

Leave to appeal against the sentence of immediate imprisonment on the basis that it was wrong in principle or manifestly excessive.

[2024]GCA026

IN THE COURT OF APPEAL OF GUERNSEY
CRIMINAL DIVISION
ON APPEAL FROM THE ROYAL COURT
(JUDGE CATHERINE MAUREEN FOOKS AND 7 JURATS)
Criminal Appeal No: 521

Before: **Jonathan Crow CVO, KC**
David Perry, KC
Sir Adrian Fulford, PC

Between: **GAL FRIDMAN** **Appellant**

-and-

THE LAW OFFICERS OF THE CROWN **Respondent**

Advocate A M Merrien for the Appellant
Crown Advocate F M Russell for the Respondent

JUDGMENT

Perry JA

Introduction

1. The Appellant, Gal Fridman, a Swedish national, aged 60 (date of birth 24 January 1964), appeared before the Royal Court and pleaded guilty to two offences relating to the importation and subsequent attempted exportation of ballistic shields and hard body armour, items designated as military goods for customs purposes. On 17 January 2024, he was sentenced to a total of 12 months' imprisonment. He now seeks leave to appeal against the sentence of immediate imprisonment on the basis that it was wrong in principle or manifestly excessive. It is contended on his behalf that a financial penalty, community order or a suspended sentence of imprisonment would have been appropriate in all the circumstances of his case. He was on bail throughout the proceedings before the Royal Court and is currently on bail pending the determination of his appeal.

Background

2. The Appellant was described in the proceedings before the Royal Court as the supplier of a wide range of bespoke items, including security and military items, trading under the name "Swedish Body Armour". He has been in business in a number of overseas jurisdictions for over 30 years.
3. In December 2022 the Appellant arranged for a quantity of shields and body armour panels, 162 in total, to arrive in Guernsey by ferry from France. He asked a local freight company to handle and store the items which he described in communications with the ferry and freight companies as "black coated polyurethane plastic polyethylene" pieces or plates used for flotation buoyancy.

Based on research into the manufacturing company (based in China) and the Appellant's own trading name, the freight company's paperwork described the goods as "bulletproof shields". When the Appellant was provided with the freight company's invoice, he objected to its description of the goods and asked for it to be altered. He claimed that the goods were "puncture resistant floatation (buoyancy) boards used in boats". The freight company agreed to the Appellant's request and the paperwork was amended.

4. When the items, packed in 20 boxes, arrived in Guernsey, the Appellant arranged for 6 boxes to be sent to his address in Sark, and for the remaining 14 boxes to be collected by a transport company for shipping to Macau.
5. On 1 February 2023 customs officers inspected the consignment for export and discovered 11 bullet proof shields and 60 smaller pieces of body armour. These were items subject to restrictions under the Export Control (Military, Security and Related Matters) (Bailiwick of Guernsey) Order 2010. The export of these items to certain territories such as China, Hong Kong, and Macau, requires an export licence which the Appellant took no steps to obtain.
6. The Appellant was arrested on 14 June 2023 following his return to Guernsey on a scheduled flight from London Gatwick Airport. A search warrant was executed at his address in Sark and the 6 boxes containing 90 pieces of body armour and 1 black bullet proof shield were seized.
7. Following his arrest the Appellant was interviewed in the presence of his legal representative. In the course of the interviews, the Appellant explained that he had started his business in Sweden, but that he had also worked in Croatia and Spain. He had moved to Sark about three years before. He denied knowing that Macau was an embargoed territory or that any of the items in question were of a military nature. He claimed that they were for use in boats for flotation and as a tough outer coating which might act to protect the pilot of a boat from inclement weather. The Appellant also suggested that the items had been sent to him by mistake but that it was too expensive and problematic to return them, and so he had decided to send them on to a customer in Macau. He accepted that he did not have a licence to export the goods to Macau and claimed that it was his client's responsibility as the importer to check on the licence requirements. He declined to disclose any details concerning his finances, on the basis that this was private information. He further denied that he had sought to have changes made to the paperwork and claimed that the freight company was trying to frame him. He denied that he had sought to mislead Customs. He denied that he had imported the items knowing that they were bulletproof body shields or that he had misdeclared their true nature to avoid the legal requirements attaching to the shipping of military items.
8. At the time of the Appellant's arrest, an iPhone and an Apple MacBook were seized from his possession. These were later subjected to examination. A number of messages were identified relevant to the description of the items in the freight and customs paperwork.
9. On 15 December 2022, in a message to a business associate connected to the China based manufacturer of the goods, the Appellant stated:

