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COURT OF APPEAL.

28th September, 1994 193.

Before: Sir David Calcutt, Q.C., (President),
J.M. Collins, Esq., Q.C., and
E.A. Machin, Esq., Q.C.

David William McDonough

- v -

The Attorney General

Application for leave to appeal against a total sentence of 2½ years' imprisonment imposed on 25th July, 1994, by the Superior Number, to which the applicant was remanded by the Inferior Number on 1st July, 1994, following guilty pleas to:

1 count of — being concerned in the supplying of a controlled drug (diamorphine) contrary to Article 5(c) of the Misuse of Drugs (Jersey) Law, 1978 (Count 1 of the Indictment), on which count, the applicant was sentenced to 2½ years' imprisonment; and

1 count of — possession of a controlled drug (amphetamine sulphate) contrary to Article 6(1) of the said Law (count 2)on which count the Applicant was sentenced to 9 months' imprisonment.

Both the said sentences of imprisonment to run concurrently with each other.

Advocate J.C. Gollop for the Applicant.
C.E. Whelan, Esq., Crown Advocate.

JUDGMENT.

MACHIN, J.A.: We now give our reasons for dismissing the application for leave to appeal in the case of McDonough. The charge which the Applicant was required to answer by the first count in the indictment was one of being concerned in the supplying of a
5 controlled drug, diamorphine, contrary to Article 5(c) of the

Misuse of Drugs (Jersey) Law, 1978. It is this charge which has given rise to the submissions deployed before us.

Article 5 creates three distinct offences, first to produce or be concerned with the production of a controlled drug; secondly, to supply or offer to supply a controlled drug to any person; and, thirdly, to be concerned in the supplying of, or in the making of an offer to supply a controlled drug to any person.

Article 26(2) of and schedule 4(2) to that Law provide, in the case of a Class A drug, within which class there falls diamorphine, that the punishment which may be imposed on a person convicted of any such offence is imprisonment for a term of 14 years, or a fine, or both. The prison term there specified is clearly a maximum and this maximum applies equally to each of the six offences created by Article 5.

The researches of neither Advocate who appeared before us have revealed any authority which deals with the way in which a Jersey Court should approach the matter of sentence in the case of an offence of being concerned in the supply of a controlled drug. We have therefore to decide what this approach should be, untrammelled by previous judicial observations.

We consider that the following principles should guide us in this task: First, the fact that the statutory maxima are the same in the case of the present offence as in the case, for example, of the supply of a controlled drug shows merely that the legislature regarded the most serious case of being concerned in the supplying of a controlled drug as being capable of involving the same degree of guilt as the most serious case of supply. Since the present case is certainly not in that class of seriousness a comparison of the prescribed maximum penalties for the offences of supply and of being concerned in supply is here inappropriate.

Secondly, our task is to sentence this particular Applicant upon the facts relating to his case. This is a discretionary function and, as this Court said in Wood -v- A.G. (15th February, 1994) Jersey Unreported C.of.A., that discretion, like all discretions, has to be exercised on proper grounds and with due regard to relevant principles, but the important fact remains that in deciding upon the sentence in every case the Court is exercising its discretion upon the facts of that case.

Thirdly, the guilt of a person who is concerned with the supplying of a controlled drug is by no means necessarily to be equiparated with the guilt of the principal offender who supplies the drug. There are many cases where conduct of a peripheral nature, although falling within the words "concerned in the supplying" and so on, falls very far short of the gravity of the conduct of the supplier himself. For example, A at the request of B may lend B a small sum of money knowing that B intends to apply

it to the purchase and then to the supply of a controlled drug; or, C at the request of D may lend D his car knowing that D intends to use it to distribute a small quantity of a controlled drug. In both of these postulated cases A, or, as the case may be C, is concerned in the supplying of a controlled drug but we would think his guilt falls short of that of B or D.

Fourthly, it follows, in our judgment, that the case of Clarkin & Pockett, heard in this Court, (1991) JLR 213, is not to be treated as governing cases of being concerned in supply. That case was one where the appellants were charged with possession of a Class A drug with intent to supply. This Court decided that in cases of that nature the starting point before effect was given to any mitigation on any ground must be a sentence of 8 to 9 years' imprisonment and it said that by cases of that nature it meant cases of possession of a Class A drug with intent to supply it to others where the involvement of the defendant in drug dealing was comparable with that in Fogg -v- A.G. (1991) JLR 31. In Fogg the appellant had pleaded guilty to possessing 1,000 units of lysergide with intent to supply. He had travelled to Jersey in order to sell drugs. That quantity of lysergide remains the largest so far seized in Jersey. Clarkin & Pockett remains the leading authority on the sentencing bench mark in cases of the supply of a Class A drug. The Court in that case was not dealing nor did it purport to deal with cases of being concerned in supplying a Class A drug. The approach adopted in Clarkin & Pockett was wholly appropriate to cases of supply. It is not, in our judgment, appropriate to cases of being concerned in supplying and we disagree both with the contention of the Crown in the present case that it should be applied, and with the acceptance in the outline of appeal on behalf of the present Applicant that there is no reason why the Clarkin & Pockett guideline should not apply. To start from a bench mark before mitigation of 8 to 9 years' imprisonment in either of the hypothetical cases we postulated earlier in this Judgment would be patently excessive.

