[2013–14 Gib LR 145]

HARDY v. R.

COURT OF APPEAL (Kennedy, P., Aldous and Parker, JJ.A.): March 15th, 2013

Criminal Law—drugs—possession—test for possession in criminal law needs evidence of knowledge and control of drugs—accused's inviting person to bring drugs onto his premises for purpose of sale/purchase means accused in possession—agreement on price and quantity not necessary

Sentencing—sentencing principles—starting points—3-year starting point for low-level retailer of Class A drugs justified if no stock, supply merely to finance own drug habit and guilty plea

The appellant was charged in the Supreme Court with possession of cannabis resin and possession of cocaine with intent to supply.

Police executing a search warrant had boarded the appellant's boat and found him there with another man, Mr. Gomez. Small amounts of cannabis resin and cocaine were on the table. The appellant picked up the cannabis resin, but gave it to the police officers when asked. A bag containing 20 wrappers of cocaine (totalling around 16g.), cash, and some of Mr. Gomez's possessions was recovered from where Mr. Gomez had been sitting. After initially saying that the bag was his, agreeing that the bag had been lent to him by Mr. Gomez, and telling a detective that all the drugs belonged to him, the appellant when interviewed stated that in fact only the drugs on the table were his.

When charged in the Supreme Court, the appellant pleaded guilty to possession of the cannabis resin and not guilty to possession of the cocaine with intent to supply. Just before the trial, he agreed to plead guilty to all charges on the basis he had intended to buy some or all of Mr. Gomez's drugs, and sell on at least part of what he bought to other people, as he was unemployed and needed the money to support his own habit. Mr. Gomez and the appellant had not yet reached a deal as to quantity and price when police interrupted. The appellant agreed to make a statement and give evidence for the Crown, and at the trial he advanced mitigating factors including his lack of means, ill health and unfortunate family life. He was convicted on his guilty pleas and sentenced to 3 years and 9 months' imprisonment.

The appellant was refused leave to appeal against conviction by a single judge of the Court of Appeal (Dudley, C.J.), who granted him leave to

appeal against sentence out of time. Before the full court, he appealed against his conviction, submitting that he had been wrongly advised to plead guilty to the possession charges, as on his version of events he never actually came into possession of the bag containing the drugs. He also sought the necessary extension of time to appeal against sentence and submitted that the low level of his dealing and the fact he only sold drugs to support his own habit did not warrant the 6-year starting point adopted by the trial judge, and his sentence was therefore too long.

Held, allowing the appeal in part:

(1) The appeal against conviction would be dismissed. The appellant had rightly been advised to plead guilty; such a plea was not at odds with his account of the facts and enabled him to put forward the mitigating circumstances more effectively. The test for possession of drugs in the criminal law was not the same as for possession at civil law. There had to be evidence that the claimant knew he possessed, or intended to possess, the cocaine, and had some control over it, or that it came on to his boat at his invitation or by his arrangement. Clearly the defendant knew the cocaine was on his boat and was content that it remained there, as he was negotiating to buy it. Even though no agreement had been reached as to how much would be supplied and how much would be paid, the jury would have no doubt concluded that appellant intended to possess the drugs, and having them on his boat afforded him sufficient proximity and control to support the possession charge (para. 9).

(2) The appeal against sentence would be allowed. The appropriate sentence in this case should not have been 3 years and 9 months' imprisonment, but rather only 2 years. The correct starting point was not, as the trial judge held, 6 years, but actually 3. UK sentencing guidelines put the starting points at 18 months and 3 years 6 months for offenders with lesser and more significant roles respectively. Moreover, there was a special class of offender who dealt in drugs only to finance his own addiction, held no stock of drugs and made few retail sales to undercover police officers only. Offenders in this class who pleaded guilty to a first drug supply charge at the first opportunity should be sentenced to terms in the order of 2 years and 6 months' imprisonment. Apart from the fact he had not sold only to undercover police officers, the appellant was in this class. Even taking into account that this was not his first offence of this kind and that he did not enter his guilty plea at the first opportunity, a lower starting point should be used when dealing with defendants, such as the appellant, who were out-of-work addicts dealing in drugs to support their own habit, rather than for a commercial motive, and so a 3-year starting point was appropriate in this case (paras 10–13).

