Leave to appeal against sentence refused.

[2023]GCA028

IN THE COURT OF APPEAL OF GUERNSEY
(CRIMINAL DIVISION CASE No: 513)

Between:

LEE ROYLE **Appellant**

-and-

THE LAW OFFICERS OF THE CROWN **Respondent**

Judgment handed down: 20 July 2023

Before: **George Bompas, KC**
Helen Mountfield, KC
Jeremy Storey, KC

Advocate for the Appellant: **Advocate S E Steel**
Advocate for the Respondent: **Advocate P F Cobb**

Storey JA

1. This is the judgment of the court.

Introduction

2. On 24 January 2023 the Appellant was sentenced by the Royal Court (Full Court: Finch LB and nine jurats) for two offences: (1) being knowingly concerned in the importation of a Class A drug ("the importation offence") on 16 September 2022 and (2) failing to disclose information after service of a notice issued under the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law 2003 as amended ("the RIPL offence"). He was sentenced to nine years imprisonment for the importation offence and nine months imprisonment consecutive for the RIPL offence.

3. On 24 January 2023 the Appellant applied for permission to appeal against his sentence. On 1 March 2023 McMahon, Bailiff, sitting as a single judge of this court, referred the application to the plenary court ("the Decision"). In this judgment we use the expression 'Appellant' even though leave to appeal has not hitherto been granted, consistent with sections 41 and 43 of The Court of Appeal (Guernsey) Law 1961.

4. We had the benefit of written submissions dated 2 June 2023 from Advocate Steel (for the Appellant) and 8 June 2023 from Advocate McVeigh (for the Respondent). We heard oral submissions on 18 July 2023.

The Appellant's offending

5. The Appellant arrived at Guernsey airport from London Gatwick on 16 September 2022. He was found to be concealing cocaine internally, 122.88 grams in four separate packages. The street value of the drugs was between £12,288 and £18,432. He behaved aggressively and offensively towards Border Agency officers, for which he subsequently apologised. He admitted his guilt the following day and pleaded guilty at the first opportunity before the Royal Court on 24 November 2022.

6. The Appellant refused to disclose the pin code to his iPhone and so it has not been possible to examine it. This forms the basis of the RIPL offence, to which the Appellant also pleaded guilty on 24 November 2022.

The Appellant's previous convictions

7. The Appellant is now 37. He has no prior convictions for drug trafficking. However, he had three convictions for robbery in the north-west of England (in 2008, 2011 and 2016) for which he had received sentences of 24 months, 40 months and eight years respectively, the last of which also attracted a three-year extended determinate sentence (which expires in December 2025). He also had previous convictions for other offences of dishonesty and two for grievous bodily harm. He was last released from prison in the UK in 2020.

The sentencing hearing

8. The Appellant was represented by Advocate Steel and the prosecution by Advocate McVeigh.

9. The Royal Court had the benefit of a pre-sentence report dated 24 January 2023. From this it was apparent that the Appellant's previous convictions for robbery were drug-related inasmuch as the Appellant's long-standing cocaine habit had resulted in large debts and the robberies were committed to repay these. Indeed, the current importation offence was said to have been committed following threats to the Appellant and his family, as a result of which the Appellant agreed to import the cocaine to clear his £20,000 debt. The RIPL offence was committed because the Appellant did not wish to incriminate others.

10. The Probation Officer believed the Appellant to be "genuinely remorseful for the consequences of his actions upon his son" (born only eight weeks prior to the importation offence). The Appellant had worked with the Prison Substance Use Service throughout his time on remand and claimed he was "now motivated to make positive changes to his drug habits", something he says he had not been able to do when serving sentences of imprisonment for non-drug offences.

11. The court applied the guidelines in Richards 2000-02 GLR 247, as recently affirmed in Barras, Watt and Orchard 2021 GLR 374 (10-13 years for 100-250g of Class A in powder form) and fixed a starting point of twelve years, in the light of the quantity and three aggravating factors: internal concealment, the unnecessary expenditure of hospital resources and the Appellant's criminal record over the last 15 years. For the RIPL offence, for which the maximum sentence is 24 months, the court's starting point was twelve months. The court recorded its application of the totality principle in sentencing. The total starting point was therefore 13 years.

