Appeal on the grounds that the sentence for an incitement was manifestly excessive in that; (1) no Class A drugs were found in the possession of the Appellant; (2) no quantifiable amounts were stated; (3) there was no evidence of supply; (4) the offence only came to light because the Appellant voluntarily handed over his phones and passcodes; (5) full credit should have been given for the Appellant's guilty plea; and (6) the court was wrong to view the Appellant's offending as a *"continuous course of conduct"*.

[2022]GCA20

IN THE GUERNSEY COURT OF APPEAL
(Criminal Division Case No. 504)

27 April 2022

Before:

George Bompas, QC
Jeremy Storey, QC
James Wolffe, QC

Between:

Stuart Michael Page — **Appellant**

-and-

The Law Officers of The Crown — **Respondent**

Advocate for the Appellant: **Advocate S J Maindonald**
Advocate for the Respondent: **Advocate J D McVeigh**

Storey JA

1. This is the judgment of the court.

Introduction

2. The Appellant pleaded guilty in the Royal Court to 13 offences: five drug trafficking offences (one of Class A, two of Class B and two of Class C) and eight offences of drug possession (five of Class B and three of Class C). For the single Class A offence he received a sentence of 6½ years' imprisonment on 21 October 2021. All other offences received sentences of concurrent imprisonment.

3. On 29 October 2021 the Appellant applied for permission to appeal against his sentence and permission was granted by the Bailiff on 8 November 2021.

4. We had the benefit of written submissions dated 25 February 2022 (Advocate Maindonald) and 10 March 2022 (Advocate McVeigh). We heard oral submissions on 25 April 2022.

The Appellant's offending

5. The Appellant faced three separate Indictments because his offending spanned three distinct periods:

    (1) 9 November 2019 – 4 January 2020;
    (2) 12 May 2020; and
    (3) 20 November 2020 – 23 February 2021.

6. The first and third Indictments included offences of supply:

    (i) being concerned in the supply of cannabis (Class B) to another between 9 November 2019 and 1 January 2020 contrary to sections 3(1) and 3(3)(b) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974 as amended [**'MDL'**]: Indictment 1 Count 2;

    (ii) being concerned in the supply of gabapentin (Class C) to another between 13 and 27 December 2019 contrary to sections 3(1) and 3(3)(b) MDL: Indictment 1 Count 3;

    (iii) offering to supply MDMA (Class A) to another between 20 December 2019 and 1 January 2020 contrary to section 3(3)(a) MDL: Indictment 1 Count 4;

    (iv) being concerned in the making to another of an offer to supply cannabis between 20 November and 6 December 2020 contrary to sections 3(1)(b) and 3(3)(c) MDL: Indictment 3 Count 3; and

    (v) being concerned in the making to another of an offer to supply lorazepam (Class C) on 1 December 2020 contrary to sections 3(1)(b) and 3(3)(c) MDL: Indictment 3 Count 4.

7. All three Indictments included offences of simple possession:

    (i) possession of herbal cannabis (19.46g) on 4 January 2020 contrary to section 4(1)(2) MDL: Indictment 1 Count 1;

    (ii) possession of cannabis resin (1.36g) on 12 May 2020 contrary to section 4(1)(2) MDL: Indictment 2 Count 1;

    (iii) possession of herbal cannabis (0.16g) on 12 May 2020 contrary to section 4(1)(2) MDL: Indictment 2 Count 2;

    (iv) possession of herbal cannabis (2.86g) on 10 December 2020 contrary to section 4(1)(2) MDL: Indictment 3 Count 1;

    (v) possession of diazepam (5 tablets) on 10 December 2020 contrary to section 4(1)(2) MDL: Indictment 3 Count 2;

    (vi) possession of herbal cannabis (0.89g) on 23 February 2021 contrary to section 4(1)(2) MDL: Indictment 3 Count 5;

    (vii) possession of diazepam (14 tablets) on 23 February 2021 contrary to section 4(1)(2) MDL: Indictment 3 Count 6; and

    (viii) possession of tramadol (40 tablets) on 23 February 2021 contrary to section 4(1)(2) MDL: Indictment 3 Count 7.

8. The total quantities of seized drugs comprised:

    (a) 23.4g of herbal cannabis (Class B) with a street value of about £700;
    (b) 1.3g of cannabis resin (Class B) with a street value of about £90;
    (c) 19 diazepam tablets (Class C) with a street value of about £76; and
    (d) 40 tramadol tables (Class C) with a street value of about £100.

