IN THE SUPREME COURT OF NEW ZEALAND

SC 14/2008
[2008] NZSC 69

JONATHAN NUKI LUMMIS JARDEN

v

THE QUEEN

Hearing: 27 May 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: R G Glover for Appellant
A Markham and M E Ball for Crown

Judgment: 28 August 2008

JUDGMENT OF THE COURT

A Appeal allowed.

B Sentence of three years' imprisonment quashed.

C Sentence of two years six months' imprisonment substituted.

REASONS

(Given by Wilson J)

Introduction

[1] Mr Jarden appeals by leave against a sentence of three years' imprisonment imposed on him after he had been found guilty by a jury on one count of conspiring to supply methamphetamine. Leave to appeal was granted not because the appeal raised any question of general importance but on the unusual ground that the Court of Appeal appeared to have applied the wrong guideline judgment, and taken into account matters which should not have been given weight, when dismissing an appeal by Mr Jarden against his sentence.[1] It was therefore necessary for this Court to consider whether a miscarriage of justice may have resulted.

[2] Following the grant of leave to appeal on 9 May, an urgent fixture was allocated for a hearing on 27 May in an attempt to ensure that the appeal was not nugatory. However, at the commencement of the hearing, Mr Glover advised the Court that Mr Jarden was to be released on parole the following day. Accordingly the only practical effect of any reduction in his sentence would be to reduce the time during which he could be recalled to prison and be subject to parole conditions.

[3] In sentencing the appellant, Fogarty J made the following remarks:

> [1] Jonathan Jarden, you have been found guilty by a jury of conspiracy to supply methamphetamine. There was overwhelming evidence before the jury that you were buying methamphetamine from Deborah Gordon-Smith immediately after she was taking a supply from Sui. As a purchaser of methamphetamine it was either for your own use or for on-supply. There was also evidence that you were trading to a degree in cannabis with the defendant Smith. Your counsel says that you may have been dealing in ecstasy. You were, to a degree, at least, a drug dealer in cannabis and the Crown agrees with that proposition.
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> [2] The question that I need to judge is your culpability in respect of the offence of conspiracy to supply methamphetamine. Your counsel submit that the only thing as a sentencing Judge I can be sure of is that the jury found that on at least one occasion you had agreed with Gordon-Smith to purchase the methamphetamine for on-supply to a customer. There are certainly difficulties in trying to work out your degree of dealing. On the authorities, to some extent I as a Judge can rely on my own judgment of the evidence.

1 [2008] NZCA 48 (William Young P, Chambers and Robertson JJ).

> [3] I am satisfied that the Crown proved that your relationship with Deborah Gordon-Smith, associated with the on-supply of Sui, was that you were buying methamphetamine regularly and I am satisfied that the Crown proved beyond reasonable doubt that you were buying methamphetamine more than once and more than just as a user. However, it is not possible, in my view, to take the evidence confidently much further, as to how much you were buying, and beyond more than at least buying for supply on two occasions.
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> [4] There is pretty strong evidence that you bought on three occasions but to a degree I think some caution has to be exercised in your way. I am also of the view that it is very difficult and dangerous to try and fit this case into the *R v Fatu* [2006] 2 NZLR 72 bands because of real doubts as to the issues of quantity. But it can be fitted into a commercial drug dealing setting. You were a commercial drug dealer, at the very least in cannabis, and to some degree in respect of methamphetamine. However, it may well be that in respect of methamphetamine it was quite minor inasmuch as a lot of the purchases may be for your use as a user.
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> [5] The Crown say I should place weight on the fact that you denied you were a heavy user. I do not think that the fact that you denied you were a heavy user means the Crown has proved that you were buying it for supply. I must be very careful about distinguishing what the Crown has proved and what is possible.
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> [6] As these remarks indicate, Mr Jarden, it is quite difficult to confidently assess the level of culpability in your case. While I can understand the Crown submitting a starting point of around four to five years imprisonment, I am persuaded, because of the general difficulties over the extent of the quantity of your dealings, that I should err on the cautious side and settle the level of your offending as warranting a starting point at around three years. You were effectively right at the bottom of the chain of supply and, as your counsel has pointed out, it is not a case where the Crown can confidently identify any of your purchasers of methamphetamine. But I am satisfied that the level of culpability warrants a starting point of around three years.

We have set out these remarks in full because it is important that they are not misunderstood by looking at parts of them in isolation. Although observing that Mr Jarden was a drug dealer in cannabis, Fogarty J was, quite correctly, sentencing him on the count on which he had been found guilty and convicted, namely conspiring to supply methamphetamine. The Judge went on to find that there were no significant aggravating or mitigating factors, with the consequence that a sentence of three years' imprisonment was imposed.

