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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

MARK WILLIAM McPHILLIPS

Before: Morgan LCJ, Gillen LJ and Maguire J

MAGUIRE J (giving the judgment of the court)

Introduction

[1] The court has before it an application by the applicant, Mark William McPhillips, for leave to appeal against sentences imposed on him on 25 November 2013 at Londonderry Crown Court. On that occasion His Honour Judge Babington ("the Judge") sentenced the applicant for a series of offences as follows:

- Fraudulently importing a Class B controlled drug, namely herbal cannabis, in evasion of a prohibition imposed by section 3(1) of the Misuse of Drugs Act 1971, contrary to section 170(2)(b) of the Customs and Excise Management Act 1979 (count 1).

- Possession of a Class B controlled drug, namely herbal cannabis, with intent to supply in contravention of section 4(1) of the 1971 Act, contrary to section 5(3) of the 1971 Act (count 2).

- Possession of a Class A controlled drug, namely methylenedioxymethyamphetamine contrary to section 5(2) of the 1971 Act (count 4).

- Possession of a Class B controlled drug, namely cannabis resin, in contravention of section 5(1) of the 1971 Act, contrary to section 5(2) of the 1971 Act (count 5).

- Possession of Articles, namely a Republic of Ireland driving licence in the name of Mark Kelly for use in frauds, contrary to section 6 of the Fraud Act 2006 (count 7).

- Converting criminal property, namely £14,000 by purchasing 64 College Glen, Londonderry, contrary to section 327(1)(c) of the Proceeds of Crime Act 2002 (count 8).

- Converting criminal property, namely £10,000 by purchasing 123B Bloomfield Park, Londonderry, contrary to section 327(1)(c) of the Proceeds of Crime Act 2002 (count 9).

- Converting criminal property, namely €25,000 by purchasing a BMW X5, contrary to section 327(1)(c) of the Proceeds of Crime Act 2002 (count 10).

- Transferring criminal property by making unexplained lodgements in the sum of £76,223.87 to an Ulster Bank account in the name of Mark McPhillips, contrary to section 327(1)(d) of the Proceeds of Crime Act 2002 (count 14).

[2] The overall effect of the Judge's sentencing was that he imposed a global determinative custodial sentence of 7 years, comprising 3 years and 6 months in custody and 3 years and six months on licence.

The factual background

[3] The factual background relating to the applicant's apprehension and prosecution was set out succinctly by the Judge in his sentencing remarks as follows:

> "On Monday 14 May 2012 at approximately 7:12 pm police stopped a white Transit van on the Glengalliagh Road in the city. The van was being driven by the accused who was alone in the vehicle. The police spoke to him and asked him was there anything in the van. The accused then told the police there was grass in the rear of the van. The police checked the rear of the van, found two partial kitchen cupboard units which had been placed onto pallets. These were placed at an angle within the rear of the van and were wrapped in black plastic with loose covered packaging around them to prevent movement. The black plastic wrapping had a sender's address taped to it. The address was in the Netherlands.

The labels also had a delivery address in Co Roscommon in the Republic of Ireland.

The van was taken to Maydown Police Station and examined by crime scene investigators. They found contained within the units 10 packages sealed in black plastic. On opening the packages they found other packages sealed with clear plastic which contained what appeared to be cannabis flowering heads. The packages were subsequently sent to the Forensic Science Laboratory where they were identified as approximately 40 kilogrammes of herbal cannabis.

On the evening of the same date police searched premises at 103A Elmvale, the home of the accused. The police located a bar of 82.37 grams of what proved to be cannabis resin (count 5).

The BMW X5 belonging to the accused was seized and … searched. A bag containing 1.52 grams of MDMA was located concealed within the engine compartment. Police also found a Southern Irish driving licence in the name of Mark Kelly with a photograph of the accused. A check with the guards revealed that Mark Kelly did not exist.

Police investigated the financial dealings of the accused and found he was the owner of property situated at 64 College Glen in the city, a property he had purchased in August 2006. A mortgage of £126,000 was provided by the Halifax and added to a deposit of £14,000 from the defendant. Further investigation disclosed that the accused also purchased a property at 123B Bloomfield Park in the city. The sale being completed on 1 February 2008. £10,000 was transferred into the client account of the solicitor on the purchase by the defendant. The police discovered that the accused had an Ulster Bank account which had a number of unexplained cash lodgements between June 2006 and June 2012 totalling £76,223.87.

