

**Judgment 21/2013**

**Dean John Hardy v Law Officers of the  
Crown  
Court of Appeal Criminal Division  
Case No 449  
11<sup>th</sup> July, 2013**

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**Appeal against conviction for the importation of methanone and application for leave to appeal  
against sentence.**

**Final Judgment  
11.07.2013**

**IN THE COURT OF APPEAL OF GUERNSEY**

**CRIMINAL DIVISION**

**Appeal No. 449**

**11<sup>th</sup> July 2013**

**Before: James Walker McNeill QC (Presiding)  
Sir Hugh Bennett  
Sir David Calvert-Smith**

**Between: DEAN JOHN HARDY (Appellant)**

**-v-**

**LAW OFFICERS OF THE CROWN (Respondent)**

**On appeal against Conviction and application for  
leave to appeal against Sentence**

**Advocate A M Merrien appeared for the Appellant  
Crown Advocate R Calderwood for the Respondent**

**Calvert-Smith, JA**

**This is the Judgment of the Court**

1. On 21<sup>st</sup> December 2012 this appellant was convicted at the Royal Court, before Judge Finch and 9 Jurats, by majority verdict of 6 to 3, of being knowingly concerned in the fraudulent evasion of the prohibition on importation of (4-methyl-1-naphthyl-1-pentylindole-3-y1) methanone also known as JWH-122 (by which name it will be described elsewhere in this judgment).

2. He was sentenced on 18<sup>th</sup> February 2013 to 6 and a half years imprisonment. He now appeals against conviction and applies for leave to appeal against sentence, that latter application having been referred to the court by the single judge.
3. The facts alleged by the Crown were comparatively simple although it will be necessary when dealing with the grounds of appeal to go into some detail. On 9th June 2011 the appellant ordered a package to be sent to him at his home address via the internet. It arrived in Guernsey on 17<sup>th</sup> June and was seized by the Guernsey Border Agency at the Post Office the same day, having been sent from abroad. Its contents were analysed and found to contain the prohibited drug JWH-122. The appellant did not dispute ordering the package but maintained to the police and at his trial that at the time he ordered it he believed he was ordering fertiliser for one or more bonsai trees. The majority of Jurats disbelieved his account.
4. Somewhat surprisingly the trial lasted 5 days. The evidential issues for the Jurats to consider fell into 2 categories. No point of law or procedure has been raised on the appeal.

### Continuity

5. Had the prosecution proved to the criminal standard that the contents of the package analysed and found to be JWH-122 were the same contents as had been in the package seized on 17<sup>th</sup> June? In his final speech Advocate Merrien who represented him at trial and appeared for him before us made, in summary, the following points:
  - i. There were inconsistencies in the evidence of the various witnesses through whose hands the package passed on its way to the laboratory such that the court could not be sure that it was the same package. In particular,
    - The substance exhibited was not the same colour, so the appellant claimed in evidence, as the substance he had received when he received an earlier package.
    - There were inconsistencies in the evidence of officers as to the number of bags used to bag the exhibit.
    - There was a possibility that, since the package had been through a number of hands following its initial seizure until its submission to the laboratory for analysis, it may have been mistakenly replaced by another.
  - ii. However, in closing this part of his case Advocate Merrien said:

*“Let us say that may create some questions. You may decide it makes no difference to the contents at the end of the day, but it is not right of the Prosecution to say the only issue is whether or not the powder was yellow. The wrappings, who cut the silver bag, was it in a single bag, was it in a double bag, if it was in a single bag where has the other bag come from, why is it the lab says it was double wrapped when the Customs say it wasn't? Why do we have these differences in the evidence?”*

*The purpose of recording exhibit numbers is to ensure that the evidence remains intact and at each stage everyone knows exactly what is moving from one place to another..... So was Mr Hardy right to question what was happening to the exhibit? Well maybe so.”*

6. The grounds of appeal ask the Court to look at the case “in the round”, and, having done so, to declare the conviction unsafe. Advocate Merrien asked us to consider the points he was able to make on continuity in considering the overall safety of the conviction.
7. We have considered the submissions on continuity. In our judgment it was open to the Jurats to conclude that they were sure that the package analysed was indeed the package received at the Post Office and therefore the package ordered by the appellant. Indeed neither in this court nor, as we have indicated, in the court below, did Advocate Merrien suggest otherwise.