[4] The crucial paragraphs in the judgment of the Court of Appeal read:

> [44] Fogarty J specifically did not apply *Fatu* to this exercise. As noted in [37] he treated Mr Jarden as a commercial drug dealer, at the very least in cannabis, and to some degree in methamphetamine.
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> [45] Applying the Judge's approach, on the basis of *R v Terewi* [1999] 3 NZLR 62, Mr Jarden was a small scale cannabis dealer for a commercial purpose. He came within category 2, which generally requires a starting point of between two and four years. Three years is unexceptional as a starting point for the Judge's assessment of the offending.

[5] *Terewi* is the guideline judgment for sentencing on charges of supply of cannabis. Accordingly, as Ms Markham for the Crown realistically accepted, the Court erred in principle in apparently applying these guidelines. This may potentially have been to the benefit of Mr Jarden, in that the commercial supply of cannabis will (everything else being equal) be less serious offending than the commercial supply of methamphetamine.[2] However the conclusion of the Court of Appeal appears to have been reached on a wrong premise. This Court must therefore approach this appeal as if it were hearing a direct appeal against the sentence imposed by Fogarty J.

Discussion

[6] In submitting that the sentence was manifestly excessive, Mr Glover advanced three grounds. First, counsel submitted, Fogarty J had over-stated the role of Mr Jarden. Secondly, the sentence failed to recognise that the charge was that of conspiracy to supply, not of supply. Thirdly, it gave no recognition to the tragic personal circumstances of Mr Jarden grounded in the form of the anxiety and depression from which he had suffered for three years. These conditions were in large part due to the mental illness of Mr Jarden's partner which had, shortly before

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[2] Under the provisions of the Misuse of Drugs Act 1975, methamphetamine is a Class A controlled drug, cannabis resin or oil is in Class B and a cannabis plant is in Class C. Section 6 of the Act provides that the maximum penalties are life imprisonment for supplying a Class A drug, 14 years' imprisonment for conspiring to do so, 14 years' imprisonment for supplying a Class B drug, 10 years' imprisonment for conspiring to do so, eight years' imprisonment for selling a Class C drug and seven years' imprisonment for conspiring to do so.

the trial and at a time when she was seven months pregnant with their child, resulted in her taking her own life along with that of the couple's unborn child.

[7] As to the first of these grounds, it is important and only fair to the Judge to remember that he was addressing his sentencing remarks to Mr Jarden after both had been present throughout what had been a six week trial during which extensive evidence against the appellant and nine co-accused had been led by the Crown. When the remarks are read in the light of that evidence, they are readily understandable.

[8] The Crown case against Mr Jarden was based largely on numerous text messages and the tapes of numerous telephone discussions between Mr Jarden and Deborah Gordon-Smith. On the evidence, Ms Gordon-Smith played a central role in the distribution of large quantities of methamphetamine.

[9] In a situation where neither Mr Jarden nor Ms Gordon-Smith gave evidence, it was open to the jury to make its assessment of whether the texts and the tapes established, to the requisite standard, the guilt of Mr Jarden on the charge of conspiring to supply methamphetamine on at least one occasion. It was, for example, a matter for them whether or not to accept an explanation which Mr Jarden gave when interviewed by the Police. When asked what he had meant by saying to Ms Gordon-Smith that "I'll pay for the whole", Mr Jarden had replied that he was referring to raffle tickets which she was selling.[3]

[10] Under s 24 of the Sentencing Act 2002 Fogarty J was, when sentencing Mr Jarden, entitled to accept as proved any fact that was disclosed by evidence at trial. That evidence justified the Judge in finding that the appellant purchased methamphetamine for on-supply on at least two occasions. Indeed, as Fogarty J implicitly recognised in his sentencing remarks,[4] that assessment was fair to the point of being generous to the appellant.

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[3] Notes of Evidence, page 144 lines 14 to 21.

[4] At paras [3], [4] and [6], set out at para [3] above.

[11] Mr Jarden is not, on the present facts, assisted by having been convicted on a charge of conspiracy to supply rather than supply itself. As the Court of Appeal pointed out in *R v Te Rure*,[5] the seriousness of the offending may well increase as a conspiracy comes closer to execution. Indeed upon execution, and while weight must be given to the higher available penalties for supply rather than conspiracy to supply,[6] the element of conspiracy in some circumstances may be seen as aggravating the seriousness of the offending rather than mitigating it. In the present case, matters had plainly progressed well beyond the planning stage to the point where Mr Jarden had purchased methamphetamine for the purpose, at least in part, of on-supply.

