

[2024]GCA082

**IN THE COURT OF APPEAL GUERNSEY
(CRIMINAL DIVISION)**

Criminal Appeal No: 525

4th December 2024

Before:

**Clare Montgomery KC, President
Sir Timothy Le Cocq, Bailiff of Jersey
Michael Furness KC, JA**

Between:

THE LAW OFFICERS OF THE CROWN

Appellant

-and-

WESLEY GUILBERT

Respondent

Counsel for the Prosecution: Advocate L Roffey

Counsel for the Respondent: Advocate S Steel

JUDGMENT

Le Cocq, JA

Introduction

1. This is the judgment of the Court on a reference by HM Procureur pursuant to S43B of the Court of Appeal (Guernsey) Law 1961 (“the 1961 Law”) for a review of the sentence imposed upon Wesley Guilbert (“the Respondent”) by the Royal Court on 6 June 2024. Leave to make the reference was granted by the learned Bailiff on 8 August 2024 (“the Bailiff’s decision”).
2. The sentences were imposed following guilty pleas entered by the Respondent in respect of certain drugs offences as follows:
 - (i) Count 1- possession of a controlled drug, Class B, namely cannabis resin – a sentence of 1 month imprisonment suspended for 3 years, concurrent with Count 5;
 - (ii) Count 2 – being concerned with the supply of a controlled drug of Class A, namely Methylenedioxy-methamphetamine (MDMA) to another – a sentence of 3 years’ probation;
 - (iii) Count 3 – being concerned with the supply of a controlled drug of Class A, namely Methylenedioxy-methamphetamine (MDMA) to another – a sentence of 3 years’ probation;

- (iv) Count 4 – possession of a controlled drug of Class A, namely Morphine – a sentence of 2 months imprisonment suspended for 3 years, concurrent with Count 5;
- (v) Count 5 – offering to supply a controlled drug of Class B, namely cannabis – a sentence of 2 years imprisonment suspended for 3 years;
- (vi) Count 6 – possession of a controlled drug of Class A, namely Methylenedioxy-methamphetamine (MDMA) with a sentence of 1 year imprisonment suspended for 3 years, concurrent with Count 5.

Background

3. The facts may be simply stated. On 30 June 2023, police officers came to the Respondent's house with a search warrant. He was cooperative and indicated where the drugs to be seized were to be found. He told officers that the cannabis and certain broken Ecstasy tablets found there were for his personal use. Officers also found a white pot containing a number of broken MDMA tablets (Count 6 on the indictment) which the States Analyst quantified as 21.11 grams of MDMA powder, as the analyst was unable to give a quantity for the tablets because they were badly broken; and 0.05 grams of cannabis resin, 8.5 grams of cannabis resin (not medicinal) (Count 1), a bottle of Morphine oral solution, in which there was a residue of 1.44 grams, together with 3 metal spoons with liquid residue (Count 4). Officers also found medicinal herbal cannabis. They found £850.96, together with digital scales. The Respondent was compliant during his arrest, and he attempted to provide the passcode to his mobile phone. Analysis of the phone revealed messages in which the Respondent had arranged the supply of 3 MDMA tablets for a total of £60 (Count 2) and 4 MDMA tablets for a total of £80 (Count 3). There was also an offer to supply an unquantified amount of cannabis (Count 5).
4. The Respondent was interviewed and answered some questions, but otherwise exercised his right to silence. He maintained that the MDMA tablets were for his personal use and made no comment in connection with the Morphine. He asserted that the cash found was his earnings from his employment.
5. The estimated street value for the cannabis resin was between £40 and £50 per gram, making the quantity of 8.55 grams worth between £344 and £430. The value of the MDMA depends upon whether it is valued in powder or in tablet form. The street value for the powder at the time was £80 to £100 per gram or £20 to £25 per tablet. 21 grams in powder form would therefore have had a street value of between £1,689 and £2,111. The value for 84 tablets would be similar, between £1,680 and £2,100. The value of the liquid Morphine would be minimal and the value of the 7 MDMA tablets (Counts 2 and 3) would be £140 to £175.

