

**IN THE COURT OF APPEAL OF GUERNSEY
(CRIMINAL DIVISION CASE No: 512)**

Between:

LEWIS AARON DEREK TOPLEY

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 C J Green
Advocate for the Respondent: Advocate F M Russell**

Storey JA

1. This is the judgment of the court.

Introduction

2. On 7 November 2022 the Appellant was sentenced by the Royal Court (Full Court: Finch LB and nine jurors) to four years youth detention for five offences: (1) being concerned (with Joshua Powell) in the supply to another of a Class A drug on 30 July 2020; (2) offering to supply to another a Class A drug on 30 July 2020; (3) offering to supply to another a Class C drug on 30 July 2020; (4) possession of a Class A drug; and (5) 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 three years three months youth detention for (1) (Count 3), three years three months youth detention concurrent for (2) (Count 1), 18 months youth detention concurrent for (3) (Count 2), 18 months youth detention concurrent for (4) (Count 5) and nine months youth detention consecutive for (5), the RIPL offence (Count 4), a total of four years youth detention.
3. On 17 November 2022 the Appellant applied for permission to appeal against his sentence. On 20 December 2022 McMahon, Bailiff, sitting as a single judge of this court, granted the application ("the Decision").
4. We had the benefit of written submissions dated 24 February 2023 from Advocate Green (for the Appellant) and 10 March 2023 from Advocate Dunford (for the Respondent). We heard oral submissions on 17 July 2023.

The Appellant's offending

5. On 30 July 2020 the Appellant was offering, via Snapchat, to supply MDMA (a Class A drug) and tramadol (a Class C drug). Of the 9.91 grams of MDMA found at his home it was agreed between prosecution and defence that about half was for his own consumption and half was for onward supply. Guernsey Police also found £445 cash, a set of digital scales, a handwritten list of names and numbers (including "Remy 80"), five tramadol tablets and about four grams of tramadol in granules. Following a number of phone calls the Appellant supplied (through Mr Powell) the equivalent of three tablets of MDMA to Ms Remy Turner, then aged 16, for £80. Sometime after taking one third of the MDMA Ms Turner developed a severe adverse reaction and had to be admitted to intensive care where she spent six days in an induced coma. The prosecution accepted that it could not be shown conclusively that Ms Turner did not take anything else so it could not reasonably be ruled out that the severe reaction was caused by something other than the MDMA. In a phone call made from prison on 13 August 2020 the Appellant admitted that the MDMA came from him. The Appellant refused to disclose the pin code to his iPhone and so it has not been possible to examine it. This is the basis of the RIPL offence (Count 4), to which the Appellant pleaded guilty at the first opportunity before the Royal Court on 9 June 2022.
6. The Appellant also pleaded guilty to the remaining Counts at the first opportunity before the Royal Court on 9 June 2022 (Counts 1-3) and 6 October 2022 (Count 5).

The Appellant's previous convictions

7. The Appellant is now 20 but was only 17 in July 2020. Prior to that date the Appellant had a number of convictions for traffic offences for which he had been fined. In October 2020 he was sentenced for a number of offences, committed prior to the offences with which we are concerned, including five offences of possessing Class C drugs, burglary and thefts for which he received a total sentence of three months youth detention. In May 2021 he was sentenced to a further four months youth detention for theft and two offences of possessing Class B drugs. He was released from prison in August 2021.

The sentencing hearing

8. The Appellant was represented by Advocate Green and the prosecution by Advocate Dunford.
9. The Royal Court had the benefit of a pre-sentence report dated 7 November 2022. The Appellant was one of eight children, whose father left home soon after the Appellant was born. The Appellant first came to the attention of the Committee for Health and Social Care aged 11 (when he was placed on the Child Protection Register with a Child in Need Plan) and was then referred to the Children's Convenor at the ages of 12, 14 and 16. He started abusing substances aged 14 and left school at 16 with a single GCSE. Following his release from custody in August 2021 the Appellant secured employment as a labourer and commenced a four year carpentry CoFE apprenticeship in September 2022. He lived with his partner and young son (now aged 18 months). His partner gave birth to their second child in May 2023. The probation officer viewed the Appellant's expressed regret and remorse for his offending and concern for Ms Turner as genuine and believed that the Appellant had been free of substance abuse since February 2021. He has engaged very positively with the Probation Service (whilst subject to a three month youth detention supervision order), matured, met a new partner, become a father, gained stable employment and accommodation, moved away from former anti-social peers and kept out of trouble, thereby "turning his life around". He was assessed with a 'medium' likelihood of general re-offending ('high' in May 2021).
10. The Royal Court was shown letters from the Appellant, his mother and grandmother, two sisters, his partner, his partner's grandmother, his employer and his CoFE tutor.

