

Judgment 19/2003

**Michael David Boocock
v Law Officers of the Crown
Court of Appeal
(Criminal Appeal 296)
11th April, 2003**

Importation of Class B drugs – Sentence - Appellant warned that Court might find his explanation incredible without evidence on oath – Declined to give evidence

IN THE COURT OF APPEAL OF GUERNSEY

Criminal Division

The 11th day of April, 2003 before Richard Charles Southwell, Q.C., Presiding, Sir John Nutting Bt., QC., and David Arthur John Vaughan, CBE, QC.

THE LAW OFFICERS OF THE CROWN

V.

MICHAEL DAVID BOOCOCK

Appellant

On the application of the Appellant for leave to appeal from the sentence imposed on him by the Royal Court on 24th January, 2003;

THE COURT, having heard Advocates M. Baudains and G. D. McKerrell for the Appellant and the Crown respectively, thereon, GAVE JUDGMENT in the terms attached hereto and DISMISSED the application for leave to appeal.

K. H. TOUGH
Registrar of the Court of Appeal

OFFICIAL TRANSCRIPT

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Final judgment printed 20.5.03

FRIDAY 11TH APRIL 2003

COURT OF APPEAL

Before

Richard Charles Southwell, Esq., QC
Sir John Nutting, Bt., QC
David Arthur John Vaughan, Esq., CBE QC

MICHAEL DAVID BOOCOCK
(Criminal Appeal No. 296)

Judgment delivered by Sir John Nutting, Bt., QC

1. On 24th January 2003, this Applicant appeared before the Lieutenant Bailiff and Jurats in answer to an Indictment containing a single Count of being concerned in the fraudulent evasion of the prohibition on the importation of cannabis resin in contravention of Section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended. He pleaded guilty and was sentenced to serve a period of 6 years imprisonment to take effect from 21st June 2002, the date of his re-arrest for the offence.
2. A similar charge lay against another man, Glenn Barclay. For reasons connected with the timing of the arrests of the two Offenders and the resultant separate lodgement of Bills of Indictment, each man was charged in separate Indictments rather than in one joint count in the same Indictment, but the Counts in which they were separately charged were identical.
3. Mr. Barclay, who appeared on the same occasion as the Applicant for sentence, was ordered to serve a similar period of imprisonment to run from 25th January 2002, the date of his arrest. He had pleaded guilty on 19th April 2002. He has not applied for leave to appeal.
4. On 28th January 2003, the Applicant served notice of his intention to apply for leave to appeal on the ground that his sentence was “manifestly excessive”. On 7th April 2003, the Bailiff directed that the application be considered by the Full Court, and granted legal aid.
5. The Applicant is 26 years of age. Soon after leaving school he enlisted in the Army and served in Northern Ireland and Bosnia. At the time of the commission of this offence he was a man of good character.
6. Mr. Barclay, by contrast, was a man in his early 30s, who at the time of his arrest had a number of convictions recorded against him, although none of them were drug related. Both men were born and brought up in Hartlepool, where they were living at the relevant time.
7. We turn to the facts of the offence: On Friday 25th January 2002, Customs Officers on duty in the Clearance Hall at White Rock, St. Peter Port, stopped a Volvo, driven by Mr. Barclay. The other passengers in that car were his partner and their 22 month old daughter. Mr. Barclay stated to the Officer that they had come to Guernsey for a long weekend break and produced travel documents showing a booking at La Villette Hotel. He stated that he did not know anyone in Guernsey.

