Judgment 6/2007 **(i) Jonathan Graham Marsh and Dean John Hardy; (ii) Shaun David Fallaize Court of Appeal (Criminal Appeals 358, 360 and 359) – 27th March 2007**

Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 – cultivation of cannabis – application of the guidelines in Richards (Court of Appeal 18th April 2002) to cultivation offences – appropriate to compare cultivation with importation

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

No. 358 360 & 359

Criminal

The 27th day of March, 2007 before Sir John Nutting Bt, QC presiding, Geoffrey Rowland Esquire, Bailiff and Sir Philip Bailhache

i) THE LAW OFFICERS OF THE CROWN

v

JONATHAN GRAHAM MARSH

and

DEAN JOHN HARDY

ii) THE LAW OFFICERS OF THE CROWN

v

SHAUN DAVID FALLAIZE

In the matter of the application by the above Appellants for leave to appeal from the sentences imposed upon them by the Royal Court on 3rd October 2006;

THE COURT, having heard Jonathan Graham Marsh and Dean John Hardy in

person, Advocate Mrs J E Roland for Shaun David Fallaize and Crown Advocate Mrs F Russell, thereon, and having on 26th March 2007 GRANTED LEAVE to all three Appellants, and having GRANTED LEGAL AID to Shaun David Fallaize this day GAVE JUDGMENT in the terms attached hereto and: -

i) DISMISSED the appeals of Jonathan Graham Marsh and Dean John Hardy; and

ii) ALLOWED the appeal of Shaun David Fallaize to the extent that the sentence of three years' imprisonment was REDUCED to one of two years' imprisonment, to reckon from 3rd October, 2006.

K H TOUGH
Registrar of the Court of Appeal

Finalised by Nutting, JA 16.4.07

IN THE COURT OF APPEAL GUERNSEY

Tuesday 27th March 2007

Before

Sir John Nutting, Bt.; presiding
Geoffrey Rowland, Esquire
Sir Philip Bailhache

MARSH, HARDY & FALLAIZE
(Criminal Appeal Nos. 358, 359 and 360)

Judgment delivered by Nutting, JA

Introduction:

1. Since these three appeals all concern the cultivation of cannabis and since all three involve several grounds of appeal which are common one to another, it is convenient to consolidate these cases.

2. This is the first occasion on which this Court has had to consider a case of cultivation of cannabis since the promulgation of the guidelines in *Richards & Others v. The Law Officers (17.4.2002)* and in the light of that and other matters we considered that it was appropriate to give leave to appeal to these Appellants and we did so.

Jonathon Graham Marsh & Dean John Hardy:

3. On 3rd October 2006, these two Appellants appeared before Deputy Bailiff Collas and Jurats for sentence on an Indictment containing a single Count, which alleged that together they cultivated cannabis plants contrary to Section 5(2) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974.

4. The Appellant, Marsh, pleaded guilty to the offence on 6th July 2006. The Appellant Hardy entered a not guilty plea and was convicted on 8th September 2006 after a trial.
5. Having heard pleas in mitigation and having considered Social Enquiry Reports, the Royal Court decided that immediate custodial sentences were required in respect of both Accused. Marsh received a sentence of 3 years imprisonment and Hardys' a sentence of 4½ years imprisonment.

6. On 10th October 2006, the Appellants filed Notices of Application for Leave to Appeal against Sentence. Leave was refused by a Singe Judge of this Court on 2nd February 2007.

7. The circumstances of the offence are that at 5.20 a.m. on Thursday 2nd February 2006, a police raid took place at a flat in Mount Durand in St. Peter Port. On entering the premises the police officers made their way to the only bedroom where they found that an area had been partitioned off with plastic sheeting. This area had been especially equipped to cultivate cannabis plants. A number of plants and seedlings were visible. Strip lights were attached to the wall and the ceiling. Water was stored in open containers; and a temperature gauge was fixed to the wall. The air within the room was hot and humid to the extent that one of the officers described the environment as being "like on a Caribbean beach".

