

COURT OF APPEAL

10

19th January, 1993

**Before: Sir Godfray Le Quesne, Q.C., (President)
J.M. Collins, Esq., Q.C.
Sir Charles Frossard, K.B.E.**

Application of **Richard Thomas Rawlinson** for leave to appeal against a sentence of three years' imprisonment passed on him by the Royal Court (Superior Number) on 23rd November, 1992, following a guilty plea before the Inferior Number on 16th October, 1992, to 1 count 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.

**Advocate A.D. Hoy for the Applicant.
S.C.K. Pallot, Esq., Crown Advocate.**

JUDGMENT

THE PRESIDENT: We first set out the facts, from which this application arises.

On Friday, 26th June, 1992, at approximately 1.15 p.m. Customs Officers on marine patrol off the north-east coast noticed a speedboat with two people on board travelling from the French coast in the direction of Gorey. The speedboat put into Anne Port and the occupants disembarked. The boat was placed on a trailer and hitched to a white Escort van. As the occupants were about to leave the slip they were challenged by Customs Officers and identified themselves as the applicant and another man.

The Officers searched the vehicle and discovered a rucksack containing a towel. In the towel was wrapped a packet covered in brown masking tape with an inner wrapping which was a Jersey Telecoms carrier bag. The bag contained a quantity of dark brown resinous material which was there and then positively tested for cannabis resin.

The applicant admitted that the rucksack was his and that the packet contained cannabis. Subsequent analysis of the resin confirmed that it was 1.737 kilograms of cannabis resin. Locally this would have a street value of approximately £9,000.

In an interview after caution that afternoon the applicant admitted that he had travelled via Paris to Amsterdam on Tuesday, 23rd June with the specific intention of buying cannabis; and

there negotiated the purchase, for £1,800, in cash of the consignment of drugs. He intended to sell the consignment in Jersey and had returned from Amsterdam via Carteret where he had hidden the cannabis under some bushes in a lane near to the Carteret Yacht Club.

He had returned without the cannabis to Jersey, on the Ferry to Gorey on 25th June, and had set off with the other man from Anne Port in the speedboat at approximately mid-day on 26th June in order to recover the drug. Arriving in Carteret the applicant and the other man had walked up the quay towards the town when the applicant pretended that he wanted to go to the toilet, but instead retrieved the cannabis from its hiding place. The other man was also interviewed under caution, and denied that he knew that the applicant had gone to collect the cannabis, or that he knew that the applicant had imported it into the Island. This was corroborated by the applicant himself.

In the course of his interview the applicant said that he had been unemployed for two weeks, having previously worked for a firm known as Halcyon Plant Hire. He had managed to save £1,800 and had used these savings to purchase the drugs in Amsterdam. It was his intention to sell the drugs in Jersey. He said that he had decided to import the drugs into the Island in order to make money a few days after losing his job.

In due course the applicant was brought before the Royal Court, charged with fraudulent evasion of the prohibition on importation of a drug of Class 'A'. To this charged he pleaded guilty and was sentenced to three years' imprisonment.

In presenting his application for leave to appeal, Mr. Hoy argued first that the sentence of three years' imprisonment was manifestly excessive. In view of the submissions which Mr. Hoy has made to us about a number of cases involving sentences for drug offences, we consider it will be useful if we make some observations about some of those cases and about the position as it is today when sentence has to be passed for offences of this kind.

In the case of A.G. -v- Matthews, Drewett (5th April, 1991) Jersey Unreported, the Royal Court said:

"We have had cited to us in the past and it is a case to which we pay great regard, the English case of Aramah (1982) 4 Cr. App. R. (S) 407. Where there is importation for commercial gain of anything up to 20 kilograms (and this was a matter of one and a half kilograms), there would normally follow a sentence of 18 months, unless there were exceptional circumstances".

