he did at page 2:

> "The significance of these questions was, of course, that had the accused co-operated with the police at that stage further inquiries might have been set in train and arrests made or at least the police would have been in a position to react rapidly to whatever information was disclosed".

and also at page 4:

> "I have already pointed to his lack of co-operation immediately following his arrest and had he been forthcoming either then or during interview that would have been of great value to the police, I have little doubt. The defendant was acting as a courier because he was asked to move the drugs. Mr Gibson accepts that he knew that the bag contained drugs although the defendant said that he had no idea that it contained so much. But given the weight of the bag it must have been apparent to him that it did contain a very substantial quantity of drugs of whatever type the drugs might turn out to be. The defendant agreed to move the drugs because he wished to discharge a debt to the dealer in question for cannabis he had purchased for his own use in the past. The Courts have had occasion to deal with couriers on many occasions in the past and it is a common feature of such situations that the courier is in debt to a drug dealer. There are of course other reasons why people act as couriers, often in return for direct payments".

It is well established that it is not a mitigating factor to claim that the instant offence arose out of a wish to need to feed an addiction or discharge a debt to a supplier. Thus in R –v- Lawrence 10 CAR(S) 463 at 464 Simon Brown J (as he then was) said:

> "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".

It is also apparent that the applicant was not a newcomer to the drugs scene. On 17 May 1994 he had been sentenced to one month's imprisonment for possession of a class A drug. Previously he had been sentenced in December 1991 to 18 months in the YOC for two robberies and four thefts. He does not seem to have learnt that criminal behaviour is unacceptable. He is now 25 and as the Recorder pointed out clearly intelligent. As this court has pointed out many times no-one likes sending young people to prison for lengthy periods but it is necessary to do so in order that offenders may be properly punished and others may be deterred from seeking to do likewise.

The most distinctive feature of this case is the amount of cannabis involved – almost 10 kg. We are familiar with cases where the amount was weighed in grammes or hundreds of grammes and it is clear that the Recorder, who, of course, has a much wider experience that we do, could recall no case involving 10 kg – hence his readiness to seek guidance from a consideration of amphetamine cases being other class B drugs. It seems to us that this 10 kg seizure is indicative of the fact that there is a growing amount of cannabis resin in circulation in this jurisdiction and that the use of cannabis is on the increase. That, of course, is a most regrettable situation and the courts must adjust their levels of sentencing upwards in an attempt to deter such activity. This impression is confirmed by statistics which we have obtained from the RUC relating to seizures of cannabis during the past 4 years.

1994 - 97 kg

1995 - 161 kg

1996 - 155 kg

1997 - 455 kg

The break-up of the 1997 figure of 455 kg is significant: in addition to hundreds of small amounts of cannabis the following seizures were made

Between 1 - 5 kg - 31

Between 5 – 10 kg - 5

Between 10 – 20 kg - 3

Over 20 kg - 4 (These included one very large seizure of 200 kg).

The starting point of Mr Gibson's argument was the well known guideline case of R –v- Armagh (1982) 4 Cr App R (S) 407. The relevant passage in Lord Lane's judgment is at page 410:

> "Supply of cannabis: Here again the supply of massive quantities will justify sentences in the region of 10 years for those playing anything more than a subordinate role. Otherwise the bracket should be between one to four years' imprisonment, depending upon the scale of the operation. Supplying a number of small sellers – wholesaling if you like – comes at the top of the bracket. At the lower end will be the retailer of a small amount to a consumer. Where there is no commercial motive (for example, where cannabis is supplied at a party), the offence may well be serious enough to justify a custodial sentence".

We would, with due respect, make two observations about the passage: firstly it is difficult to appreciate the division of cases into those involving massive quantities justifying ten year sentences and others falling within a one to four year bracket. There must in practice be cases which appropriately fall within a five to ten year framework. Secondly the amount of drugs involved must be reviewed in the light of the local contemporary scene. Thus while 10 kg may be a common seizure in England it can in Northern Ireland represent the first flowering of a developing drugs market which requires a forceful judicial response.

It must also be remembered that Aramah is now 15 years old and attitudes to the evolving drug scene change. As has been said many times by this court it is determined to play its part in trying to protect the public against the wide-spread evils of the drugs trade. In England in R –v- Gilmore (20.5.86), referred to in King at page 174, Drake J said:

> "The experience of all the members of this Court is that the number of serious drug offences is on the increase, and has been on the increase since the time when *Aramah* was before the court in 1982. We think that without violating the guidelines to be looked at the time has clearly come when it is necessary to move up the level of sentencing for serious drugs offences".

That led to an immediate response by Lord Lane CJ in R –v- Hedley (1989) 11 CAR(S) 298 when he said at page 300:

> "There have been suggestions recently that the guidelines in *Aramah* no longer apply to offences involving cannabis. Those suggestions are wrong. Although, in view of the increase in the maximum sentence in respect of Class A drugs, the guidelines in *Aramah* have now been amended, so to speak, by the decision in *Billinski and Others* (1987) 9 Cr. App. R. (S.) 360, so far as cannabis is concerned the *Aramah* guidelines are still in force".

In this jurisdiction the continuing value of Aramah has been frequently recognised but for our part we do not consider that it gives determinative guidance today in the type of case where one is dealing with a large and valuable consignment of cannabis.

Mr Gibson sought to rely heavily on the decision in R –v- Fyfee (1994) 15 Cr App R (S) 13 where the Court of Appeal (Glidewell LJ and Garland J) reduced a sentence of four years' imprisonment to two years. The appellant who was 29 had agreed to collect a package in Liverpool and take it by car to Perth. When the car was stopped 19 kg of cannabis resin was found. The appellant was expecting to receive £300 for his trouble. The court decided that the sentence was outside the Aramah guidelines and required to be reduced substantially. The court drew attention to the fact that earlier in his judgment in Aramah Lord Lane had said in relation to the importation of cannabis:

> "… importations of amounts up to about 20 kilogrammes of herbal cannabis or the equivalent in cannabis resin or cannabis oil, will, save in the most exceptional cases, attract sentences of between 18 months and three years, with the lowest ranges reserved for pleas of guilty in cases where there has been a small profit to the offender".