8. The Appellant Marsh, who was present, was taken to the police station for questioning. Later that morning the Appellant Hardy was arrested at his place of work and was also subsequently interviewed.

9. Both Appellants made full admissions. They stated that they had decided to cultivate cannabis together for their own use as it was cheaper than buying it. Marsh said that he had bought the seeds on the Internet and that he and the Appellant Hardy had set up the equipment in the flat together. No one else was involved.

10. Hardy later retracted his admissions. At trial he stated that he had made a false confession in order to protect his sister in whose name the premises were rented. Marsh gave evidence on Hardy's behalf.

11. Analysis established that there were 14 small cannabis plants in the premises together with 45 seedlings. In addition 29 cannabis seeds were recovered.

12. At the trial of the Appellant Hardy, evidence of an Officer of the Drugs Squad was read to the Court, apparently by agreement, that this was a far more organised and sophisticated attempt at growing cannabis than either Appellant had admitted in interview. The Officer calculated that the plants and seedlings, not including the 29 seeds, could have yielded a total crop of approximately 4.75 kilograms of cannabis. This amount would make between 19,000 and 21,000 reefer cigarettes, which for recreational use, would have taken one person between 17 and 19 years to consume.

13. The value of the cannabis, as estimated, was £35,000. The officer's conclusion was that the volume of cannabis recovered, combined with the Appellants' financial outlay, preparation and organisation indicated that the Appellants were engaged in a commercial enterprise.

14. As to previous convictions, both Appellants have appeared before the Magistrate's Court on a number of occasions but prior to the present proceedings neither had any drug related convictions. Marsh's most recent conviction in March 2005 was for a motoring matter. Hardy's most recent conviction in January 2006, was also for a relatively minor offence. Neither man has been to prison before.

15. On behalf of the Appellants it was submitted to the Royal Court that the guidelines set out in ***Richards*** should not be applied in the present case for the following reasons:-

    (i) Whilst the Courts had stated, prior to ***Richards***, that cultivation cases should be considered along the same lines as importation cases, the sentencing principles in the latter situation were now different and therefore this approach was no longer appropriate.

    (ii) ***Richards*** referred only to cannabis resin while the present case concerned cannabis plants.

    (iii) It would be inappropriate to take account of the 4.75 kilogram figure with reference to the ***Richards*** guidelines because the Drug Squad Officer's opinion was based on a potential yield rather than an actual yield. In any event it was submitted that the figure was a gross over estimate. The plants cultivated were of a low quality dwarf variety and it had not been established how many of the seedlings were female and therefore of any value.

16. It was further submitted that the Court should not sentence the Appellants on the basis that they were engaged in a commercial enterprise. The venture was in its early stages. The plants discovered were only a month old and no useable cannabis had yet been produced. There was no evidence that the Appellants had sought to supply cannabis to others or had profited in any way from their activities.

17. The Court's attention was further drawn to the personal circumstances of each Appellant. Marsh in particular was described as being keen to address his drug dependency. The Court was invited to adopt the recommendation made in his Social Enquiry Report that a suspended sentence could be imposed with drug treatment and testing requirements.

18. In sentencing the Appellants the Deputy Bailiff noted that this was the first occasion on which the Court had had to consider appropriate sentences for an offence of cultivating cannabis since the guidelines in ***Richards*** had been laid down. It was acknowledged that ***Richards*** did not expressly refer to the cultivation of cannabis.

19. The Deputy Bailiff emphasised that in the earlier cases of ***Le Flock*** *(Royal Court 3.10.1996)* and ***Le Long*** *(Royal Court 5.12.2000)* the Royal Court had said that it would treat commercial cultivation on a similar basis to importation. The Court's view in the instant case was that this remained the correct approach. It was plain, said the Deputy Bailiff, that the Appellants' crop would have added to the stock of cannabis on the island in accordance with the mischief identified in ***Richards.*** However, the Court emphasised that the ***Richards*** sentencing guidelines should not be rigidly applied. Given the number of plants and seedlings in this case and the degree of sophistication involved, the Royal Court considered that the correct starting point was 5 years imprisonment.

