Judgment 21/2003

Paul Sebastian Reynolds
V Law Officers of the Crown
Court of Appeal
(Criminal Appeal 299)
10th April, 2003

Possession of Class B drug with intent to supply – Relevance to sentence of the drug trafficking report – All evidence in the trial could properly be taken into account – Whether a specific sentencing policy in another jurisdiction is relevant in Guernsey

IN THE COURT OF APPEAL OF GUERNSEY

Criminal Division

The 10th 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

PAUL SEBASTIAN REYNOLDS

Appellant

In the appeal of the Appellant from the sentence imposed on him by the Royal Court on 21st February, 2003;

THE COURT, having heard Advocates M. Baudains and P. Robey for the Appellant and the Crown respectively, thereon, GAVE JUDGMENT in the terms attached hereto and DISMISSED the appeal.

K. H. TOUGH
Registrar of the Court of Appeal

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Final judgment printed 27.5.03

THURSDAY 10TH APRIL 2003

COURT OF APPEAL

Before

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

PAUL SEBASTIAN REYNOLDS
(Criminal Appeal No. 299)

Judgment delivered by Sir John Nutting, Bt., QC

1. On 21st February 2003, this Appellant appeared before the Bailiff and Jurats for sentence in respect of an Indictment which had originally contained two Counts. In the first Count the Appellant was charged that on 27th April 2002 he had in his possession cannabis resin, with intent to supply to another, in contravention of Section 3(1)(b) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended. In the second Count he was charged on the same date with simple possession.

2. Having at an earlier hearing pleaded not guilty to the first Count and guilty to the alternative second Count, a plea which was not acceptable to the Crown, on 21st January 2003 he changed his plea in respect of the first Count to one of guilty and was remanded for sentence at the hearing a month later. At the conclusion of the case he was sentenced to 2 years' imprisonment.

3. On 26th February 2003, he served notice of his intention to apply for leave to appeal on the grounds that the sentence was "manifestly excessive". On 27th March 2003, a single Judge of the Court of Appeal granted leave.

4. The Appellant is 21 years of age; he was born and brought up in Guernsey. He left school in 1996 without any qualifications and became employed in a variety of jobs, including labouring and tree planting. In February 2002 he took up employment with S & D Groundworks as a general labourer.

5. Part of that employment included work on Brecqhou, for which he was earning between £400 and £600 a week at the time of his arrest. At that time he was also living at home with his mother who suffers ill health.

6. He has one relevant previous conviction for possession of a controlled drug at the Guernsey Juvenile Court in June 1998, when he was fined £200.

7. On Saturday 27th April 2002, a team of Police Officers attended at the Appellant's home address, 22 Cour du Parc Flats, Charroterie, St. Peter Port. They were in possession of a search warrant. On the floor of the Appellant's bedroom, next to the foot of the bed, was a bucket, nearly full of water, in which was a cut-down plastic drinks bottle. The Officers recognised this as being a homemade device used for smoking drugs. At this point the Appellant said:

"Anything here is for my personal use."

8. A number of items associated with drug taking or drug dealing were subsequently discovered, including three cheese graters, three knives, two used or partially used tubes of cling film, and a set of electrical scales. The Appellant admitted that he was in possession of cannabis resin, and a considerable amount was recovered at the address in varying weights and in different places. Also found in a video cassette box was £2,075 cash and two pieces of paper containing a list written in blue ink with calculations written in black. It was apparent that these documents recorded drug deals.

9. The Appellant was arrested, conveyed to the Police Station and later interviewed. He asserted that the cannabis recovered was his, but that it was for his personal use. He said that he had never supplied drugs in his life and never would do so. In relation to the paraphernalia, he claimed that he had used some of the items for preparing cannabis for his own consumption but made no comment in relation to other items. He said that the cash found constituted his accumulated savings from the job on Brecqhou, but declined to comment on the writing on the two sheets of paper that were found in the video cassette box.

10. In total the cannabis recovered weighed 70.8 grams, having a street value of between approximately £500 and £640 in Guernsey, based on a price of between £7 and £9 per gram.

