Judgment 46/2009 **Alan John Driscoll – Royal Court (Criminal Appeal No 12 of 2009) – 24 September 2009**

Criminal appeal from the Magistrate's Court – importation of Class A and Class B Drugs respectively – appeal against sentence – whether the Assistant-Magistrate has taken due note of the mitigating factors – guidelines in Richardson and Edwards where very small quantities imported for personal use – to be punished in the same way as offences of simple possession – no requirement upon the Assistant-Magistrate to take any starting-point – appeal dismissed

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 24th day of September, 2009 before Richard John Collas, Esquire, Deputy Bailiff:present: Stephen Edward Francis Le Poidevin and Michael Henry De La Mare, Esquires, Reverend Peter Gerald Lane, Barbara Jean Bartie, John Ferguson, Stephen Murray Jones and Peter Sean Trueman Girard, Esquires, Jurats.

No.12 of 2009

In the action of THE LAW OFFICERS OF THE CROWN against ALAN JOHN DRISCOLL to pursue the appeal of which the said Driscoll gave notice against the sentence imposed upon him by the Magistrate's Court on the 23rd day of July, 2009 in the terms attached hereto;

THE COURT, having heard Advocate S. Mallett for the Appellant and Advocate G.D. McKerrell for the Crown, DISMISSED the appeal.

S M SIMMONDS
Her Majesty's Deputy Greffier

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24.09.09

PROCUREUR

THE LAW OFFICERS OF THE CROWN

ACTION

ALAN JOHN DRISCOLL

to pursue the appeal of which the said Driscoll gave notice against his **sentence** in the Magistrate's Court on the 23rd day of July, 2009, in respect of two charges the **first** of being knowingly concerned in the fraudulent evasion of the prohibition on importation of certain goods, namely Cocaine, 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; contrary to section 77(1)(b) and 77(2) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972 as amended, in respect of which the Court sentenced him to imprisonment for a period of eight months with effect from 13th July, 2009; the **second** being knowingly concerned in the fraudulent evasion of the prohibition on importation of certain goods, namely Cannabis, a controlled drug of Class B , 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; contrary to section 77(1)(b) and 77(2) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972 as amended, in respect of which the Court sentenced him to imprisonment for a period of one month concurrent to the other sentence imposed that day;

the whole as recorded by an Act of Court of the said 23rd day of July, 2009, a copy of which Act of Court, together with a transcript of proceedings, was annexed to the summons served upon the said Driscoll.

And the said Law Officers claim costs.

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Approved Text
30.09.2009

IN THE ROYAL COURT OF GUERNSEY

On Appeal from the Magistrate's Court

ALAN JOHN DRISCOLL (Appellant)
-v-
Law Officers of the Crown (Respondents)

Before Richard John Collas, Deputy Bailiff

Jurats: S E F Le Poidevin, M H De La Mare, P G Lane, B J Bartie, J Ferguson, S M Jones, P S T Girard

Appeal Against Sentence Heard 24th September 2009

Advocate for the Appellant: Advocate S Mallett
Advocate for the Respondent: Crown Advocate G D McKerrell

1. The Appellant was stopped by Customs Officers at the White Rock on 12 July this year on his arrival in Guernsey from Weymouth on his way to Sark where he planned to spend a few days fishing with a friend.

2. Initially he told the Customs Officers that he had nothing to declare and that he had no controlled drugs on him. But he then produced from inside his trousers some herbal cannabis wrapped in tinfoil. He was then arrested and was asked whether he had anything else whereupon he produced another package from inside his underwear containing a white powder wrapped in some white plastic.

3. Analysis of the drugs established that he had 8.7 grams of herbal cannabis and 2.9 grams of cocaine.

4. On the 13 July he pleaded guilty in the Magistrate's Court to two charges of importation of a controlled drug and on 23 July in the same Court he was sentenced, on the first charge concerning the cocaine, to 8 months' imprisonment and on the second charge, concerning cannabis, to one month's imprisonment. The two sentences were to be served concurrently and with effect from 13 July.

5. The Appellant appealed against the sentence alleging that it was both wrong in principle and manifestly excessive. In his amended grounds of appeal, he no longer seeks to argue that the sentence was wrong in principle and instead he claimed only that the sentence was manifestly excessive in all of the circumstances and that insufficient credit was given for all of the mitigating factors.

6. The Court has had the benefit of reading the transcript of the hearing on 23 July and all the material prepared for that hearing, including the very helpful Social Enquiry

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Report and a hand written letter from the Appellant as well as a number of references submitted by letter and email. We have also taken note of the mitigation put forward that day by Advocate Mallett and of her submissions that afternoon.

7. The Appellant is aged 51 years, he lives in Uxbridge and was of previous good character save for one conviction on 9th January this year in Uxbridge Magistrate's court for possession of Cannabis, a Class C drug.

