

Judgment 11/2010

**Hayley Belle Briggs – Court of Appeal (Criminal Appeal 403) -
17 March 2010**

Importation of Class B Drug – application for leave to appeal against sentence – whether due weight given to the defendant’s health problems – principles as to when ill health may be taken into account when sentencing – leave to appeal refused.

IN THE COURT OF APPEAL OF GUERNSEY

Criminal No 403

The 17th day of March, 2010 before Dame Heather Steel, DBE presiding, Sir de Vic Carey and Michael Cameron St John Birt, Bailiff of Jersey

THE LAW OFFICERS OF THE CROWN

-v-

HAYLEY BELLE BRIGGS

(Applicant)

On the application of the Applicant for leave to appeal from the sentence imposed on her by the Royal Court on the 11th November 2009,

THE COURT, having on the 16th day of March 2010 heard Advocate D R F Domaille, for the Applicant and Crown Advocate G D McKerrell, thereon, this day GAVE JUDGMENT in the attached terms and: -

1. DISMISSED the application for leave to appeal;
2. GRANTED LEGAL AID for this renewed application; and
3. DIRECTED, for the purposes of the Proviso to Section 37(3) of the Court of Appeal (Guernsey) Law, 1961 that no part of the time during which the Applicant, when in custody, was specially treated as such, shall be disregarded in computing the sentence to which the Applicant is subject.

K H TOUGH
Registrar of the Court of Appeal

**Approved Judgment
17 March 2010**

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

CRIMINAL DIVISION – APPEAL NO 403

17 March 2010

Before:

**Dame Heather Steel, DBE
Sir de Vic Carey
Mr Michael Cameron St John Birt**

Between:

Hayley Belle Briggs

(Appellant)

v

Law Officers of the Crown

(Respondent)

**Advocate D R F Domaille appeared for the Applicant
Crown Advocate G D McKerrell appeared for the Crown**

Authorities referred to:

Law Officers v Richards (C.A.) unreported 17th April 2002

R v Bernard [1996] EWCA Crim 519

Texts referred to:

Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972, as amended, section 77(1)(b) and 77(2)

Court of Appeal (Guernsey) Law, 1961, Article 37(3)(b)

This is the Judgment of the Court

BIRT, M C StJ

1. This is an application by Hayley Briggs for leave to appeal against a sentence of two and a half years imprisonment imposed by the Royal Court on 11th November 2009 for one offence of having been knowingly concerned in the fraudulent evasion of the prohibition on the importation of certain goods, namely cannabis resin, contrary to section 77(1)(b) and 77(2) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972, as amended. Leave to appeal was refused by the Bailiff sitting as a single judge on 19th February 2010 and the applicant has renewed her application for leave to this court.
2. The factual background can be shortly stated. On 12th July 2006 a farm worker came across a tool box hidden in a hedge-row in a field known as Haut Séjour in the Castel Parish. The police were called. They established that the tool box contained 40 bars of cannabis resin weighing in total just over 9.5kgs with a street value of between £64,000 and £108,000 depending on the manner in which the drugs were sold. The police removed the cannabis and replaced it with a substitute package made up of telephone directories. The tool box was then put back into the hedge-row where it had been found. The police also installed a covert 24 hour CCTV surveillance system of the area.

