

Heroin LSD

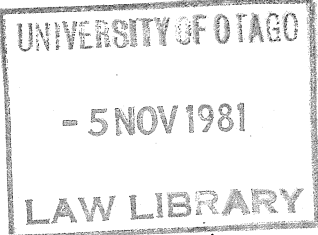
IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 37/81

THE QUEEN

v.

STEVEN DOMINIC URLICH



Coram: Cooke J. (presiding)
Somers J.
Mahon J.

Hearing: 17 July 1981

Counsel: J.W. Clearwater for Appellant
J.R.F. Fardell for the Crown

Judgment: 16 September 1981

JUDGMENT OF THE COURT DELIVERED BY SOMERS J.

Steven Dominic Urlich applies for leave to appeal against concurrent sentences of 6 years imprisonment imposed on him on 9 February 1981 in the High Court at Auckland on charges of possession of heroin for supply and the supply of 4-Bromo-2, 5 Dimethoxyamphetamine. Both are Class A controlled drugs under the Misuse of Drugs Act 1975, the latter having been added to the First Schedule to that Act by Regulation 3 of the Misuse of Drugs Order (No.2) 1978 - serial No. 1978/249, and being an hallucinogen having effects on ingestion similar to lysergide. It is referred to as DMA and some reference to its qualities

is made in Richardson (C.A. 27/81; judgment 13 July 1981).

In late October 1980 the applicant bought a sheet of 50 tablets of DMA from a supplier at a price of \$8.20 per square. He regarded them as LSD or acid. He cut each tablet in half and mounted them on a strip of cello tape so as to produce 100 trips. He said he used about 5 himself, gave away about 10 as samples, and sold the remainder at \$5 or \$6 each.

A few days later he bought from the same supplier three sachets of heroin each weighing about 1 gram at a total price of \$360. The actual heroin content was 5% of weight. A co-offender a Miss Te Au bought 6 grams for \$600. The applicant divided his three sachets in half intending to sell the six packets so produced for about \$100 per packet.

A few days later he realised he was being followed by a Police car. During a chase Miss Te Au threw some of the heroin out of the car window. The applicant then stopped the car and ran off throwing away the six packets of heroin and eight DMA tablets. He later disclosed their whereabouts to the Police and told them all he knew about his supplier.

The Judge concluded that the applicant was dealing only in a minor way; that the amount of drugs involved was small; and that the applicant who was himself an addict intended to support his habit by selling drugs to others.

The applicant is a single man aged about 27 years. He was sentenced to Borstal Training in March 1971 at the

age of 17 1/2 years on 37 charges of dishonesty. He had two minor convictions in 1972 and 1973 and in 1975 was sentenced to one year's imprisonment on a charge of receiving stolen property. After his release he became involved in drugs and developed an addiction for heroin. On 13 December 1977 he was sentenced to 3 years imprisonment for possession of heroin for supply. While in prison he was early admitted to weekend leave. On one occasion on his return to the prison he supplied heroin to three inmates. On 1 June 1978 he was sentenced to a total of two years imprisonment in respect of those offences the terms to run concurrently with the sentence he was then serving. He was released on 28 July 1980 and the present offending occurred between 27 October and 3 November 1980.

Three submissions were advanced in support of the appeal. First that the sentence of six years was manifestly excessive; secondly that there was a gross disparity between his sentence and that of his co-offender Miss Te Au; and thirdly that no or no sufficient account was taken of the assistance he gave to the police.

In R. v Spartalis [1979] 2 N.Z.L.R. 265, 266 this Court considered it was not then possible to discern any real pattern of sentencing in cases involving heroin. Now some two years and nine reasoned cases later a preliminary attempt is worthwhile. And something too may be said of cases involving lysergide.