We note that the present case is not an importation case and we have some difficulty in co-relating the Chief Justice's importation and supply guidelines. Looking at other cases we are satisfied that the court in Fyffe must have felt that there were circumstances requiring a merciful and lenient outcome and the result appears to be out of line with other decisions. For instance in R –v- Doyle [1996] 1 Cr App R (S) 449 Wright J said at 450:

> "Possession of cannabis with intent to supply – and of course it must be understood that even dealing with cannabis on the basis that the appellant alleged that he had dealt with it, involves that offence – but possession with intent is an offence which almost inevitably attracts a custodial sentence. The scale established in the well-known guideline case of *Aramah* is between one and four years, depending on the scale of the operation. In the past, this Court has upheld sentences of as much as 30 months on a plea of guilty when the amount involved was less than 500 grammes".

We would also point out that in Aramah Lord Lane's 20 kg related to "herbal cannabis or the equivalent resign or cannabis oil". In R –v- Ronchetti & others (The Times 9 December 1997) the court points out that the real distinction is between herbal cannabis and cannabis resin on the one hand and cannabis oil on the other and this distinction arises from the fact that 10 kg of herbal cannabis or cannabis resin are required to make 1 kg of cannabis oil.

So we return to the question – was this sentence manifestly excessive? We are satisfied that it was not. Even allowing for the early guilty plea we would not have interfered with a 5 years' sentence. This was a substantial quantity of cannabis, no assistance was given to the police by the applicant who already had a relevant conviction. We would repeat yet again – those who offend in this way will on conviction receive lengthy custodial sentences. The public is entitled to be protected from the evil of drug abuse and it is the duty of judges in this jurisdiction to make it clear that they will seek to discourage anyone from participating in that trade.

We would repeat what this court recently said in Hutton (24.10.97):

> "We would add that sentencing in drugs cases in England does not necessarily reflect the need for deterrence which in this jurisdiction the courts consider to be so very necessary in order to keep at bay the insidious tide of misery which follows from the growing ready availability of drugs of both classes A and B. Cannabis is sometimes described

> as a 'soft drug' but it does not follow that even if that is an appropriate description possession with intent to supply or supplying should attract a 'soft' sentence. Such a reaction would not be in the public interest and would not be a proper judicial response to a grave social evil".

The statistics which we have already quoted make it clear that cannabis resin is now being seized in sizeable quantities. As seizures may only represent the "tip of an iceberg" we are satisfied that a growing trade in cannabis is developing in this jurisdiction and the courts must make it clear that they will not tolerate that development. In sentencing for possession with intent the maximum permitted sentence remains at 14 years despite the upsurge in such offending since the 1971 Act was passed. We note that in Ronchetti Rose LJ said "we are also told, and accept, that there is no present intention on the part of the Government to increase the present maximum of 14 years for this offence (importation)". For our part we would express the hope that the Government in this jurisdiction will review this unrealistic upper limit as a positive effort to prevent Northern Ireland becoming more deeply involved in the evil drug trade.

In England and Wales the courts have to fit enormous seizures into this rigid penalty frame. We find the statistics as set out in his judgment in Ronchetti by Rose LJ to be alarming:

> "For the 3 years ending March 1997, there were 77 seizures of between 200 and 500 kilogrammes; 16 seizures of between 500 kilogrammes and 1 tonne, and 33 seizures of between 1 and 9 tonnes. There were no seizures during that period in excess of 9 tonnes. It follows that the greatest majority of seizures are of less than 1 tonne".

Faced with these amounts and the 14 year maximum the Lord Justice continued:

> "We have been invited by the Crown to give some indication for the guidance of judges of first instance, in relation to the sort of level of sentence which is appropriate for importations of the order of 100 kilogrammes. In conformity with, but by way of addendum to Aramah, we would suggest that, following a trial, the importation of 100 kilogrammes by persons playing more than a subordinate role, should attract a sentence of 7 to 8 years. In our judgment, 10 years is the appropriate starting point, following a trial, for importations of 500 kilogrammes or more, by such persons. Larger importations will, as the authorities show, attract a higher starting point. That starting point should, in our judgment, rise according to the roles played, the weight involved, and all the other circumstances of the case, up to the statutory maximum of 14 provided by Parliament".

In this jurisdiction 200 kg appear to be the largest seizure of cannabis to date. Its value is some £2 million and is a significant indeed massive quantity of a potentially harmful drug and in principle, while recognising that larger consignments may exist in this jurisdiction, possession with intent of such an amount should attract a sentence of about 10 years' imprisonment. In so stating we appreciate that we are departing slightly from the English suggestion that the 10 year figure involves a seizure of some 500 kg. We take this course because we are satisfied that it is essential that we try to curb the increasing traffic in this drug in this jurisdiction.

The appropriate sentence cannot be calculated simply by an arithmetical calculation based on weight or value though those will be relevant considerations. That said we are satisfied that possession of a substantial quantity of cannabis (which would include a one kg consignment) should attract a sentence of at least 5 years' imprisonment which would rise according to, among other reasons, weight and value to about 10 years for a 200 kg seizure. Larger quantities would attract sentences up to the maximum which could well be appropriate in many cases.

Sentences will, of course, always have to be appropriate to the circumstances of a particular case which means that mitigating and aggravating factors will have to be reflected in the actual sentence.