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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

THE QUEEN

-v-

STEPHEN GREER

Applicant.

Before: Higgins LJ, Coghlin LJ and Gillen J

**GILLEN J (delivering the judgment of the court)**

[1] This is an application for leave to appeal against sentence brought by Stephen Greer ("the applicant") who was refused leave to appeal by the Single Judge.

[2] On 7 January 2013 the applicant was arraigned and pleaded guilty to five counts involving possession of five different classes of drugs. As set out below in paragraph 5, these pleas covered Counts 4, 6, 8, 10 and 12.

[3] On 27 February 2013, the first day of his trial, he was arraigned and pleaded guilty to one count which dealt with possession of a 9mm firearm and 15 cartridges (namely 15 rounds of ammunition) in suspicious circumstances and to four other counts involving drugs. As set out below in paragraph 5, these pleas covered Counts 3, 5, 11, 13 and 14.

[4] The trial judge, having heard pleas on his behalf dealing with these counts, sentenced him to a determinate custodial sentence of seven years consisting of three years and six months custody and a licence period of three years six months concurrent on each count. The record of the outcome from Belfast Crown Court notes as follows:

**“Sentence or order**

Crown Court - imprisonment/detention - determinate: The Court having taken into account the defendant’s early plea of guilty,

The defendant was sentenced as follows:

Total sentence of: seven years

Determinate Custodial Sentence Custodial Period of: three years six months

Licence Period of: three years six months

Concurrent on each count.”

[5] A summary of each offence and the sentence imposed together with a note of the maximum sentence permissible under the relevant legislation is as follows:

<b>Offence</b>	<b>Sentence imposed</b>	<b>Maximum sentence</b>
3. Possession of a Class A drug (ecstasy) with intent to supply contrary to section 5(3) of the Misuse of Drugs Act 1971.	3 years and 6 months custody and a licence period of 3 years and 6 months.	On indictment: Class A drug, involved - Life or a fine, or both.
4. Possession of a Class A drug (ecstasy) contrary to section 5(2) of the Misuse of Drugs Act 1971.	As above - concurrent	On indictment - Class A drug involved - 7 years or a fine, or both.
5. Possession of a Class A drug (cocaine) with intent to supply contrary to section 5(3) of the Misuse of Drugs Act 1971.	As above - concurrent	On indictment - Class A drug involved - Life or a fine, or both.
6. Possession of a Class A drug (cocaine) contrary to section 5(2) of the Misuse of Drugs Act 1971.	As above - concurrent	On indictment - Class A drug involved - 7 years or a fine, or both.
8. Possession of a Class B	As above - concurrent	On indictment - Class B

drug (herbal cannabis) contrary to section 5(2) of the Misuse of Drugs Act 1971.		drug involved – 5 years or a fine, or both.
10. Possession of a Class C drug (diazepam) contrary to section 5(2) of the Misuse of Drugs Act 1971.	As above - concurrent	On indictment – Class C drug involved – 2 years or a fine, or both.
11. Possession of a Class C drug (TFMPP) contrary to section 5(2) of the Misuse of Drugs Act 1971.	As above - concurrent	As above
12. Possession of a Class C drug (BZP) contrary to section 5(2) of the Misuse of Drugs Act 1971.	As above - concurrent	As above
13. Possession of a Class B drug (cannabis) contrary to section 4(3)(a) of the Misuse of Drugs Act 1971.	As above - concurrent	On indictment – Class B drug involved – 14 years or a fine, or both.
14. Possession of firearms and 15 rounds of 9 mm cartridges in suspicious circumstances contrary to Article 64(1) of the Firearms (Northern Ireland) Order 2004	As above - concurrent	Indictment – 10 years or a fine or both.

[6] Mr McDonald QC appeared on behalf of the applicant. Mr Henry appeared on behalf of the Crown. The court is indebted to counsel for their careful and detailed skeleton arguments augmented by oral submissions before this court.

