Waterman v Law Officers
Court of Appeal
13th December 2016

JUDGMENT
51/2016

Dismissal of appeal against sentence imposed for supply.

IN THE COURT OF APPEAL

OF GUERNSEY

CRIMINAL DIVISION - APPEAL NO. 475

13th December 2016

Before:

John Martin QC Presiding
Sir David Calvert Smith
William Bailhache – Bailiff of Jersey

Between: **THOMAS DAVID WATERMAN**

Appellant

and

LAW OFFICERS OF THE CROWN

Respondents

Advocate S Maindonald represented the Appellant

Crown Advocate F Russell represented the Respondents

JUDGMENT

Calvert-Smith JA:

This is the judgment of the Court.

1. This is an appeal, with leave of the Bailiff of Guernsey sitting as a single judge of this Court, against a sentence of 9 years imprisonment passed on 29th July 2016 by the Royal Court (Judge Finch and 9 jurats) upon the appellant following his plea of guilty to an offence of being concerned in the supply to another of 11.485 kg of cannabis resin.

The facts

2. On 30th December 2015 a Suzuki Jeep driven by a man named Osborne was driven into a car park by the Grandes Rocques bus stop. Almost at once a Mercedes driven by the appellant drove into the car park and parked next to the Jeep. Osborne took a cardboard box from the back seat of his car and placed it on the back seat of the appellant's Mercedes. The two men returned to their vehicles and were arrested before they could leave the car park. The box contained 3 packages, each containing 40 bars of cannabis resin. These were the subject of Count 1 against the two men.

3. Osborne was in due course charged with two further offences arising from a search of his home. Approximately 38 kilograms of cannabis was found there together with a cannabis plant.

4. In interview the appellant claimed that he had been offered £5000, by someone in a public house he hardly knew, to look after approximately 5 kilograms of cannabis. He said he did not know Osborne although it was clearly Osborne with whom he spoke on the telephone to arrange the hand over. He pleaded guilty at the first opportunity before the Royal Court.

The sentence hearing

5. At the sentencing hearing the Court had the benefit, in addition to the prosecution opening and mitigation advanced by Advocate Maindonald, of the appellant's list of convictions, a probation report and two letters of support from members of his family.

6. The defendant has relevant previous convictions. On 13th November 2006 he was sentenced on his plea of guilty to 5 years imprisonment for an offence of importation of cannabis. On that occasion a Confiscation Order was made in the sum of £55,092.44. That order has been satisfied. On 13th August 2012 he was fined a total of £700 in respect of two offences of simple possession of cannabis.

7. The Probation Report stressed that apart from his propensity to use and be involved in commercial dealing with cannabis he is a law-abiding and constructive citizen. The officer was unable to put forward any justification for his having decided to re-offend after the experience of a long prison sentence for the same sort of offence.

8. The two letters – from a cousin, and an older family friend – referred to

    I. His care for his father who became seriously ill and then resident in a care home following an accident and for his mother who was deeply affected by the change in her circumstances.

II. His support for a cousin and his family following the tragic death of a child and his work to assist a charity set up following that bereavement.

9. In mitigation Advocate Maindonald relied upon a number of other matters which she suggested should reduce the inevitable prison sentence which would be passed. In summary she submitted that

    I. The appellant should receive the full discount for his early plea of guilty.
    II. The fact that on this occasion, unlike the earlier offence, he had not been assisting in adding to the stock of cannabis on the island but merely storing cannabis which was already on the island, meant that the offence was less serious.

10. Judge Finch, giving the judgment of the Court explained the sentence passed in summary as follows:

    I. Applying the tariffs set down in the guideline case of *Richards and Five Others v Law Officers of the Crown [2002] GLR 247* the starting point was 9-12 years for amounts between 10 and 30 kilograms.
    II. That starting point had to be adjusted upwards, also by reference to *Richards,* to reflect the fact of the previous conviction.
    III. The mitigation for plea had to be less than the full one third because the defendant had little alternative bearing in mind that the drugs had been put in his car in his presence and that of Guernsey Border Agency officers.
    IV. Accordingly the starting point would be 11 years and the sentence one of 9 years.

11. Osborne, who had no relevant previous convictions, was sentenced to a total of 10 years imprisonment which was reached by fixing a starting point of 15 years and reducing it by one third.

12. Confiscation proceedings in respect of both men are under weigh.

The Appeal

13. In her original Grounds of Appeal Advocate Maindonald relied on 4 grounds. In summary these were:

    I. The starting point was too high – the previous conviction should not have been used to increase it.
    II. The discount of about 18% from 11 to 9 years was too small.
    III. The previous conviction seems also to have been used to reduce the credit for plea.
    IV. Disparity with the sentence passed on Osborne, who was sentenced in connexion with a total of some 50kg of the drug as well as an offence of cultivation of cannabis.