20. The Deputy Bailiff acknowledged that neither Appellant had appeared in the Royal Court before and that neither had previously been convicted of a drug related offence. Their personal circumstances and the Social Enquiry Reports were also considered and Marsh was given full credit for his guilty plea.

21. However, the Court's view was that the Appellants had been engaged in an elaborate enterprise to produce cannabis and that in the circumstances therefore the appropriate sentences were sentences of immediate custody.

22. The Appellant, Marsh, now appeals against his sentence on the grounds that the Court erred:-

    1. In failing to disclose its starting point.

    2. By following the ***Richards*** guidelines in circumstances which were not appropriate.

    3. In declining to suspend the sentence.

23. The Appellant, Hardy, appeals against his sentence on the grounds that the Court erred:-

    1. By referring to the ***Richards*** guidelines when determining the starting point.

    2. In selecting a starting point based on a presumed yield of 4.75 kilograms of cannabis.

    3. In finding that the cannabis was grown on a commercial basis.

    4. In attaching insufficient weight to the fact that the Appellant did not have any similar previous convictions.

Sean David Fallaize:

24. On 3rd October 2006, this Appellant appeared before Lieutenant Bailiff Finch and Jurats for sentence on an Indictment containing a single Count which alleged that he cultivated cannabis plants contrary to Section 5(2) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974.

25. The Appellant had pleaded guilty to the offence on 3rd August 2006. Having heard details supporting the charge and a plea in mitigation, and having considered a Social Enquiry Report and a Psychiatric Report, the Royal Court imposed a sentence of 3 years immediate imprisonment. On 11th October 2006, the Appellant filed Notice of Application for Leave to Appeal against Sentence; but leave was refused by a Single Judge of this Court on 2nd February 2007.

26. On 26th May 2006, at 5 p.m. a police raid on a flat occupied by the Appellant in Tower Hill, St. Peter Port, revealed that the loft area had been converted for the cultivation of cannabis. The loft appeared to have been divided into a growing

area and a drying area. There were 26 cannabis plants present in various stages of growth. These were divided into two main groups. One group of 10 plants was located close to the loft hatch: their leaves were wilted and dried out. The second group of 26 plants was located towards the back of the attic space: these plants were apparently healthy and thriving. The area also contained electric lights, a fan, plant food, pest sprays, peat, dried plant material and a 2006 calendar containing handwritten notes on when to feed, water and cut the plants. Alongside the healthy plants were bunches of mature buds hanging from drying lines attached to the rafters.

27. Elsewhere in the flat police found various other paraphernalia connected with cannabis cultivation including seeds, seedling pots, a seed propagation box and two books entitled "Marijuana Growers Guide" and "Hydroponics." It was later discovered that since the Appellant had taken up residence in the flat the average electricity consumption had increased by 93%.

28. The Appellant was interviewed. He accepted that the plants were cannabis plants and that they belonged to him. He stated that no one else was involved in the cultivation of the plants and that the cannabis produced was for his own use. He claimed to smoke about 2 ounces of cannabis per week and that he had intended to throw away the plants which were dead.

29. Analysis confirmed that the 16 live plants were indeed cannabis. Two different varieties were present. Had these plants continued to grow, according to an Officer of the Drugs Squad, it was expected that they would have produced up to 799.47 grams (28.21 ounces) of cannabis with an approximate value of between £3,375 and £5,642. In addition to the plants a total of 333.25 grams (11.9 ounces) of cannabis plant material was recovered from the loft. This material was estimated to be worth between £2,140 and £2,380. The total weight of cannabis as calculated was potentially in excess of 1.13 kilograms.

30. The Officer estimated that the 333.25 grams (11.9 ounces) of cannabis available for consumption at the time of seizure would have made between 1,333 and 1,487 reefer cigarettes, which, assuming recreational use, would have taken one person just short of 500 days to consume. The Appellant's claim of smoking 2 ounces of cannabis per week would use up the cannabis seized within 6 weeks. The Officer considered that this level of consumption by a person in full-time manual employment such as the Appellant was unlikely. The level of investment by the Appellant was estimated to have been in the region of £2,000 which combined with the level of preparation and organisation suggested that the Appellant was cultivating cannabis on a commercial basis.

