

Judgment 36/2009

**Rachael Lydia Gallienne – Court of Appeal (Criminal
Appeal 395) – 15 July 2009**

Importation of Class A drug – appeal against sentence – whether disparity of sentence with co-defendant – appropriateness of starting point and discount given for admissions and mitigation – appeal dismissed

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

Criminal 395

The 15th day of July, 2009 before The Hon Michael Jacob Beloff QC, presiding, Dame Heather Steel, DBE and John Vandeleur Martin, QC

RACHAEL LYDIA GALLIENNE

Appellant

-v-

THE LAW OFFICERS OF THE CROWN

Respondents

In the matter of the appeal, with leave, by the Appellant from the sentences of five years' imprisonment, imposed on her by the Royal Court on 11th May 2009.

THE COURT, having heard Advocate A J Ayres for the Appellant and Advocate G Perry for the Crown thereon, GAVE JUDGMENT this day in the attached terms and DISMISSED the appeal.

K H TOUGH

Registrar of the Court of Appeal

concerned in the fraudulent evasion of the prohibition on importation of certain goods, namely diamorphine, a controlled drug of Class A, in contravention of the prohibition on importation imposed by section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended. We call this "Count 1".

3. In the same indictment, Mr Peden alone was charged with possession on 2 May 2008 of a controlled drug, namely diamorphine, with intent to supply to another ("Count 2").
4. In a separate indictment, the appellant was charged with a later, unconnected theft. No complaint is made of the sentence of one months' imprisonment concurrent she received in respect of this charge, and it is unnecessary to refer to it further.
5. On 11 May 2009 the appellant was sentenced by the Royal Court to five years' imprisonment on Count 1. Mr Peden was sentenced to eight years' imprisonment on Count 1, and to seven years' imprisonment on Count 2, the sentences to run concurrently.
6. Count 1 concerned the postal importation of 8.21 grams of heroin of 67% purity, with a street value of between £2,500 and £5,000. Count 2 related to a total of 2.34 grams of heroin with a street value of between £690 and £1,380.
7. The appellant and Mr Peden both pleaded not guilty to Count 1, and Mr Peden pleaded not guilty to Count 2. They were convicted after a trial before Finch, Lieutenant Bailiff, and Jurats.
8. The Royal Court approached sentencing on the following basis. It referred to the decision of this court in *Law Officers of the Crown v Richards* (2002, Criminal Appeal No 267), indicating that offences concerning amounts between 1 and 20 grams of Class A drugs should attract a sentence of between seven and nine years imprisonment, and proceeded to fix starting points in accordance with the view that the court took of the criminality of the appellant and Mr Peden. That resulted in a starting point of seven years on Count 1 for the appellant, and a combined starting point for Mr Peden on Counts 1 and 2 of 8½ years. The court then considered mitigation, having previously stated that the previous convictions of the appellant and Mr Peden essentially went towards limiting available mitigation. It made what it described as a small reduction for various admissions which had been made that had saved court time; and then said this:

"In relation to [the appellant] we have heard a good deal of mitigation. We have considered the reports very carefully, a great deal of what has been ably put forward on your behalf amounts to the fact that you've had a hard life which we recognise. Whilst accepting that, we are bound to remark that many people have had very difficult lives but choose not to indulge in criminal activity, and we repeat a point we are often obliged to make; sentencing is not ... simply an exercise carried out in the interests of the well-being of the Defendant.

Whilst emphasising that sentencing is not a mathematical exercise with all the factors fed into a computer and an answer generated, we give Peden the limited mitigation applicable to his admissions and [the appellant] a slightly

larger amount, in the region of just over one quarter for that plus some personal mitigation, based on all the circumstances we have heard".

Finally, the court pointed out that both the appellant and Mr Peden had previously offended in relation to Class A drugs and had not learnt their lesson; and told the appellant that her exculpatory efforts had failed on this occasion, that an over-sympathetic approach would be misplaced, that it was a serious offence, and that she knew exactly what she was doing.

