

Appeal against sentences imposed by the Magistrate's Court, on the grounds that the sentences imposed on the Appellants were wrong in principle and/or manifestly excessive.

[2021]GRC065

**ROYAL COURT  
FULL COURT  
ON APPEAL FROM THE MAGISTRATE'S COURT**

**AIVIS LICITIS**

**and**

**GUNDEGA DREMAINE**

**Appellants**

**- v -**

**THE LAW OFFICERS OF THE CROWN**

**Respondent**

**Decision handed down: 13<sup>th</sup> December 2021**

**Before: Catherine Maureen Fooks, Judge of the Royal Court**

**Crown Advocate F Russell appeared for the Crown  
Advocate N J Barnes appeared for the Defendants**

**Legislation and Authorities considered:**

The Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988

The Magistrate's Court (Guernsey) Law, 2008

The Emergency Powers Coronavirus General Provisions (Bailiwick of Guernsey) (No 6) Regulations 2021

R v Roy William Garner 1986 82 Cr App R 27

**JUDGE OF THE ROYAL COURT**

**Introduction**

1. The Grounds of Appeal in this case were that the sentences imposed on the Appellants were wrong in principle and/or manifestly excessive. In view of these mixed Grounds, the Appeals were heard by the Full Court constituted with Jurats but, as I have determined that the Appeals should be allowed in part on the legal Ground of wrong in principle, it was not necessary for the Jurats to determine the second Ground. There follows my Judgment in this matter.
2. On 20<sup>th</sup> September 2021 the Appellants appeared in the Magistrate's Court and were sentenced as follows:
  - (1) Aivis Licitis ("AL") to 14 days immediate custody for the offence of failing to comply with a Requirement to self-isolate imposed by Regulation 5 (1) of The Emergency Powers Coronavirus General Provisions (Bailiwick of Guernsey) (No 6) Regulations 2021 as amended ("the Regulations") contrary to paragraph 14 (2) and punishable by virtue of paragraph 14 (8) of the Regulations; and

- (2) Gundega Dremaine (“GD”) to 28 days’ custody suspended for two years together with a fine of £1000 payable before release or 50 days imprisonment in default for the offence of aiding and abetting AL to fail to comply with the above Requirement.
3. By two notices of appeal both dated 28<sup>th</sup> September 2021 the Appellants appealed against the sentence imposed.

### **Materials and submissions**

4. The materials provided and submissions of Advocate Barnes and Crown Advocate Russell have been considered carefully.

### **Applicable Law/Legal Principles**

5. The Magistrate’s Court’s sentencing powers are limited in this matter to those contained in Section 14 (8) of the Regulations which provides that a person guilty of an offence under paragraph (1), (2), (4) or (5) is liable on conviction to a fine not exceeding level 5 on the uniform scale, to imprisonment for a term not exceeding 3 months, or to both.
6. Section 14 of the Magistrate’s Court (Guernsey) Law, 2008 (“the 2008 Law”) gives the Magistrate’s Court specific powers in relation to fines including the power to order that a fine be paid at once.
7. There are no prescribed Grounds of Appeal in The Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988 (“the 1988 Law”). This Court approaches appeals against sentence as the Court of Appeal approaches such appeals from the RC namely that it will not interfere with a sentence unless it is wrong in principle or manifestly excessive.
8. Under section 6 of the 1988 Law the Royal Court has the power to confirm vary or reverse the decision appealed against, and to re-sentence the Appellant to a sentence more or less severe than that imposed in the Magistrate’s Court.

### **The Grounds of Appeal**

9. The appeals in this case are made on the following grounds common to both namely that:
  - (1) The sentences were “almost unprecedented” (Advocate Barnes added “almost” in his oral submissions);
  - (2) The custodial sentences were wholly unjustified for a minor offence with strong mitigating features in other words manifestly excessive and/or wrong in principle; and
  - (3) The Learned Judge (“Learned Judge”) of the Magistrate’s Court took no account of the plea and good character of each appellant;and, additionally, in the case of GD that:-
  - (4) imposing a fine to be paid from custody and in excess of her ability to pay is wrong in principle.

