

Appeal as of right against conviction for being concerned in the supply of a controlled drug of Class A namely tetrahydrocannabinol (“ $\Delta^9$ -THC”) under the Misuse of Drugs (Bailiwick of Guernsey) Law 1974 as amended.

[2022]GCA076

**IN THE COURT OF APPEAL OF GUERNSEY**  
**CRIMINAL DIVISION**  
**APPEAL NO. 508**

**6 December 2022**

**Before:** **Lord Anderson of Ipswich K.B.E. K.C.**  
**David Perry K.C.**  
**Helen Mountfield K.C.**

**Between:** **Martyn Steven Clarke** **Appellant**  
**-and-**  
**Law Officers of the Crown** **Respondent**

**Advocate Liam Roffey for the Appellant**  
**Advocate Jenny McVeigh for the Respondent**

**JUDGMENT OF THE COURT**

**PERRY JA:**

**Introduction**

1. The Appellant, Martyn Steven Clarke, is aged 42 (date of birth 12 November 1980). He appeals as of right against his conviction of being concerned in the supplying of a controlled drug of Class A. This offence was Count 2 of an indictment containing a total six counts (all relating to dangerous drugs) to which the Appellant entered not guilty pleas. His trial in the Royal Court before John Russell Finch Esq. OBE, Lieutenant Bailiff, and eight Jurats began on 7 March 2022. On the second day of the trial the Appellant pleaded guilty to two of the counts (Counts 1 and 3) but disputed the prosecution version of the facts. This dispute was left to the Jurats to resolve. At the end of the trial, on 9 March 2022, the Appellant was found guilty of the other four Counts (by seven votes to one on Count 2 and by five votes to three on Counts 4, 5 and 6) and the Jurats were unanimous in accepting the prosecution version of events on the two counts to which he had pleaded guilty (Counts 1 and 3). The net result was that the Appellant stood convicted of three counts of being concerned in the supplying of a controlled drug to another, contrary to section 3(3)(b) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974 (Counts 1, 2 and 3), and three counts of possessing a controlled drug with intent to supply to another, contrary to section 4(3) of the same law. The drugs in question were cannabis (Count 1),  $\Delta^9$ -Tetrahydrocannabinol (“THC”) (Count 2), Gabapentin (Count 3), ADB-Butinaca (Count 4), 4-fluoro MDMB-BUTICA (Count 5) and 4-fluoro ABUTINACA (Count 6).

2. On 27 April 2022, the Appellant was sentenced to a total of eight years' imprisonment. This sentence was imposed in respect of Count 2, with lesser concurrent sentences of imprisonment on the other counts. The sentence on Count 2 reflected the fact that THC is a Class A controlled drug. The sentences for the other counts were 5 years' imprisonment (Counts 1, 4 and 5) and 3 years' imprisonment (Count 3). There is no appeal against conviction or sentence in respect of those other counts.
3. Before turning to the grounds of appeal, it is necessary to explain the background to the case.

