Judgment 36/2011

Simon Thomas Bienvenu v Law Officers of the Crown – Court of Appeal file no. 430
- Court of Appeal
- 14th December 2011

Criminal appeal from the Royal Court – appeal against sentence – two counts of importation of controlled drugs – appeal dismissed.

IN THE COURT OF APPEAL OF GUERNSEY

The 14th day of December, 2011 before Dame Heather Ann Steel DBE, presiding, Michael Scott Jones QC and Nigel Peter Pleming QC

SIMON THOMAS BIENVENU

(Appellant)

-v-

THE LAW OFFICERS OF THE CROWN

(Respondent)

In the matter of the appeal, with leave, by the Appellant from the sentence of twenty one months' imprisonment, imposed on him by the Royal Court on 18th July 2010.

THE COURT, having on the 12th day of December heard Advocate M D Dunster for the Appellant and Advocate G D McKerrell for the Crown thereon, DISMISSED the appeal and GAVE JUDGMENT in the attached terms.

J TORODE
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

CRIMINAL DIVISION – APPEAL NO 430

Before: **Dame Heather Steel D.B.E., President**
Michael Scott Jones Q.C.,
Nigel Pleming Q.C.

14 December 2011

Between: **SIMON THOMAS BIENVENU** **(Appellant)**

V

LAW OFFICERS OF THE CROWN **(Respondent)**

Appeal from the sentences imposed by the Royal Court on 18th July, 2011 on the charges of:

1 count of: Illegal importation of goods, contrary to Article 3 of the Import and Export (Control) (Guernsey) Law, 1946, as amended; and the Import and Export of Goods (Control) (Guernsey) Order, 1990, as amended (Count 1 on the Joint Indictment).

1 count of: Illegal importation of goods, contrary to Article 3 of the Import and Export (Control) (Guernsey) Law 1946, as amended; and the Import and Export of Goods (Control) (Guernsey) Order, 1990, as amended (Count 2 on the Joint Indictment).

Advocate M G A Dunster appeared for the Applicant
Crown Advocate G D McKerrell appeared for the Crown

THIS IS THE JUDGMENT OF THE COURT

THE PRESIDENT:
Introduction

1. On 18th July 2011 the Appellant, Simon Thomas Bienvenu, who is aged 28, was sentenced by the Royal Court, Finch, Judge of the Royal Court, and eight Jurats, to two terms of imprisonment. Four months and twenty one months were to be served concurrently, for two offences (Counts 1 and 2) contrary to Article 3 of the Import and Export (Control) (Guernsey) Law 1946, as amended; and the Import and Export of Goods (Control) (Guernsey) Order 1990 as amended.

2. The grounds of appeal relate solely to the sentence of twenty one months imprisonment on Count 2.

3. On the same day, his Co-Defendant, Emma Jane Lynch, who is aged 27, was sentenced by the Royal Court to 40 hours and 200 hours Community Service to be served concurrently for the

same two offences, with a consecutive term of 40 hours for three offences contrary to the Supplementary Benefit (Guernsey) Law 1971, as amended.

4. Each Defendant had pleaded guilty to Count 1, which concerned the illegal importation of 29.501 grams of Mephedrone on 24th April 2010, and had been convicted in the Royal Court of Count 2 which concerned the illegal importation of 498.21 grams of Mephedrone on 25th February 2010.

5. The Court made an Order for the confiscation of the drugs, the Appellant's computer and iPhone.

6. On 7th November 2009, the importation of any quantity of Mephedrone (a synthetic stimulant sometimes described as a 'designer drug') to Guernsey without an import licence was made illegal. On 16th April 2010 Mephedrone was classified as a Class B drug under the Misuse of Drugs Law. At the time of these offences it was not illegal to possess or use that drug in Guernsey. In February 2010 the offence of importation without a licence carried a maximum sentence of two years imprisonment.

The facts

7. The facts of the offences are closely linked. On the morning of 24th February 2010 a special delivery package, which had no customs declaration, was intercepted at Postal Headquarters. It had its own unique tracking number and was addressed to Emma Jones (the Co-Defendant's maiden name) with an address of 9 Gibauderie, States Flats, Gibauderie, St. Peter Port, Guernsey GY1 1XL. It was found to contain 29.501 grams of Mephedrone. The package was tracked to show that it had been posted through a mail centre in Bolton on 23rd February 2010, the sender being from 167 Plodder Lane BL4 OBT. The package was photographed and resealed. A number of calls were received enquiring about the package from a caller who identified himself as Simon Bienvenu.

