Application for leave to appeal against Sentence; on the basis that the sentences imposed were manifestly excessive; with it pointed out that no Class A drugs were found in the Applicant's possession, the offending came to light through the voluntary provision of passcodes to the phones seized, but where no quantifiable amounts of MDMA could be ascertained and there was no evidence of actual supply of Class A drugs. The grounds also cover the wrongness of the Royal Court declining to give the Applicant full credit for his co-operation and early guilty pleas and a final ground relates to the extent of the continuity of the offending in respect of Class A drugs.

[2021]GCA074

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION

Between: **STUART MICHAEL PAGE** **Applicant**

-v-

THE LAW OFFICERS OF THE CROWN **Respondent**

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE

Decision on the Papers

Decision of Richard James McMahon, Esq., Bailiff

Date of Decision: 8 November 2021

Counsel for the Applicant: **Advocate S Maindonald**

1. The Applicant was sentenced by the Royal Court on 21 October 2021 to a total of 6½ years' imprisonment in respect of 13 Counts spread across three indictments. The approach taken by the Royal Court was to identify the most serious offence of offering to supply MDMA, a Class A controlled drug, as the lead offence, for which that sentence was imposed (Court 4 of the first Indictment), with all other sentences being made to run concurrently and for shorter, and in some instances much shorter, periods. Amongst the other Counts were two for being concerned in the supply of, or offer to supply, cannabis, a Class B controlled drug, and two in respect of Class C controlled drugs. In addition, there were eight Counts relating to simple possession of either Class B or Class C controlled drugs.

2. The basis on which the grounds of appeal settled by Advocate Maindonald proceed is that the sentences imposed were manifestly excessive, focussing particularly on Count 4 of the first Indictment, pointing out that no Class A drugs were found in the Applicant's possession, the offending came to light through the voluntary provision of passcodes to the phones seized, but

where no quantifiable amounts of MDMA could be ascertained and there was no evidence of actual supply of Class A drugs. The grounds also cover the wrongness of the Royal Court declining to give the Applicant full credit for his co-operation and early guilty pleas. A final ground relates to the extent of the continuity of the offending in respect of Class A drugs.

3. Taking that final ground first, I am not persuaded that there is any basis for it. The Court's sentencing remarks make clear that there was three references in the messages from December 2019 to MDMA. The timeframe for that Count is 20 December 2019 to 1 January 2020. The references to dealing in Class A drugs during that period must be read in that context. It is apparent that the Court found that this was not an isolated incident and was aware of the period covered and the examples of offering to supply MDMA over that Christmas period. There was no misunderstanding of the factual basis for the offending for which this sentence was imposed.

4. The manner in which the Court reached a sentence of 6½ years was to take its first starting point at the lowest end of the range for Class A drugs in the guideline case of ***Richards*** (2002). (The Court properly noted that the principles had very recently been confirmed by this Court in ***Barras, Watt and Orchard v Law Officers***.) There can be no criticism of the Court for that initial starting point.

5. As set out in para. 12 in ***Richards***, the Court then dealt with the fact that more than one Class of controlled drug was involved in the raft of drug trafficking offences for which the Applicant fell to be sentenced. It recognised that the amounts involved meant that the bottom end of the applicable ranges (and possibly even below that for the Class C drugs) would be appropriate starting point for each such Count, if viewed in isolation. Accordingly, the number of instances of supplying or offering to supply resulted in the combined starting point being 8 years' imprisonment. Whilst another Court may not have increased the combined starting point by a full year, I take the view that to do so does not fall outside the range of what the Court was entitled to do and so this step does not result in the final sentence being manifestly excessive.

6. The Court then proceeded to find a number of factors that aggravated this offending. These included that the Applicant had begun this course of drug-related offending whilst still subject to the terms of a community service order for unrelated offending. The offences committed later during the period of offending, identified through searches at the Applicant's home, demonstrated that a good number of the offences were committed after the Applicant had been admitted to bail. The fact that he had continued to offend whilst waiting to be dealt with for the more serious offence relating to MDMA could properly be regarded as a significant aggravating factor. As a result of looking at what had been undertaken in the round, the Court increased the combined starting point to 9½ years' imprisonment.

7. At first blush, this looks to be quite a severe response. If the offer to supply MDMA were viewed in isolation, the starting point, before mitigation, of 7 years' imprisonment would then lead to a sentence proportionately reduced. The simple possession offences add little to the overall pattern of offending for which the Applicant was being sentenced. Reference was made to the variety of the drugs involved, but that aspect arguably had been dealt within in the increased combined starting point. The values involved were not particularly high, but the messages indicating that the Applicant was involved in dealing over a period of time through regularly turning over his stock. By reference to the totality principle, though, reaching a sentence above the top of the lowest range, and in the middle of the next range, for Class A tablets, in my view results in having to look particularly carefully at the discounts to that figure found by way of mitigation. If there is a significant increase from the initial starting point by reference to aggravating factors, care will be needed when dealing with mitigation.

8. In my judgment, the core feature of this application relates to the manner in which mitigation has been dealt with. The Court felt unable to afford the applicant full credit for his guilty pleas,

although without explaining why that was. In relation to the Applicant having co-operating in providing his passcodes, this was viewed as being very much to his credit and as important mitigation. However, the overall discount for his mitigation was just three years, being below one-third.

9. The effect of pleading guilty is touched on in para. 15 of ***Richards***:

> "*A guilty plea will always be an important mitigating factor, even where the accused appears to have very little choice but to admit guilt. As a very general rule, the appropriate discount is one-third from the starting point, particularly when an early indication of such a plea is given. It is generally in the public interest that the expenditure of time and money on a full trial be avoided. When there is no sensible alternative to a guilty plea, the discount will be more limited.*"

Guernsey has not enacted legislation along the lines of the regime found in England and Wales. Whilst there may be scope to afford an accused person a discount of below one-third, as recognised in the final sentence of the paragraph quoted, there really ought to be a fuller explanation of any reasons for doing so. I take the view that it is surprising that the overall discount afforded to the Applicant did not start with a one-third discount for his early guilty pleas.

10. Although any other mitigation is at best minimal, when coupled with the comment in the sentencing remarks about the important mitigation for voluntarily providing his passcodes, it is even more surprising that the final discount for all the mitigation did not reach above one-third Having said that, providing passcodes is what the law expects a suspect to do. Failure to do so without reasonable excuse constitutes an offence. In the present case, it is unclear quite what those sentencing made of the difference between dealing with the Applicant for such an offence (or offences) and the culpability of the overall offending for which he was being sentenced, the most serious of which arose from an analysis of his device.

11. What matters is whether the final sentence can be said to be arguably manifestly excessive. Although this is not a clear case of where something appears to have gone wrong, taking a step back from the arithmetic of how the outcome was reached, I consider that the Applicant may have grounds capable of being advanced on his appeal that a final sentence of 6½ years' imprisonment is high. It arises from the mitigation taken with the increases from the initial starting point. Whether this sentence of 6½ years' imprisonment falls outside the range of permissible sentences will be a matter for the plenary court, but I am satisfied that this is a case in which leave to appeal should be granted.

12. Having granted the Applicant leave to appeal it follows that I will also grant his application for legal aid to pursue his appeal. It is probably over-ambitious to have this appeal heard at next month's sitting of the Court, but it should be feasible for it to be heard early in 2022.

Richard McMahon
Bailiff