9. The eight possession counts followed searches of the Appellant's home in St Peter Port on 4 January, 12 May, 10 December 2020 and 23 February 2021. As well as the drugs, police seized cash totalling £4,395, a set of scales and the Appellant's mobile phones.

10. The Appellant gave the police his phone passcodes and an examination of his phone records revealed a wealth of drug related communications including exchanges with 20 different third parties.

11. The Appellant gave largely 'no comment' interviews following the four searches.

12. The Appellant was on police bail from 4 January 2020 so the two offences contained in the second Indictment were committed whilst on bail for offering to supply Class A drugs. The Appellant was on court bail from 14 September 2020 so the seven offences contained in the third Indictment were committed whilst on court bail.

The Appellant's previous convictions

13. The Appellant is now 46. He has 65 previous convictions starting from the age of 12. The majority are offences of dishonesty. Only two related to drugs: simple possession in 1993 and 1999 (Class A) for which he received sentences of seven days' imprisonment and three months' imprisonment; the latter suspended for two years. The suspended sentence was activated following commission of a non-drugs related offence ten weeks after its imposition. The Appellant's longest custodial sentence was five years for robbery in 2012. On 25 October 2018 he had received a Community Service Order (80 hours) for theft and was still subject to that when he committed the offences contained in the first and second Indictments.

The sentencing hearing

14. The Appellant stated at his first committal that he "agreed with the prosecution" and pleaded guilty to the six offences on the first and second Indictments on 23 December 2020 (the second plea and directions hearing, the first having been ineffective through no fault of the Appellant). He also pleaded guilty to the seven offences on the third Indictment on 12 August 2021 (the first plea and directions hearing).

15. On 21 October 2021 the Appellant was sentenced by Judge Catherine Fooks and nine Jurats when the defendant was represented by Advocate Maindonald and the prosecution by Advocate McVeigh. The court had the benefit of the prosecution's written outline and a Probation Report dated 19 October 2021. The probation officer assessed the likelihood of the Appellant reoffending as *"very high"*. She was sceptical of the Appellant's claimed remorse.

16. The Appellant's offence-based mitigation was that all supplies were not-for-profit, purely to fund his own addiction and to top up his own illicit and prescribed drugs (for opiate addiction and chronic back pain). He co-operated with the police – had he not done so there would have been no evidence of the supply offences. The supplies were of unknown quantities (and likely to be low) to known associates. So far as the single Class A drug trafficking offence is concerned, there is no evidence of actual supply and no MDMA was found in the search of 4 January 2020 (or subsequently). The phone records are no more than the Appellant attempting

to 'show off' because he never had any to sell. The quantity of drugs the subject of the possession counts was not high.

17. As for offender-based mitigation, the Appellant sought *"full credit"* for his early guilty pleas. Although his criminal record is a long one he is only lightly convicted of drugs offences and then over 20 years ago. These are his first drug trafficking offences. Advocate Maindonald also relied upon the Appellant's physical and mental health issues.

18. The court decided to treat the sole Class A offence (carrying life imprisonment) as the 'lead' offence. The remaining twelve offences were treated as an aggravating factor. Four other supply offences received sentences of 2½ years' imprisonment concurrent (two of Class B) and one year imprisonment concurrent (two of Class C). The eight possession offences received sentences of six months' imprisonment concurrent (Class B: Indictment 1 Count 1), three months' imprisonment concurrent (Class B: Indictment 2 Counts 1 and 2 and Indictment 3 Counts 1 and 5) and one month imprisonment concurrent (three of Class C).

19. On the lead offence the court first set a starting point of seven years, the bottom of the lowest band at [10] of *Richards v Law Officers of the Crown* [2000-02 GLR 247], which assumes a supply of up to 20g. The court referred to three or four offers to supply MDMA during December 2019 and rejected the Appellant's claim to have been just 'showing off'.

20. The court then increased its starting point from seven to eight years to take account of the other supply offences. A single supply of cannabis on its own would merit a starting point of at least three years for quantities up to 2kgs under *Richards* and this Appellant was guilty of supplying in November/December 2019 and again in November/December 2020. The supplies of Class C drugs in December 2019 and December 2020 would merit a starting point of approximately 18 months in isolation. The possession offences fell outside the *Richards* guidelines but the quantities of herbal cannabis were *"not insignificant"* and the Appellant *"had a lot"* of tramadol. The Appellant's stock was being turned over quickly.

