Appeal against sentence of six years and six months' imprisonment for importation of drugs and a failing to disclose information after service of a notice issued under the Regulation of Investigatory Powers Bailiwick of Guernsey Law 2003. Sentence reduced to 5 years.

[2022]GCA070

IN THE COURT OF APPEAL OF GUERNSEY
CRIMINAL DIVISION
APPEAL NO. 510

28th September 2022

Before:

Jonathan Crow KC President
Sir Timothy Le Cocq KC, Bailiff of Jersey
James Wolffe KC

Between:

Conner Anthony Falla **Appellant**

-and-

Law Officers of the Crown **Respondent**

Advocate S E Steel for the Appellant
Advocate J D McVeigh for the Respondent

Judgment of the Court

Le Cocq JA

Introduction

1. This is the judgment of the Court on an appeal by Conner Anthony Falla (the Appellant) against a sentence passed on him by the Royal Court (Full Court: John Russell Finch Esquire OBE Lieutenant Bailiff, presiding with Jurats Jones, Morris, Mortimer, Wyatt, Robillard, King, Burnard and Reed) on the 12th May 2022.

2. The Appellant was sentenced by the Royal Court to a total of six years and six months' imprisonment in respect of four counts contained in two indictments. The first indictment comprised two counts, namely Count 1 which related to the importation of 13.84 grams of

herbal cannabis through the postal system on the 11th May 2021 ("the Importation Offence"); 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 the 26th March and 4th April 2021. The Appellant pleaded guilty to the Importation Offence but not guilty to the RIPL Offence. He was convicted of the RIPL Offence following a trial in which he gave no evidence.

3. The second indictment also comprised two counts, namely Count 1 which related to possession on the 6th July 2021 of 571 grams of Δ9-Tetrahydrocannabinol ("THC") which is a class A controlled drug ("the Class A Offence"); and Count 2, which dealt with the possession on the same date of 63.98 grams of herbal cannabis with an additional 3.09 grams being a mixture of herbal cannabis and tobacco ("the Class B Possession Offence"). On his second indictment, the Appellant entered guilty pleas to both counts at the first plea and directions hearing.

4. The Sentencing Court imposed the following sentences:

    a. two years, eight months' imprisonment for The Importation Offence;

    b. eighteen months' imprisonment for the RIPL Offence;
    the two to run consecutively;

    c. two years and four months' imprisonment for the Class A Offence;

    d. six months' concurrent for Class B Possession Offence;

    with those sentences at c. and d. to run consecutively to the sentences at a. and b. The overall sentence of imprisonment was accordingly six years and six months' imprisonment.

5. Leave to appeal against the sentence was given on the papers by McMahon, Bailiff, sitting as a single judge of this Court, on the 23rd May 2022. In granting leave on the papers, the learned judge said:

    > ***"I am persuaded that the final overall sentence of six years and six months imprisonment through aggregating three sentences consecutively does not appear to have had sufficient regard to the totality principle that should have 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."***

6. At the time of the offending, the Appellant was aged twenty-two and he was subject to a sentence of 140 hours community service imposed on the 19th March 2020 at the Magistrate's Court. This was coupled with a Probation Order. The offences to which that penalty related were not drugs offences but it is accordingly the case that the instant offences were committed when the Appellant was on probation. He has a number of previous convictions but none for drugs related offending nor has he previously served a

sentence of imprisonment although he has not responded well to previous non-custodial disposal.

7. The facts of the offending in this case can be simply stated. On the 11th May 2021, customs officers on duty at Guernsey Post intercepted a postal package addressed to a named individual which had been sent from the UK via special delivery. It was found to contain both clear and silver heat-sealed packaging which in turn contained a substance which on analysis was found to be 13.84 grams of herbal cannabis. A missing delivery slip was left at the address and subsequently that day a redelivery request was submitted via the internet asking for delivery the day after. A contact number was provided and, by examining the Guernsey electronic freight manifest system, a consignment in the name of the Appellant was identified. The contact number was identified as his.

