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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 9 May 2012

B e f o r e:

THE VICE PRESIDENT
(LORD JUSTICE HUGHES)

MR JUSTICE COOKE

MR JUSTICE BURNETT

R E G I N A
v

ROBERT HEALEY
MATTHEW TAYLOR
GARY BREARLEY
ALEXANDER MCGREGOR
MARK BOLTON

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(Official Shorthand Writers to the Court)

Mr R Barradell appeared on behalf of **Healey**
Miss J Seaborne (Solicitor Advocate) appeared on behalf of **Taylor** and **McGregor**
Mr G Wyatt appeared on behalf of **Brearley**
Mr I West appeared on behalf of **Bolton**
Mr L Mably appeared on behalf of the **Crown**

J U D G M E N T
(As Approved by the Court)

1. THE VICE PRESIDENT: These five defendants were all sentenced on the same occasion in the Crown Court at Sheffield for offences of cultivating cannabis. Their cases are entirely separate, but it has been convenient to hear them here one after the other in the same court in much the same way as it was obviously convenient in the court below. That is especially so since the judge sentenced them together and offered some generalised remarks about the basis on which he approached such cases.

2. Amongst those generalised remarks, the judge referred (correctly) to the frequency with which such cases were being encountered currently in Sheffield. He referred to the impact on the neighbourhoods in which they occurred. He referred to the decision of this court in R v Auton [2011] EWCA Crim. 76, [2011] 2 Cr.App.R (S) 75. Having done so, he said this:

> "If it is not possible to continue passing immediate sentences of imprisonment in Auton 1 type cases under the [Sentencing Council] guideline, then I would have no hesitation in saying that in those cases to follow the guideline would not be in the interests of justice and decline to follow it."

He was referring to the then recently published Sentencing Council definitive guideline on drug offences which was published in February 2012 and was expressed to have effect from 27th February 2012 onwards.

3. We are obliged to say that the approach encapsulated in the last brief citation of the judge's remarks is wrong.

4. There are inevitably bound to be different views from time to time about the general level of sentencing. In some fields, and drugs offending is one of them, there is a level of public debate at least about parts of it. That may or it may not be one of the reasons why Parliament elected to create the Sentencing Council as an independent body to take an overview of sentencing and to publish guidelines. At all events Parliament did so. The Sentencing Council receives a very wide range of information, statistical data, research and opinion, both lay and professional. The collection of information available to it is far wider than the members of this court, individually or collectively, or individual sentencers, can hope to have. The Council also engages in a comprehensive consultation programme before it publishes any guideline, frequently with the publication of one, or sometimes a succession, of drafts for discussion. That process frequently involves - and it did in this case - extensive testing of commonly encountered scenarios upon experienced sentencers, namely Crown Court judges and district judges.

5. There is deliberately built in to the guidelines issued by the Sentencing Council a good deal of flexibility, as we shall in a moment demonstrate. The flexibility available to Crown Court judges is appreciable. It does not, however, extend to deliberately disregarding the guidelines, not on the grounds that the case has particular facts which warrant distinguishing it from the general level, but because the judge happens to take a different view about where the general level ought to be. The latter approach is

demonstrably unlawful. It would remove all point from the issuing of any guidelines at all but such guidelines are required by the Coroners and Justice Act 2009. It would also, for that matter, equally rob of any point guidelines contained in a decision of this court. Indeed, such approach amounts to frank disobedience of the statute. That provides in section 125(1) of the Coroners and Justice Act 2009 that the court:

> " ... must follow ... any sentencing guidelines which are relevant to the offender's case ... unless satisfied that it would be contrary to the interests of justice to do so."

In the end, that kind of approach, if adopted, would also be contrary to the rule of law to which all judges are committed. Very few judges are fortunate enough to go through life without encountering rare occasions when they would prefer the law to be otherwise to that which it is. The judge's duty is nevertheless to apply it, whether at first instance or in this court, just as it is the duty of the citizen to obey the law whether he happens to agree with it or not.