Some preliminary observations may be made. First the cases to be mentioned are some only of those in this Court in which reasons for judgment have been given. It would be quite impracticable and of no assistance to refer to all of them although each such case since 1975 has been read. Numerous cases have been disposed of by dismissing the application for leave to appeal without the necessity of an oral hearing and without reasons being given. They call for no consideration. Secondly and obviously, there is no sentence of which it may be said that it represents the optimum. Thus when an appeal is dismissed it cannot normally be predicated that a greater or lesser sentence might not also have met the same fate; and when a sentence has been increased - so far that has happened only in appeals by the Crown - it is often to that level which is considered the lowest appropriate for the class of offending - a higher sentence may well have been beyond reproach. Thirdly, we have been particularly concerned to notice the effect on sentencing of the Misuse of Drugs Amendment Act 1978 which increased the maximum sentence from 14 years imprisonment to life imprisonment in the case of certain types of offending involving Class A controlled drugs thereby indicating the concern of Parliament with this evil. For that reason we have indicated where sentences are for post 1978 offending. Last, because the personal circumstances of each offender differ so much and because in this field they have less than their usual significance, no attempt has been made to refer to them.

HeroinImporting - pre 1978 Amendment (Maximum sentence 14 years)

Summerton (C.A. 40/76; judgment 31 May 1976)
4.5 gms. of fairly pure heroin, street value over \$5,000;
jury rider for utmost clemency. Sentence of 3 years
imprisonment upheld.

Beri (C.A. 33/76; judgment 11 August 1976)
Amount sufficient for 60,000 capsules.
Sentence of 13 years upheld.

Perry and Osborne (C.A. 162/76, 166/76; judgment 17 December 1976)
street value about \$250,000. Sentences of 9 years upheld.

Johnson (C.A. 171/76; judgment 4 February 1977)
At least 3 1/2oz. with street value \$5-7000. Addict with profit
motive. Sentence of 6 years upheld.

Rosandich (C.A. 6/77; Sentence 6 April 1977)
Amount which would produce 6-8000 capsules with a value
of about \$200,000. Sentence of 6 years upheld.

Bryan (C.A. 180/77; judgment 2 March 1978)
36 milligrams for own use by addict. Sentence of 3 1/2 years
reduced to 2 years.

Mahmud (C.A. 9/78; judgment 9 June 1978)
137.2 grammes. Sentence of 10 years upheld but
recommendation for deportation cancelled because of continuing
liability in country of origin to death sentence.

Importing - Post 1978 Amendment

Morgan (C.A. 76/80; judgment 5 June 1980)
290 milligrams of which 197 mg. were pure heroin for
personal use. Sentence of 2 years upheld.

Curtis (C.A. 210/79; judgment 24 June 1980)
About 400 grams of pure heroin. Sentence of life imprisonment
reduced to 16 years.

Hughes (C.A. 71/81; judgment 29 July 1980)
53 grams of 20% purity worth about \$40,000. Sentence of
7 years upheld.

in Urtich (supra) our Court of Appeal concluded that
 The cases on importing point generally to three classes.

- (1) Those - Bryan and Morgan - ^{Case where} whose imports were measured in a limited number of milligrams and were for the offender's own use have both before and after the Amendment Act ^{Maximum of 2 years} received sentences of two years. ^{1978 (where the maximum sentence was raised from 14 years to 15 years)} It is too early to say whether in the future ^{of considering whether} even in those cases larger sentences may not be justified.

- (2) Importers on a large scale - Beri, Perry & Osborne, Mahmud and Curtis - have received sentences from 9 to 16 years.

Of those Curtis alone is post 1978 and the amount there involved was very large. ^{(3) Importers of quantities of heroin} In between lie those - Johnson and Hughes - who received sentences of 6 and 7 years ^{before these extreme cases} respectively. ^{however the Court concluded that} Again there is little material after 1978 upon which any conclusions about sentence levels ^{could} can be drawn. The case of Rosandich does not fit comfortably into either bracket.

Cases of sale, supply, possession for supply, and offering to sell can be considered together. ^{These offences are considered together as} Each involves a similar elements of actual or intended distribution to others ^{usually} mostly with a profit motive.

Pre 1978

Woolston (C.A. 138/75; judgment 12 May 1976)

Possession for supply of 1.48 grammes; Sentence of 5 years imprisonment upheld.

Clotworthy, Newbold, Lee

(C.A. 136/75, 140/75, 139/75; judgments 12 May 1976)

Offering to sell 34.2 grams; 4 months in custody; Sentences of 6 1/2 years and 7 1/2 years imprisonment upheld.