Cases cited:

(1) *R.* v. *Afonso*, [2005] 1 Cr. App. R. (S.) 99; [2004] EWCA Crim 2342, *dicta* of Rose, L.J., applied.

(2) *R.* v. *Cavendish*, [1961] 1 W.L.R. 1083; (1961), 45 Cr. App. R., considered.
(3) *R.* v. *Lewis* (1988), 87 Cr. App. R. 270, applied.
(4) *R.* v. *Peaston* (1979), 69 Cr. App. R. 203, applied.
(5) *R.* v. *Searle*, [1971] Crim. L.R. 592; (1971), 115 Sol. Jo. 739, considered.
(6) *Viner* v. *R.*, 2005–06 Gib LR 233, applied.
(7) *Warner* v. *Metropolitan Police Commr.*, [1969] 2 A.C. 256; [1968] 2 W.L.R. 1303; [1968] 2 All E.R. 356; (1968), 52 Cr. App. R. 373, applied.

C. Salter for the appellant;
J. Fernandez, *Crown Counsel*, for the Crown.

1 **KENNEDY, P.,** delivering the judgment of the court: On May 25th, 2011, this applicant, Brian Hardy, who is now 52 years of age, pleaded guilty to the first two counts in an indictment which contained four counts. The third count related only to a co-accused, Juan Gomez, and the applicant had previously pleaded guilty to Count 4. He was then sentenced to 3 years and 9 months' imprisonment, on Count 2, and there was no separate penalty in relation to the other two counts. He was legally represented, but not by Mr. Salter who appears for him today.

2 In January of this year, Mr. Salter, who had been instructed in November 2012, served a notice of motion in which he sought leave to appeal against conviction and sentence, notwithstanding that the time during which any notice of appeal should be served had long expired. The matter came before the Chief Justice, as a member of this court, on January 30th, 2013, when he refused leave to appeal against conviction, but granted leave to appeal against sentence out of time. Mr. Salter now renews his application for leave to appeal against conviction, and the necessary extension of time. Essentially, it is his contention that the applicant's version of what occurred on July 14th, 2009—when all of the offences were said to have been committed—was such that the applicant should not have pleaded guilty to Counts 1 and 2 in the indictment (which allege possession of 15.59g. of cocaine, and possession of that cocaine with intent to supply) because he never in fact acquired possession of that drug. Count 4 related only to possession of cannabis resin.

The facts

3 The prosecution case was largely based on the statement of Det. Const. Hammond, which shows that on July 14th, 2009, at about 3.55 p.m., he and other officers went to execute a drugs search warrant at the home of the applicant. He was not there, but the officers were told that he was working on his boat "Foxy Lady," which was berthed at Marina Bay. Detective Const. Hammond and Det. Insp. Barton went to Marina Bay.

They found the boat with the top cabin hatch open; they boarded it and found, in the cabin, the applicant and Mr. Gomez. When the applicant saw the officers, he grabbed a piece of cannabis resin which had been on the table. He was asked to surrender it, and he did. That was the subject of Count 4. The officers then retrieved from the table a wrapper which contained white powder which turned out to be cocaine. The applicant was arrested and cautioned, but chose to remain silent. Det. Const. Hammond saw that there was a blue bag where Mr. Gomez had been seated. It contained 20 further wrappers of cocaine, 18 of them in a Marlboro cigarette packet. It also contained some items clearly belonging to Mr. Gomez. The bag was shown to the applicant who said it belonged to him. The bag also contained £125 in notes, £11.50 in loose change and €160 in notes. Mr. Gomez was asked whether the bag belonged to him. He said that he had lent it to the applicant to go to the shops to buy something, and the applicant agreed with that. Mr. Gomez was also arrested and both were taken to the police station. At 6.45 p.m. that evening, when the drugs were tested in the presence of the applicant, he said to Det. Const. Hammond that all the drugs found on the boat belonged to him. The Detective Constable entered that into his pocket book, and the applicant read it over and signed it as correct. Some more cannabis resin was found at the applicant's home. At about 7.56 p.m. that evening, the applicant was interviewed. Initially, he confirmed what he had said earlier, but then he said that the drugs in the blue bag did not belong to him. He did not know that there were wrappers in that bag, but he did know about the wrapper on the table, and accepted that it belonged to him. Asked why he had previously admitted owning all of the drugs found on the boat he said that he was confused and shocked. Asked if the wrapper on table had come out of the blue bag, the applicant said: "I think so, yeah." He agreed that they were going to smoke a reefer and a line of coke. Asked if Mr. Gomez had sold it to him, he said: "No money has been exchanged." He was then asked whether he was going to buy the cocaine and denied that, but said that "it was just there for us to consume there."

