

Production of Class B drug Cannabis, possession and supply of class A drug MDMA supplying of a Class C drug, Gabapentin, and the supplying of Class B drug, Dihydrocodeine.

[2022]GRC066

**ROYAL COURT  
FULL COURT**

**29<sup>th</sup> June 2022**

**Before: Catherine Maureen Fooks, Judge of the Royal Court and Jurats:  
Jonathan Grenfell Hooley, Steven John Morris, Joanne Marie Wyatt,  
Stuart Michael Crisp, Marilyn Jasmine King, Tina Jane Le Poidevin,  
Paul Martin Burnard, Felicity Jane Quevatre-Malcic, Heather Reed.**

**THE LAW OFFICERS OF THE CROWN**

- v -

**JAMES CHRISTIAN DAVID BOURGAIZE**

**And**

**JOSHUA LUKE DAIGLE**

**Advocate J R Calderwood appeared for the Crown  
Advocate C A Tee appeared for the First Defendant (Bourgaize)  
Advocate S E Steel appeared for the Second Defendant (Daigle)**

**JUDGE OF THE ROYAL COURT:**

**Background**

Mr Bourgaize and Mr Daigle you have pleaded guilty to one joint charge (Count 1), that between the 1<sup>st</sup> March 2021 and the 3<sup>rd</sup> July 2021 you, together, produced Cannabis, a Class B drug, the maximum penalty for which is 21 years imprisonment.

Mr Bourgaize you have pleaded guilty to four other charges. All charges are under the Misuse of Drugs Law 1974, as amended.

Count 2 is that on the 1<sup>st</sup> July 2021 you offered to supply a Class A drug namely MDMA, which carries a maximum penalty of life imprisonment.

Count 3 that on the 2<sup>nd</sup> July 2021 you had MDMA in your possession, the maximum penalty for which is 14 years' imprisonment.

Counts 4 and 5 that between the 3<sup>rd</sup> September 2020 and the 3<sup>rd</sup> July 2021 you were concerned in the supplying of a Class C drug, namely Gabapentin, for which the maximum penalty is 14 years' imprisonment and the supplying of Class B drug, namely Dihydrocodeine, which carries a maximum penalty of 21 years' imprisonment.

The facts are that on the 2<sup>nd</sup> July 2021, police officers attended the home, which you were sharing, for an unrelated matter, regarding Mr Bourgaize, which is no reflection on him. Mr Bourgaize you let the police in and Mr Daigle was asleep with his 5 year old son. Mr Bourgaize you were somewhat

obstructive to police, after you had been arrested, but then officers entered the attic space which was warm and smelt of Cannabis. You were heard to say '*you might as well take me to the van now, there's plants upstairs*'.

In the attic officers found a long bench holding 9 large pots containing Cannabis plants and 7 smaller pots containing growing seedlings. The plants were illuminated by several large high powered LED lamps and a longer lamp which emitted heat. There was tinfoil along the wall, behind the bench and scales. The Court was given photographs showing the set-up which was neat and well organised.

In terms of yield, the prosecution alleges, for the 16 plants, the figures based on the United Nations office on drugs and crime, of 22-40 grams per plant and that would suggest a yield of 352-640 grams, although it is to be noted that variations due to cultivation factors have to be considered.

When searching Mr Bourgaize, police found 2 blue MDMA pills in his pocket and, Mr Bourgaize, you invited officers to your room and indicated that there would be further pills in the second drawer down, for your personal use. They found a large zip lock bag containing a further 10 blue MDMA pills.

Mr Daigle, you were then subsequently arrested. Mobile phones belonging to both of you were seized, you both declined to give the PIN numbers which did not prevent officers from accessing your devices. Mr Bourgaize, you, initially answered some questions claiming that the drugs found during your arrest were all for your personal use and that your reason for growing the plants was to avoid paying "horrendous street prices and fuelling drug dealers pockets". You claimed that the MDMA was also for personal use. You told the officers that you are prescribed Dihydrocodeine and Gabapentin. You thereafter exercised your right to silence at interview, as is your right, and similarly Mr Daigle you exercised that right.