11. An investigation was carried out under the provisions of the Drug Trafficking (Bailiwick of Guernsey) Law 2000. The conclusions of the Investigating Officer were that the Appellant had benefited from drug trafficking in the amount of £8,550 and that the sum which might be realised under a confiscation order was £2,137. The Royal Court made an order in the latter sum.

12. Advocate Baudains submitted to us that the Royal Court adopted the wrong approach to the sentence in this case. He suggested that an analysis of the law reveals that the Court should have had little, if any, regard to the drug trafficking report when considering the appropriate sentence. Secondly, he asserted that it is plain that the report led the Court to adopt a graver view of the nature of the drug dealing than that to which the Appellant pleaded and that to which any reasonable finding of fact on the admissible material would justify.

13. We deal first with the law. There are three principal authorities in this area, all from the mainland jurisdiction. R. v. Bragison (1988) 10 Cr. App. Rep. (S.) page 258; R. v. Harper (1989) 11 Cr. App. Rep. (S.) page 240; and R. v. Saunders (1990) 12 Cr. App. Rep. page 344. Harper and Saunders were approved and followed in R. v. Thompson and Smith (1997) 1 Cr. App. Rep. (S.) page 209. Principles relevant to the argument advanced by Mr. Baudains can readily be distilled from these cases.

14. It is axiomatic that a Court cannot properly sentence an offender for offences of which he has not been convicted or which he has not asked to have taken into consideration. However, a Court plainly is entitled to take into account, by way of example and relevant to the instant case, the degree of professionalism with which the offence has been carried out, whether it is a one-off offence or not, whether it involved a degree of planning or was committed without thought or a consideration for its effect, and whether it involved others or affected the offender alone.

15. In cases where a drug trafficking report exists, the authorities to which we have referred reveal that the Court is entitled to have regard to such a report even if the report contains material which was not adduced at trial or which would have been inadmissible at trial, see Bragison (Woolf LCJ, McCullough and Auld, JJ) and Harper, (Russell LJ, Farquharson and Brooke JJ). However, the Court should bear in mind in such a situation that the standard of proof inherent in the compilation of the report is limited to a civil standard, whereas an offender should always be sentenced on the basis of the criminal standard.

16. Any admissions by the offender can be considered in this context:

> *"It would be absurd to say that if in the course of the Drug Trafficking Act investigation the defendant, for example, admitted extensive drug trafficking, the sentencing Judge should entirely disregard that in determining the appropriate sentence"* per Hutchinson J, in Saunders."

17. In the instant case the evidence used to determine the benefit, as defined by Section 4(1) of the Drug Trafficking (Bailiwick of Guernsey) Law 2000 and to recommend the amount to be confiscated under Section 5(3), was the very evidence used by the Prosecution to justify a charge of possession with intent to supply and which caused the Prosecution to decline to accept the Appellant's plea to simple possession. Moreover, the only additional piece of evidence adduced in the report, not available in the trial papers, consisted of an admission by the Appellant to the author of the report that the entries on the two pieces of paper did indeed relate to deals in cannabis which he had made with friends in exchange for money. In interview with Police after his arrest he had declined to comment on those entries.

18. It follows that in our view the Court was entitled to take into account the contents of the report in its assessment of the nature and scale of the dealing represented by the Appellant's plea to possessing cannabis with intent to supply. This limb of Mr. Baudains' argument fails.

19. Mr. Baudains' second point has no greater merit. He contends that the Royal Court was influenced by the conclusion in the report that the Appellant had benefited in the amount of £8,550, a figure culled from one of the two sheets of paper found in the video cassette box. Mr. Baudains suggested that this figure provided the basis for what he asserted was the erroneous contention by the Bailiff in his sentencing remarks that:

> *"This activity was no small time dealing."*

20. There are a number of relevant passages in the hearing of 21st February 2003. We refer in particular to paragraph 10 C - D, a passage shortly after Mr. Baudains began his mitigation when the Bailiff sought to clarify the approach which the Court should adopt:

> *"Here what we have, we have a dealer, as I understand it, somebody who the Prosecution are presenting that he deals, he sells, whether he sells to his friends, whether he sells to existing addictive persons or not, is something only within his peculiar knowledge, but we have to look at this and the fact that there is cash in his house to the extent of £2,000 indicates that he is not what you would call a small time dealer.* (Our emphasis) *On the other hand, he is not dealing in bars of cannabis, but one of the issues with a dealer is that if you catch him when his stock is high, when he has a large stock in place, well that's fortuitous from the point of view of showing the seriousness. If however, he's only got a small stock at the time, clearly it looks less serious, but you've got to look at the scale of the activity, rather than the actual quantity found in the shop at the time that the Police raided it, haven't you?"*

21. We next refer to the submission and, particularly, to the concession properly made by Mr. Baudains at page 11 C - D and E of the transcript:

> *"The basis of sentencing should be that Paul Reynolds had 70.8 grams of cannabis only in his possession with intent to supply. Mr. Reynolds was not a commercial dealer but would possibly have supplied the drug to one or more of a number of persons in a close circle of friends. The Prosecution had referred to a list of names and numbers where the words "received" and "owed" appeared. Mr. Reynolds knew everyone to whom he would have passed the drugs. It was the case that Mr. Reynolds would obtain the drug, divide it up and pass it on, and so supply in that sense."*

And then at E:

"Mr. Reynolds stupidly took on the role of being the person who would obtain the cannabis and distribute it."

22. We also refer to the response which the Bailiff made to the submission that the Court should limit its attention strictly to the 70.8 grams of drugs for the purposes of sentencing, see page 15 C - D:

"…you're saying we shouldn't take any notice of the quantity of the money in his possession, but I think what we are entitled to look at is the fact that, forgetting about the confiscation order, here is a man found in possession of what is not a large amount of cannabis, but also in possession of an unexplained sum of money, which is in his bedroom, which rather indicates that he may have been earning money from the sale of drugs, so even if we weren't addressing our minds to drug trafficking or dealing with this before the days of drug trafficking, we would have got that as part of the snap shot from the Police raid."

23. And we refer finally to the clear warning which the Bailiff gave to himself and to the Jurats about the relevance of the drug trafficking investigation report in this case, see page 17 E - H:

"BAILIFF: I think I will go through that with the Jurats again, that section, but I think that's the basis on which we've got to approach it.

ADVOCATE BAUDAINS: Sir, I'd also just point out in the drug trafficking report, it refers to a very large sum of money, in excess of £8,000 as being an assumption reached under the provisions of the Drug Trafficking Law, again sir, when it comes to sentencing, it's my submission that-

BAILIFF: You can't just take that in and sentence on that basis.

ADVOCATE BAUDAINS: That's my submission sir, yes.

BAILIFF: It's the level, it's the kind of picture we get of the level of activity here.

ADVOCATE BAUDAINS: Thank you sir."

24. Accordingly we conclude:

1. The Royal Court took care to utilise the report and the evidence in the case for the purposes of assessing the nature and scale of the drug dealing.

2. The Court put itself on notice to avoid the temptation to extrapolate from the figure of £8,550 a mathematical formulae which might represent the extent of that dealing and to seek to assess the total amount of cannabis which might have passed through the Appellant's hands.

3. The Court took into account, as it was entitled to do, all the evidence in the trial, which evidence also founded the conclusions of the drug trafficking investigation report.

4. Insofar as the Court was assisted by the additional evidence of the Appellant's admission to the author of the report, and insofar as that admission added to the inferences which could be drawn from the two documents, the Court was entitled to consider such material. Since the material was indeed an admission by the Appellant, the criminal burden of proof was satisfied and there was no requirement on the Court to hold a Newton Hearing, see McNaulty 15 Cr. App. Rep. (S.) page 606.

5. The Court's conclusion that the activity did not constitute small scale dealing was predicted and explained by the Bailiff in the passage cited, no exception being taken by Mr. Baudains at the relevant time.

25. On the evidence before the Court, the phrase *"No small scale dealing"* was, in our judgment, not inappropriate to describe the nature and scale of the dealing in this case.

