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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

PATRICK JOSEPH MURDOCK

Before: Carswell LCJ and Coghlin J

CARSWELL LCJ

[1] This is an application for leave to appeal against sentences passed on the applicant on 2 July 2002 at Belfast Crown Court by His Honour Judge McFarland. The gravamen of the applicant's case, as presented in this court, was that there was an unjustifiable and unfair disparity between himself and his co-accused Michael Edward Wheeler, who received the same sentence. At the conclusion of the hearing we dismissed the application and stated that we would give our reasons in writing at a future date. This judgment now contains our reasons.

[2] The applicant, Wheeler and Damian John Joseph Bruce were charged on an indictment containing a number of counts of drugs offences. The applicant was charged on the following counts:

7. Possession of cannabis resin at the Royal Ascot car park.
8. Supplying cannabis resin at the Royal Ascot car park.
9. Possession of cannabis resin at his home.
10. Possession of the same with intent to supply.

The applicant pleaded not guilty, but after the jury was sworn on the morning of trial he changed his plea to one of guilty. On the charges of possession in counts 7 and 9 the judge sentenced him to three years' imprisonment. On counts 8 and 10 he made a custody probation order, consisting of five years' custody and two years' probation, indicating that if the applicant had not

consented to this he would have sentenced him to seven years' imprisonment. All sentences were made concurrent.

[3] Wheeler pleaded guilty at the same time to six counts:

1. Possession of cannabis resin at the Royal Ascot car park.
2. Possession of the same with intent to supply.
3. Possession of MDMA (Ecstasy) at his home.
4. Possession of the same with intent to supply.
5. Handling stolen goods, namely a Subaru car.
6. Handling stolen goods, namely a Cosworth Escort car.

On count 1 the judge sentenced him to three years' imprisonment and on counts 5 and 6 to two years. On count 3 the sentence was four years, and on counts 2 and 4 he made a custody probation order of five years' custody and two years' probation. All sentences were made concurrent. Bruce was charged with possession of the cannabis resin seized at the Royal Ascot car park, supplying the same and being concerned with supplying the same. He was sentenced to two years' imprisonment on the first of these charges and in respect of the other two the judge made a custody probation order consisting of two years' imprisonment and two years' probation. All sentences were made concurrent.

[4] On 25 May 2000 Wheeler drove a car into the car park of the Royal Ascot public house at Carryduff. The applicant reversed his car alongside, took a sack from the boot and placed it in the boot of Wheeler's car. Police arrested the two men. The sack contained two sealed packs of cannabis resin containing 40 and 60 wrapped bars respectively, which weighed a total of 24.79 kg. The estimated street value of these drugs was of the order of £250,000.

[5] The applicant's home at Thorndale Road South, Carryduff was searched the same day and police found there in the boot of a car two packages of cannabis resin containing in all 40 wrapped bars weighing a total of 9.91 kg. The estimated street value of this consignment was approximately £100,000.

[6] That evening police arrested Bruce at the Royal Ascot public house. He admitted ownership of a white Vauxhall van parked in the car park, the keys to which had been found in the applicant's possession. A "hide" was subsequently found constructed in the floor of the van. Bruce had in his possession a sum of cash amounting to £2905 and his mobile telephone contained the number of the mobile telephone found in the possession of the applicant.

[7] The next day Wheeler's lock-up garage in Belfast was searched. Police found a stolen Subaru car and a bag of 3018 Ecstasy tablets, with an estimated

street value of approximately £30,000 (although we understand that this estimate may now be on the high side). They found a second stolen car in a neighbouring garage.

[8] In interview none of the accused made any admissions. The applicant said only that he was at his car to obtain cigarettes, and declined to answer a series of questions put to him. Before the judge the case was made on behalf of Bruce that he had been paid a sum of £1000 to bring the consignment of 100 bars of cannabis resin from Liverpool and deliver it to the applicant and Wheeler.

[9] The applicant is now aged 33 years. He has a poor criminal record of convictions between 1986 and 1996, largely consisting of road traffic offences, but with several convictions for offences of dishonesty and public order offences. He had no previous convictions for drugs offences. The pre-sentence report states that he was unemployed prior to his arrest and that he claimed to have been a former but not a recent user of cannabis. He became involved in the offences in order to gain what he termed "easy money", which he desired for drink and gambling. He claimed to have given little consideration to the implications or consequences of his behaviour and to have been ignorant of the nature of the goods which he was "dropping off" for another. None of this profession is consistent with the details of his activities contained in the committal statements, and the judge rejected it, in our view quite correctly classifying both Wheeler and the applicant as probably concerned in warehousing and possibly in wholesaling the drugs. The probation officer considered that he needed to develop a definite resettlement plan, to control his alcohol consumption, examine his gambling and engage more regularly in constructive occupation. He recommended attendance at an alcohol management course.