"... the shields and plates have arrived to France and I already been asked to pay import duties for Guernsey. Unfortunately [the manufacturer] stated on the goods "Pollyethylene Shield" so the freight forwarder called it Bullet Proof Shields! It is nearly impossible to export or import any goods today the government are trying to stop all trading and any excuse to stop, fine confiscate or disrupt the business. So PLEASE never use any words like PROTECTION LEVEL, SHIELDS, BULLET PROOF, BODY ARMOUR, only soft PE panels with EVA Foam or hard PE panels with POLYUREA COATING thank you!!"
10. On 31 December 2022 the same business associate sent the Appellant the following message:

“I have told [the manufacturer] many times to avoid writing sensitive descriptions on documents. However, I don’t know why they still make such mistakes. I will continue to criticise them. By the way, I think your company name “Swedish Body Armour” is very sensitive. I don’t know how to solve this problem if you want to have your logo on the products.”

11. In an earlier message, sent to another business contact in December 2022, the Appellant stated:

“From Spain we shipped 2 boxes with 4 vests each, with DHL Express as Flotation vests because they can also be used for that and with a low customs invoice to save you on import cost. From China we shipped 3 Boxes with 10 flotation plates each, with FEDEX and with a low customs invoice. We never use the words Bullet Proof or protections vests because the Customs are very suspicious for Bullet Proof products and always want to check them. So flotation device is more boring and no one wants to check and make problems.”

12. The Royal Court concluded (correctly in our view) that these messages established beyond doubt that the Appellant was trying to conceal the true nature of the goods and minimise the risk that they would be intercepted and seized by Customs officers.
13. In the proceedings before the Royal Court the prosecution acknowledged that attaching a precise value to the items was difficult, but the documentary materials suggested that they were to be sold for £27,629, which was the sale price after a discount of £14,940.

The Indictment

14. The Appellant pleaded guilty to two counts. The first was making a false declaration relating to the importation of ballistic shields and hard body armour panels, contrary to section 75(1)(a) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972. The maximum penalty for this offence is 2 years’ imprisonment and/or an unlimited fine. The second count was being knowingly concerned in the attempted fraudulent evasion on the prohibition of the exportation of military items, namely ballistic shields and hard body armour panels (imposed by Article 1 of the Export Control (Military Security and Related Matters) (Bailiwick of Guernsey) Order 2010), contrary to section 77(1) of the same Customs and Excise Law as count 1. The maximum penalty for this offence is 10 years’ imprisonment and/or a fine up to level 4 (currently £5,000), or an amount 3 times the value of the goods, whichever is greater.

The Sentence of the Royal Court

15. At the time he came to be sentenced the Appellant was 59 years of age with pre-settled UK residency status under the EU Settlement Scheme, valid until February 2026. He had been resident (but not settled) in Sark for about 3 years. He had no previous convictions and as noted above, had been on bail throughout the proceedings.
16. The Royal Court (Judge Catherine Maureen Fooks and 7 Jurats) gave consideration to the legislative framework and had regard to the factors identified as relevant to cases of this type in *R v Knight (John)* [2008] 2 Cr App R (S) 76, a decision of the English Court of Appeal. The Royal Court was satisfied that the Appellant was motivated by personal financial gain and made these observations:

“In our judgment this is a very serious matter and a significant element of deterrence is justified. We do not want those dealing in these kinds of items to come to the Bailiwick thinking that it might be a suitable place to export such items, undetected. We do acknowledge that there was an attempt rather than a completed offence, but (the Appellant) had taken all steps to complete it. We are in no doubt that the custody threshold is passed.”

