APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 50
HCA/2019/245/XC

Lord Justice General
Lord Menzies
Lord Brodie

OPINION OF

LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL FOLLOWING THE REFERENCE BY THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION

by

LISTON CRAIG PACITTI

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlater; Faculty Services Limited (for George Mathers & Co, Aberdeen)
Respondent: Edwards QC, AD; the Crown Agent;

9 July 2019

[1] On 17 December 2017, at the sheriff court in Dundee, the appellant pled guilty to a charge of culpable and reckless conduct between 3 July 2013 and 7 December 2014 at shops in Arbroath and Montrose by supplying multiple quantities of new psychoactive substances,

which he knew would cause a danger to health and, in consequence, he injured one person and endangered the lives of ten others.

[2] On 27 February 2018 the appellant's co-accused, namely Paul Brocklehurst, pled guilty at a subsequent first diet to an indictment in similar terms, but over a 2 year period, involving only one shop in Perth and supplies to ten adults and two children, with injuries to seven of the adults and one of the children.

[3] On 24 April 2018 the sheriff sentenced both accused to 4 years and 6 months imprisonment, which he had reduced from a starting point of 6 years. In sentencing the accused the sheriff said that there was "nothing to choose between them" despite the different circumstances. The two accused had basically been conducting the same business in conjunction with each other, but from different shops. The appellant was aged 28. He had a criminal record, which included a conviction for assault to severe injury in 2010, which attracted probation and unpaid work in the community, a further assault to injury in 2013 which attracted a fine of £200, various road traffic contraventions and a charge of vandalism. Mr Brocklehurst was aged 61. He had no criminal record.

[4] In selecting an appropriate custodial sentence the sheriff expressed the view that the substances were akin to Class B drugs. He had regard also to the English Sentencing Council's Definitive Guideline on Drug Offences. He also took into account the fact that the Psychoactive Substances Act 2016, which had not been in force at the time of the offences, had provided for a maximum penalty of 7 years imprisonment in the absence of any injury.

[5] On 26 June 2019 the appellant's appeal against sentence was refused. The court was not persuaded that the sheriff's reference to the Definitive Guideline had been in error. The substances for sale had a similar effect to controlled drugs. The court was also not persuaded that there was any room for a distinction between the two accused based on the

circumstances of the offences. The essence of the conduct was the risk which it posed to others.

[6] On 6 October 2018 a differently constituted court allowed Mr Brocklehurst's appeal and reduced the sentence to 3 years and 9 months (from a starting point of 5 years). This court determined that the sheriff had not been entitled to take into account the fact that, subsequent to the offences, Parliament had determined that the maximum penalty for supplying psychoactive substances was 7 years. The court also considered that it was an error to take into account sentencing guidelines which applied to proscribed drugs. The court noted that in *Khaliq* v *HM Advocate* 1984 JC 23, which was an analogous offence of culpable and reckless conduct, in that case by supplying glue, a sentence of 3 years imprisonment had been imposed. Standing the ages of the two accused, the previous convictions of the appellant and the fact that he operated from two rather than one shop, the court considered that there was possible room for distinction.

[7] In deciding to refer the case to this court, the SCCRC had regard to the tension which existed between the two appeal court decisions, one of which found no error on the part of the sheriff, and the other which identified two errors in relation to matters taken into account. The SCCRC considered that the sheriff had erred in that regard:

> "Firstly by taking into account the provisions of the 2016 Act which were not in force at the time of the offence and, secondly, in his reliance upon the Definitive Guidelines for drugs offences which were an irrelevant consideration as the two types of offending were distinctly different".

On this basis the SCCRC considered that a miscarriage of justice may have occurred by reason of an excessive starting point which fell outwith the range of appropriate sentences. The SCCRC noted that both accused had argued that their sentences ought to be reduced on the basis of comparative justice having regard to the circumstances applicable to each other.

They did not consider that comparing the number of persons affected was material. There was a significant difference in relation to record and age. There was also a gap in the timing of the respective pleas, with Mr Brocklehurst attempting later to withdraw the guilty plea.

[8] The court agrees with the SCCRC's analysis in relation to the sheriff taking into account irrelevant considerations, notably the English Sentencing Council's Drug Offences Definitive Guideline. The supply of proscribed drugs is not analogous to culpable and reckless conduct of this type. In addition, the subsequent determination by Parliament that a 7 year maximum penalty should be imposed for the sale of psychoactive substances was not relevant given the timing of the offences.

[9] There were grounds upon which the two co-accused could have been distinguished. The appellant had a significant criminal record. He was aged 28. Mr Brocklehurst was aged 61 with no criminal record. On the other hand the appellant had pled guilty at an earlier point than Mr Brocklehurst and this perhaps tipped the scale back into balance. In all the circumstances, the court considers that it is appropriate that both accused should, as the sheriff had determined, have been sentenced to the same period of imprisonment. Comparative justice therefore requires that the appellant's sentence be reduced to one of 3 years and 9 months imprisonment (from a starting point of 5 years). The appeal is accordingly allowed.