Application for leave to appeal against Sentence, on the grounds that: (1) the sentence is manifestly excessive as the Appellant was sentenced on the basis that he was "evidently a supplier in some form or another" without justification, (2) the sentence for Count 3 was manifestly excessive as the weight was deemed to 'add considerably to the store available' on the island, but this was an irrelevant aggravating feature as this was not an importation offence and (3) the sentence for Count 3 was manifestly excessive as the quantity was deemed 'very large' but insufficient weight was placed on the fact that the THC comprised only a very small percentage of the total weight of the foods and syrups.

[2022]GCA030

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION

Between: **CONNER ANTHONY FALLA** **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: 23 May 2022

Counsel for the Applicant: **Advocate S E Steel**

1. The Applicant, Conner Falla, was sentenced by the Royal Court on 12 May 2022 to a total of 6 years and 6 months' imprisonment in respect of four Counts across two Indictments. The first of those Indictments contained Count 1 relating to importing 13.84 grams of herbal cannabis through the postal system on 11 May 2021 and Count 2 which dealt with an offence of failing to disclose information after service of a notice issued under the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003 ("the RIPL offence") between 26 March and 4 April 2021. On this Indictment, at the first plea and directions hearing, the Applicant pleaded guilty to Count 1, but not guilty to Count 2. He was found guilty on Count 2 following trial. The second Indictment contained Count 1 relating to possession on 6 July 2021 of 571 grams of Δ9-Tetrahydrocannabinol ("Δ9-THC"), which is a Class A controlled drug, and Count 2 dealt with possession on the same date of 63.98 grams of herbal cannabis, with an additional 3.09 being a mixture of herbal cannabis and tobacco. On this second Indictment, guilty pleas to both Counts were entered at the first plea and directions hearing.

2. The sentences imposed were 2 years and 8 months' imprisonment for the importation in Count 1 of the first Indictment, with 18 moths' imprisonment in respect of Count 2 (the RIPL offence) to run consecutively, and 2 years and 4 months' imprisonment for Count 1 on the second indictment (possessing Δ9-THC), plus 6 months' imprisonment concurrent for Count 2, with those sentences for the second Indictment to run consecutively to the sentences on the first Indictment. The custodial sentences were made to run from when the Applicant was first remanded into custody on 19 July 2021.

3. The Applicant is aged 23. He had a sentence of a total of 140 hours of community service imposed on him by the Magistrate's Court on 19 March 2020 as a direct alternative to imprisonment, which was coupled with a probation order. The offences involved were not drugs offences. However, the sentencing Court was aware that he would be dealt with in the Magistrate's Court for various possession offences committed in September and December 2020 and April 2021, and cultivating one cannabis plant in December 2020, all of which were committed before the importation offence and the later possession offences covered by the two Indictments.

4. In the course of the Court's sentencing remarks, having regard to the guidelines from *Richards* 2000-02 GLR 247, the starting point for the importation offence was enhanced to 4 years' imprisonment on the basis that the method had involved abuse of the postal system, the Applicant had been on bail at the time and he had a poor record of compliance. In respect of the RIPL offence, a starting point of 18 months' imprisonment arose from the circumstances, which showed the Applicant was seeking to avoid detection as a drug-dealer. The Court noted that *Richards* did not provide guidance for simple possession offences, but the quantity of Δ9-THC was large and, whilst acknowledging the offence to which the Applicant had pleaded guilty was not a drug trafficking offence, noted that "*it adds considerably to the store of such drugs in Guernsey*". The combined starting point for the two Counts on the second Indictment was indicated as 3 years and 6 months' imprisonment.

5. In terms of mitigation, the Court found none in respect of the RIPL offence, but afforded a discount of one-third in respect of the matters to which the Applicant had pleaded guilty. Those adjustments for plea resulted in the final total sentence.

6. Three grounds are advanced in the application for leave to appeal dated 12 May 2022 settled by Advocate Steel:

> "*1. The sentence in respect of all Counts, but especially Count 3 [sic], was manifestly excessive as the Appellant was sentenced on the basis that he was "evidently a supplier in some form or another" without justification. He was not convicted of any supply offences. Whilst the sentencing court "is entitled to proceed on the basis that the failure to provide access [to a device following a RIPL notice] is motivated by a desire to hide something either to protect others involved in criminal activity or to conceal the accused's own more extensive criminality" (para. 79 of Orchard and others v LOC, 4/10/21) the Court went too far in assuming that criminality was supplying drugs on the facts of this case.*
>
> *2. The sentence in respect of Count 3 was manifestly excessive as the weight was deemed to 'add considerably to the store available' on the island, but this was an irrelevant aggravating feature as this was not an importation offence.*
>
> *3. The sentence in respect of Count 3 was manifestly excessive as the quantity was deemed 'very large' but insufficient weight was placed on the fact that the THC comprised only a very small percentage of the total weight of the foods*

and syrups (e.g. 600mg in 93.6g of 'Skittles' syrup, 250mg in 38.77g of sweets as seen on the labels in the photographs)."

