

COURT OF APPEAL

18th April, 1994.

73.

Before: R.D. Harman, Esq., Q.C., (President),
A.C. Hamilton, Esq., Q.C., and
Miss E. Gloster, Q.C.

Alexander Robertson Stewart

-v-

Her Majesty's Attorney General

Appeal against a total sentence of 5½ years' imprisonment imposed on 31st January, 1994, by the Royal Court (Superior Number), to which the Appellant was remanded to receive sentence following guilty pleas, on 26th November, 1993, before the Inferior Number, to:

- 4 counts of being knowingly concerned in the fraudulent evasion of the prohibition on importation of a controlled drug contrary to Article 77(b) of the Misuse of Drugs (Jersey) Law, 1978:
- Count 1: M.D.M.A, on which he was sentenced to 5½ years imprisonment;
- Count 2: Cannabis, on which he was sentenced to 6 months' imprisonment, concurrent;
- Count 3: Cannabis resin, on which he was sentenced to 6 months' imprisonment, concurrent; and
- Count 4: temazepam, on which he was sentenced to 3 months imprisonment, concurrent;

Advocate P.C. Harris for the Appellant.
The Attorney General.

JUDGMENT.

THE PRESIDENT: On 26th November, 1993, this Appellant, who is aged 25, appeared before the Inferior Number of the Royal Court, and pleaded guilty to an indictment containing four counts. The first count, which related to an offence on 24th July, 1993, was for being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, the compound commonly known as M.D.M.A. or Ecstasy. The three remaining counts

dealt with similar offences in respect of cannabis, cannabis resin and temazepam.

On 31st January, appearing before the Superior Number, he was sentenced by the Bailiff to a term of imprisonment of 5½ years on count 1 and concurrent sentences in respect of the remaining counts. The total therefore was 5½ years and it is the sentence imposed in respect of the first count which is the subject of this appeal. On 24th February the Deputy Bailiff granted leave to appeal against that sentence.

The grounds of appeal were that the sentence was manifestly excessive and did not fully take into consideration the mitigating circumstances. The facts can be shortly stated.

On 24th July, 1993, the Appellant arrived at the Queen Elizabeth II Terminal in a car driven by a young woman, in fact a friend of his who also had with her his own four year old child. They said that they were on holiday. So far as the Appellant was concerned this was in order to disguise the true purpose of his mission. They were taken to the Customs Hall where the Appellant admitted possession of a small quantity of cannabis. This proved to be herbal cannabis and cannabis resin. He was also found to be in possession of two white tablets and 33 green capsules. These proved to be M.D.M.A. or Ecstasy and temazepam. He said that they were for his own use. He was X-rayed with a negative result and the next day the car was searched in his presence. With the aid of a sniffer dog, two plastic bags were located concealed behind the glove box. They contained Ecstasy, over 1,900 capsules with a street value of some £48,000. The Appellant denied knowledge of precisely what drugs they were and said they had been hidden in the car by other persons shortly before departure time. He said that he had been paid £500 which was to cover the cost of the hire of the car and its ferry. He later said that he was to be paid a further £500 by way of reward with a quantity of temazepam tablets.

Later again he referred to what has been called at this appeal a forgiveness of debt in an undisclosed sum where he had been asked to look after a package for his dealer which had mysteriously vanished. He also maintained that he had been told the drugs found in the car were in fact temazepam.

We have considered a number of authorities which are frequently quoted at appeals against sentence in drugs cases heard by this Court. They include, of course, the well-known case of Clarkin, and Pockett -v- A.G. (3rd July, 1991) Jersey Unreported, decided by this Court in July, 1991, in which reference was made to the now equally familiar appeal of Fogg -v- A.G. (8th April, 1991) Jersey Unreported C.of.A.; (1991) JLR 31 C.of.A. The words of the Bailiff when giving Judgment in Fogg included the following statement of principle:

"It has been suggested by counsel for the Appellant that although he concedes that sentencing policy in this Court may differ from sentencing policy in England, the difference is or should be very slight. The Royal Court has always felt itself free to lay down its own distinguishing and separate principles dealing with the punishment of offenders, particularly in relation to drug offences. It has been said in the Royal Court, both by the Inferior Number and the Superior Number that the Island is particularly vulnerable to the importation of drugs where we have a quite large group of young people susceptible to corruption by drug abuse. It is mainly for that reason that the Courts in this Island have taken what would be regarded outside the Island as a stricter approach to a sentencing policy".

