Application for leave to appeal sentence on the grounds it was manifestly excessive.

[2023]GCA003

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION

Between: **LEE ROYLE**

-v-

THE LAW OFFICERS OF THE CROWN

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE

Decision on the Papers

Decision of Richard James McMahon, Esq., Bailiff

Date of Decision: 1 March 2023

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

1. On 24 January 2023, the Applicant, Lee Royle, was sentenced by the Royal Court to a total of 9 years and 9 months' imprisonment. The Applicant had pleaded guilty to two Counts on his first appearance before the Royal Court on 24 November 2022. The first of those Counts was an importation of cocaine (being knowingly concerned, contrary to the Customs and Excise General Provisions) (Bailiwick of Guernsey) Law, 1972), for which the sentence imposed was 9 years' imprisonment, and the second was failing to disclose information, contrary to the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003 ("a RIPL offence"), for which the sentence was 9 months' imprisonment, to run consecutively. The start date for the sentence was when the Applicant lost his liberty on 16 September 2022, the day of his arrival in Guernsey when he was apprehended.

2. The basis on which the Applicant now seeks leave to appeal is that the sentence of 9 years' imprisonment is manifestly excessive. (The Notice of Appeal dated 24 January 2023 does not appear to appeal against the sentence for the RIPL offence, save to the extent that this is covered by the second of the grounds advanced.) The first ground of appeal refers to the starting point taken of 12 years in respect of the first Count. It should, of course, be the sentence resulting that is said to be manifestly excessive, but I am treating the reference to the starting point as if it follows that the outcome flowing from it is a manifestly excessive sentence. Given the quantity of cocaine imported (122.88g) and the role as courier of the Applicant, it is suggested that a lower starting point within the applicable band (10-13 years) should have been selected. The second ground of appeal is that the discount afforded to the Applicant of 25% was insufficiently generous in the light of his early guilty pleas, the absence of drug-related convictions, his determination to address his addiction and remorse.

3. In respect of the starting point for the first Count, the Royal Court explained that it was following the guidelines found in ***Richards*** 2000-02 GLR 247, and as recently affirmed in ***Barras, Watt and Orchard*** 2021 GLR 374. The quantity of Class A drug involved is acknowledged in the Notice of Appeal as falling within the applicable band of 10 to 13 years' custody. In the sentencing remarks, reference was made to the internal concealment as an aggravating factor and also to the Applicant's previous convictions, "*which shows serious criminality over a number of years*". Although there may have been no previous drug trafficking convictions, from the material before the Royal Court it was clearly open to those sentencing the Applicant to note that several of the serious offences for which lengthy prison sentences had been imposed were linked to his cocaine habit. Further, the Royal Court could properly recognise that these periods in custody do not appear to have affected the manner in which the Applicant has chosen to live his life following release.

4. In my judgment, taking all these matters into account, the Royal Court was entitled to adopt a starting point of 12 years in respect of this Count. The starting points are not intended to operate on a linear basis associated with weight, although weight is obviously an important factor when the starting point is selected. If consideration is given to the aggravating factors, it is apparent that the initial starting point would have been lower than 12 years. Whether it was 10 years, 10½ years or 11 years does not matter when the figure taken, including these aggravating factors, is stated as 12 years. Accordingly, subject to the question of mitigation attracting a discount from that starting point, I am not persuaded that the first ground of appeal justifies granting the leave sought.

5. Although there is no reference to the starting point of 12 months' imprisonment in respect of the RIPL offence in the application, I would simply note that no guidance has been given by the Court of Appeal for such offending (see, eg, para. 79 in ***Barras, Watt and Orchard***), but the comments made therein point towards such a starting point with a view to imposing a consecutive sentence not resulting in the sentence being manifestly excessive. Accordingly, the combined starting point of 13 years' imprisonment is not, in my view necessarily going to result in the sentences imposed being too long.

6. Turning to the second ground of appeal, relating to the discount for all the mitigation available to the Applicant, in their sentencing remarks the Royal Court noted first quite properly that the Applicant's motivation to clear his drug debts would not be treated as mitigating his offending. Those remarks also refer to it not being the Court's "*job to cast around for mitigation, when we cannot in reality find a great deal, apart from your inevitable guilty pleas, on these facts.*" The discount explained as one quarter was said to be erring "*on the side of generosity and the seriousness of these offences outweigh any considerations on family life.*"

7. Paragraph 15 in ***Richards*** addresses the mitigation arising from a guilty plea:

> "*A guilty plea will always be an important mitigating factor, even where the accused appears to have had little choice but to admit guilt. As a very general rule, the appropriate discount is one-third from the starting point, particularly when an early indication of such a plea is given. It is generally in the public interest that the expenditure of time and money on a full trial be avoided. When there is no sensible alternative to a guilty plea, the discount will be more limited.*"

In this case, there was no sensible alternative for the Applicant but to plead guilty. The sentencing remarks clarify that the Royal Court has chosen not to apply a discount of one-third, but a more limited discount. It was open to the Court to be less generous than affording the Applicant that full one-third discount even if a differently constituted Court might have been prepared to do so, although when doing so a more detailed explanation as to the reasons for that

outcome might be more appropriate. What matters is whether the final sentence fully reflects all the mitigation available to the person being sentenced.

8. Importing a Class A controlled drug into the Bailiwick is serious, as the Royal Court noted. That level of seriousness has already been recognised by the starting point. In addition to the Applicant's early indication of guilty pleas, the other mitigation referred to in the Notice of Appeal includes remorse and the determination finally to address his addiction to cocaine. I am not persuaded that the absence of drug-related convictions in a poor record of offending can properly be regarded as mitigation, especially where some of the robberies and violence in which the Applicant has engaged relate to his drug use. The passing reference to family life in the sentencing remarks relates to the fact that the Applicant is the father of a young child, which is a factor that needs to be borne in mind when deciding the length of the sentence.

9. The difficulty with not setting out expressly the discount attaching to the guilty plea and choosing instead to combine it with any other mitigation available, however limited that might have been viewed, is that understanding how the mitigation has been viewed by those sentencing the Applicant becomes more speculative than it would be if a discrete discount for the guilty pleas had been stated. Reducing the discount from one-third to one quarter because the guilty pleas were inevitable would not, in my view, result in the sentence necessarily being manifestly excessive. But if that were the discount being applied, it would follow that any other mitigation would appear to have been ignored Reducing the discount to one-fifth, or even lower, starts to appear contrary to the indication given in ***Richards*** about the importance of giving as early an indication as possible that there will be guilty pleas and also impacts on the view that must have been taken about the other aspects of mitigation, but without explanation. It is apparent from the material before the Royal Court that remorse was expressed and the effect on the Applicant's relationship with his child, where an immediate custodial sentence was inevitable probably deserves more than a passing comment.

10. Although the sentence is severe, because of the combination of mitigation I have just mentioned, I am not persuaded that there is necessarily an arguable case that it is manifestly excessive, which would result in me granting leave to appeal when sitting as a single judge. Instead, because I take the view that the totality of the mitigation available advanced on the Applicant's behalf might not have been adequately reflected by a discount of only 25% from the starting points, I propose to take the step of referring his application to the plenary Court for it to consider whether this is an appropriate case for which leave to appeal should be granted. This will enable the Applicant's Advocate to elaborate on the grounds being advanced, and particularly the second ground, more fully than any decision taken on the papers can do.

11. Through referring the application for leave to the plenary Court, I will also grant the Applicant legal aid enabling that application to be made.

Richard McMahon
Bailiff