7. Although the focus is on the sentence in respect of what is referred to as Count 3, ie, Count 1 on the second Indictment (possession of Δ9-THC), the first ground encompasses a general challenge to the overall length of the sentence imposed as being manifestly excessive. In my judgment, this is an arguable basis on which to grant leave to appeal this sentence of 6 years and 6 months' imprisonment, which strikes me as being high for the totality of what it was that the Applicant fell to be sentenced on.

8. The reasons advanced in the second and third grounds of appeal relating only to the possession of Δ9-THC may be factors for why the sentence of 2 years and 4 months' imprisonment is manifestly excessive but, if either or both were viewed in isolation, these grounds would not have resulted in leave being granted. The maximum sentence for this Count is 14 years' imprisonment. The Royal Court was informed that there is inadequate local data to value the Class A drugs involved in this Count, but a sub-set of them (the two liquid exhibits) could be valued at between £20,560 and £26,728. I take the view that the sentencing Court could properly regard the total amount of Class A drugs covered by this Count as very large, even if the items referenced in the third ground of appeal might be viewed differently from some of the other items covered. In effect, they might be regarded as adding comparatively little to the overall picture, which reflects a fairly substantial stock of drugs possessed by the Applicant. The Applicant had claimed in interview that he consumed these drugs to help him calm down, particularly before going to bed. The comment that these added to the stock of such drugs in the Island may well be more apposite for an importer, but remains relevant, in my view, where someone says that drugs were acquired locally because one consequence is that others may well be tempted to feed that habit through further importations. This follows because it can be inferred that importers have to have a market for the drugs they import. The starting point taken on the second Indictment may appear to be a high one, but I think the Court could view this as being a large personal stock and the comment reflects the risks associated with maintaining such a significant amount, with a correspondingly high value, of Class A drugs. The starting point for a drug trafficking offence would inevitably have been considerably higher, so the starting point for the combination of two types of drugs possessed by the Applicant can be regarded as falling within the range open to the Court.

9. In respect of the RIPL offence, if viewed in isolation, a starting point of 18 months' imprisonment for an offence carrying a maximum sentence of 2 years' imprisonment, where there are no previous drug trafficking convictions, if not already excessive, must be regarded as being at the very upper end of what is permissible. The starting point should reflect the appropriate sentence following trial. Whilst I understand the Court's concerns about the Applicant inevitably having something to hide, that is a factor that is usually factored in anyway before selecting an appropriate starting point. This starting point should be recognised as being a high one and one from which no reduction was made for any mitigation.

10. In respect of the importation of a comparatively small amount of herbal cannabis, selecting 4 years' imprisonment in a range running from 3 to 6 years also appears to me to be at the upper end for an offender without any previous relevant convictions. In itself, this would not be a ground for granting leave to appeal, but when coupled with the other Count on that first Indictment (the RIPL offence), the totality for this Indictment is, in my view, arguably stretching beyond the range that could appropriately be imposed. The Applicant has an arguable case that this is manifestly excessive.

11. Turning back to the second Indictment and the possession offences, particularly the Count relating to Δ9-THC, it is apparent that this offending has passed the custody threshold in its own right. It is unusual for such a significant quantity to be dealt with as possession and I

understand why the sentencing Court chose a combined starting point at the level that it did. However, I fear that insufficient regard was had to the dates of the other offences with which it was dealing. (This is an issue covered by the first ground of appeal rather than the second or third ground.) The RIPL offence was complete by 4 April 2021. This possession offence relates to 6 July 2021, just over three months later. Having taken a high starting point for the RIPL offence, I think it is arguable on behalf of the Applicant that there is an element of double-counting when adding a further consecutive sentence of the length that the Royal Court has for these different phases of offending.

12. For these reasons, I am persuaded that the final overall sentence of 6 years and 6 months' imprisonment through aggregating three sentences consecutively does not appear to have had sufficient regard to the totality principle that should have been applied when sentencing on these two Indictments. Each of the individual sentences might be within the range of sentences for the offences to which they attach, although I do think some of them would have to be viewed at the upper end of the range available, but making each such sentence consecutive without taking the step back and looking at the end result is where I consider the sentencing Court may be found by the plenary Court to have fallen into error. Accordingly, I will grant the Applicant leave to appeal in this case.

13. As a result of granting the Applicant leave, I will also grant him the legal aid for which he applies to enable him to pursue his appeal against sentence.

Richard McMahon
Bailiff