It is now well recognized that in cases of this nature there should be an established bench mark, that is to say a starting point before any mitigation is taken into account on any ground. In the present case counsel for the Appellant has accepted that the proper starting point was 9 years and that sentence turns on the appropriate reduction for mitigation. Advocate Harris submits that the reduction should have been one at least of 5 years making a proper sentence significantly below that of the 5½ years imposed by the Royal Court on count 1.

Reference has been made to the case of R. -v- Bilinski (1987) 9 Cr.App.R. (S.) 360 and to the relevant extent of an accused's knowledge. The Judgment of Lord Lane CJ in Bilinski contains this passage which was mentioned by the Bailiff in the present case:

"Where the defendant's story is manifestly false the judge is entitled to reject it out of hand without hearing evidence. Whether that is so or not, we take the view that the exercise of only a small degree of curiosity, enquiry or care would have revealed the true nature of the drug in this case and that accordingly the mitigating effect of the belief, if held, was small".

The Royal Court found that the mitigating effect of that belief in this case, if it was held, was small. We agree. The Court also found that the use of a young woman and child as a device to try to get drugs through Customs was an aggravating factor. We agree.

We have taken into account a recent unreported judgment of this Court, delivered on 15th February, 1994, in the case of Andrew John Wood when the Court reduced a sentence of 5½ years' imprisonment to 4½ years where the offence was one of supplying a controlled drug, namely L.S.D. The facts of that case were immediately distinguishable from the case which we have considered today. The Appellant, it was submitted, had co-operated with the

Police to an exceptional degree. He admitted a large number of past deals in the course of which he had received over £6,000 for drugs with a street value of £12,000 with a profit of £1,500 for himself. This appeared from the discovery of three pieces of paper at his address which the Appellant readily admitted was his record of these deals. The Judgment of the Court of Appeal includes these words:

"The co-operation offered by this Applicant to the police in his statement explaining exactly what the three pieces of paper were may not be precisely equivalent to the action of a Defendant giving himself up to the police, as the Applicant was under arrest at the time when he made his statement, but it is significant that the explanation which the Applicant gave of those pieces of paper made it possible for the charge of supplying LSD to be made. Upon the evidence then available to the police, it does not appear that it would have been possible for that charge to have been made without the explanation voluntarily given by the Applicant in his statement. This is a feature of the case which rightly constitutes mitigation and demands some modification of the sentence in addition to the ordinary reduction of one-third for a plea of guilty".

The Court had referred to a well established principle that a deduction should be made of one-third for the plea of guilty. We do not believe that it was intended to add emphasis to the application of that principle. Such a reduction should not be regarded as automatic in every case regardless of the circumstances.

This is now accepted by Advocate Harris on behalf of the Appellant in the present case. In the case of Wood the Court went out of its way to state the position when it said:

"We desire to add and to emphasise this observation, to avoid misuse of this decision in future cases: it should clearly be understood that our decision in this case depends entirely on this case's particular features. We are laying down no new principle; far from that, we are following the principles already established by this Court, and our decision in this case will not constitute any authority for deciding what is the correct sentence in any future case in which the features of this case are not exactly reproduced".

This Court has taken into account all the matters urged upon us by Advocate Harris and the whole of the mitigation available to the Court to consider. Certain additional matters were urged upon the Royal Court and accepted. They include, but are not restricted to, the details of the Appellant's early background, his unhappy childhood and subsequent dependence on temazepam. We have read the Probation Report submitted by Mr. Trott, the

psychiatric report supplied by Dr. Evans, and the report from the Department of Health (Alcohol and Drug Service). We have also seen four helpful references and taken into account the Appellant's past record.

However, this is the largest importation of Class A drugs which has been detected in Jersey and we are satisfied that the sentence of 5¹/₂ years' imprisonment was not excessive. In our judgment it was an entirely proper sentence. But for the conclusions of the Attorney General, we would have been inclined to regard it as unduly lenient. This appeal is therefore dismissed.

Authorities.

Clarkin, Pockett -v- A.G. (3rd July, 1991) Jersey Unreported
C.of.A.

Thomas: Current Sentencing Practice:
B11-23A01: R. -v- Bilinski (1987) 9 Cr.App.R.(S.) 360.

Wood -v- A.G. (15th February, 1994) Jersey Unreported C.of.A.

Ferri -v- A.G. (27th September, 1993) Jersey Unreported C.of.A.

Campbell -v- A.G. (28th September, 1992) Jersey Unreported
C.of.A.

Olumide (1988) Cr.App.R.(S.) 364.

Fogg -v- A.G. (8th April, 1991) Jersey Unreported C.of.A.; (1991)
JLR 31 C.of.A.