12. Apart from the Appellant's "inevitable" guilty pleas on these facts the court:

> "*cannot in reality find a great deal [of mitigation]: It is not our job to cast around for mitigation, when we cannot in reality find a great deal, …It is rather stretching things to give much of a discount, though we are encouraged to do so. In total, in all the circumstances to [sic] the case we afford a discount of 1/4, which errs on the side of*

generosity and the seriousness of these offences outweigh any considerations on family life".

13. The twelve year and one year starting points were accordingly reduced by 25% to produce sentences of nine years and nine months imprisonment for the importation and RIPL offences respectively.

Grounds of appeal

14. The Appellant challenges: (1) the twelve-year starting point for the importation offence, given the quantity and the Appellant's role (courier acting under direction, engaged by intimidation); and (2) the discount of only 25% applied to both sentences, given (a) the guilty pleas, (b) absence of drug-related convictions, (c) determination to address his cocaine addiction and (d) remorse.

Powers of this court

15. The powers of the court on an appeal against sentence are set out in section 25(3) of The Court of Appeal (Guernsey) Law 1961 which provides:

"*The Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal.*"

Discussion

- Starting point of twelve years for the importation offence

16. Advocate Steel concedes that the method of concealment and the commission of the importation offence while subject to a post-release licence were aggravating features. He disputes that the previous convictions for non-drug trafficking offences justify any uplift. He further argues that the Appellant's role as a courier allegedly acting under direction and engaged by intimidation should have been taken into account in reducing the starting point. In summary, Advocate Steel submitted that the starting point for the importation offence ought not to have been more than eleven years.

17. In our view a starting point of twelve years was well within the discretion of the sentencing court and was in accordance with Barras. As the Bailiff remarked at paragraph 4 of the Decision, the quantity is not to be applied mechanistically within the 100-250g band. The Appellant's role as a courier, employed because of his drug indebtedness, does not mean that his responsibility is less - without a courier's agreement there could be no drugs reaching the Guernsey market (see the comments of the Court of Appeal in Richards at [52]-[54]). The Appellant was obstructive to the investigation, "intending to waste as much time as possible" and so valuable medical resources had to be utilised. The Appellant's previous convictions for dishonesty (especially the three robberies) and his 2018 offence of grievous bodily harm were all drug-related.

18. The Appellant does not challenge the starting point for the RIPL offence (twelve months, after totality), nor the sentences being consecutive. Such was in accordance with Falla [2022] GCA 70 at [35].

- Mitigation

19. The discount for an early guilty plea, as here, is not required to be one third. As this court observed in Richards at [15] it will be less when there is no sensible alternative to a guilty plea. As the Bailiff recognised at paragraph 7 of the Decision there was no sensible alternative for this Appellant but to plead guilty, particularly to the RIPL offence. Advocate Steel accepted this but he points to the culpatory admission of guilt to Border Agency officials. We accept that "*a guilty plea will always be an important mitigating factor*". We also agree with the Bailiff that a reduction of the discount from one third to one fifth or lower would appear to be contrary to the above indication in Richards. The 25% discount could therefore be justified only if there was no additional personal mitigation.

20. The Royal Court gave no reasons for reducing the Appellant's discount from one third to one quarter (which was expressed to be erring on the side of generosity); we agree with the Bailiff at paragraphs 7 and 9 of the Decision that a more detailed explanation as to the reasons for this reduction would have been appropriate. Nor did the court state whether any discount was being allowed for personal mitigation other than the guilty pleas and, if so, what. The most that can be gleaned is that the court was not minded to make any reduction on account of Article 8 of the European Convention on Human Rights (considerations on family life of the Appellant, his son and partner) due to the seriousness of the offences. It would seem that the court probably rejected Advocate Steel's reliance upon the Appellant's claimed determination to finally address his cocaine habit and his alleged remorse.