### **Circumstantial evidence**

8. This in essence is the ground of appeal advanced by Advocate Merrien. In his summing up the Judge said:

*“Circumstantial evidence can be powerful evidence but it is important to examine it with care and consider whether the evidence upon which the Prosecution relies in proof of its case is reliable and whether it does prove guilt.*

*Furthermore before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy a prosecution case:*

*“It is no derogation of evidence to say that it is circumstantial”.*

*It’s a comment made in the English case of Taylor 1928. Circumstantial evidence may be highly probative and even compelling evidence on what happened on a particular occasion. Indeed, so long as the possibility of fabrication can be discounted, circumstantial evidence may be more reliable than direct testimony.*

*As a general rule, the value of circumstantial evidence lies in its cumulative effect. So while a single item of circumstantial evidence may only slightly increase the likelihood a defendant is guilty, several items taken together may carry enough probative force to produce a conviction.*

*But it is also necessary to be sure that there are no other co-existing circumstances that would weaken or destroy the inference.*

*Teper v R 1952 Privy Council, Lord Normand.*

*A defendant should not be convicted on the basis of a cumulative inference drawn from circumstantial evidence if an alternative inference could be drawn which would be consistent with the defendant being not guilty.*

*From paragraph 1.18 of Blackstone current edition, Exall 1861:*

*“One strand of the cord might be insufficient to sustain the weight but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence. There may be a combination of circumstances no one of which would raise a reasonable conviction or more than a mere suspicion, but the whole taken together may create a strong conclusion of guilt, that is with as much certainty as human affairs can require or admit of.”*

*Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence and mere speculation. Speculation in a case amounts to no more than guessing or making up theories without good evidence to support them and neither the Prosecution nor the Defence nor you should do that.*

*I stress that here it's most important: there must be no speculation in your considerations."*

No complaint is or could be made of this careful direction.

What is said is that the circumstantial evidence in this case was not such that a reasonable jury could have convicted upon it.

9. What was the circumstantial evidence which pointed towards guilty knowledge and away from the arrival of the prohibited drug being a mistake? In summary:
  - a. The appellant had ordered the package which was addressed to him at his address. Although mistakes are possible, those who receive orders do not as a general rule send something quite different in fulfilment of them.
  - b. The cost of the package, \$940.50, pointed towards the package being a prohibited substance and away from its being a fertiliser for bonsai trees. The most expensive bonsai fertiliser costs *circa* 2.5p per gram. This substance cost nearly £6 per gram and was therefore *circa* 240 times as expensive.
  - c. There was no evidence, following his arrest, of the order of the package on the appellant's computer. He claimed that he had ordered it on that computer but the Crown asked the court to infer that that he had deliberately ordered it on another one so as to leave material suggesting an interest in bonsai trees on his computer but to conceal the order for the prohibited drug.
  - d. The appellant had already ordered and paid \$209 for another package on 22<sup>nd</sup> May 2012. The following day he bought a bonsai tree for £18.99. The expenditure of \$209 less than three weeks before the second order on 9<sup>th</sup> June pointed away from it having been payment for fertiliser and towards it being a prohibited drug. In addition to pointing to the high cost (for fertiliser) the Jurats were invited by the prosecution to infer that the first order had been a "test" order.
  - e. There were no instructions – surprising in such expensive purchases - with either package on how to use its contents.
  - f. At the time both sums were paid the appellant was unemployed and living on benefits.
  - g. The appellant only had one bonsai tree in his possession. That was in poor condition and stored (at least by the time of his 2<sup>nd</sup> interview in October) in a room with no light. Although in interview he said that he had ordered other trees, in evidence he said he had been given other trees by a friend whom he could not name, and whom he did not call as a witness.
  - h. There were searches on his computer for the prohibited substance JWH-018, a different but similar prohibited substance to that seized. The appellant's contention that someone else must have used his computer to make the searches because he was out at work was belied by his concession that he had been unemployed on the dates in question.
  - i. The appellant had no idea how much or how little fertiliser to use on his tree.

