LIN v HM ADVOCATE

No 14
02 November 2007
[2007] HCJAC 62

Lord Justice-General (Hamilton),
Lord Nimmo Smith and
Lord Carloway

Zhi Pen Lin, Appellant—*Crowe*
Her Majesty's Advocate, Respondent—*McConnachie QC, A-D*

Procedure – Solemn procedure – Sentence – Appeal – Whether sentence excessive – Pannel pleading guilty to a charge of production of cannabis as a first offender – Misuse of Drugs Act 1971 (cap 38), sec 4(1), (2)(a)

The Misuse of Drugs Act 1971 provides in sec 4(1) and (2)(a) that it shall be an offence to produce any class C controlled drug specified in Pt III of sch 2 to that Act.

The appellant pled guilty to a single charge of production of cannabis. The appellant was a first offender who had been placed in charge of looking after the plants in a house given over to the professional large scale production of cannabis. A total of 849 plants were found in the five-roomed private dwelling which had been specially fitted out and equipped for the purpose. The sheriff took as the starting point the maximum sentence of five years which he discounted to three years and nine months having regard to the stage at which the plea was tendered and also backdated.

Counsel for the appellant argued that the appellant, a Chinese national, was only the 'gardener' and at the lower end of culpability. He was a first offender and had been assessed at being at a low risk of reoffending. Having regard to all of the factors, the sentence was excessive.

The Advocate-depute argued for the Crown that the development of cultivation of cannabis in Scotland on a commercial scale was a relatively recent phenomenon and that the sentences given in similar circumstances were on the same scale.

Held that the appropriate starting point for 'gardeners' was in the range of four to five years where drugs were being cultivated on the scale in question, and it was appropriate to discourage a new development in the Scottish jurisdiction even where the sentence range was apparently higher than that applied in England (paras 11–13); and appeal *refused*.

Zhi Pen Lin was charged on indictment at the instance of the Right Honourable Elish F Angiolini QC, Her Majesty's Advocate, on charges under the Misuse of Drugs Act 1971 and a charge of theft. He pled guilty in the sheriff court at Forfar to a single charge under the Misuse of Drugs Act and was thereafter sentenced.

The accused appealed to the High Court of Justiciary against the sentence imposed.

Cases referred to:
Advocate (HM) v Ting Yen Chen 29 August 2007, unreported
R v Hung Van Nguyen [2006] EWCA Crim 2522
R v Kieu Vi To [2005] EWCA Crim 3532; [2006] Cr App R (S) 38
R v Kuang Van Nguyen [2007] EWCA Crim 629
R v Tuckman [2005] EWCA Crim 335

At advising, on 2 November 2007, the opinion of the Court was delivered by the Lord Justice-General (Hamilton)—

Opinion of the Court— [1] The appellant pled guilty at a continued first diet in the sheriff court at Forfar to a contravention of sec 4(2)(a) of the Misuse of Drugs Act 1971 — production of cannabis, in contravention of sec 4(1) of the Act. The offence was committed between 10 February and 5 March 2007. The appellant was

sentenced to imprisonment for three years and nine months, the sentence having been discounted by reason of his early plea from one of five years' imprisonment. A deportation order was recommended.

[2] The appellant, who is 32 years of age, is a Chinese national. He entered the United Kingdom illegally in March 2005. He claimed asylum under a false name. His claim was rejected. He was initially detained but then released temporarily, subject to a reporting restriction in London. He failed to comply with that restriction, next coming to the notice of the authorities in connection with the present offence.

[3] The dwellinghouse at 77 South Street, Forfar is a bungalow comprising five rooms with kitchen and bathroom. In September 2006 its owner leased it to a named individual. Rent was paid timeously. On 5 March 2007 in furtherance of a search warrant police officers forced entry into this dwellinghouse. All its windows had their curtains drawn closed. The floors and internal doors were covered with plastic sheeting. Reflective material had been placed on the walls of certain of the rooms. The whole dwellinghouse, other than its kitchen, was devoted to the cultivation of cannabis. Elaborate electrical cabling arrangements had been made to supply heat and light to the plants. High voltage bulbs were in use. The rooms were at high temperatures, at one point reaching 96 degrees Fahrenheit. Arrangements for propagating and fertilising the plants were in place. Within the bathroom was a large water tub with a hose attachment leading to the hall area to facilitate the watering of plants throughout the house.

[4] Within the property were in all 849 cannabis plants at various stages of growth. Their estimated value was £100 per plant, giving a total value of £84,900.

[5] At interview the appellant stated that on leaving London he had gone to Manchester to work. While there in February 2007 he had been approached by a man who had requested him to reside in his house and to water some plants. He was taken by that man to the dwellinghouse in Forfar where he lived and slept in the kitchen. Every few days the man would bring food to the appellant and check the plants. The appellant's duties were to water the plants, feed them, cut the leaves from the bottom of them and lay out the cut leaves to dry. The appellant stated to the police that he believed that the plants were 'some sort of air freshener'. He could not, he said, name the man who had brought him to Forfar, stating only that he had the nickname 'AJ'. That man had put dried cannabis leaves into plastic bags.