8. A search of the car was undertaken. The Officers removed the interior trim panel on the offside rear door, revealing several packages wrapped in silver tape. The Officers then removed the interior trim panel on the nearside door; more silver taped packages were found, concealed within that panel. The packages were shown to Mr. Barclay who denied all knowledge of them. Later, Officers examined the spare wheel of the vehicle and noticed that it felt unusually heavy. The tyre was removed from the rim. Ten silver wrapped packages were found concealed within it. A total of 64 packages of a brown resinous substance, which later proved to be cannabis, were recovered from the car.
9. Also travelling on the same boat as Mr. Barclay were two other men, one of them the Applicant, who was travelling as the passenger in a Fiesta van. It became apparent to the Customs Officers that some of the occupants of the two cars knew each other, and the Applicant and his companion were also arrested. A series of interviews took place. Mr. Barclay made no comment to all the questions which were put to him.
10. The Applicant was interviewed on three occasions. He maintained that he had come to Guernsey in order to see his father who was working here and who was celebrating his birthday on 25th January. Throughout the interviews the Applicant insisted that he and his friend had come to Guernsey without premeditation. He denied any knowledge of Mr. Barclay, and maintained that he had never seen him or his partner either in Hartlepool or on the ferry and denied ever having been in the Volvo car which Mr. Barclay had been driving. He denied that he knew that drugs were concealed within it. He provided a set of fingerprints and was subsequently released, as was his travelling companion.
11. The drugs and packaging were then sent to the Forensic Science Services for analysis and forensic examination. A number of fingerprints were found. Those of Mr. Barclay were identified on several of the pieces of tape that had been used to wrap a number of cannabis packages. A fingerprint belonging to the Applicant was found on the tape wrappings from one of the packages removed from within the spare tyre. In the opinion of the forensic scientist that fingerprint had been laid down on the surface of the tape after it had been wrapped around the cannabis resin.
12. A search of the vehicle in which the Applicant was travelling revealed a piece of headed paper detailing the address and telephone number of La Villette Hotel.
13. The cannabis resin in the packages recovered from Mr. Barclay's car weighed 15,800 grams. The Guernsey street price of such an amount varies between £110,000 and £142,000 and is capable of producing just in excess of 100,000 cigarettes.
14. Mr. Barclay having been detained following his arrest remained in custody until trial. In view of the state of the evidence no further proceedings were taken against either Mr. Barclay's partner nor the driver of the Fiesta.
15. The Applicant was re-arrested on 21st June 2002, and brought back to the Island by virtue of a warrant issued by the Bailiff and remained in custody from that date until trial.
16. It is important to examine the nature of the mitigation submitted to the Royal Court with some care. Advocate Baudains' instructions were that the Applicant's involvement in this offence stemmed from a visit he had made to a club in Hartlepool shortly before the journey to Guernsey. The Applicant claimed that he had mentioned at the club to an acquaintance that he intended to visit this Island in the immediate future on the occasion of his father's birthday. The acquaintance asked the Applicant to act as a courier for drugs. The Applicant indicated that he would think about the proposition. Some days later, according to the Applicant, the acquaintance arrived at his flat with a carrier bag containing three packages wrapped in silver tape and told the Applicant to take the packages to Guernsey.

17. Through his Advocate at trial, the Applicant claimed that he feared reprisals if he refused, and insisted that he had been recruited merely to provide cover for the importation by Mr. Barclay, whom he continued to insist he did not know.
18. No sensible explanation was vouchsafed in mitigation for the presence of one of the Applicant's fingerprints on the packages, no reason was given to the Court for his ignorance of the man for whom he admitted providing cover, and no justification was provided for his presence in the second car, if, as was hinted, the driver was responsible for the piece of paper containing the hotel details providing the link to Mr. Barclay. In short, since the drugs were plainly imported in Mr. Barclay's car, since cover was plainly provided for Mr. Barclay by the presence of his partner and baby, since the Applicant was a mere passenger in the second car, which was being driven by another, and since the two cars were not apparently associated until a detailed search of the Fiesta had been made and the piece of paper recovered, the Lieutenant Bailiff expressed puzzlement at the mitigation put forward, and raised with Advocate Baudains the part which the Applicant must have played in the importation in view of his plea of guilty. Indeed, the Lieutenant Bailiff indicated that the Court considered that the details of the mitigation did not appear to be wholly consistent with that plea.
19. During the exchange which passed between Bar and Bench, Advocate Baudains assured the Lieutenant Bailiff and the Jurats that he was satisfied that the Applicant's plea was in no sense equivocal, whereupon, and quite properly, the Lieutenant Bailiff indicated that the Court might well be unwilling to accept the mitigation advanced without evidence on oath. Having taken instructions, Advocate Baudains declined the invitation to call the Applicant as a witness. No further elaboration was given to the Court relating to the circumstances of the Applicant's involvement.
20. The Court was therefore left in a position in which it was constrained to make its own assessment of the Applicant's role, drawing such inferences as appeared to the Court to be proper from the information before it. The Lieutenant Bailiff and the Jurats adjourned to consider the matter shortly after 2.30 p.m. and returned to Court about 2 hours later to pass sentence. The Lieutenant Bailiff gave a long and considered judgment extending to five pages of transcript. In relation to the respective roles played by Mr. Barclay and by the Applicant, the Lieutenant Bailiff said this:

