

JERSEY / JUDGMENT

1999/125 - AG v Wright [1999] UR 125 (12 July 1999) [1999] UR 125

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COURT OF APPEAL

12 July 1999

Before: Sir John Nutting Esq Q C (President)

P D Smith Esq Q C and

M G Clarke Esq Q C

Michael Derek WRIGHT

-v-

AG

Appeal against a sentence of 11 years imprisonment, passed on 22 February 1999,

[1999.033]

by the Superior Number of the Royal Court, to which the appellant was remanded by the Inferior Number on 8 January 1999, following a guilty plea to 1 count of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to Article 77(b) of the Customs and Excise (General Provisions)(Jersey) Law, 1972: count 1: (diamorphine-heroin).

Leave to appeal was granted by the Bailiff on 11 March 1999.

(A co-accused, Arthur James Schorah, who has not appealed, was sentenced on the same occasion to 7 years imprisonment following a guilty plea to the same count.)

Advocate JC Gollop for the Appellant

TJ le Cocq Esq Crown Advocate

JUDGMENT

THE PRESIDENT: This is an appeal against a sentence of 11 years' imprisonment passed on 22 February 1999, by the Superior Number of the Royal Court to which the appellant was remanded by the Inferior Court on 8 January 1999, following a plea of guilty to an allegation of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, namely heroin, contrary to Article 77(b) of the Customs and Excise (General Provisions) (Jersey) Law, 1972. Leave to appeal against that sentence was granted by the Bailiff on 11 March 1999. It is pertinent to observe that a co-accused, Arthur James Schorah, who has not appealed, was sentenced on the same occasion to 7 years' imprisonment following a guilty plea to a similar count.

The facts were these. The appellant and the man, Schorah, travelled together as foot passengers on a car ferry arriving at St. Helier Harbour from Poole on Wednesday, 2 September 1998. The booking for their trip had been made at the last minute and paid in cash.

On disembarking the appellant and Schorah were questioned by local customs officers and stated that they had come to Jersey for a few days' holiday. They further stated that they did not know anyone in Jersey and had no accommodation reserved. It was noted by the customs officers that Wright in particular appeared to be very nervous and was visibly trembling. The appellant's baggage and that of Schorah were searched and both consented to personal searches. Nothing was found as a result of those searches, though both the appellant and Schorah subsequently agreed to provide urine samples, which samples proved positive for both opiates and cannabis. As a result further enquiries were made by the customs officers.

The appellant agreed to be x-rayed. The x-ray examination disclosed the presence of a number of packages being carried internally by the appellant. He was asked by customs officers whether he was carrying controlled drugs to which question he initially answered "no". When challenged with the results of the x-ray examination the appellant then admitted that he was.

During a subsequent search Schorah was also asked if he had any controlled drugs inside him. Schorah immediately admitted that he had six packages concealed internally, stating that the packages contained controlled drugs although he did not know of what kind.

Over a period of hours both men passed a number of packages from their bodies, the contents of which were later analysed and proved to be heroin. The appellant was found to have been concealing four bags containing a total of 105 grams of heroin representing at least 1,052 "score bags" with a street value of approximately £31,560. Schorah was found to have been concealing six packets containing a total of 168 grams of heroin with a street value of approximately £50,511 representing at least 1,683 "score bags". The purity of the appellant's heroin was some 39%. The purity of the heroin found in the packets which Schorah was carrying was some 42%.

The appellant admitted in interview to the customs officers that he knew that one of the bags contained heroin and had presumed that the others did as well. The smallest bag, containing some 20 grams of heroin was claimed by the appellant to be for his personal use. He also admitted in interview that his purpose in coming to Jersey was to import heroin. He said that he

had been approached a week or two previously by his own drug suppliers to whom he was substantially in debt. He said he was too afraid to name them. He said that he had been paid £2,000 for himself and would have had his drug debt of £3,500 cancelled in addition. The appellant further stated that he had wrapped and concealed the drugs at his home the night before his journey to Jersey and had persuaded Schorah, who was a very old friend of his, to help him carry some of the drugs. He had given the drugs to Schorah, he said, the night before their journey. The plan had been when they arrived in Jersey that Schorah would hand the drugs back to Wright at the earliest opportunity who would then make his way to a pre-arranged location and there give the drugs to an unknown third party.