6. This court's decision in Auton was explicitly delivered in anticipation that the more general factors affecting drugs sentencing were to be addressed by the statutory body responsible, that is to say the Sentencing Council. The decision in Auton contained this observation at paragraph 13:

> "We are aware that the Sentencing Council has before it the task of framing guidelines for a wide range of drug offences. What we say by way of assistance to judges for the present must necessarily be subject to any more general guidelines thus prepared."

For that additional reason it was simply not open to the judge to announce that he preferred the earlier and limited analysis of the level of sentencing which had been given in Auton to the definitive guidelines published by the Sentencing Council. One of the principal purposes of the Sentencing Council and of the guidelines that it creates is to avoid the necessity for repeated reference back in Crown Courts, Magistrates' Courts or here to previous decisions whether they are single instances or, for that matter, previously delivered guideline judgments.

7. There are in fact some, but limited, differences between the levels of sentencing contemplated at the time of Auton for offence of cultivation of cannabis and the levels of sentences contemplated by the definitive guideline. The sentencer's job is to read the guidelines for what they are. The differences however are not nearly as large as the arguments before the judge seem to have contended.

8. We recognise that the preparation of guidelines which are designed to assist in advance the whole range of drugs sentencing, if they are to be put in a reasonably condensed form, is a formidable task for those who undertake it. We also recognise that the concentrated form which such guidelines necessarily take requires reading in a manner which is different to reading a narrative judgment of this court given upon one or a few cases on known factual bases. The process is unavoidably different.

9. The format which is adopted by the Sentencing Council in producing its guidelines is to present the broad categories of offence frequently encountered pictorially in boxes. That is perhaps convenient, especially since it is necessary to condense the presentation as much as possible and to avoid discursive narrative on so wide a range of offending. It may be that the pictorial boxes which are part of the presentation may lead a superficial reader to think that adjacent boxes are mutually exclusive, one of the other. They are not. There is an inevitable overlap between the scenarios which are described in adjacent boxes. In real life offending is found on a sliding scale of gravity with few hard lines. The guidelines set out to describe such sliding scales and graduations. We wholeheartedly endorse the approach of Mr Wyatt, counsel for one of these defendants (Brearley), who asked us to find that a particular case was to be located on examination somewhere between two of the pictorial boxes.

10. In these guidelines, as in almost all such, there is a recognition that the two principal factors which affect sentencing for crime can broadly be collected together as, first, the harm the offence does, and secondly, the culpability of the offender. Those two root factors are often linked but not always. In some other contexts from that which we are now considering, such as for example offences of impromptu violence or offences which are committed carelessly, the two factors may not march together. In the context of offences which involve a considerable degree of deliberation and planning, such as will normally be the case for the production of drugs, they generally do march broadly together and certainly the one is likely to colour the other. Quantity, which is a broad appreciation of harm, may well colour participation, which is a broad appreciation of culpability, and vice versa. What we have just said about sliding scales applies equally to both elements, both to culpability and to harm. In neither case do the boxes have hard edges.

11. In these drug guidelines the broad indicator of harm in most cases, not all but including the cultivation of cannabis, is quantity. As this court made clear recently in R v Boakye [2012] EWCA Crim 838, the quantities which appear in the sentencing guideline pictorial boxes as broad indicators of harm are neither fixed points nor are they thresholds. They are, as the heading to the relevant column says, "indicative" quantities designed to enable the experienced judge to put the case into the right context on the sliding scale. In the particular context of the production of drugs with which we are today concerned, they are indicators of output or potential output as the preamble to the relevant page (18) explicitly says. In production cases it is the output or the potential output which counts. The guidelines have to provide for all manner of production methods of all manner of drugs. They are not limited to cannabis, nor to plants. Nor can they be revised from month to month as production techniques or cultivation practices or the breeding of plants changes. At the time of R v Auton and at the time of the drafting of these guidelines, such evidence as there was suggested that many cases seemed to involve an output of about 28 to 40 grams, or an ounce to an ounce and a half, to the plant. A note on page 18 of the guidelines expressly states this assumption. Where numbers of plants are indicated that assumption underlies the numbers. The cases dealt with by the Recorder of Sheffield in the present sequence seem to indicate that at least in these cases, and perhaps for all we know more generally, productivity has increased markedly. The indicative quantity for the lower of the categories of harm is suggested to be around nine plants. Nine plants at 40 grams would be about a third

