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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM DOWNPATRICK CROWN COURT
IN NORTHERN IRELAND

THE QUEEN

–v-

WILLIAM ROBERT McCREA

Before: Stephens LJ, Treacy LJ and McCloskey LJ

McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal against sentence only, leave having been granted by the single judge.

Prosecution and Sentencing

[2] The prosecution and sentencing of the Appellant were as follows:

Count	Offence	Plea	Sentences (Concurrent)
1	Cultivating cannabis, contrary to s. 6(2) Misuse of Drugs Act 1971	Not Guilty Left on books	N/A
2	Being concerned in the supply of a controlled drug of Class B, contrary to s. 4(1) Misuse of Drugs Act 1971	Not Guilty Left on books	N/A
3	Dishonestly using electricity, contrary to s. 13 Theft Act (Northern	Guilty	DCS – 2 years 1 year imprisonment

	Ireland) 1960		1 year licence
4	Possession of articles for use in frauds, contrary to s. 6 Fraud Act 2006	Not Guilty Left on books	N/A
5	Permitting premises to be used for the supply of a Class B drug, contrary to s. 8(b) Misuse of Drugs Act 1971	Not Guilty Left on books	N/A
6	Permitting premises to be used for production of a controlled Class B drug, contrary to s. 8 Misuse of Drugs Act 1971	Guilty	DCS – 2 years 1 year imprisonment 1 year licence
7	Possession of Class B drug, contrary to s. 5(2) Misuse of Drugs Act 1971	Guilty	DCS – 2 years 1 year imprisonment 1 year licence

All of the offences were alleged to have occurred on 3rd and 4th July 2018.

[3] On 11th January 2019 the Appellant was committed to the Crown Court for trial. On 12th February 2019 upon arraignment he pleaded not guilty to counts 1 – 5. On 25th February 2019 he was re-arraigned and pleaded guilty to counts 3, 6 and 7 (counts 6 and 7 having been added post-arraignment). Counts 1, 2, 4 and 5 were left on the books.

[4] On 2nd May 2019, the Appellant was sentenced as outlined in the table above. In addition to the concurrent sentences imposed for the index offences the judge activated a five month suspended sentence which had been previously imposed at Belfast Magistrates' Court on 16th March 2018 for a theft offence.

Pre-Sentence Report

[5] A pre-sentence report dated 26th April 2019 was compiled following one interview with the Appellant. This has the following noteworthy features:

a. At the time of the index offence and sentencing, the Appellant was a single, unemployed, 35 year old man with a significant history of substance misuse, a history of homelessness and of involvement with the criminal justice system from a young age;

b. He is the father of six children, all of whom live in England and with whom the applicant has no contact. His family connections in Northern Ireland are limited;

c. He has limited employment experience;

d. The Appellant was assessed as presenting a medium risk or re-offending but not as posing a significant risk of serious harm to others.

e. He was disposed to " …*fully admit to* [the charges] *however states that he doesn't feel that he was really given a choice in the matter considering previous paramilitary threats/attacks and drug debts"*.

Dr Weir's Report

[6] The Appellant was examined by Dr Weir, Consultant Psychologist who considered his GP records and criminal record, the statement of complaint, the police interview and forensic reports. Dr Weir records the background to the offences as recounted to her by the applicant and notes that he stated that:

- The cannabis plants belonged to paramilitaries who recruited the Appellant to use his house for the growing operation;
- The 'leverage' used against him was a debt of £1,500 owed to the paramilitaries accrued through the applicant's own drug use;
- The Appellant did not have anything to do with tending to the plants. An individual named 'Kurt' (who remained in the property to monitor the applicant) carried out any tasks associated with the cultivation;
- Following his arrest, the Appellant breached his bail by travelling to Scotland where he was subsequently arrested for theft of alcohol and detained in prison before being returned to Northern Ireland and being remanded into custody;
- While in Scotland, paramilitaries made contact with him, threatening him regarding the payment of his debt, which they stated was now £8,000.

[7] The Appellant further recounted that when aged 16 his family moved home as a result of connections with para-militarism. A further move to Bolton (England) followed. The Appellant stated that he had from a young age been in trouble with paramilitaries and the police as a result of stealing cars and 'joyriding'. He attended mainstream school and Dr Weir opines that the applicant is of 'at least average intelligence'.