The Respondent's background

6. The Respondent is a local man of some 44 years of age. At the time of the offending he was working at a bar, although was currently signed off work awaiting surgery. He has a long list of previous convictions and had been sentenced previously to substantial terms of imprisonment for burglary, GBH and robbery associated with drugs. Perhaps most notably for these purposes, he was sentenced to 9 years imprisonment in 2014 for drugs offences, including the offence of production of the Class A drug Methylamphetamine. He was released in October 2019 and his parole licence expired on 1 April 2020, with supervision requirements ending in July 2022.

The approach of the Royal Court to sentencing

7. It is important to consider how the Royal Court approached the sentences that it handed down. This was carefully analysed in the Bailiff's decision and we gratefully quote from his judgment at paragraph 6 et seq. His analysis, which we adopt, was as follows:

- “6. *The way these sentences were explained is also set out in the sentencing remarks. There was an acknowledgment that the two most serious counts were the supplying of 7 MDMA tablets, ie, the second and third counts. These are drug trafficking offences to which the guidelines established by this Court in Richards v Law Officers 2000 – 02 GLR 247 applies. Those principles have been re-affirmed in Barras, Watt and Orchard v Law Officers [2021] GCE 045. Having regard to para 10 in Richards the starting point taken was 7 years imprisonment. This was at the lowest end of the range for Class A drugs in tablet form (1 to 500) and below what might have been the range for Class A drugs in powder form (20-50 g) had the contents of the white pot been taken into account, rather than becoming the sixth count. The Court accepted what Advocate Steel on behalf of the Respondent had suggested was the appropriate course and treated these two counts as supplying tablets. This was consistent with the judgment given by the judge of the Royal Court, who presided at the sentencing hearing, on 13 June 2024.*
7. *The only other drug trafficking offence for which the Respondent fell to be sentenced was the fifth count, offering to supply cannabis, in respect of which the Court chose to take a stand-alone starting point of 3 years imprisonment. The cannabis is a Class B controlled drug and the lowest range of 3 to 6 years imprisonment applies to up to 2 kilograms.*
8. *In relation to the possession counts, the Royal Court adopted a notional starting point of two years imprisonment for the possession of MDMA, being for the Respondent’s personal use. As regards the first count, it is suggested that that would only justify a small increase to that 2 year period and the possession of morphine was said not to justify any increase in the starting point. It seems that the possession counts were then used to aggravate the lead offences.*
9. *Having taken a starting point for what were described as the lead offences, the Court increased that starting point to 8 years imprisonment as a result of the previous offending of the Respondent, particularly noting that he had been sentenced to 9 years imprisonment in 2014 for drugs offences, and because there was more than one drug involved, being a reference to para 12 of the judgment in Richards.*
10. *From that increased starting point, the Court was prepared to afford a full one-third discount in respect of the guilty pleas. Reference was also made to the Respondent’s good work ethic and the fact that he was assessed at having a very high likelihood of re-offending. Although the social enquiry report explained the Respondent was anticipating an immediate custodial sentence, the Court also had 3 letters by way of character references, including from the Respondent’s mother and daughter, and explained that the Court had looked beyond the Respondent’s offending and his record. However, the Court expressly referred to the possible interference with family life (citing Bourgaize v Law Officers (unreported) 10 December 2014)) before concluding that any impact of a custodial sentence on the Respondent’s daughter and grandchildren fell outside the range of dependency and impact envisaged in such cases.”*

8. The learned Bailiff in his decision quoted from the opening paragraphs in the sentencing remarks. We believe that they are relevant to our consideration and they read as follows:

“Even applying the most generous discount for your personal mitigation to add to the full one-third discount for your plea you could have no complaint were you to leave today to start a prison sentence of 4 years or longer, which would ordinarily rule out any consideration of alternatives to immediate custody.

Nevertheless, the Court was struck by the letters from your family and referee and the evidence from the writer of the social enquiry report that you had turned your life around. You have accommodation, you are playing a full role in family life, you have family support and you are willing to be free from illegal drugs. The Court considers that there is a prospect of rehabilitating you and that doing so in the community represents a better chance of long-term rehabilitation than sending you to prison, wholly exceptionally (and I cannot emphasise that enough) the Court is going to impose an alternative to immediate custody.

The Court is concerned to pass sentences which would enable the Court to sentence you for these offences if you do not adhere to the terms of the orders or if you re-offend, so there will be probation order for the supplying of Class A offences and suspended sentences which will give any further court the ability to re-sentence you to an appropriate term of immediate imprisonment, plus there will be suspended sentences which can be activated.”