4 In February 2010, the applicant pleaded not guilty to the first two counts of the indictment, and guilty to Count 4; possession of cannabis resin. The case was then listed for trial in May 2011. On May 19th, the applicant's counsel, Mr. Pilley, sent a letter to prosecuting counsel, Mr. Fernandez, telling him that the applicant would plead guilty to possession of cocaine with intent to supply, and set out a written basis of plea, which read thus:

> "The basis of plea will be that he met up with Mr. Gomez on July 14th, 2009. The meeting had been initiated by a telephone call by Mr. Gomez to say that he, Mr. Gomez, was already on Mr. Hardy's boat in Marina Bay. The principal reason for the visit was to enable Mr. Hardy to buy drugs from Mr. Gomez. Both were found on the

boat sitting around a table on which there was white powder, which turned out to be cocaine, and a small piece of cannabis resin. Next to Mr. Gomez was a rucksack which contained, amongst other things, a Marlboro cigarette packet inside which were 18 wrappers of cocaine each with approximately 0.8g. It was the intention of Mr. Hardy to buy some or all of the drugs which Mr. Gomez had. The exact quantity was not known, and the deal had not yet been finally struck. That said, Mr. Hardy intended that at least a part of the drugs he acquired would be sold to third parties. Mr. Hardy is a user of cocaine, he is unemployed and was at the time, he has limited resources, he has none of the trappings of a drug dealer, there were no scales or lists found in his possession, but selling a proportion of the drugs he acquired enabled him to feed his own habit."

5 The letter also indicated that the applicant would be willing to make a statement and to give evidence for the Crown. He made that statement on the following day, May 20th, 2011. It amplified the basis of plea by adding that when he went to the boat, the applicant had with him £120 with which to buy drugs, and that sum of money was found on him when he was arrested. He said that when the police arrived: "I had not physically concluded the transaction with Mr. Gomez, though it had been agreed that I would buy drugs from him." He said that Mr. Gomez subsequently offered him money to take all of the blame. He had previously had drugs from Mr. Gomez, and hoped to get from Mr. Gomez more than he could pay for, and to sell part of what he received and pay the balance to Mr. Gomez later. He then referred to his own personal lack of means.

6 On May 25th, 2011, the applicant was re-arraigned and pleaded guilty to Counts 1 and 2. The case opened by Mr. Fernandez for the Crown saying that the cocaine purity was 75%, and consequently, the amount recovered was the equivalent of 10 or more grams of pure cocaine, with an estimated value of some £760. The Crown produced the statement which the applicant had made on May 20th. Asked by the judge how the Crown viewed that statement, counsel said that the evidence suggested that the police intervened at the apex of a deal. They could not say exactly what was to be bought and sold.

7 Mr. Pilley presented his mitigation, emphasising the applicant's lack of means, and that the applicant's statement would strengthen the case against his co-accused, Mr. Gomez. He put in written submissions which dealt with the applicant's family background, his tragic loss of a daughter in a traffic accident in 1999, and his problems with his eyesight.

8 The judge then passed sentence and explicitly gave the applicant credit for his willingness to testify. No one suggested that if the truth was as set

out in the written basis of plea and in the applicant's witness statement, he should not have pleaded guilty to either Count 1 or Count 2.