[12] There is, however, more force to Mr Glover's final submission that the personal circumstances of Mr Jarden were so overwhelming that they should have been given some recognition on sentencing. As the Courts have repeatedly said, and as we emphasise again, in sentencing those convicted of dealing commercially in controlled drugs the personal circumstances of the offender must be subordinated to the importance of deterrence. But this does not mean that personal circumstances can never be relevant.

[13] In *Terewi*, the Court of Appeal stated that:[7]

> As with any drug offending for the purpose of profit making, the personal circumstances of the offender whose activities fall within Categories 2 and 3 [of *Terewi*] are usually not to be given much significance in the sentencing process. The fundamental requirement is that the sentence imposed should act as a deterrent to other persons minded to engage in similar activity.

To like effect in a judgment delivered five days previously, a differently-constituted Court in *R v Wallace* included among the general considerations when sentencing those convicted of trafficking in Class B drugs the statement that:[8]

> Personal circumstances are relegated in importance to the need to deter dealing in drugs with their potential harm to the vulnerable. In this context dealing by addicts warrants no different response from dealing out of greed or otherwise motivated.

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5 [2007] NZCA 305.
6 See footnote 2.
7 At para [13].
8 [1999] 3 NZLR 159 at para [25].

In *R v Harlen,*[9] an appeal against a sentence for benefit fraud, a Full Court of the Court of Appeal addressed as follows the place of personal circumstances when sentencing for drug offending, in response to submissions of counsel which raised that question:[10]

> [Counsel] highlighted in her written argument the recent decision of this Court in *Howard*,[11] an appeal against a sentence of two and a half years imprisonment on a charge of conspiracy with her partner to supply cannabis. The appellant's partner was also imprisoned as a consequence of the offence. This Court reduced the sentence to eighteen months imprisonment having regard to the circumstances of the offending and the acceptance by the appellant of responsibility and the need for her to desist from future involvement in drug offending. In relation to an argument based on the impact of the separation of the two young children from their mother, as well as their father, the Court said:
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> > …we must necessarily bear in mind the need to deter other women in Ms Howard's position and to remove from their minds any thought that a substantial sentence will not be visited upon them because they happen to have young children. Nor would we wish to encourage the thought in the minds of those who might perceive an advantage in the transacting of drug activities through women who might, because of their family circumstances escape otherwise well merited sentences. (pp5-6).
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> It is in error to read this passage as suggesting that New Zealand Courts do not take the welfare of affected children into account in the sentencing process. The family situation of a convicted person, including where applicable the well-being of an offender's children, will always be among the personal circumstances to which regard is had by a sentencing Judge. Indeed *Howard* itself is a case where leniency was extended on appeal on account, in part, of an appellant's personal circumstances. What however must be recognised is that the family situation of an offender, including the well-being of the offender's children, is only one of a number of relevant factors. How much weight it can be accorded in any particular case depends on its circumstances. In *Howard* the importance of both general deterrence and deterrence of the appellant from future involvement in drug offending required a sentence which the Court, implicitly reflecting the principles of s7 [of the Criminal Justice Act 1985], adjusted on appeal to ensure that it was the minimum consonant with promoting the safety of the community.

[14] The personal circumstances of an offender may be relevant either because they contributed in some way to the offending, or on purely compassionate grounds.

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9 (2001) 18 CRNZ 582 (CA).

10 At paras [21] – [22].

11 *R v Howard* (Court of Appeal, CA 315/99, 2 December 1999).

In oral argument, Mr Glover accepted that in the present case there was no evidence of a causal link between Mr Jarden's anxiety and depression and the offending of which he was convicted. His personal circumstances, in the form of the loss of his partner and their unborn child shortly before his trial was to commence, were however so extreme that they could and should have been taken into account in sentencing. The crucial importance of deterrence requires however that the reduction in sentence be a modest one.

[15] Treating this as a general appeal,[12] we therefore approach the sentence of three years' imprisonment on the basis that the Judge, having heard the evidence, was entitled to make the findings which he did as to the seriousness of Mr Jarden's offending. We further consider that it does not avail the appellant that he was convicted of conspiracy to supply rather than simply supply. Three years' imprisonment was therefore an appropriate starting point, before any adjustment was made for any aggravating or mitigating factors. A reduction of six months should, however, have been made to reflect the very tragic situation in which Mr Jarden found himself shortly before his trial.

Result

[16] The appeal is therefore allowed. The sentence of three years' imprisonment is quashed and a sentence of two years six months' imprisonment is substituted.

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[12] For the reasons discussed at para [5] above.