[2005–06 Gib LR 6]

TRINIDAD v. R.

COURT OF APPEAL (Staughton, P., Stuart-Smith and Otton, JJ.A.): February 10th, 2005

Sentencing—drugs—possession with intent to supply—Class C drugs—guideline sentence of 4 years for supply of large quantities, 6 months to 3 years for smaller operations, depending on scale—possession of 119 prescription tablets, street value £250, no evidence of dealing, lower end of scale, 9 months' imprisonment

The appellant was charged in the Supreme Court with possession of Class C drugs with intent to supply.

Police officers searched the appellant's home and found a small bottle of prescription drugs hidden in the washing machine. There were 119 tablets in all, with a street value of approximately £250. The appellant made no attempt to resist the search and there was no evidence that he was dealing in the drugs.

He pleaded guilty and the court (Dudley, A.J.) sentenced him to 18 months' imprisonment and also activated 18 months of a 2-year suspended sentence (imposed 9 months previously for a similar offence), making a total of 3 years. In doing so it referred to a previous Court of Appeal authority, which appeared to set a guideline of 2 years for this offence. However, it felt that the activation in full of the 2-year suspended sentence would be excessive and that 3 years was more appropriate.

On appeal against sentence, the appellant submitted that, whilst he

accepted that 2 years was the proper sentence for this offence, the total term of 3 years was disproportionate because (a) his early guilty plea should be taken into account; (b) the offence was at the lower end of the scale of seriousness; and (c) applying the principle of totality, the judge should have allowed a greater discount than he did.

As the court felt that the previous Court of Appeal authority had been misconstrued, it also considered what sentencing guidelines should be prescribed for this offence.

Held, allowing the appeal and substituting a sentence of 9 months' imprisonment:

(1) The term of 18 months' imprisonment and the activation of 18 months of the suspended sentence were excessive and would be set aside. This case was at the lower end of the scale as there was a single count, the street value was small and there was no evidence of immediate dealing. The appellant was also entitled to credit for pleading guilty at an early stage. A term of 6 months for this offence and the activation of 3 months of the suspended sentence would be substituted, making a total of 9 months' imprisonment. A 2-year probation order would also be imposed (paras. 13–14).

(2) The Supreme Court had erred in regarding the previous Court of Appeal authority as creating a binding precedent establishing a tariff for this offence. The following guidelines would be prescribed for cases involving Class C drugs. In view of the 5-year maximum sentence, terms of 4 years were only justified for the supply of large quantities of drugs. Otherwise, sentences of between 6 months and 3 years were appropriate, depending upon the scale of the operation. The wholesale supply of a number of smaller sellers would be at the higher end of this bracket. The retailer of a small amount was at the lower end of the scale, where even a fine could be appropriate, although imprisonment would be necessary if there was persistent flouting of the law (paras. 11–12).

Cases cited:

(1) *R.* v. *Aramah* (1982), 76 Cr. App. R. 190; 4 Cr. App. R. (S.) 407, *dicta* of Lord Lane, C.J. followed.

(2) *Trinidad* v. *R.*, 1997–98 Gib LR *N*–5, distinguished.

C. Salter for the appellant;
Ms. K. Khubchand for the Crown.

1 **OTTON, J.A.,** delivering the judgment of the court: On November 4th, 2004 the appellant, Victor Trinidad, pleaded guilty before Dudley, A.J. to a single count of possession of controlled drugs of Class C with intent to supply, contrary to ss. 6(1) and 7(3) of the Drugs (Misuse) Ordinance, and was sentenced to 18 months' imprisonment. The learned judge ordered that a suspended sentence of 2 years' imprisonment,

imposed on September 15th, 2003, should be activated in part by the imposition of 18 months' imprisonment to run consecutively, making a total of 3 years' imprisonment.

2 The circumstances of the instant offence can be briefly stated. On June 10th, 2004, acting on information received, police officers arrived at the appellant's home with a search warrant. He initially denied having any drugs. As a result of a manual search and the use of dogs, suspicion was drawn to the washing machine detergent drawer. Further investigation revealed a child's sock in the tube to the machine, inside the sock was a small round bottle containing 50 10mg. Diazepam, 59 2mg. Clonazepam and 10 2mg. Alprazolam tablets. All three drugs were identified as Class C.

3 The appellant, when confronted with the drugs, remained silent, as he did when arrested and interviewed under caution. He was remanded in custody pending trial. He indicated that he was to plead guilty well before trial.

4 The circumstances of the previous offence were remarkably similar. The police found controlled drugs on his premises. On that occasion, the appellant said that they had been left there by a third party and they were to be collected later (known as "warehousing"). He offered the same explanation to the probation officer.

5 The appellant was originally a signwriter by occupation but due to advances in technology and failing eyesight he became unemployed and looked to criminal activity to sustain him and his family. He is now 55 years old. He had a large number of convictions between 1971 and 2003, mostly drugs related.

