

COURT OF APPEAL

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15th January, 1997.

Before: Sir Godfray Le Quesne, Q.C., (President)
Sir Peter Crill, K.B.E., and
M.G. Clarke, Esq., Q.C.

Jack Robert Gregory.

- v -

The Attorney General

Application for leave to appeal against a total sentence of 6 years' imprisonment, passed on 1st October, 1996, by the Superior Number of the Royal Court, to which the accused was remanded by the Inferior Number on 30th August, 1996, following guilty pleas to:

3 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 Customs and Excise (General Provisions) (Jersey) Law, 1972:

Count 1: Diamorphine, on which count a sentence of 6 years' imprisonment was passed;

Count 2: Methadone, on which count a sentence of 6 years' imprisonment, concurrent, was passed;

Count 3: Dexamphetamine, on which count a sentence of 1 month's imprisonment, concurrent, was passed; and

1 count of possession of utensils for the purposes of committing an offence, contrary to Article 8 of the Misuse of Drugs (Jersey) Law, 1978. (Count 4), on which count a sentence of 1 month's imprisonment, concurrent, was passed.

Leave to appeal was refused by the Deputy Bailiff on 16th October, 1996.

Advocate J. Martin for the Appellant.
J.A. Clyde-Smith, Esq., Crown Advocate.

JUDGMENT

THE PRESIDENT: This is an application by Jack Robert Gregory for leave to appeal against concurrent sentences of six years' imprisonment passed on him by the Superior Number of the Royal Court on 1st October, 1996, on two counts charging him with the importation of controlled drugs. One of these counts related to 8.54 grams of heroin of 57% - 64% purity; the other to 139 tablets of methadone. There were also two minor counts upon which short, concurrent sentences were passed.

Gregory arrived in Jersey on the ferry on Sunday, 28th April, 1996. He went to the 'Greenwood Lodge' Hotel where he had booked a room. Police officers entered this room with a search warrant about 4.20 p.m. on 29th April. They found Gregory coming out of the bathroom carrying two plastic containers which he had excreted. One contained the heroin, the other the methadone.

At the Police Court Gregory was charged not only with the two offences of importation but also with two offences of possession of the same drugs with intent to supply. He pleaded not guilty to the latter charges but guilty to the charges of importation. Thereupon the Crown abandoned the charges of possession with intent to supply. Mr. Clyde-Smith explained to us that this was done because it was well established that in cases of importation of controlled drugs the purpose to which the drugs were to be put was not a relevant consideration for sentencing. Gregory having pleaded to the charges of importing, it was not, in the Crown's view, worthwhile to pursue the charges of possession with intent to supply because the two types of offence would attract commensurate and concurrent sentences.

When Gregory pleaded guilty to the importation charges, he did so maintaining that the drugs imported were for his personal use. The Crown's view, on the other hand, was that the drugs were to be supplied by Gregory to someone else. In support of this view, the Crown obtained a report from Dr. Stephen Robinson, who was the senior police surgeon to the Greater Manchester Police and a lecturer in clinical forensic medicine at Manchester University. Dr. Robinson stated in his report that he was instructed that Gregory intended to stay in Jersey for three days, and his opinion was that it was unarguable that the drugs in his possession were for personal use over three days.

Miss Martin applied to the Bailiff, both before the sitting of the Superior Number and again at the beginning of that hearing, to exclude Dr. Robinson's report. Both applications failed. Miss Martin's objection was based partly on a contention that Dr. Robinson had been wrongly instructed, because Gregory had never said he intended to stay in Jersey only for three days. She also told us that it was only shortly before the sitting of the Superior Number that she discovered that the Crown was still contending that the importation was for a commercial purpose, and she therefore had no opportunity to get an expert's report herself. She applied to us for leave to use a report of Dr. Massimo Riccio, who is a consultant psychiatrist and a senior lecturer at the Academic Department of Psychiatry at Charing Cross and Westminster Medical School. Mr. Clyde-Smith offering no objection, we admitted Dr. Riccio's report *de bene esse*, and we shall refer to it in due course.

