[2021 Gib LR 262]

GLYNN v. R.

COURT OF APPEAL (Kay, P., Rimer and Elias, JJ.A.): May 11th, 2021

2021/GCA/04

Sentencing—drugs—possession—no leave to appeal against 4 months' imprisonment for possession of almost 13g. cannabis resin—aggravating features include previous offence of possession and commission of offence in prison

The applicant was sentenced for a drugs offence.

The applicant had pleaded guilty to possession of just under 13g. of a Class B drug, namely cannabis resin. He was sentenced in the Supreme Court to four months' imprisonment. He was given a one-third discount for his guilty plea. His sentence would otherwise have been six months. The judge noted that, for a first offender with no aggravating features, a fine would have been appropriate, but identified aggravating features including previous possession of Class B drugs; the offence had been committed in prison; and the applicant went to considerable lengths to conceal the drugs. The judge recognized that she should apply the UK Sentencing Guidelines, which provided that the sentence would normally be within a range between a fine and six months' imprisonment.

The applicant claimed that the judge failed to take into account mitigating factors, namely that he had completed a drug use programme and that he had cooperated with the authorities. The applicant claimed that if the judge had given any weight to either of those matters, which she should have done, she must have started above six months imprisonment, which was outside the guidelines, and she was obliged under s.485(1)(a) of the Criminal Procedure and Evidence Act 2011 to state her reasons for going outside the range. The applicant also submitted that the sentence was manifestly excessive.

The Chief Justice refused the applicant leave to appeal against his sentence and the applicant renewed his application before the Court of Appeal.

Held, refusing leave to appeal:

(1) Section 485(1)(a) of the 2011 Act was not applicable. The judge did not go outside the sentencing range in the guidelines and there was nothing

to explain. The statute did not provide that a judge must explain why he or she would have gone outside the range but for any mitigating factors. In any event, the court was not satisfied that the judge did envisage a sentence in excess of six months before mitigating factors were taken into account. Neither of the alleged mitigating factors was of any material weight. Notwithstanding completion of the drug use programme, the applicant continued offending and, as to the alleged cooperation, the applicant had volunteered only a small amount of the drugs to the authorities, seeking to deceive the authorities into believing that he had produced all of the drugs in his possession (paras. 6–7).

(2) The sentence was not manifestly excessive. There were some seriously aggravating features, in particular the fact that the offence occurred in prison. Taken overall, the sentence was within the range which a reasonable judge could properly impose (para. 8).

Legislation construed:
Criminal Procedure and Evidence Act 2011, s.485(1):
"[A] court passing sentence on an offender must—
(a) state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed . . ."

C. Brunt (instructed by Phillips Barristers & Solicitors) for the applicant;
P. Canessa (instructed by OCPL) for the respondent.

1 **ELIAS, J.A.:** This is a renewed application for leave to appeal against sentence following refusal by the Chief Justice. We refuse permission also and will give our reasons briefly.

2 On February 27th, 2020, the applicant was sentenced by Ramagge Prescott, J. to four months' imprisonment for possession of just under 13g. of a Class B drug, cannabis resin. He had pleaded guilty at the first opportunity and was given the full credit of one-third reduction. So, but for the plea, the sentence would have been six months. In view of the plea, a separate offence of conveying a prohibited article into prison, namely the drugs, was not proceeded with. The applicant claimed that he had been given the drugs in prison by a fellow prisoner.

3 The judge noted that, for a first offender with no aggravating features, a fine would be appropriate. However, in this case she identified five aggravating features. They were as follows:

(1) On May 29th, 2019, the applicant was fined £200 for possession of a Class B drug.

(2) Earlier, on May 7th, 2019, he had received a conditional discharge of twelve months for possession of a Class B drug. The judge noted that

she could re-sentence for the breach of the condition but she chose instead to treat the breach as an aggravating factor.

(3) The applicant had been on bail when the offence was committed, apparently awaiting trial for dangerous driving.

(4) Importantly, the offence had been committed in prison and, as the judge noted, the Sentencing Guidelines identify this as a specific factor justifying upward adjustment. The judge noted that drugs in prison constitute "a serious potential threat to maintaining good order in prison which is vital for the protection of inmates and staff alike."

(5) The defendant went to considerable lengths to conceal the drug. He had voluntarily offered up a small amount to the prison authorities but sought to conceal the main part of the drug in his possession. Because of their suspicions that he still possessed drugs, the prison authorities had to place him in a segregation cell and keep him under observation.

4 The judge recognized that she should apply the UK Sentencing Guidelines in the absence of Gibraltar guidelines: see s.484(1) of the Criminal Procedure and Evidence Act 2011. The relevant guidance says that the sentence for possession of this nature would normally be within a range between a fine and six months imprisonment. The judge chose therefore to go to the top end of the guideline (although the maximum sentence is twelve months even for a summary conviction).

5 There are essentially two grounds of appeal. The first is that the judge failed to take into account two mitigating factors. First, as the pre-sentence report noted—and the judge specifically referred to this—the defendant had completed a programme which was directed to his dealing with his drug use. Second, it is alleged that the applicant had cooperated with the authorities and had voluntarily disclosed the existence of some of the drugs in his possession.

6 The applicant says that if the judge had given any weight to either of these matters, as she should have done, she must have started above six months. Since that is outside the guidelines, she was obliged under s.485(1)(a) of the 2011 Act to state her reasons for going outside the range. This section provides that if a sentence is outside the range specified in relevant guidelines, the judge must say why. We do not agree that this section was applicable. The judge did not go outside the range and there was nothing to explain. The statute does not say that a judge must explain why he or she would have gone outside the range but for any mitigating circumstances.

7 In any event, we are not satisfied that the judge did envisage a sentence in excess of six months before mitigating factors were taken into account. In our view, neither of these alleged mitigating factors is of any material

weight. Notwithstanding completion of the drug use programme, the applicant still carried on offending. It cannot in the circumstances carry much, if any, credit. As to the alleged cooperation, this was in fact wholly compatible with the applicant wishing to deceive the authorities into believing that he had produced all the drugs in his possession so that they would not discover the drugs he had retained. This cannot amount to proper cooperation deserving credit; on the contrary, it is part of the act of concealment which aggravated the offence.

8 The other ground of appeal is that the sentence was manifestly excessive. We do not agree. As we have indicated above, this was a case with some seriously aggravating features, in particular the fact that it occurred in prison. Taken overall, the sentence was in our view within the range which a reasonable judge could properly impose.

9 For these reasons, we refuse leave to appeal.

10 **RIMER, J.A.:** I agree.

11 **KAY, P.:** I also agree