### **The Evidential Background**

[7] The Crown case was that on Friday 2 September 2011, pursuant to Section 23 of the Misuse of Drugs Act 1971, a police officer conducted a search of the property where the applicant was living with his girlfriend. During the search a quantity of controlled drugs and ten rounds of 9 mm ammunition in a sock were discovered. The applicant's car was also searched and therein the police found four small plastic bags containing a white substance and two plastic cash bags. A package of drugs

was also dropped from the defendant's trousers as he was being arrested. The drugs found in this search constituted the basis of the drug offences to which he has pleaded guilty as set out in paragraph [5] above.

[8] In the course of a subsequent search of the applicant's home under Section 52 of the Firearms (NI) Order 2004 on 3 September 2011, a handgun namely a 9mm Beretta pistol wrapped in a pair of gloves was found in a second bedroom at the rear of his property. This was recovered together with a magazine containing five rounds of 9 mm ammunition.

[9] The police also located electronic scales in the kitchen of the house and a dealer's list in the applicant's wallet. The list contained names, figures referring to amounts totalling in excess of £10,000 and "E's". There were three text messages on the applicant's mobile phone which a PSNI drugs expert connected to the sale of drugs by the owner/user of the phone.

[10] Throughout all subsequent interviews with the police, the applicant denied any knowledge of the firearms and ammunition asserting that he would not be connected by DNA profile to them. The items were forensically tested and the applicant was found to be the major contributor to the mixed DNA profile on the glove that contained the pistol and magazine with five cartridges. The characteristics of his DNA were also present at significant levels in the mixed profile on the sock. During his interviews he made various admissions about the drugs albeit the applicant refused to provide the police with the identity of anyone described in his accounts other than his girlfriend, her family and his own family.

[11] In the pre-sentence report before the court, it was stated that the applicant claimed the firearm was not his and he had no intention of using it. He stated he was aware the firearm was in the house but not of its exact location or how long it had been in the property as it was placed in the house by someone else. He claimed he perceived there was a threat to his safety and therefore he was forced to keep it. He continued to dispute any prior knowledge of the sock containing the ten rounds of ammunition.

[12] The "offence analysis" section of the pre-sentence report stated that following death threats the applicant and his girlfriend had moved out of the property in question but after establishing it was safe to return he moved back. He claimed he and two male associates were in the house on the night the police searched the property and were later joined by another male and his girlfriend for a party. He asserted the drugs found by the police were all for personal use. The pre-sentence report asserts that the applicant accepted his guilt in relation to the drugs found but disputed unlawfully supplying drugs to anyone outside of passing joints between each other on the night in question.

### **The applicant's previous convictions**

[13] The applicant had twenty previous convictions, the relevant convictions being five drug related offences and one firearms offence dealt with on 7 October 2005 at Downpatrick Crown Court and a further conviction of possession of a Class C drug on 18 June 2012 for an offence on 19 August 2011.

[14] The details of the convictions of 7 October 2005 were that he received concurrent sentences of 3 years imprisonment and one year on probation for offences of possession of a class A drug, possession of a class A drug with intent to supply, possession of a class C drug with intent to supply and possession of a prohibited weapon (outlined to this court as a stun gun).

### **The applicant's pre-sentence report**

[15] The applicant was assessed as posing a medium likelihood of re-offending based on his past relevant offending, his propensity for substance misuse and associated distorted thinking, lack of consequential thinking skills and evidence of risk-taking behaviour. A reduction in the risk of re-offending was identified by virtue of a supportive relationship, a positive family support, a previous engagement with relevant organisations and a gap in offending history. He did not meet the PBNI threshold to be assessed as posing a significant risk of harm to others but the amount and variety of drugs uncovered in this instance together with a firearm raised significant concerns. The report stated that the applicant would be required to evidence a sound commitment and motivation to address the factors that contributed to the commission of the offences.

### **The trial judge's sentencing remarks**

[16] In the course of his sentencing remarks the trial judge noted that the amount of drugs found was not substantial and he took into account that the applicant had been involved in the supply of the drugs at a low street level and sharing. He agreed with the pre-sentence report that the applicant was not dangerous and there was not a significant risk of serious harm.