21. The court then increased its starting point from eight to 9½ years on account of three aggravating factors:

    (1) the protracted period of offending (over 15 months), the number of contacts (at least 20), evidence of chains of supply and the amount of cash involved (at least £4,395). The court rejected the Appellant's claim he was not benefitting financially;

    (2) the range of drugs involved; and

    (3) the commission of offences whilst subject to a Community Service Order and on bail (see paragraphs 12 – 13 above).

22. The court declined *"in all the circumstances"* to give the Appellant *"full credit"* for his guilty pleas. No reasons were given for this stance, nor did the court specify what credit was in fact allowed.

23. As for other mitigation the court rejected any suggestion of remorse. However, the Appellant's provision of his passcodes was "*important mitigation"* and *"very much to your credit"*. Again, the court did not specify what discount was in fact being made.

24. The court took into account *"the totality principle"*.

25. The sentence passed on Count 4 of Indictment 1 was one of 6½ years' imprisonment. This suggests a total discount of about 32% was allowed to the final starting point of 9½ years.

Grounds of appeal

26. The Appellant raises six grounds of appeal in relation to the sentence on Indictment 1 Count 4 being manifestly excessive (a seventh was abandoned following sight of the Bailiff's ruling on 8 November 2021):

    (1) no Class A drugs were found in the possession of the Appellant;

    (2) no quantifiable amounts were stated;

    (3) there was no evidence of supply;

    (4) the offence only came to light because the Appellant voluntarily handed over his phones and passcodes;

    (5) full credit should have been given for the Appellant's guilty plea; and

    (6) the court was wrong to view the Appellant's offending as a *"continuous course of conduct".*

Powers of this court

27. The powers of the court on an appeal against sentence are set out in section 25(3) of The Court of Appeal (Guernsey) Law 1961 which provides:

> *"The Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal."*

It is well recognised (and accepted by both parties) that the Court of Appeal will not interfere with the sentencing discretion of the Royal Court merely on the ground that it might have passed a somewhat different sentence: the Court of Appeal will only quash a sentence passed at the trial where it is manifestly excessive or wrong in principle, passed on the wrong factual basis or where the court improperly took into account some matter or where fresh evidence is admitted.

Discussion

28. There can be no criticism of the Royal Court taking the only Class A drug trafficking offence as the 'lead' offence for the purpose of sentencing. Advocate Maindonald has rightly not sought to criticise the concurrent sentences of 2½ years, one year, six months, three months or one month. In our judgment the Appellant can consider himself fortunate that he did not receive any consecutive sentences when his supply offending spanned November/December 2019 and then November/December 2020.

- *Ground 6 (factual basis of sentence)*

29. The Appellant criticises the factual basis of the court's sentence ("*a continuing course of conduct dealing with drugs over a period and possessing them"*) when there was no continuous course of dealing in Class A illicit substances. Advocate Maindonald maintained there were

only two relevant messages: one on 21 December 2019 and one on 31 December 2019 because the message on 24 December 2019 was not an offer to supply.

30. We do not accept this analysis. In two separate messages on 21 December 2019 the Appellant was offering to supply MDMA of 85% purity. In the message of 24 December 2019 the Appellant stated he had MDMA in some bags wrongly handed to C. The Count spanned 20 December 2019 to 1 January 2020.

31. In our view the Royal Court's reference to *"all the offences represent a continuing course of conduct of dealing with drugs over a period and possessing them"* was to the entire 15 month period between 9 November 2019 and 23 February 2021. We acknowledge that the court was in error in referring to a period commencing in September 2019 but this is immaterial. The earlier reference to *"dealing in Class A drugs … continuing during that period"* was a correct reference to the 13 day period the subject of Count 4.

- *Grounds 1 – 3 (the correct starting point)*

32. It is correct that no MDMA was ever found in the Appellant's possession but the Royal Court was clearly entitled to reject the Appellant's claim that he was just 'showing off' when he made his offers to supply (see, for example, the message of 24 December 2019 referred to at paragraph 30 above). It is also correct that there was no evidence of specific amounts offered or of actual supply but this is often the case. The Appellant was found in possession of substantial cash sums on different occasions. The small number of messages and the short timeframe involved is no doubt why the court's initial starting point was at the bottom of the relevant *Richards* band (six years), approved very recently by this court in *Barras v Law Officers of the Crown* [2021] GCA 045 at [54].

33. The increase of twelve months to the initial starting point was in our judgment legitimate to reflect the two other supply offences committed at the same time: *Richards* at [12]. Although another court may not have increased the starting point by as much as a year (as the Bailiff pointed out at [5]), a court would be entitled to take such a course in fixing the combined starting point.