3. Daily checks were made thereafter and the inspection on 31st July 2006 showed that the tool box was missing. The CCTV was subsequently viewed. This showed two people approaching the area on foot. It is now known that the applicant was one of these although she was not identified at the time. The CCTV shows the two people rummaging around the hedge-row using a stick to part the undergrowth and a torch to help them see. It can be seen that the applicant is smoking a cigarette which she then throws to the ground. Both people were then observed to crouch down and that was followed by the applicant crawling into the hedge-row on her hands and knees to pull out the box. She then walked away from the hedge-row with the tool box which was opened and the two people were then recorded as leaving the field with the substituted box and contents.
4. The cigarette end was recovered and sent for DNA analysis. A DNA profile was obtained but no match was found on the national DNA database. As it was not possible to identify the applicant or her companion from the CCTV footage, the matter rested there until 10th June 2008, when the applicant was arrested for a drink driving offence. She provided a DNA sample which was subsequently sent to the UK national database. A match was identified with the profile obtained from the cigarette end found in the field in July 2006.
5. She was arrested and interviewed on 4th October 2008. She was represented by Advocate Domaille who read a prepared statement on her behalf. It can be summarised for our purposes as follows. She said that she commenced a relationship with her then partner in about November 2005. Six months into the relationship he told her that he had previously imported cannabis resin into the island. However she did not think that he had any continuing involvement with drugs. Sometime thereafter her partner asked if he could take her car to the mainland to visit family members and she agreed. He went alone and spent about two weeks away. On his return he told her that he had imported an amount of cannabis in the car. She said she was shocked and angry by this revelation. Her partner had unwrapped the cannabis in a local hotel room where they had been staying for a long weekend. He put the drugs into two tool boxes and the same day he took the boxes and buried them in a field in St Saviour. She had known nothing of his plan to import the cannabis until this point and she did not assist in any way in secreting the tool boxes. Her partner told her that he would go and dig up the drugs when people wanted to buy them. She then explained that she was out driving with her partner some time later when he told her that he was going to check his last tool box. They drove to the field and she went with him. He went to a hedge, pulled out a tool box from the hedge, opened it and discovered it was filled with telephone directories. He then told her to get out of the field quick.
6. She provided a further DNA sample for analysis and this confirmed a complete match with the DNA found on the cigarette end submitted in 2006. She was subsequently re-interviewed on 10th December 2008. The conclusive result of the complete DNA comparison was put to her. She provided no comment response to questioning. She was interviewed once more on 23rd January 2009 when she supplied a second prepared statement read out by her advocate. This elaborated on certain details which it is not necessary to record. The key difference from the first statement was that on this occasion, having seen the CCTV, she admitted that she was the one who had crawled into the hedge-row to recover the box. She said that her partner had asked her to do it as she was smaller than he.
7. Essentially, her version was accepted by the Crown and was the basis upon which she fell to be sentenced. In summary it was accepted that she had nothing to do with the actual importation and that she only discovered about the cannabis after it had been brought to Guernsey in her car by her partner. She knew that the cannabis had been hidden in the tool boxes in a field but had played no part in placing them there. The sole part which she played was to accompany her partner to the field so that he could recover the tool box with the cannabis. She would not have played any further part in the onward distribution of the cannabis. That would have been done by her partner. She would not have derived any benefit from the onward distribution.

8. The applicant is aged 32. She was 28 at the time of the offence. The information before the Royal Court showed that, amongst other convictions, the applicant had two previous convictions for possession of cannabis in 2000 and 2001. She voluntarily disclosed to the court that she also had a conviction for possession of heroin in the Exeter Magistrate's Court in April 2000. She had no previous convictions for any form of drug trafficking.
9. The Royal Court had before it a detailed report from the Probation Service and a medical report from her general practitioner together with letters from both her parents. These showed that she faced a number of difficult problems. She was the only daughter of very supportive parents. At Exeter University she developed a heroin addiction which resulted in her failing to complete university. Whilst there she also suffered a serious injury to both knees and one leg. She had had numerous operations since then but there were ongoing problems. She required crutches at the time of her appearance before the Royal Court. Although she had eventually cured her heroin addiction, her mental and physical state was poor. She drank heavily and suffered from depression, eating disorder and thyroiditis. Her GP advised that a period of imprisonment would have a detrimental effect mainly on her mental health issues.
10. In mitigation before the Royal Court, Advocate Domaille emphasised the very limited nature of her participation in the offence, namely accompanying her partner to the field and crawling in to recover the box from the hedge-row. He said that she had forgotten until she saw the CCTV footage that she had actually crawled in under the hedge-row and touched the tool box. That was why she had not mentioned it in the first statement. Otherwise she had been fully co-operative and straightforward from the start. He referred to her plea of guilty, the fact that there had been delay in the prosecution process, her mental and physical health problems and the fact that she had in effect now become housebound, only rarely going out. He said she was also willing to give evidence against her partner if he were brought back to face trial. He referred to the leading guideline case of *Law Officers v Richards*. He submitted that this was an exceptional case and that the Royal Court could properly depart from the guidelines in that case. He urged the court to proceed by way of a sentence of community service.
11. In giving the decision of the Jurats, Robey, Lieutenant Bailiff referred to *Richards* and the fact that the starting point was to be determined primarily by considering two factors, namely the class and quantity of the drugs and the involvement or rôle of the defendant in the commission of the offence. He pointed out that the starting point for between 5 – 10kgs of cannabis resin was seven to ten years imprisonment. The court concluded that, although the weight in this case of some 9.5kgs pointed towards the top end of the bracket, the limited involvement meant that the court could take a starting point at the bottom of the bracket, namely seven years. The court then referred to the mitigation and said that it could not proceed by way of community service. It allowed a full one third discount for the guilty plea and in view of the other mitigation imposed a sentence of two and a half years imprisonment.
12. In his grounds of appeal and written submissions, Advocate Domaille submitted that the Royal Court sentenced on a basis outside the agreed facts as presented by the prosecution and the defence. He said it was agreed by the prosecution and defence that the applicant should be sentenced on the facts contained in the last paragraph of the prosecution summary and the CCTV footage. The last paragraph of the Crown summary had read "In conclusion, for the avoidance of any doubt, the Crown's case is put on the basis that whilst the defendant had prior knowledge of the drugs prior to the events that we have just seen on the CCTV, it was only on that occasion that she had any direct contact with them to the extent that we have seen." The reference to the prior knowledge was of course to the fact that the applicant's partner had unwrapped the drugs in the hotel room after their importation at which time the applicant had become aware of the importation.
13. In the end, Advocate Domaille did not press this point and we think he was correct not to do so. We are unable to see that the Royal Court sentenced on anything other than the agreed basis. The court made it clear that it sentenced the applicant on the basis that she was not involved in the planning and organisation of the importation, nor was she involved in, or even

at the time, aware of, the importation of the drugs into the Island. It described her involvement in the enterprise as 'limited'.