11. Advocate Green submitted that the harm to Ms Turner was not an additional aggravating factor because Class A drugs are inherently dangerous and the very high tariff is an acknowledgement of this. We accept this analysis, particularly on the facts agreed by the prosecution.
12. Advocate Green invited the Royal Court to impose a sentence of community service. The Royal Court sentenced the Appellant "in respect of your actions in knowingly supplying a Class A drug, knowing [Ms Turner] would consume a drug and this was a significant contribution to her perilous state". The court recognised a further aggravating feature: the known young age of the buyer. The Appellant was therefore sentenced as an active Class A and Class C drug dealer who fell to be sentenced in accordance with the lowest band in Richards 2000-02 GLR 247 (7-9 years), as recently affirmed in Barras, Watt and Orchard 2021 GLR 374. The court's starting point was seven years for the drugs offences and one year for the RIPL offence, in accordance with Falla [2022] GCA 70 at [35].
13. As for mitigation the court noted the guilty pleas "which were in the face of strong evidence". It is unclear whether the court reduced its sentence on account of plea by one third or something less. The total mitigation merited a reduction of 50% ("just over 50% for [the] drug offences and one quarter for the RIPL offence") as the final sentence was four years. The only personal mitigation expressly accepted by the Royal Court comprised the Appellant's young age (a juvenile). Mention was made of the Appellant's family circumstances and the cases of R v Mackey [2013] CA 1 Cr App Rep (S) 522, R v Petherick CA [2013] 1WLR 1102 and Bourgaize (McMahon DB) 49/2014, but it is not clear whether the court decided to make any reduction on account of this factor and, if so, what.

Grounds of appeal

14. The overall sentence of four years youth detention and the individual sentences for Counts 1 and 3 (Class A drug trafficking) and for the RIPL offence are said to be manifestly excessive. The Appellant is said to have been entitled to a discount of $\frac{1}{3}$ on account of pleas to the drugs offences and of $\frac{1}{4}$ on account of his plea to the RIPL offence as well as "at least a further one third for the other mitigation". The Appellant complains that the Royal Court failed to state separate discounts for plea and personal mitigation.

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

16. On this appeal Advocate Green candidly accepted that an immediate youth detention sentence was not wrong in principle.
 - Starting Points
17. There is no challenge to the twelve month starting point for the RIPL offence or that the sentence should be consecutive to those for Counts 1-3 and 5.

18. Not surprisingly there is no challenge to the seven year starting point for the drug trafficking offences. Advocate Green accepted it could have been higher, a point highlighted in paragraphs 6-8 of the Decision. Two separate drugs were involved in the offer to supply and a seven year starting point would have been justified on Counts 1 or 3 alone. There was also an aggravating factor (the victim's age). In all the circumstances, we observe that the Appellant can consider himself fortunate to have his sentence calculated upon a combined starting point of only eight years. It could have been higher.

- Mitigation

19. 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:

“... 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].

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.

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 Fleming 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...”