of a kilo. The indicative quantity for the next category up is around 28. Twenty-eight plants at 40 grams would be something just over a kilogram. The judge however in the present case had one or more statements from police officers or forensic scientists indicating a yield very substantially greater than that this: sometimes 100 grams for a plant, sometimes 200 and sometimes apparently even more. That kind of yield is a step change. It demonstrates that the number of plants is, as the note to the guidelines makes clear, to be considered only as a route to the more fundamental question of output or potential output.

12. In the present case, the defendant McGregor stood to obtain no less than 1.47 kilograms, just under one and a half kilograms, nearly three-and-a-half pounds, from only seven plants. Another defendant, Brearley, stood to obtain about a kilogram and a third from a mere six plants. As is obvious, that puts their cases and ones like them squarely into category 3 of harm and not category 4, irrespective of the number of plants.

13. The same approach needs to be applied to the assessment of culpability which is particularly a matter for the experience of the judge. The guidelines say this, if one takes one's eyes out of the pictorial boxes and troubles to read the whole of them:

> "Culpability demonstrated by offender's role
>
> One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive."

We would draw attention to the use of the words "may" and "not exhaustive".

14. The characteristics which are designed to assist sentencers in assessing the culpability of the defendant are couched in terms of role, no doubt because many cases of production, or for that matter of supply, involve chains of defendants operating at different levels. It is no doubt as good a generic word as can be thought of to meet all the different types of offence which there might be. It has somehow to contain within it both, on the one hand, the case where there are several offenders operating with different functions and, on the other, those where there is but a single defendant working on his own. The present cases, with one minor modification, are essentially cases of people working on their own. But their culpability still has to be assessed. The guidelines make it clear that one or more of the listed characteristics *may (we emphasise) demonstrate the category into which the culpability of the defendant falls but it also says explicitly that those listed characteristics are not exhaustive. These pictorial boxes are not to be treated as exhaustively defining every possible form of criminal activity, even if that were ever possible, which it is not.*

15. The lowest level of culpability headed, for convenience, "lesser role", encompasses those whose activity is at the bottom of the range of offending which courts encounter in the particular field which one is considering. So it includes, for example, those who are exploited or coerced by others or who became involved through naivety. Where there is a chain it encompasses those who are at the bottom of it and have little or no influence on those above them. It would, to take an example at random, be likely one

suspects to include the defendant whose only function was to be the delivery man taking from A to B a batch of cutting agent for the producer who is busy bulking up quantities of heroin for onward sale.

16. *This lowest category may (our emphasis again) also include those who if operating entirely alone are acting entirely for their own use. The box says so:*

> *"If own operation, solely for own use (considering reasonableness of account in all the circumstances)."*

That recognises a critical distinction which is highly material to these cases. It is the distinction between those who produce a drug which will increase the general availability of the forbidden substance by circulating it and those who do not.

17. *The defendant who has half a dozen plants or so in a grow-bag alongside his tomatoes outside the back window is no doubt contemplated as engaged in what the guidelines would call a domestic operation (see category 4 of the harm). Assuming he is growing only for his own use, he would clearly have what they envisage as the lowest level of culpability within the range of offences of this kind. However, those who create a purpose-built room in the loft or the cellar or the garage, or who dedicate a bedroom to the exclusive purpose of cultivating cannabis, having invested substantially in professional equipment for watering, for lighting and/or for electronically controlled timing of those operations and others, cannot sensibly be described as having a lesser role. Nor can they sensibly be bracketed with people who perform a limited function under direction, who were engaged through coercion or intimidation or who were involved through naivety or exploitation. People with the kind of determined approach to cultivation which we have described and who are prepared to make the investment, do so because they are contemplating repeated cropping under professional or semi-professional conditions with dedicated apparatus which has been bought for the purpose, usually at a cost of some hundreds of pounds. Those people can perfectly properly be described, and in our view should be described, as having the kind of level of culpability which is the next level up from those who are at the lowest level, ie that labelled "significant role." Also in significant role will be those who like the defendants we have just described have the apparatus and the dedicated space for cultivation but in whose case there is a real likelihood of additional wider circulation, in other words supply, whether for money or not. That latter group is clearly higher up in the sliding scale and higher up in the significant category than those who do not. There is an essential and important distinction between cases where there is likely to be circulation or supply and cases where there is not.*