8. The Assistant-Magistrate observed that the Appellant was "*hardworking, conscientious, successful*" and save for the conviction in January was a law abiding man who would probably never again trouble the criminal courts in this Island or anywhere else. He also said that he recognised the impact a prison sentence would have on the Appellant's business and personal life and that it would affect his family, his business colleagues and his employees.

9. In our view that shows that the Assistant-Magistrate had taken note of the mitigating factors that had been put forward and we agree that the mitigation was substantial in this case.

10. The question is whether the Assistant-Magistrate had failed to do so adequately and to the extent that the sentence he imposed was manifestly excessive.

11. When sentencing in a case of importation of controlled drugs, or any other drug trafficking case, the starting place for any Guernsey Court is to look at the sentencing guidelines in the case of ***Richards***. The Assistant-Magistrate did not refer to that case by name but he showed his awareness of it when he mentioned the frequently quoted comment from the case that "*the misuse of drugs is one of the scourges of European society*".

12. The ***Richards*** guidelines state that the starting point for a quantity of a Class A drug between 1 and 20 grams is 7 to 9 years imprisonment. In that decision and in subsequent cases, such as ***Edwards*** in 2006, the Court of Appeal has given guidance as to the sentencing of cases involving the importation of a very small quantity of drugs for personal use. It has said that they are to be punished in the same way as offences of simple possession and we endorse the Assistant-Magistrate's comments about the sentencing policy and we note that any importation, as the Court of Appeal says, adds to the stock of drugs in the Island. We particularly endorse the Assistant-Magistrate's comments that any sentencing policy, if it is to be fair and effective, must be applied equally to all strata of society, the rich and the poor, the successful and the less advantaged.

13. In the present case, it was accepted that the cocaine and cannabis imported by the Appellant were for his own personal use and that no one else knew about the drugs. As for the quantity involved, it is sometimes a moot point as to whether any particular amount is to be considered as small enough to be punished as for possession, but Counsel is not disputing the decision of the prosecution to deal with the present case in the lower court. The Appellant can count himself lucky that it was dealt with in that court. The Royal Court was surprised that the matter was not referred to the Royal Court for sentencing

14. There may be cases involving 2.9 grams or less of a Class A drug where the circumstances would demand that they be sentenced in the Royal Court. We would not want anyone to think that all cases involving 2.9 grams or less of a Class A drug should be dealt with in the lower court.

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15. It must always be remembered however that sentencing is not a simple mathematical exercise where the only relevant fact is the quantity of the drugs concerned. The circumstances of the individual are relevant and in cases such as this they can be very important.

16. Advocate Mallet assumed in her submissions that the Assistant-Magistrate took twelve months as a starting point because that was the maximum sentence that he could impose as the case was heard before the increase in the criminal jurisdiction introduced with the coming into force this month of the Magistrate's Court (Guernsey) Law 2008.

17. In our view, that assumption is flawed. The Assistant-Magistrate had the jurisdiction to impose a sentence not exceeding twelve months' imprisonment and in deciding what sentence to impose, he had to look at all the circumstances of the case and sentence it "in the round". There were no restrictions requiring him to consider a starting point of twelve months and then to reduce form that figure in order to take account of the guilty plea and the mitigation available. There is no statutory requirement that he must use a starting point even in a drug trafficking case.

18. The Royal Court has to look at guidelines when sentencing in drug trafficking cases, because this court has to follow the ***Richards*** guidelines and they lay down the starting-points which we have to follow, but there are no similar guidelines for cases of simple possession of a controlled drug. So, there is no requirement upon the Assistant-Magistrate dealing with such a case to use any particular starting-point and indeed he may not use a starting-point at all.

19. Each case of possession needs to be sentenced on its own particular facts viewing all the circumstances of the case "in the round". The analysis put forward by Advocate Mallett concluded that no credit had been given for the Appellant's circumstances in reducing the sentence from 12 months to 8 months, because it was said that a one third credit for a guilty plea would have been allowed, but that analysis is clearly flawed in the light of our conclusion that there is no requirement upon the Assistant-Magistrate to take any starting point, let alone a starting-point of 12 months.

20. In any event, a credit for the Appellant's guilty plea would have taken account of the strength of the evidence against him, including the fact that the drugs concerned were concealed in the Appellant's underpants and to the credit may well have been less than the full one third.

21. In our conclusion there was substantial mitigation in the case, but it must be remembered that the quantity of drugs concerned was 8.7 grams of herbal cannabis and more importantly, 2.9 grams of cocaine. In our view the sentence was not manifestly excessive, in fact some members of the bench considered that the sentence should be increased, but to do so they accept would only be tinkering and this court does not tinker with sentences. So the sentence is upheld and the appeal is dismissed.

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