31. The Appellant has a large number of previous convictions for a variety of offences. His most recent conviction prior to these proceedings was on 5th March 2004 for an offence involving public order. He has several previous convictions for the possession of controlled drugs, the last being for possession of cannabis on 26th April 1999.

32. On behalf of the Appellant it was submitted to the Royal Court that the guidelines set out in ***Richards*** should not be applied in this case as those

guidelines applied only to the importation of cannabis resin and not to the cultivation of herbal cannabis. If the ***Richards*** guidelines were to be applied, it was submitted that the Appellant's case should be viewed as falling at the bottom of the scale.

33. It was further submitted that undue weight should not be attached to the evidence of the Officer of the Drug Squad. It was suggested that the Officer had failed to take into account that ultimately only the buds of the cannabis plants were to be used (in accordance with the Appellant's evidence) and that the remainder would be thrown away. It was emphasised that the Appellant was cultivating cannabis for his own use.

34. Finally, attention was drawn to the Appellant's personal circumstances and in particular to the fact that he suffered from a chronic back problem. This caused him considerable pain from which the cannabis provided relief. It was submitted that the Appellant's medical condition amounted to extenuating circumstances and that a suspended sentence should therefore be imposed.

35. In sentencing the Appellant the Lieutenant Bailiff stated that the expert evidence including the evidence of the Officer of the Drug Squad had been particularly helpful to the Court. He observed that consistent with the principle of ***Richards*** the amount of cannabis available in the island of Guernsey had been increased by the Appellant's cultivation of the drug and that the quantities involved were far from insignificant. He said that the Appellant's claim that the cannabis was for personal use did not assist the Court because the mischief of adding to the stock of drugs on the island still applied. A starting point of 5 years imprisonment was adopted. The Lieutenant Bailiff stated that having taken into account all the information provided on the Appellant's behalf, in the Court's view, a suspended sentence was not appropriate. He emphasised that the Court considered that this was a sophisticated effort to cultivate a substantial amount of cannabis and that the Appellant's enterprise was organised and fruitful and had required a significant outlay.

36. This Appellant appeals against his sentence on the grounds:-

    1. That the Court erred in applying the ***Richards*** guidelines in a case involving the cultivation of herbal cannabis. The ***Richards*** guidelines only apply to cases concerning cannabis resin.

    2. Even if the ***Richards*** guidelines were relevant the Court erred in selecting a starting point of 5 years. In the circumstances this starting point was too high.

    3. The Court's approach to the starting point was inconsistent both with previous cases (for example ***Le Long***) and also with the

    similar case of Marsh and Hardy who had been sentenced, albeit by a different Court, that very morning.

4. The method adopted by the Court for assessing the quantity of cannabis cultivated by the Appellant was inaccurate. The Court failed to take into account that some or all of the plants might not have survived; that some of the detritus would have been thrown away; and that only the buds of the plants were to be smoked.

5. The Court attached insufficient weight to the Appellant's contention that the cannabis was for his personal use.

37. Before we come to determining these appeals we should like to pay tribute to Miss Roland who presented the appeal of Fallaize with a cogency and a realism which made her submissions the more attractive. We would also like to assure the Appellants Marsh and Hardy that the absence of Advocates to argue their cases in the light of the refusal of legal aid has caused them no disadvantage. The persuasive and succinct way in which they expressed themselves to us together with the written submissions settled by Counsel on their behalf (in advance of their applications for leave to appeal) have provided this Court with all the information and argument which the Court needs to determine their appeals.