- j. When the appellant went to the Post Office to collect the package, he effectively “wrote off” the \$940 he had paid by failing either to fill in the form he was offered by the Post Office or by trying to reclaim, as he knew he have been entitled to do, his money from Paypal.
- k. Although the appellant said that there had been email correspondence between him and the seller, there were no such emails on his computer and he gave differing accounts as to how they may have disappeared.
- l. The coincidence of three facts.
  - a. The appellant ordered half a kilo of marshmallow leaf on 4<sup>th</sup> June. Marshmallow leaf, though used as a complementary medicine is also smoked on its own or mixed with prohibited drugs such as JWH-122.
  - b. The order for JWH-122 5 days later on 9<sup>th</sup> June.
  - c. The appellant volunteered in interview that the officers may find that he had searched for acetone on his laptop. Acetone is used to dissolve JWH-122 for use with ground marshmallow leaves.
10. The Crown case closed at 11.00 on 19<sup>th</sup> December. There was no submission of no case, and therefore, at first blush, an acceptance that the circumstantial evidence then before the court was sufficient for a jury properly to convict if they chose. Advocate Merrien submitted that too much should not be read into his failure to submit at that stage. In a case such as this, he contended, it would be important for the court to hear the defendant’s explanation on oath, rather than be confined to his answers to the police in interview. The only relevant defence evidence on this issue came from the appellant.
11. As is clear from the summary just set out, aspects of the case gained in strength because the evidence given by the appellant was either different from what he had said in interview or because it was on its face false. He called no other evidence as to fact.
12. In general, if a case is founded on circumstantial evidence fit to be left to a jury and those circumstances are still, in spite of the evidence of the defendant, available for the jury’s consideration as they were in this case, it will be rare indeed for an appellate court to quash a conviction.
13. In fact in our judgment the evidence was very strong. Wholly independent strands of it all pointed the same way. The case was of a type commonly encountered in the criminal courts, in which, in the absence of admissions, the evidence is bound to be circumstantial. Unsurprisingly no case of this type where prohibited drugs are received from abroad by post has been cited to us in which an appellate court whether here or elsewhere, has upheld an appeal solely on the ground that the evidence was insufficient for the conviction to be upheld.
14. The test to be applied on an appeal against conviction based solely on the strength of the evidence has been expressed in various ways. In *Law Officers of the Crown v Ogier & Le Noury* the Court of Appeal held that a verdict would only be set aside, absent a legal challenge, if it was “obviously and palpably wrong”.
15. Nothing in the written grounds, or in the helpful oral submissions of Advocate Merrien to us, persuades us that that threshold, in the absence of misdirection or other legal or procedural flaw, has been approached, let alone passed. The appeal against conviction is dismissed.

## Sentence

16. As we have said the applicant was sentenced on 6<sup>th</sup> February 2013 to 6 and a half years imprisonment. Additional orders not the subject of this application were made as to

destruction and forfeiture and for Compulsory Supervision for one quarter of the total sentence.