The mobile phones were analysed and revealed messages between you about the Cannabis cultivation set-up, which were included in the prosecution outline. Some evidence on Mr Daigle's phone suggested that the Cannabis was being sold, but that is not an essential element of the production offence. There is also a message Mr Daigle proposed to send to Mr Bourgaize, found on another person's phone, in which he asks Mr Bourgaize if he is prepared to take the hit for the Cannabis cultivation. There is no count relating to that message and we do not factor it into our sentencing exercise.

The analysis of Mr Bourgaize's phone shows messages which relate to Counts 2, 4 and 5. In relation to Count 2 with male A, to whom Mr Bourgaize offered to supply 4 MDMA tablets and there is also reference to him having 12 'Ds' meaning Dihydrocodeine.

In relation to Counts 4 and 5, there are messages again with male A, from April 2021 to whom Mr Bourgaize offers Dihydrocodeine and Gabapentin and the numbers indicate that there are 282 Dihydrocodeine and 180 Gabapentin tablets which totalled 462.

The Prosecution alleges that the dealing in Counts 4 and 5 is more extensive than the period of the messages, as there are deposits into your bank account from male A totalling £2,555 across 20 transactions from the 4<sup>th</sup> September 2020 to the 25<sup>th</sup> June 2021 and there is a correlation between your prescription dates and those payments. The Prosecution asserts that it can be proved to the criminal standard that you were concerned in the supplying of sufficient tablets of Classes B and C together to fall within the band of 500 to 1,000 and probably at the upper end of that band, were the Court to apply the bands in '*Richards*' which apply to Class A tablets. It would be the second band, the Prosecution suggests, which would be applicable.

The Defence say that Counts 4 and 5 should be approached separately, there are two different classes of drugs and that there can be no certainty as to the quantity of tablets supplied, extrapolated from the

financial data, with the result that you should be given the benefit of any uncertainty and his offending, in relation to each class of drugs, treated as falling within the lower band for tablets.

Additionally, Advocate Tee, on behalf of Mr Bourgaize, does not accept that the Class A bands are applicable at all to the Class B and C offending. She urges the Court not to speculate or try to extrapolate and she urged the Court also to assume that more of the supply, which is comprised in the £2,555, relates to Class C than Class B.

We were given street values but they are of limited assistance in this particular case.

Mr Bourgaize and Mr Daigle you are both local men, Mr Bourgaize you are now 27 and you were 25/26 at the time of the offences, you are carpenter. You have a number of previous convictions including cultivation of Cannabis in 2016, for which you were fined, but most notably you were imprisoned for 7 years and 10 months for 7 drugs offences in 2017, including importation of Cannabis, MDMA in powdered and tablet form (there were 1,042 tablets) and possession of Cannabis. You had been released on parole on the 20<sup>th</sup> December 2019; you committed the offences on this Indictment whilst on parole, so you were recalled to prison on the 12<sup>th</sup> July 2021. You have been on remand since the 25<sup>th</sup> June 2022, following the end of your parole licence, on that date.

Mr Daigle, you are 28, you were 27 at the time of your offence. You are a gardener, you have a few previous convictions, none for drugs and nothing in this Court. On the 12<sup>th</sup> October 2020 you were given a Conditional Discharge for theft. You have offended whilst subject to that Order, so under the Probation (Bailiwick of Guernsey) Law 2018, Section 19(5), this Court may deal with you in respect of that theft offence, in any way in which the Magistrate's Court could have dealt with you, if it had convicted you of that offence. You have been on conditional bail throughout the proceedings.

### **Sentencing Guidelines**

The sentencing guidelines applicable to offences involving the supply of drugs are contained in the case of 'Richards' and those guidelines were recently considered by the Court of Appeal in 'Barras, Watt and Orchard v Law Officers of the Crown' and reaffirmed as current and appropriate and the Court will continue to follow them.