The accused was interviewed at Strabane Police Station on 14 and 15 May. He told police that he had woken up at approximately 5:20 am on the morning of 14 May on a sofa in a friend's house in Dublin. He declined to name the person or disclose the address. He drove the silver BMW from Dublin to Derry arriving at approximately 9 am. He said that his plans were to pick up two pallets

but refused to elaborate any further stating it would put his life in danger. The accused stated that he had a cocaine habit and had run up a debt of approximately €40,000 and had to do jobs for people in order to repay some of this debt. He also alleged that he had borrowed €25,000 about two years earlier which he had used to purchase the BMW from travellers in the Republic and this made up part of the debt.

The accused went on to state that he rented a van in Derry and drove to Sligo. He said he had two mobile phones in the van, one for his personal calls, and one for this particular job. It was his intention to get rid of this latter phone when the job was completed. He said that when he got to Sligo he parked in a small village but refused to tell police where this was. He said he subsequently received a text message telling him to ring now, so he rang. He got instructions and made his pickup. He said that he knew that what he was to pick up was not legal and when pressed he admitted he knew it was drugs.

When asked about the drugs find at 103A Elmvale, the address of Gemma Sheerin, he stated that any drugs found at this address would be his and for his own use but declined to indicate where they had come from.

He was asked about his involvement in the removal of the drugs from the van but he refused to answer. When asked how much of the debt would be paid off for this job he refused to answer. He also refused to say for whom the drugs were intended. He also refused to answer any questions about any travel to the continent and any knowledge about the names on the address labels.

He was asked about a record of phone calls made on the two mobiles recovered from the van, in particular he was asked about calls made to Dutch and Spanish numbers on 14 May but he refused to answer questions in relation to those. He was asked to explain the text received on one of the phones that day that read:

"It's Beenie's mate here, I need to talk to you and your mate. You are 50/50 with him in this. If I have to come down looking for you it will be double payback, ring me."

He declined to answer.

> The accused was also asked about the money used for deposits of the two houses he purchased in College Glen and Bloomfield Park. He told police that he could not remember that far back but he must have got help from his family and he had a professional spraying business.
>
> At a later stage in the interview the accused admitted visiting both Holland and Spain in recent times."

[4] The street value of the herbal cannabis found in the Transit van, according to the prosecution, was £800,000. Depending on how the drugs would in fact be sold, the defence conceded that the street value was in the range £400,000 to £800,000.

The applicant's criminal record

[5] The applicant came before the Judge with a significant criminal record consisting of some 32 previous convictions. Most relevantly for present purposes, nine of these were for drugs related offences. They arose out of four incidents in the first half of 2002 resulting in convictions for 3 offences of supplying a Class B controlled drug; two offences of possessing a Class B controlled drug with intent to supply; two offences of possessing a Class B controlled drug; and two offences of fraudulently importing a Class B controlled drug.

[6] All of these offences were dealt with together on 31 August 2004 when the applicant received 9 concurrent suspended sentences. The sentences which were suspended ranged from 12 months to 3 years and the period of suspension in each case was 3 years. It may be observed, therefore, that the expiry of the suspension period in respect of each of the offences was to be 31 August 2007.

Pre-sentence report

[7] The Judge had before him a pre-sentence report from the Probation Service. The applicant's childhood appears to have been difficult. He left school after completing his GCSEs. He then worked both in England and Ireland. For a substantial period the applicant became a significant drugs user, especially in relation to cocaine. He was assessed as presenting a high likelihood of reoffending due to his habit of substance misuse; his lack of consequential thinking skills; his risk taking behaviours; his willingness to offend for financial gain; his history of similar offending; his association with like-minded peers; and his limited victim awareness.

