

Application for leave to appeal against Sentence; on the grounds that the custodial term should be reduced or imposed as a direct alternative to a Community Service Order because the imported substance was: (a) prescribed to the Appellant, (b) relatively low in quantity, and (c) intended for his own use only; and that a sentence of immediate custody is a disproportionate interference with the family life of the Appellant's children, justifying the imposition of a suspended sentence.

[2022]GCA23

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION

Between:

XAVIER McKEE

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: 16 May 2022

Counsel for the Applicant:

Advocate S E Steel

1. The Applicant, Xavier McKee, was sentenced by the Royal Court on 20 April 2022 to 2 years and 8 months' imprisonment in respect of the first Count, which related to the importation of morphine, a Class A controlled drug, on 4 September 2020. No separate penalty was imposed in respect of the second Count, which related to possession of cannabis on 5 April 2021. Guilty pleas had been entered in respect of both Counts on the first day of what would have been a three-day trial. The earlier offence put the Applicant in breach of a sentence of four months' imprisonment suspended for two years imposed in respect of an offence of unlawful wounding. That suspended sentence was also activated by the Royal Court to run consecutively.
2. By a Notice of Appeal dated 3 May 2022 settled by Advocate Steel, two grounds are advanced on behalf of the Applicant:

"1. The custodial term should be reduced to no more than 2 years and suspended, or imposed as a direct alternative to a Community Service Order because the imported substance was (a) prescribed to the Appellant, (b) relatively low in quantity, and (c) intended for his own use only.

2. *Immediate custody is a disproportionate interference with the family life of the appellant's children which justifies the imposition of a suspended prison sentence."*
3. As the sentencing remarks of the Court make clear, the guidelines recently re-affirmed as found in *Richards* 2000-02 GLR 247 indicate a starting point within the band of seven to nine years' imprisonment for a drug trafficking offence for 1 to 500 tablets of Class A. The number of morphine capsules imported by car by the Applicant was 36. The Court noted that this is above the very small quantity for personal use that would make such an offence fall outside the guideline. Accordingly, the Court took a starting point for the offence itself at the lowest end of this range of seven years.
4. The Court also referred to the aggravating and mitigating factors involved. There was a previous conviction for a serious drugs offence. The importation put the Applicant in breach of a suspended sentence, albeit for a different type of offence, but it should have been uppermost in his mind that there could be consequences if he were to commit any imprisonable offence within the operative period of the suspension. Although it was a comparatively insignificant offence, involving possession of just 0.39 gram of cannabis, the second Count was an offence committed whilst on bail for the first. The description of the Applicant as someone with "*a laissez-faire attitude to drugs*" is an apt one. These aggravating factors would result in an increase from the chosen starting point of seven years' imprisonment before considering mitigation. Reference was made to the fact that this was not a sophisticated importation. The basis of plea was that the morphine was for the Applicant's personal use, albeit relying on prescriptions that had expired and were known to have expired. That aspect was repeated and so clearly at the forefront of the Court's mind. As a result, for the offence, a revised starting point considerably lower than seven years was reached, being four years' imprisonment.
5. Although the extent of the discount for the late guilty pleas is not expressed, it was explained that it could not be as great as the one-third discount generally available for an early guilty plea. Given that the final sentence imposed was one-third off the revised starting point of four years' imprisonment, it follows that the combined discount for all personal mitigation, including remorse, was a fairly generous one given the significant revision to the starting point reflecting the role and culpability of the Applicant in this importation of a Class A drug.
6. The Court then turned to the effect that an immediate custodial sentence would have because the Applicant is a family man. This was addressed by reference to *Bourgaize v Law Officers of the Crown* (2014), which adopted the principles found in *R v Petherick* [2013] 1 Cr App R (S) 116. It is apparent that the relevant issues to be considered were indeed considered. The balancing exercise required was undertaken. However, it was noted that this was not a case on the cusp of custody. Even with the significant discounts afforded to the Applicant, the final sentence is well above where alternatives to immediate custody become available.
7. The question on this application, therefore, is whether the Applicant has an argument that has a realistic prospect of success that the Royal Court erred in reaching a final sentence of above two years' imprisonment. I am not persuaded that it did. From an initial starting point following the *Richards* guidelines, the Court has already afforded the Applicant a generous discount to reflect the basis of plea. The Applicant has foregone the greater discount that might have been available to him had he acknowledged his guilt at an earlier stage of the proceedings. Although there is nothing prescriptive in this jurisdiction as to the usual approach to a guilty plea discount, there is no reason to inflate the discount available in this case to attempt to reach a sentence where alternatives to immediate custody become available. Any importation of more than a tiny quantity of Class A controlled drug is treated seriously by our Courts. As a local man in his mid-30s, it cannot be said that the Applicant was unaware of the consequences in the event that his importation was detected. Another Court might not have managed to impose

as a short a sentence as the Court did on the Applicant. Taken in the round, I am not persuaded that the Applicant could persuade the appellate Court that the sentence imposed was manifestly excessive for any of the reasons set out in the first ground of appeal.

8. The second ground of appeal effectively invites the appellate Court to re-visit the approach taken in the Royal Court to the question of interference with the right to family life of the Applicant and others. As I have stated, it is evident that the relevant questions have been addressed. The sentencing Court knew that the sentence it was minded to impose would in principle affect those Article 8 rights. I do not consider that it failed to address the issues that it had to consider and that it was not incumbent upon the Royal Court to reach an outcome for the commission of the offence in the first Count in the circumstances in which it was committed that meant that the Applicant should not be sent to prison. There is nothing wrong in principle with the approach taken and, in my opinion, the sentence imposed is not one that can be said to be manifestly excessive. I take the view that the sentence imposed fell well within the band appropriate for the first Count and so I am not satisfied that this second ground is one for which leave to appeal should be granted.
9. For these reasons, I am not satisfied that this is an application where I should grant the leave to appeal sought. Importing a Class A controlled drug in the quantity involved, even where it is accepted that this was for the Applicant's personal use, is always likely, following *Richards* to result in a sentence of immediate custody. In the Applicant's case, the aggravating factors have not helped him and, in my view, they made it inevitable that the sentence alighted upon would have to be an immediate custodial one. Accordingly, sitting as a single judge, leave to appeal is refused. The Applicant is permitted, though, to renew his application before the plenary Court.
10. It follows from the refusal of leave that I will also dismiss the Applicant's application to be granted legal aid.

Richard McMahon
Bailiff