

COURT OF APPEAL

128

14th July, 1992

Before: Sir Patrick Neill, Q.C., (President),
R.D. Harman, Esq., Q.C., and
A.C. Hamilton, Esq., Q.C.

Her Majesty's Attorney General

- v -

Mark Ian Schollhammer

Appeal against sentence of 3½ years' imprisonment imposed on the appellant on 5th March, 1992, by the Royal Court (Superior Number), following guilty plea before the Inferior Number, on 28th February, 1992 to 1 Count of importation of a controlled drug, contrary to Article 23 of the Customs and Excise (General Provisions) (Jersey) Law, 1978.

Leave to appeal was granted by the Deputy Bailiff on 23rd March, 1992.

The Attorney General.
Advocate A.D. Robinson for the appellant.

Her Majesty's Attorney General

- v -

Mark Christopher Reissing

Application of Mark Christopher Reissing for leave to appeal against concurrent sentences of 4 years' imprisonment passed on him on 26th March, 1992, by the Royal Court (Superior Number), in respect of each of two counts in the indictment laid against him, following a guilty plea before the Inferior Number, on 13th March, 1992: Count 1: Possession of a controlled drug with intent to supply to another,

contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978; Count 2: Supplying a controlled drug, contrary to Article 5 of the Misuse of Drugs (Jersey) Law, 1978.

Leave to appeal was refused by the Deputy Bailiff on 15th April, 1992.

Miss S.C. Nicolle, Crown Advocate.
Advocate Mrs. N. Davies for the appellant.

JUDGMENT

THE PRESIDENT: I will now give the judgment in two appeals, dealing first with the appeal of Schollhammer, although much of what we say in that case will be directly relevant to the application for leave to appeal in the second case, that of Reissing. The Schollhammer case is an appeal pursuant to leave granted by the Deputy Bailiff on 23rd March, 1992, from a sentence of 3½ years' imprisonment imposed on the appellant by the Royal Court on 28th February of this year.

The appellant had pleaded guilty to one count of importation of a controlled drug, contrary to Article 23 of the Customs and Excise (General Provisions) (Jersey) Law, 1978. The drug in question was Ecstasy and the quantity was 200 tablets with a street value of approximately £5,000.

The maximum penalty prescribed by law for the importation of Class 'A' drugs is 14 years. This is the effect of the amendment made to Article 23 of 1978 Customs and Excise Law by Article 27 of the Misuse of Drugs (Jersey) Law, 1978. It was held in AG -v- Bouhsine (10th January, 1992) Jersey Unreported, that the 1978 amendment must be construed as applying to paragraph 1(b) of Article 23, although in terms it refers, mistakenly, to paragraph 2.

The facts of the Schollhammer case follow an all too familiar pattern. The appellant left the Island, went to Glasgow, returning by air on 27th September last year. At the Airport he went through the green lane as if he had nothing to declare. He was questioned by Customs Officers. He denied that he had anything concealed in his body. He eventually agreed to an X-ray examination. This revealed the presence of what turned out to be six rubber pouches containing the drugs in question.

Schollhammer admitted that he had placed these packages into his body. He knew that he was carrying controlled drugs, but he

said that he was unaware of the type. He said that he was acting merely as a courier. As to this the comment made in the English case of R -v- Lawson (1987) 9 Cr. App. R.(S.) 52 at 54 is apposite. Croom-Johnson LJ there said: **"But there are couriers and couriers"**. Some may be of **"the more innocent kind"** but others are determined smugglers, smuggling in a way that can only be carried out with the utmost co-operation of the criminal involved. It is obvious from the statement of facts I have made that this is a case in the second category.

Schollhammer was uninformative as to the planning of his drug smuggling operation. He did not disclose his source of supply, or who was to receive the Ecstasy tablets in Jersey, if indeed anybody was to receive them. He specifically stated that he did the run in order to earn money which must mean either that he would sell the drugs himself to the ultimate users, or hand them over to one or more distributors for cash. But for the diligence of the Customs Officers there can be no doubt that the supply of Ecstasy tablets in Jersey would have been increased.

There have been three recent cases in the Court of Appeal in which drug offences have been considered. The most recent is AG -v- Cappie & Hailwood (20th January, 1992) Jersey Unreported. That was a case of conspiracy to import 85 Ecstasy tablets. Various mitigating circumstances had been urged in the Royal Court and that Court had imposed a sentence of 3 years' imprisonment on both accused. The sentence was upheld on appeal. I quote the following passage from the judgment in that case:

"This was an offence of the importation into Jersey, for reward, of a very dangerous substance. The use of drugs such as ecstasy is well-known to be a prevalent and growing problem here. And that very fact offers a temptation to people in England and elsewhere to try to bring these substances in.