8. As a result of the parcel being intercepted at Guernsey Post, a search was carried out and a mobile telephone was seized from the Appellant's living room. He was issued with a RIPL notice relating to that phone but failed to provide the correct PIN number for it and it could not therefore be forensically examined. As we have indicated, that matter was contested at trial but the Appellant was convicted unanimously.

9. With regard to the second indictment, on Tuesday 6th July 2021, a police officer was driving in a marked police car up Hauteville and noticed two males exiting number 19. They approached two other males who were waiting outside the address. On seeing the police vehicle, the males who had exited the address immediately went back inside and hid behind the door. One of the other two males outside started to walk away and all four males, none of whom were the Appellant, were detained. One of them explained to the police officers that he had come immediately from the Appellant's property and thereafter the officer attended to find the Appellant with his partner. The officer could smell cannabis and the Appellant confirmed that he had just smoked some. Cannabis was found at the property and seized and placed into an empty metal tin and this was confirmed to comprise 10.19 grams of herbal cannabis. On searching a cupboard in a room in the Appellant's property, packets were found containing 53.19 grams of herbal cannabis with four ready rolled cigarette joints containing a mixture of cannabis and tobacco. In total, 63.98 grams of herbal cannabis was found with a further 3.09 grams being a mixture of herbal cannabis and tobacco.

10. In the same cupboard, two further packets were found containing sweets (which on examination contained 38.8 grams of THC) together with two bottles named *'Skittles THC Syrup'* and *'RSO Brain Liquor'* containing a total of 205.6 grams of THC. Two grip seal foil bags were found to contain 237 grams of THC paste and a further two bags were found to contain a total of 89.6 grams of THC.

The decision of the Sentencing Court

11. After setting out the nature of the counts on the indictment, the Sentencing Court indicated that the total value of all of the cannabis concerned was £4,045.50 to £5,683.70 and the THC liquid could be valued at £20,560 to £26,728. The THC sweets and paste mixture which had formed part of the items found could not be valued.

12. In relation to the Importation Offence, the Court identified correctly that it was obliged to follow the guidelines in the case of Richards [2002] GLR 247 and identified that for the

importation of up to two kilos the starting point to be considered was in the region of three to six years. The Court determined the starting point in the following terms:

> ***"In view of the facts of the case, noting especially the abuse of the postal system, the fact that you were on bail and your poor record of compliance, we enhance the starting point to four years."***

13. With regard to the RIPL Offence, the Court then started with a period of eighteen months based on circumstances *'which showed you were avoiding detection as a drug dealer'*.

14. Referring to the second indictment, the Court indicated that the Class A Offence involved a very large quantity of Class A drug with a considerable value and that the Class B Possession Offence again related to a significant amount of herbal cannabis. With regard to the Class A Offence on the second indictment, the Court said:

> ***"We sentence on the charges as set out ie possession, but make what we consider is a common sense and rational decision that with such a large amount it adds considerably to the store of such drugs in Guernsey. We also remind ourselves how you failed to comply with the RIPL notice, for what we conclude are obvious reasons."***

15. The Court went on to express the view that the Appellant *was* ***'evidently a supplier of drugs in some form or another'***.

16. In referring to mitigation, the Court indicated that it had noted what had been said by the Appellant's legal adviser and the probation reports and the Appellant's own note. The Court stated, however, that the Appellant had ***'a history, to put it mildly, of non-compliance'.*** It also went on to conclude that the Appellant had little practical alternative but to plead guilty to the matters before the Court to which a proper deduction would be made with the exception of the RIPL Offence which resulted in a finding of guilt after a trial and in respect of which the Court could ***'see no applicable credit'***.

17. Having stated that the Appellant presented a ***'high likelihood of reoffending'***, the Court imposed the sentences set out above.

The Appellant's case

18. The Appellant submits that the sentences imposed for each offence individually and for the offending collectively was manifestly excessive. The Appellant was sentenced on the basis that he was a supplier in some form or another, but this was not justified and he was not convicted of any supply offences. The Court went too far, so it was argued, in assuming that the reason for committing the RIPL Offence was to hide other criminality relating to the supply of drugs. In oral submissions Counsel for the Appellant accepted that the Royal Court was entitled to draw an adverse inference from the RIPL Offence, but submitted that there were a number of explanations that were possible, such as for example protecting himself or his own source of supply that fell short of him being a supplier himself.