[17] By way of mitigation, the trial judge took into account his pleas of guilty whilst adding that he would not get full credit in relation to the most serious charges because his pleas in those instances had been entered on the morning of trial rather than at the first opportunity. The trial judge also took into account matters referred to in the pre-sentence report including the applicant's work record, his personal circumstances and the impact the inevitable prison sentence would have on him. In the course of his sentencing remarks reference to his previous convictions was made in these terms:

“It is clear that you did not respond to that sentence, the fact that you were put in prison, the fact that you were released then put on probation, you did not avail of the opportunity that was given you to set your affairs in order and resume a life free from crime. So in my view that is a particularly relevant and an aggravating factor (sic).”

[18] The judge concluded that given the aggravating factors the appropriate sentence would have been nine years custody but taking into account the guilty pleas, he sentenced the applicant to seven years where the custodial term was three years six months and the licence period was three years six months concurrent in respect of all the counts.

### **Grounds of appeal**

[19] The applicant’s grounds of appeal may be summarised as follows:

- The judge did not include individual sentences for the drug offences which he had described as low level dealing.
- To refer to the aggravating feature of the possession of the gun was confusing as it was clear that the possession of the gun was deemed the most serious offence.
- The sentence was not consistent with sentences imposed in other courts for like offences.
- The pre-sentence report and the gap between the accused’s previous offending and the instant case had received insufficient consideration.
- There was no public necessity for a deterrence aspect in this case.

### **Conclusions**

[20] It is clear that the trial judge erred in imposing concurrent sentences of seven years on Counts 10, 11 and 12 where the maximum sentence is two years or a fine or both, on Count 8 where the maximum sentence is five years or a fine or both and on Counts 4 and 6 where the maximum sentence is seven years or a fine or both in circumstances where the applicant had pleaded guilty. This court is obliged to correct those sentences. This case underlines the obligation on judges to consider each count individually before passing sentence.

[21] However it is equally clear that counsel both for the defence and prosecution, are under a duty to bring all relevant authorities and any procedural irregularity to the attention of the court during a hearing. To that end counsel must ensure that the judge is aware of any legal limitations on the court’s sentencing powers and any relevant guidelines as to sentence so as to be in a position to assist the judge if

necessary. In this case both counsel failed to alert the judge to the maximum sentence in the above mentioned counts.

[22] The principles to be observed are summarised in R v Cain [2007] 2 Cr. App. R. (S) 135 where the Lord Chief Justice observed:

“It is the duty of a judge to impose a lawful sentence, but sentencing has become a complex matter and a judge will often not see the papers very long before the hearing and does not have the time for preparation that advocates should enjoy. In these circumstances a judge relies on the advocates to assist him with sentencing. It is unacceptable for advocates not to ascertain and be prepared to assist the judge with legal restrictions on the sentence that he can impose on their clients. The duty is not restricted to defence advocates. We emphasise the fact that advocates for the prosecution also owe a duty to assist the judge at the stage of sentencing .... Nor can an advocate, when appearing for the prosecution for the purpose of sentence and a plea of guilty, limit the assistance that he provides to the court to the outlining of the facts and details of the defendant’s previous convictions. The advocate for the prosecution should always be ready to assist the court by drawing attention to any statutory provisions that govern the court’s sentencing powers. It is the duty of the prosecuting advocate to ensure that the judge does not, through inadvertence, impose a sentence that is outside his powers. The advocate for the prosecution should also be in a position to offer to draw the judge’s attention to any relevant sentencing guidelines or guideline decisions of this court.”

[23] Counsel had diligently researched a number of authorities dealing with sentences for firearm offences and drug offences. However these cases tend to be fact-specific particularly in circumstances where there was no authority drawn to our attention where drug offences had been combined with a firearms offence.

#### *Firearms Offences*

[24] We take this opportunity to emphasise the gravity of gun crime. It is necessary to ensure that sentences for this type of offence contain a sufficient element of deterrence to discourage others. Those who so offend must expect to be

dealt with severely with lengthy sentences of imprisonment save in very exceptional circumstances.

