

171.

COURT OF APPEAL

25th September, 1996.

Before: Sir Godfray Le Quesne, Q.C., (President)
Sir David Calcutt, Q.C., and
Miss E. Gloster, Q.C.

Malcolm Peter Rayner

-v-

The Attorney General

Applications: (1) for an extension of time within which to apply for leave to appeal; and (2) for leave to appeal against a **TOTAL SENTENCE OF 11 YEARS' IMPRISONMENT**, passed by the Superior Number of the Royal Court, to which the Appellant was remanded by the Inferior Number on 15th May, 1996, following guilty pleas to:

- 1 count of being knowingly concerned in the fraudulent evasion of the prohibition on importation of a controlled drug (M.D.M.A.), contrary to Article 77(b) of the Customs and Excise (General Provisions) (Jersey) Law, 1972 (count 4), on which count a sentence of **11 YEARS' IMPRISONMENT** was passed;
- 1 count of possession of a controlled drug (M.D.M.A.) with intent to supply it to another, contrary to article 6(2) of the Misuse of Drugs (Jersey) Law, 1978 (count 5), on which count a sentence of **11 YEARS' IMPRISONMENT CONCURRENT** was passed;
- 2 counts of possession of a controlled drug, contrary to Article 6(1) of the Misuse of Drugs (Jersey) Law, 1978:
 - count 6: M.D.M.A., on which count a sentence of **11 YEARS' IMPRISONMENT CONCURRENT** was passed;
 - count 7: cannabis resin, on which count a sentence of **2 WEEKS' IMPRISONMENT CONCURRENT** was passed;

Counts 1, 2, and 3 of the indictment were laid against a co-accused, who has not appealed.

On 8th March, 1996, Rayner pleaded not guilty to counts 4, 5 and 6 and guilty to count 7. On 15th May, 1996, leave was given to plead guilty to all counts.

Advocate N.M. Santos-Costa for the Appellant.
J.A. Clyde-Smith, Esq., Crown Advocate.

JUDGMENT

CALCUTT, J.A.: On 6th June 1996, Malcolm Peter Rayner (who I will call "the applicant"), together with another man by the name of Jones, was sentenced by the Superior Number of the Royal Court in respect of offences which related to trafficking in and possession of Class A drugs. The drugs involved were 5,469 Ecstasy tablets, which had a street value of £109,380. This is the largest amount of Ecstasy tablets which have ever been seized in Jersey.

In respect of these offences the applicant was, in circumstances which I will outline, sentenced to periods of eleven years' imprisonment concurrent.

A brief period of imprisonment was also imposed, concurrently, in respect of a charge relating to the possession of cannabis, but this Court has not been concerned with that.

The facts of this case may be outlined in this way. A drug dealer contacted Jones, in England, and offered Jones money to run drugs to Jersey. Jones arrived in Jersey on 15th October 1995, and made his way to a hotel, where he had reserved overnight accommodation. Jones, in due course, met up with the applicant (who was previously unknown to him) and transferred the consignment of Ecstasy to the applicant, putting them, at the applicant's direction, into the glove compartment of the car driven by the applicant. The car was stopped by the police, and the drugs were taken into police possession.

Jones was co-operative with the police; this co-operation went far beyond the kind of co-operation which is commonly found in a defendant in a criminal case. Jones named his supplier, and gave information to the police which the police assessed as being of good quality and useful. Jones would have been prepared to give evidence against the applicant, had there been the need for it in a contested trial. Jones at no time sought to dispute his guilt.

The conclusions moved for in respect of Jones were these:

- (1) that the starting point should be eleven years' imprisonment;
- (2) that there should be a reduction of four years for 'ordinary mitigation'; and
- (3) that there should be a further reduction of three years for the assistance given to the police in respect of the drug trafficking information.

In the result the prosecution moved for an overall effective sentence of four years' imprisonment. The Court accepted these conclusions.

The applicant's case before the Royal Court was very different from that of Jones. The Royal Court accepted, in our view with justification, that the applicant was an important cog in a vicious machine in the distribution of drugs in Jersey. Further, the applicant had been unwilling to assist the police. Where he was going in his car on that day, he preferred to keep to himself. Further, although the applicant did eventually plead guilty, this was only after an earlier plea of not guilty, the change being made only at the eleventh hour. Finally, the applicant was not a man of previous good character: he had previous criminal convictions, including convictions for offences involving the misuse of drugs.

The conclusions moved for in the applicant's case were these:

- (1) that the starting point should be fourteen years; and
- (2) that there should be a reduction of three years for 'ordinary mitigation'.

Accordingly the prosecution moved for an effective sentence of eleven years' imprisonment. The Court accepted these conclusions.

The applicant lodged an application for leave to appeal against sentence, but only did so about one month after the time for applying for leave had expired; and accordingly, he also applied for an extension of time in which to apply for leave to appeal against sentence. Without departing from anything which this Court has said about the circumstances in which this Court will extend time, the Court in this particular case proposes to consider the matter on the basis of the application which has been made for leave to appeal.