19. The Appellant had no relevant previous convictions, had never previously been to prison, and the quantity of drugs imported in the Importation Offence was relatively small and consistent with personal use. The sentence for the RIPL Offence was manifestly excessive

as the maximum sentence is twenty-four months and again the Appellant had no relevant previous convictions.

20. With regard to the Class A Offence, it was argued that the assessment of the weight of the drugs as adding *'considerably to the store available'* on the island was an irrelevant aggravating feature given that the Appellant was not charged with an importation offence. It was further argued that the quantity, whilst deemed by the Sentencing Court to be 'very large', was not large in as much as the THC comprised only a small percentage of the total weight of the foods and syrups.

21. In addition, the Appellant emphasises his personal mitigation given that he has a recognised mental health diagnosis (emotionally unstable personality disorder), has had a traumatic upbringing and was the victim of a serious assault in June 2020 which led to him using cannabis to control his anxiety and help him sleep and that he had a partner and young daughter in the community.

22. Furthermore, it was argued that the Sentencing Court paid insufficient regard to the principle of totality when arriving at the overall sentence of six years and six months. The dates of the offences span a little over three months from the 4th April to 6th July 2021 and, it is submitted, the aggregate length of the sentences was neither just nor proportionate.

23. It is argued that this Court should either proportionately reduce each consecutive sentence or select a combined starting point based on the totality of the offending, identify The Importation Offence as the most serious principal offence and impose a greater term than otherwise would be imposed for The RiPL Offence and order that the other three sentences to run concurrently, or make a combination of the two previous approaches.

24. The Appellant cites paragraph 12 from Richards above which is in the following terms:

> ***"It is a feature of some cases that two different drugs are imported at the same time, both in significant quantities. It may be two different Class A drugs, or a Class A drug and a Class B drug. In such cases the combined quantity is a relevant factor in determining the extent of the criminal conduct, which must be greater than if only one drug was imported. In such cases the court should assess the appropriate starting point in respect of each of the drugs, and then determine a 'total' starting point, taking into account the overall quantity. Thereafter the mitigation will be applied to arrive at the actual sentences to be imposed. The court then provides for the total length of sentence by imposing a greater term of imprisonment than otherwise would have been imposed for the more serious of the two offences (if such can be identified), to run concurrently with the other sentence imposed. Consecutive sentences should not normally be imposed in such cases, since that may create a misleading impression that each offence is being sentenced more leniently that it is. The court must clearly state in any such case both what the court considers to be the appropriate 'total starting point' and how it is arrived at."***

The Respondent's case

25. The Respondent submits that, with regard to all of the uncontested matters, a discount of one-third was applied in recognition of the early guilty pleas. No such discount could of course be applied with regard to the RIPL Offence, which was contested. The Court

applied the one-third on the basis that, with regard to the non-contested matters, the Appellant had little alternative but to plead guilty and the one-third was an appropriate discount to take all of the mitigation into account.

26. In addition, of course, there were aggravating factors in that the Appellant was in breach of a community service order and did have some previous convictions although they were generally public order or theft and were not drugs offences. In addition, the Appellant had abused the postal service to commit the Importation Offence.

27. It was pointed out that the observation by the Sentencing Court that the Appellant was *'evidently a supplier in some form or another'* came after a comment about the packaging for the THC drugs which were predominantly contained in food stuffs and were, it was said, an inducement to young people.

28. With regard to the Importation Offence, the Respondent points out that Richards provides for a starting point of three to six years' imprisonment (after trial and prior to considering mitigating factors). The sentence imposed recognised that there was an abuse of the postal service, the Appellant was on bail when it was committed, and he had demonstrated poor compliance with previous sentences. The starting point was identified as four years which was reduced by a one-third discount on the basis set out above reaching a sentence of two years eight months.

29. With regard to the RIPL Offence, the sentence was some three-quarters of the maximum the Court could have imposed, but it is argued that this was perfectly appropriate as a deterrent sentence.