Bazuik (C.A. 11/76; judgment 28 May 1976)

Supply of 2 capsules at \$35 each and administering.
Sentence of 3 years reduced to 2 years. Addict
obliging another addict without profit.

Walker (C.A. 131/76; judgment 26 November 1976)

Two charges of selling total of 40 capsules for \$1,500.
Sentence of 5 years upheld.

Stephens (C.A. 102/77; judgment 16 November 1977)

Crown appeal. Possession for sale of 348.9 grams of cannabis
and 4 grams of heroin. A courier and not the owner of
the drugs. Sentence of probation quashed and sentence
of imprisonment for 2 years imposed. Save for particular
circumstances it was said that ordinarily 4 years would
have been appropriate.

MacDonald (C.A. 100/77; judgment 22 November 1977)

Sale of 19.2 grams. Sentence of 5 years imprisonment
upheld.

Scale (C.A. 42/78; judgment 17 July 1978)

Possession for supply of 110 grams. 30% pure - sentence
of 7 years imprisonment upheld.

Williams (C.A. 120/78; judgment 7 June 1979)

Possession for supply of 8 grams. of which 1.3 grams
were pure heroin. Sentence of 3 years imprisonment
upheld and said to be at the lower end of the scale.

Sherwin (C.A. 145/78; judgment 2 July 1979)

Possession for supply of 7.76 grams pure.
Sentence of 6 years upheld.

Anderson (C.A. 204/78; judgment 28 June 1979)

Crown appeal. Six charges of supply. Total 8.2 grams
being 2.2 grams pure. Sentence of 4 years imprisonment
increased to 6 years.

Post 1978 Amendment

Archer (C.A. 59/79; judgment 8 August 1979)

Possession for supply. 7.2 grams. of which
2 grammes pure. Sentence of 5 years to be served
on completion of existing sentence of 2 years imprisonment
upheld.

Spartalis (1979) 2 N.Z.L.R. 265.

Possession for supply of 11 grams. of which 1.2 grams were pure heroin; said to be a major drug dealer and had sold other heroin. Sentence of 10 years imprisonment upheld.

Smith (C.A. 121/79; judgment 3 December 1979).

Seven charges of supply and possession for supply; 2 grams. in possession but considered well up in drug hierarchy. Effective sentence of 10 years imprisonment upheld.

Hennah (C.A. 18/80; judgment 16 April 1980)

Supply of 163 milligrams of which 8 mgs. were heroin. Supply to an addict out of compassion and rendered assistance to Police. Sentence of 2 1/2 years imprisonment reduced to 18 months imprisonment.

Espie (C.A. 183/80; judgment 5 November 1980)

Supplied 7 grams and possession for supply of 6.03 grams 95% pure. Assistance rendered Police and larger amount disclosed to Police. Sentence of 6 years imprisonment reduced to 5 years imprisonment.

Certain features emerge from that catalogue. First, the level of sentencing has shown an increase since the 1978 Amendment thus recognising the legislative intent. Secondly, ^{sentencing} the level bears a distinct relation to the degree of involvement of the offender. Even in the cases where only small amounts of drugs were discovered long sentences follow where the evidence shows trafficking. ^{harsher} ^{Orlich (refers)} ^{These} ^{Examples have been} ^{echoed in Annual} ^{reports where the} ^{Court state} ^{that} Thirdly, there are two circumstances in which an otherwise appropriate sentence has been reduced. These are where the offender has afforded real assistance to the Police in naming or otherwise helping in the identification of dealers further up the chain of supply; and where the offender has discovered to the Police drugs which would not otherwise have been

found.

Lysergide

(We use this heading because most cases relate to LSD - but it includes cases of DMA and may be appropriate to other Class A hallucinogens)

Pre 1978

Brown (1978) 2 N.Z.L.R. 174

Offering to supply one "trip"; and two charges of offering to sell 100 tablets for \$400; the items though believed to be were not in fact LSD. On that account sentence otherwise described as unexceptionable reduced from 3 years imprisonment on each of the charges of offering to sell to 18 months imprisonment and the sentence of offering to supply reduced from 18 months imprisonment to 9 months imprisonment.