It goes without saying, that the Court, in this case, is satisfied that the custody threshold, in respect of the offending by both of you, has been passed.

The Court of Appeal in 'Marsh and Hardy and Fallaize v The Law Officers of the Crown' 2007-08 GLR 1 held that the 'Richards' guidelines also apply to cultivation cases, based on potential yield for quantity and factoring in the sophistication and scale of the operation. Those guidelines are equally applicable to production cases.

In your case, the set up was well organised and equipped. There were seedlings as well as plants and the phone evidence supports the proposition that it was being grown for financial gain and we treat the operation as completely joint, ongoing, relatively small but reasonably sophisticated.

Based on the prosecution figure for yield of 352-640 grams, we start at 3 years for each of you before considering aggravating and mitigation factors. Although you are appearing together you must be sentenced separately and there are important factors which differentiate between you in the overall sentencing process.

There are aggravating factors present in the production offence, notably and of gravest concern to the Court, the presence of Mr Daigle's son in the property, which relates to both defendants, but more particularly to him. We did not find that there was any offence mitigation.

We will consider separately the aggravating factor of Mr Bourgaize's extensive drug related criminal record and that he had committed the offence while on parole and we accept Advocate Tee's submission in that regard (against double counting). We will also deal separately with the breach of the Conditional Discharge by Mr Daigle.

Having considered the offence related aggravating factors, we increase the starting point for both of you to 3 years and 6 months for the production offence.

We now turn to Mr Bourgaize's other offences. Although Count 2 concerns only 4 Class A MDMA tablets, offering to supply Class A is always a serious offence. The lowest available starting point in 'Richards' is 7 years, which we adopt.

Count 3. The possession charge comprises more MDMA tablets, 12 in number, than the offer to supply charge. Only possession has been charged and that is what must be sentenced. 'Richards' does not apply to this offence. We take a starting point of 3 months.

Counts 4 and 5 concern drugs which are not directly covered by 'Richards'. Class B tablets and Class C drugs. The case of 'Grunte' in which the Court took two thirds of the Class A Band for the number of tablets concerned Amphetamines, which Dihydrocodeine is not. In the case of 'Lamb' the Court of Appeal did not endorse the Court's practice of using one-half of the Class A Band for Class C drugs and thus 'Richards' remains the guideline case to be applied. It gives the Court principles with which to set a sentencing starting point and that is to take into account in sentencing, notably quantity and role. Sentencing is always a matter for the Court's discretion; it is an art and not a science.

We take into account the number of tablets which are disclosed by the messages and the fact that the dealing clearly spanned a 9 month period involving a greater quantity of each drug, but we consider that the quantity of tablets cannot be combined for sentencing, as the prosecutions suggests. There are two separate offences with two separate penalties.

The starting point, before aggravating and mitigating factors for the Class B offence, will be 4 years and the Class C offence 18 months.

There are considerable aggravating factors in your case Mr Bourgaize, in terms of your previous convictions, which include drugs offences, the breach of parole, although we do take into account the fact that you have served that sentence, so there is no double counting in relation to that aggravation and we also consider that the sale of prescription drugs is an aggravating factor in itself. These aggravating factors justify increasing the starting points, which we do as follows:-

Count 1 - we make no change and that remains at the 3 years and 6 months.

Count 2 - factoring in the low number of tablets, we also leave that starting point at 7 years.

Count 3 - increased to 4½ months.

Count 4 - increased to 2 years 3 months

Count 5 - increased to 5 years 6 months.

**Mr Bourgaize**, in accordance with paragraph 12 of 'Richards' we must now set a total starting point which will form the basis for the sentence on Count 2 which is the most serious offence. The other offences will be sentenced concurrently. Looking at the matter in the round and applying the totality principle, that total starting point is 9 years for Mr Bourgaize.

