

Being knowingly concerned in the fraudulent evasion of the prohibition on importation of goods, contrary to section 77(1)(b) and 77(2) of the Customs and Excise General Provisions (Bailiwick of Guernsey) Law 1972, as amended, through the importation of a Class A drug namely morphine, in contravention of the prohibition on importation imposed by section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended. Possession of cannabis contrary to section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974 as amended.

[2022]GRC026

**ROYAL COURT
FULL COURT**

20th April, 2022

Before: Catherine Maureen Fooks, Judge of the Royal Court and Jurats:

**Stephen Murray Jones OBE, Terry John Ferbrache,
David Percy Langley Hodgetts LVO, David Allan Grut,
Joanne Marie Wyatt, Paul Martin Burnard, Felicity Jane Quevâtre-Malcic,
Heather Reed, James Robert Toynton.**

THE LAW OFFICERS OF THE CROWN

- v -

XAVIER MCKEE

**Advocate M Davies appeared for the Crown
Advocate S E Steel appeared for the Defendant**

JUDGE OF THE ROYAL COURT:

Background

Mr McKee you have pleaded guilty to 2 counts on 1 indictment.

The first count is of being knowingly concerned in the fraudulent evasion of the prohibition on importation of goods, contrary to section 77(1)(b) and 77(2) of the Customs and Excise General Provisions (Bailiwick of Guernsey) Law 1972, as amended, by your importation of a Class A drug namely morphine, on the 4th of September 2020, in contravention of the prohibition on importation imposed by section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended. The maximum penalty is life imprisonment.

The second count is of possession of cannabis on 5th April 2021 contrary to section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974 as amended. The maximum penalty is 10 years' imprisonment or a fine or both.

The facts in relation to the first count are that on 4th September 2020, you were stopped by customs as you entered Guernsey on the ferry with your car. You denied having any controlled drugs. Your car was searched and you were found to have a total of 36 morphine capsules of differing strengths in various places in your car. You initially said that they had been given to you by a friend for back pain but later said that you were referring to different drugs when you said this and had been nervous on

being stopped. At your first interview you said that you were unaware that they were controlled drugs and that they had been prescribed to you by your doctor in Spain. At your second interview you produced two Spanish prescriptions dated 2011 and 2019 for morphine. You accepted that those prescriptions were no longer valid to enable you to import the morphine. At your third interview, you exercised your right to silence.

The street value of the capsules is £720.

In relation to the second count, you were stopped again when entering Guernsey and found to have 0.39g of herbal cannabis in your possession.

You are a local man of 36 years of age, 35 at the time of the first offence. You are currently signed off work.

You have previous convictions, notably in 2005 for possession of controlled drugs of class B with intent to supply and for supplying class B, namely cannabis resin, for which you received 2 years' Youth Detention in 2005 and in March 2020 for unlawful wounding for which you received a sentence of 4 months' custody suspended for 2 years. You committed the offences for which appear today in breach of that suspended sentence and you committed the second offence in breach of the suspended sentence and whilst on bail in respect of the first offence.

You have been on conditional bail for most of the proceedings, but you spent 1 month in prison last year in July.

Sentencing Considerations

The sentencing guidelines applicable to offences involving the supply of drugs are contained in the case of Richards. Those guidelines were recently considered by the Guernsey Court of Appeal in Barras, Watt and Orchard v Law Officers 2021 GCA 045 and re-affirmed as current and appropriate. This Court will continue to follow those guidelines.

The lowest band for Class A drugs in tablet form in Richards is 7 to 9 years for quantities from 1 to 500 tablets. You had 36 tablets which is not a huge number but is above the very small quantity for personal use which would place you outside the guidelines.

It is important to note the basis of your plea, namely that you imported the morphine on expired prescriptions, knowing that those prescriptions had expired and that those tablets were for your own use.

We will deal separately with the cannabis offence which does not fall within the Richards guidelines.

Being satisfied that the custody threshold is passed in relation to the morphine we set the initial starting point at 7 years, before considering aggravating and mitigating factors.

There are aggravating factors: your previous conviction, when a teenager, for serious drugs offences and the breach of the suspended sentence handed down by the Magistrate's Court on 12th March, 2020. There is also the fact that you committed the second offence whilst on bail for the first offence.

In terms of mitigating factors, there are also some in your case. This is not a sophisticated importation and I repeat the terms of the basis of plea and particularly, that it is accepted that the tablets were for your own use.

Advocate Steel urges the Court to reduce the starting point considerably in the circumstances.

Having taken all of that into consideration, the revised starting point before mitigation is set at 4 years.

