

Judgment 10 / 2004

**Peter David Lofthouse – Court of Appeal
(Criminal Appeal 312) – 20 April, 2004**

Importation of Class B drug – sentence – nearly 4 kg of cannabis resin imported by applicant and co-accused – whether disparity of sentence – test to be applied – application dismissed.

IN THE COURT OF APPEAL OF GUERNSEY

The 20th day of April, 2004 before Sir Philip Bailhache, Presiding, Sir John Nutting Bt., QC.
and Jonathan Philip Chadwick Sumption Esq., QC.,

THE LAW OFFICERS OF THE CROWN

V

PETER DAVID LOFTHOUSE

Applicant

On the application of the
Applicant for leave to appeal from the sentence imposed on him by the Royal Court on 16th
October, 2003;

THE COURT, having heard Advocates M.
A. Torode and G. D. McKerrell for the Applicant and the Crown respectively, thereon, and
having, on the 19th April, 2004, DISMISSED the application for leave to appeal, this day
GAVE JUDGMENT in the terms attached hereto and GRANTED Legal Aid.

K.H. TOUGH
Registrar of the Court of Appeal

OFFICIAL TRANSCRIPT

TUESDAY 20TH APRIL 2004

COURT OF APPEAL

Before

Sir Philip Bailhache; presiding
Sir John Grenfell Nutting Bt., QC
Jonathan Philip Chadwick Sumption, Esq., QC

PETER DAVID LOFTHOUSE
(Criminal Appeal No. 312)

Judgment delivered by Nutting, JA

1. On 16th October 2003 this Applicant appeared with a co-Defendant, Darren Randell, before the Bailiff and Jurats in respect of an Indictment containing a single count in which they were both charged as principals, in relation to an offence of being concerned in the fraudulent evasion of the prohibition on the importation of cannabis resin, a Class B drug, within the classification defined by the Misuse of Drugs (Bailiwick of Guernsey) Law 1974. They had pleaded guilty to the offence at a hearing before the Deputy Bailiff the previous month.
2. Having heard the facts outlined by the Crown, and mitigation on behalf of both men, the Bailiff, having considered sentence with the Jurats, ordered each man to serve a sentence of 4 years imprisonment.
3. On 23rd October 2003, the Applicant served notice of his intention to apply for leave to appeal on the grounds that the sentence was manifestly excessive. The co-Defendant has not sought leave to appeal.
4. The facts were these: On 5th June 2003, the Applicant, a 58 year old man from Southampton, arrived at the Ferry Terminal at St. Peter Port in company with his co-Defendant, a 37 year old man, also from the Southampton area. Both men were stopped by Customs Officers and taken to separate rooms to be searched. The Applicant was found to have packages taped to his chest, thighs and ankles. He admitted strapping the packages to his body but denied knowing more than the nickname of the man who had given them to him to bring to Guernsey. He also maintained at that time that he was ignorant of the contents of the packages. In the meanwhile a search of the person of the co-Defendant revealed ten more packages also strapped to his body.
5. In submissions to us on behalf of the Applicant a contrast was drawn between what was said by him to the Customs Officers and what was admitted by the co-Defendant, Randell. It is relevant to record that Randell immediately identified the contents of the packages as cannabis and disclosed the quantity of drugs he was carrying. This initial assistance to the Officers continued in the interviews the co-Defendant gave to Customs Officers over the next two days.

6. During those interviews he disclosed that he had been approached a week before by a man in a public house with an offer of £1,000 to smuggle drugs to Guernsey. He stated that as a result he had approached the Applicant for assistance since he could not carry the sixteen packages by himself secreted on his own person. He said that since the Applicant, like himself, was unemployed and needed money, the Applicant had agreed to help.
7. Randell related how, having collected the drugs, each of them had assisted the other to strap the packages to their respective bodies, and how, the following day, they had both been driven to Poole by a different man from the person who had made the initial approach and were provided with tickets for the ferry.
8. Upon analysis the bars of cannabis in the packages were found to contain nearly 4 kilograms of the drug. The separate consignments carried by the two men weighed almost exactly the same, 1.96 kilos, (the Applicant) and 1.98 kilos, (Randell.)
9. This weight of cannabis could have been sold on the streets of the Bailiwick for between £27,000 and £35,000, according to the estimate provided to the Royal Court.
10. Additionally, forensic analysis showed the presence of the Applicant's fingerprint on the tape used to strap some of the drugs to his body.
11. At the Royal Court, in mitigation for the Applicant, his Advocate made the following points-
 - (i) the Applicant did not know the identities of those behind the attempt to smuggle this cannabis to Guernsey but knew enough about them to fear them greatly, which was why he had said nothing to the Customs Officers in interview;
 - (ii) the Applicant was a man well in to middle-age, who had recently been made redundant and was short of money: he had been tempted to earn some, and had succumbed to that temptation;
 - (iii) the fact that the Applicant had led an unblemished life up to 4th June 2003, on which date, (the day before he was arrested here) he had been convicted of an offence of shoplifting, was a matter which entitled him to be treated as a person of good character;
 - (iv) and finally, the Applicant's plea of guilty, notwithstanding the weight of the evidence, entitled the Applicant to some credit for not contesting the Indictment: the plea was notified to the Crown and the Court shortly before the Committal proceedings on 22nd July 2003.
12. Since a contrast is sought to be made between the two men by Advocate Torode, who has acted for the Applicant before this Court, it is pertinent to observe:
 - (i) that Randell also indicated his intention to plead guilty on 22nd July 2003;
 - (ii) that although Randell has a large number of previous convictions he has not been convicted on any prior occasion of an offence involving drugs;
 - (iii) that the tragic occurrence of his mother being murdered by a man whose identity has never been discovered, at a time when Randell was approaching