17. The Royal Court then set a starting point of 20 months' imprisonment for the export offence, which was aggravated to 2 years to take account of the import offence, involving as it did the deliberate misdescription of the goods so as to avoid the scrutiny of Customs and Excise.
18. The Appellant was afforded full credit for his pleas of guilty and the Royal Court had regard to his personal mitigation which had been set out in a 'helpful' Social Enquiry Report and also emphasised in comprehensive submissions made by his Advocate. The Royal Court noted in particular, the Appellant's age, good character, the fact that he had a 16-year-old son whom he had not seen for over a year, an elderly mother who was terminally ill, and other grown up children who had been impacted by the proceedings, together with the impact of the bail conditions which had required him to remain in Sark. The Royal Court also had regard to the fact that the Appellant had been assessed as having a low to very low likelihood of general re-offending.
19. The Royal Court expressed its overall conclusion in the following way:

“The Court has carefully considered alternatives to immediate custody and has specifically taken into account all the mitigation mentioned and the impact on your family, particularly your child, but in view of the seriousness of the offences the Court has concluded that alternatives to immediate custody are not appropriate in your case.”
20. The Appellant was accordingly sentenced to 2 months' imprisonment on count 1 and a consecutive sentence of 10 months' imprisonment on count 2 making a total of 12 months' imprisonment.
21. The Court also made orders of forfeiture in relation to the goods and in relation to the two electronic devices seized from the Appellant at the time of his arrest.

The Appeal

22. The Appellant filed a Notice of Appeal on 17 January 2024 (the day of his sentence) and later that day applied for bail pending his appeal. This application was heard by the Bailiff sitting as a single judge of the Court of Appeal who granted bail subject to a surety and a condition of residence in Sark pending the hearing or determination of the appeal.
23. In his helpful written and oral submissions on behalf of the Appellant, Advocate Merrien contends that the Royal Court was wrong to impose an immediate custodial sentence and invites the Court to quash the sentence and impose in its place a community service order, a fine or a suspended sentence of imprisonment. In support of these submissions, Advocate Merrien drew to the Court's attention the sentencing approaches of the Courts in England and Wales and made reference to the following:
 - (i) The decision of the English Court of Appeal in *R v Knight (John)*, *supra*, in which the court identified a non-exhaustive list of factors to be taken into account in cases of this kind: (1) the nature of the goods involved; (2) the quantities and values of the weaponry involved; (3) the intended customer and location of supply; (4) the level of involvement of the particular defendant; (5) the degree of planning and knowledge; (6) the sophistication of the transaction and any attempt to evade responsibility or to create a false impression.
 - (ii) An extract from a 2007 Select Committee on Defence First Report regarding the enforcement of the equivalent legislation in force in England and Wales in which it was recommended that the Sentencing Guidelines Council should conduct a review of the guidelines and sentences for breaches of export control. It appears that no review has taken place, or at least no guidelines have been promulgated.

- (iii) The First Joint Report of the Committee on Arms Export Controls Session 2022-2023 and the Response of the Secretaries of State for International Trade, Defence, Foreign and Commonwealth and Development Affairs, presented to Parliament in January 2023 which contained details of sentences imposed in a number of cases involving the export of military goods, including in particular the sentences imposed on two individuals who were involved in a deliberate evasion of UK export controls between April 2003 and December 2005 in relation to body armour and other military equipment valued at approximately six million dollars. One of these individuals was sentenced to two years' imprisonment suspended for two years.
 - (iv) A document entitled 'What can happen to me if I violate the UK's Export Controls Regulations' which contains a more detailed summary of the facts of the case involving the two individuals (as well as others). We understand that this document came to light as a result of the Royal Court's own researches. It was quite properly provided to the parties during the course of the lower court proceedings. The original provenance of the document is not definitively known, but Advocate Merrien has informed us that the document appears to be linked to the website of a group of aerospace, defence and dual use goods exporters, and that the information within it may be derived from official notices recording enforcement action.
24. In relation to the principles identified in *R v Knight (John)*, Advocate Merrien submits that the goods in the Appellant's case are not weapons; their value is low (the Appellant contends they have a value of only £7,000) in comparison with the values involved in other cases referred to in the various reports; the intended destination, Macau, is not a war zone; the Appellant is not a licensed arms dealer and the planning involved and the period in question is short; the offence involved a false declaration but was not otherwise sophisticated.
25. We are also invited to consider the Appellants' personal mitigation (contained in the Social Enquiry Report and in the plea in mitigation before the Royal Court) and the fact that the Appellant had been obliged to remain in Sark away from his friends and family pending his sentencing hearing and more recently his appeal. We were informed that at the time of his arrest the Appellant was in the process of moving his belongings in readiness to leave Sark and as a result of his inability to travel and work in other jurisdictions he has suffered financial loss.
26. A key part of Advocate Merrien's argument is that Guernsey's legislation in this area is closely related to legislation in the United Kingdom and that the sentence imposed by the Royal Court is out of line with the sentences and penalties imposed in England and Wales.