Post 1978

O'Connell (C.A. 150/79; judgment 29 October 1979)

Supply of one tablet of DMA, 18 months imprisonment; possession of 91 doses of DMA, 3 months imprisonment concurrent; other charges relating to cannabis; the overall effective sentence of 18 months was upheld.

Nicholls (C.A. 165/79; judgment 5 December 1979)

Sale of cannabis for \$50, one year's imprisonment;
Sale of cannabis for \$240, two years imprisonment;
Supply of 100 doses of LSD at \$7 dose, 5 years imprisonment.
A co-offender who had supplied 200 doses at \$7 and whose case was described as more serious had been sentenced to an effective sentence of 4 years. Sentence reduced to 4 years solely on account of that disparity.

Halliday (C.A. 146/80; judgment 2 September 1980)

Charges of sale of 100 tablets for \$550 and 50 tablets for \$300. Sentence of four years imprisonment upheld.

Rowell (C.A. 48/80; judgment 18 September 1980)

Offering to supply DMA which was believed to be LSD to value of \$1000; participation described as minor and the principal offender was sentenced to 9 months imprisonment on the footing that he thought the drug was another fairly innocuous drug. Sentence of 18 months imprisonment reduced to 9 months.

Josephs (C.A. 239/80; judgment 8 May 1981)

Possession for supply of 960 tablets weighing 134 mg; offender's wife involved in a lesser way sentenced to 18 months imprisonment; sentence of 7 years imprisonment reduced to 4 years imprisonment.

Wilson (C.A. 53/81; judgment 12 June 1981)

Two charges of supplying 20 tablets for \$200; 100 tablets for \$800 and 4 charges of selling cannabis. Sentences of 3 1/2 years imprisonment on LSD charges and 18 months imprisonment on cannabis charges upheld.

Greer (C.A. 282/80; judgment 6 March 1981)

Charges of importing about 37,000 tablets. Sentence of 8 years imprisonment upheld.

Thomson (C.A. 15/81; judgment 12 June 1981)

Importing - another party to part of Greer's importation. Sentence of 8 years imprisonment upheld.

Richardson (C.A. 27/81; judgment 29 July 1981)

Possession of DMA for supply - 87 tablets, total weight 44 mgms. intended to be sold at \$7 or \$8 each - had originally bought 100 tablets at \$4 each. Crown appeal against sentence of 18 months imprisonment allowed. Sentence increased to 3 1/2 years imprisonment.

That review indicates that the sentences imposed in the present case involving two Class A controlled drugs and an offender who has twice previously been convicted of like offences could not possibly be viewed as excessive, and indeed would be too low, apart from special factors present in this particular case. But there are two special factors here. If it were not for them, the appropriate sentence may well have been between 7 and 8 years imprisonment.

The first special factor is that the applicant gave all assistance he could in identifying his supplier and

discovered to the Police the whereabouts of the drugs he had abandoned. That in itself justifies some reduction of the sentences that these very serious offences would otherwise call for. This Court wishes to stress particularly that the revealing of suppliers can be crucial in suppressing the drug trade. It is so important that it should be recognised in a significant way on sentence.

The other special factor is the disparity between the sentence imposed on the applicant and that imposed on Miss Te Au. She was involved in peddling the heroin she bought in order to sustain her own craving. She was sentenced to 12 months imprisonment. This aspect of the appeal has given us some concern. On the material before us the sentence on Miss Te Au seems to be extremely light. A gross disparity between sentences on true co-offenders similarly implicated does in some cases afford grounds for this Court to interfere. Where the offence involves drug dealing less weight can be given to that factor, but it cannot be entirely ignored. We add, however, that it arose here as a result of a sentence subsequently imposed by a different Judge, so that only this Court is in a position to deal with it.

For these reasons we think that in the case of this particular offender each sentence should be reduced by a period of one year, this representing as against the sentences that would be appropriate without those two special factors, a reduction of two or three years.

Leave to appeal is given. The sentences imposed are