26. Advocate Baudains makes two further submissions.

First, he says the sentence was manifestly excessive and criticises the starting point of 4 years. In justification of this assertion he provided us with a short summary of a case in this jurisdiction The Law Officers of the Crown v. John McGoff and asked us to compare that case to this. We are not inclined to accept his invitation. He has not furnished us with a transcript of the case, which was, in any event, a decision at first instance. This Court has repeatedly deprecated the value of comparing individual cases in the absence of a full understanding of the facts, especially where the invitation to compare is limited to a single case, which by definition can reveal no trend or pattern, which might well have turned on its own particular facts, which might not be consistent with the guideline cases.

Secondly, Advocate Baudains invites out attention to the R. v. Ollerenshaw, (1998) Crim. LR 515 . In that case the Vice President of the Court of Appeal (Criminal Division), said that where a Court is considering a comparatively short period of custody *"of about 12 months or less"* it should generally ask itself, particularly where the offender has not previously served a period in custody, whether an even shorter period might be equally effective to protect the interests of the public and to punish and deter the offender. It is clear that Rose, LJ, was reflecting the Courts' anxiety, prevalent in England in 1998 no less than today, that the problem of the over-crowding of prisons on the mainland should result in appropriate cases in a reduction from the usual sentence to mitigate the practical difficulties caused by the high prison population.

27. We are not attracted by a comparison of the public mischief created by the evasion of the duty on alcohol and tobacco, and possession with intent to supply a Class B drug. In Ollerenshaw the offence was one for which the maximum sentence is 7 years imprisonment. The maximum sentence for the offence with which this Appellant was charged was life imprisonment. Furthermore, the sentence passed in Ollerenshaw was one of 12 months imprisonment, reduced to 9 months. The sentence passed by the Royal Court in this case was twice as long as that sentence and we do not accept that it is appropriate to include this sentence within the embrace of a period of custody *"of about 12 months or less."*

28. Finally, although the prison here may face practical problems similar to those envisaged by the Vice President, this is not the occasion, nor the type of case, in which this Court will be tempted to resolve any such difficulties in this jurisdiction by borrowing a solution from another, without some evidence of the nature and extent of those difficulties and the likely impact of reduced sentences on those difficulties, and if so, for which offences. Courts of law in any jurisdiction should be slow artificially to reduce sentences, otherwise appropriate, in order to solve social problems caused by circumstances outside its control and within the responsibility of the executive.

29. Lastly, Advocate Baudains submits that the 50% discount from the starting point, which resulted in this 2 year sentence, was insufficient to reflect all the points in mitigation which Mr. Baudains carefully tabulated before the Royal Court, as he tabulated them before us. We do not think it necessary to lengthen this judgment by listing them here. They are itemised in the sentencing remarks of the Bailiff, and were apparently treated with as much attention and concern by the Royal Court as they received at our hands. We have some real sympathy for this Appellant, and particularly for his mother, who is far from well, and in respect of whom we have read and considered an up-to-date medical report, prepared by Dr. Wilson.

30. We were also concerned about the delay between the offence and final determination. The sequence of dates is as follows:

27th April 2002	-	arrest
8th October 2002	-	committal
9th December 2002	-	plea and directions hearing, plea to Count 2
20th January 2003	-	plea and directions hearing, plea to Count 1
21st February 2003	-	sentence.

31. It should be remembered that a long wait to determine punishment for a serious offence bears heavily on an offender, particularly a young person who has never previously served a sentence of imprisonment. We express the hope that in future such a time frame can be significantly shortened, particularly the period between arrest and committal. It is difficult to justify a 5½ month delay between these events, particularly in such a case as this, in which the compilation of evidence was straightforward.

32. We have had to consider whether the 50% reduction from the starting point was the right reduction. We have carefully considered whether we should increase it. We have read the Bailiff's sentencing remarks. It is clear that he took into account every point available to the Appellant in mitigation and was as anxious as this Court about the 10 month delay, which he found to be unjustifiable by a factor of at least 4 months.

33. We have concluded that we cannot fault the sentence passed, which must therefore stand, and this appeal must be dismissed.

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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 27th May 2003