The Submissions of the Respondent

27. In equally helpful submissions on behalf of the Respondent, Crown Advocate Russell submits that it is difficult to argue that the sentence of 12 months' imprisonment is either wrong in principle or manifestly excessive in all the circumstances of the case. As she made clear, the Royal Court regarded the offences as very serious and the custody threshold was crossed. Moreover the Royal court considered that alternatives to immediate custody were not appropriate and no community penalty was recommended by the Probation Service.

Decision

28. This is the first prosecution in the Bailiwick of Guernsey for offences relating to the importation and exportation of military goods and in the absence of any local sentencing guidelines in relation

to cases involving export order breaches it has to be approached on the basis of first principles. This was the approach adopted by the Royal Court in its careful and impressive sentencing decision. The Royal Court correctly identified the purpose of the legislation: to ensure that the Bailiwick's involvement in international trade does not contribute to regional instability, external aggression or internal repression by overseas States and regimes.

29. The Royal Court also noted that the Policy letter in support of the 2006 Export Control Law explained that an update to the Bailiwick legislation was necessary "to ensure that it has an effective export control regime which enables it to maintain its position as a responsible jurisdiction in the modern world".
30. In our view, as the Royal Court also recognised, the licence requirement on the export of military goods is part of a common international obligation to prevent the proliferation of weapons and supplies of arms to irresponsible regimes or groups and Guernsey is required to play its part in enforcing the restrictions that serve this common good. The core objective of the legislative scheme is to promote global security while facilitating responsible trade.
31. It is also relevant to note that in addition to export controls attaching to military items, there is an embargo on trade in certain items, including shields and body armour panels in respect of China, Hong Kong and Macau and certain other territories.
32. Against the backdrop of these considerations, we agree with the Royal Court that there is a strong public interest in the prosecution of breaches of export controls in Guernsey and that a significant element of deterrence is justified.
33. The Royal Court correctly approached the English materials (which we have identified at paragraph 23 above) with a degree of caution, not least because in England and Wales the current approach is to use a system of compound penalties rather than prosecutions, a system which is not available in Guernsey. The Royal Court made reference to the factors identified in *R v Knight (John)* and applied them on "a common sense basis". The Royal Court was right to do so. It correctly evaluated the significance of each of the individual factors. The items in question were items of armour capable of being used to carry out acts of oppression. The consignment was not huge and the intended sale value was £27,000. The identity of the intended customer remained opaque. The intended destination of Macau, an embargoed territory, is an aggravating factor. The Appellant's experience as a trader was at odds with any suggestion of ignorance either as to nature of the items and the existence of an embargo on items with Macau. The Appellant had intended to test out how alert customs were and had tried to disguise the true nature of the goods to reduce the risk of seizure.
34. We also note that the Royal Court was not satisfied that the Appellant had been candid in the course of his interviews under caution or that he was being fully open at the time of the sentencing hearing (where he maintained his assertion that the items were flotation devices).
35. In our view the Royal Court was right in its assessment of the seriousness of the offence by reference to the legislative objective of the export regime and the culpability of the Appellant. The Royal Court properly had regard to the maximum sentence for each count and was entitled to conclude that the custody threshold was satisfied having regard to the aggravating and mitigating factors identified by the Court. The sentence of immediate imprisonment was properly available to the Royal Court and we see no basis for concluding that the sentence was either wrong in principle or manifestly excessive.
36. For these reasons, while we grant leave to appeal, the appeal against sentence is dismissed.