[8] With regard to substance abuse, Dr Weir records that the Appellant:

- began drinking alcohol at age 18, but that this was never a problem and did not cause him to be in trouble;
- engaged in solvent abuse between 12 and 14;
- started to use cannabis at age 14 and that this continued for seven years;
- has a long history of prescription medicine addiction and abuse, resulting in many overdoses to include a life threatening overdose in or about 2018;
- from 2003 was addicted to cocaine and crack cocaine, which he used on a daily basis; and
- began to use heroin while in prison in 2005, such use continuing 'over the years'.

[9] Dr Weir concludes:

> *"Undoubtedly there have been mental health problems linked to paramilitary punishments and injuries. The General Practitioner notes available provide information from 2010 and note a gunshot wound in September of that year. GP notes from his time in England were not available and would probably have noted other injuries and overdoses. At this assessment William McCrea reported he had tried to hang himself at one point. Ongoing paramilitary threat often led to overdose and self-harm and drug abuse. A few attempts have been made by services to provide him with psychiatric or addiction input and he referred only to two. The CBT stands out as a negative occurrence … and he described it as 'opening a can of worms'. He said his mental state was more unstable following this intervention. I agree that this does happen and is a regrettable situation but it is not uncommon. His GP notes indicate he was attending the Mental Health Care Team in Blackpool and suffering from anxiety, depression, PTSD and thoughts of suicide. This history is not comprehensive as a result of the incomplete GP notes. It is however notable that for 2017 and 2018 his addiction levels, mental health, overdose and suicidal behaviour have clearly occurred at a serious level and in February I understand he took an overdose of heroin, Xanax, Lyrica and other tablets. He states now that this was a 'wakeup call' and reports that he is now abstinent from all drugs."*

The Sentencing Decision

[10] The judge considered it "*… quite clear that the Defendant facilitated the use of the premises for the purposes of the production of cannabis plants.*" He next noted that the Appellant was not contesting the charges on the ground of duress. He continued

> "*The facts indicate that some £15,000 of drugs have been produced and grown in these premises and it is clear, on any basis, that these were intended to be used on the open general drugs market … with the consequent damage to other people.*"

The judge described this offending as "*comparatively prevalent*" and "*serious*", requiring the imposition of a "*significant*" sentence. He then drew from the decided cases a starting point of three years imprisonment custody. Next he described the quantity of cannabis involved as "*significant … but … not substantial*".

[11] In determining to give the Appellant appropriate credit for his plea of guilty, the judge added that this was probably excessive given that the Appellant "*… was*

effectively caught red-handed and there was a very strong case against him …" He described the Appellant's criminal record as "*poor*". It consists of some 84 offences altogether which have been committed in the three jurisdictions of Northern Ireland, Scotland and England. The Appellant's first conviction was acquired when aged 11 years (he is now aged 36) and he has continued to offend with frequency ever since. His convictions span a broad range of offending and include offences of dishonesty, public order offences, criminal damage, road traffic offences, breaching court orders and two offences of possessing a Class B controlled drug, committed in 2000 and 2003 respectively. Offences of dishonesty predominate. The Appellant has been the subject of a range of both custodial and non-custodial disposals for his prolific offending.

[12] The judge noted that the Appellant had "*made some progress in life*", acknowledging his positive conduct in prison and his recent abstinence from illicit drugs consumption. His assessment of the appropriate starting point was three years imprisonment. This he reduced to two years to reflect the Appellant's plea of guilty. Next, noting that the offending had occurred just some three months following imposition of a suspended sentence of five months imprisonment, the judge determined to bring this into operation fully and consecutively.

Leave to Appeal

[13] The single judge, Horner J, granted leave to appeal on the sole ground that the starting point selected by the sentencing judge was arguably manifestly excessive and wrong in principle. The parameters of this appeal, duly reflected in the submissions of counsel, were shaped by the following passage in the judge's ruling, at [9]:

> "*I consider that it is arguable that there is a distinction between a 'gardener' and an occupier who permits his premises to be used for the cultivation of cannabis. If that is correct then the trial judge erred in selecting a starting point of three years.*"

The Correct Approach

[14] The sentencing judge directed himself correctly by reference to the decision of this court in *R v McKeown and Han Lin* [2013] NICA 28. In those combined cases there was a reference to the Court of Appeal by the Director of Public Prosecutions in respect of a sentence for possession of a commercial quantity of Class A drugs with intent to supply (*McKeown)*. This was listed together with an appeal (*Han Lin*) against the imposition of a determinate custodial sentence of three years and six months, divided equally between imprisonment and licenced release, for the offence of producing a Class B controlled drug.