Submissions in Common:

38. The first point which is common in the cases of all three Appellants is the submission that the lower Court was wrong to apply the guidelines in *Richards* to cases involving the cultivation of cannabis because the *Richards* guidelines should only be applied to cases involving importation. In fact, there are several cases albeit at first instance where the Royal Court has indicated that in such cases proper comparators are indeed cases concerning importation. The cases to which we have been referred include *Petit (10 GLJ 24)* in which the Deputy Bailiff said in sentencing:-

> *"As regards cultivation of cannabis, where the Accused cultivates more than a few plants the Court will impose a deterrent sentence for the same reason and at the same level as has been stated as regards sentences for importation of cannabis to the value of several hundred pounds. The difficulty of detecting this offence calls for a high level of punishment as is recognised by the level of penalties which the Court is empowered to impose."*

39. That approach was endorsed by the Royal Court in the subsequent case of *The Law Officers v. Antony Le Flock* on 3rd October 1991:-

> *"The Court adopts what was said in the case of Petit in 1990, which was that cultivation of more than a few plants of cannabis would attract sentences at similar levels to those imposed for importation of larger amounts of cannabis."*

40. The most recent instance where a guideline case of importation was used in a cultivation case is *Le Long.* The offender in that case had cultivated in excess of 2.5 kilograms of cannabis. In sentencing the Deputy Bailiff said:-

> *"Except in cases where a clear intent has been established to deal in the crop which results from the cultivation of cannabis when such intention will be treated as an aggravating factor, and therefore generally lead to a longer sentence, this Court will approach sentencing on the basis of the amount of cannabis produced. This Court has said in the case of Le Flock in 1996, that cases of cultivation will be treated in a very similar way to cases of importation."*

41. We seen no reason to disapprove this approach. Indeed we consider that in such cases as these the Court should look to the guideline cases involving importation which since 2002 consists of ***Richards*** to obtain assistance for appropriate starting points for sentence.

42. The second common submission was that since cases of cultivation necessarily involve herbal cannabis it is not appropriate to compare importation cases which invariably concern cannabis resin. We do not agree. The evidence of the Drug Squad Officers in the instant cases tabulated the comparative prices for both herbal cannabis and cannabis resin. The Officers provided the prices for street dealing in both kinds of cannabis as well as the mid-market price and the wholesale price in each instance per one eighth of an ounce. The price for both kinds of cannabis was the same in all categories. It follows that there was no reason for the Royal Court to feel deterred from treating herbal cannabis any differently from cannabis resin, with which ***Richards*** was, among other drugs, concerned.

43. The third linked submission was that in assessing the amount which the cultivation in each case might have produced the Royal Court was not entitled to assume that all the plants would have survived nor that all the plants would have yielded material fit for consumption and that actual weight in importation cases is an inappropriate yardstick to compare with potential yield in cultivation cases.

44. It is of course true that the weight of cannabis with which the Court is concerned in a case of cultivation is less certain than in a case of importation where the amount seized can be weighed to a nicety. Nevertheless where an offender chooses to grow cannabis on a continuing basis and where, as was the situation in both the instant cases, the evidence consisted of seeds and seedlings and seedling pots as well as all the paraphernalia necessary to produce regular supplies of cannabis the offender cannot complain if the Court makes a sensible estimate of the quantity of cannabis which could be produced by the material found at the time of the raid, based on evidence given by someone with knowledge of cannabis cultivation.

45. In both the flat at Mount Durand (Marsh and Hardy) and in the flat at Tower Hill (Fallaize) the sophistication of the cannabis cultivation process was all to obvious. We accept that the inexpertise of an individual offender might cause him to fail to cultivate the full potential of the plants he has grown so as to achieve the weight estimated by a Drug Squad Officer, but so long as the Court treats the evidence of the Officer as an estimate rather than a certain amount and provided the Court makes some allowance for that fact, we see no reason why

the Court should not pay heed to the evidence of such an expert. It is to be noted that no evidence was submitted to the Royal Court in either case (notwithstanding assertions made to the Royal Court and repeated to us) to contradict the conclusions of the Drug Officers.

46. We wish also to emphasise that the amount of cannabis which might potentially become available once the crop has been harvested is only one of the matters to which the sentencing Court should have regard in deciding the starting point. Another aspect is the sophistication of the cultivation process and the scope of the offender's involvement in the drug scene. The cultivation of a few plants with no evidence of more than the possibility of one harvest is necessarily very different from a case where there is evidence of plants at various stages of growth, evidence of seedlings waiting to be potted on, and of packaged seed waiting to be planted.

