

Judgment 48/2003

**Fanzisai Andrew Peter Zvirawa
v Law Officers of the Crown
Court of Appeal
(Criminal Appeal 306)
25th September, 2003**

Criminal Law – sentence – appeal to Court of Appeal – importation of Class B drugs – degree of criminality more relevant than amount of drugs imported – appropriate starting point.

IN THE COURT OF APPEAL OF GUERNSEY

Criminal Division

The 25th day of September, 2003 before Richard Charles Southwell, Q.C., Presiding, Hon Michael Jacob Beloff, Q. C., and Peter David Smith, Q. C.

THE LAW OFFICERS OF THE CROWN

V.

FANZISAI ANDREW PETER ZVIRAWA

Appellant

On the application of the Appellant for leave to appeal from the sentence imposed on him by the Royal Court on 23rd May, 2003;

THE COURT, having heard Advocates P. T. R. Ferbrache and G. D. McKerrell for the Appellant and the Crown respectively, thereon, GRANTED leave to appeal and ALLOWED the appeal to the extent that the sentence of six years' imprisonment was set aside and replaced by a sentence of five years' imprisonment, to run from 5th April, 2002.

K. H. TOUGH
Registrar of the Court of Appeal

OFFICIAL TRANSCRIPT

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THURSDAY 25TH SEPTEMBER 2003

COURT OF APPEAL

Before

Richard Charles Southwell, Esq., QC; presiding
Hon. Michael Jacob Beloff, Esq., MA QC
Peter David Smith, Esq., QC

FANZISAI ANDREW PETER ZVIRAWA
(Criminal Appeal No. 306)

Judgment delivered by Peter David Smith, Esq., QC

SMITH JA: The judgment I am about to deliver is the judgment of the Court.

1. On 23rd May 2003 the Applicant was sentenced by the Royal Court (the Bailiff presiding) to six years imprisonment on one count of being concerned in the fraudulent evasion of the prohibition on the importation of amphetamine sulphate, a Class B controlled drug. Amphetamine sulphate is colloquially known as “speed.”
2. On 6th October 2001, one Tessa Eileen Francis arrived at Guernsey Airport where she was arrested. In her holdall a package was found containing 933.6 grams of damp powder. After drying it weighed 445.96 grams and on analysis was found to contain amphetamine sulphate of 80% strength. At the time of the offence the street price of speed in Guernsey was between £15 and £20 per gram, so that 445.96 grams would have had a value of between £6,689.40 and £8,919.20. However, the high purity of the amphetamine sulphate would have enabled it to have been “cut” (i.e. mixed with another substance or substances) to produce a street sale value of between £28,105.10 and £37,473.47.
3. According to Tessa Francis prior to her travelling to Guernsey she had met a man in London she knew as “Peter” through a mutual friend. This man was the Applicant. Francis alleged that he asked her if she wished to make some money involving drugs. It is not known whether the Applicant approached Francis of his own volition or whether he was acting on instructions from someone else.
4. On the day she travelled to Guernsey Francis was telephoned by the Applicant on her mobile telephone. He asked her to travel to the Island and she knew that this would involve carrying drugs. They met twice that day. On the second occasion the Applicant was accompanied by another man. Francis was driven to her home address where she packed a bag she had taken from the back seat of the car. The bag already contained the drugs and was the holdall found in Francis’s possession in Guernsey the same day.
5. Francis travelled with the Applicant and the other man to Gatwick Airport. On the way they stopped at a restaurant and there she was told what airline and hotel to book. It was principally the other person who gave her the instructions but the Applicant was present when they were given and he provided Francis with an envelope on which she noted details of her travel. Arrangements were made to keep in touch with the two men. She was to telephone the Applicant and was provided with the telephone number. She was given £200.