18. *We observe that we are conscious that the Council was not, unlike a judge dealing with a single or even a number of similar cases, confining itself to the relatively small part of the tapestry which we are here considering. It was not confining itself to the cultivation of cannabis or even to the production of drugs generally. It was attempting the much heavier task of giving help in the sentencing of drugs cases across the board. In particular, a large part of drug sentencing is concerned with those whose offence is not cultivation but supply. There has to be a sensible relationship between the levels for small scale supply and the levels for cultivation which will be likely to give rise to*

circulation or small scale supply. If one looks at the indicated levels in the section of the guidelines concerned with supply (pages 10 to 15) and compares them for cannabis with those with which we are concerned, one can see that the Council has sought to achieve a proper balance between the two.

19. *In considering the question of the prospect of supply or circulation, we ought to say this. First, all these cases were explicitly dealt with by the judge on the assumed basis that there was no prospect of a future circulation. We in this court must honour that approach. We cannot forbear to say that the quantities involved in at least two of the cases would have caused all of us acute anxiety as to whether the assertion of sole consumption could possibly be truthful. Second, it is important to note that the prospect of future supply does not generally call for the inclusion of additional counts for possession with intent to supply. On this, the view of this court remains that which it held in R v Auton. The offence of possession with intent to supply relates to the possession of an identifiable quantity of drug which is in being. It does not relate to the possession of plants from which drug may or will in the future be extracted. In cultivation cases it follows that the prospect of future supply very often simply has to be evaluated by the judge and cannot be the subject of a jury verdict. Third, we have deliberately used the expression "the prospect of circulation or supply" because it is that, as it seems to us, which is the important question. It is not necessarily the same (although it often will be) as the defendant's intention. The reality is that if the cultivation process is going to produce a substantial surplus, beyond what the defendant will himself consume, of a substance which is worth something in the general region of £10 a gram, there will in many cases (although not all) be a real prospect of circulation even if he did not set out with that principally in mind. Moreover, circulation in this context is not confined to sale. Particularly in the context of cannabis the use is often semi-socialised. Those who use it in social conditions are committing an offence just as much as those who use it anywhere else. The reality is accordingly very likely quite often to be that supplies of surplus cannabis which has been grown will take place without the inevitable exchange of money consideration. It may well take place in circumstances which are rather different from the hole in the corner exchange of a small plastic bag at the back of a public house. But it still supply and it is still expanding, socialising and increasing the circulation of a product which Parliament has forbidden. Accordingly, what has previously been said in this court in a number of cases about the perils of the expression "social supply" remains as relevant now as it ever was.*

20. *As the quantity of cannabis or for that matter any other drug produced increases, the likelihood of it all being destined for the sole consumption of the defendant reduces. It may be possible for a defendant to consume a kilogram of cannabis all by himself, but it would take some time and involve very heavy use. Some of these defendants asserted that they were heavy users. The heaviest of them suggested that he had been spending as much as £200 per week on his habit. We do not know, and it is not necessary for the purposes of this case for the reasons we have given for us to investigate, the truthfulness of that, nor to examine whether his past income ever provided the possibility of him spending at that rate. But even assuming that it was truthful, it would take him about a year to consume a kilogram of cannabis. The cycle of production under the intensive conditions which were operated by all these defendants and are*

frequently encountered, produces either three or four crops each year, which means that a unit producing a kilogram at a time is going to produce about three times what even that kind of allegedly heavy user could possibly consume for himself.