30. With regard to the Class A Offence Richards states:

> ***"The Court should primarily consider the weight of the drug involved, taking into account its street value only to a lesser extent. The purity of the drug was not taken into account unless very high or where there was reason to believe the drug would be cut before being passed on."***

31. It is argued that there is nothing in the totality argument advanced by the Appellant because the Importation Offence and the RIPL Offence were committed at a different time to the Class A Offence and the Class B Possession Offence.

Discussion and Conclusion

32. We are of course mindful that we are dealing with the careful deliberations of the full sentencing court and would not generally interfere with their view unless sure that we should do so.

33. Having considered the submissions before us, we cannot say that the Sentencing Court's general approach to the matter was incorrect. It was perfectly reasonable to sentence the Importation Offence and the RIPL offence on a consecutive basis to the Class A Offence and the Class B Possession Offence. The factors identified by the Sentencing Court as aggravating appear to us to be appropriate. The Court was entitled to form a view that a guilty verdict would after trial have been almost inevitable and there was a history of non-compliance and a reasonable indication of a significant use of cannabis and, indeed, THC.

34. We do however differ from the Royal Court in certain material respects. We are concerned with the statements to the effect that the offender was a drugs dealer or a supplier of drugs, which on one interpretation suggests that this was in the mind of the court when assessing sentence. He had not been charged with any dealing offence. Whilst the RIPL Offence could justify an inference that the Appellant wished to avoid detection in respect of criminality, this was not the only possible inference, and it would not follow that the criminality in question was drug dealing. And whilst the Court was entitled to take into account, as it did, that the packaging of some of the Class A drugs was such as to be attractive to young people, the Court was required to sentence the Appellant on the basis that he had been convicted only of offences of simple possession.

35. Whilst we think that, as a matter of principle, a RIPL Offence may, in appropriate cases, attract a deterrent sentence and it is also appropriate that that sentence run consecutively with the other offence with which it is connected, we have in mind that we are dealing here with an offender who has not previously been convicted of a RIPL Offence, or indeed of a drugs offence, and in our view the starting point adopted by the Royal Court for this offence was too high. We think that a starting point of 50% of the maximum possible sentence would be appropriate in this case.

36. We are also concerned about the personal mitigation available to the Appellant. No deduction appears to have been made by the Royal Court for personal mitigation in respect of the RIPL Offence at all. Whilst the Royal Court stated, under the heading of "Mitigation" that it had considered what the Appellant's advocate had told them, his note and the probation reports, it did not refer to any personal mitigation. These considerations suggest to us that the deductions made from the starting points in respect of the other offences related solely to the guilty pleas and that no allowance was, in fact, made for personal mitigation.

37. We do not repeat the mitigation set out in the Probation Reports and in the submissions of Counsel, but we consider that there was personal mitigation available to the Appellant which should have been factored into the sentencing decision. We note, in particular, his mental condition, his difficult upbringing and that he had been a victim of a serious assault. We are less persuaded by his reliance on the fact that he has a partner and child in the community; he pointed to no information which would lead us to regard their position as justifying, in this case, any additional reduction in sentence.

38. Considering the matter in the round we think that the sentencing court erred in the allowance made for available mitigation and the starting point for the RIPL Offence.

39. We accordingly quash the sentences imposed by the Royal Court and impose the following sentences in their stead:

    a. With regard to the Importation Offence from a starting point of 4 years' imprisonment making an appropriate allowance for mitigation we impose a sentence of 2 years and 4 months' imprisonment;

    b. With regard to the RIPL Offence from a starting point of 12 months' imprisonment and after making an appropriate allowance for mitigation we impose a sentence of 8 months' imprisonment;

    these sentences to be served consecutively;

c. With regard to the Class A Offence we impose a sentence of 2 years' imprisonment;

d. With regards to the Class B Possession Offence we impose a sentence of 6 months' imprisonment;

Those sentences to run concurrently with each other but consecutively with the sentences imposed for the Importation Offence and the RIPL Offence, making a total of 5 years' imprisonment.

40. Stepping back and looking at the matter from the point of view of totality we are also satisfied that a sentence of 5 years' imprisonment is the appropriate sentence in this matter.