9. We also think it is of assistance to quote the Royal Court in its statement immediately before sentence was passed. It said:

“You have said that you would agree to any conditions or terms of any order were the Court willing to give you a chance. Your Advocate said that you would grasp the chance with both hands. That is easy to say but harder to do. Here is your chance. It will be the one and only chance. You can choose to turn your back on a 30-year past blighted by illegal drugs and continue to enjoy your freedom and your fishing trips, your own accommodation in the company of your family and dog but be in no doubt that if you do not make that choice and you come back before this Court or the Magistrate’s Court, you can expect to spend a long time in prison. The Court urges you to take this exceptional chance for yourself and for the sake of your family and for the sake of your community, which needs to see an end to your offending. Do not let them down or yourself down.”

10. This, to us, succinctly encapsulates the sentencing court’s approach. Clearly the sentencing court looked to find a way to rehabilitate the Respondent and to find a way to impose a sentence that permitted that to happen and be served in the community even though the overall offending would normally have attracted a custodial sentence of a significant number of years.
11. The question for us is whether, in its desire to do this, the Court acted unreasonably and in so doing imposed a sentence that was unduly lenient.

The legislative framework and legal test

12. Section 43B of the 1961 Law, insofar as it is relevant, provides as follows:

“(1) This section applies to any case in which a sentence is passed on a person for –

(a) An offence for which the maximum penalty is imprisonment for a term of 5 years or longer (whether or not it is one for which any other penalty may be imposed)

.....

(2) If it appears to Her Majesty’s Procureur –

(a) that the sentencing of a person in any proceedings in the Royal Court has been unduly lenient, and

(b) that the case is one to which this section applies,

Her Majesty's Procureur may, with the leave of the Court of Appeal, refer the case to the Court of appeal for it to review the sentencing of that person.

(3) Without prejudice to the generality of sub-section (2), the conditions specified in paragraph (a) of that sub-section may be satisfied if it appears to Her Majesty's Procureur that the Royal Court –

(a) erred in law as to its powers of sentencing, or

(b) failed to impose a sentence which it was required by law to impose.”

13. Under Section 43C of the 1961 Law, this Court has the ability, amongst other things, to quash any sentence and impose in its place such sentence as this Court considers appropriate. The relevant provision is in the following terms:

“(1) On a reference under Section 43B, the Court of Appeal may –

(a) quash any sentence passed on the person for an offence (whether passed on the person's conviction or in subsequent proceedings), and

(b) in place of it pass sentence as the Court thinks appropriate for the case and as the Royal Court have the power to pass when dealing with the person.

(2) In deciding under sub-section (1) the appropriate sentence to pass on a person for an offence, the Court of Appeal shall not make any allowance for the fact that the person is being sentenced for a second time in relation to the offence.”

14. The approach to the exercise of our jurisdiction under these provisions has been considered by this Court in Law Officers of the Crown v Trenchard [2024] GCA 025 where, at paragraph 19 et seq, the Court said:

“19. The starting point must be to identify the correct trigger for the exercising of this Court's powers under Section 43C. It will be seen from the statutory language quoted above that a reference can be made under Section 43B (with leave) if it appears to HM Procureur that a relevant sentence is unduly lenient. Perhaps surprisingly, Section 43C then confers certain powers on the Court without expressly providing that they can only be exercised if this Court agrees with HM Procureur that the sentence is unduly lenient. Nevertheless, it is in our judgment clear that that is what the statute intended. It would be perverse to limit HM Procureur's power under Section 43B by reference to a test of undue leniency, but then to confer on this Court a power to quash any sentence under Section 43C without also being satisfied that it is unduly lenient.

20. The next step is to identify an appropriate test for determining whether a sentence in 'unduly lenient'. Any such endeavour must tread a careful path between (on the one hand) imposing an unwarranted gloss on the statutory language and (on the other) leaving the jurisdiction so open textured that its application would risk be arbitrary and unpredictable. In our judgment, a number of guiding principles should be kept in mind.

(i) The first is that in order to remain faithful to the statutory language, it is plainly not sufficient for this Court merely to reach the view that the sentence was lenient: the test is 'unduly lenient', and real value must be given to the work 'unduly'.