21. We repeat what this court stated in Page [2022] GCA 20:

> "***37***. *It was not necessary for the Royal Court to specify individual discounts (whether by way of fraction, percentage or amount) for each element of mitigation. In Thurban v AG [2021] JCA 087, the Jersey Court of Appeal had to deal with an appellant who was entitled to a full one-third discount for guilty plea and a further discount for additional personal mitigation:*
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> > *"… the court seems to have wrapped up [the appellant's] personal mitigation with the discount for a guilty plea and ended up at a total for mitigation of one-third … There is nothing wrong in approaching sentence that way. While it is essential that the reasoning of the sentencing court is clearly understood, there is no obligation on the court to identify how much is taken off a starting point for particular items of mitigation": per Bailhache JA at [35] – [36].*
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> ***38***. *The Royal Court followed the correct sentencing process by first fixing a starting point (taking account of any aggravating and mitigating features of the offences). The court is then required to assess the discount(s) from that starting point for a guilty plea (where applicable) and personal mitigation, if any:*
>
> > *"19. As set out in Richards at paragraph 8, the Court begins by fixing upon a starting point. In arriving at that starting point, the Court must consider everything that is relevant to the gravity of the offence. That includes any aggravating and mitigating features of that offence. As Richards makes clear the primary features are likely to be the quantity and category of the drugs, to a lesser extent the street price, and the involvement and role of the defendant, but there may be other relevant factors.*
> >
> > *20. The starting point as assessed is the figure from which deduction (if any) is to be made for a guilty plea (where applicable) and any personal mitigation. Paragraph 15 of Richards states that the discount for the guilty plea is the first item to be deducted from the starting point. The reasoning for*

this was helpfully elaborated by the Jersey Court of Appeal in Harrison v Attorney General [2004] JLR 111, at paragraphs 90 and 91:

> *"If a discount for a plea, usually expressed in fractions as we have seen, is customary in cases where the offender admits the offence, the questions [sic] arises, one-third, or one-quarter, of what? There must be a figure on which the one-third or one-quarter is calculated and the question should be answered by reference to a figure allowed for the offence itself, the starting point.*
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> *In England, as suggested in the consultation paper dated November 14th, 2003 issued by the Sentencing Advisory Panel entitled Reduction in Sentence for a Guilty Plea, the discount is usually given from the figure which would have been passed on the particular offender before the court (i.e. after allowance for personal mitigation) on the assumption that he had pleaded not guilty. However, in a jurisdiction such as Jersey, where resources are finite and the disruptive effect of a large number of contested trials can be substantial, we think that a slightly greater discount could usefully be applied. In our judgment the appropriate course in this jurisdiction is for the sentencing court firstly to make the appropriate allowance for any plea of guilty as a deduction from the starting point appropriate for the offence, and thereafter to make such further deduction as it thinks fit for the other mitigating factors."*

21. We consider the remarks in these paragraphs also apply to the situation in Guernsey.

22. It follows that the correct approach is that the sentencing court, having deducted the appropriate discount (if any) for a guilty plea from the starting point, should then proceed to consider whether or not any further discount should be made for personal mitigation. This is not to suggest that this should be mechanistic, or that there should be the application of mathematical formulae. But we would expect it to be apparent from the sentencing remarks that the court has reached a conclusion on the correct starting point and then applied, where appropriate, a discount from that figure to reflect both any plea of guilty and any personal mitigation.

23.We are not here suggesting that the sentencing court must necessarily articulate separately the discounts given respectively for a guilty plea and for personal mitigation. It is perfectly in order for the Royal Court to calculate a single comprehensive discount for both a plea of guilty and any personal mitigation - see Harrison v Attorney General, at paragraph 92:

> *"In this regard, the Attorney General has suggested that the two-stage process would or might require the Royal Court to specify in relation to each piece of mitigation what allowance or discount had been given. Kenward v Attorney General, 2000 JLR 251 was referred to in this connection. In that case, the Court of Appeal made it clear that in future, when considering mitigating factors, the Royal Court should calculate a single comprehensive discount for all the relevant factors including the plea of guilty and all other personal mitigation (2000 JLR at 254 – 255). We agree."*