### **The Facts**

4. On the evening 23 January 2021, police officers attended a property at Flat 22 Rue D'Abri, Grand Bouet, St Sampson. This was the home address of Rachel Smith. Asleep in a bedroom was the Appellant. Inside the flat was a duffel bag which, according to the prosecution, belonged to the Appellant. This bag contained transparent bags and dropper bottles containing herbal cannabis, cannabis in liquid suspension and items commonly used in the commercial supply of drugs; small weighing scales, gelatine capsules, transparent deal bags and transparent vials. The total weight of the cannabis was 174.06 grammes. Also found in the premises was a red wallet containing a Bank of Scotland debit card in the Appellant's name (Mr Martyn S Clarke) and £3,990 in a mix of Guernsey and United Kingdom notes.
5. The Appellant was arrested. Later, when interviewed under caution he said that as a result of a domestic incident at his home address and the promise of a house party at Miss Smith's flat, he had arrived at the property with some of his possessions. He said that the cash was the remains of a recent £14,000 compensation payout made in respect of events that had occurred many years ago.
6. At the time of the search, police officers also seized a black iPhone, found on the coffee table in the lounge. The access code was 121180, which is the Appellant's date of birth. On examination, there were numerous pieces of information which led the investigating officers to conclude that the phone was under the Appellant's control. The phone was subsequently examined by officers in the Police High Tech Crime Unit. Loaded onto the phone was a Facebook Messenger application, logged under the Appellant's name. Messages extracted from the phone indicated that the Appellant was concerned in the supply of controlled drugs of Class A, B and C.
7. The prosecution case was that the Appellant had used the phone in the period leading up to his arrest for the purpose of arranging the supply of controlled drugs. There were message conversations with a total of 45 contacts, all involving drug selling conversations. The prosecution acknowledged that the phone had also been used by others in the relevant period.
8. In support of its case, the prosecution relied on the entirety of the extracted data to show both the Appellant's use of the phone and the fact that he was at the centre of a web of dealers and regular customers. While the Appellant's biggest trade was cannabis (including cannabis in liquid suspension), he also made reference to the Class C drug gabapentin ("gabs", "gabbies") and the Class A drug THC ("thc and spice", "spice thc or both").
9. The messages which evidenced the Appellant's involvement in the supplying of THC were four in number:
  - (i) On 5 January 2021, at 8:09pm, the Appellant communicated with Ky Ogier who asked: "What about oil then man will take the proper thc, an not at kita's";
  - (ii) On 14 January 2021, at 4:11pm, the Appellant was in discussion with Daley Edmonds about the supply of drugs and when asked "...what oil you got?", replied "Thc and spice, not much spice left tho m8."

- (iii) On 12 January 2021, at 2:33pm, the Appellant was in discussion with James Leale who asked: “U get any juice?” To which the Appellant replied: “I got oil yes but what 1 u want, spice, the or both.”
  - (iv) On 17 January 2021, at 10:32pm, the Appellant was in discussion with Jack Le Couvey who asked about the availability of drugs. The Appellant said “it’s bud m8 like all my smoke is and oil is the and spice.”
10. The prosecution expert on cannabis was Mr Richard Halliday, a States of Guernsey Executive Customs Officer. In a witness statement read to the Royal Court, he noted that the psychoactive constituent of cannabis is  $\Delta^9$ -Tetrahydrocannabinol, more commonly referred to as THC. He also noted that THC vape oil and other vape oils containing synthetic cannabinoid have a street price of around £100 to £130 per 10ml bottle.
11. Count 2 of the indictment, against which the appeal is directed, was particularised as follows:
- “Martyn Steven Clarke, between the 11<sup>th</sup> day of January, 2021 and the 15<sup>th</sup> day of January, 2021, in the island of Guernsey or elsewhere, was concerned in the supplying of a controlled drug of Class A, namely  $\Delta^9$ -Tetrahydrocannabinol (“THC”) to another in contravention of section 3(1) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended.”*
12. In advance of the trial, the Appellant’s case was that other people used the phone and that he himself was not involved in any drug dealing enterprise.

### **The Course of The Trial**

13. Having pleaded not guilty to the indictment, the Appellant appeared for trial before the Royal Court on 7 March 2022. The prosecution called a police officer to produce various exhibits, including the duffel bag and other items seized at the time of the Appellant’s arrest. The other evidence in the case was agreed. The Appellant gave evidence in support of his defence. He denied that the duffel bag was his and claimed that the iPhone belonged to Rachel Smith. In the course of giving evidence he admitted that he had supplied Class B and Class C drugs but not Class A THC. In relation to Count 2 and the messages referring to THC he said: “*It must’ve been Rachel if they were selling Class A. It must’ve been...I’ve never seen that stuff never touched it or anything, so I don’t see how I could have.*” In light of his admissions, the Appellant then pleaded guilty to Counts 1 and 3 of the indictment but on a factual basis more limited than the prosecution case. In relation to Count 1 (the supplying of cannabis), his case was that the drug dealing was Rachel Smith’s enterprise and that he was acting as her agent. He also claimed that Rachel Smith (and others) would take control of his Facebook Messenger and pretend to be him for the purpose of drug dealing. In relation to Count 3 (the supplying of gabapentin), his case was that he had supplied “gabs” to others, but only as a swap for drugs and not for commercial gain. This basis of plea was not acceptable to the prosecution and the competing versions of the facts were left to the Jurats to resolve.
14. The Lieutenant Bailiff delivered his directions to the Jurats on 9 March 2022 and the guilty verdicts were delivered later that day.