We add the weight of this Court to statements which have already been made by the Royal Court that in those circumstances those who import or attempt to import these substances into Jersey as a commercial venture must, in spite of youth and previous good record, anticipate severe punishment".

On 3rd July, last year, the Court of Appeal decided the appeals in Clarkin and Pockett. One purpose of the Court of Appeal there was to clear up an ambiguity which had been detected in language used by the Court of Appeal in deciding the earlier case of AG -v- Fogg (8th April, 1991) Jersey Unreported, C. of A. Fogg had been arrested when in possession of 1,000 units of LSD. He was clearly extensively involved in drug trading activities on the Island. After mitigating factors had been taken into account, the Court of Appeal fixed Fogg's sentence at 6 years. The result

of Clarkin and Pockett was that it was made clear by the Court of Appeal that for a person in the position of Fogg, the starting point for sentencing before effect was given to any mitigating factor or any ground of mitigation was a sentence of 8 to 9 years' imprisonment. This is what the Court said in that case:

"The possession of a Class "A" drug must always be a grave offence, but if the involvement of the defendant in drug dealing is less than that of Fogg, if, as it is sometimes put, there is a greater gap between him and the main source of supply, the appropriate starting point would be lower. It is very seldom that the starting point for any offence of possessing a Class "A" drug with intent to supply it on a commercial basis can be less than a term of six years.

We repeat, so that there may now be no doubt, that the figures which we have stated are figures for starting points before any mitigation is taken into account on any ground".

Clarkin had pleaded guilty to being in possession of a 832 units of LSD with intent to supply to another person contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978. He had to be viewed as a man who was arrested with a large quantity of dangerous drugs. Although he had no previous convictions the Court of Appeal viewed him as a person dealing in drugs on a serious scale and upheld the sentence of 5½ years.

Pockett had been arrested when in possession of 73 units of LSD. The Court of Appeal had this to say about this case:

"He had no previous conviction for any offence connected with drugs; he had been, as the Crown acknowledged, very frank and forthcoming from the moment of his arrest and his plea of guilty had been of value to the prosecution.

Advocate Renouf in addition to emphasising these facts submitted to us that Pockett was a supplier on an altogether smaller scale than either Fogg or Clarkin and this should have led to a greater difference than one year between the sentence passed on Pockett and the sentence passed on Clarkin. In Pockett's case the appropriate starting point must certainly be lower than either in the case of Fogg or in that of Clarkin. His plea of guilty, furthermore, coupled with his co-operative behaviour from the moment of his arrest, deserved greater consideration than could be given to the much later pleas of guilty in those two cases.

Bearing in mind, on the one hand, the gravity of any offence of possessing a Class "A" drug with intent to supply, and on the other hand these factors to which I have just referred, as well as the other grounds of mitigation which were present, we consider that the appropriate sentence on

Pockett would have been a sentence of four years' imprisonment. This would have been only six months less than the sentence which was in fact passed, and it is not normally right to allow an appeal against sentence in order to give effect to so small a difference of judgment".

They go on to say that there were special circumstances which persuaded them, exceptionally, to reduce the 4½ year sentence to one of 4 years.

Returning from that brief review of recent decisions of the Court of Appeal to the facts of this case in which the appellant, Schollhammer, pleaded guilty to importing 200 tablets of Ecstasy, it is at once apparent that a sentence of 3½ years cannot be faulted on the ground of severity when set against the 4 year sentence passed on Pockett. It was not suggested to us by Advocate Robinson that the crime of importing a dangerous drug merited a smaller sentence than that imposed for being found in possession with intent to supply.

The thrust of the argument on behalf of the appellant was that the sentence passed on Schollhammer of 3½ years was out of line with three other comparable cases; two decided before Schollhammer and one decided after his case in which sentences of 3 years had been passed. These cases were Cappie and Hailwood (4th December, 1991) Jersey Unreported, to which I have already made reference - conspiracy to import 85 tablets of Ecstasy. AG -v- Carr and Feeney (11th February, 1992) Jersey Unreported - conspiracy to import 423 Ecstasy tablets, and AG -v- Welsh and Haslam (26th March, 1992) Jersey Unreported - importation by a husband and wife team of 200 Ecstasy tablets and 415 mg. of Cannabis. The husband there being sentenced to 3 years' imprisonment, and the wife being put on probation.

