

Unlawful supply of Class A and B controlled drugs contrary to section 3 of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 and failure to comply with notices served under section 46 of the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003 to provide the passcodes to unlock a mobile telephone and a laptop

[2020]GRC029

**ROYAL COURT
FULL COURT**

27 May 2020

**Before: Richard James McMahon, Esq., Bailiff and:
Terry John Ferbrache, David Allan Grut, Jonathan Grenfell Hooley,
Steven John Morris, Peter Francis Gill, Stuart Michael Crisp,
Tina Jane Le Poidevin, Jurats.**

THE LAW OFFICERS OF THE CROWN

- v -

**Jonathan WELCH
and
Emily May BIRTWISTLE**

Crown Advocate C G Dunford appeared for the Crown

Advocate L C Roffey appeared for the First Defendant

Advocate S E Steel appeared for the Second Defendant

BAILIFF:

Background

Jonathan Welch and Emily Birtwistle, you have both pleaded guilty to Counts on the Indictment as follows:

Count 1 relates solely to Mr Welch, involving being concerned in the unlawful supply of MDMA, a Class A controlled drug, to another, contrary to section 3 of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974. The maximum penalty for this Count is life imprisonment.

Count 2 relates to you both, and involves being concerned in the unlawful supply of cannabis and cannabis resin, Class B controlled drugs, to another, again contrary to section 3 of the 1974 Law. The maximum penalty for this Count is 21 years' imprisonment.

Counts 3 and 4 relate solely to Mr Welch and involve failing to comply with notices served under section 46 of the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003 to provide the passcodes to unlock a mobile telephone and a laptop. The maximum penalty for each of these Counts, to which we will refer as "the RIPL offences", is two years' imprisonment.

Mr Welch also asks for six further offences to be taken into consideration as set out in the list provided. Items 1-4 were originally before the Magistrate's Court and pleas were entered. When all

the facts relating to Mr Welch's drug-dealing became clear it was agreed to put all these before the Royal Court, with his co-operation. We note that items 5 and 6, both simple cannabis possession offences, also originally before the Magistrate's Court, were committed whilst Mr Welch was on bail.

The drug-related offences on the Indictment came to light after a police officer detained someone with whom Mr Welch had been dealing, who was found to have cannabis on him and officers then went to Mr Welch's property to arrest him. Miss Birtwistle was also present and arrested at that time. Cannabis and other drug paraphernalia were seized. The amount involved was 48.38 grams, having a street value of between £917.80 and £1,452.40. Four MDMA tablets were also seized, having a street value of between £100 and £112. These figures, though, do not represent the totality of the drug dealing covered by the Indictment. Mr Welch's mobile telephone and laptop were seized as well. Following interviews in which you both maintained your right to silence, notices under the 2003 Law were served on Mr Welch, but he chose not to comply with them, being aware of what would be found.

Analysis of the devices was, however, capable of being undertaken, along with Miss Birtwistle's iPhone. Nothing was found on the laptop but, from the mobile telephones, as we have heard in some detail, evidence of a wider pattern of dealing has emerged. Although your dealing appears largely to have been to fund your own drug use, we are satisfied that the actual drugs found last April, support a conclusion that the amounts involved are just a portion of what can be regarded as the extent of your offending. The details stored on Miss Birtwistle's phone show that she was fully aware of the details of the cannabis dealing both of you were engaged in, although Mr Welch's ecstasy dealing was his sole venture.

Both of you are local people and, at the time of these offences, you were in a relationship, which has since ended. Neither of you has been employed recently. At the time of the offences, Mr Welch was 28 and Miss Birtwistle just 19, although Mr Welch has recently had a birthday. Mr Welch has previous convictions for public order and assault matters and has previously been sentenced to periods of custody. We treat Miss Birtwistle as being of previous good character.

Both of you have been on conditional bail since your arrests on 17 April 2019 and guilty pleas were entered on 13 February 2020.

Sentencing Considerations

The Court accepts that Mr Welch may have been dealing a small number, in relative terms, of MDMA tablets, but the approach the Court is to take when two different drugs are involved is covered by the guidelines that we are bound to follow from the 2002 case of *Richards*. At para. 12, it is explained that, in this type of case:

“... the court should assess the appropriate starting point in respect of each of the drugs and then determine a ‘total’ starting point, taking into account the overall quantity. Thereafter the mitigation will be applied to arrive at the actual sentences to be imposed. The court therefore provides for the total length of sentence by imposing a greater term of imprisonment than would otherwise have been imposed for the more serious of the two offences (if such can be identified) to run concurrently with the other sentences imposed. Consecutive sentences should not normally be imposed in such cases, since that may create a misleading impression that each offence is being sentenced more leniently than it is. The court must state in any such case both what the court considers to be the appropriate ‘total starting point’ and how it is arrived at.”