We observe that from the context it is clear that the reference "**there would normally follow a sentence of 18 months**" means that there would normally follow a sentence of at least 18 months. We say this because the Court had just acknowledged the guidance to be obtained from the case of Aramah (1982) 4 Cr.App.R.(S.) 407; and what was said in that case by the English Court of Appeal was this:

**"Class B drugs particularly cannabis.
Importation of Cannabis.**

Importation of very small amounts for personal use can be dealt with as if it were simple possession. Otherwise importation of amounts up to about 20 kilograms of herbal cannabis, or the equivalent in cannabis resin or cannabis oil will, save in the most exceptional cases, attract sentences of between 18 months and 3 years; with the lowest ranges reserved for pleas of guilty in cases where there has been small profit to the offender".

It is necessary to read that case now, bearing in mind what was said by this Court in July last year in the case of Schollhammer; Reissing -v- A.G. (14th July, 1992) Jersey Unreported C.of.A. This Court observed in that judgment:

"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".

The Aramah Judgment was given 10 years' ago. In the light of the more recent developments to which this Court referred in the passage which we have just quoted we think that the reference in the Aramah Judgment to sentences between 18 months and 3 years must now be read as though it referred to sentences of between 18 months and 4 years. We see nothing inconsistent with this in any of the local cases.

We refer in particular to two upon which Mr. Hoy placed emphasis. Those are the cases of A.G. -v- Davies (10th September, 1992) Jersey Unreported; and the case of A.G. -v- Toone and McNally (24th September, 1992) Jersey Unreported. All that we say about those is that the case of Davies does not, it appears to us, lay down any new principle or guideline; it is simply an application of the existing guidelines in a particular case. As

to the second case, that of Toone and McNally, we see nothing in that at all inconsistent with what we have said we think must now be the view to be taken of the Aramah guideline.

In the case of Toone and McNally, the Court, dealing, it is true, with the importation of Class 'B' drugs of a rather greater value than the drugs concerned in this case, sentenced the defendant, whom they regarded as the principal offender, to 3 years' imprisonment, and another offender, whom they regarded as a tool, to 2 years' imprisonment.

When one comes to apply these principles to the present case, the matter stands like this: this was a case of a plea of guilty, but it was not, or at least was certainly not shown to the Court to be, a case involving only small profit. The Court was informed that the street value of the cannabis resin was £9,000. It was impossible, since no information on the subject was placed before the Court by the defendant, to estimate what his profit would in fact have been, but the street value being £9,000 and there being no material to show what the precise profit would have been, the Court was clearly justified in regarding it as a case in which the profit would have been more than small.

From the facts which we have outlined, it is plain that this was a deliberate and carefully planned commercial undertaking. The landing of the goods at Anne Port showed a clear intention to conceal their importation.

We have not overlooked the material which was put before the Court on behalf of the Defendant from members of his family and others. But we are obliged to observe that what has to be looked for when the Court is passing a sentence is mitigation of the particular offence which has been committed. Unhappily, we are unable to find here any mitigation of that kind.

It was obviously impossible on these facts for the case to be regarded as falling at the lower end of the sentencing bracket. The Court did not regard it as falling at the higher end. They took a figure nearer, it is true to the higher end than to the lower, but an intermediate figure in passing the sentence of 3 years, and in our judgment this is a sentence with which it is not possible for this Court to interfere.

It is now necessary to say something upon another point which may be of some importance and which was raised by Mr. Hoy. The Court ordered that the cannabis resin should be forfeited and also that the boat in which it had been brought from France should be forfeited. Mr. Hoy submits that the Court ought to have regarded this forfeiture and the loss of the boat which it involved for the Applicant as being part of their sentence and ought therefore to have taken it into account in assessing what was the proper length of the term of imprisonment to be imposed.

This, in our judgment, involves seeing whether the order of forfeiture was in the circumstances automatic and required by the legislation without any exercise of discretion by the Court, or whether it was something to be imposed or not at the Court's discretion. The statute concerned is the Customs and Excise (General Provisions) (Jersey) Law, 1972. Article 57 of that Law reads, and I omit words irrelevant for present purposes:

"Where anything has become liable to forfeiture under the Customs or Excise Laws (a) any ship or other thing whatsoever which has been used for the carriage of the thing so liable for forfeiture shall also be liable to forfeiture".