Part of Advocate Robinson's argument involved the proposition that mitigation played a small or insignificant rôle in relation to drug offences and it was therefore appropriate in the interests of fairness and consistency to apply an established tariff which, he said, was 3 years here in a rigid if not mechanistic manner. As to this we say three things: first we reject the premise that mitigation is not of significance in drug cases. While it is true that the pleas of youth and first offender do not have the effect which they normally have it is obvious that mitigation is something of importance for which there is considerable scope. That is clear from what the Court of Appeal said in Fogg and in Clarkin and Pockett. The 8-9 year starting point for Fogg was reduced by mitigation to 6 years. For Clarkin to 5½ years. For Pockett the starting point was not less than 6 years and the sentence was actually 4.

Secondly, in our opinion, the cases relied on by counsel, Cappie and Hailwood, Carr and Feeney, Welsh and Haslam, do not

establish a tariff of 3 years. Those cases merely show differences in sentence produced by different fact situations and differing mitigations. In particular, in relation to Carr and Feeney, we draw attention to what the Deputy Bailiff said there:

"In the view of the Court, having regard to the Court of Appeal's judgment in re Pockett (3rd July, 1991) Jersey Unreported C. of A., the conclusions in the present case, if they err at all, do so on the side of leniency".

(And that was when the conclusions were for 3 years). They added:

"It is difficult, therefore, to appreciate the additional mitigating factors that exist in the present case, to justify a reduction to three years".

Finally:

"....the Court is unanimous in its opinion that the sentences requested by the Attorney General have already been mitigated as far as it is possible to go".

One sees clearly from those three passages a reluctance almost to go down as low as three years. They would have thought that somewhere a bit higher, 3½ to 4 years might have been right, or certainly perfectly possible.

Therefore the tariff is not established in our view by those cases. Furthermore, one has to set against that trio the latest case which is AG -v- Campbell (1st July, 1992) Jersey Unreported, a case of the importation of 369 Ecstasy tablets concealed in a baby powder container. The conclusions were for 4 years' imprisonment and the sentence imposed by the Court was 3½ years. Exactly the same as in Schollhammer's case.

Thirdly, even if contrary to the view which we have taken, something like a tariff of 3 years has been established for the quantities of drugs comparable to the amounts handled by Schollhammer, we would not intervene to knock 6 months off a 3½ year sentence.

The true position is, however, that there is no tariff of 3 years. As a starting point of 6 years and in practice after mitigation, one finds a band of sentences in the range of 4-3 years.

Schollhammer has no cause for a sense of grievance, he has received a sentence in the centre of that band and his appeal is accordingly dismissed.

We turn now to the Reissing case; the sentence there was imposed on 26th March, 1992. Leave to appeal was refused by the learned Deputy Bailiff on 15th April, 1992, therefore this is an application to this Court for leave to appeal.

The material facts of the case are as follows: The police outside a discothèque saw the accused; they saw another man with whom he had carried out a transaction, and who was arrested when he was found to be in possession of two tablets of Ecstasy. He was separately dealt with. Reissing was chased and after being caught was searched and a total of £1,040 was found on him. The police noticed a swelling in his cheek and from out of his mouth came a bag with some tablets in it. He later told the police that he had dropped a bag as he ran away, or had thrown it away, and that was found to contain some 60 to 70 tablets. A search was carried out at his home and more money was found - some £700. Therefore the proceeds from drug trafficking were in the order of £1,500 and a confiscation order was made in respect of just over £1,000.

The conclusions were for 4 years and the sentence of the Court was for 4 years. It should be noted that in this case there were two counts; one for being in possession with intent to supply under Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978; and secondly another count for supplying contrary to Article 5 of the Misuse of Drugs (Jersey) Law, 1978.

This statement of the case shows that it is precisely covered by the Court of Appeal ruling in Pockett, to the extent that somebody in possession of dangerous drugs on a comparatively small scale for the purposes of sale will receive a sentence in the order of 4 years. Here in addition there was the second count of actually supplying. If I can put it this way, that makes a sentence of 4 years all the more justifiable. In fact the judgment under appeal did not discriminate between the two counts, a total of 4 years was imposed. The learned Bailiff saying this:

"The Court has considered everything that has been said by your counsel. The Court cannot get away from the fact that you were supplying drugs for gain and therefore you come within the usual band which the Crown Advocate has outlined. We cannot think that the conclusions are wrong.

