APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 86
HCA/2019/000452/XC

Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD GLENNIE

in

APPEAL AGAINST SENTENCE

by

DAVID MARTIN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: McCluskey; Paterson Bell Solicitors
Respondent: McFarlane, *ad hoc*; Crown Agent

12 November 2019

[1] The appellant, David Martin, was convicted of an offence under section 43(b) of the Misuse of Drugs Act 1971, being involved in the supply of diamorphine, a class A drug. He was also convicted of possession of cocaine. This was his fourth offence of supplying class A drugs, previous convictions having been:

- in 2004, before sheriff and jury, as a result of which he was sentenced to 13 months detention;
- in 2008, again sheriff and jury, for which he received a sentence of imprisonment of 56 months; and
- in 2015, tried summarily, for which he was imprisoned for 12 months.

Because the current offence involves a conviction on indictment, section 205B of the Criminal Procedure (Scotland) Act 1995 is relevant. That provides, reading short, that where a person aged 21 or over is convicted on indictment in the High Court of a class A drug trafficking offence he shall be sentenced to a term of imprisonment of at least 7 years, unless the court is of the opinion that there are specific circumstances which relate to any of the offences or to the offender and that those specific circumstances would make such a sentence unjust. The judge was not persuaded that there were any such specific circumstances and, in accordance with that section of the Act, he sentenced the appellant to 7 years imprisonment in respect of charge 1, admonishing him on charge 2.

[2] The appellant appeals against sentence. It is not disputed that a significant custodial sentence was justified in this case, but it is submitted that the sentencing judge attached too little weight to the circumstances of the offence and of the appellant and that in consequence the length of sentence imposed was unjust. So far as concerns the offence, what is relied upon is the modest amount of drugs involved in this operation, amounting to only some 12 grams in quantity and with a value possibly as low as £900. So far as concerns the appellant himself, it is submitted that he has significant health difficulties including deep vein thrombosis, leg ulcers requiring daily bandaging, impaired mobility, the result of ankle fractures in the past; and that he not only takes medicine for pain relief but also takes anti-psychotic medicine and anti-depressants.

[3] Section 205B was intended to have a deterrent effect, to deter repeat offending in the area of involvement in the supply of class A drugs. While there may be arguments about the effectiveness of such a policy, it is not for this court to go against the declared will of Parliament in this area. The court must impose a sentence of at least 7 years unless there are specific circumstances relating to the accused or to the offence which make such a disposal unjust. We were referred to a case which came before the Court of Criminal Appeal in England and Wales under reference to English legislation to the same effect: *AG's Reference, R* v *Marland* [2018] EWCA Crim 1770. We need not refer to that case in any detail; but it is useful to note from the decision that, although the court is not looking for exceptional circumstances, it should not be too willing to treat normal circumstances as "specific circumstances" for the purpose of the section; and, further, that the court must come to the view that those specific circumstances themselves are such as to make it unjust to pass the minimum sentence.

[4] Of the points relied upon here concerning the appellant himself, that is to say his health difficulties, his requirement for treatment and his taking of medications, we cannot say that these can properly be regarded as specific circumstances justifying of themselves a departure from the policy of the Act.

[5] However, the other aspect of the appeal, referring to the low value of the drugs and the low level of offending, raises a slightly more complex issue given that under the legislation the trigger offence to justify the imposition of the minimum 7 year sentence is an offence which results from a conviction on indictment. It does not apply if the offence is tried summarily. The decision as to where the prosecution is brought is, of course, a decision by the Crown over which the accused has no influence or control. The low level of the drugs involved in the offence will be relevant in many cases to the decision as to

whether to prosecute on indictment or summarily. To this extent it seems to us that the low level of the offending in a case such as this can and does amount to a "specific circumstance" relating to the offence, justifying the court in considering that the mandatory minimum sentence of 7 years would be unjust. In those circumstances we consider that we are justified, and the sentencing judge would have been justified, in departing from a minimum term of 7 years.

[7] Having reached that conclusion, the question of what is the appropriate sentence is at large. It is relevant to bring into account again the circumstances which are personal to the appellant, such as his medical difficulties and other matters to which we have referred. In all the circumstances, having regard both to those matters and the low level of offending in this particular case, but bearing in mind that this is repeat offending against a history of three previous convictions, we consider that the appropriate sentence is one of 5 years imprisonment.

[8] We will therefore allow the appeal, quash the sentence of 7 years imprisonment and, in its place, impose a sentence of 5 years imprisonment.