[25] This court endorses the recent comments of the Lord Chief Justice of England and Wales in R v Wilkinson and Others [2009] EWCA 1925, another case involving gun crime, where he said at paragraphs [2] and [3]:

“The gravity of gun crime cannot be exaggerated. Guns kill and maim, terrorise and intimidate. That is why criminals want them: that is why they use them: and that is why they organise their importation and manufacture, supply and distribution. Sentencing courts must address the fact that too many lethal weapons are too readily available: too many are carried: too many are used, always with devastating effect on individual victims and with insidious corrosive impact on the wellbeing of the local community. ... Whenever a gun is made available for use as well as when a gun is used public protection is the paramount consideration. Deterrent and punitive sentences are required and should be imposed.”

[26] In R v Avis and Others [1998] 1 Cr. App. R. 420 Bingham CJ at 424 set out guiding principles to be invoked in cases of gun crime.

“The appropriate level of sentence for a firearms offence ... will depend on all the facts and circumstances relevant to the offence and the offender, and it would be wrong for this court to seek to prescribe unduly restrictive sentencing guidelines. It will, however, usually be appropriate for the sentencing court to ask itself a series of questions:

(1) What sort of weapon is involved? Genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded firearms ....

(2) What (if any) use has been made of the firearm? It is necessary for the court, as with any other offence, to take account of all circumstances surrounding any use made of the firearm ...

(3) With what intention (if any) did the defendant possess or use the firearm? Generally speaking, the



most serious offences under the Act are those which require proof of a specific criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence.

(4) What is the defendant's record? The seriousness of any firearms offence is inevitably increased if the offender has an established record of committing firearms offences or crimes of violence."

[27] In the instant case, this was a real firearm which was loaded. Moreover it had additional ammunition for use therein. The applicant had not declared any use to which the firearm would be put but its presence along with drugs carried a serious aggravating aspect which the trial judge was wise not to ignore.

[28] In passing we observe that the trial judge could also have considered properly whether this was an appropriate case for the imposition of consecutive sentences for the drug offences on the one hand and the firearm offences on the other. In Attorney General's Reference Nos. 58-66 of 2002 (R v Warren, Coudjoe and Others) [2003] EWCA Crim. 636, the Court of Appeal dealt with drug related crime involving the use of firearms. The court stated:

"In most cases where guns are carried and used, it is desirable to pass a consecutive sentence to mark the additional gravity attributable to the presence of firearms. But if that is done in a case such as this, the sentences which are passed have to be adjusted to ensure that the total sentence is not too high."

[29] The seriousness of this firearm offence was inevitably increased by virtue of the applicant's previous conviction and imprisonment for possession of a prohibited weapon namely a stun gun, particularly as this was also in association with drugs offences. His period of licence upon release from this sentence had ended only four years before the current offence. We consider it entirely appropriate that the trial judge reflected the applicant's failure to learn from this conviction in the sentence that he imposed upon him and treated it as a particularly relevant aggravating factor. That within four years of a sentence of imprisonment for possession of a prohibited weapon, this applicant had escalated his involvement with firearms to the point where he now possessed a Beretta pistol with fifteen rounds of ammunition not only inevitably elevated the seriousness of the instant offence but illustrated that his previous contact with the justice system and imprisonment had failed to deter him from such crime. This demanded a strong judicial response and the invocation of a firmer deterrent aspect in the sentence.

## *Drug offences*

[30] Turning to the drug offences, the following principles relevant to this case can be distilled from the recent decision of the Court of Appeal in Northern Ireland in R v McKeown and Lin [2013] NICA 28 which cited with approval R v Hogg and others [1994] NI 258 :

- Possession of a drug is less serious than supplying it to another;
- In connection with the offences of supplying ... a previous conviction for a similar offence should weigh heavily against the accused;
- Severe sentences, including custodial sentences of any kind, are of assistance in signifying the community's rejection of drug taking and its hostility to traffickers in drugs and even to those who supply them free of charge;
- The supply of any Class A drugs or their possession with intent to supply should generally be visited with a heavier sentence than in the case of Class B drugs.
- Supplying drugs is the next in descending order of gravity (*after importation of drugs*), with possession with intent to supply a short distance behind.
- More flexibility may be adopted by the sentencing court in the case of possession where there has been no supply of drugs or intent to supply them to other persons."