Aggravating and Mitigating factors

[8] In the course of the Judge's sentencing remarks he identified the following aggravating factors in respect of the applicant's offending:

- the substantial quantity and value of drugs seized in the van;

- the applicant's previous drugs convictions and the fact that the suspended sentences imposed for those convictions had not prevented re-offending;

- the applicant's heavy involvement in the drugs trade in Northern Ireland. In the Judge's view he was not just a courier paying back drugs debts. A range of matters suggested a deeper involvement: the text message on his phone; his recent foreign travel; the withholding of details of the operation he was engaged in from the police; and the fact that he had paid no tax in Northern Ireland since 2006;

- the money laundering aspects of his offending. While the applicant pleading guilty to money laundering offences, notably he had not given the police any explanation regarding them in interview.

[9] As regards mitigating factors, the Judge referred to a reference provided by the applicant's prospective father-in-law which indicated that it was the writer's view that the applicant was committed to repairing the damage. Moreover the Judge was prepared to give the applicant a measure of credit for his guilty pleas. However, in this regard, the Judge noted that he had not made full admissions at interview so he would fall short of being allowed maximum credit. The Judge was prepared to provide a discount of 25% in these circumstances.

The Judge's approach

[10] The Judge approached his sentencing in a structured way. He assessed the starting point as 8 years' imprisonment. Because of the discount referred to above, the sentence was reduced to 6 years. The Judge, however, decided he should address the issue of the suspended sentences imposed in 2004 referred to above. This was because some of the offending which the Judge was dealing with occurred during the currency of the period of the suspension, *viz* before 31 August 2007. The Judge stated that:

> "He is in breach because count 8 related to the purchase of 64 College Glen [which occurred prior to 31 August 2007] and count 14 [which] related to the unexplained cash lodgements which either occurred or occurred partially prior to 31 August 2007."

In order to deal with these breaches of the 2004 suspended sentences, the Judge increased the overall sentence by one year to one of 7 years' imprisonment.

[11] In the course of his sentencing remarks the Judge indicated that he felt there were some difficulties of a technical nature involved in putting the suspended sentences wholly or partly into effect. These related to concerns he had about the

wording of the Criminal Justice (Northern Ireland) Order 2008 and about whether it was possible to run a period of imprisonment arising from a breach of a suspended sentence imposed under a previous sentencing regime consecutively to sentences of imprisonment imposed under the 2008 Order. To avoid these, he did two things: he indicated that he would make the total sentence 7 years rather than 6 because the suspended sentences were a significant aggravating factor and he activated the suspended sentences but concurrently with other sentences. In argument before this court, the Judge's approach was described in this regard as "pragmatic". Finally, it is clear from the Judge's sentencing remarks that he viewed 7 years as consistent with the interest of totality in respect of his sentencing in this case.

The applicant's case

[12] Before this court, Mr McCreanor QC (with whom Mr Mullan appeared) for the applicant focused his argument on three issues which he said arose on the facts of the case. The first related to whether the Judge's 8 year starting point after a trial was excessive. The second concerned whether there was duplicity or double counting in the Judge's sentencing in the way in which he assessed the applicant's previous convictions and the breaches of the 2004 suspended sentences. Thirdly, counsel argued that the Judge, in granting a 25% discount, had afforded insufficient credit in respect of the applicant's guilty pleas.

Sentencing in drugs cases

[13] Before considering each of these points in turn, it is important, in the court's view, not to lose sight of the approach of the courts in this jurisdiction to sentencing in respect of cases of this type. This has been the subject of discussion in this court frequently, most recently in R v McKeown; R v Han Lin [2013] NICA 28. It is unnecessary to set out in detail all of what the court has said in previous cases on this matter but the following points, of particular relevance to the court's assessment of sentence in this case, are worthy of repetition. First, this court has expressed the view that severe sentences are of assistance in this sphere in signifying the community's rejection of drug taking and its hostility to traffickers in drugs. Second, the importation of drugs, especially done for gain, ought to be very severely punished, especially if it is on a large scale. Third, in connection with offences of supplying drugs, a previous conviction for a similar offence should weigh heavily against an accused person. In R v McIlwaine [1998] NI 136 this court made it abundantly clear that the public is entitled to be protected from the evil of drug abuse. Indeed, it was the duty of judges to make it clear that they would seek to discourage anyone from participating in that trade. Consequently, the need for deterrent sentences has been recognised in the area of drugs sentencing in this jurisdiction: see also R v Hutton [1998] NIJB 27 at 30-31.

