IN THE COURT OF APPEAL OF NEW ZEALAND C.A.235/96

THE QUEEN

v

JOANNE KATHLEEN BLACK

Coram: Gault J
Tompkins J
Robertson J

Hearing: 5 November 1996 (at Auckland)

Counsel: G J Newell for Appellant
D J Boldt for Crown

Judgment: 5 November 1996

JUDGMENT OF THE COURT DELIVERED BY GAULT J

The appeal is against the sentence of imprisonment for five years for conspiracy to supply and supplying the Class A controlled drug heroin. The appellant was also fined $970.00.

The appellant travelled on three occasions from Auckland to Hamilton where she purchased heroin. In total she acquired five ounces during October 1995 for $9,000 or $10,000 per ounce. She made the purchases by arrangement with a co-offender with whom she was in a relationship. Both were addicted to heroin. In addition to meeting their own requirements, friends or acquaintances of the co-offender were supplied. On analysis the heroin was found to be 70-76 percent pure

when supplied to the appellant. She and her co-offender denied diluting ("cutting") it for resale.

When the police, who had the suppliers under surveillance, executed a search warrant at the appellant's home address she was found in the toilet that had just been flushed. She was holding a plastic bag which showed traces of heroin. She has said that she disposed of one ounce in this way.

The appellant pleaded guilty to the two offences as were described in a full police summary of facts. The sentencing Judge was provided with this and with a substantial pre-sentence report dealing with the appellant's personal circumstances. That described a conscientious and productive person who successfully carried on a series of businesses in a manner that attracted admiration and respect from customers and those with whom she worked. All this while coping with some major stresses in her personal life.

The break-up of an 18 year marriage and the entry into a romantic involvement with the co-offender appear to have brought about a dramatic downturn in the appellant's life. She began to use hard drugs, became dependent, lost the capacity to operate her business and fell into the inevitable downward spiral from which some attempt to get help had failed prior to the offending with which we are concerned. She was said to have denied engaging in distributing the heroin (other than to her co-offender) for profit and maintained her involvement was solely to meet the demands of her own addiction.

The pre-sentence report also addressed the appellant's efforts at rehabilitation since arrest. Bail arrangements were made for assessment for the Higher Ground treatment programme. This resulted in discharge for using illicit drugs. Thereafter, until sentencing, she was accommodated at a support house of the Serenity House Trust, under contract to remain drug free. She has been supported in that by her former husband and adult children.

Prior offending reported included two drug related offences, the more recent being 12 years ago.

The sentencing Judge was also provided with a report from an alcohol and drug counsellor with Waitemata Health Regional Community Service. This indicated motivation by the appellant to undertake counselling and treatment programmes. There were, in addition, supporting references written by members of her family and acquaintances and also a handwritten letter from the appellant herself.

In her sentencing remarks the Judge summarised the information provided and then referred to the submission made on behalf of the appellant that the Court consider a suspended prison sentence coupled with supervision on conditions to encourage the appellant's recovery efforts. The Judge declined to deal with the appellant in this way for two reasons. The first was that the seriousness of the offending called for a sentence in excess of imprisonment for two years so that there

was no power under s 21A Criminal Justice Act to suspend the sentence. The second was that there were not shown special circumstances of the offending or the offender which would justify departing from the statutory presumption of a full time custodial sentence (s 6(4) Misuse of Drugs Act 1975).

The Judge also referred to the greater weight to be given to deterrence and punishment than to personal circumstances in such cases under current sentencing policy. She then said:

> The amount of heroin purchased by Black on behalf of both prisoners was considerable. The inference to be drawn from the evidence found by the Police at Waaka's house on his arrest, is that the wholesale drug purchases made by the prisoners were being retailed onwards by them. The fact that this pernicious drug was finding its way onto the streets in Auckland, this being what first alerted the Police to the drug dealing activities of the prisoners and their associates, is an appalling feature.
>
> I do not intend to differentiate between these two prisoners. It may be that their roles in the distribution of the drugs they were purchasing wholesale, was different. That is of no consequence, as they were both jointly in the enterprise.

