

Counts 1 – 6, the importation of Class C controlled drugs, including Diazepam, Testosterone and other prohibited substances. Counts 7 – 9 the possession of Class C drugs.

[2024]GRC062

**ROYAL COURT
FULL COURT**

15th July 2024

**Before: John Russell Finch, Esq., O.B.E., Lieutenant Bailiff and Jurats:
Stephen Murray Jones OBE, Claire Helen Le Pelley, Jonathan Grenfell Hooley,
Stuart Michael Crisp, Marilyn Jasmine King, Tina Jane Le Poidevin, James Robert Toynton.**

THE LAW OFFICERS OF THE CROWN

- v -

**HORACIO DE GOIS VIRISSIMO
&
MASON DECLAN THOMAS SMALE**

**Crown Advocate F M Russell appeared for the Crown
Advocate S J Maindonald appeared for the First Defendant (HDeGV)
Advocate S E Steel appeared for the Second Defendant (MDTS)
(An Interpreter was present for the First Defendant)**

LIEUTENANT BAILIFF:

Background

You appear here today for sentence in respect of three Indictments. The first and third concern the First Defendant, Virissimo, alone. The second to both defendants.

The First Indictment comprises 9 counts: Counts 1 – 6, the importation of Class C controlled drugs in October, 2022. Counts 7 – 9 the possession of Class C drugs in November, 2022.

The Second Indictment refers to both defendants: Counts 1 – 5 that together, in April, 2023, they knowingly imported Class C controlled drugs. Counts 6 – 8 relate to Mr Smale alone. Counts 6 – 7 a separate attempted importation of two Class C controlled drugs. Count 8, possession of a Class C controlled drug.

The Third Indictment concerns a single count of unlawful importation of a Class C controlled drug on 19 January, 2024.

The maximum penalties laid down by the States of Guernsey, are for importation offences, 14 years' imprisonment; for possession of a Class C controlled drug, 4 years' imprisonment.

We have heard the facts of the case in considerable and helpful detail, we need not repeat them as extensively.

The First Defendant is aged 51, a Portuguese national. There is a driving whilst disqualified conviction from Scotland in 2022 with a fine and a 2-year suspended sentence from Madeira in September 2022 for domestic violence.

The Second Defendant is a local man, now aged 24 with a bail offence in 2019, common assault in 2020 (for which a Probation Order was made) and a caution for drug possession.

The First Defendant originally pleaded 'not guilty' to the importation matters Counts 1 – 6, also on the offences set out in the Second Indictment.

The Second Defendant Mr Smale entered timely 'guilty' pleas.

Mr Virissimo breached his bail conditions, having been allowed a long period to spend time with his family in Madeira. He failed to return on the due date (16th January 2024), came back on 19th January 2024, was remanded in custody and was charged with a single importation offence in the Third Indictment. In May 2024, he changed his 'not guilty' pleas to 'guilty' and pleaded 'guilty' to the last offence. A trial date for July had been set and was vacated. We note the explanations.

So, the First Defendant has been in custody since 19th January 2024 and the Second Defendant on bail throughout.

To cut rather a long story shorter, the offences on the First Indictment which relate to the First Defendant only, emerged with the interception of two postal packages, which gives rise together to Counts 1 – 6. When his residence at the staff quarters at the Fermain Valley Hotel was searched, vials of liquid were found which comprise Counts 7 – 9. Deleted messages were found on his mobile phone, which we have heard about, and which plainly show the illegality, the unlawfulness, of these importations, was understood. In interview, reference was made to using steroids for his knees and shoulders and his bodybuilding; and that questions were answered throughout.

On the Second Indictment, in respect of Mr Smale as well, a postal package was intercepted in the UK on 19th April 2023, containing 765 Class C Diazepam type tablets (Counts 6 and 7) in the name of 'Thomas Small'. Extensive enquiries were made and a further incoming consignment located, with 445 Class C tablets (Count 1) and amounts of other drugs, including Testosterone and other prohibited substances (Counts 2 – 4) and 101 other Class C tablets (Count 5). These items would have been delivered to a communal area at the Second Defendant's multi-occupancy address. A Search Warrant was executed and Testosterone items were found (Count 8) and £1,000 in cash in an envelope under the Mr Smale's mattress. His mobile phone was examined and provided linkage to the First Defendant in relation to the package intercepted on 22nd April, 2023.

In interview, the Second Defendant lied unconvincingly throughout, claiming his innocence. The First Defendant exercised his right to silence in his interview.

The Second Defendant's mobile phone was examined and showed incriminating messages with a person known as Contact A, which we have heard about and noted. Importantly, messages between the First and Second Defendant were also found, again we heard the details. They amount, in summary, to proof of both defendants being jointly involved in the illegal importations - Counts 1 – 5 on the Second Indictment. It is suggested by the Prosecution, and, this is consistent with the facts established in the investigation, that the First Defendant, having been caught in respect of the offences in the First Indictment and on bail, changed to using the Second Defendant to make orders for unlawful drugs for him. The Court also heard of the internet searches about being caught, etc, for illegal importations to Guernsey on the Second Defendant's iPad, and other very relevant messages. The First Defendant's mobile phone showed messages with a payment to the Second Defendant on 7th April 2023 of £50; and evidence of a WhatsApp communication with Contact A, to whom we have already alluded.

There is not a lot to say about the Third Indictment relating to Mr Virissimo alone. He had over-stayed his bail, so he was expecting arrest when he got back. A box of 80 tablets of a drug subject to abuse for body-building, not for medicinal use and banned under the World Anti-Doping Code was found, with 76 left. We heard the First Defendant's explanation for this offence.