47. The fourth point made by all three Appellants was that the Royal Court was wrong to decline to adopt the submission that the cannabis found at the two locations was for the personal use of the Appellants and to sentence them on that basis. It is clear that in their approach to sentencing both the Deputy Bailiff and the Lieutenant Bailiff had in mind the approach to sentence which the Deputy Bailiff adopted in *Le Long*:-

"With regard to cases of importation the Court of Appeal has stated- (and this was in the combined appeals of *Mather and* Cooper in July 1999) *the Court of Appeal stated this, and this obviously relates to importation:-*

> *"The gravity of the offence depends on the nature and quantity of the drugs imported and to an extent and by extension to their street value. We accept that an importer who brings drugs into the Bailiwick for his own consumption may use that fact to mitigate his conduct but the larger the quantity the less likely it is that the drugs will be used by the importer alone and the more likely it is that the drugs will be supplied to one or more persons within the jurisdiction. Quantity is an aggravating feature."*

"By similar reasoning this Court would state that the essential seriousness of the offence of cultivation depends upon the fact of cultivation itself and the amount grown. In this case the amount of cannabis available for use within this community has been increased by some 90 ounces. It is also obvious that your cultivation of the cannabis was a well planned exercise."

48. The genesis of this approach may be derived by what was said by Lord Carlisle of Bucklow, QC, in *Stephenson* 21st July 1997:-

> *"The Court accepts the distinction made by the Comptroller that whilst there may be cases where there is no evidence of intention to supply at the time of importation and therefore it would not be appropriate to bring a prosecution for intent to supply but nevertheless there is a distinction between those cases where the amount brought in is merely for personal use for one or two days and should be equated with simple possession and*

> *those where the individual brings into the community a significant amount which in itself is bound to be a matter of public concern because of the continuing risk of the existence of the drug within the island and the temptation it may hold out to people. In cases of that kind whilst it is not appropriate to indict on possession with intent to supply nevertheless the gravity of the importation is in itself far greater than the gravity of the offences of mere possession."*

49. Moreover this was the essential mischief which was later identified and endorsed in *Richards* and was repeated most recently in *Edwards* 19th September 2006:-

> *"In applying the guidelines it is for the sentencing Court to determine whether the quantity of drugs under consideration can properly be described as 'very small' having regard to the facts and circumstances of the particular case. If it cannot be so described a 'personal use' claim will not generally result in a lighter sentence, because any importation adds to the stock of drugs available in the island. The risk of such addition to the stock is that drugs may find their way into other hands."*

50. In the view of this Court it is the increase in the available stock which is the appropriate basis for sentence in cases such as those with which we are dealing today. Where an offender is able to show indubitably that the cannabis was for his own consumption, usually because of the very small amount discovered, that fact may be considered as a mitigating factor in sentence. By the same token where the evidence reveals, usually but not invariably by reference to quantity, that the offender is a dealer that fact will be treated in aggravation of punishment. But where as in many cases there is no certain conclusion which can be drawn one way or the other the offender should be sentenced on the above basis and punishment should be assessed, paying appropriate caution to quantity as identified above in cases of cultivation, by reference to the current guidelines established in *Richards*.

The individual appeals:

51. The Appellant, Marsh, submitted that the Deputy Bailiff erred by setting a starting point which was manifestly too high. Apart from the submissions canvassed above in support of this proposition, he asserted in particular that the amount of cannabis which could have been produced at his address was not 4.75 kilograms as suggested to the Royal Court, but not more than 100 grams. We do not accept the figure suggested by the Appellant. There was cogent expert evidence before the Royal Court that the plants recovered at Mount Durand were **capable** (our emphasis) of producing 4.75 kilograms. Moreover the *Richards* band into which this amount would fall if imported was a band between 2 and 5 kilograms. The sentencing bracket for such a band is 5 to 8 years. Thus the Deputy Bailiff chose a starting point at the bottom of the band for an estimated quantity of cannabis very near to the top. Rightly, in our view, he emphasised that in selecting the starting point the Court had *"not rigidly applied the Richards sentencing guidelines."*