[31] Whilst the applicant may well have been, as the trial judge described, a low level street trader, he was nonetheless a supplier of various classes of drugs. Of signal importance he had previously been convicted of drug offences, including possession of a Class A and Class C drug with intent to supply and was on licence until 4 August 2007. Consistent with the guidelines, this record again weighed heavily with the judge. Moreover a mere two weeks prior to his arrest for the current offence he had been found in possession of a Class A drug on 19 August 2011. We do not accept the contention of counsel that the time gap between the previous offending and the instant offences was material.

[32] The trial judge correctly –

- refused to give full credit for the late pleas in the more serious counts.
- expressly took into account the matters of mitigation mentioned in the presentence report.
- recognised the additional gravity of the firearms offence in this context

[33] We observe that consecutive sentences were not considered by the trial judge in this instance but it certainly would have been open to him to have countenanced such a possibility. In the event the trial judge was justified in considering the totality of the offending in this case rather than dealing separately with the firearm offences and the drug offences.

[34] There were no cases cited to the judge, or to this court, of like offences where offenders with records of similar offences had been convicted of both drugs and firearm offences. Hence we found the submission of counsel that the sentence in the instant case was inconsistent with “like offences “to be unsustainable.

[35] There is no doubt that these were stiff sentences passed by the judge on the firearms offences and the offences of supplying drugs. Nonetheless we do not consider that they were manifestly excessive or wrong in principle in relation to Counts 3, 5, 13 and 14 given the combination of offences, his previous record and the need for deterrent sentences in cases of this kind.

[36] It was clearly erroneous to pass such sentences on Count 8 (where the maximum sentence is five years on indictment or a fine or both) and in the case of Counts 10, 11 and 12 (where the maximum sentence on indictment in each instance is two years imprisonment or a fine or both). Similarly it was erroneous on a plea of guilty to impose the maximum sentence permissible in the case of Counts 4 and 6. These oversights however have no bearing on the appropriateness of the sentences passed on the more serious offences.

[37] Accordingly, we affirm the sentences of three years and six months custody and a licence period of three years and six months in the case of Counts 3, 5, 13 and 14 and refuse leave to appeal. We grant leave and allow the appeal on Counts 4, 6, 8, 10, 11 and 12. Invoking our powers under s10(3) of the Criminal Appeal (Northern Ireland) Act 1980 we quash those sentences and substitute the following sentences:

- On Count 4, possession of a Class A drug (ecstasy) we impose a determinate custodial sentence of five years consisting of two years and six months custody and two years and six months on licence.
- On Count 6, possession of a Class A drug (cocaine) we impose a determinate custodial sentence of five years consisting of two years and six months custody and two years and six months on licence.

- On Count 8, possession of a Class B drug (herbal cannabis) we impose a determinate custodial sentence of three years consisting of one year and six months custody and one year and six months on licence.
- On Count 10, possession of a Class C drug (diazepam) we impose a determinate custodial sentence of sixteen months consisting of eight months custody and eight months on licence.
- On Count 11, possession of a Class C drug (TFMPP) we impose a determinate custodial sentence of sixteen months consisting of eight months custody and eight months on licence.
- On Count 12, possession of a Class C drug (BZP) we impose a determinate custodial sentence of sixteen months consisting of eight months custody and eight months on licence.

[38] These custodial sentences and licence periods are all concurrent and will run concurrently with the periods of custody and periods of licence imposed on Counts 3, 5, 13 and 14. Hence the total period in custody will be 3 years and six months and thereafter on licence for a period of 3 years and six months.