When the Superior Number sat to pass sentence, Mr. Clyde-Smith submitted that Gregory had imported the drugs for the purpose of supplying them to others, so that the importation constituted trafficking and the guidelines laid down by this Court in the case of

Campbell, Molloy and MacKenzie -v- AG (1995) JLR 136 CofA should be applied. In support of this he relied upon Dr. Robinson's report. Miss Martin submitted that Gregory intended to use all the drugs himself and there was no evidence that he was engaged in any commercial activity. Gregory was a man of 50, and had been addicted to heroin for 25 years. He had come to Jersey, he said, in order to remove himself to a new scene and there wean himself from his addiction. The heroin and the methadone were to be used by him in that process. He had been able to acquire them, he said, because before coming to Jersey he had received £667 in arrears of benefit from the Department of Social Security upon which he relied for his means of survival. After buying the ticket to Jersey and the drugs he was left with about £150 in cash which he brought to Jersey. He said he had made arrangements for a friend in London to send him more money if he needed it.

The quantities of the drugs, Miss Martin submitted, were explained by the high level of tolerance of these drugs which Gregory had developed during his long addiction.

The Superior Number of the Royal Court did not accept this suggestion. In passing sentence the Bailiff said:

"We reject the explanation of the defendant that he imported the drugs for his personal use. This was, therefore, in our judgment, an importation for commercial purposes and the guidelines in A.G. -v- Campbell apply.

The Crown Advocate took a starting point of nine years' imprisonment, having regard to the amount of drugs involved and, in general, we understand his reasons for doing so. We have, however, given anxious consideration to this question also and have taken note in particular of the submission of defence counsel that Gregory is a man who has been addicted to heroin for some 25 years. We consider that this is an unusual circumstance and we accept that a proportion of the drugs which he imported were intended for his own use and, on that basis, the commercial purpose associated with the importation was more limited than might otherwise have been expected to be the case, having regard to the quantity of the drugs in question. Taking the most sympathetic view of the surrounding circumstances which it is possible to take we consider that the appropriate starting point in this case is one of seven years' imprisonment".

The Court reduced this period by one year on account of the plea of guilty, and sentenced Gregory to concurrent sentences of six years on each of the counts of importation.

It is thus clear that the Court rejected Gregory's claim that he imported the drugs for his own use and sentenced him on the basis that he imported some of them for a commercial purpose. Miss Martin submitted in this Court that this was wrong. In view of the contradictory contentions of the Crown and the defendant about the purpose of the importation, the Court should either have sentenced Gregory on the basis of his contention or have ordered a 'Newton' hearing to decide which of the two contentions was to be accepted.

Mr. Clyde-Smith submitted that the AG situation was one of those in which a 'Newton' hearing is unnecessary. He referred to the three such

5 situations set out in paragraphs 5-44 - 5-46 of the 1995 edition of Archbold. The second of these situations is that in which "***the version put forward by the defence can be described as manifestly false or wholly implausible***". Mr. Clyde-Smith conceded that neither of these descriptions could be applied to Gregory's version of his purpose.

10 He did, however, seek to bring the case within both the other situations. The first is that in which the difference between the two versions is immaterial to the sentence. Here Mr. Clyde-Smith relied on the case of R -v- Dolgin (1988) 10 Cr.App.R.(S) 447 in the English Court of Appeal. That was a case of importation of 124 grams of cocaine, said by the defendant to have been for his personal use. In delivering the judgment of the Court, Simon Brown J. (as he then was) said, at p.449:

15 ***"...this Court does not accept that it is of any real materiality to an offence of this nature whether the importation is intended for onward supply or for personal use"***.

20 The third situation is that in which the matters put forward by the defendant do not amount to a contradiction of the prosecution case but rather to extraneous mitigation explaining the background of the offence or other circumstances which may lessen the sentence. Where the charge is importation, Mr. Clyde-Smith submitted, a plea that the drugs were for personal use does not contradict the Crown's case as such.

25 We pause here to consider what is involved in Mr. Clyde-Smith's submission. We refer first to the injustice of the result. In terms of offence to the common good, importation of drugs for supply to others is clearly more serious than importation for the importer's own use. This is true even when allowance is made for the possibility that drugs imported for personal use may subsequently find their way into the hands of others. Nor is what we have said equivalent to saying that importation for the importer's own use is of no social or criminal significance. As has repeatedly been pointed out by the Courts an increase in the volume in dangerous drugs circulating in a country is itself an evil. Nevertheless, the two situations of importation for commercial use and importation for personal use do stand on different levels from the point of view of the vice being introduced. It seems unjust and inexplicable that two acts so different in their results should be visited with the same penalty.