21. *We wish to reiterate that if a judge is faced with a defendant who asserts that an improbably large quantity of cannabis is entirely for his own use, he is entitled to indicate that he is not presently inclined to accept that assertion. He is entitled to give the defendant and his counsel the opportunity to give evidence about it if he wishes. We would suggest that that should generally be done, if the quantities involved raise a question of improbability. If it is done it does not involve an adjournment to some long post-dated future special hearing; it can usually be accomplished, and should usually be accomplished, by the hearing of evidence there and then. That is, as it seems to us, perfectly possible in the time available even in a busy Crown Court list. The defendant may then be able to explain both his production cycle and the consumption that he is engaged in, consistently with his occupation and family circumstances, or he may not. If he can, he must be sentenced on the basis that the drug was for himself. If he cannot, he will be sentenced on a different basis further up in the significant role box and he will of course moreover generally forgo most of the reduction for the plea of guilty which would otherwise have been accorded to him. What however the judge is not entitled to do is to say that he accepts the assertion that the drug cultivation was all for the defendant's own use and yet sentence on the basis that there is likely to be a supply to somebody else. In the present case the judge came close, if he did not, to falling into that error, for he said, whilst accepting in each of these cases that the use was going to be personal, this:*

> *"Often even if the original purpose was personal use there is a temptation to supply, not least to recover the set-up costs when the plants produce more than expected."*

The sentiment behind those remarks is right. If it had led him to find that there was a prospect of supply in these cases, such a finding would have been wholly unchallengeable. What, however, cannot be done is take that reality into account at the same time as accepting the defendant's assertion that there is no prospect of supply.

22. *Those general observations lead us to the very clear conclusion that the defendant who invests substantial sums in the creation of a production line for the cultivation of cannabis, usually in a separate room dedicated for the purpose, is properly to be located on the sliding scale of culpability at the bottom end of the significant role category. Those who do the same where there is a prospect of supply are higher up in the significant role category and those who do it where it is frankly clear that there will be supply for money are a little further up again. When the operation becomes commercial, in the ordinary sense, then one is talking about the uppermost category of culpability. That, as it seems to us, is a perfectly workable form of approach and it is entirely consistent with the guidelines. It does not involve any departure from them at all. If (as here in most cases) the quantities are such as to put the case into category 3, then for those where there is no prospect of supply it seems to us that the appropriate level for sentencing will very often be in the general region of six to 12 months after trial. There may of course be cases where it is entirely proper for there to be a*

non-custodial penalty but the general range seems to us to be that which we have identified. That again, we make clear, is achieved by the application of the guidelines and not by departure from them.

23. *That having been said, we turn to the present cases. The defendant Brearley was 45 years of age. He had a specially constructed room at the back of his garage, partitioned off from the rest of it. Whether it was formally concealed or not is not entirely clear. In it he had the usual collection of equipment for the intensive cultivation of cannabis. At the time that he was arrested there were six plants in there, but their potential yield was very high and would have been as much as one and a third kilograms. He had spent something like £600 on the equipment, an investment which would have meant undoubtedly that it must have been his intention to have repeated crops. There were aggravating factors. He involved other people. On the occasion of his arrest two of his friends were there, apparently helping him crop the plants. In addition, he had bypassed the electricity. The equipment that is used for this kind of intensive cultivation uses a lot of electricity. That means that the person who does it either has to sustain a substantial further investment or he has to swindle the electricity company. Brearley chose the latter course and that is a clear aggravating factor which affects the sentence.*

24. *At the age of 45 he had a number of previous convictions but none was for a like offence. He pleaded guilty at an early opportunity. He asserted that the product would all be for his own use and that appears to have been accepted notwithstanding the yield. We here proceed on the same basis, as we must. He is a below-knee amputee (he is missing a foot) as a result of an unfortunate accident some years ago. He asserted that he used the cannabis to assist the phantom pains which he experienced. We observe, as did the judge, that there was no medical evidence whatever, not so much for the presence of the pains (which may well exist in an amputee) but for any effort on his part to obtain legitimate prescription medicine for them.*