17. The applicant is now 34 years old. He has previous convictions. In addition to a large number of convictions for motoring offences, and a smaller number for theft, criminal damage, assault and a public order offence, on 13<sup>th</sup> October 2006 he was convicted of cultivation of cannabis and sentenced to 4 and a half years imprisonment. It is now clear – if there was any doubt as the result of *Hutchinson* Court of Appeal 10.2.03. – from *Ingram* Court of Appeal 10.8.05 (at paragraph 9) that a relevant previous conviction can and should affect the starting point for sentence.
18. There was no pre-sentence report, the applicant having refused to cooperate with an officer for that purpose.
19. There was little personal mitigation.
20. In his sentencing remarks the judge said:

*“The world of illegal drugs is changing at a fast rate. New compounds come to notice on a regular basis. When the Guernsey Court of Appeal laid down its binding guidelines in drug cases, complex compounds of this type were not known.*

*If we are dealing with Class B drugs in powder form, then the approach in cases such as Turner and Grunte applies. These set out that the band of sentences in respect of offences involving Class B powders should be two thirds of that laid down in Richards in respect of Class A powders. Hence, for the quantity range 50 – 100 grams, the band of sentences is 6 – 8 years here. Here the primary controlled substance under consideration is indeed powder, so we accept that these guidelines apply.*

*Your previous relevant and serious conviction goes to increase the starting point (as accepted by the Court of Appeal in the case of Ingram).*

*Taking everything into consideration, including the quantity, which is at the top of the band, we start today at 7 years imprisonment.”*

21. Advocate Merrien submits in summary that the Court applied the wrong “label” to this, comparatively new, Class B drug, and that this court should hold that JWH-122 should be treated in the same way as cannabis resin, rather than in the way other Class B drugs such as amphetamines or other Class B powders are treated.
22. Over the years since 1990 the Courts have considered the question of the proper sentencing framework in cases involving dangerous drugs. The following principles have emerged.
  - i. Importation for sale is to be treated in the same way as possession with intent to supply – *Petit* 1.10.1990.
  - ii. The range of sentences to be imposed may vary according to the prevalence or otherwise of drug use on the island. In *Oren* 24.8.94. the Deputy Bailiff suggested that sentences needed to be increased bearing in mind the increased use of drugs on the island.
  - iii. In *Westmore* 11.4.02. the Royal Court issued further guidelines. At paragraph 12 of the Guideline the Court stated:

*Previous convictions for drug trafficking and/or smuggling offences will continue potentially to be regarded as aggravating features justifying a higher starting point.*

- iv. In the same case at paragraph 19 the Court stated:

*It must be pointed out that the legislature views all Class A drugs with equal seriousness as it does all Class B drugs. It is not for this court to say that one particular type of drug is worse or more harmful than another, and therefore to lay down a different sentencing policy for those drugs.*

This principle was reiterated by the Court of Appeal in *Richards* 3.5.02. At paragraph 13 of his judgment Nutting JA stated:

*It is for the legislature to set sentencing policy in relation to different types of drugs. It is not for the courts to say that one particular type of drug within a class is worse or more harmful than another, or to lay down different sentencing policy for those drugs.*

- v. In *Richards* the Court made it clear that its guidelines replaced all previous guidelines so far as sentence ranges are concerned.
- vi. The guidelines in *Richards* were supplemented by the Royal Court in *Turner* later the same year. The Court set ranges of sentence equivalent to those set in *Richards* for cannabis resin for other Class B drugs in tablet or powder form.
- vii. The range of starting point for sentence for 20-100 grams of Class B drugs in powder form was set at 5-8 years and for 100-250 grams at 7-10 years.
- viii. In *Grunte* 15.12.05 the Court of Appeal revised the relevant guideline to one of 6-8 years.
- ix. In all these cases the Royal Court and Court of Appeal have stressed that the facts of the case and the role and background of the offender may be so important as to take an individual case above or below the ranges set in the cases.
23. In this case the quantity seized was almost exactly 100 grams. The unchallenged evidence of the expert witness Ms Falla was that JWH-122 would be used in a number of ways, all of which involved substantial dilution of it with other material. Particular methods are oral ingestion or smoking, either in a cigarette or mixed, after dissolution in acetone, with leaves such as marshmallow leaves. This latter method would involve, typically, mixing 2 grams of JWH-122 with 35 grams of leaf material. On that basis the expert indicated that some 1753.51 grams of herbal material ready for smoking would be produced. The price range was estimated to be between £25 and £30 a gram giving a value of between £43,000 and £52,000. No evidence was called either during the trial or during the sentencing hearing to rebut her conclusions. The overwhelming inference from the verdict was that this applicant was intending to make a considerable profit from his investment by becoming part of a business, whether on his own or with others, to sell the JWH-122 to customers on the street, in the same way that he had done or intended to do when cultivating what must have been commercial quantities of cannabis before October 2006.
24. Accordingly the Judge indicated in a preamble to the sentencing decision that he intended to treat the case as one falling into the range 6-8 years, being 2/3rds of the range for similar drugs of class A.