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45 Secondly, Mr. Clyde-Smith frankly accepted that the effect of his submission is that a person guilty of importing drugs is to be presumed to have imported them for supply to others unless he proves the contrary. This is to add to Article 77 of the Customs and Excise (General Provisions) (Jersey) Law, 1972 words which it does not contain. In the present case it has produced a strange result. It will be remembered that originally there were charges both of importation and of possession with intent to supply, Gregory having pleaded guilty to the former and not guilty to the latter. If the Crown had pressed the charges of possession, the Crown would have had to prove the intent to supply. If Mr. Clyde-Smith is right, by abandoning the charges of possession with intent to supply the Crown has escaped from this burden and produced a position in which Gregory is presumed to have had that intent unless he proves that he did not.

55 What, then, is to be made of the case upon which Mr. Clyde-Smith relied, R. -v- Dolgin? The answer is to be found by examination of what

the Court actually said. We repeat the sentence quoted already from that judgment, but set it this time in its context:

5 *"...this Court does not accept that it is of any real materiality to an offence of this nature whether the importation is intended for onward supply or for personal use. Of course if it is a relatively small amount, obviously for personal use, that is of great relevance, but its relevance lies in its limited quantity. The vice in the offence consists in the very fact of importation, of increasing the stock of the prohibited drug within our shores. There is always the risk that the drug once here may be stolen, and there is the possibility, particularly if it is a large quantity, that even if the importer had not initially been intent on supply, as time passes he may become tempted for whatever reason to make supplies of it"*.

10 The Court did not say in that passage, without qualification, that the purpose of the importation is irrelevant to the sentence on a charge of importing. On the contrary, they said expressly:

15 *"...if it is a relatively small amount, obviously for personal use, that is of great relevance"*.

20 By the words 'of great relevance', the Court plainly meant of great relevance to the nature of the offence. That must include relevance to the sentence.

25 For the purposes of this case it then becomes important to consider what was meant by the words 'relatively small amount'. This judgment must be reached after the consideration of all the circumstances of the case, including the personal circumstances of the defendant. It is at this point that it is important to refer to Dr. Riccio's report. I refer to two paragraphs in the section of his report headed

30 'Conclusions'.

35 *"Mr. Gregory's drug dependence goes back over thirty years for drugs in general and to over twenty-five years for heroin in particular. This means that he has developed a large tolerance to this drug which means that not only can he tolerate large amounts of the drug at any one time, but he needs large amounts in order to provoke the desired effect. In addition it is important to distinguish between inhalation of the drug through smoking its vapour, chasing the dragon, and the intravenous route. When smoking heroin there is more wastage and therefore a larger amount of drug is needed to obtain the same effect. Mr. Gregory has always used heroin by smoking it as he has never injected drugs. Mr. Gregory's large tolerance of opiates is in keeping with his statement that his average daily use was in the region of one gram but that he could tolerate up to two grams a day. I have personally seen patients smoking in excess of two grams of heroin a day. With Mr. Gregory's tolerance I would suspect that doses around 70-90 milligrams of methadone may be needed to avoid experiencing physical withdrawal symptoms once heroin taking had ceased"*.

40 The quantities of drugs found in Gregory's possession were more than trivial, but they could fairly be described as relatively small - just under 10 grams of heroin and 139 tablets of methadone. When this

quantity is considered beside the personal circumstances of the defendant described by Dr. Riccio in the passage which I have read it is in our judgment clear that this was a case of importation of relatively small amounts of the two drugs.

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Once the case of Dolgin has been properly understood the basis of Mr. Clyde-Smith's argument in relation to the propriety of a 'Newton' hearing is removed. It is clearly impossible to say that the difference between the two versions was immaterial to sentence when the amount of the drug was an amount which was actually stated in Dolgin to be of great relevance. Nor is it possible to say that the version given by the defence was one which amounted to extraneous mitigation going to the background of the offence. On the contrary, it is perhaps accurate to describe it as mitigation, but it is mitigation arising from the very nature of the offence itself.

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In these circumstances the Superior Number should either have ordered a 'Newton' hearing or passed sentence on the basis of Gregory's version of the purpose of his importation. In fact there was no 'Newton' hearing and sentence was passed not on Gregory's version, but on a modification of the Crown's version. The sentence was therefore passed on a wrong version and must be set aside. Before we consider the consequences of this it may be useful to make some general observations on the handling of cases of this kind.