So, in summary we have got:

- On Indictment 1, there were 401 tablets and 65 ml of liquids, total approximate value, £351.32.
- On Indictment 2, there were 1,311 tablets and 33 ml of liquids, total approximate value, £8,422.50. The bulk of the tablets was the responsibility here of Mr Smale.
- On Indictment 3, as stated, 76 tablets of a Testosterone type drug, approximate value, £30 - £35.

Those are the facts.

Sentencing Considerations

Since the Guernsey Court of Appeal laid down binding guidelines for sentencing Class A and Class B drug-trafficking offences, there has been a considerable increase in the number of Class C offences, especially due to the appearance of many new compounds. As a rule we start, where appropriate, at 50% of the guidelines for Class A drugs. But we have found with Class C drugs, that circumstances vary widely and the principle that each case has to be decided on its own facts, applies particularly in this area. The exercise we carry out is the one set-down by the Court of Appeal, namely firstly considering aggravating features, then available mitigation, including any personal mitigation. It is not, of course, a matter of mathematical computation. Here we have the misuse of the postal system and a repetition of offending. The circumstances vary between the two defendants, as the Second Defendant (Mr Smale) only features in the Second Indictment: Counts 1 – 5 with the First Defendant and Counts 6 – 8 on his own. The £1,000 found under his mattress will be confiscated as the realizable assets of drug-trafficking following a total benefit of £8,422.50. We follow the normal procedure and select combined starting-points for each defendant, representing in our judgment, their overall criminality; their overall blameworthiness. We will then go on to consider applicable mitigation.

On the facts of this case, we start at 3 years for the First Defendant and 2 years for the Second Defendant. We again stress that this is very much a case on its own individual facts, not a case where any general principles are set-out.

Mitigation

Guilty pleas always amount to mitigation, but vary in the extent, depending on the circumstances. For the First Defendant, the pleas of 'not guilty' were not vacated until 8th May 2024 after a trial this month had been fixed, as we set out. The Second Defendant, as stated, entered timely guilty pleas. We have considered the submissions made on behalf of each defendant and noted the relevant written materials. We consider that the previous history of the defendants is not especially serious and not an aggravating factor. In other words, the previous matters do not make things worse, putting it in simple terms. The helpful Probation Reports have also been considered. The Second Defendant Mr Smale, has not helped his cause with his accounts to the Probation Officer, just as he lied when interviewed after arrest.

On the basis of all this, we afford, we give, a discount to each Defendant of 50%, erring, if at all, on the side of generosity and we will make the sentences all concurrent, reflecting the overall criminality and heeding the totality principle. Had the drugs been Class A or B, the sentences would have been considerably higher.

Sentence

In respect of the **First Defendant, Mr Virissimo**:

First Indictment:

- Counts 1 – 6 (importation) the sentence is 18 months' imprisonment on each;
- Counts 7 – 9 (possession) the sentence is 2 months' imprisonment on each, all concurrent.

Second Indictment:

- Counts 1 – 5 (importation) the sentence is 18 months' imprisonment on each; all concurrent.

Third Indictment:

- (importation) the sentence is 2 months' imprisonment concurrent.

Total for Mr Virissimo: 18 months' imprisonment, with effect from 19th January 2024.

In respect of the **Second Defendant, Mr Smale**:

Second Indictment:

- Counts 1 – 5 (importation) the sentence is 12 months' imprisonment on each concurrent.
- Counts 6 – 7 offences the sentence is 12 months' imprisonment on each, all concurrent.
- Count 8 (possession) the sentence is 2 months' imprisonment, concurrent.

Total for Mr Smale: 12 months' imprisonment, with effect from today 15th July 2024.

Mr Smale please go off with the Officer.

- Forfeiture and Destruction Orders, as requested. The applications succeed on the facts as the items were used in the commission of offences.
- Compulsory Supervision, where appropriate, for one-quarter of the total sentence on release.
- Drug Trafficking Order as agreed by the Advocates here, in the same terms made in the realizable amount of £1,000; the total proceeds being assessed as £8,422.50 (Second Indictment); and I have to put a period of imprisonment on default but it will be paid obviously, but 3 months' consecutive if not paid.

Deportation

The First Defendant is a Portuguese National. We must now consider whether we should recommend to His Excellency the Lieutenant-Governor, that an Order for his Deportation should be made. We have a full report from the Immigration Officer in front of us.

The First Defendant is 51. He came here in June 2022 to work as a kitchen porter. He is permitted to remain until 3rd June 2027 and resides in staff accommodation, with no family or other substantial links subsisting in the Island. He wants to remain here and provide for his children, who live in Madeira, aged 18 and 15. He lived in the UK from 2015.

We must follow the detailed and binding authority of the Court of Appeal in the O'Dette case (2007). Here we balance the European Convention on Human Rights against the offending. In particular, Article 8 of the Convention is relevant – the right to family life. The First Defendant is not likely to receive any further permission to work here in view of his convictions. There are no family ties in Guernsey and these offences involve the importation of prohibited drugs in substantial amounts. The balancing exercise, when we look at all the factors in this case, comes down in favour of making a recommendation, in the interests of the public good. We make such a recommendation, reminding everyone present that it is a matter for His Excellency as to whether it should be followed or not. So the recommendation is made but it is up to the Governor to decide, and he will consider all relevant matters when doing so.

**J R Finch, O.B.E.
Lieutenant Bailiff**

15th July 2024