There is no doubt in this case that the cannabis resin itself was a thing which had become liable to forfeiture; and it therefore follows (and so much, we understand, is not disputed) that the boat which had been used for the carriage of the Cannabis had also become liable to forfeiture. That expression **liable to forfeiture** is perhaps somewhat ambiguous, and in order to see whether it confers any discretion upon the Court, it is necessary to look at other provisions of the Law.

The first schedule to the Law contains provisions enabling any person, who claims anything which has been seized as liable to forfeiture, to give notice of his claim if he alleges that the thing in fact is not liable to forfeiture.

The relevant Committee of the States is then required to take proceedings before the Court for condemnation of the thing and I quote from paragraph 6 of the First Schedule:

"If the Court finds that the thing was at the time of seizure liable to forfeiture, the Court shall condemn it as forfeited".

It is therefore clear that if a notice of claim is made and rejected by the Court, the Court has no discretion but is obliged to order the forfeiture. It would be wholly illogical if in a case in which no claim had been made the Court had some discretion to exercise". The provisions which I have read from the First Schedule, in our judgment, make it clear that when the Court has been satisfied that the boat, or whatever it is, is liable to forfeiture, it is obliged to order the forfeiture. It may become so satisfied as the result of rejecting a notice given under the First Schedule, or it may become so satisfied, as happened in this case, because in the course of a prosecution forfeiture is sought by the Crown and the Court then considers whether the thing in question is liable to forfeiture or not.

Either way, once the Court is so satisfied, it has no discretion but must order the forfeiture. This appears to us to be the correct interpretation of the Act and it is in fact no more than was decided by the Royal Court in the case of the Finance and Economics Committee -v- Bardsley (28th May, 1992) Jersey Unreported.

The position therefore is that in the circumstances of this case, the legislature has required that the order of forfeiture shall be made. The intention of that is plain. That order is to be made whatever the other consequences of the offence may be. We are unable, therefore, to accept the submission made by Mr. Hoy that the making of the order of forfeiture should have been taken into account by the Court in fixing the term of imprisonment. And we should also add that we think that authorities in England based upon the Powers of Criminal Courts Act, 1973 in which the power of the Court to make an order is clearly discretionary, have no application to the interpretation of the Law which we have been considering.

We therefore come to the conclusion that this application must be dismissed.

Authorities

- Schollhammer: Reissing -v- A.G. (14th July, 1992) Jersey Unreported C.of.A.
- A.G. -v- Thomas (15th November, 1991) Jersey Unreported.
- A.G. -v- Nicolas, Charles (30th May, 1991) Jersey Unreported.
- A.G. -v- Matthews, Drewett (5th April, 1991) Jersey Unreported.
- A.G. -v- Clohessy and Roberts (25th January, 1989) Jersey Unreported.
- A.G. -v- Douglas (31st January, 1992) Jersey Unreported.
- A.G. -v- Davies (10th September, 1992) Jersey Unreported.
- A.G. -v- Toone, McNally (24th September, 1992) Jersey Unreported.
- Finance & Economics Committee -v- Bardsley (28th May, 1992) Jersey Unreported.
- Thomas: "Principles of Sentencing" (2nd Ed'n): p.p. 335-6:
Forfeiture of property used for purposes of offence.
- Clarkin and Pockett -v- A.G. (3rd July, 1991) Jersey Unreported C.of.A.
- A.G. -v- Davidson (6th August, 1992) Jersey Unreported.
- Campbell -v- A.G. (28th September, 1992) Jersey Unreported C.of.A.
- Aramah (1982) 4 Cr.App.R.(S.) 407.
- Adewoye (1988) 10 Cr.App.R.(S.) 226.
- Harris (1989) 11 Cr.App.R.(S.) 169.
- Hedley (1989) 11 Cr.App.R.(S.) 298.
- Customs and Excise (General Provisions) (Jersey) Law, 1972:
Article 57.
- Powers of Criminal Courts Act 1973.