Mitigation

The Court must first consider the impact of your guilty pleas on sentence. You entered those pleas to an amended indictment on the first day of a 3-day trial, so cannot be afforded full credit for those pleas, but you are in receipt of credit, nonetheless.

The Court has considered carefully the Probation Report prepared in respect of you and we have also listened to the carefully crafted submissions of your Advocate and read carefully the 3 letters which were provided.

The Court is struggling to accept that this offending was born of naivety and poor-judgment. The Court notes that you were not truthful when you were stopped. You have a laissez-faire attitude to drugs but, you have now sought appropriate help for your back pain and you have referred yourself to 'Healthy Minds'. The Court is concerned that you have been taking such high doses of pain relief over such a long period of time.

You have accepted responsibility for your offending and it is said that you have learned your lesson in terms of dealing with prescription drugs. You are not assessed as in need of any supervision or work and it is said that you know what to do in order to avoid future offending. You are assessed as having a moderate likelihood of re-offending which we must take into account. We note that the risk of re-offending has increased rather than decreased.

There is no request for a drug trafficking investigation in respect of you and it is noted that your phone yielded no evidence. You have expressed your remorse.

Importantly, you are a family man. You live with your partner and your young child and step-child and you have 2 other children and we heard details of your relationship with them and their circumstances. We have read carefully the letters from you and your partner provided to us just before this hearing, which contain important information about your family and the potential impact of a custodial sentence.

In accordance with the case of Bourgaize v the Law Officers of the Crown 2014 (Jmt 49), the Court is required specifically to consider the Article 8 rights of especially the minor children affected by any immediate custodial sentence. There are 3 questions to be considered:

- Is there an interference with family life?
- Is it in accordance with the law and in pursuit of a legitimate aim within article 8.2?
- Is the interference proportionate given the balance between the various factors?

A sentence of imprisonment almost by definition interferes with family life. The imposition of a sentence of imprisonment for a serious criminal offence is in accordance with law and in pursuit of a legitimate aim within Article 8.2. Parents who commit serious offences face prison like everyone else.

The issue for this Court is always whether the imposition of an immediate custodial sentence would be a proportionate interference with family life, given the balance between the various factors. In this case the Court has to balance that impact against the legitimate aim of sentencing in a serious drugs case. This is not a case which stands on the cusp of custody as it falls within the Richards guidelines. In a case such as that, where the custody threshold is clearly passed, the balancing exercise entitles the Court to consider reducing the length of the sentence or, if appropriate, suspending it. The Court has in your case, considered the balancing exercise very carefully and noted the impact on the young children and your partner, but, having done that and even taking into account the circumstances of the offence and the mitigating factors, in view of the seriousness of the offences, the Court is unable to consider a sentence sufficiently low to attract consideration of alternatives to immediate custody.

The amount of cannabis in your possession was very small and it would have been dealt with by way of a financial penalty had it been charged on its own. In the circumstances the Court will impose no separate penalty.

Suspended Sentence

I turn now to the topic of the suspended sentence. You are in breach of the suspended sentence imposed by the Magistrate's Court. This Court has the option to activate it, vary it or make no order. Whilst it was imposed for a dissimilar offence, you have breached it within 6 months by committing a much more serious offence and the Court considers that the only appropriate alternative is to activate it and it will do so and make that consecutive to any sentence for the drugs offence.

In calculating the sentence, we have taken into account the totality principle and have therefore reduced the sentence on the first count to take account of the activation of the suspended sentence.

Sentence

The Law concerning controlled drugs has to apply to all people, including those who are in pain or who have various difficulties. It is important that those with such conditions seek appropriate help. The Court hopes that you will use your time in custody wisely to ensure that this is your last Court appearance.

Taking into account everything that has been said and applying all the appropriate discounts, the sentence will be as follows:

- Count 1 in respect of the morphine – 2 years and 8 months with effect from today.
- Count 2 in relation to the cannabis – no order as the suspended sentence is activated consecutively to the time to be served in Count 1.

Supervision

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 the shorter. If you fail to comply with the conditions of the supervision, you will be liable to further imprisonment, a fine, or both.

Forfeiture under the Misuse of Drugs (Bailiwick of Guernsey) Law 1974 as amended

The Crown's application pursuant to section 28 of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended, which was not opposed, for the forfeiture and destruction of the morphine tablets and cannabis which were lawfully seized and relate to the offences, is also granted.

In summary, I repeat that the total sentences are as follows:

Count 1 - 2 years and 8 months' immediate custody from today in respect of the morphine.

Count 2 - No order in respect of the cannabis.

Activation of the suspended sentence, consecutive to the time to be served on Count 1.

You may now leave with the officers once the Court has risen which will not be immediately as we have a couple of matters to attend to so I will just invite the Jurats to retire.

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

20th April 2022