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In a case of importation if the Crown contends that the drugs were imported for the purpose of supply and they were imported for the defendant's own use, the question of whether there should be a 'Newton' hearing must be considered and considered on the principles which we have set out in this judgment.

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Mr. Clyde-Smith submitted that this was going to place the Crown in great difficulty because the intention with which the drugs were imported is something purely within the knowledge of the defendant and it would be very difficult, if not impossible, for the Crown to prove it. We do not accept this comment. It is clear from the passage which we have cited from the judgment in R. -v- Dolgin that the quantity of the drug imported is a critical consideration. If, in all the circumstances of the case, it is a relatively small amount that may show that the intention of the defendant was to put it to his own personal use. Once the amount goes beyond a relatively small amount as it increases so it becomes increasingly suggestive of an intent to put the drugs to commercial use and it becomes increasingly difficult to regard the defendant's version as in any way plausible. This evidence derived from the quantity of the drug is objective evidence not in any way dependent on the defendant's own account of what he intended.

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We should add that even if any difficulty of the kind suggested did exist, the proper remedy for it would be by legislation and not by reading into the existing statute words which are not there.

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Finally, we come to the question of what sentence should be passed in substitution for that which has to be set aside. Once it is established and accepted that sentence has to be passed on the basis that the importation was not for a commercial purpose the guidelines in Campbell are not applicable. That case deals only with cases of trafficking on a commercial basis. This is clear from the following passage in the judgment:

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"The Attorney General submitted that that day had now come and that the guidelines set out in *Clarkin and Pockett* should be revised to provide for higher sentences for those involved in the importation and supplying of Class A drugs on a commercial basis.

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We have no doubt that the courts should indeed play their part in suppressing the evil of drug trafficking which has the capacity to wreak havoc in the lives of individual abusers and their families. Lord Lane C. J. in *R. -v Aramah* (1982) 4 Cr. App. R. (S.) 407 referred in the context of Class A drugs to the "degradation and suffering and not infrequently the death which the drug brings to the addict". Sadly the lives which are blighted by the abuse of drugs are usually young lives. We agree that circumstances have changed since this Court issued its guidelines in *Clarkin and Pockett* in 1991. The courts cannot by themselves provide a solution to the problem but they can play their part by adopting a sentencing policy which marks the gravity of the crime. We desire therefore to make absolutely clear what is the policy of the courts in this jurisdiction in relation to the sentencing of offenders who import or deal in drugs on a commercial basis. That policy is that offenders will receive condign punishment to mark the peculiarly heinous and antisocial nature of the crime of drug trafficking.

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CLASS A DRUGS

We begin by endorsing the sentencing approach laid down by this Court in *Clarkin and Pockett -v- A.G.* 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.

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In the passage from the judgment in *Clarkin and Pockett* which we have cited above, this Court laid down a band of starting points between six and nine years' imprisonment. A starting point of nine years' imprisonment was considered to be appropriate for an offender whose involvement in drug dealing was akin to that of *Fogg*. *Fogg* had been arrested in possession of 1,000 units of LSD. He had arrived in the Island only a short time before his arrest. Within a few hours he had received this large quantity of LSD and had set about selling it. He was also sentenced at the same time for other offences involving the possession and supply of cannabis. He was a mature man with one previous conviction for a drugs offence. In our judgment the appropriate starting point for a case of drug trafficking of that nature would now be one of twelve years' imprisonment. If the involvement of a defendant in drug trafficking is less than that of *Fogg*, the appropriate starting point will be lower. If the involvement of a defendant in drug trafficking is greater than that of *Fogg* the appropriate starting point will clearly be higher. Much will depend upon

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5 the amount and value of the drugs involved, the nature and
scale of the activity and, of course, any other factors showing
the degree to which the defendant was concerned in drug
trafficking. We propose also to vary the lowest point of the
band established in *Clarkin and Pockett*; we accordingly state
that it is seldom that the starting point for any offence of
trafficking in a Class A drug on a commercial basis can be less
than a term of seven years. We have employed the term
"trafficking" deliberately. In the past, some distinctions may
10 have been drawn between offences involving the importation of
Class A drugs and offences involving their supply or their
possession with intent to supply. In our judgment there is no
justification for any such distinction. The guidelines which
we have set out above apply to any offence involving the
15 trafficking of Class A drugs on a commercial basis".