We do not consider that we should attempt to lay down guidelines for sentence in cases of being concerned in the supplying of a Class A drug. The statutory phrase "to be concerned in", which is an ingredient of the offence, embraces so wide a spectrum of turpitude as to render a bench mark inapposite, as Mr. Whelan for the Crown conceded. What we do think it proper to state is that normally a custodial sentence should be passed, tailored to the facts of the particular case and to the mitigation available to the accused. There may, however, be wholly exceptional cases where, having regard to the peripheral nature of the involvement of the accused, a non-custodial sentence would be justified. At the other end of the scale his involvement may be so gross as to match or even exceed in blameworthiness that of the actual supplier, so that a sentence appropriate to supplying would be fully justified.

We pass to consider a sentence appropriate to the case before us. The relevant facts are those admitted by the Applicant in a statement made by him on 28th June, 1994. We read two passages from that statement. *"I remember,"* he said, *"calling my brother. He was asleep and I spoke to Kevin Proctor."* (Mr. Proctor was a co-accused). *"I was going to call down to the house at "Timbers", but Proctor told me he was coming into town and he would pick me up and take me to "Timbers" himself. On the way to "Timbers" we stopped for breakfast at "The Big Breakfast". Kevin Proctor asked myself if I knew where he could get some heroin which took me by surprise because I didn't realise he was involved in "stuff". He told me he was a bit run down and needed some to get him through a bit of 'cold turkey', which he explained he was going through. I told him I knew of somebody and that I would see them in the afternoon and organise it for him. He told me he wanted 4 grams and asked me a price which I didn't know until I'd seen the person involved. After breakfast we left for "Timbers" so I could retrieve some clothes. I stayed there for 20 minutes or so and told Proctor to meet me in French Lane by the Market by 4.30 in the afternoon to let him know whether I had seen the other person to whom I was making the deal with for him. I did in fact meet Proctor at the said time, 4.30, where as I pointed him to the people who he'll get his heroin from and that was the last I seen of Kevin Proctor. I would like to also add I have been living with my brother and Kevin a week or so previous to this because of domestic problems with my girlfriend which he did let me stay for rent-free. I suppose that's why I went through this for him. It's not a thing I'd normally get involved with especially with the trouble it caused my family at home with another brother of mine being a heroin addict eight years' ago whereas my family were under counselling because of his addiction which led to all kinds of trouble at home."*

At the end of that statement he said this: *"Going back to the heroin I felt obliged to do a favour to Kevin which I know now is not really doing anybody a favour, but at the time I was not thinking straight. Whilst I've been in prison my girlfriend has had a baby boy and she has been very supportive to me, with regular visits, and I see how it has affected her. I cannot go back into that life now, as I never want to let her or my child down again. I now realise I have so much to lose and drugs are not the answer."*

We have taken into account all the matters relied upon by Mr. Gollop who appeared for this Applicant. Nevertheless, being concerned with the supply of a Class A drug must always be regarded as a serious offence meriting a sentence of imprisonment save in the most exceptional case.

We have now to consider the appropriateness of the sentence of 2½ years' imprisonment passed by the Royal Court in respect of the offence of being concerned in the supplying of a Class A

drug, diamorphine. We remind ourselves that our task is not to decide what sentence we ourselves might have imposed, had the matter come before us as a Court of first instance. We have to look to see if there is any error of principle disclosed by the quantum of sentence awarded below, or whether that sentence is so far inconsistent with the limits of the band into which such a sentence should fall as to make our intervention necessary.

We find no error of principle and no such inconsistency. We think it neither necessary nor helpful to approach the matter by fixing a starting point and then discounting for the Applicant's plea of guilty and for any other mitigation to which the circumstances may properly be said to give rise. Such methodology is appropriate to cases where there are established guidelines. It is not appropriate to the present case.

We have considered whether the sentence should be altered by reason of any sense of injustice under which the Applicant may be said to labour as a consequence of a comparison between his sentence and that of Proctor, who was also sentenced to 2½ years' imprisonment for an offence of being in possession with intent to supply as a result of the acquisition by him of 3.7 grams of heroin pursuant to the assistance given to him by the Applicant. We are unable to distinguish to any relevant degree between the culpability of the Applicant on the one hand and that of Proctor on the other. The Applicant introduced Proctor to the dealer in heroin, as a result of which Proctor was enabled to possess himself of a quantity of that highly dangerous drug with which himself to deal. It is, in our view, nothing to the point that Proctor might have found a dealer without the Applicant's assistance. The fact is that the Applicant did supply such assistance.

Furthermore, it may properly be said that the mitigation available to Proctor was stronger than that available to the Applicant. Proctor co-operated with the police and he was younger than the Applicant. The Applicant lied to the police and only confessed to the commission of the present offence when he faced imminent trial on a more serious offence based upon false interview statements made by him.

In these circumstances it would not have surprised us had the Royal Court passed upon the Applicant a sentence longer than in fact he did receive.

For the foregoing reasons we have dismissed the application to appeal.

Authorities

Clarkin, Pockett -v- A.G. (1991) J.L.R. 213 C.of.A.

Whelan: Aspects of Sentencing in the Superior Courts of Jersey: p.p. 15-16.

A.G. -v- McDonough, Proctor, Scott (15th June, 1994) Jersey Unreported.

Archbold (1993 Ed'n): 7/147.

A.G. -v- Ferri (26th June, 1993) Jersey Unreported.

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