6. The Applicant's fingerprint was found on the envelope that Francis alleged he had given to her. An analysis was carried out on the mobile telephone used by Francis; this revealed that she had called and received a call from a number stored under the name "Peter" prior to her arrest. The name and telephone number of the mutual friend who had introduced Francis to the Applicant were found stored in a mobile telephone found at the Applicant's home in London.
7. The Applicant was arrested in London on 5th April 2002. He was brought to Guernsey but, when interviewed, did not admit his involvement. He exercised his right to the old style Committal proceedings, at which Francis attended and identified him as "Peter." He entered a plea of guilty to the offence before the Royal Court on 1st May 2003.
8. In his plea in mitigation before the Royal Court, Advocate P.T.R. Ferbrache, who appeared also before us on the Applicant's behalf, asserted that the offence was a one-off as far as the Applicant was concerned. He had been approached by an acquaintance involved in illegal drug importation. It was alleged that the mutual friend who introduced Francis to the Applicant had heard, quite independently of the Applicant, the possibility of a drug run being made and raised this with the Applicant in the course of a telephone conversation. It was the mutual friend who indicated that Francis might well be amenable to being a courier. When it came to making the arrangements for the importation the Applicant's role was simply to be the contact. He received only £200 for his part in the enterprise.
9. As to the Applicant's personal circumstances, the attention of the Royal Court was drawn to his age (24 years), his previous good character, the fact that he has a long-term partner who gave birth to the Applicant's son after his arrest, the support he is receiving from his family and his regular employment. A number of impressive references from distinguished people were produced testifying, among other things, to the Applicant's respectable background and his involvement with a HIV charity in Zimbabwe. A number of authorities were opened to the Royal Court.
10. In sentencing the Applicant the Royal Court took account of his guilty plea but pointed out that it had been tendered extremely late and only after Francis had had to give evidence against him at the Committal proceedings. It adverted to the Applicant's age, his lack of previous convictions, the references and the support of his parents. As to the Applicant's role in the offence, it referred to the Applicant's recruitment of Francis (whom it described as "a vulnerable young girl"), his active participation in the arrangements for the collection of the drugs by her and his journeying to the airport with her. Reference was also made to the Applicant's involvement in the arrangements for Francis's stay in Guernsey.
11. The Royal Court took the view that the Applicant's level of criminality was more relevant than the amount of drug imported. Clearly, it viewed the Applicant's role as significantly greater than that of Francis as it took a starting point of 9 years imprisonment, whereas in Francis's case 7 years had been chosen. A discount of one quarter was allowed for the guilty plea and, taking account of the other mitigating factors, a total of one-third was deducted to produce the sentence of 6 years imprisonment.
12. In support of the application for leave to appeal Advocate Ferbrache reiterated the arguments as to the Applicant's role in the importation contending that although it was not that of a courier it was, nonetheless, relatively minor. Although we were reminded of all the mitigating factors, including the plea of guilty, the appropriateness of the discount of one-third allowed by the Royal Court was not disputed. What was disputed was the starting point chosen by the Royal Court. Mr. Ferbrache contended that the correct starting point would be 6 years imprisonment.
13. Mr. Ferbrache sought to support this contention by means of an analysis of a number of authorities. However, it seems to us that consideration of the guidelines case of Oren (1994) 18. GLJ 13, Royal Court, is sufficient to dispose of this application (the Applicant having committed the offence prior to the Court of Appeal guidelines case of Richards et al (17th April 2002, Royal Court).

14. In Oren a range of 2½ years to 5 years imprisonment was laid down by the Royal Court for trafficking in Class B drugs, the point to be chosen within the range being dependent on amount and value. Furthermore, it was indicated that those involved in the organisation of importation and distribution of drugs in Guernsey without necessarily exposing themselves to the danger of actual possession or physical importation could expect more substantial sentences.
15. What was described as the “starting point” in Oren took into account a plea of guilty. However, this approach was subsequently altered so that, by the time of the commission of the offence by the Applicant in October 2001, the practice was and remains to calculate the starting point on the assumption that the offender had been convicted, having pleaded not guilty, and after a full trial (see Richards et al). On this basis, as was pointed out by the Royal Court in its Revised Sentencing Guidelines of the Royal Court (see Westmore Cr. App. 283) issued on 11th April 2002 (which were superseded by the guidelines laid down in the following month in Richards et al), the Oren starting point range of 2½ to 5 years would fall to be uplifted to take account of the discount of a quarter to one third conventionally allowed for a plea of guilty. Thus, the relevant Oren range would become approximately 3¼ years to 7½ years.
16. The application of the Oren starting point range, as revised, to the instant case is complicated by the fact that by reason of its purity the amphetamine sulphate imported could have been “cut” and, therefore, sold at a much higher price than its uncut weight would have commanded. This, in our view, would dictate the adoption of a starting point towards the upper end of the range. Moreover, the role played by the Applicant in the importation would meet the criteria set out in Oren for the imposition of a more substantial sentence.
17. As to that role, it is clear that although it was more than that of Francis, the courier, it appears to have been rather less than that of the other person, to whom we have referred, who gave her the instructions.
18. Inevitably it is not possible to calibrate role mathematically and uplift scientifically the period of imprisonment calculated on the basis of amount. This process must remain a matter of judgment based on careful consideration of the relevant factors in each individual case.
19. In the instant case the Royal Court chose 9 years as the starting point. In our judgment applying, as we must, the Oren guidelines, this starting point appears to have been too high. Neither the amount of drugs imported nor the Applicant’s role, nor the two taken together, are such as to justify the choice of a starting point of 18 months above the Oren maximum based on quantity. In our judgment the appropriate starting point was 7½ years imprisonment, and allowing one third discount for mitigating factors the appropriate sentence would have been one of 5 years.
20. The logic of our conclusion as to the starting point in the instant case is that the starting point chosen in respect of Francis - 7 years - was too high also. Although this is so, we would point out that we have carefully considered the sentencing remarks of the Deputy Bailiff in that case and that, in our judgment, the end result after mitigation, a sentence of 3 years imprisonment seems to have been about right.
21. For the reasons stated we grant leave to appeal. We have been requested on the Applicant’s behalf that in that eventuality we should treat the application for leave as the substantive appeal. This we do and substitute a sentence of 5 years imprisonment.

ADVOCATE PETER FERBRACHE: Thank you sir.

SOUTHWELL, JA: Thank you. There’s nothing else to be said, Mr. Ferbrache?

ADVOCATE PETER FERBRACHE: No sir.

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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
Thursday 9th October 2003