Application for leave to appeal against sentence in respect of offering to supply a Class A controlled drug, MDMA, and of being concerned in the supply to a young person of MDMA and in respect of offering to supply a Class C controlled drug, Tramadol, and possession of MDMA. Also, a RIPL offence.

[2022]GCA085

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION

Between: **LEWIS TOPLEY** **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: 20 December 2022

Counsel for the Applicant: **Advocate C J Green**

Introduction

1. The Applicant, Lewis Topley, was sentenced by the Royal Court on 7 November 2022 to a total of 4 years' youth detention. The Applicant had pleaded guilty to five Counts on the Indictment. Four of those Counts related only to him, whereas another Count was a joint offence with another. Accordingly, that total sentence comprises 3 years and 3 months' youth detention in respect of two Counts, 18 months' youth detention concurrent in respect of another two Counts and 9 months' youth detention consecutive in respect of what is commonly termed a RIPL offence. The longer sentences were imposed in respect of offering to supply a Class A controlled drug, MDMA, and of being concerned in the supply to a young person of MDMA (Counts 1 and 3 respectively). The shorter concurrent sentences were imposed in respect of offering to supply a Class C controlled drug, Tramadol, and possession of MDMA (Counts 2 and 5 respectively).

2. The grounds of appeal settled by Advocate Christopher Green contend that the overall sentence of 4 years' youth detention is manifestly excessive and adds that each component part for Counts 1 and 3 on the one hand and for the RIPL offence on the other is individually manifestly excessive. The grounds further complain that the Royal Court explained in its sentencing remarks that from the starting points announced (of 7 years' youth detention for the drug offending and of 12 months for the RIPL offence) the discounts afforded to the Applicant were

combined on the drug offending whereas the discount for the guilty pleas and for other personal mitigation should have been explained separately, and the discount of just 25% in respect of the RIPL offence appears to have afforded no reduction in sentence for the personal mitigation accepted in respect of the drugs offences. Further, it is to be argued that the Court took insufficient account of the effect of a sentence of immediate youth detention on the Applicant's partner, child and another child due next year when imposing a total sentence of 4 years. Finally, the grounds refer to the fact that the offending for which the Applicant was sentenced in November 2022 pre-dated the offending that had resulted in previous periods of youth detention and so he should have been treated, also in accordance with the totality principle, as someone who did not have a significant criminal record when sentencing for these offences.

3. One of the more serious drug trafficking offences (Count 1) for which the Applicant was sentenced related to a crystal rock of MDMA weighing 9.91 grams found when he was arrested in respect of the offence in Count 3. The Prosecution accepted that around half of this was intended for onward supply with the other half being for the Applicant's personal consumption. This resulted in the two Counts (1 and 5) relating to supply and possession respectively. At the same time, the Tramadol (5 capsules and around 4 grams in granules) was also found. Count 3 related to the supply, with the Applicant's co-Defendant, of MDMA to a young girl, then aged 16, who had an adverse reaction to it and was placed in an induced coma for some days.

Discussion

4. Before turning to the grounds pleaded, the principal issue on this application is whether the overall sentence of 4 years' youth detention is manifestly excessive. It does not particularly matter how that final sentence has been reached. Accordingly, the question for me is whether it is arguable, in there being a realistic prospect of such an appeal succeeding, that this sentence went beyond what the Royal Court could properly impose for this set of offences, paying particular regard to the totality principle, where the total sentence should be just and proportionate to the Applicant's offending behaviour.

5. If the RIPL offence (Count 4) were to be viewed in isolation, it is possible that a differently constituted Court would take a different approach. The starting point of 12 months is uncontentious. Similarly, no objection is taken to the principle that such a sentence should run consecutively to other sentences. As the sentencing remarks explain, this Court in ***Orchard*** recognised that it inevitably follows that the person not disclosing a key to protected information has something to hide. Accordingly, the discount afforded for a guilty plea and any other personal mitigation that could properly be taken into account on this offence is where the merits of any appeal lie. At first blush, affording only a total discount of 25% might appear on the low side. This is especially so when the total discount for the drug trafficking offences was a little over 50%. In the absence of any explanation for why a different approach has been taken to the two elements of the overall sentence, I would note at this stage that it is arguable that a sentence of 9 months' youth detention can be said to be beyond the upper end appropriate for that offence.

6. When considering the approach to the drug trafficking offences, and so the overall sentence imposed, I take the view that it should be recognised that a higher starting point than 7 years could have been adopted. This is relevant when considering whether the sentence imposed is manifestly excessive.