his teenage years, played a significant part in the accumulation of convictions recorded against him.

13. The features of mitigation which are plainly common to both men are:
 - (i) there were no aggravating features associated with this importation;
 - (ii) both men are of mature years who must have known the risks they ran in carrying large quantities of cannabis from England for importation to another jurisdiction;
 - (iii) both men were unemployed at the time and although no doubt short of money were tempted to solve their financial problems by acting as drug couriers;
 - (iv) both pleaded guilty and, notwithstanding the strength of evidence against them, deserved some credit for their pleas.
14. It is also plain that this was a joint offence. Indeed the Crown made it clear that their case was that each man was jointly and severally responsible for the importation of the total amount of cannabis imported (See the transcript of the proceedings in the Royal Court – page 2 G).
15. In his sentencing remarks the Bailiff recorded that the Court had carefully considered both the mitigating features which were common to the Applicant and to his co-Defendant, as well as those features which distinguished their respective backgrounds. He emphasised in relation to the Applicant that the Royal Court had taken into account in particular his previous good character and the references put forward on his behalf.
16. In relation to Randell, the Bailiff emphasised his frankness with the Customs Officers and the tragic circumstances of Randell's early life.
17. The Royal Court had to conduct a balancing exercise of the various features to which we have referred and decided to reduce the starting point of 6 years by a full one-third to reflect the guilty pleas and to give effect to the other points of mitigation.
18. The Bailiff concluded his sentencing remarks by saying: "*It...*" (the Court) "*... has felt unable to conclude that it would be other than fair to treat both of you in the same way.*"
19. Advocate Torode has urged us to hold that that approach was wrong and that the Applicant was entitled to a lower sentence than Randell because of his good character. He emphasised the melancholy fact that the Applicant had lived a decent and hardworking life until, at the relatively advanced age of 58, he had allowed himself to be involved in this grave offence.
20. The test for disparity, where two offenders are jointly charged and sentenced for the same crime, is that laid down by Lawton, LJ, in R. v. Fawcett & Others (1983) 5 Cr. App. R. (S.) page 158:

"In our judgment, the approach is would right thinking members of the public, with full knowledge of all the relevant facts and circumstances, learning of this sentence, consider that something had gone wrong with the administration of justice."

That principle has been applied regularly in this jurisdiction and most recently in the case of Charles John Bond (No. 294 – 11th April 2003).

21. Mr. Torode points not only to the differences in record and lifestyles of the two men, but also to the fact that Randell recruited the Applicant to this criminal enterprise. Mr. Torode asserts, as he must, that these distinguishing features would cause a member of the public who learned of the case to react in the way defined above
22. We do not accept that such differences in personal mitigation as there were in this case come within striking distance of the test we have described. As we have observed there were factors peculiar to Randell which the Royal Court was perfectly entitled to conclude balanced those factors particular to the Applicant. Moreover since the Applicant was 21 years older than Randell, and since he was given ample opportunity to resile from the planned importation in the significant period of time between his agreement to participate in the crime and its implementation, we conclude there is nothing in Mr. Torode's recruitment point.
23. In the judgment of this Court the Royal Court was entitled to conclude that it was appropriate to treat these offenders as equally culpable. Indeed, we consider on the facts of this case that the Court could have been criticised if it had treated them differently for the purposes of sentence.
24. This application must be dismissed.

ADVOCATE TORODE: Gentlemen, in relation to Mr. Lofthouse's application before this Court, I would ask that legal aid be granted?

THE PRESIDENT: Yes, I think so.

NUTTING, JA: Yes the Court will grant legal aid, Mr. Torode.

ADVOCATE TORODE: Much obliged sir.

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I, Suzanne Margaret O'Neill hereby certify the foregoing to be a correct and complete extract, prepared to the best of my skill and ability from the tape-recording of the proceedings in this case.

..... Suzanne M. O'Neill
Friday 14th May 2004