52. The second point made by this Appellant is that in *Le Flock* an offender who was caught with 45 plants valued on the basis of street sale at £27,000 was sentenced on the premise that the appropriate starting point was 3 years. This Court has emphasised on many occasions that a precise comparison between the sentences in different cases is usually a vain and fruitless exercise and that this Court is concerned not whether the sentence in a given case fits precisely on a particular and identifiable footfall of a ladder of graduating seriousness; but rather whether the Court which imposed the sentence applied appropriately the principles of sentencing extracted from other cases in which this Court has laid down guidelines. As has been said often in this and the neighbouring jurisdiction sentencing is an art and not a science. Moreover it is pertinent to point out that *Le Flock* was a case in which the sentence was imposed before the *Richards* guidelines were published.

53. We have considered the circumstances of this Appellant. We have borne in mind his personal circumstances including the fact that he has no drug related convictions, that he has not previously been sentenced to a period of imprisonment and that since his incarceration he has become the father of a child. We have borne in mind too that his plea of guilty entitled the Royal Court to give a significant discount in sentence, albeit not a full discount since the evidence against him was overwhelming. We conclude that the 5 year starting point adopted by the Royal Court was proper and we can find no fault in the 2 year deduction from that starting point given by the Royal Court to reflect those matters which we have identified above. Accordingly, the 3 year sentence must stand and this appeal must be dismissed.

54. The Appellant, Hardy, was, like the Appellant Marsh, a man with no previous convictions for drugs and someone who had not previously been sentenced to imprisonment. We can see no reason to distinguish between these two Appellants for the purposes of assessing a starting point and accordingly we uphold the 5 year starting point in his case. Unlike his co-Appellant he contested the Indictment. He was therefore not entitled to a discount for sentence which the Appellant Marsh received. We have carefully considered every aspect of his case but can find no reason to reduce the sentence of 4½ years imposed by the Royal Court. His appeal must also be dismissed.

55. We turn finally to the sentence of 3 years imprisonment passed on the Appellant Fallaize.

56. Miss Roland's primary submission was that the 5 year starting point was too high. Although we do not accede to some of her arguments in support of this proposition, whose validity we have considered above in other contexts, nonetheless it is a fact that the sentencing band in *Richards* into which on the evidence of the Drug Squad Officer the cannabis found at Tower Hill fell, is a lower band than the one we have identified and described in dealing with the appeals of Marsh and Hardy.

57. The relevant sentencing band in Fallaize's case is the lowest band and relates to up to 2 kilograms of cannabis. It is linked to a

sentencing bracket of between 3 and 6 years. Even if the Court were to accept the maximum weight for cultivation attested by the Drug Squad Officer and if, contrary to the approach we have suggested above, no allowance is made for the possibility for example of wastage or inexpertise by the grower, the maximum weight is still only slightly in excess of the halfway point in this bracket. Nonetheless the starting point selected by the Royal Court is near to the top end. We take the view that the starting point should have been 3 years for this Appellant not 5 years.

58. We cannot ignore the fact that he is a man with a large number of previous convictions including offences for drugs and that he has been sentenced to many different punishments including cautions, bind-overs, fines, probation, youth detention and custody. Moreover having read the medical report we are not persuaded that the cultivation of cannabis in his case had much to do with his back problem for which he was being treated with Dihydrocodeine on prescription from his doctor. Indeed, it is not without note that Miss Roland did not mention this aspect when she dealt with the Appellant's personal mitigation.

59. On the other hand, it is to his credit that the Appellant pleaded guilty; and although the evidence against him was overwhelming, the Royal Court considered that a discount for his plea was appropriate.

60. All things considered we take the view that the appropriate sentence for this Appellant is one of 2 years imprisonment. His appeal against sentence is allowed to that extent, and the sentence passed by the Royal Court varied accordingly.

Thank you very much.

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……. Suzanne M. O'Neill
17th April 2007