In the earlier part of that paragraph reference to 'trafficking of
that nature' is a reference to trafficking of the kind which was
established in the earlier case of *Fogg* which was clearly a case of
20 commercial dealing. Not only so, but the Court says expressly on two
occasions later in the paragraph that they are dealing with trafficking
on a commercial basis. Ultimately, indeed, Mr. Clyde-Smith before us
accepted that *Campbell* was dealing only with cases of importation on a
commercial basis.

25 It was suggested by Miss Martin that failing any guidance from
Campbell we might find guidance in the case of *Plowright -v- AG* (13th
February, 1995) Jersey Unreported. We do not think that guidance can be
derived from that case either. The reason for that is that it was
indeed a case in which the defendant contended that he had imported
30 drugs for his own use but the Court (and I quote their language on p.3
of the judgment) had every doubt that these drugs were for personal use
only. It therefore appears that *Plowright* was a case in which the Court
regarded the version of the defendant as implausible and that meant that
35 the case did not call for a 'Newton' hearing; it also means that it can
provide no guidance as to the proper starting point in the present case.

We think that we have to determine the starting point without any
help from earlier authority. In order to do so we bear in mind in
40 particular the nature of the offence. This was an importation, or it
has for the purpose of this sentence to be regarded as an importation,
for personal use only. At the same time it was an importation of more
than a trivial amount of heroin and methadone. It was brought in by the
defendant who had with him only a small sum of money and could make only
45 shadowy suggestion of some unidentified figure in London who might send
him more. In these circumstances this, in our judgment, was a case in
which, however blameless the intention with which the defendant brought
the drugs to Jersey, there was a real possibility that ultimately they
might get on to the market.

50 We then compare this case with the guidelines in the *Campbell* case
in which the lowest starting point for cases of importation on a
commercial basis is said to be seven years. Setting that figure for a
commercial case alongside this case, which is not a case of commercial
importation, and bearing in mind the features of this case to which we
55 have just referred, we think that the proper starting point for fixing a
sentence here is six years. This must be reduced on account of the
defendant's plea of guilty. However, we do not consider that the full
remission of one-third can here be allowed. The defendant was

apprehended *in flagrante delicto*. He was left with no practical alternative to pleading guilty and he gave no co-operation of any value to the police thereafter. We therefore think that the proper reduction on account of the plea of guilty is one year.

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Of the other matters which were urged upon us by Miss Martin, we think that some weight must be attached to the remorse now expressed by the defendant; to his desire at last to seek and accept help in breaking his addiction; to the difficulty of such a process for a man who has been addicted for twenty-five years, and to the effect of his leg injury in defeating his earlier attempts to wean himself off the drug. Bearing all these matters in mind we think it fair to allow a further reduction of one year.

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Our conclusion therefore is that the application must be granted. Treating the argument which we have heard as the argument of the appeal, we allow the appeal, set aside the sentence imposed by the Superior Number and substitute on each of these counts concurrent sentences of four years' imprisonment.

Court of Appeal.
Jack Robert Gregory-v-The Attorney General
Judgment delivered on 15th January, 1997.

The first sentence of the last paragraph on page 8 of the above Judgment (lines 51-53), distributed on 29th January, 1997, contained a textual slip. The sentence should read: "...in which the lowest starting point for cases of importation on a commercial basis is said to be seven years."

An amended text is attached and should be substituted for the text distributed on 29th January, 1997. There will be no charge for the amended text.

Authorities

- R. -v- Dolgin (1988) 10 Cr.App.R.(S) 447.
- A.G. -v- Pringle (12th July, 1993) Jersey Unreported.
- A.G. -v- Plowright (13th February, 1995) Jersey Unreported.
- Plowright -v- A.G. (3rd July, 1995) Jersey Unreported CofA.
- Campbell, Molloy, & MacKenzie -v- A.G. (1995) JLR 136 CofA.
- A.G. -v- Russell-Biggie (31st August, 1995) Jersey Unreported.
- Archbold (1995 Ed'n): paras. 5-41 to 5-47.
- Whelan: "Newton and the Reverse, in England and in Jersey".
- AG -v- Broadhurst and Walsh (27th October, 1995) Jersey Unreported.
- AG -v- Young (1980) JJ 281.
- AG -v- Ingham (9th February, 1996) Jersey Unreported.
- McLean (1994) 15 Cr.App.R.(S) 706.
- Meah and Marlow (1990) 12 Cr.App.R.(S) 461.