(ii) The second point is to recognise that this is an Appellate Court, not a sentencing Court. Accordingly, the question in any given case is not whether this Court would have passed a different sentence if it had been conducting the sentencing exercise.

(iii) The third consideration is to recall the unique legal structure in this jurisdiction, particularly the participation of Jurats, as noted above. That again militates in favour of interpreting the scope of Sections 43B and 43C in such a way as to keep the exercise of this Court's power within appropriately principled constraints.

(iv) The fourth consideration is that any test must be clear and practical, so that it can be applied readily and predictably in individual cases.

(v) Finally, we are acutely conscious that this is a relatively new legislative regime and the proper scope of its operation will need to be explored and tested in individual cases over time. It would be unwise to be unduly prescriptive at this early stage.

21. Taking all these considerations into account, in our judgment the appropriate test for deciding whether any given sentence is unduly lenient is to ask whether it was outside the range which the trial court, applying its mind to all relevant factors (and only to relevant factors), could reasonably consider appropriate. In applying that test, although this Court will plainly have regard to the process by which the sentencing court arrived at its decision, ultimately the judgment under Section 43B is made by reference to the overall sentence that is passed."

15. The above principles are those that we apply in the instant case. We pay particular regard to paragraph 21 of the citation above because an element of the submissions before us related to the process by which the Royal Court arrived at its sentence in certain respects as being justification for the submission that it must have got the sentence wrong such as to be unduly lenient. We remind ourselves as is made clear from the quotation above that ultimately although the process by which the sentencing court arrived at its decision is of relevance, our jurisdiction is exercised by reference to the overall sentence that is passed.

The Appellant's contentions

16. The Appellant argues in its thorough written contentions that the starting point taken by the Royal Court of 8 years was too low in the light of the previous criminal record and the number of different drugs involved. It points out that there are 5 previous convictions for drugs-related offences including a 2014 conviction for the offence of being concerned in the production of a Class A drug in respect of which the Respondent was sentenced to 9 years imprisonment. The Respondent remained offence-free for less than a year following the completion of his sentence in July 2022 when his adult custody supervision order was completed.
17. Furthermore, the cannabis which is the subject of Count 5 was more than a nominal amount. The Respondent himself characterised it on his mobile phone message as "*quite a bit for sale*" and the Appellant puts before us paragraph 12 of Richards (supra) which deals with 2 different drugs that are imported at the same time. The Court in that case said:

"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."

18. Furthermore, the Appellant argues that a full one-third discount for a guilty plea is too high.
19. Again, the Appellant quotes Richards which, at paragraph 15 says:

“A guilty plea will always be an important mitigating factor, even where the accused appears to have very 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 an 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.”

20. The Appellant argues that the Respondent gave no indication of plea at his committal hearing although subsequently entered guilty pleas at the earliest opportunity. The Crown argues, however, that in this case there was, in the words of Richards, “no sensible alternative” to a guilty plea. The Appellant points to the evidence that was before the sentencing court which includes for Counts 2, 3 and 5 clear telephone evidence of the Respondent’s dealing activities. This evidence, so the Appellant argues, was so overwhelming that the Respondent was left with no sensible alternative but to enter guilty pleas. Indeed, in respect of Counts 2 and 3 – the MDMA offences – the Respondent sent a photograph of the drugs to be supplied. In summary, the Appellant argues that the deduction for a guilty plea should have been no more than 25% as opposed to the full third applied by the Royal Court.
21. The Appellant further argues that there was no material mitigation and points out that of the 3 letters submitted to the Court, only one made reference to the Respondent seeking to implement any change. The social enquiry report expressly referred to by the Royal Court in its sentencing remarks did not, so the Appellant argued, expressly or impliedly, make reference to the Respondent turning his life around. Again it is pointed out that any such assertion is undermined by the fact that he committed the offences on the indictment less than a year after the end of his adult custody supervision order. At the time of sentencing, the Respondent was unemployed and based upon his telephone messages his response to unemployment appeared to be to sell drugs. The Appellant points to the specific message relating to the selling of cannabis taken from the Respondent’s mobile phone in which he said “*Can you get rid of any weed mate. I need moey asap no job any more (sic)*”.
22. We note that the Bailiff’s decision contains his views with regard to the letters from the Respondent’s family and referee that, at paragraph 31, “*It is difficult to see how the personal mitigation mentioned in the sentencing remarks justifies anything other than a term of imprisonment*”.
23. The Appellant points to other features that do not count in the Respondent’s favour. He provided the police with an incorrect PIN, claimed in interview that he “*knew nothing about*” being concerned in the supply of controlled drugs and maintained in his meeting with probation officers that the offer to supply cannabis was “*a joke*”.
24. With regard to the Social Enquiry Report, the Appellant argues that notwithstanding the positive terms in which the Royal Court clearly viewed it, there were a number of “*concerning elements*”. We accept that the Social Enquiry Report was not unequivocal in its support for the idea that the Respondent had changed or was in the process of changing his life.
25. We do not think it necessary to refer to all of the contents of the Social Enquiry Report but, as pointed out by the Appellant we do know that he claimed that he had “*stopped drug dealing before getting raided*” (paragraph 3 of the report) and “*ended this (drug dealing) around the end of 2021/2022*” (paragraph 7 of the report). He did not appear, therefore, to recognise that Counts 2, 3 and 5 on the indictment are drug-dealing counts. We note also that at paragraph 7 of the report the Respondent “*is not motivated to engaged with the Smart programme (group or one-to-one)*”.