### **Facts of the case/Approach of the Magistrate’s Court to sentence**

10. The facts are that AL arrived in Guernsey on 24<sup>th</sup> May and was required to self-isolate until 5<sup>th</sup> June. He was staying at the Farmhouse Hotel. Following a report to the Border Agency that there may have been a breach of the Requirement to isolate, both Appellants were arrested and interviewed during which they admitted that, while AL was self-isolating, GD entered his room and stayed for 15 to 20 minutes, having taken him some food in breach of the Requirement to self-isolate. It further emerged that a worker at the hotel had gone into AL’s room on 27<sup>th</sup> May and found GD hiding in the wardrobe.

11. It took some time for the matters to come to light. The Appellants were charged on the 29<sup>th</sup> August 2021 and appeared in court on the 31<sup>st</sup> August 2021 and 13<sup>th</sup> September 2021 at which times they sought adjournments to organise legal representation and for full advice to be given. They entered their pleas and were sentenced on the 20<sup>th</sup> September 2021.
12. Advocate Barnes, who represents the Appellants today, also represented them both in the Magistrate's Court. He explained that AL had come to Guernsey to work and had travelled from Latvia via St Malo and Jersey to Guernsey. Advocate Barnes told the Court that AL had had three negative PCR tests in Latvia, Jersey and Guernsey. (Note: at the appeal hearing he said that the tests had been in Latvia, France and Jersey). AL and GD had been in a relationship and she went to his room to see where they were with the relationship which she considered required a face to face meeting. The Learned Judge was told that, during her visit, AL had stood on the balcony and she had stood some 4 metres away by the door.
13. Advocate Barnes explained that neither Appellant was in a position to pay a substantial fine immediately and that both were due to return to Latvia. He invited the court to bind them over to leave Guernsey which was firmly (and rightly) rejected by the Learned Judge of the Magistrate's Court as a disproportionately low sentence.
14. The Learned Judge made enquiries as to how the Appellants had been supporting themselves and was told that they had been working and that what resources they had they needed to get home to Latvia with GD particularly needing to get home to attend to her ill mother. In answer to the Learned Judge's specific question about the resources of the Appellants, Advocate Barnes told him that GD had £1000 and AL had no money at all as he had been unemployed since he was arrested because he was due to leave the island at that point and was unable to return to work because he no longer had a permit to live in Guernsey and was not receiving any benefit.
15. The Learned Judge gave the Appellants credit for their guilty pleas although he made the point that he did not understand why those pleas had been delayed. He noted that they had been caught red-handed and had made admissions. He also gave them credit for previous good character.
16. The Learned Judge was clear that he viewed the matters as being serious. He said that COVID had had a devastating impact upon the island's economy, that guest workers would be part of the recovery but that people such as the Appellants (who breached the Regulations) could send the island "*spiralling back into lockdown with their selfish actions*".
17. He rejected GD's reasons for entering AL's room as spurious. He considered her to have been the initiator and her actions in entering AL's room to be a deliberate and knowing breach of the Regulations. He referred to her having hidden when the member of staff was properly following up his concern. He considered the appropriate penalty to be a sentence of 28 days' imprisonment suspended for two years together with a fine of £1000 or 50 days in default to be paid before her release.
18. In the case of AL, he rejected the PCR tests as mitigating the offending. The Regulations are there for a reason and are not optional. The conduct of AL in permitting DG to enter and stay in his room had to be met with a significant penalty and that the only appropriate such penalty was a sentence of immediate custody of 14 days. He considered a deterrent to be required in the circumstances.

### **Discussion/Applicable legal principles**

19. In order to succeed on a submission of wrong in principle the Appellant must convince me that the Learned Judge passed a sentence which offends a specific sentencing principle.