The applicant's argument

9 That, however, is the submission made to us by Mr. Salter today. Having heard his submission, we are prepared formally to grant leave. He is therefore before us as an appellant. Mr. Salter says that because the police intervened, the appellant never actually got possession of any cocaine other than that which he had consumed from the wrapper on the table, which it is common ground is not really the subject of the first two counts of the indictment. In civil law, Mr. Salter's position must be right. No agreement had been reached as to how much was to be supplied, or how much was to be paid, but that may have been already common ground. In criminal law, however, the position is different. It is necessary to consider whether, in all the circumstances, the alleged offender had sufficient knowledge and control. The issue has been considered in the English courts in a number of cases over the years. In *R*. v. *Cavendish* (2), oil drums found in the defendant's yard were stolen goods, and he was convicted of being in possession of stolen goods. Lord Parker, C.J., giving the judgment of the Court of Appeal, said ([1961] 1 W.L.R. at 1085) that it was not enough to show that the goods had been on the defendant's premises. There must be evidence of knowledge and some control, or that the goods had come ". . . albeit in his absence, at his invitation or by arrangement." That arrangement was inferred in that particular case, and the conviction upheld. In the present case, the cocaine was on the appellant's vessel, he knew that it was there, and was entirely content that it should be there because he was negotiating to buy it. Then, there was the case of *Warner* v. *Metropolitan Police Commr.* (7), which was heard in the House of Lords, and subsequently the case of *R*. v. *Searle* (5), which was decided in the Court of Appeal. In *Searle*, the drugs were found in a vehicle used by the defendants for a touring holiday. It was held that the jury ought to have been asked to consider whether the drugs formed a common pool from which all had the right to draw at will, and whether there was a joint enterprise to consume the drugs together. In the context of the present case, that approach could well have applied to the open wrapper on the table, but as to the rest of the cocaine, more careful decisions may have to be made and the most helpful decisions seem to us to be those made by the Court of Appeal in *R*. v. *Peaston* (4), and more particularly, in *R*. v. *Lewis* (3). In *Peaston*, amphetamine was delivered by post to a house in which the defendant and others occupied bed-sitting rooms. The packet was put on the hall table, and, unknown to the defendant, it was there when the police executed a search warrant. A police officer took the packet to the defendant. He opened it and gave it back to the officer. It was held by the Court of Appeal that, having given directions to the supplier, the defendant came into possession of the goods

when they dropped through the letterbox of the house. In *Lewis*, the defendant was the sole tenant of the house where the drugs were found, but he claimed that he did not live there, having it only for social security purposes. Having considered the authorities, and in particular the speeches in the House of Lords in *Warner*, May, L.J. said (87 Cr. App. R. at 277):

> "Call it a policy decision if you will, call it a matter for the jury, both Lord Pearce and Lord Wilberforce made clear that the question in the end is whether on the facts the defendant is proved to have or ought to have imputed to him the intention to possess or the knowledge that he does possess what is in fact a prohibited substance."

If that question were to be posed in relation to the appellant's version of the facts in the present case, the jury would no doubt have concluded that he intended to possess the drugs, and his proximity was such that in the circumstances he did have sufficient control to support the charge. Thus, it seems to us that the appellant was rightly advised to plead guilty. His plea was not at odds with his version of the facts, and it enabled him to put forward more effectively the mitigating circumstances on which he was able to rely. It is therefore unnecessary to consider how the plea could be set aside, but, as we have indicated, we have extended time, and having done so the appeal against conviction is refused.

Sentence

10 We turn now to the sentence. The judge considered that, having regard to the amount and purity of the drug, the appropriate starting point was 6 years. The plea was only offered on the date when the case was due to be heard, so only a small discount could be made for the plea. The application of that discount reduced the sentence to 5 years and 4 months. Because the appellant was willing to testify for the Crown, he was given further credit. That reduced the sentence to 4 years and 4 months, and finally, the judge made a further discount for the blows which the appellant had sustained in his domestic life. Thus the final sentence became 3 years and 9 months.