> *But it is important that the final sentence is fixed by following the approach set out in paragraph 22 above": per Pleming JA, President, in Falla v Law Officers of the Crown Criminal Appeals 445 and 446 (12 March 2013).*

***39**. As McMahon B observed at [9], a court ought to give at least brief reasons for denying a defendant full credit of one-third for an early guilty plea…the Appellant had very little choice but to admit guilt so a sentencing court is entitled to apply a discount of less than one third:*

> *"A guilty plea will always be an important mitigating factor, even where the accused appears to have had 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 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": per Carey P in Richards at [15].*

***40**. As the Court of Appeal explained in Falla:*

> *"32. The rationale for giving a reduction in sentence for a Guilty plea is that it avoids the need for a trial, shortens the gap between charge and sentence, saves costs, and in the case of an early plea saves victims and witnesses from the concerns about having to give evidence…*
>
> *35. It is important that a clear message is given to defendants that the court will give credit for pleas of guilty which have the effect of saving court time…"*

22. The issue before us is therefore whether this Appellant was entitled to some additional discount for personal mitigation. Advocate Steel submitted to us that the total discount for mitigation, including for pleas, ought to have been at least one third. This would have produced an overall sentence of eight years, assuming Advocate Steel's combined starting point of twelve years. First, Advocate Steel's reliance upon the lack of any prior drug-related convictions is not relevant - this goes solely to the correct starting point (i.e. the absence of another aggravating factor). Nor, on the facts, is it correct. Second, as recognised by the Bailiff at paragraph 6 of the Decision, the Appellant's motivation to clear his drug debts would not be treated as mitigating his offending. That leaves the Appellant's claimed determination to address his addiction to cocaine, alleged remorse and Article 8.

23. We accept Advocate McVeigh's written submission that the Appellant's supposed remorse must be viewed with considerable scepticism. He began abusing drugs at the age of 19 and committing serious crime at the age of 21. He has received sentences totalling in excess of 14 years (excluding concurrent sentences). His offending in 2022 was not out of character. Once he has accumulated drug debts he has always reverted to crime. If the birth of his son was to be a genuine turning point, then surely the Appellant would not have committed this crime only eight weeks later, whilst on statutory licence? As the pre-sentence report noted, the Appellant was "remorseful for the consequences of his actions upon his son" [our emphasis], not for the offence or the effect upon his victims or the consequences of a successful importation of cocaine into Guernsey (see paragraphs 5, 18 and 19 of the pre-sentence report). In his own words, when discussing with the Probation Officer the impact of his offending behaviour upon others, the Appellant committed the offences because he just "did not care" about the consequences to others or himself.

24. The passing comment on Article 8 ought to have been much fuller if the court had decided not to give the Appellant any credit for the loss of the Article 8 rights of the Appellant, his partner and his very young son, his first child. The court is required to carry out a balancing exercise (the legitimate aims of sentencing against its effect on family life). The graver the offence and the longer the term of imprisonment the less proportionate it becomes to advance the reunion of defendant and family by a few months. There is no right to a discount and the issue must be trusted to the judgment of experienced judges (and jurats). The Royal Court decided not to allow any discount and no criticism was made of that in the grounds of appeal.

25. Finally, Advocate Steel raised one point of mitigation not made below or indeed in the grounds of appeal. A prisoner serving his custodial sentence in England, such as the Appellant, must serve only half his sentence before automatic release, whereas a prisoner serving the same sentence in Guernsey has the right to apply for parole after serving one third. In our judgment the difference between the Appellant's release date in England of November 2027 and the date he can apply for parole in Guernsey (about December 2025) – which would of course take time to process and may or may not be successful, given the Appellant's earlier breach of his post-release licence – does not justify an additional discount to the sentence.

26. In our judgment the failure to allow any discount additional to the 25% for guilty plea was not outside sentencing norms. As we have already stated a discount of only 25% for plea was within the range of permissible sentences and is unobjectionable in principle.

Conclusion

27. We refuse permission to appeal.