**Mr Daigle**, your revised starting point remains at 3 years and 6 months.

We must now consider plea and personal mitigation.

### **Mitigation**

#### Plea

The Court must first consider the impact of your guilty pleas on sentence. We afford you both full credit for your guilty pleas to all offences.

#### Mitigation

In relation to personal mitigation, the Court has considered carefully, the informative and realistic probation reports prepared in respect of you. We have also listened to the sensible submissions of your experienced advocates and read the helpful and appropriate letters provided.

Taking **Mr Bourgaize** first, you have very limited personal mitigation available to you. It is unclear whether, despite your plea, you fully accept your joint role in the production offence. It was clearly a joint enterprise. You have accepted that your offending, or at least part of it, was motivated by financial gain, at least to some extent, to maintain your lifestyle. You are clearly intelligent and capable, with a good work ethic. Your work reference is a good one. You are a long term user of Cannabis and you have what the Probation Officer describes as a “relaxed attitude” to drugs, although you do acknowledge the harm caused to society. You are said to have the skills to change your life after release from prison and you have your employment skills and a supportive family. These positive factors were not enough to stop you from offending and neither has being on parole, which is a concern. You, yourself, acknowledge that you have wasted your 20’s in prison. You are assessed as having a medium risk of re-offending, which is taken into account.

**Mr Daigle**, you are not a person of previous good character, but we can give you credit for your fairly minimal convictions, none of which are directly relevant. You have not faced prison before. You have accepted equal responsibility for the production, though you claimed that it was for your personal use, you being a long-term Cannabis user. Your messages suggest a different story, but there is no supply charge.

We are concerned that you had your son staying with you at premises on which there was a Cannabis cultivation operation. This shows a lack of judgment on your part. On a more positive note, in interview, you do acknowledge that your son should not be exposed to drugs.

You say that you have made a massive mistake but we are concerned that you have continued to use Cannabis illegally, even though in lesser amounts, as you are facing this Court case. That said, the Probation officer has reported that you have developed some insight and that the Court process has been salutary. We have noted the content of your letter, which was sincere and realistic.

We must consider the impact of any custodial sentence on your son, who lives with his mother, but who sees you once or twice a week with one overnight stay. He would obviously continue to live with his mother. We were impressed by her letter and we note the plan to increase your time with your son so that it would effectively be shared residence.

In accordance with the case of *‘Bourgaize v The Law Officers of the Crown’* the Court is required specifically to consider the Article 8 rights of the minor child affected by your being imprisoned, as well, of course, as your own rights.

There are the usual three questions to be considered:

1. Is there an interference with family life?
2. Is it in accordance with law and in pursuit of a legitimate aim, within Article 8.2?
3. Is the interference proportionate given the balance between the various factors?

A sentence of imprisonment, 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 will be a proportionate interference with family life, given the balance between the various factors.

The Court has to balance the impact against the legitimate aims of sentencing in a serious drugs case. This is not a case which stands on the cusp of custody because it falls fairly within the *Richards* guidelines, but the Court is entitled, in this case, to consider either reducing the length of the sentence or non-custodial alternatives.

An immediate custodial sentence would result in the loss of your rented home and your job, the latter rendering you unable to pay maintenance for your child. You would also lose your place on the waiting list for a 2-bedded property. You are assessed as having a low/moderate likelihood of re-offending, which we take into account. You are in breach of the Conditional Discharge imposed by the Magistrate's Court for theft by finding of sunglasses and we deal with that separately.

### **Sentence**

As has been reiterated recently, the legislation concerning drugs has to be obeyed by all and this Court is bound to apply the sentencing guidelines for those who break it. Those who deal in drugs must expect prison sentences and Mr Bourgaize, in your case, those who re-offend can expect to face long sentences to ensure that the public is protected.

