

Judgment 42/2005

**Gary Michael McKenna – Court of Appeal
(Criminal Appeal 328) – 20 July, 2005**

Possession of class A drug with intent to supply – appeal against conviction and application for leave to appeal against sentence – standard of summing up – whether material non-disclosure by prosecution – whether the prosecution case was such that the verdict could not be supported – appeal and application for leave to appeal both dismissed.

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

The 20th day of July, 2005 before The Honourable Michael Jacob Beloff Q.C., presiding, Dame Heather Steel, D.B.E., Q.C. and The Right Honourable Sir Charles Mantell

THE LAW OFFICERS OF THE CROWN

v

GARY MICHAEL McKENNA

(Appellant)

In the appeal of the above Appellant from his conviction by the Royal Court on 11th October, 2004 and his application for leave to appeal from the sentence imposed on him by that Court on 14th April, 2005;

WHEREAS THE COURT, on 18th July, 2005, having heard Advocate A. M. Merrien for the Appellant and Crown Advocate P. Robey thereon, DISMISSED both the appeal against conviction and the application for leave to appeal against sentence and 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 Appellant, when in custody, was specially treated as such, shall be disregarded in computing the sentence to which the Appellant is subject;

THE COURT this day GAVE REASONS in the terms attached hereto.

K. H. TOUGH
Registrar of the Court of Appeal

APPROVED TEXT

OFFICIAL TRANSCRIPT

smon/McKenna20.7.05

Finalised 10.8.05

WEDNESDAY 20TH JULY 2005
IN THE COURT OF APPEAL

Before

The Hon Michael Beloff, QC; presiding
Dame Heather Steel, DBE QC
The Rt. Hon Sir Charles Mantell PC

GARY MICHAEL McKENNA
(Criminal Appeal No. 328)

Judgment delivered by Mantell, JA

Background:

1. On 18th September 2003, Customs Officers were keeping watch on a flat in Rondhurst Court, St. Sampson's. They had been similarly engaged on the two previous days. There had been various comings and goings including that of a cyclist. However, on the morning of the day in question their attention was attracted by an Alfa Romeo motor car which drove up to the flats and parked and from which two men alighted and were seen to enter the flat, being observed. One of them, the driver, was Gary Michael McKenna; the other was Christopher James Taylor.
2. Within minutes the Officers (armed with a search warrant) had forced their way into the flat to find the two men in a bedroom surrounded by quantities of Ecstasy tablets. Gary McKenna was wearing the remnants of a latex glove, the main portion of which he had torn off and discarded on hearing the Customs Officers attack the front door. Found in the flat were zip and seal plastic bags, a chopping board evidently used for splitting the tablets and a rucksack containing just short of 5,000 tablets. The total number of Ecstasy tablets recovered was over 9½ thousand.
3. McKenna and Taylor were arrested on a charge of having in their possession a Class A controlled drug, namely, MDMA with intent to supply.
4. But that did not put an end to the investigation. On a further search of the room a second latex glove was found from which a DNA profile identical to McKenna's was recovered as was a fingerprint impression matching McKenna's from a plastic bag which had itself contained Ecstasy tablets. Also found were cigarettes, a lighter and mobile telephone, which had been placed next to a sofa. They all belonged to McKenna. When Officers searched McKenna's home they found 31 Ecstasy tablets which were indistinguishable from those recovered from Rondhurst Court.
5. In interview, when not declining to comment, McKenna explained that he was merely giving Taylor a lift and had gone into the flat out of idle curiosity. The tablets at his house were for his personal consumption. Taylor admitted that he had been in possession with intent to supply and in due course pleaded guilty to that charge and to another involving cannabis.

The Trial:

6. Having pleaded not guilty to two charges of possessing a Class A drug with intent to supply representing the drugs from Rondhurst Court and, separately, his home McKenna in due course stood trial before the Royal Court. The evidence against him was much as set out above and his defence was an elaboration of what he had said in interview. He was convicted on the first count and acquitted on the second. He was sentenced on count 1 to a term of 13 years 9 months imprisonment.

The Appeals:

7. McKenna now appeals against his conviction. He sought and was refused leave to appeal against sentence.
8. He renewed his application to this Court. On Monday this week the Court heard both the appeal against conviction and the renewed application. Both were dismissed. We said that our reasons would follow and so they do.