In respect of the Class A drug, MDMA, the lowest band of starting points is given at between 7 and 9 years' imprisonment. We find that Mr Welch falls into this band.

In respect of cannabis, the lowest band of starting points is for up to 2 kg, which we are also persuaded is the proper band for a starting point in respect of Count 2 of between 3 and 6 years' imprisonment.

As regards Mr Welch, we are satisfied that the custody threshold is clearly passed. Although the amount of drugs being supplied is unknown, we are prepared to regard Counts 1 and 2 as being at the lower end of each band and, when both Counts are considered, we increase the shortest period in the band for Class A drugs a little and take as the total starting point a sentence of 7½ years' imprisonment.

In respect of Miss Birtwistle, the Court is only considering an appropriate starting point on Count 2. Again, we find that the custody threshold has been passed, but are satisfied that your role in respect of this offence was one of lower culpability than Mr Welch's and this offence is also at the lower end of the range and that gives a starting point of 3 years' youth detention.

Reverting to Mr Welch, we also have to consider the two RIPL offences. Non-compliance with this type of notice is a serious matter and those who choose to obstruct the proper investigation of offences must be prepared to take the consequences. Ignoring, for a moment, that access was able to be gained to the mobile anyway, making it apparent why it was that Mr Welch was so reluctant to volunteer the information required, we proceed on the basis that these two offences are related to one another, and so apply the totality principle when considering the sentence they merit, but the fact that there were two notices means there is an aggravating factor here. Accordingly, we take a starting point of 15 months' imprisonment in respect of each.

Further, in Mr Welch's case, we regard the number of other offences he has asked to be taken into consideration as aggravating the offences on the Indictment. We regard the commission of further offences, after arrest for the offences on the Indictment, as demonstrating that he had not realised that his offending must end. We also note that there was yet another RIPL offence committed on a separate occasion and, of particular significance, that he had possession of an article with a blade, all of which add to the overall seriousness of this spate of offending and which we take into account before turning to the mitigation available to him.

Mitigation

The Court has the benefit of Probation Reports in respect of each of you. In relation to Mr Welch, we note that there is a high likelihood of you re-offending and that you are assessed as presenting a risk of serious harm to the public in certain situations. In relation to Miss Birtwistle, we note that there is a moderate risk of re-offending, but you are not assessed as posing a risk of serious harm to the public.

The Court has also listened to what your Advocates have said about you and on your behalves. We recognise that you have chosen to be habitual drug users and that your levels of dependency led you to dealing to support your habits. In Miss Birtwistle's case, we have taken into account that you are still young and that you have thrown away what was effectively your previous good character. The fact that Miss Birtwistle appears not yet to have abandoned use of cannabis is itself a cause of considerable concern – if nothing else, this should have been a wake-up call leading to total abstinence.

The Court gives each of you full credit for the guilty pleas you entered. We consider that Miss Birtwistle co-operated with the investigation more than Mr Welch did, although we bear in mind, in relation to the RIPL offences, that his non-compliance did not completely frustrate the overall investigation into what had been taking place.

We have read the letters provided on behalf of both of you and noted their contents. We recognise further that you have both expressed your remorse and are promising to keep out of trouble in the future, so lessons appear to have been learnt, albeit the hard way. We understand both of you have had various problems in your lives, including mental health issues, and that you were seeking different means to address them and we have also borne in mind that these matters have been hanging over your heads for longer than has been ideal.

Sentence

Drugs users depend on someone being prepared to supply them. Without willing dealers, the supply chain would dry up and the misery caused by this type of offending would reduce or even disappear. Whilst there are different scales of dealing, and your activities may be towards the lower end, dealers at every level play an important part in the drug culture operating in this Bailiwick. These were not isolated acts of dealing but a well-organised and documented arrangement indicative of engaging in dealing to make money as if a small business enterprise; the period covered by the Indictment runs to several months. The fact that the proceeds were then used to provide each of you with essentially drugs, at no additional cost to yourselves does not disguise that this was being done for your personal gain. The reasons you have given for turning to drug use in the first place are, in our view, unexceptional – self-medication is not any form of justification – and serves only to demonstrate that each of you lacked the will to address your problems as any law-abiding citizen would. We take the view that the sentences handed down by this Court can, and should, continue to include an element of deterrence for others. We take a particularly dim view of anyone supplying Class A drugs.