20. Nevertheless, we agree with Advocate Green that it would have been of considerable assistance to this court if separate discounts for plea and personal mitigation had been set out. The Royal Court clearly reduced the credit for plea to a maximum of 25% for the RIPL offence and we think it likely that it also reduced the credit for plea for the drugs offences to 25% because of the express reference to "strong evidence".
21. The discount for an early guilty plea, as here, "should be meaningful" (Wicks 2011-12 GLR 482 at [59]), but it is not required to be one third. As this court observed in Richards at [15] it will be less where there is no sensible alternative to a guilty plea, but we accept that "*a guilty plea will always be an important mitigating factor*".
22. Advocate Green accepts that the Royal Court can reduce the credit for an early guilty plea below one third: Pirito (Criminal appeal 381, 2 April 2008) at [15]. However, he submitted that this was not a case where the defendant had no real alternative but to plead guilty. We reject that. As the Royal Court observed the evidence was indeed strong. The findings at the Appellant's home showed clearly he was a dealer in Class A and Class C drugs. Ms Turner's evidence was that she made contact with the Appellant via Snapchat at least twice on 30 July 2020 (when she agreed to buy the MDMA for £80 and to collect it at Ivy Castle Lane at 6pm), having on a previous occasion spoken to him in town and been in contact with him via phone. The Appellant admitted he was the source of the MDMA in his prison phone call on 13 August 2020. As for the RIPL offence there was no defence. It was, in our judgment, open to the Royal Court to allow only 25% discount for all pleas.
23. Turning to the personal mitigation, it does appear that an error may have been made by the Royal Court in allowing a significant discount for the drugs offences (probably about 29%) but none at all for the RIPL offence. We can see no justification for not applying the appropriate discount across the board.
24. We accept Advocate Dunford's written submission that the Appellant was required to be sentenced on his criminal record as at the date of sentence. Although he had no drugs convictions prior to July 2020 (and so there was no question of his record increasing the starting point), he was on bail for possession of Class C drugs. By November 2020 he had seven convictions for possession of Class B and Class C drugs, for which he had received sentences of youth detention.
25. Advocate Green submitted that the Royal Court allowed insufficient discount for personal mitigation. The only matter expressly recognised was the Appellant's age. Although brief mention was also made of the Appellant turning his life round since the offences and of his domestic situation, it is unclear whether any such factors were regarded as relevant. As the court noted, quite correctly, the guidance in Petherick is that where custody cannot proportionately

be avoided, as here, the effect on children or other family members might afford grounds for mitigating the length of sentence, but it may not do so. Further, "*the likelihood of the interference with family life which is inherent in a sentence of imprisonment being disproportionate is inevitably progressively reduced as the offence is the graver*". This is because the court must balance the legitimate aims of sentencing, including the need of society to punish serious crime, the interest of victims that punishment should constitute just desserts, the needs of society for appropriate deterrence and the requirement that there ought not to be unjustified disparity between different defendants convicted of similar crimes.

26. Here the Royal Court has failed to articulate the results of the balancing exercise it was required to carry out. This court can therefore review that stance and is entitled to exercise the discretion itself. In our view it is important to note that the Appellant's partner and two children have only appeared on the scene after his offending. The Appellant cannot therefore be accused of failing to consider his family circumstances before offending.
27. At paragraph 13 of the Decision the Bailiff's stated view was that the Royal Court may not have had sufficient regard to the Appellant's age (17 at the time of the offences and 19 at the time of sentence) and the effect that a lengthy custodial period will have on his family members. In our view, having read all the material placed before us and having heard full argument, these highly important matters were insufficiently regarded. We also think that the Appellant's genuine remorse and shame and his remarkable change in life choices must be reflected in assessing the appropriate discount. He has not offended since his last term of custody, he has a job, a stable family, a home and appears to have put his substance abuse behind him. He is still only 20.

Conclusion

28. As the Decision makes clear the Court of Appeal is not concerned with how a sentence has been calculated, merely whether a sentence of four years youth detention is manifestly excessive, taking account of the totality principle and all the relevant circumstances. We have already stated that a reduction of only 25% for pleas was not outside sentencing norms. However, we believe that the minimum discount for additional personal mitigation here was 45%. With a total discount of 70% from a starting point of eight years, the sentence would have been no more than 29 months youth detention. The sentence of four years youth detention on this 19 year old was manifestly excessive.
29. We allow this appeal. We quash the sentences imposed by the Royal Court and substitute the following sentences:

Count 3: 25 months youth detention.

Count 1: 25 months youth detention concurrent.

Count 2: 18 months youth detention concurrent (no change).

Count 5: 18 months youth detention concurrent (no change).

Count 4: four months youth detention consecutive.

Total: 29 months youth detention from 7 November 2022.