Evaluation

[14] In the course of his submissions to the court Mr McCreanor frankly accepted that he could not gainsay the trial Judge's conclusion that the applicant had been heavily involved in the drugs trade in Northern Ireland.

[15] In those circumstances this court is of the clear view that the Judge's starting point of 8 years could not be said to be in any way excessive. Rather it was, in our view, consistent with the approach summarised above. In this case, the facts largely speak for themselves. The applicant had pleaded guilty to a fraudulent importation charge in respect of a substantial quantity of herbal cannabis. He has also pleaded guilty to possession of herbal cannabis with intent to supply; to possession of a Class A controlled drug and other kindred offences; and to a series of proceeds of crime offences, all of which tended to demonstrate that he was a man significantly engaged in the drugs trade for financial gain. In addition, the applicant had previous convictions going back to 2002 for similar offending.

[16] Given that in R v McIlwaine *supra* this court indicated that an appropriate sentence on a guilty plea for an accused with a relevant record convicted of possession of 9.88kg of cannabis resin (much less than the quantity at issue in this case) was one of 5 years' imprisonment the Judge's starting point of 8 years in this case appears to us to be soundly based. In McIlwaine having posed the question whether the applicant's sentence was manifestly excessive, the court answered (at page 141):

> "We are satisfied it was not. Even allowing for the early guilty plea we would not have interfered with a 5 year sentence. This was a substantial quantity of cannabis, no assistance was given to the police by the appellant who already had a relevant conviction. We would repeat yet again – those who offend in this way will on conviction receive lengthy custodial sentences."

[17] In respect of his second issue Mr McCreanor argued that there was a risk in this case that the Judge had double counted in respect of the applicant's 2004 convictions by taking them into account in reaching his view of the starting point and then by considering them in the context of increasing the discounted sentence of 6 years to one of 7 years.

[18] In the court's view, this argument is misconceived. There is no doubt that the Judge did take into account the applicant's criminal record in reaching his view about the starting point (as he was fully entitled to do) but this court does not accept that the Judge in any way acted improperly in seeking to deal with the applicant's offending in 2002 in circumstances in which he had breached the suspended sentences which had been imposed by committing further offences within the period of suspension. The issue facing the Judge was what should he do in relation to

punishment for the 2002 offences? The Judge answered that question in the ways already discussed, but particularly by adding a year to the applicant's overall sentence. In doing so, it seems to us, he was not engaging in a process of double counting: rather he was dealing with the consequences of breach of the 2004 suspended sentences. While the method he used to effect the result he wished to achieve was pragmatic, it was accepted at the hearing before the court by both Mr McCreanor, for the applicant, and Mr Connell, for the prosecution, that no issue arose from the method used. The additional year, therefore, cannot be said to be the fruit of double counting.

[19] Before leaving this point, the court considers that it should make clear that the overall outcome in this case of a 7 year sentence of imprisonment, in our view, cannot be said to offend the totality principle. The Judge plainly kept totality in mind when conducting his sentencing exercise and there were, it seems to us, a number of ways in which the Judge could perfectly properly have achieved this result, apart from the one he used.

[20] The final issue raised on the applicant's behalf relates to the credit he received for his guilty pleas. It is suggested that credit at 25% on an 8 year sentence was insufficient in the circumstances of this case.

[21] The court considers there is no merit in this point. Counsel was obliged to accept that the applicant had not been full and frank during his police interviews. Indeed, he chose not to reveal to police anything beyond his own personal involvement in the events of 14 May 2012, even though he obviously was aware of a great deal of information which would have been of value to police. Such a posture is bound to reduce the degree of credit which can be given to the applicant where he pleads guilty. Indeed, the importance of co-operating with the police so that they can advance their investigation has often been emphasised as a relevant and important one when it comes to mitigation of sentence. The court is also of the view that as this case is one in which the applicant was caught red-handed, it is difficult to see why he should, in any event, have received maximum credit for his pleas. The conclusion of the court, therefore, is that the applicant should count himself as fortunate to have obtained the 25% discount which the Judge afforded him.

Conclusion

[22] For the above reasons, the court has decided that it should refuse the applicant's application for leave to appeal against sentence in this case.