[10] Wheeler, now aged 35 years, has a significant criminal record, which includes drugs and dishonesty offences. He had been in prison previously and dispositions by way of probation and community service do not appear to have met with any degree of success. He attempted to minimise his involvement in the instant offences to the probation officer, claiming that he did it just for the money and that he expected to receive the sum of £1000 for transporting the drugs from Carryduff to the Malone area. The judge quite rightly did not accept this explanation. The probation officer stated in the original pre-sentence report that there were no specific issues raised which suggested the need for probation supervision in his case, and pointed out that he had offended during the currency of a previous probation order. It appears from the judge's sentencing remarks, however, that a subsequent report indicated that he should have some probation supervision after his release.

[11] In his sentencing remarks the judge summarised the offences, then said:

> " … I propose to deal with you and Wheeler in a similar fashion, because I have no doubt that you were in partnership with equal culpability. In doing so, I wish to stress that I am not penalising you, Murdock, by associating you with criminal offences with which you are not charged, particularly possession of 'A' class drugs; rather I propose to pass a sentence which reflects the degree of criminal activity on your part and showing some leniency towards Wheeler. He neither deserves nor has earned that leniency but I wish to indicate now how I am approaching the question of sentencing so that you will not feel aggrieved at the fact that you may be treated in a more serious fashion.
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> Clearly, as I have said, you were in this scheme together and you deserve equal treatment. Similarly, your records are both long and in my view are broadly similar, although I accept that Mr Wheeler has one relevant conviction, although it was for a simply possession of a 'B' Class drug."

He accepted that Wheeler and the applicant were acting on behalf of another party or parties not before the court. He gave them credit for their plea of guilty, though pointing out that they had been caught red-handed and had changed their pleas only at the last minute. He referred to a number of previous cases and proceeded to impose the sentences which we have summarised.

[12] The applicant's grounds of appeal raised issues of the length of the sentence and the adequacy of the allowance for his plea of guilty and his personal background. In his argument before us, however, Mr O'Donoghue QC confined himself to the disparity issue. He argued that Wheeler was a materially worse offender, in that he had been convicted of possession of a Class A drug and also had a previous drugs conviction. He submitted that this disparity gave rise to a justified feeling of grievance on the part of the applicant that he had been too severely treated in comparison.

[13] We shall take the opportunity to review some of the principles to be applied in sentencing for drugs offences, in order to assess the correctness of the length of the sentences imposed upon the applicant. The landmark cases of *R v Aramah* (1982) 4 Cr App R (S) 407, *R v McIlwaine* [1998] NI 136 and *R v Darragh and Boyd* (2000, unreported) were referred to by the judge, and to

them must be added this court's decisions in *R v Hogg and others* [1994] NI 258 and *R v Stalford and O'Neill* (1996) *JSB Sentencing Guideline Cases,* vol 1, 1.24. The following propositions are relevant to the present case and are worth re-stating:

(a) The possession of Class A drugs with intent to supply should generally be visited with a heavier sentence than in the case of Class B drugs.

(b) A wholesaler or warehouser of drugs will generally be less heavily sentenced than an importer and more heavily than a retailer or lesser supplier. Much will depend on the circumstances of the case and general rules should be applied with caution. Supplying will usually attract a heavier sentence than possession with intent to supply, but the line between the offences may be fine, for the charge may depend on the circumstances in which the offender was apprehended.

(c) Where persons are caught with substantial quantities of drugs in their possession which are far beyond their own possible needs, a plea of guilty to possession with intent to supply, especially at a late stage, does not merit as much discount as might otherwise be afforded to them.

(d) Guidelines are of use in maintaining a degree of consistency in sentencing, but they are not to be slavishly followed, since the sentencer in any given case has to determine what is appropriate for the individual case before the court. Mitigating and aggravating factors in the particular case will have to be taken into account in determining the final disposition. Reported previous decisions may provide a benchmark, but it should be observed that in some reported cases there may be unstated factors, eg co-operation with the police, which have influenced the length of sentence. It should also be borne in mind that levels of sentence may move upwards, or downwards, depending on the prevalence and danger to the public of any type of offence.

(e) The quantity of drugs involved in different cases is a relevant factor, but should not be used as a rigid guide to sentencing levels by way of an arithmetical scale based on weight or value.