14. In granting leave the single judge rejected Ground I. He did however grant leave to appeal on two bases:

    > *"Some disparity between the co-defendants in the reductions for mitigation is justified but the magnitude of the difference was perhaps not fully explained by the Royal Court. The Court may also have confused the situation in the eyes of the Applicant by referring to his lack of good character immediately after referring to Mitigation in their sentencing remarks: "he [Mr Osborne] is of good character which cannot be said for Mr*

> *Waterman", a statement which may have given the Applicant the impression that he was being awarded a reduced discount because of his previous bad character."* And
>
> *"….the Court's treatment of the mitigation applicable to each of the co-defendants was not explained as clearly as might be expected. For that reason, this may be a case where the function of the Court of Appeal will not be to apply the "manifestly excessive" test but of ensuring that all important and relevant factors have been taken …..into account by the sentencing court – quoting from paragraph 46 of the Court of Appeal's judgment in Falla and Falla v the Law Officers of the Crown 12 March 2013, Criminal Appeals No. 445 & 446,……"*

15. Following receipt of the single judge's decision Advocate Maindonald abandoned her first ground and focused instead on Grounds II-IV.

16. In support of Ground II she submitted that in spite of the circumstances in which he had come into possession of the drugs the appellant could have maintained a plea of Not Guilty and has thereby saved much time and expense by his guilty plea. There should therefore have been no or at any rate no substantial reduction of the normal one third discount for plea. In oral argument she conceded that a reduction to 25% could not have been criticized, but maintained that the actual reduction of about 18% from 11 to 9 years was too small.

17. As to Ground 3 she submitted that the lower reduction may have been result of the Court using the appellant's bad character twice.

18. As to Ground 4 she submitted that the difference of only one year between his sentence and that passed on Osborn failed properly to reflect the significant difference in culpability between the two.

Decision

Ground II

19. In *Richards* at [6] the court said,

> *"A guilty plea would always be a significant mitigating factor, even if a defendant had little alternative but to admit guilt. Generally a one third discount from the starting point would be appropriate, particularly if an early indication of a plea were given. The discount would be limited if there were no sensible alternative to a guilty plea, e.g. if the defendant were arrested in possession of the drug."*

20. In our judgment, despite Advocate Maindonald's well-argued submission, this appellant's case fell squarely within the principle enunciated in the last sentence quoted above from *Richards.* This defendant was indeed arrested in possession of a substantial quantity of cannabis resin worth in the region of £250,000 on the street in circumstances in which it was crystal clear that he was part of a significant drug dealing operation.

21. In *Falla and Falla* this Court, having considered *Richards* and the judgment of the Jersey Court of Appeal in *Harrison v Attorney General* [2004] 111, said that

"....the correct approach is that the sentencing court, having deducted the appropriate discount (if any) for a guilty plea from the starting point, should then proceed to consider whether any further discount should be made for personal mitigation.

22. As to that, there were the two letters to which we have referred, and the fact that in other respects the appellant is a law-abiding citizen. There is no evidence of remorse. The appellant clearly disapproves of the law forbidding the use and sale of cannabis and only regrets the fact that he was caught. We have therefore concluded that the court was entitled to reduce the normal one third discount for plea by a significant margin.

Ground III

23. As for Ground III, while, as the single judge rightly commented when giving leave to appeal, the way in which the sentencing remarks were phrased might have given the impression to the appellant that his bad character was being used twice, both to increase the starting point and to reduce the discount from it, the proper interpretation of the second reference to the appellant's bad character of those remarks is simply to indicate – correctly - that whereas the ultimate sentence of Osborne had to reflect his good character, that of the appellant could not.

Ground IV

24. This ground has given us, as it did the single judge, more to consider. Disparity of sentence is a hard argument to make good in particular if the sentence standing alone would be justified. As Advocate Maindonald put it, members of the appellant's family found it hard to understand that Osborne with more than four times the quantity of the drug in his possession only received one year longer than the appellant.

25. In this context the statement of principle, since adopted in cases before this Court, of Lawton LJ in *Fawcett (1983) 5 CAR (S) 381* poses the question which an appeal court should ask itself.

"....would right-thinking members of the public, with full knowledge of all the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice."

26. The first, and obvious, point to make with reference to this appeal is that the dictum is not one which is directed towards the family or friends of a defendant but to hypothetical objective observers with full knowledge of the case.

27. In *Bond,* Criminal Appeal 294 11th April 2003, this court, having adopted the dictum of Lawton LJ, went on to set out the sort of situations which may or may not constitute disparity such as to justify this court's intervention. In setting out 13 possible scenarios the court said at paragraph 9(x)

"there may be objectionable disparity in sentence where two offenders, whose culpability and personal circumstances are different, receive different sentences, but the difference in their sentences is insufficient to mark the differences in their culpability or personal circumstances;"

28. The fact that one defendant may have been treated over-leniently is not – unless the resulting disparity is very great – a reason for disturbing a proper sentence passed on another, thus creating two over-lenient sentences instead of one.

29. In our judgment, although Osborne would no doubt have been in difficulty raising a disparity argument himself had the appellant's sentence been a little lower, the difference in the sentences is not in itself such as to trigger the *Fawcett* principle.

30. In the result we have adopted the course suggested by the single judge in the paragraph quoted above and concluded that "all relevant and material factors were indeed taken into account".

31. We cannot say either that the sentence standing alone for this offence measured against the *Richards* guidelines and the sentence passed on the co-accused was manifestly excessive or wrong in principle, although we concur with the single judge in his comment that the way in which the Court enunciated its conclusions could perhaps have been clearer.

This appeal is therefore dismissed.