Neutral Citation No. [2011] NICA 74 | *Ref:* **COG8418**

Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **17/12/2011**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v.

STEPHEN O'BRIEN

Before: HIGGINS LJ, COGHLIN LJ and HART J

COGHLIN LJ (delivering the judgment of the court)

[1] The appellant in this case appeals to this court with the leave of the single judge from sentences imposed in respect of two convictions: cultivation of cannabis for which he received a determinate sentence of 12 months imprisonment, divided into 4 months in custody and 8 months on licence, and £1,000 fine in respect of possession of the same drug.

[2] There is an agreed factual basis for the convictions. I should remind the court that he was unanimously acquitted of possession of cannabis with intent to supply which is a matter of some significance in the course of this appeal.

[3] On 25 August 2009 police carried out a search at Cranbrook Gardens, Belfast, which is the appellant's address, and during the search they found two bedrooms which were being used for growing cannabis. The rear first floor bedroom contained 15 plants together with fans and heat lamps. A further 8 plants were found in an earlier stage of growth in growing apparatus on the front first floor bedroom. This bedroom also contained two pieces of string attached to the wall for use in drying harvested cannabis. Photographs were taken of the plants and growing materials in situ and we have seen those photographs.

[4] In addition to the cannabis under cultivation police also found .39 grams of cannabis in a Tupperware container in the kitchen of the property. The appellant

was arrested and interviewed by police about the cannabis and in the course of interview he immediately admitted cultivating the cannabis, emphasising that the cultivation was for his own personal use. The cannabis found in the Tupperware container had an estimated value of £3.90. There was a dispute between an expert called on behalf of the defence and the police witnesses for the prosecution as to the value of the cannabis that could have been produced by the growing plants. One estimate produced by the prosecution was £11,500. The defence expert estimated £2,100 to £3,600. No Newton hearing was arranged by the trial judge to determine which was the appropriate valuation and, since the appellant was acquitted unanimously on the first ground of possession with intent to supply, we think that it was sensible on the part of Mr McClean to accept that this court should proceed on the basis of the lower figure.

[5] The equipment that has been shown to us in the photographs does not appear to have been particularly sophisticated and we note that there was no question of unlawfully extracting electricity. That said, there is absolutely clear evidence that he was using his premises for a significant degree of cultivation. One can see that from the lamps and the various other pieces of equipment.

[6] Reports from Dr Carol Weir, Chartered Clinical Psychologist, and the Probation Service confirmed the appellant's long term addiction. It appears to have commenced with alcohol when he was approximately 14 or 15 and progressed rapidly to cannabis. At one time or another he has also taken amphetamines, Ecstasy and LSD. He claims to have self referred himself to the Northern Ireland Community Addiction Service without any real benefit but no evidence was forthcoming as to whether he had consulted or attended his GP about his addiction.

[7] There is a sad and unfortunate family background of alcohol and drug dependence together with psychiatric illness. Dr Weir diagnosed that this appellant is suffering from anxiety, stress and the effects of long term drug abuse. She considered his mental health to be poor, noting that in the course of his interview he was quite disturbed in his thinking and feeling. She recommended a reference to the Life Style Programme administered by Addiction Northern Ireland in the course of which he could be monitored by the Probation Service.

[8] The pre-sentence report from the Probation Service of Northern Ireland covered most of the ground set out in Dr Weir's report. It recorded his explanation for cultivation, namely, that he was concerned about the purity of cannabis he bought on the street and also the inroads that such purchases were making into his benefits. The report did not consider him to present a serious risk of harm to others and a medium risk of reoffending almost solely related to his addiction.

[9] In the court below the trial judge gave careful consideration to the reports and the submissions. She allowed the appellant full credit for his early plea of guilty and took into account the variation in valuations although as I have indicated she did not appear to reach any conclusive finding. She also had regard to the appellant's

responsibility for his disabled brother and to his previous conviction in 1997. She expressly left out of account his conviction that post-dated these offences. She had regard to the submissions advanced by Mr Maguire based on – (1) the appellant's willingness to undergo treatment for his cannabis addiction, (2) his clear record for 12 years prior to the offences and (3) that imprisonment would not afford him an opportunity to deal with what she referred to as his personal issues and could in a negative way be destabilising noting that these were also concerns that were expressed specifically in the probation report.