26. Perhaps significantly, at paragraph 11 the Respondent was assessed as posing “a very high likelihood of re-offending...Mr Guilbert minimises his offending behaviours, having a generalised view that he has been unfairly treated by the criminal justice system”.
27. As the Appellant argues, paragraph 18 of the Social Enquiry Report summarises the approach of the Probation Service to this offender. It says:

“Mr Guilbert has completed significant offending behaviour intervention in the past during previous sentences. The 2018 parole report states that Mr Guilbert knows what he needs to do to avoid re-offending in the future and there is absolutely no reason for him not to achieve this, depending entirely on his own motivation. Given the new offences, I remain concerned in his attitude towards substance use. Although Mr Guilbert is happy to be drug tested and CJSS have assessed him as being suitable for a drug testing component, he is not willing to engage in one-to-one work. He does not see the programme as being beneficial as it does not allow him to move on from areas that he believes he has dealt with. In his words, drugs ruined his life, and he believes that he has matured enough to move away from substances in future. Thus I am not recommending a period of probation supervision.”

28. Submissions were also made by the Appellant in terms of the general principles relating to the sentencing of drug trafficking offences. The Appellant makes the obvious point that the need to impose condign punishment on those that commit drug trafficking offences was made clear in Richards and in Barras (supra). In the latter case, the Court of Appeal, at paragraph 55, said this:

“55. The starting point in our analysis is to consider whether there is a good reason to justify a relaxation of the policy which in 2002 motivated the Court of Appeal to formulate sentencing guidelines for the principal drug trafficking offences. At the forefront of the President’s reasoning was his “preliminary conclusion” (at paragraph 4):

“The information provided on behalf of HM Procureur persuades us that the level of drug trafficking in Guernsey has not abated despite the commendable efforts being made by the law enforcement authorities to detect it and other bodies to contain abuse. Indeed as we have identified there are disturbing signs of recent growth in activity. There appears to us no justification for relaxing the general policy of the courts of this Bailiwick in visiting drug trafficking offenders with condign punishment”.

56. The Appellants do not dispute that drug trafficking remains a serious problem in Guernsey. To the contrary, they seek to rely on the increased level of importation activity since 2002. As Advocate Steel submitted on behalf of the Second and Third Appellants:

“The value of drugs seized by Guernsey police doubled between 2012 and 2019...and so drug use remains an issue”.

57. We have little doubt that if we were to relax the guidelines to identify a lower starting point for small amounts of drugs there would be an increase in drug trafficking activity with criminal gangs packing drugs in smaller amounts to take advantage of the higher rewards available through selling drugs in Guernsey.”

29. In dealing with one of the Defendants, the Court in Richards observed:

“However we wish to reiterate, as did the Deputy Bailiff in his sentencing remarks, that the supply of Class A drugs of however small the quantity, will almost always result in the imposition of immediate custodial sentences and the exceptions will be rare indeed.”