[6] In mitigation before the sheriff it was stated that the appellant, who had a wife and young son in China, had fled from that country following difficulties there. He had paid money to a 'snakehead' for his journey to the United Kingdom. He was saving up to repay that debt. He had found himself out of work in Manchester and in these circumstances had accepted the offer of work in Scotland. He had been told that he would be paid for the work. He had hoped in due course to get work in a kitchen or restaurant. He had been told that the plants were to do with some sort of air freshener but, having seen the arrangements, quickly realised that the operation was concerned with controlled drugs. He had had, however, no option but to do what was asked of him. He had no source of income, no roof over his head and no food. He was effectively a prisoner in the situation in which he had found himself. The appellant was a first offender. He had found his remand in custody to be very difficult, because of the language barrier and his inability to communicate with other inmates.

[7] Before us counsel for the appellant submitted that, while the illegal operation

in which the appellant had become involved was elaborate and was commercial in nature, the appellant's role was very much at the lower end of culpability. He was only a 'gardener' and could be regarded as a 'drug slave'. He was a first offender, assessed at being at a low risk of reoffending. His period in custody awaiting trial had made him much more fully aware of the impact drugs had on society and the seriousness of the situation in which he was involved. The sheriff's starting point of five years, it was submitted, was too high. Reference was made to *HM Advocate v Ting Yen Chen* where in analogous circumstances (506 plants with a street value of £141,680) an accused had been sentenced by Lord Brailsford to 18 months' imprisonment. No issue was taken as to the amount of the discount allowed for the early plea. In England, on a plea of guilty in similar circumstances, a sentence of two years' imprisonment might be expected.

[8] On leave to appeal being granted, this appeal was identified as a case in which it might be appropriate for the court to exercise its power, under sec 118(7) of the Criminal Procedure (Scotland) Act 1995 (cap 46), to issue guidance on sentencing. In these circumstances intimation was given to the Crown that the court would welcome being addressed by it on the general issues arising. A court of three judges was convened. The Lord Advocate helpfully lodged written submissions and the Advocate depute was heard in elaboration of them.

[9] The Advocate-depute informed us that an operation, established by Strathclyde Police in December 2006 and with which other police forces in Scotland had co-operated, had identified a very substantial recent increase in Scotland in the illegal production, apparently by organised criminals, of cannabis on a commercial scale. Thousands of cannabis plants were involved with a current estimated yield in excess of £10 million at street value. Rented domestic premises were a typical site. Fifty-one individuals had so far been arrested. Apart from the appellant and Ting Yen Chen, seven of these had so far been prosecuted to conviction. Of these four had been convicted after trial in the sheriff court and three had pled guilty at preliminary hearings in the High Court. All but the last of these had been sentenced. The sentences imposed had ranged from three years to three years and six months in the sheriff court. In the High Court, leaving aside the disposal in *HM Advocate v Ting Yen Chen*, the sentences, both on pleas of guilty, had been of three years and nine months and four years and six months. The latter sentence had been imposed by Lord Hodge in circumstances similar to the present but where 580 plants with a value of £250,000 were involved. All except that accused who had not yet been sentenced (whose involvement had been associated with several addresses and with the renting of them) had been 'foot soldiers'. Typically they were of Chinese or Vietnamese nationality. The Advocate-depute also drew the court's attention to certain disposals in England: *R v Kieu Vi To*, *R v Tuckman*, *R v Kuang Van Nguyen* and *R v Hung Van Nguyen*.

[10] The illegal cultivation of cannabis by organised criminals on a substantial commercial scale appears to be a relatively new phenomenon in Scotland. There has been a degree of disparity, at least in the High Court, in the sentences so far pronounced on persons convicted of relatively minor involvement in such activity. A significant number of other persons are being or are likely to be prosecuted for such involvement. In these circumstances it appears appropriate to offer guidance to sentencers on the appropriate level of sentence.

[11] The maximum sentence on conviction on indictment for contravention of sec 4(2)(a) of the Misuse of Drugs Act is 14 years' imprisonment or an unlimited fine or both. That maximum remains, notwithstanding the reclassification of cannabis as

a class C drug for the purposes of the Act. The dangers associated with this drug are well known.

[12] The higher ranges of sentence within the statutory maximum must be reserved for the more serious cases — involvement at a sophisticated level, multiple offences and repeat offences. First offenders with minor involvement, such as 'gardeners', may appropriately be dealt with less severely. Nonetheless, where cultivation is, as in cases of which the present is typical, on a commercial and substantial scale, a sentence of imprisonment will, almost inevitably, be appropriate. The courts must seek to deter individuals from lending their services to such activity — even where offenders are in circumstances where the pressure on them to participate may be heavy.

[13] In our view the appropriate starting point for such 'gardeners' involved in relatively large scale operations will ordinarily be in the range of four to five years' imprisonment. Where within that range or, if the circumstances justify it, outwith that range, the sentence in any case should be set will depend on the particular circumstances of the offence and of the offender. Although this range appears to be higher than that currently set in England (where the cases cited to us seem to suggest a starting point of three years) we consider that the need to discourage a new development in this jurisdiction justifies that difference. Where a plea of guilty is tendered, the starting point should be discounted to the extent appropriate to the timing of such tender.

[14] In the present appeal the starting point selected by the sheriff was at the upper end of the range which we have identified. While the sentence imposed might be described as on the severe side, it is not in our view excessive. In these circumstances this appeal must be refused.

THE COURT refused the appeal.

Drummond Miller – Crown Agent