People like you, even on a smaller scale, are supplying drugs to young people who use them, we understand, at 'raves'. They get used to these drugs, and this eventually could lead on to other things.

This Court is determined, so far as it lies within its power, to give sentences of sufficient severity as we hope will

deter others. You are sentenced to four years' imprisonment".

Going back to the first paragraph there, it is obvious that the "usual band" to which the Bailiff referred was a reference to the Pockett case with the 6 year starting point, capable of being reduced by mitigation, and the Court clearly thought that 4 years was the right point to which to descend into that band.

In our view it was fully understandable why the Deputy Bailiff refused leave to appeal here, and we think he was right to do so. However, Advocate Davies argued that we should give leave to appeal and allow the appeal by reducing the sentence. The steps in her argument were really twofold. Firstly she said that importing is more serious than being in possession for the purposes of supply. Secondly, the possession cases show that there is a tariff of 3 years. As to the second step in that argument we have already answered that in the judgment we have just given in the Schollhammer appeal.

As to the first step, it is true that there are cases in this Island in which it has been said that importation is twice as serious as being in possession and should have twice the sentence. Those cases are AG -v- Young (1980) JJ 281 and AG -v- Peacock (10th February, 1989) Jersey Unreported. But on a reading of those cases it is clear that what has been done there was to contrast simple possession, possibly for one's own use, with importation. The contrast was not between importation and possession within intent to supply other people. Therefore, we reject both steps in Advocate Davies' argument as being erroneous.

As to the point that the Court below may have been sentencing on the basis of 130 tablets rather than some 70, we think there is nothing in that. The sentence would have been the same whichever figure was taken and if it helps to remove any sense of grievance, we can state that this Court is acting on the basis of a figure of 70, which was a figure admitted by the accused.

In conclusion I would add this. There is a lamentable flow of drug cases coming before the Courts of Jersey. The Attorney General in the Schollhammer case rightly referred to a change which has been taking place over the last two to three years. He referred to the growing social problem of drugs, with the corrupting influence that they bring with them, creating inducements, for example, to carry out these smuggling runs.

What we have said about the starting points for sentencing and the normal bands may one day have to be reviewed in the light of this growing social menace. These sentences are not set in stone. However, that is for another day. We refuse leave to appeal.

Authorities in Schollhammer

AG -v- Bouhsine (10th January, 1992) Jersey Unreported.

AG -v- Cappie and Hailwood (4th December, 1991) Jersey Unreported.

AG -v- Cappie and Hailwood (20th January, 1992) Jersey Unreported
C.of.A.

Oluwatoyin Lawson (1987) 9 Cr. App. R.(S.) 52.

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

AG -v- Carr and Feeney (11th February, 1992) Jersey Unreported.

AG -v- Welsh and Haslam (26th March, 1992) Jersey Unreported.

Thomas: "Principles of Sentencing" (2nd Ed'n): pp.29-35.
pp.395-399.

AG -v- Campbell (1st July, 1992) Jersey Unreported.

AG -v- Coutanche (2nd February, 1992) Jersey Unreported.

AG -v- Fogg (8th April, 1991) Jersey Unreported, C.of.A.

Customs and Excise (General Provisions) (Jersey) Law, 1978.

Misuse of Drugs (Jersey) Law, 1978.

Authorities in Reissing.

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

AG -v- Clarkin (16th April, 1991) Jersey Unreported.

AG -v- Carr and Feeney (11th February, 1992) Jersey Unreported.

AG -v- Cappie and Hailwood (4th December, 1991) Jersey Unreported.

Thomas: "Principles of Sentencing" (2nd Ed'n): p.186.

AG -v- Peacock (10th February, 1989) Jersey Unreported.

AG -v- Young (1980) JJ 281.

AG -v- Schollhammer (5th March, 1992) Jersey Unreported.

AG -v- Welsh and Haslam (26th March, 1992) Jersey Unreported.

AG -v- Bouhsine (10th February, 1992) Jersey Unreported.

AG -v- Coutanche (2nd February, 1992) Jersey Unreported.

AG -v- Matthews and Drewett (5th April, 1991) Jersey Unreported.

AG -v- Sambor (14th February, 1991) Jersey Unreported.

AG -v- Fogg (8th April, 1991) Jersey Unreported C.of.A.

AG -v- Pagett (1984) JJ 57.

R -v- Bent (1986) Cr. L.R. 415.

AG -v- Campbell (1st July, 1992) Jersey Unreported.