“As far as you are concerned, Mr. Barclay, the role you played is relatively clear, you were the physical importer, the courier, which is always a vital role. You were, however, not a simple mule, you certainly helped to conceal some of the drugs and provided camouflage, even if advised, by booking a weekend break at La Villette Hotel with your family. Involving your family does not impress the Court. Clearly you would have made the car available for the drugs to be removed from it, once you had arrived”

And later:

“As far as you are concerned, Mr. Boocock, you have, through your Counsel, sought to explain your very limited involvement in this importation. The Court indicated that it found that explanation incredible and gave you the opportunity to try and persuade it otherwise, which you have not taken up. What inferences can the Court rightly make from the established facts, bearing in mind that it views your story as incredible? Your fingerprint was found on a package in the spare tyre. The Court concludes that you were involved in that concealment. Even on your story you knew the drugs were coming to Guernsey.

You arrived by separate transport in Guernsey at the same time as Mr. Barclay's car. Both vehicles had travelled down from Hartlepool. Your companion, the driver of the van, made enquiries of the Customs about Mr. Barclay. The Court concludes that this was not mere coincidence, the fact that your father was in Guernsey and that it was his

birthday the next day, and that you were just staying for one night, according to you, works both ways, both for and against you.

In the vehicle in which you were travelling was found the address and phone number of a hotel in which Mr. Barclay was to stay. As the Court has already said that does not necessarily mean that you knew of it or of its contents, on the other hand, against the circumstances which the Court has just referred to, it is entitled to infer, which it does, that the address was of significance to you. The Court has therefore concluded that your involvement in this importation at the least was that of a minder.”

21. Having considered the relevant authorities the Royal Court concluded that the starting point for sentence, both for Mr. Barclay and for the Applicant was 9 years imprisonment. Credit was given to both men for their pleas of guilty, and the Court took into account in Mr. Barclay’s favour that he had had to wait a year between arrest and sentence, an unusually lengthy period for a guilty plea. Credit was given in the Applicant’s case for his good character, not only evidenced by his lack of previous convictions but also by certificates relating to his military service and two references, one from a former employer and the other from the Chaplain of the States of Guernsey Prison Service. In reflection of these mitigating features, the Court reduced the 9 year starting point by $\frac{1}{3}$ for both offenders.
22. Advocate Baudains puts his submission to us on behalf of the Applicant on two bases. First he suggests the sentence was passed on a wrong factual footing and, in particular he asserts:
 1. There was no evidence before the Court upon which the Court could reasonably come to the conclusion that the involvement of the Applicant was “*at least that of a minder.*”
 2. The Applicant should have been sentenced on the basis that his role was of a most minor nature, there being no factual basis upon which the Jurats could conclude otherwise.
 3. There was no evidence that the Applicant was involved in the concealment of the drugs in the spare tyre. Advocate Baudains submitted that the fact that one of the Applicant’s fingerprints was found on one of the packages in the tyre did not provide sufficient evidence for the Court to come to the conclusion that he was a party to the concealment of the drugs in the car.
23. Advocate Baudains maintains that the Royal Court should have arrived at a lower starting point for the Applicant than for his co-accused.
24. We are not persuaded that the findings of the Royal Court relating to the respective roles of the two offenders were erroneous, in particular we consider that their conclusion that the Applicant was a “minder” of Mr. Barclay and/or the drugs, was justified on the evidence before them. Nor are we persuaded that the Applicant’s role can be characterised as “of a most minor nature.” It is clear that the Lieutenant Bailiff and the Jurats took time to consider the roles played by the two offenders, and the Lieutenant Bailiff described, in the passage quoted above, the reasons why the Court had come to the conclusions about the Applicant’s role which the Lieutenant Bailiff described and defined. We find nothing to criticise in the reasoning deployed by the Royal Court.
25. Albeit that the two offenders were charged separately for the technical reasons to which we have referred, the case was rightly in our view, presented to the Court as a joint offence. Whether the Applicant participated in this offence to “mind” the co-accused or the drugs, or to assist in some other way is not material, there was no justification on the evidence before the Royal Court for making any distinction between the two offenders: certainly the Applicant provided none. He has only himself to blame in our view for the fact that the mitigation, which he put forward, was both inadequate to explain the evidence against him and insufficient to account for the wholly incredible coincidences which arose from his explanation. He was given an appropriate warning of the approach which the Royal Court was minded to take and