8. The Appellant and Emma Lynch then collected the package from the Post Office. She signed for it, and as she returned to the Appellant's van with it they were both arrested. A search was made of the van, which was found to contain drug paraphernalia, a large quantity of glucose and an iPhone belonging to the Appellant, the Appellant's home was searched and a computer was seized. The iPhone and the computer contents were analysed. A mobile phone was seized from the Co-Defendant and a quantity of plastic bags and sucrose recovered from her home. Each was interviewed and bailed.

9. On 25th February a second Special Delivery package addressed to Emma Jones at the same address was intercepted at Guernsey Post Headquarters. The tracker number disclosed that this entered the postal system on 24th February and passed through the Bolton mail centre. The sender's details were listed as 183 Crescent Road BL3 2 JS, indicating a post office in the postal district adjoining that of the package already seized. That package was found to contain 498.12 grams of Mephedrone and was photographed. The Appellant and Co-Defendant were further interviewed. He declined to comment.

10. Analysis revealed a large quantity of text messages on the Appellant's iPhone between January 2010 and his arrest which indicated that he was involved in the selling, pricing and supply of various substances. There are also messages which indicate that the Appellant was using the substances himself. Text messages also indicated the involvement of the Co-Defendant in his activities and that she provided him with her address and maiden name, which were used for the importations the subject of the charges. On examination the computer disclosed the tracking number for the first package, the name and address of the proposed recipient and contact details in Bolton.

11. Analysis of the Co-Defendant's mobile phone revealed very few text messages and no reciprocal messages. In interview, when questioned about texts to her boyfriend on 24th February before the package arrived in Guernsey indicating her use of the substance, she denied using Mephedrone or assisting the Appellant to supply it to others. She agreed that she knew about the importation of the first package but alleged that the Appellant had organised it. She denied knowledge of the second package.

12. The Royal Court on 18th July 2011 consisted of Judge Finch and eight of the nine Jurats who had tried the case and convicted the Appellant and his Co-Defendant. The Court considered a Social Enquiry Report on the Appellant dated 13th July 2011 from Stuart Crisp, and a record of his numerous previous court appearances and convictions which included driving offences, public order offences and offences of dishonesty. Four character references for him were before the Court. The Co-Defendant's record showed two court appearances for motoring offences and, for sentence, she was treated as of good character. A Social Enquiry report on her by Greg Harvey was considered.

Grounds of appeal

13. The grounds of appeal are that

    The sentence on Count 2 is manifestly excessive in light of sentencing guidelines and the public interest

    It was submitted
    a) that the sentence of twenty one months imprisonment was disproportionately harsh for this offence which then carried a maximum sentence of two years imprisonment;

    b) that the sentence for this offence left no sentencing headroom for an importation of a much larger quantity of Mephedrone; and

    c) that the character of the Appellant was such that he should not be regarded as a professional or serial drug trafficker

14. Leave to appeal against sentence was granted on 10th November 2011.

15. Advocate Dunster cited Richards v Law Officers CA 18th April 2002 and Law Officers v Turner (Royal Court December 5th 2002 unreported). He accepts that there are no guidelines which apply to Mephedrone following its recent classification as a Class B drug. He submitted that the guidelines set out and established by those cases for the importation of Class B drugs, where the maximum sentence is 21 years, are: for the importation of 250-500 grams the sentencing band would be 9-12 years; and for 500+ grams, 11 years upwards. If these guidelines were applied to the Appellant's sentence, Advocate Dunster submitted that even though the importation would be in the 250-500 grams bracket, a sentence of over 18years, 87.5 % of the available maximum, would have been imposed.

16. We were addressed on the public interest and the need, in the interests of justice, for sentencing in importation cases to be proportionate, consistent, fair and for headroom to be retained for the most serious cases. Advocate Dunster submits that, relying on the analogy set out above, the sentence in this case would provide no headroom for an importer of 5 kg, or a professional or serial drug trafficker.