Mr Welch, you have come to the Court today expecting to be sent to Prison and we are satisfied that only an immediate custodial sentence is appropriate for your offences, having regard to the overall criminality in which you have engaged. As your Advocate pointed out, we certainly cannot follow the recommendation in the Probation Report of a suspended sentence supervision order.

Starting with the most serious offence – the MDMA in Count 1 – the sentence we impose is one of 4 years' imprisonment.

In respect of Count 2 (the cannabis), we impose a sentence of 2 years' imprisonment to run concurrently with the sentence on Count 1.

As we have said, the RIPL offences are serious in their own right and each deserves a term of imprisonment, in your case to be added to the drug-related Counts. In respect of Counts 3 and 4, we sentence you to 9 months' imprisonment on each Count, to run concurrently to one another but to run consecutively to the sentences on Counts 1 and 2. That makes a total sentence of 4 years and 9 months' imprisonment, running from today, where the 6 other offences have been taken into consideration.

In accordance with section 1 of the Criminal Justice (Supervision of Offenders) (Bailiwick of Guernsey) Law, 2004, upon release (or completion of any parole period if applicable), you will be subject to supervision by the Probation Service for a period equal to one quarter of the total sentence or the period you would have served had you not received remission, whichever is less. If you fail to comply with the conditions of the supervision, you will be liable to further imprisonment, a fine, or both.

The exercise in respect of Miss Birtwistle recognises that your participation in the supplying of cannabis reflected in Count 2 was, in our view, an active one. We are persuaded that your willingness

to participate arose from the nature of your relationship with Mr Welch. Accordingly, even when taking into account your age and your previous good character, what you have done is, we find, so serious that a non-custodial sentence cannot be justified, meaning that, in accordance with the Criminal Justice (Youth Detention) (Bailiwick of Guernsey) Law, 1990, a sentence of youth detention is capable of being imposed today.

We have then gone on to consider whether we should impose a sentence of immediate custody or find an alternative disposal, especially where community service is not recommended by the probation officer because of the concerns about the likelihood of you breaching any such order.

We have decided that your youth means you should be given a second chance to stay out of trouble. We have further considered your lesser role in respect of this offence. We are satisfied that you will benefit from some form of statutory intervention whilst remaining in the community. The length of sentence of youth detention we have reached enables us to impose the suspended sentence supervision order recommended by the Probation officer. We find that there is a realistic prospect that you will mature sufficiently during the currency of the order to make sure that you really have learnt your lesson and so can be rehabilitated without being sent to Les Nicolles. In future, you need to think about the impact of your actions on others before you take them, and not only afterwards. You should realise that this is not a soft option for you because if you do commit further offences the consequences for you are likely to be less palatable and your ongoing use of controlled drugs places you at greater risk of committing further offences than if you were to give up completely, as you now should.

In respect of Count 2, we are imposing a sentence of 18 months' youth detention, the effect of which will be suspended for 2 years, with the supervision period being the 18 months period recommended in the Probation officer's report. This means that for those 18 months you will be under the supervision of a Probation officer and will be required to keep in touch with the person supervising you in accordance with the instructions you are given by him or her and must notify any change of address.

You will not, however, have to serve this suspended sentence of 18 months' youth detention unless during the next 2 years you are convicted of an offence punishable with imprisonment. If you are convicted of such an offence, you are liable to serve all or part of this sentence.

The forfeiture and destruction orders sought by the Crown in respect of the tablets and the cannabis, which were not opposed, are also granted.

The Crown's application pursuant to section 3 of the Police Property and Forfeiture (Bailiwick of Guernsey) Law, 2006 in respect of both mobile telephones and the digital scales is also granted. The Court notes again that this application was not resisted and in any event, the Court is satisfied that these phones, and the scales, were lawfully seized and that each item of property was used for the purpose of committing or facilitating the commission of an offence. The Court has, as required by subsection (5), had regard to the value of the property and the likely financial and other effects on you of making the order before deciding to grant the Crown's application.

There is no request on behalf of Her Majesty's Procureur for a drug trafficking investigation.

Richard J McMahon
Bailiff

27 May 2020