11 Mr. Salter's submission is that the appellant was wrongly sentenced on the basis that the blue bag belonged to him, but I think that submission is no longer seriously pursued, and his more substantive submission is that the learned judge started at too high a point, having regard to the low level of this appellant's trading. The drug was a Class A, and it was of a high purity, but it was only in a relatively small quantity and it was being supplied only to support the appellant's own habit. We have had the advantage of looking at the sentencing guidelines published in the United Kingdom in relation to this category of offence, and it seems that in those guidelines, for someone with a lesser role, the starting point is 18 months, and the category ranges from a community order to 3 years' custody. For

someone with a significant role, the starting point would be 3 years and 6 months' custody, in a range from 2–5 years. Perhaps of more assistance, particularly in this jurisdiction, is the decision of this court in the case of *Viner* (6). In that case, we reviewed a number of authorities, and said this (2005–06 Gib LR 233, at para. 14):

> ". . . [In *R.* v. *Afonso* (1)] the Court of Appeal again turned its attention to this type of offender and the Vice-President (Rose, L.J.) said this ([2005] 1 Cr. App. R. (S.) 99, at para 2.):
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> > 'Nothing which we say is intended to affect the level of sentence indicated by *Djahit* and *Twisse* for offenders, whether or not themselves addicts, who, for largely commercial motives, stock and repeatedly supply to drug users small quantities of Class A drugs; and, as was pointed out in those authorities, as well as other authorities, the scale and nature of the dealing are important when deciding the level of sentencing.'
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> He then indicated (*ibid*., at para 3.) that there is a special group of offenders, namely those who are out of work drug addicts, whose motive is only to finance the feeding of their own addiction, who hold no stock of drugs, and who are shown to have made a few retail supplies of the drug to which they are addicted to underground police officers only."

In the present case, and I interpose, that applies to this appellant save that the supply was not to underground police officers only.

12 Continuing with the decision in *Viner* (*ibid*., at para. 16):

> ". . . [W]here a drug treatment order is not appropriate, [in *R.* v. *Afonso* (1)] the Vice-President said [[2005] 1 Cr. App. R. (S.) 99, at para. 4]:
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> > '. . . adult offenders in the category we have identified, if it is their first drug supply offence, should, following a trial, be short-term prisoners, and, following a plea of guilty at the first reasonable opportunity, should be sentenced to a term of the order of two to two-and-a-half years' imprisonment.'"

13 Again, we interpose, this plea of guilty was not at the first reasonable opportunity, but only shortly before the case was due to start as a contested trial, so the starting point must be a little higher than that indicated in the case of *Afonso*. This was not, on the facts, it seems, the first time that the appellant had been involved in this type of behaviour, but it is important to emphasize that he had no previous convictions in relation to this kind of behaviour. Having reminded ourselves of that

passage in *Viner*, it does seem to us that the starting point adopted by the learned judge in the present case was too high. *Viner* was a very young offender, aged only 18. The present appellant does not have the advantage of youth. It seems to us, however, that in all the circumstances of the present case it would be appropriate to adopt a starting point of three years' imprisonment before considering what further discount could be applied. There plainly were further discounts that could be applied, to which the judge referred, but the appellant had, it seems, been entirely honest during the course of the investigation, and although there was a period when he was disposed to dispute his guilt, before the matter came before the judge he had said all that he could to the prosecution and offered to give evidence on behalf of the Crown. We are now in a position to know that he did, in fact, give evidence in accordance with his statement, so clearly some further discount has been earned by that course of conduct. The judge was also entitled to have regard, as she did, to his unfortunate domestic circumstances, and to his attempt, as we now know, to address his drug problem. Having regard to all of those matters, it seems to us that the starting point of 3 years must be reduced, and having taken into account those matters, it seems to us at the end of the day the appropriate sentence in this case would have been not the sentence imposed by the learned judge but a sentence of 2 years' imprisonment, and to that extent this appeal is allowed.

Appeal allowed in part.