25. *The judge passed a sentence of nine months' imprisonment which would suggest a starting point around 13 months or thereabouts. Because there is the clear possibility that the judge's approach was to some extent flawed by his general approach to the guidelines, we have thought it right to approach this case, as indeed the others, afresh. That will result in a modification of the sentence which had there not been the arguably flawed approach might have been smaller than would ordinarily justify intervention by this court. The proper sentence in his case, given the quantities and the aggravating features of the operation, would have been about 12 months after trial, eight months on a plea of guilty. That is based on significant role, category 3. We allow the appeal and substitute the sentence of eight months for nine months.*

26. *The defendant McGregor was 24 years of age. He had constructed a dedicated room with a similar set of equipment, no doubt at similar expense, in this case in the loft of the house which belonged to his mother where he also lived. She, it seems, was kept in the dark about it. He had seven plants there at the time of his arrest. They would have yielded as much as 1.47 kilograms of product - in other words something that would be worth, were it to be sold, something just short of £15,000. The offence was aggravated by the risk to which he exposed his mother and for that matter by the presence of other*

non-users in the house who at least were at risk of being affected by the fumes. He pleaded guilty. There had been a warning for a different offence in the past, but he was otherwise unconvicted.

27. *Once again, given the quantities and the circumstances of the offence, in our view the proper sentence after trial would have been about 12 months. He pleaded promptly and his sentence ought to be eight months in the same way as Brearley's should. That too is based on significant role, category 3. We allow the appeal, quash the sentence of 10 months and substitute one of eight.*

28. *The defendant Healey had a purpose-built structure of wood erected in the cellar of the house where he lived. It had once again the same kind of specialist semi-professional equipment for the cultivation of cannabis. In his case, as in all the others, clearly a continuous process of cultivation was afoot. There were at the time of his arrest nine growing plants with a further 14 cuttings which were clearly going to be the next batch. The potential output of those altogether, even taken at the lower assumed yield of 40 grams per plant, would have been something over 900 grams, in other words just short of a kilogram.*

29. *Healey pleaded guilty at an early stage. There were cautions as a child, although they were for the possession of cannabis, but there were no other convictions and he was 23 years of age. The case did not have the aggravating features which were present in the case of Brearley and McGregor. It seems to us the right sentence after trial would have been about nine months and accordingly six months to recognise his prompt plea. That also is significant role, category 3. We allow the appeal. We quash the sentence of nine months and substitute one of six months.*

30. *The defendant Taylor had a purpose-built room this time in the loft. The equipment once again demonstrated that what was afoot was a continuous process of cultivation. There were at the time of arrest eight plants with an estimated yield of 800 grams or about £8,000 worth. He had two previous cautions for the possession of cannabis and a number of other unrelated convictions. He was not a man of good character. There were however no particular aggravating features of the kind that we have identified in the case of Brearley and McGregor. He was 28 years of age. In his case, as in Healey's, we think that the sentence after trial ought to have been about nine months based on significant role, category 3. We quash the conviction and substitute, allowing for his plea of guilty, a sentence of six months.*

31. *Lastly, the defendant Bolton had a loft conversion structure. In it at the time he had 10 plants. In his case the assumed yield was significantly less. It was assumed on the basis of 40 grams of plant and thus was only about 400 grams. The defendant advanced a clearly unsustainable and untruthful story when first asked about it and suggested that somebody else had put the equipment and the plants in his loft without his knowledge and thereafter there was a good deal of prevarication about his account. Eventually, he came before the court on the admitted basis that there would have been an element of supply by way of sale in his offending. There are therefore two differences between his case and the others. The first is the admitted prospect of sale which puts him clearly into the significant role box, but the second is the much smaller*

quantity which does put him in the lower category 4 level of the range of harm contemplated by the guideline. In that case the appropriate range is between a community order and about six months' imprisonment. He is at the top of that range, as it seems to us, and after trial his sentence ought to have been about six months. His plea was extremely late. We shall adjust it to a small extent. We shall quash the sentence of nine months which was imposed upon him, very much the same as on all the others, but substitute a sentence of five months in his case.

32. *To those limited extents, the appeals of each of these defendants are allowed.*