7. The sentencing Court chose to use a starting point of 7 years' youth detention. This is at the bottom end of the bands for Class A drugs found in ***Richards*** 2000-02 GLR 247. Although para. 12 refers to two different drugs being imported at the same time, the Count relating to the Class C drug, Tramadol, in my opinion, can be equally applicable to the offences of offering to supply, which are covered because they are drug trafficking offences. That paragraph enables

the sentencing Court to identify separate starting points for each Count before determining a "total" starting point, having regard to the combined quantity. By announcing the combined starting point staying at the lowest point in the band, which would have been equally applicable if the Court had been sentencing just for the single Count 1, it seems that increasing the combined starting point must have been rejected. A differently constituted Court could well have taken a different approach.

8. Further, the Royal Court does not appear to have articulated any increase to that original combined starting point taking into account the other aggravating factors that were present. Count 3 related to the supply of MDMA to a young person. This was properly described in the sentencing remarks as "*a very serious matter and could easily have been an investigation into an unlawful death*". Any supply to a young person is an aggravating factor. When combined with the consequences, along with the other factors of multiple Counts relating to drugs falling to be sentenced together, the Applicant can regard himself as fortunate that the Royal Court did not move upwards from its combined starting point. Had it done so, before assessing the appropriate sentence after mitigation, I take the view that the Applicant could have had no complaint.

9. In relation to what was accepted in mitigation, and subject to what I have already stated in respect of the RIPL offence, credit was clearly given for the guilty pleas. Paragraph 15 in ***Richards*** explains that such pleas "*will always be an important mitigating factor, even where the accused appears to have had very little choice but to admit guilt*". Accordingly, although not expressed separately as a discrete discount, the reference to those pleas being "*in the face of strong evidence*" infers that the usual one-third discount for an early guilty plea might not have been in the minds of those sentencing the Applicant.

10. As regards personal mitigation, reference was made to the age of the Applicant at the time of committing these offences and also to the manner in which he has turned his life around. Passing reference was made to the delay in dealing with these matters which should, in turn, cover the ground of appeal that the Applicant's criminal record would be viewed differently if having regard to the dates when these offences were committed. Although some sentencing Courts might have dealt with each aspect of mitigation separately, those sentencing the Applicant reduced the sentence from a combined starting point of 7 years' youth detention to 3 years and 3 months, with no express mention being made of the Applicant's apparent remorse, albeit indirectly referred to through noting that the probation report had been read. That report also supports the submissions made about the changes to the Applicant's lifestyle since committing these offences. The question arises, therefore, as to whether sufficient regard was had to all the mitigation advanced.

11. There is a separate issue relating to the effect that a custodial sentence would inevitably have on the Applicant's family, including him being the father of a child with another on the way. This is always an important factor for a sentencing Court to consider. There is specific reference in the sentencing remarks to the case of ***Petherick*** [2012] EWCA Crim 2214 and how that case has been applied in Guernsey. Accordingly, I am also satisfied that the sentencing Court did not overlook this important point. Ultimately, a balance needs to be struck, bearing in mind the need to determine an appropriate overall sentence for the offences committed.

12. Taking a step back, for this level of Class A drug offending, coupled with a RIPL offence, I am not persuaded that anything other than an immediate custodial sentence was capable of being imposed. As such, I do not treat this as a "cusp of custody" case. The key issue, in my judgment, is whether sufficient credit has been given for the mitigation advanced on behalf of the Applicant. As I have indicated, the starting point for the principal drug trafficking offences could have been higher than it was, which needs to be borne in mind when considering all the mitigation.

13. In the circumstances of this case, I take the view that there would be justification for affording the Applicant a full one-third discount for all his offending for the early guilty pleas. Further, I am satisfied that it is arguable that the Royal Court may, in particular, not have had sufficient regard to the age of the offender. He was just 17 years old when these offences were committed. Even when 19 years old at the date of sentence, 4 years' youth detention is a significant sentence to impose for offending carried out when a juvenile. Even if the starting point for the principal drug trafficking offences had been higher than 7 years, I find that it is arguable that the discount that might have been applied could have resulted in a lower overall sentence, particularly through having regard to the Applicant's age and the effect that a lengthy custodial period will have on his family members. I am further persuaded that this issue goes beyond what might otherwise be tinkering (which could have been relevant if the only aspect in issue had been the consecutive sentence for the RIPL offence).

14. For these reasons, I grant the leave to appeal sought by the Applicant. It follows that I will also grant the Applicant legal aid in respect of his appeal against sentence.

Richard McMahon
Bailiff