(f) As a general vade mecum for sentencers in this type of case we venture to repeat a passage from our judgment in *R v Darragh and Boyd* (2001, unreported):

> "Guidelines, as their title indicates, are designed to give guidance to judges faced with the difficult and

> infinitely variable task of passing sentences. As Lord Taylor of Gosforth CJ stressed, however, in *R v Warren and Beeley* [1996] 1 Cr App R 120 at 123, the criteria have been laid down for guidance only. The figures which they contain reflect broadly the fact that in general persons caught dealing with substantial amounts of controlled drugs are guilty of more heinous offences than those concerned with small amounts. They are, however, only a starting point, and the sentencer is free to depart from them in either direction. They are of most assistance when the court is concerned with persons who have been trading in the substances, for in their case differences in amounts may be quite a valid guide to differences in guilt. What a sentencer should aim to do is to fix upon the quality of the defendant's act, which will depend on an amalgam of factors, the amount involved being only one. Mitigating factors may then be taken into account, and the extent to which they can influence the sentence will depend on the nature of the case as well as the circumstances of the individual defendant. As the judge properly remarked, the necessity to pass sentences which will deter those tempted to deal in drugs for profit may reduce the extent to which personal factors can be allowed to operate in mitigation."

[14] When we apply these principles to the instant case, we take into account by way of aggravation the amount of drugs involved, the mercenary nature of the transactions and the public's feeling of concern about the level of drug taking, which is fuelled by the activities of suppliers such as the applicant. In mitigation the applicant is entitled to have considered his plea of guilty, his record (so far as it is of assistance to him) and his personal circumstances. All of these, in particular the mitigating factors, were taken into account by the judge. We are quite satisfied that the sentences which he imposed were perfectly correct in principle and quite justified in amount for a case of this type.

[15] We then have to consider Wheeler's case in order to determine the issue of disparity. We recognise that the charges in relation to the Class A drug of Ecstasy would normally carry a heavier penalty than comparable charges concerned with Class B drugs. As against that, the quantity and value of Ecstasy tablets found were materially below the amounts and value of the cannabis resin. In respect of the latter, where the applicant and Wheeler could be said to have been roughly equal in culpability, they each received the same sentence. The judge fully appreciated that he might well

have imposed a heavier sentence on Wheeler, in which we agree with him, but was exercising a degree of leniency towards him in treating him in the same way as the applicant.

[16] The question of disparity has been discussed on a number of occasions in this court. It most frequently arises where offenders concerned in the same transaction are sentenced by different courts, sometimes with insufficient knowledge of the circumstances of both. Disparity which causes a justified sense of grievance is less likely to occur when the same sentencer deals with both offenders, for there is generally a tenable reason for the conclusions reached. The approach to be adopted by an appellate court to the issue was conveniently summarised in *R v Delaney* [1994] NIJB 31. Referring to counsel's submission that the applicant had a justified sense of grievance, we said at page 33:

> "In so arguing counsel was invoking the well known line of authority in which it has been held that where one co-accused has been treated with undue leniency another may feel a sense of grievance when he receives a sentence which in isolation is quite justifiable but which is more severe than that imposed upon his associate. Rather than allow such a sense of grievance to persist, the court has on occasion reduced the longer sentence on appeal. It has only done so as a rule where the disparity is very marked and the difference in treatment is so glaring that the court considered that a real sense of grievance was engendered: see *R v Brown* [1975] Crim LR 177. The principle served by this approach is that where right thinking members of the public looking at the respective sentences would say that something had gone wrong the court should step in: *R v Bell* [1987] 7 BNIL 94, following *R v Towle and Wintle* (1986, The Times, 23 January).
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> It should not be supposed, however, that the court will be prepared to invoke the principle and make a reduction unless there is a really marked disparity, for unless that condition is satisfied it will not regard any sense of grievance felt by an appellant as having sufficient justification. The examples in the decided cases where reductions have been made are generally cases of very considerable disparity. Where the disparity is not of such gross degree the courts have tended to say that the appellant has not a real grievance, since his own sentence was properly in line

> with generally adopted standards, and if his associate was fortunate enough to receive what is now seen as an over-lenient sentence that is not something of which the appellant can complain."

The sentencing judge in the present case recognised that he had treated Wheeler with a degree of leniency in comparison with the applicant, though we should not ourselves regard the difference in culpability between the two defendants as very large. We are quite satisfied, however, that in so far as Wheeler may be said to have been more leniently treated, the disparity was not of gross degree, certainly not such as to entitle the applicant to feel any sense of grievance or to indicate to a fair-minded and right-thinking observer that anything had gone wrong with the sentencing process. We therefore do not consider that there was any unfairness to the applicant in the sentences which he received.

[17] For the reasons which we have given in this judgment we accordingly dismissed the application for leave to appeal.