20. Advocate Barnes fairly conceded at the start of his oral submissions that some of the Grounds were less strong than others. I will deal with them in the same order as he did and as expanded by him in those submissions.
21. Ground 3 - that the Learned Judge took no account of the Appellants' pleas and previous good character and that he took into account irrelevant considerations namely, the two adjournments without making due enquiry as to the reasons for them. Those submissions are rejected. The Learned Judge said that he gave the Appellants credit for their guilty pleas. Whilst he was unimpressed with the delay in entering the pleas (and he had granted the two adjournments), and he is entitled to refer to the timeline of entering pleas, there is no suggestion that he gave any less than full credit for the pleas as a consequence of the adjournments. The Appellants were not entitled to full credit as they had been caught red-handed as he properly observed. He specifically said that he gave credit for previous good character. This Ground is rejected.
22. Ground 4 - in respect of GD only that:-
- (1) imposing a fine to be paid from custody is wrong in principle. No authority is cited for this proposition. Section 14 (a) (i) of the 2008 law specifically allows the Magistrate's Court to order that a fine be paid "at once". The Learned Judge had been clearly told that GD had the funds to pay the fine but would be leaving the Island. The Court is entitled to take such steps as are necessary to ensure that a financial penalty is paid as intended. It was entirely appropriate and not wrong in principle to order GD to pay her fine before release;
  - (2) imposing a fine which exhausted the funds available to her which were intended to fund her return home is also wrong in principle. It is wrong in principle to impose a fine in excess of a person's ability to pay R v Roy William Garner 1986 82 Cr App R 27 but, as Advocate Barnes acknowledged, GD had the funds to pay the fine. The Learned Judge enquired into GD's finances and appropriately tailored the fine to GD's resources. Advocate Barnes complains that the amount of the fine left her unable to fund her return to Latvia. That point was not clearly articulated to the Learned Judge but, in any event, as submitted by Crown Advocate Russell, it is well established that a fine is meant to be a punishment and it is perfectly proper for the offender to have to endure any degree of hardship in paying it. The learned judge was entitled to impose the fine at that level. There was no error of principle. This Ground is rejected.
23. Ground one - that the sentences imposed on both Appellants were almost unprecedented. Advocate Barnes added "almost" in recognition that there had been cases of immediate custody. As Crown Advocate Russell submitted, in any event, a sentence being unprecedented is not a valid challenge. This Ground is rejected.
24. Ground 2 - that the sentences of imprisonment were manifestly excessive and/or wrong in principle. This is the strongest Ground. I will deal with the legal challenge, wrong in principle first.
25. Advocate Barnes submitted that, in the case of an offence which is triable only summarily with a maximum fine at level 5 plus 3 months' imprisonment, it is wrong in principle to impose a custodial sentence in any of the following circumstances:
- a) where there have been guilty pleas; or
  - b) upon persons of previous good character; or
  - c) where there are strong mitigating circumstances.

26. As statements of general principle these are much too broadly stated. Even persons of a previous good character, entering guilty pleas and with strong mitigating circumstances may be properly imprisoned in appropriate circumstances.
27. The Learned Judge was very clear that he viewed the offences as serious and with the capacity to send the Island of Guernsey "*spiralling back into lockdown*". He specifically (and rightly) rejected the mitigation offered in terms of the PCR tests and viewed GD's explanation as spurious. Advocate Barnes' submissions that the time spent together by the Appellants was to be equated with the same level of risk as family members sharing the use of a room while one of them is isolating is not sustainable. The two Appellants were in the same room. GD was found hiding in the wardrobe. As a guest worker in hospitality, she could have carried the virus and spread it with devastating consequences. AL was not entitled to determine himself to be low or no risk based on earlier PCR tests particularly only 3 days into his self-isolation.
28. At the time of the commission of the offences the island had only relatively recently come out of a full lockdown and the safety of opening the borders rested on the requirement for those arriving to self-isolate until they were known not to pose a risk. The Learned Judge was entirely right to conclude that deterrence is an important part of the sentencing of those who breach the Regulations.
29. It is important not to lose sight of the reason why the Regulations have been made. We are and were, at the time of the commission of the offences, in an emergency as defined by the Civil Contingencies (Bailiwick of Guernsey) Law 2012. The recital to the No 6 Regulations records that there had been a surge of infections in Europe. Regulations have been made since the start of the pandemic restricting our personal liberties to prevent the spread of a virus which has resulted in death and serious illness and which has the capacity to cause serious disruption to our island economy.
30. It should also be noted that the Regulations had been amended twice since they were first made to increase the penalties for breaches, most notably increasing the period of custody to three months on 21 May 2021 a few days before the offences were committed. The policy reasons for the increase are in the public domain namely to reflect the seriousness of the offences, to ensure compliance with the regulations by those for whom a financial penalty is an insufficient deterrent and to ameliorate the automatic application of the rule in relation to default sentences imposed for non-payment of fines.
31. The Appellants came up for sentencing as they were leaving the Island. As the Learned Judge observed, his sentencing options were very limited in these circumstances.