30. The Appellant argues that in this case the need for condign punishment is quite clear given the Respondent’s previous convictions.
31. The Appellant referred us to the English Sentencing Council guidelines and the factors which would normally be taken into a consideration in determining whether a sentence could properly be suspended. We do not propose to go through those guidelines and, of course, they are not binding in this jurisdiction, but we note that there really is little in the present case which could be prayed in aid to justify the suspension of the sentence within the principles set out in those guidelines.
32. In summary, the Appellant argues that even were the starting point of 8 years to be appropriate and it was appropriate for the Court to afford a full one-third discount, that would give a revised finishing point, prior to personal mitigation, of 5 years and 4 months imprisonment.
33. The Appellant argues, in the light of the paucity of mitigation and evidence supporting a change in the Respondent, the sentence imposed by the Court fell well outside the range that a trial court would reasonably consider appropriate.
34. The Appellant points out that the Royal Court itself described the sentence it was imposing as “*wholly exceptional*” and repeats the remarks made by the learned Bailiff in his decision granting leave to the effect that:

“It remains difficult to see how the starting point of 8 years imprisonment for the lead counts results in probation orders rather than any term of immediate custody of some years.”

The Respondent’s Contentions

35. The Respondent, in his equally thorough contentions argues that the sentence imposed upon him was neither unreasonable nor outside the range which could reasonably be considered to be appropriate.
36. The Respondent further contends that the Royal Court was perfectly entitled, and indeed perfectly placed, to exercise its discretion to select the sentences that it did. The Respondent points out that such a discretion has been asserted and emphasised in Richards (supra) and reaffirmed in Watt (supra) at paragraph 61 in the following terms:

“... the Appellant’s criticism of the Richards guidelines are in any event overstated for the following reasons. First, in Richards the Court of Appeal emphasised that it was not attempting to establish an inflexible sentencing code. The President said in terms: “These are general guidelines only. Sentencing is always a matter for the court’s discretion. It is an art and not a science.” The Appellant’s have accepted in their submissions that the decision in Richards ensured that the sentencing courts retain a discretion and guidelines provide ample scope for the first instance court to exercise its judgement when deciding on appropriate sentence.... they are starting points and not end points... the guidelines provide a flexible framework capable of reflecting individual circumstances in any given case... it is not irrelevant to note the constitutional role played by the Jurats in the sentencing process. They perform a full part in sentencing decisions. They are able to reflect and give expression to the values of the wider Guernsey community... the position in Guernsey is that the Royal Court is the sole court

dealing with sentencing for serious offences. This fact in itself is conducive to consistency of approach and fairness.”

37. Furthermore, so it is argued, the Respondent had been offence free for some 9½ years as his last recorded offending was on the 14th of January 2014.
38. The Respondent also argues that he should not be sentenced on the basis of having, with regard to the cannabis, “*quite a bit for sale*” as he was only found in possession of less than 9 grammes of cannabis and that formed the possession count on the indictment. It is argued, therefore, that the Royal Court was entitled not to place much if any weight on the contents of the text message.
39. In response to the Appellant’s argument that the current sentence creates an unfortunate precedent the Respondent points out that the Royal Court itself, as set out above, describes its approach as *wholly exceptional* and giving the Respondent an *exceptional chance* and pointing out that the Respondent could not have complained if the sentence had been four years or longer.
40. With regard to the guilty pleas, the Respondent argues that they were entered at the earliest opportunity and the Respondent had provided the PIN code to his phone, or had attempted to do so, and that, so the Respondent characterised it, had been convicted for the supply offences “from his own thumbs”. A guilty plea, so the Respondent argues, is always an important mitigating factor. It is in the public interest that the expenditure of time and cost of a trial is avoided if possible and the Royal Court was entitled to give a full credit for those pleas.
41. By way of personal mitigation, the Respondent points to the letters put forward by family members and friends on his behalf, pointing to the difficulties in his background and to, in one instance, the belief that he has begun to turn his life around and to put drugs behind him. His family circumstances and relationships were called in aid.
42. The Respondent refutes the Appellant’s arguments that the social inquiry report contained worrying elements.
43. A probation order is, in any event, an onerous sentence and the consequences of non-compliance are severe.
44. In conclusion, the Respondent argues that the Royal Court was entitled to give him a chance to respond to a probation order before imposing immediate custody. Accordingly, the sentence was reasonable in the circumstances of the case. Prison had not previously been a deterrent as the Respondent had served a significant custodial sentence in the past but had still not being able to avoid committing further offences.
45. We have in the preceding paragraphs summarised, although not exhaustively so, the arguments advanced in written form on behalf of the Appellant and the Respondent. Those arguments were referred to also in oral submissions before us which emphasised some of the points above but did not carry the argument in any different direction.