Mr. Santos-Costa, in opening his application for leave, made two matters clear. First, he submitted that his application was based simply and solely on the differences between the overall sentences imposed on each of the two defendants: four years in the case of Jones, eleven years in the case of the applicant. Secondly, he conceded that there should have been some disparity, but asserted that the difference was unjust.

The principle that this Court will interfere where there is a glaring difference between sentences imposed on different defendants in the same case, such as to give rise to a real sense of injustice, is a principle which is plainly recognised in the law of Jersey: see Mawdsley -v- A.G. (8th July, 1996) Jersey Unreported, Lynch -v- A.G. (24th July, 1991) Jersey Unreported CofA; (1991) JLR N.15 CofA, and Hollman, Cummins -v- A.G. (4th April, 1995) Jersey Unreported CofA.

It is important, however, to understand the nature of that difference. It is not a difference which might strike a casual onlooker as unjust, but only one in which there is full knowledge of all the relevant facts and circumstances. When the facts and circumstances of this particular case are fully considered, there is, in the opinion of this Court, no difference, such as to give rise to any legitimate sense of injustice.

The applicant does not (and in our view could not, in the light of the authorities) quarrel with the starting point, in his case, of fourteen years. But even if fourteen years' was the right starting point for the applicant, was a starting point of eleven years' right for Jones? This Court would not wish to appear to diminish the seriousness of the part played by any courier; but this Court accepts that the Royal Court was right to conclude that the applicant's criminality was greater than that of Jones, sufficient to justify the difference between the two starting points. Jones was a courier. The applicant played the part which I have described. Further, our attention was drawn to the Attorney General's statement made, in the case of this applicant, under Article 5(1) of the Drug Trafficking (Offences) (Jersey) Law 1988 which, at paragraph 6.4, is in these terms:

"(The applicant) is a regular user of the drug cannabis and is no stranger to the local drugs scene. It is the opinion of investigating officers that this illegal activity has provided him with a comfortable life-style over a number of years".

As far as a reduction for 'ordinary mitigation' - ordinary cooperation with the police, a plea of guilty, good character and so forth - is concerned, when the facts and circumstances of this case are fully understood, the reduction which was allowed in the case of Jones - four years - calls for no special comment from this Court. It was well within the discretion of the Royal Court. The comparable reduction allowed to the applicant - three years - was perhaps if anything, as Mr. Clyde-Smith submitted, generous; but it was the conclusion of the prosecution, and was accepted by the Court.

The further reduction made in the case of Jones (but plainly not available to the applicant) was allowed to Jones having regard to his supply of relevant and significant drug-trafficking information to the police. This approach is fully supported by the decision of this Court in Campbell, Molloy, MacKenzie -v- A.G. (4th April, 1995) Jersey Unreported CofA. In that case it was said, at p.7 of the Judgment:

"The proper approach is that the sentencing court should adopt a starting point which is appropriate to the gravity of the offence. Having established the starting point, the Court should consider whether there are any mitigating

factors and should then make an appropriate allowance for any such mitigating factors before arriving at its sentence. A substantial allowance may be expected where a defendant has identified his supplier or otherwise provided information which is of significant assistance to the authorities". (Italics added).

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It is for these reasons that this Court is of the view that the difference complained of is justified, having regard to the facts and circumstances of this particular case.

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In these circumstances the application for leave to appeal is dismissed.

Authorities

- Campbell, Molloy, MacKenzie -v- A.G. (4th April, 1995) Jersey Unreported CofA.
- A.G. -v- Chadwick (30th October, 1995) Jersey Unreported.
- A.G. -v- Burke (24th January, 1996) Jersey Unreported.
- A.G. -v- Raffray (20th July, 1995) Jersey Unreported.
- A.G. -v- Marella & Ors. (2nd May, 1996) Jersey Unreported.
- Mawdsley -v- A.G. (8th July, 1996) Jersey Unreported.
- Current Sentencing Practice:
R.29: February, 1995: p.10915: A.9-5A014: R. -v- Fawcett (1983) 5 Cr.App.R.(S) 158.
R.25: 1-iii-93: p.10910: R. -v- Beere (22nd November, 1974) Unreported; R. -v- Tilley (1983) 5 Cr.App.R.(S) 235.
p.10906/2: R. -v- Church (1985) 7 Cr.App.R.(S) 370.
- Melville -v- A.G. (17th January, 1996) Jersey Unreported CofA.
- A.G. -v- McAteer (17th May, 1996) Jersey Unreported.
- A.G. -v- Vellam (5th March, 1993) Jersey Unreported.
- A.G. -v- Akehurst (29th July, 1996) Jersey Unreported.
- A.G. -v- Cain (9th September, 1996) Jersey Unreported.
- Hollington & Emmens (1985) Cr.L.R. 364.
- Lynch -v- A.G. (24th June, 1991) Jersey Unreported; (1991) JLR N.15 CofA.