Mr Bourgaize, there can, of course, be no consideration of alternatives to immediate custody for you, but, for you, Mr Daigle, the Court has been able to consider alternatives and has been persuaded that an immediate custodial sentence would be disproportionate in view of your plea, lack of relevant previous convictions, stable lifestyle and in particular the impact on your son of an immediate custodial sentence.

In sentencing you both we have taken into account the totality principle.

Mr Bourgaize, you have served your 2017 sentence in full, you have been on remand for a few days, we will start your sentence with effect from the 25<sup>th</sup> June 2022.

Mr Bourgaize, by choosing to offend in the most deliberate way by establishing a Cannabis production unit and dealing in all classes of drugs, while on parole, you have shown that you have not learnt your lesson. You need to reconsider your relaxed attitude to drugs and their money-making potential and look to the positives of work and family, if you are not to spend large periods of your future life in custody.

Mr Daigle, the production operation in which you involved yourself was a serious offence and, were it not for your mitigation and particularly the impact on your son, you would be going into custody today, be in no doubt that this is your one chance.

Taking into account all the above and applying the appropriate discounts, the sentences will be as follows:-

**Mr Daigle:**

Count 1 - 2 years' imprisonment suspended for 3 years.

You will not have to serve the suspended sentence of imprisonment unless, during the next 3 years, you are convicted of an offence punishable with imprisonment. If you are convicted of such an offence, you will be liable to serve all or part of the sentence. A suspended sentence is not a let-off, it will hang over your head for that period of time and those will be the consequences, so please do not forget that.

**Mr Bourgaize:**

The remaining Counts only relate to you:

Count 2 - which is the most serious – 6 years' imprisonment with effect from 25<sup>th</sup> June 2022.

Count 1 - 2 years' imprisonment concurrent

Count 3 - 3 months' imprisonment concurrent

Count 4 - 18 months' imprisonment concurrent

Count 5 - 4 years' imprisonment concurrent

You will therefore serve a total of 6 years' imprisonment with effect from the 25<sup>th</sup> June 2022, the day on which you completed your sentence.

**Mr Daigle**, in addition to the suspended sentence in relation to Count 1, we must deal with you for the breach of the Conditional Discharge, which we do by sentencing you to a Community Service Order of 50 hours with a direct alternative of one month. We note that you have signed a form stating that you understand the effect of a Community Service Order, the power of the Court to review the Order and the consequences that may follow if you fail to comply with the requirements or if you are convicted of a further offence while the Order is in force. The Court is satisfied that provision can be made for you to perform the work and that you are a suitable person. Please note that if you fail to complete even one hour without a medical certificate or commit any other offence you will be brought back before this Court and you will face going to prison and it is particularly important that you do not re-offend because you were already in breach of the Conditional Discharge and that is not very impressive, so you must make sure that you don't.

**Mr Bourgaize**, 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.

The Crown's application pursuant to Section 3 of the Police Property and Forfeiture (Bailiwick of Guernsey) Law, 2006, for forfeiture and destruction of Mr Bourgaize's iPhone and Mr Daigle's Samsung and Apple Mac is also granted. This application was not opposed, the items were lawfully seized and were used for the purpose of committing or facilitating the commission of the offences. The Court has taken into account their value, £40, £400 and £50-£350 respectively and the likely financial and other effects on you of making the Order before deciding to grant the application.

The Crown's application pursuant to Section 26 of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974, as amended, which was not opposed for the forfeiture and destruction of the tablets, plants and equipment, as set out by the prosecutor, which were lawfully seized and relate to the offences, is also granted.

### **Summary**

**Mr Daigle, 2 years' imprisonment, suspended for 3 years, together with a CSO of 50 hours or 1 month in relation to the breach of the Conditional Discharge.**

**Mr Bourgaize, 6 years' imprisonment with effect from the 25<sup>th</sup> June 2022 and forfeiture and destruction is ordered of the drugs and paraphernalia and devices.**

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

**Dated 29<sup>th</sup> June 2022**