The sentence of five years was imposed on both offenders after a reduction in each case of one year from a starting point of six years because of the pleas of guilty. Each was fined a sum equivalent to the money possessed at the time search warrants were executed.

Mr Newell appeared in this Court for the appellant. He did not represent her at sentencing. He applied for leave to read an affidavit from the appellant

providing a full statement of her personal circumstances. It does not purport to deal with matters subsequent to sentencing so there is no basis for its admission on appeal. To the extent that it purports to provide evidence of the appellant's role in the offending it seeks to place her actions in the most favourable light which, it is said, was not done at the time of sentencing. However, insofar as it conveys an impression different from that to be taken from the police summary of facts and the pre-sentence report the evidence is too late. It should have been given at the time of sentencing. That was the time to resolve disputed questions of fact as a basis for the sentence. To the extent that it repeats and elaborates on the full information that was before the sentencer it is superfluous.

Consideration of sentence must start with the statutory presumption of a full time custodial sentence. That reflects the seriousness of the offending by dealing in Class A controlled drugs as does the maximum sentence for each of the offences here involved - imprisonment for life for supplying heroin and 14 years for conspiracy to supply. The legislature has made plain that dealing in hard drugs is an activity to be met with heavy and deterrent sentences. That has been responded to in the courts where long prison sentences for major dealers are imposed.

In the present case the total quantity of heroin purchased by the appellant was five ounces (140 grams). It was of a high degree of purity reflecting dealing well up towards the top of the distribution chain. At street level heroin of 8-12 percent purity would sell for something in the region of $1,200 per gram. The case

for a sentence of less than five years imprisonment therefore does not lie in a promising context.

Mr Newell acknowledged that prima facie the sentence is not manifestly excessive but submitted that the position is different if the actual culpability of the appellant compared with that of her co-offender is taken into account. He invited us to accept that the appellant's role was simply as a go-between for the seller and her co-offender; that her only motivation was to secure heroin for her personal use; that she did not participate in weighing or cutting it; that she did not participate in the distribution and that she did not profit from sales.

The summary of facts on which she pleaded guilty does not read consistently with that. It records that on each occasion it was the appellant alone who made the purchases; that after one of the purchases both offenders were observed visiting a number of addresses in Auckland known to the police to be homes of suspected drug users and dealers; that in an intercepted call when asked after her home was searched whether she had made any money from the last lot the appellant replied that it had all gone down the toilet, and that she was found by the police to be in possession of a substantial amount of cash inconsistent with her circumstances at the time.

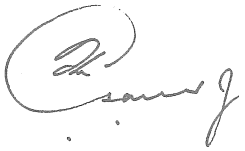
We do not consider the Judge erred in forming the view that both offenders were jointly in the enterprise and in declining to differentiate between them for sentencing. The pre-sentence report notes a refusal by the appellant to attribute her

downfall to the co-offender, and nothing was presented to the Judge indicating any exercise by him of control over her. Having stood together with him before the Judge the appellant cannot now, on appeal for the first time, cast herself in the role of his victim. In any event the go-between is as essential a link in the distribution chain as is the distributor. A person of the appellant's experience would have known that the funds provided to her for each successive purchase were generated by sales of that she had previously supplied. The quantities involved were obviously the subject of commercial dealing.

Of course, the Court cannot but be appalled at the destructive effect on the appellant's life of her drug dependency. Nor is the Court unsympathetic to the troubles in the earlier life of the appellant which she appeared to have coped with admirably until succumbing to addictive narcotics.

Mr Newell submitted that some reduction in sentence would be justified to give credit for the appellant's background and her efforts towards rehabilitation. They are to be respected and it is hoped that the appellant, now said to be drug free, will remain so and will continue to receive the support of the authorities and her family to do so. But consistently this Court has said that personal circumstances in general can carry little weight when it comes to sentencing for serious drug dealing. This is such a case. We have not been satisfied that the Judge proceeded on any wrong basis. The sentence was within the range open to her and we will not interfere with it.

The appeal is dismissed.



Solicitors
Daniel Overton and Goulding, Auckland, for Appellant
Crown Law Office, Wellington, for Crown