34. The increase of 18 months to produce a final starting point of 9½ years is also fully justified in our view. Although we agree with the Bailiff that the second aggravating factor relied upon by the Royal Court (see paragraph 21 above) probably represents double counting – the range of drugs having already resulted in an increase in the starting point from seven years to eight years, the other two factors taken into account were undoubtedly aggravating ones. Two further supply offences were committed about twelve months after the first three. Six offences were committed during the currency of a Community Service Order. Nine offences were committed whilst on bail for offering to supply a Class A drug.

35. We accept, as the Bailiff did, that the simple possession offences add little. We must therefore ask ourselves whether a final starting point of 9½ years for five supply offences was manifestly excessive. It is true that the probable quantities/values involved were not particularly high but the offending comprised three classes of drugs over two periods of seven weeks and two weeks, separated by eleven months, aggravated by being committed whilst subject to a Community Service Order and whilst on court bail respectively. Most importantly, the sentences for the four offences of supplying Class B and C drugs were to run concurrently with the sentence for the offence of offering to supply Class A drugs. Despite the express reference by the Royal Court to 'the totality principle' this was not engaged because all sentences imposed were concurrent. A final starting point which happens to fall within the lowest but one band in *Richards* does not then seem to us to be excessive.

36. We were not assisted by Advocate Maindonald's reliance on a newspaper report of a sentence of six years handed down by the Royal Court on 2 November 2021 for a single count of importing 13.86g of cocaine with a street value of up to £4,200. She argued this is evidence of disparity. Although the Appellant may have attached importance to the news item the Court of Appeal will not entertain a submission that a sentence in an instant case is unreasonably different to that in another unrelated and non-guideline case (see, for example, *Law Officers of the Crown v Ingram* [2005-06 GLR 194] at [11], *McCarthy v Law Officers of the Crown* [2007-08 GLR 414] at [27] and *Garven v Law Officers of the Crown* (13 September 2013) at [47]).

- *Grounds 4 and 5 (mitigation)*

37. It was not necessary for the Royal Court to specify individual discounts (whether by way of fraction, percentage or amount) for each element of mitigation. In *Thurban v AG* [2021] JCA 087, the Jersey Court of Appeal had to deal with an appellant who was entitled to a full one-third discount for guilty plea and a further discount for additional personal mitigation:

> *"… the court seems to have wrapped up* [the appellant's] *personal mitigation with the discount for a guilty plea and ended up at a total for mitigation of one-third … There is nothing wrong in approaching sentence that way. While it is essential that the reasoning of the sentencing court is clearly understood, there is no obligation on the court to identify how much is taken off a starting point for particular items of mitigation"*: per Bailhache JA at [35] – [36].

38. The Royal Court followed the correct sentencing process by first fixing a starting point (taking account of any aggravating and mitigating features of the offences). The court is then required to assess the discount(s) from that starting point for a guilty plea (where applicable) and personal mitigation, if any:

> *"19. As set out in Richards at paragraph 8, the Court begins by fixing upon a starting point. In arriving at that starting point, the Court must consider everything that is relevant to the gravity of the offence. That includes any aggravating and mitigating features of that offence. As Richards makes clear the primary features are likely to be the quantity and category of the drugs, to a lesser extent the street price, and the involvement and role of the defendant, but there may be other relevant factors.*
>
> *20. The starting point as assessed is the figure from which deduction (if any) is to be made for a guilty plea (where applicable) and any personal mitigation. Paragraph 15 of Richards states that the discount for the guilty plea is the first item to be deducted from the starting point. The reasoning for this was helpfully elaborated by the Jersey Court of Appeal in Harrison v Attorney General [2004] JLR 111, at paragraphs 90 and 91:*
>
> > *"If a discount for a plea, usually expressed in fractions as we have seen, is customary in cases where the offender admits the offence, the questions* [sic] *arises, one-third, or one-quarter, of what? There must be a figure on which the one-third or one-quarter is calculated and the question should be answered by reference to a figure allowed for the offence itself, the starting point.*
> >
> > *In England, as suggested in the consultation paper dated November 14th, 2003 issued by the Sentencing Advisory Panel entitled Reduction in Sentence for a Guilty Plea, the discount is usually given from the figure which would have been passed on the particular offender before the court (i.e. after allowance for personal mitigation) on the assumption that he had pleaded not guilty. However, in a jurisdiction such as Jersey, where resources are finite and the disruptive effect of a large number of contested trials can be substantial, we think that a*

slightly greater discount could usefully be applied. In our judgment the appropriate course in this jurisdiction is for the sentencing court firstly to make the appropriate allowance for any plea of guilty as a deduction from the starting point appropriate for the offence, and thereafter to make such further deduction as it thinks fit for the other mitigating factors."