[10] The learned trial judge ultimately felt that the law was clearly set out in the case of R v Auton & Ors [2011] EWCA Crim 76 and in view of the previous possession conviction she did not feel that a non-custodial disposal would be sending out the right message. She made it clear that she would not have imposed a custodial sentence for the possession charge alone and the course of action that she took was to impose a prison sentence of 12 months divided as I have indicated earlier between 4 months in custody and 8 months on licence. Having regard to the relevant individual who was dealt with in Auton it is interesting to compare the outcomes. In Auton a 27 year old man with one previous conviction for possession of cannabis, who was also apprehended cultivating the material, was considered by the Court of Appeal to have warranted 6 to 9 months if it had been established that it was exclusively for his own use. That was not the case for Mr Auton but it must be regarded as the case in this appellant's case because of the acquittal on the supply count. Therefore it seems to us that prima facie this sentence was manifestly excessive.

[11] In our view the decision in Auton has to be read with some care. It is a decision by the Court of Appeal who, in their own words, were dealing with four cases involving well planned and resourced cannabis cultivation operations. Mr Maguire in the course of his detailed submissions has referred us to paragraph 5 of the judgment in that case which begins:

> "Production of cannabis on the kind of scale we are considering in these cases is far from the equivalent of simple possession of the drug. Whatever may be the position in the different case of a plant or two in the garden production of the kind here under discussion will almost inevitably call for a custodial sentence. It involved not simply possession but creating a drug which it is illegal to have and this kind of intensive cultivation involves doing so in some quantity."

Therefore it is clear that the Court of Appeal was dealing with significant amounts of cultivated cannabis. These were cases, which do not appear in any way unusual, involving operations likely to produce not less than 1 kilogram and sometimes quite a lot more. As the Court also said with some significance:

> "The total drug available in the community is appreciably increased by these operations".

[12] The individual defendants in Auton ranged from possession of 49 plants in two growing rooms with an estimated yield, as I have indicated, of 1 kilogram being produced principally for the defendant's own use to a circle of comrades who were also using it in multiple premises with unlawful abstraction of electricity and a history of possession with intent to supply cannabis and, in another case, cocaine.

[13] We recognise the experience of the trial judge in this case and the careful attention with which she treated this case and, in such circumstances, we would only be prepared to differ from her with considerable reluctance. However, after taking into account the factual evidence, the expert reports and recommendations and the submissions that we have heard today we have reached the view that this should be regarded as a quite exceptional case in which the community might be best served by a non custodial sentence and we bear that in mind as well as taking into account the fact that in our view the sentence was manifestly excessive. Therefore we propose to allow the appeal and substitute for the 12 month prison sentence a period of 3 years' probation. That period of 3 years' probation will include the condition recommended in the pre sentence report, that the defendant shall present himself in accordance with the instructions given by the probation officer to the PBNI programme delivery unit in Patrick's Street, Belfast or to another venue specified by the probation officer, to participate actively in an alcohol drug counselling and/or drug treatment programme during the probation period and to comply with the instructions given by or under the authority of the person in charge. We would add that it may well be appropriate for this appellant to undergo the Ratsdam programme. We can only do so if this appellant is prepared to consent to that being done Mr Maguire. Does your client consent to being put on probation for 3 years on those terms? Mr Maguire – yes he does.

[14] In so doing we should not be thought to be differing in any significant way from the general principles set out by the Court of Appeal in Auton. Cannabis remains a drug which is capable of causing significant long term psychiatric damage. That is demonstrated not only by repeated research programmes but also by the sad individual who is making the appeal in this case. Cultivation of cannabis always carries with it the potential risk of supply whether it is for pecuniary advantage or for friends. However having made those observations it is also important to say that the nature of the judicial sentencing exercise must always accommodate the myriad of facts that go to make up individual cases some of which may be exceptional in terms of the general principles.

[15] For the £1,000 fine we propose to substitute a fine of £200 with 12 months to pay. He is already subject I think to having to pay the previous fine.