[15] In *Han Lin* the Appellant, a Chinese national, lived alone in a house where he acted as the "*gardener*" in the cultivation of cannabis, involving 673 plants

distributed among five rooms with a value of some £188,000 and a financial benefit to him of £3,000 which he had provided to his impecunious family in China. He was aged 17 and was an unlawful "overstayer". Drawing from its previous decision in *R v Hogg* [1994] NI 258 this court noted the absence of any guideline case relating to the production of drugs. It then referred to the English decision of *R v Xu and Others* [2007] EWCA Crim 3129, at [19]:

> *"There is no guideline case concerning the production of drugs. That is unsurprising given the range of circumstances in which the offence can be committed. There is however guidance in R v Xiong Xu and others [2007] EWCA Crim 3129, a decision of the English Court of Appeal. The court noted that typically in such operations there would be one or more workers tending the plants in the particular premises, carrying out the ordinary tasks involved in growing and harvesting the cannabis. They would usually have little or nothing to do with the setting up of the operation, but would simply carry out their tasks on the instructions of those running the operation. They would often be illegal immigrants, who were being exploited because of their vulnerability. Above the workers in the hierarchy were those who played a greater part in the operation, making arrangements for the plants to be brought in and the crop to be distributed. They might be involved in more than one operation and in making payments such as rental payments. They could be described as managers. There would then be others who had played a part in setting up the operation by obtaining the premises, the workers and the equipment with which to carry out the operation. They could be described as organisers. Finally there would be those who controlled a substantial number of such operations."*

At [20] this court continued:

> "*The court suggested a starting point of three years imprisonment for those at the lowest level before taking into account any discount for a plea and any mitigation factors. We accept, as did the learned trial judge, that starting point. It should be noted that not only does this represent the sentence on a contest for a person with no previous convictions, but it also takes into account the vulnerability of the offender by reason of his immigration status. There should be no further discount for that vulnerability.*"

The court concluded that the starting point should have been three years imprisonment which it reduced to two years to reflect the Appellant's guilty plea

and youth, the outcome being a determinate custodial sentence of two years imprisonment equally divided between custody and licenced release.

[16] The Appellant in the present case invokes the relevant publication of the Sentencing Guidelines Council of England and Wales (the "*SGC*"). This formed the basis of the submission of Mr Stephen Toal (of counsel) that in that jurisdiction there is a clear distinction between supplying drugs and permitting premises to be used for the cultivation of drugs. Offences belonging to the former category are the subject of specially devised, discrete sentencing guidelines involving an intricate series of differing levels and divisions. Sentencing judges are enjoined to observe a rigid step by step approach entailing a series of considerations and questions before progressing from one step to the next. The guidelines contemplate disposals ranging from fines and community orders to imprisonment of up to 18 months.

[17] Developing this discrete submission Mr Toal drew to the attention of the court *R v Joseph* [2012] EWCA Crim 2706, a decision of the English Court of Appeal which upheld a sentence of 12 months imprisonment imposed on an occupier of premises who had pleaded guilty to permitting the production of Class B drugs therein. One floor of his house had been specially converted for the exclusive use of cultivating cannabis, involving 135 plants at different stages of cultivation with an estimated "street" value of £8,500. The impugned sentence was determined following the adoption of a starting point of 18 months imprisonment. At [15] the court observed that the sentencing of the cultivators of this quantity of cannabis would have entailed a starting point of six years imprisonment with a "*category range*" of between 4 ½ and 8 years.