Discussion and conclusion

46. In our judgment, we do not think that the argument of the Appellant that the Respondent should not have been afforded a full one-third discount for a guilty plea is persuasive. Ultimately, of course, it is a matter for the sentencing court how much credit to give for a guilty plea and it will not always be the case that a guilty plea entered at a late stage will merit a full discount. Cases, for example, of internal concealment of a drug are unlikely to merit a full discount

because of the inevitability of the conviction were the matter to go to trial. Nonetheless, there is a substantial public interest in saving court time and expense and indeed resources and in avoiding the necessity of a trial and in our view it is entirely open to a sentencing court to afford a full one-third discount if it sees fit to do so. That is, to our mind, very much within the discretion of the sentencing court.

47. Nor do we think that the Court was necessarily wrong in identifying a starting point of 7 years and creating an uplift to take into account the possession offences and the existence of more than one drug. That the Court assessed this as an additional year is, perhaps, generous but in our view, is not impeachable. The Court must, of course, in hitting upon a starting point, give consideration to issues such as totality. There was more than one drug involved and an addition of one year to account for that, taking the starting point to 8 years was, to us, reasonable.
48. Similarly, the appropriate discount to give for mitigating factors is one that it is quintessentially within the purview of the Jurats to consider. Naturally, such consideration must be rational and items should not be taken into account which are not truly mitigating the offence or the culpability of the offender. If it is mitigation, however, it is for the Court in the round to determine what weight should be given to it.
49. We have to say that in this case the mitigation to the extent that it comprised references and letters seemed to us to be fairly slim. One might reasonably assume that members of a Defendant's family and friends might very well write glowing letters of support and point, where they can, to a change in the criminal attitudes of their loved one. We are not certain that were we making this decision, we would have afforded the weight to those items of mitigation that clearly the Royal Court did. However, we are an appellate court and we accept that the Royal Court was persuaded that there was the real prospect of rehabilitation for a Defendant who had had been a recidivist over many years. Neither are we sure that the Social Enquiry Report, properly considered, did provide the support for the Defendant's change of heart that the Royal Court apparently thought.
50. However, having applied a starting point of 8 years and a full third discount for a guilty plea and a reasonable amount for other mitigation such as the Defendant's co-operation, the letters, his cooperation and otherwise it is still unclear to us how the sentencing court could have arrived at a non-custodial disposal of this matter other than simply determining that it should do so irrespective of the guidelines.
51. Guidelines are not tramlines, as is often said, and it is open to the sentencing court to depart from the guidelines in appropriate cases. Provided it explains clearly its reasons for doing so, this Court would be slow to interfere with such a decision, certainly where a court is intending to pass a sentence which is significantly out of line and inconsistent with the normally applicable principles of sentencing, it must be done with extreme care, clear justification, and cogent explanation.
52. However, that is not what happened in this case. The Court, on a proper application of the Richards guidelines and the addition by way of uplift which it was entirely appropriate to make, reached a starting point of 8 years. It was reasonable to do so. Allowing a generous full one third with perhaps an additional 6 months to cover both the guilty plea and the other possible mitigation, we are still left with a sentence of well over 4 years imprisonment. The removal from an immediate custodial sentence of that duration to a non-custodial disposal must, it seems to us, be based upon cogent reasoning which is more than a mere hope that a Defendant will change his long-established ways. It is the absence of such justification and, indeed, no apparent justification on the material before it that this Court can divine, in our judgment puts this sentence into the realms of being unduly lenient.

53. Accordingly, we allow the appeal. We must now consider how to deal with the Respondent. In our judgment the sentence should be replaced by one of immediate custody but allowing for the fact that the Respondent has served some time under a probation order. Whilst we accept that the sentence we now pass might in, other circumstances, be regarded as low, having regard to the seriousness of the offending and the available mitigation, we replace the current sentence with one of 4 years imprisonment.