### **The Grounds of Appeal**

15. The Appellant submits that the verdict on Count 2 should be set aside on two grounds:
- (i) it was unreasonable and cannot be supported by the evidence;

- (ii) the Lieutenant Bailiff failed to direct the Jurats on the correct approach to circumstantial evidence and this failure was a material oversight amounting to a miscarriage of justice.
16. In relation to the first ground, the Appellant submits that there was insufficient evidence for the Royal Court to conclude that the messages referring to “thc” were sent by the Appellant and that, in any event, two of the messages (the message to Ky Ogier on 5 January 2021 and the message to Jack Le Couvey on 17 January 2021) fell outside the period specified in the particulars of the offence (11 – 15 January 2021) and the Jurats should have been directed not to place any reliance upon them.
17. In relation to the second ground of appeal, the Lieutenant Bailiff’s direction to the Jurats on their general approach to the evidence was in the following terms:

*“You will decide this case only on the evidence than is before you, there will be no more. You are entitled to draw inferences that is come to common sense conclusions, based on the evidence which you accept, but you must not speculate about what evidence there might have been or allow yourselves to be drawn into speculation.”*

18. The Appellant contends that the Jurats should have been given a more detailed direction and relies on the guidance in the English Crown Court Compendium, (Ch 10.1). This guidance suggests that in a case involving circumstantial evidence relied on by the prosecution, the judge should summarise any evidence and or arguments relied on by the defence to rebut the evidence and or conclusions which the prosecution seek to draw from it and direct the jury:
- a) to examine each strand of it and decide which if any they accept and which if any they do not and decide what fair and reasonable conclusions can be drawn from any evidence that they do accept;
  - b) not to speculate or guess or make theories about matters which in their view are not proved by any evidence;
  - c) to decide, having weighed up all the evidence, whether the prosecution have made them sure of the defendant’s guilt.
19. The Appellant also seeks to rely on a decision of the English Court of Appeal, *R v Marcel Akinsete and Gabrielle Prempeh* [2012] EWCA Crim 2377. This decision is advanced as an example of a similar case involving controlled drugs where there was no direct evidence of any drug dealing and the absence of any drugs or paraphernalia indicative of drug dealing. In rejecting an argument that the judge had misdirected the jury that an actual supply of drugs could be inferred from circumstantial evidence, Aikens LJ said (at paragraph 47):

*“The prosecution can rely on circumstantial evidence. The judge gave a perfectly proper “circumstantial evidence” direction...He correctly warned the jury to be careful to distinguish between arriving at conclusions based on “reliable circumstantial evidence” and “mere speculation”. The judge explained what he meant by speculation and did so correctly. There were no errors in the directions given by the judge.”*

## **Other Issues**

20. The Perfected Grounds of Appeal, dated 22 October 2022, raise a number of additional issues concerning the evidence relied on by the prosecution to prove the Appellant’s involvement with THC. These additional issues were developed by Advocate Roffey in the course of his helpful oral submissions. He submits that the references to THC in the messages extracted from the phone are ambiguous and could be taken to be references to cannabis (a Class B controlled drug)

with a high THC content, as opposed to cannabis with a high cannabidiol (CBD) content. In support of this argument, Advocate Roffey relies on the following matters:

- (i) The prosecution expert, Mr Richard Halliday, did not include in his statement an assertion that the abbreviation THC is the Class A controlled drug  $\Delta^9$ -Tetrahydrocannabinol, nor did he conclude on the basis of the evidence available to him that the Appellant was involved in the purchase and distribution of  $\Delta^9$ -Tetrahydrocannabinol.
  - (ii) The Appellant had given evidence to the effect that references to oil and bottles were references to CBD mixed with cannabis. He accepted that he would assist Rachel Smith to put “*proper stuff*” in CBD. In other words, he had admitted mixing the Class B controlled drug, cannabis, with legal CBD oil.
  - (iii) The agreed evidence of the States Analyst, Mr John Bullock, to the effect that the cannabis found in the exhibit seized from the address was of high CBD/low THC variety, together with the fact that some of the cannabis plant material was suspended in liquid, is said to be compelling evidence to support the Appellant’s case.
  - (iv)  $\Delta^9$ -Tetrahydrocannabinol is a substance not often encountered in criminal proceedings in Guernsey, and while the courts may be able safely to conclude that the messages refer to cannabis, in all its various forms, the same cannot be said of a less familiar drug such as THC.
21. The Appellant also submits that even if there is “*sufficient evidence to conclude that the user of the phone believed that he was concerned in the supplying of  $\Delta^9$ -Tetrahydrocannabinol, in the absence of any substance being seized and bearing in mind the multitude of legal vapes and legal synthetic cannabinoids available on the black market, the court could not have safely excluded the possibility that the use of the phone was actually concerned in the supply of an altogether different substance.*”
22. In resisting the appeal, Advocate McVeigh submitted that there was ample evidence to support the verdict and that the Lieutenant Bailiff’s direction to the Jurats was adequate in the context of the case as a whole.

## **Discussion**

23. We should preface our consideration of the grounds of appeal by stating that this case is rightly characterised as one that depended on circumstantial evidence, at least so far as Counts 1 to 3 of the indictment are concerned. It is accepted by the prosecution that no Class A drugs were seized from the premises. Nor were any Class C drugs (“gabs”). Instead of relying on the physical seizure of drugs, the prosecution relied on the Facebook messages and invited the Royal Court to conclude that the Appellant was concerned in the supplying of controlled drugs (cannabis, THC, gabs) to another. It was a matter for the Jurats to interpret the messages and decide whether they were satisfied that the prosecution case was correct. In conducting that exercise, the Jurats were entitled to examine the messages both individually and as a whole. Considered in their entirety, the messages indicated a pattern of customers contacting the user of the phone in search of controlled drugs. The evidence was sufficiently cogent to enable the Jurats to conclude that the Appellant was the principal user of the phone and also that he was responsible for the content of the relevant messages. It followed from this that there was evidence upon which the Jurats could be sure that the Appellant had been concerned in the supplying of controlled drugs to another.

24. Accordingly, in relation to the first ground of appeal, we consider that there was ample evidence upon which the Jurats could safely conclude that the Appellant was responsible for sending the messages which made reference to THC. The position at the trial was as follows:
- (i) The phone used to send the messages belonged to the Appellant.
  - (ii) The Appellant admitted in evidence that he had applied for and had control of the Facebook Messenger account.
  - (iii) The Appellant admitted in evidence that he was responsible for the messages involving “cannabis” and “gabs”.
  - (iv) The veracity of the Appellant’s claim that Rachel Smith was responsible for any messages referring to Class A drugs was a factual matter for the Jurats to decide. They rejected the Appellant’s evidence as they were entitled to do. The Appellant’s evidence that Rachel Smith had pretended to be him was inconsistent with the pattern of usage of the phone which evidenced dealing by the Appellant in dangerous drugs. There was also supporting evidence in the conversational threads to support the conclusion that the Appellant was responsible for sending the messages.
25. In relation to the Appellant’s complaint that two of the messages relevant to Count 2 fell outside the period of time particularised in the indictment, we consider that the evidence of the messages was properly to be viewed in its entirety. The significance of the messages in question is that they formed part of the pattern of behaviour which the prosecution relied on in support of its case on Count 2. In other words they were directly relevant to the issue of whether the Appellant was guilty of that Count and Appellant’s attempt to rely on the dates in the charge is both technical and artificial. We reject the Appellant’s suggestion that the Jurats may have placed “undue weight upon those two messages” as misconceived. It was common ground that the messages were correctly admitted in evidence. They provided clear support for the prosecution case that the Appellant participated in the enterprise of supplying controlled drugs of Class A to others. This is what the Jurats concluded and we see no reason to disagree.
26. It seems to us that the first ground of appeal is an attempt to rerun the factual case which the Jurats rejected at the trial. There is no substance in the Appellant’s complaint and we see no reason to conclude that the conviction is unsafe.
27. In relation to the second ground of appeal, we accept, as do the prosecution, that no Class A drugs were seized from the premises and that the prosecution case depended upon the Jurats’ interpretation of the text messages viewed collectively and in the context of the evidence as a whole. We do not accept the criticism of the Lieutenant Bailiff’s direction to the Jurats. While the direction could have been more detailed the issue is whether it amounted to a misdirection and in our view it did not. The Lieutenant Bailiff conveyed the substance of what was required: that the Jurats were to decide the case only on the evidence; that they were entitled to draw common sense conclusions based on the evidence; that they were not to speculate or be drawn into speculation. This was followed by a direction on the burden and standard of proof and by a direction that the Jurats were required to reach separate verdicts on each count, having focused on each separately, but taking into account all the background circumstances. While the Lieutenant Bailiff did not make any express reference to ‘circumstantial evidence’, this was a case where the issues were clear and where the evidence had been concluded within three days. There is no rule of law that requires the trial judge to use any particular form of words and any summing-up will depend on the nature of the case and the evidence. Viewed overall the Lieutenant Bailiff’s summing-up was fair and succinct and we have no doubt that the Jurats understood the issues and properly reached a verdict that was open to them. In our view, there is no substance in the second ground of appeal and no reason to conclude that the conviction is unsafe.