[18] The distinction between the SGC and other kindred agencies in England and Wales was noted in *Joseph* in a brusque rejection of the submission that "*… the guideline applies to offenders of previous good character following trial*", at [17], the court adding at [18]:

> "*This is emphatically inaccurate. This is a Sentencing Council Guideline and not a Sentencing Guidelines Council Guideline and, as surely practitioners should understand, there is a fundamental difference between guidelines issued by those two bodies. What is said in the ground of appeal is accurate in relation to Sentencing Guidelines Council Guidelines, but utterly inaccurate in relation to Sentencing Council's Guidelines ….*"

The SGC, in common with its associate, the Sentencing Advisory Panel, no longer existed at the time of the *Joseph* decision. Both had been superseded by a new statutory entity, the Sentencing Council, an advisory non-Departmental body established by section 118 of the Coroners and Justice Act 2009.

[19] The Northern Ireland Court of Appeal has not endorsed the adoption of the ranges suggested in the SGC *Drugs Offences Definitive Guideline*. The issue was addressed in *McKeown and Han Lin* where the Lord Chief Justice said:

> "*Sentencing Guidelines Council*
>
> *[24] We have examined the Definitive Guideline of the Sentencing Guideline Council on drugs offences published in February 2012. We are satisfied that the factors related to culpability are of assistance in the assessment of culpability in this jurisdiction as are the quantities in respect of the category of harm. We wish to make it clear, however, that where very large quantities are involved a different approach may be taken for the reasons set out in R v McIlwaine [1998] NICA (11 March 1998). We also consider that the factors influencing seriousness are appropriate factors to take into account in the sentencing process.*
>
> *[25] The Definitive Guideline suggests starting points and ranges depending upon the category of harm and the nature of the role into which the offender falls. There are, however, dangers with that approach. In many instances there will be competing considerations affecting the offender's role and inevitably considerable variation even within each category of harm. We consider that in attempting to categorise each case in the way suggested in the Guidelines the judge may be distracted from finding the right sentence for each individual case. Guidelines and guidance in this jurisdiction are intended to assist the sentencing judge without trammelling the proper level of discretion vested in the sentencer. This is not to say that the Definitive Guideline does not provide useful assistance in identifying aggravating and mitigating factors and indicating appropriate ranges of sentencing worthy of consideration depending on the precise circumstances of the individual case."*

This passage resonates strongly in the sentencing exercises carried out day and daily in this jurisdiction and in this court's routine determination of appeals against sentence and DPP's references.

[20] While *R v Joseph,* where the sentence was one of twelve months imprisonment, has certain factual parallels with the present case three observations are appropriate. First, no two cases are identical and it has been stated time out of number that in the sphere of sentencing factual comparisons with other cases normally entail an arid exercise. Second, the sentence in *Joseph* was the product of

applying a sentencing guideline (published by the Sentencing Council) which has no application to or parallel in this jurisdiction. Third, in *McKeown & Han Lin* this court endorsed the decision of the English Court of Appeal in *Xu* which, *inter alia*, established a category of offenders "*involved at the lowest level*", per Latham LJ at [6]. Neither *McKeown* nor *Xu* makes any distinction between the owner/occupier who makes his premises available for the cultivation operation and the person who tends the plants.

[21] The analysis that the Appellant's offences of permitting the use of premises and dishonestly using electricity were inextricably linked with the unlawful production and supply of drugs is indisputable. This is neither diluted nor challenged by resort to and emphasis upon labelling and categorisation in the context of a sentencing exercise in which the court will always strive to evaluate the offender's culpability and the gravity of his offending in the application of the overarching sentencing principles of retribution and deterrence, aided by such binding guidance as may be available. This court cautions against too ready resort to taxonomy in this sphere. The adoption of labels such as "*premises facilitator*", "*gardener*", "*cultivator*" and kindred descriptions runs the risk of distracting the sentencing judge from the task in hand. The owner or occupier of the relevant premises is as vital a cog in the wheel of criminality as the so-called "gardener". The substance and reality of the individual offender's criminality and its consequences must be the central focus of the sentencing judge's attention.

[22] Properly analysed, this appeal in substance challenges this court to revisit and revise the guidance in *McKeown & Han Lin*. For the reasons given we consider it inappropriate to do so.

[23] Finally, Mr Toal, wisely in our view, abandoned the further ground of appeal challenging the sentencing judge's activation of the live suspended sentence.

Omnibus Conclusion

[24] For the reasons given the sentencing at first instance is affirmed and the appeal is dismissed.