6 When sentencing, the learned judge acknowledged and took account of the early plea of guilty and that the drugs involved were at the bottom end of the scale of seriousness. He drew attention to the imposition, only 9 months before, of the sentence of 2 years' imprisonment suspended for 3 years coupled with a probation order. Having referred to a previous decision of this court, which seemed to indicate that an appropriate sentence for this type of offence was 2 years' imprisonment, he considered the totality of the sentence. He concluded that activation of the suspended sentence to its full effect and a further term of 2 years for the instant offence (*i.e.* 4 years in total) would be excessive. He accordingly imposed 18 months for the instant offence and activated only 18 months of the suspended sentence to run consecutively, making 3 years in total.

The appeal

7 Mr. Charles Salter, on behalf of the appellant, assumed that a sentence of two years was the appropriate sentence and submitted that the learned

judge, when considering the principle of totality, could and ought to have applied a larger discount than he in fact did. He also advanced a second ground, albeit with muted enthusiasm, and which has no bearing on the outcome.

8 In sentencing, the learned judge based his conclusion on the case of *Trinidad* v. *R.* (2) and in particular the passage where Neill, P. said: "We consider that the appropriate sentence on count 1 is a term of two years' imprisonment." Accordingly, the learned judge considered that the sentence of two years was appropriate for the instant offence. He regarded the Court of Appeal's decision as a precedent, establishing a tariff, or guideline for this offence. Counsel in his submission at first instance and before this court adopted the same approach and concentrated on the principle of totality. Suffice it to say that we can well understand how that approach has become current. However, on reading the decision, we are of the view that the Court of Appeal was not creating a binding precedent, establishing a tariff, or indicating guidelines for succeeding courts seised of this offence.

9 The court on the previous occasion was primarily considering whether a sentence of three years was too severe and whether it should be reduced and concluded in all the circumstances of the case that two years was appropriate. Those circumstances were significantly different from the instant case. The indictment contained seven counts to which the accused pleaded guilty. They included possession of a Class A drug, possession of a Class B and two counts of the actual supply of Class C drugs to third parties. The police mounted surveillance on his home and the two men were seen to leave the house. They were stopped, searched and the drugs were found in their possession. When the police arrived at his home with a search warrant, access was resisted, which resulted in a forced entry. The street value of all the drugs seized was approximately £500. In the instant case there were no Class A or B drugs present, there was no evidence of dealing, no resistance to the police and the street value was about £250.

10 In *R.* v. *Aramah* (1) the Court of Appeal dealt with a number of cases on the same occasion when the parameter of sentences was considered according to the degree of seriousness of the offence. When addressing the supply of Class C drugs (in particular cannabis) Lord Lane, C.J. said (76 Cr. App. R. at 193):

> "Supply of cannabis: here again the supply of massive quantities will justify sentences in the region of 10 years for those playing anything more than a subordinate role. Otherwise the bracket should be between one to four years' imprisonment, depending upon the scale of the operation. Supplying a number of small sellers—wholesaling if you like—comes at the top of the bracket. At the lower end will be the retailer of a small amount to a consumer . . .

> Possession of cannabis: when only small amounts are involved being for personal use, the offence can often be met by a fine. If the history shows, however, a persisting flouting of the law, imprisonment may become necessary."

11 Neither counsel (to whom we are indebted) has been able to discover any reported decision where Class C drugs have been considered either in a group or in isolation. It will, of course, be for those who have to decide what sentences to impose in the light of all the circumstances. However, it might be of some assistance to point out that the remarks of Lord Lane were made in the context of Class B drugs where the maximum sentence on indictment is 14 years' imprisonment for supply. Under the Ordinance, the maximum sentence on indictment for the same offence for Class C drugs is still only 5 years. Class C drugs are by their nature less dangerous or harmful than Class B. In the present case they were available on prescription and are usually non-addictive.

12 By drawing a comparison between the two classes, recognising the distinction drawn by the Ordinance and adapting the *dicta* in *Aramah*, it would not be unreasonable to infer that the supply (and the possession with intent to supply) of massive quantities will justify sentences in the region of four years for those playing other than a subordinate role. Otherwise the bracket should be between six months' to three years' imprisonment, depending on the scale of the operation. Supplying a number of smaller sellers (and possession with intent), wholesaling, comes at the top of the bracket. At the lower end will be the retailer of a small amount which can often be dealt with by the magistrate and where even a fine may be appropriate. If there is a history of persistent flouting of the law, imprisonment may still become necessary.

13 Applying this approach to the present case, we have come to the conclusion that the 18 months' term of imprisonment and the reduced sentence of 18 months for the suspended sentence were excessive. The case was at the bottom of the retail scale for this type of offence, there was a single count, the street value was small and there was no evidence of immediate supply. Although the appellant was entitled to credit for pleading guilty at an early stage, he was not entitled to any credit for good character—indeed he has flouted the law.

14 Accordingly, we allow the appeal, set aside both sentences of 18 months and substitute a period of 6 months for the present case, and 3 months for the suspended sentence, the second period to run consecutively to the first, making a total of 9 months.

15 We also consider that a new probation order is desirable and we impose one for 2 years. To that extent the appeal is allowed.

Appeal allowed.