9. As we have said, on Count 1 the appellant was sentenced to five years' imprisonment and Mr Peden to eight years' imprisonment.
10. In *Law Officers of the Crown v Bond* (2003, Criminal Appeal No 294) this court indicated that the test to be applied where an appeal was based upon disparity in sentence was that applied in the English cases of *R v Pitson* (1972) 56 Cr App R 391 and *R v Fawcett* (1983) 5 Cr App R (S) 158. As this Court stated in *McCarthy v Law Officers of the Crown* (2008, Criminal Appeal No 384), the relevant principles are now to be found conveniently summarised by Lord Bingham of Cornhill in the English House of Lords case of *R (O'Brien) v Independent Assessor* [2007] 2 AC 312 at [26], as follows:

"In some cases (of which *R v Fawcett* (1983) 5 Cr App R (S) 158 is an example) an appeal against sentence has succeeded because right-thinking members of the public, learning of a lenient sentence imposed on a co-defendant, would think something had gone wrong with the administration of justice on also learning of a disproportionately severe sentence passed on the appellant. In some of the cases such an appellant is said to have a justified sense of grievance. If the matter is viewed through his eyes alone, that may sometimes be so. But the appellate courts of all three United Kingdom jurisdictions have shown themselves to be, in varying degrees, resistant to disparity arguments of this kind, and the reason is not hard to discern. For while the perception of the sentenced defendant is important, a criminal sentence is imposed in the interests of the public and for its protection. The "right" sentence in a given case is that shown by statute, authority and other guidance to be best fitted to serve those ends. Thus the court will, and generally should, be very slow to impose what it regards as anything other than the right sentence simply because it or another court has imposed a "wrong" sentence on a co-defendant. The more usual approach is that very recently articulated by the Court of Appeal (Criminal Division) in *R v Tate* [2006] EWCA Crim 2373 at [20]:

"The fact that the co-defendant Sheppard appears to have been extremely fortunate is not in our judgment a good reason for imposing a sentence on the appellant that would in our judgment be less than the facts of the case merit".

11. The starting point of seven years adopted by the Royal Court in the case of the appellant was at the very bottom of the relevant *Richards* band. Advocate Ayres for the appellant suggested that the Royal Court had erred in taking a combined starting point for Mr Peden, 8½ years being too low to reflect his culpability on Count 1. In our view, any argument based on disparity must in principle and for

obvious practical reasons rely on the sentence actually imposed on the co-accused, not what might have been imposed. We would add that in any event the sentence of eight years imposed on Mr Peden does not seem to us to be outside the acceptable range. Moreover, and more importantly, the starting point for the appellant was in our view wholly appropriate.

12. As the Royal Court indicated, the difference in the starting points was designed to reflect the court's view of the relative criminality of the conduct of Mr Peden and that of the appellant.
13. The discount for admissions and personal mitigation in the appellant's case was two years; in Mr Peden's case it was six months. That difference reflects the fact that, as the Royal Court pointed out, the appellant had some personal mitigation whereas Mr Peden had none. He was aged 38, with what the court described as "a long and depressing record of criminality involving drugs, violence and other matters" for which he had served significant custodial sentences including 4½ years for being concerned in the supply of Class A drugs in 2003 in England.
14. The appellant is 25. She has a four-year-old son. She had a turbulent and fractured upbringing, which prompted a psychotherapist who assessed her after her arrest to say that "in 26 years of professional practice in child protection and mental health I have rarely encountered a history of multiple sexual and emotional abuse such as [the appellant] has experienced". She had succeeded in overcoming this to the extent of qualifying as a beauty therapist and for a time living a normal life. However, the Crown opened the case to the Royal Court on the basis that the appellant had fallen deeply in love with Mr Peden at a time when, according to the social inquiry report, she was "very vulnerable both emotionally and physically".
15. Against that personal mitigation had to be set, as the Royal Court did, the fact that the appellant had a previous relevant conviction. In November 2000, when she was 16, she and a female companion carried cocaine, concealed internally, into the Island. For that, the appellant was sentenced in February 2001 to 30 months youth custody.
16. It seems to us that the Royal Court's sentencing exercise and decision cannot be faulted. Viewed in isolation, the sentence of five years' imprisonment was wholly appropriate: it proceeded from the correct starting point, recognised the appellant's not-guilty plea and previous conviction, and gave a substantial discount for admissions and mitigation. Moreover, the Royal Court recognised the difference between the culpability and circumstances of the appellant and those of Mr Peden, both in fixing the starting point and in discounting for mitigation. The result, which was that the appellant received a sentence five-eighths as long as that given to Mr Peden, is in our view beyond criticism. We do not think that any right-thinking member of the public could suppose that anything had gone wrong with the administration of justice in the circumstances of this case.
17. In giving leave to appeal, the single judge suggested that an issue potentially arose as to whether a court, faced with two accused of whom one was more vulnerable than the other, should apply a degree of flexibility in sentencing, even after a trial. We do not consider that any special principle applies to such cases. The approach adopted by the Royal Court in this case, of selecting starting points by reference to

relative culpability and then discounting for personal mitigation, is more than adequate to take into account the vulnerability of a defendant where it is appropriate to do so.

18. For these reasons, we dismiss the appeal.