14. More generally, Advocate Domaille repeated the submissions which he made to the Royal Court. In particular, he emphasised the very limited rôle which the applicant played, the fact that she knew nothing about the importation until after it had occurred and the fact that her only involvement after she had discovered about the importation was to help retrieve the tool box as shown on the CCTV. Although prior to the hearing he had argued that this amounted to a wholly exceptional case and that the Royal Court should therefore have departed from the Richards guidelines, he accepted before us that he could not realistically say that the sentence was wrong in principle or manifestly excessive.
15. Ultimately, Advocate Domaille concentrated his submissions on the applicant's medical condition. With the Court's leave, he produced an up to date medical report from Mr R K Vhadra, consultant orthopaedic surgeon. This shows that the applicant underwent a procedure to her knee early in 2009, but that this has unfortunately resulted in complications. She is in discomfort and is finding it difficult to move. Without further surgery, she will develop early arthritis in the knee. The surgery to correct the position is a long and difficult procedure and carries significant risks and complications, particularly in the light of the applicant's medical history. It is apparently critical that the procedure be performed in the next few months and we were informed that it has now been fixed for 20th April. The report from Mr Vhadra also indicated that he had concerns about the suitability of the prison environment for the applicant's rehabilitation after the operation. There have apparently recently been problems with pain control and, according to Mr Vhadra, he has not received adequate feedback from the prison doctors.
16. Advocate Domaille referred us to the well-known case of R v Bernard [1996] EWCA Crim 519 where the English Court of Appeal sought to lay down principles as to when ill health may be taken into account in deciding upon the length of a prison sentence. Rose LJ said this:

"It is apparent, as we have said, that these decisions are not easily reconcilable. However, we take the view that the following principles emerge from them:

- (1) A medical condition which may at some identified future date affect either life expectancy or the prison authorities' ability to treat a prisoner satisfactorily may call into operation the Home Secretary's powers of release by reference to the Royal Prerogative of mercy or otherwise, but is not a reason for this court to interfere with an otherwise appropriate sentence (Archibald Moore);*
- (2) The fact that an offender is HIV positive, or has a reduced life expectancy, is not generally a reason which should affect sentence (Archibald Moore and Richard Moore);*
- (3) A serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate (Wynne);*
- (4) An offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate."*

17. We have to say that we do not consider that the applicant's health falls within the sort of case envisaged in Bernard. There is no question here of any form of terminal illness. The applicant requires an operation, which has been arranged, presumably with the co-operation of the prison authorities. Following discharge from hospital, she will require appropriate post-operative care. No evidence has been produced to us that suggests that the prison is incapable or unwilling to provide such care. On the contrary, we would expect the prison to be fully aware of its duty of care towards inmates who require medical treatment. The fact

that the letter from Mr Vhadra suggests that there may have been difficulties over the nature of pain control treatment does not support a suggestion that the prison is incapable of providing appropriate post-operative care for the applicant. No evidence was produced to us that the matter has even been taken up with the prison authorities on behalf of the applicant.

18. Although Advocate Domaille did not ultimately press the argument that the sentence was wrong in principle or manifestly excessive, we have considered all the matters which he put forward in his written contentions, as well as orally before us. The fact remains that the courts of this Bailiwick have repeatedly made it clear that those who become involved in any way in the distribution and sale of controlled drugs can expect condign punishment. In our judgment the Royal Court made proper allowance for the applicant's limited rôle by choosing the bottom of the applicable bracket in *Richards*. It then allowed considerable further deduction to represent all the available mitigation. The Court of Appeal cannot interfere simply because its members may or may not have passed a different sentence. This court may only interfere if the sentence is wrong in principle or manifestly excessive. We have come to the clear conclusion that a prison sentence cannot be said to be wrong in principle; nor can a sentence of two and a half years be categorised as manifestly excessive.
19. We have also considered whether the applicant's medical condition is such as to fall within (4) of the passage from *Bernard* cited above, but, for the reasons given, we are satisfied that it does not. In the circumstances, the application for leave to appeal is refused. However, we grant legal aid for this renewed application and we direct under Article 37(3)(b) of the Court of Appeal (Guernsey) Law, 1961 that no part of the time served by this applicant shall be disregarded in computing the term of her sentence.