Conviction:

9. There are three grounds. The first is that the summing-up of the Deputy Bailiff was less than clear in the direction as to joint enterprise in connection with the necessary constituent of intent to supply. The second is that there had been material non-disclosure on the part of the prosecution. The third is that there were weaknesses in the prosecution case such that the verdict cannot be supported.
10. We take those grounds in turn. At page 529 of the transcript of the summing-up the Deputy Bailiff directed the Jurats as to the ingredients of possession. We do not understand the Appellant now to be complaining about the terms in which that was done [although such a complaint formed part of the original grounds settled by his former Advocate]. In our view the direction was impeccable. The Deputy Bailiff then went on at page 531 to direct that *“The prosecution must also prove that the accused intended to supply the drug to another or others.”* Complaint is made that he said nothing about joint enterprise. There was absolutely no need for him to do so. What had to be proved was the necessary intent on the part of McKenna and for McKenna to be guilty it was nothing to the point that he shared such an intent with Taylor or harboured it on his own. That ground is entirely without merit.
11. The charge of non-disclosure arises in this way. It may be remembered that a cyclist had been seen coming and going from Rondhurst Court. On the third sighting the observing Officer noted in his log that the cyclist was not carrying a rucksack. It may also be remembered that a rucksack had been recovered from the flat. Since the rucksack had not been referred to on the first two sightings of the cyclist, Advocate Merrien for the Appellant, submits that there must have been an un-revealed source of evidence about how the rucksack came to be in the flat which was known to the Officer and led him to record the fact that on the third sighting the cyclist did not have any such article. Quite apart from Advocate Robey having told us that there was and is no undisclosed evidence of the kind suspected by Advocate Merrien there are other more likely explanations for what appears in the observation log. For example the Officer may have seen the rucksack on the first two occasions but failed to record the fact. It was only when he noticed the difference on the third occasion that he considered it worthwhile doing so. In any event the point was fully explored at trial and even had it been concluded that there had been non-disclosure it could hardly have been material. We conclude that the second ground is also without merit.
12. We may take the third and final ground relatively shortly. In summary it is submitted that because the evidence allowed the possibility of another person or persons being

involved that of itself renders the verdict “*Obviously and palpably wrong.*” (See Crown v. Ogier & Le Noury Court of Appeal (6th April 1989). The proposition only has to be stated to expose its weakness. It was never contended by the prosecution that others were not involved and indeed in summing the matter up the Deputy Bailiff drew the attention of the Jurats to the possibility of a witness called Hoolihan perhaps also being involved in controlling this massive quantity of Ecstasy tablets. Indeed for such a quantity of tablets the clear implication was that others must have been involved. So when Advocate Merrien complains that the baking board had been wiped clean, possibly destroying the fingerprints of someone else, we are less than impressed. The other weakness to which he points, namely, the evidence concerning the rucksack and the unproven allegation that a Customs Officer who claimed to have looked through a keyhole must have been lying are likewise, we consider, without merit. Even if the chopping board had contained the fingerprints of someone else the same observations as have been made already would apply.

13. So far as the allegation concerning the Customs Officer claiming to have looked through the keyhole is concerned this was a most serious allegation never put to the witness at trial and only supported by the flimsiest of evidence, namely, that the witness had stated elsewhere that the door contained a Yale lock, it being well known that a Yale lock does not require a keyhole. That never was to say that there might not have been a Mortise lock in addition to the Yale lock preserved from some earlier occasion, complete with keyhole, and, indeed, such would appear to be the case from photographs now supplied and produced on behalf of the Crown. In any event a lie of that character would have been entirely pointless, even if it had been, would again have been quite immaterial. But may we say without intending any rebuke that Advocates must be extremely careful about making allegations of that sort unless supported by solid evidence which was not, we regret to observe, the case here. So that final ground as to the overall weakness of the prosecution we find to be without merit also. Taken together the facts raised do nothing to undermine what we regard as overwhelming evidence of guilt. Accordingly, we dismissed the appeal against conviction.

Sentence:

14. As was stated by the single Judge this was the largest consignment of Ecstasy ever found in Guernsey. The Royal Court was satisfied that the Applicant was “*A wholesale drug dealer in Ecstasy tablets.*” It simply cannot be argued that the starting point of 15 years was out of line with the guidance given in Richards Court of Appeal (18th April 2002) which sets the level for 5,500 tablets and above at 14 years and upwards. The Applicant has a bad record albeit not for drugs offences. The only personal mitigation arises from delay in coming on for trial insofar as it was not his fault. It seems to us that a discount of 15 months was more than generous. Accordingly, the application for leave to appeal against sentence was refused.

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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
Wednesday 10th August 2005