## **Decision**

32. I will first determine whether the sentences or either of them is wrong in principle.
33. The Regulations prescribe penalties which include custody so it cannot be argued that it is wrong in principle in the sense of being wrong in law to impose a custodial sentence. The decision to impose custodial sentences has to be seen in its context of emergency legislation which had been amended to increase the scope of the custodial penalty. The question is whether, in that context, on the facts of these cases, bearing in mind the pleas, good character and mitigation offered, it was wrong in principle to do so. I do not consider that it was bearing in mind the seriousness of the offences and the need, properly identified by the Learned Judge, for an element of deterrent in the sentences. The sentences imposed were at the lower end of the range of custodial sentences available and I reject Advocate Barnes' submission that it was wrong to impose custody for offences at this level (the minor level in his submission, which I reject) as this did not leave sufficient sentencing headroom for more serious offences or, e.g. repeat offenders.

34. Having determined that custodial sentences were appropriate and specifically that a fine alone was not sufficient in the case of GD, the next questions are the duration of the sentences, which should be the shortest possible and whether the sentences can be suspended.
35. The Learned Judge concluded that GD's custodial sentence of 28 days should be suspended for two years but that AL's custodial sentence of 14 days should not be suspended on the basis that "a suspended sentence would, in effect, be no sentence at all". He had earlier said that in relation to both Appellants that "*a suspended sentence in isolation (my emphasis) has no teeth and very little meaning because you will not be coming here so, in essence, it would be no more than a slap on the wrist and would have no general effect for others*". It appears therefore that he declined to suspend AL's sentence because he was unable to pay a fine in contrast to GD who was and that he considered a suspended sentence, in the circumstances, to lack any deterrent factor.
36. I respectfully disagree with the Learned Judge that a suspended sentence is "no sentence at all" as it is a custodial sentence the operation of which has been deferred conditionally. The Appellants were due to leave the island and, one can only assume, unlikely to return so that a suspended sentence would be unlikely to be served. It is often the case that sentences of imprisonment are suspended and are never served. This does not prevent them from being effective deterrent sentences of custody marking the seriousness all the offences for which they are passed.
37. I respectfully consider that the learned Judge has erred in principle namely that he has created an unwarranted disparity in the sentencing of the two Appellants by suspending one sentence and not the other. It appears that he did not suspend AL's sentence because he was unable to pay a fine and that is wrong in principle.
38. Having determined that it was appropriate to suspend the custodial sentence of GD, the custodial sentence of AL should have been likewise suspended even though he could not pay a fine. It was justified to have some disparity between the two Appellants to mark the greater culpability of GD who was the instigator. That was achieved by the fine payable by her. As respects GD, aside from the fine, I consider that there should have been no disparity between the two Appellants and that her longer sentence was, therefore, wrong in principle.

### **Conclusion**

39. I allow the appeal of AL to the extent that his custodial sentence should have been suspended and I substitute for the 14 days' immediate custody, a sentence of 14 days suspended for 2 years from the date of the original sentence. I allow the appeal of GD to the extent that I substitute for the 28 day suspended sentence, a suspended sentence of 14 days suspended for 2 years from the date of the original sentence.
40. I am grateful to both counsel for their assistance.

**Catherine Fooks**  
**Judge of the Royal Court**

**13<sup>th</sup> December 2021**