21. We consider the remarks in these paragraphs also apply to the situation in Guernsey.

22. It follows 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 or not any further discount should be made for personal mitigation. This is not to suggest that this should be mechanistic, or that there should be the application of mathematical formulae. But we would expect it to be apparent from the sentencing remarks that the court has reached a conclusion on the correct starting point and then applied, where appropriate, a discount from that figure to reflect both any plea of guilty and any personal mitigation.

23. We are not here suggesting that the sentencing court must necessarily articulate separately the discounts given respectively for a guilty plea and for personal mitigation. It is perfectly in order for the Royal Court to calculate a single comprehensive discount for both a plea of guilty and any personal mitigation - see Harrison v Attorney General, at paragraph 92:

"In this regard, the Attorney General has suggested that the two-stage process-would or might require the Royal Court to specify in relation to each piece of mitigation what allowance or discount had been given. Kenward v Attorney General, 2000 JLR 251 was referred to in this connection. In that case, the Court of Appeal made it clear that in future, when considering mitigating factors, the Royal Court should calculate a single comprehensive discount for all the relevant factors including the plea of guilty and all other personal mitigation (2000 JLR at 254 – 255). We agree."

But it is important that the final sentence is fixed by following the approach set out in paragraph 22 above:" per Pleming JA, President, in *Falla v Law Officers of the Crown* Criminal Appeals 445 and 446 (12 March 2013)."

39. As McMahon B observed at [9], a court ought to give at least brief reasons for denying a defendant full credit of one-third for an early guilty plea. Any denial in this Appellant's case could not properly be on the basis of a delayed plea. However, the Appellant had very little choice but to admit guilt so a sentencing court is entitled to apply a discount less than one-third:

"A guilty plea will always be an important mitigating factor, even where the accused appears to have had 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": per Carey P, in *Richards*, at [15].

40. As the Court of Appeal explained in *Falla*:

"32. The rationale for giving a reduction in sentence for a Guilty plea is that it avoids the need for a trial, shortens the gap between charge and sentence, saves costs, and in the case of an early plea saves victims and witnesses from the concern about having to give evidence.

...

35. It is important that a clear message is given to defendants that the court will give credit for pleas of guilty which have the effect of saving court time ..."

41. For this appeal to succeed the Appellant would have to show that no reasonable sentencing court (1) could have awarded him less than one third credit for a guilty plea and (2) could have refused to allow an additional discount for co-operation. Here we are quite satisfied that the Royal Court was entitled to apply less than one third credit because of the overwhelming evidence. Advocate Maindonald's submission in response was to say that the evidence was only overwhelming because of the Appellant's co-operation. That may be so, but the Appellant is not entitled to the same discount twice. He is entitled to a discount for co-operation but cannot then complain that he did not receive a full one third discount for his plea. In our judgment a discount of less than a third was not outside sentencing norms.

42. We turn now to the amount of the discount for co-operation. As McMahon B pointed out at [10], a failure to provide a phone passcode without reasonable excuse is an offence, punishable on indictment by two years' imprisonment under section 46 Regulation of Investigatory Powers (Bailiwick of Guernsey) Law 2003. The mitigation available to the Appellant was therefore limited.

43. We reject Advocate Maindonald's submission that this Appellant was entitled to additional substantial credit of at least one-half for helping the authorities to prosecute others: *Richards* at [17]. He was not an informer. He did not name his supplier(s) nor his customers. He did not *"add to the intelligence of Law Enforcement in terms of other criminal conduct"*. If the Appellant was entitled to such credit then so would every defendant who provided a phone passcode to reveal messages of drug trafficking with unnamed third parties.

44. Advocate McVeigh pointed out that even a reduction of a full one-third to the final starting point (from 114 months to 76 months) would not render the sentence imposed of 78 months manifestly excessive.

45. In all the circumstances a total discount of only three years did not make the Appellant's sentence manifestly excessive. Many sentencing courts might have allowed more than the 32% allowed by the Royal Court in this case, but that is of course irrelevant. The Court of Appeal will not tinker with sentences imposed by a lower court.

Conclusion

46. We regard the overall sentence of 6½ years' imprisonment as within the range of permissible sentences for these 13 offences and unobjectionable in principle.

47. The appeal is dismissed.