25. In mitigation Advocate Merrien asked the judge to set the lowest starting point he could. He did not in terms submit that the quantity of the drug in this case should be measured against the quantities set for cannabis resin in *Richards* to produce the correct sentencing range. In his skeleton argument developed for the appeal he asks the Court to consider that possibility.
26. JWH-122 is one of a number of synthetic drugs, as the judge said, which have appeared in the recent past. Such drugs are being created in large numbers. They come onto the market as “legal highs” until the authorities gather sufficient information to take action. Typically the action begins with regulation, and ends with criminalisation. So here.
27. In 2009 JWH-122, one of a number of synthetic cannabinoid receptor agonists originally created in the 1990s by JWHuffman and others in the USA and which bear his initials, was scheduled by the Import and Export of Goods (Control) (Guernsey) (Amendment No 2) Order 2009.
28. The following year JWH-122 and other synthetic cannabinoid receptor agonists became controlled drugs of Class B as the result of The Misuse of Drugs (Modification) Order 2010.
29. The quantity in this case was right at the top of the range and there was little mitigation. The judge selected 7 years as the appropriate starting point and as already noted passed a sentence of 6 and a half years.

As we have said, Advocate Merrien submitted to us that the Court should have equated the weight described by the expert to the same weight of cannabis resin. That equation would have produced a lower starting point between 3 and 6 years. He submits further that the “2/3rds” rule introduced by *Richards* as modified by *Turner* and *Grunte* is directed at amphetamines rather than drugs like this one whose make up and effects are similar to those of cannabis.

30. We have come to the following conclusions:
  - a. The proliferation of synthetic drugs and their classification within one or other of the classes A B and C does not allow for “sub-categorisation” by the courts. The principle, clearly stated in both *Westmore* and *Richards* remains valid.
  - b. Synthetic cannabinoids are indeed drugs in powder form.
  - c. Strict application of the guidelines in this case would have suggested a starting point above 8 years bearing in mind that,
    - i. The quantity was at the top of the range and
    - ii. The existence of a serious previous conviction for the cultivation of cannabis which had attracted a sentence of 4 and ½ years.
31. The sentence eventually passed was therefore well below that which such a strict application would have indicated.
32. If the weight were to be treated as falling within the lower range applicable to cannabis resin, the same 2 aggravating features would have suggested a starting point above 6 years.
33. On no basis therefore could it be suggested that the sentence actually passed was manifestly excessive so as to require the intervention of the court.
34. We decline to devise new guidelines to cover drugs which are now appearing and are classified in one or other class. All the authorities make it clear that the guidelines are just that, and that they are not straitjackets. The state of knowledge and opinion about classified

drugs is constantly changing and courts must be loyal to the decisions of the legislature in respect of those classifications. If the quantities used to smoke or ingest drugs, the ways in which those drugs are used, the vagaries of the illegal drugs market or other factors change, as they surely will, the courts must retain the flexibility to react to such changes on a case by case basis, or, if appropriate by fresh guidelines.

35. Accordingly this application for leave to appeal against sentence is refused.