- he declined the invitation to remedy the situation which resulted from the instructions which he had given to his Advocate.
26. There is nothing in this complaint by the Applicant.
 27. The second basis of Advocate Baudains' submissions was that the differences in the personal circumstances of the two offenders justified a greater reduction from the starting point in the Applicant's case. In particular Advocate Baudains emphasised the following contrasts. In respect of Mr. Barclay, *inter alia*:
 1. He was the driver of the car in which the drugs were imported and would have provided the vehicle to people in Guernsey to enable them to remove the drugs.
 2. Mr. Barclay had used as cover for his crime, his partner and 22 month-old baby.
 3. Mr. Barclay had previous convictions, indeed a lengthy criminal record including several periods of immediate custody.
 28. In respect of the Applicant, Advocate Baudains points by way of difference to the following matters, *inter alia*:
 1. The more minor role played by the Applicant and the lack of evidence to show that he either knew Mr. Barclay or that there were drugs contained in Mr. Barclay's car.
 2. The Applicant had an exemplary record with no previous convictions and good references.
 3. The risk of re-offending was assessed in his case as "low" in the pre-sentence report, in contrast to Mr. Barclay, whose risk factor was assessed to being "low to moderate".
 29. In our view it is misconceived to ask the Court to contrast the roles played by the two offenders as part of their personal mitigation, as in the first point made in respect of each offender (see 1 above). We have already concluded that there was insufficient evidence before the Royal Court to treat the offenders differently in terms of the starting point and nothing to prevent the Court from concluding that they were jointly responsible.
 30. In relation to the marginal differences in the risk assessments of re-offending between the offenders, we cannot conclude that this is a factor, which would have justified any distinction to be made in sentence.
 31. The only point of potential substance under this heading relates to the significant difference in the records of the offenders. However, the distinction is balanced in our view by a factor available in mitigation for Mr. Barclay but not applicable to the Applicant. The melancholy fact is that Mr. Barclay was compelled to wait to be sentenced, having pleaded guilty to this offence on 19th April 2002 (two weeks before the Applicant's re-arrest) until 24th January 2003. This is a long delay in any jurisdiction for an offender, having admitted his guilt, to learn his punishment.
 32. We sought an explanation from the Crown Advocate for this state of affairs. It is apparent both from the chronology provided to us and from what Advocate Baudains confirmed in argument, that five months of the delay was explained because the Applicant wished to instruct a Defence fingerprint expert to check the evidence produced by the Crown. For reasons that have not been wholly explained, but which relate partly to the illness of the first expert, there was then a delay between 31st July 2002, when notification was given of intention to instruct a Defence expert, and 7th January 2003, when the Crown was told that the Applicant would plead guilty.

33. It is, of course, an offender's right to have expert evidence verified, even where, as here, the likely accuracy of that evidence is within his own knowledge, but it must at once be recognised that the effect of the delay resulting in the exercise of that right by the Applicant, had a severe effect on the time during which his co-offender was kept waiting for sentence. If Mr. Barclay had been charged alone we see little reason, in view of his plea on 19th April 2002, why his case should have been heard any later than 1st August 2002.
34. It follows that the delay caused by the requirement to re-arrest the Applicant and his desire to instruct a fingerprint expert resulted in some real prejudice to Mr. Barclay. In our judgment that mitigating factor balanced the mitigating factors available to the Applicant. It follows that we do not consider the Royal Court erred in giving the same discount to each offender. The application is dismissed.
35. Before leaving this case, we would like to add a footnote unrelated to the merits of the application. It is apparent from the transcript of the proceedings which took place in the Royal Court that an unrecorded conversation took place out of Court between the Advocates and the Lieutenant Bailiff. The conversation apparently related to the statement of offence, or to the form of the charge in the Indictment. We would like to emphasise that any conversation, representations or submissions in a criminal case, should wherever possible, be made in the presence of the Defendants and in public. If, for good reasons, such proceedings have to be heard in Chambers, whether in Court or out of Court, tape-recording equipment should be available to record the detail of what is said.

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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
Tuesday 20th May 2003