17. The Appellant in this case, he submits, cannot be so regarded. These importations were a bad mistake following which the Appellant has made an effort to distance himself from drug use and, with the help of his supportive parents, he succeeded in becoming drug free within two or three weeks of his arrest and no longer mixes with the friends who led him into drug use.

None of his previous convictions relate to drugs offences. Insufficient regard was given to his character.

Conclusion

18. By reason of the changed legislation and reclassification of Mephedrone as a class B drug, these offences are unusual and the appropriate sentencing is unlikely to be considered again by this Court. The Royal Court was mindful of the maximum sentence available to it for the offences charged, and in sentencing had the advantage of having heard all the evidence and assessing the character and relative culpability of the defendants, neither of whom gave evidence.

Proportion and public interest

19. We consider first the submission that the sentence was manifestly excessive in proportion to the available maximum of two years. We note that the Court had stated in sentencing that for each offence the maximum sentence was two years -- and that 'we must sentence within the sentencing parameters that subsisted at the relevant time.' The Appellant was here to be sentenced for two offences committed on consecutive days for what was regarded as one course of conduct, one illegal enterprise. The starting point for those offences was said by the Court to be two and a half years – "We start for the main offences at 2 ½ years imprisonment". We were initially concerned as to how that starting point was reached in light of the available two year maximum for one offence. However, it could be said that for two offences the available sentence maximum is four years – this appears to have been the approach of the Court, see the reference above to "the main offences" (emphasis added). The Court was not considering Count 2 in isolation from Count 1. Although this is an odd approach which we would discourage, in this case it lead to an appropriate result, and therefore the Appellant's criticism of the overall starting point of two and a half years cannot be sustained. That starting point proportionally accommodates the overall criminality of this Appellant and also allows headroom for a Court to sentence an importer of larger quantities of Mephedrone.

20. The Court stated in sentencing that the unlawful importation was large scale and under the present guidelines the starting point would be around six years. The Court described the Appellant as behaving as a 'spoilt and immature person, motivated by selfishness and lacking responsibility'. For the two offences the Court started at a sentence of two and a half years and reduced that in the case of the Co-Defendant by substantially over one third and, in the case of the Appellant, on the facts and in view of his previous poor character, around one quarter. For the Co-Defendant the Court considered that a total custodial sentence of 18 months was appropriate, with 17 months for the drugs offences and a further month for the other offences. Her good character, circumstances, early pleas to all the charges save Count 2 and the extent of her involvement resulted in a long Community Service Order which reflected that length of sentence.

21. The Court reduced the starting point for the Appellant for the two offences by a little over one quarter (or "around ¼") – from two and a half years (or 30 months) to a total of 21 months. The mitigation available to the Appellant from his plea of guilty to Count 1, the reports and documents was taken into consideration and additional discount was given for the sensible concessions made in the conduct of the trial. Whilst not a previously convicted drug offender the court noted that the Jurats had found on the evidence that the Appellant was the prime mover. The Court stated that in view of the not guilty pleas that discount erred on the side of leniency. We are satisfied that by reason of the careful method of the importations, the amount of Mephedrone illegally imported, and the changing legislation, that the Court sentenced in a manner appropriate to all the circumstances and the criminality of this offender

to a term within the permitted maximum for one offence and comfortably within the maximum sentence then permitted for the two offences.

22. We are not persuaded that the sentence of 21 months was either disproportionate or manifestly excessive, even if confined to Count 2. The iPhone and computer evidence demonstrated a sophisticated contact network for the illegal importation of a drug that was very soon to be reclassified. The submissions in relation to the proportion of the total available sentence for this offence should be applied to the corresponding Misuse of Drugs Law guidelines.

23. In the view of this Court, a custodial sentence for the Appellant was inevitable, and an overall period of 21 months cannot be considered manifestly excessive, whether considered alone, or in light of the sentence imposed on the Co-Defendant.

24. The sentence passed on the Appellant was entirely appropriate for all the circumstances of the offence and the offender and the appeal is dismissed.

Authorities

Richards v Law Officers CA 18th April 2002, unreported
Law Officers v Turner (Royal Court) December 5th 2002, unreported