28. So far as the other matters are concerned, we see no merit in the Appellant's complaints:

- (i) Mr Richard Halliday's evidence was agreed. He provided evidence of what the Lieutenant Bailiff described as a "*drug user's glossary*". It was not for Mr Halliday, in his role as an expert, to express an opinion on whether the Appellant was involved in the purchase and distribution of  $\Delta^9$ -Tetrahydrocannabinol. This was a matter for the Jurats to decide. And while Mr Halliday did not specifically say that  $\Delta^9$ -Tetrahydrocannabinol is a controlled drug of Class A, he did not need to; the Schedule to the Misuse of Drugs Law makes clear that it is.
- (ii) The Appellant's evidence to the effect that he admitted mixing cannabis with legal CBD oil was an issue for the Jurats to consider when they were interpreting the messages sent by the Appellant. The Jurats concluded that the Appellant was concerned in the supplying of THC and this was a conclusion properly open to them.
- (iii) The agreed evidence of the States Analyst was merely one aspect of the prosecution case. The question for determination by the Jurats on Count 2 depended upon their view of the messages. The Appellant had demonstrated by his messages and when giving evidence a good knowledge of different types of drugs and in particular cannabis and its various derivatives ("green", "oil", "spice", "thc"). When giving evidence he admitted knowledge of the fact that THC is a Class A controlled drug and did not challenge the prosecution case that THC is an abbreviation for  $\Delta^9$ -Tetrahydrocannabinol. In these circumstances, as we have noted, the Jurats were entitled to convict the Appellant on the basis of the messages. We reject the submission that the evidence of the States Analyst provided compelling support for the Appellant's account.
- (iv) Whether or not  $\Delta^9$ -Tetrahydrocannabinol is frequently encountered in criminal proceedings in Guernsey is irrelevant. The only question that arose for consideration by the Jurats was whether the messages sent by the Appellant demonstrated that he was concerned in supplying that drug in the manner alleged by the prosecution. After direction from the Lieutenant Bailiff, the Jurats concluded that the case against the Appellant was proved. We see no reason to disagree.

29. For all these reasons we reject the Appellant's submissions and dismiss his appeal against conviction.

### **The Sentence**

30. The Appellant's original Notice of Appeal, dated 2 May 2022, sought to appeal not only his conviction but also his sentence on all counts. It was submitted that the sentence of eight years' imprisonment is manifestly excessive. The appeal against conviction operated as of right. On 16 May 2022, the Bailiff granted the Appellant legal aid to pursue the appeal against conviction. Having taken that decision, the Bailiff referred the application for leave to appeal against sentence to this Court while making clear that if there had been no appeal as of right against conviction he would have refused leave to appeal against sentence. The Bailiff was satisfied (as are we) that the Appellant's sentence falls within the permissible range having regard to the guideline case of *Richards* 2002-02 GLR 247. Thereafter the Appellant abandoned his appeal against conviction and the sentences imposed on Counts 1, 3, 4, 5, and 6 of the indictment. The result of this abandonment is that any adjustment to the sentence was dependent upon the outcome of this appeal. Having dismissed the conviction appeal, the sentence remains as it was, a total of eight years' imprisonment.