Schorah was also interviewed. He stated that the trip to Jersey was made to clear a debt and sought to assist his co-defendant (the appellant) by involving himself to a far greater extent than in truth he was.

Later in Court the appellant accepted full responsibility for the importation. He acknowledged through his advocate that anything that Schorah had said to the customs officers to his own detriment had been said to protect his friend (the appellant) and that Schorah had become involved in the importation entirely because of an approach by the appellant.

The Crown at the trial alleged that they were jointly in possession of the total amount of heroin but emphasised a significant difference in the culpability of the two men.

At the time of his arrest, the appellant was in possession of £421 in cash. Investigations took place into the circumstances of his receipt of that money and suffice it to say, upon an application by the Attorney General, the Royal Court ordered its confiscation, having made the relevant assumptions under Article 4(3)(a)(ii) of the Drug Trafficking Offences (Jersey) Law, 1988.

As to the previous records of the two men, they are starkly different. The appellant has served lengthy prison sentences for drug offences. He was sent to prison for two years by the District Court of Stockholm for importing a kilo of cannabis into Sweden in 1983. Three years later he received a six year sentence for importing amphetamine sulphate into Sweden. In 1991 he received a seven year sentence from the Appeal Court of Belgium for possessing 52 kilos of cannabis which he was intending to deliver to Denmark.

Schorah, by contrast, has no previous convictions for drug offences and had never, in fact, been sentenced to imprisonment.

The Social Enquiry Reports prepared for the Royal Court also revealed significant differences between the two men. The appellant related to the Probation Officer who prepared his report that Schorah had lived with his family from an early age and that in 1995 he, the appellant, had become an alcoholic often drinking up to 30 bottles of strong lager a day, and that during the period of his alcoholism he discovered that heroin relaxed him and made him forget his problems and it was as a result that he became a heroin addict.

In relation to the current offence the appellant told the Probation Officer that the drug dealer to whom he owed money at the relevant time was, as he put it,

"getting a bit heavy"

and he remembered feeling distinctly threatened by him. The appellant confirmed that the drug dealer told him that if he took heroin to Jersey it would clear his debt and that he had accepted that offer as an easy way out of his difficulties.

Also during the interview with the Probation Officer the appellant took complete responsibility for implicating his co-defendant. He explained that he would not himself have been able to import all the drugs that both men had carried and therefore decided to call upon his friend to assist him. The appellant expressed his shame and disgust at his behaviour towards Mr. Schorah who, he presumed, would find it difficult to refuse him due to a combination of the latter's naiveté and willingness to assist the appellant to whom he was especially close due to their lengthy association.

By the same token Schorah's Social Enquiry Report revealed the extent of the closeness of that association and indeed established that from an early period in their lives, as friends, the appellant would be their spokesman due to Mr. Schorah's stammer, and that Mr Schorah would undertake some of the appellant's fights in return. In the Probation Officer's view despite Schorah's attempts to present himself as a tough and independent person his nervousness and difficulty in articulation during interview caused the Probation Officer to question his level of assertiveness. In relation to the current offence it was quite clear to the officer that Schorah had acted very much at the instigation of the appellant.

Schorah told the Probation Officer he knew that the packages were illegal and that they probably contained drugs though he maintained that he did not know which drug. That, we pause only to say in parenthesis, would not have availed him very much, if anything, by way of mitigation in accordance with the principles set out in *Campbell, Molloy and MacKenzie -v- AG*

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CofA. His attitude was neatly encapsulated by the Probation Officer using Schorah's own words. Schorah told the Probation Officer

"he

(that is the appellant)

was in trouble ... that's all that mattered".

The Probation Officer's conclusion was that Schorah presented as a gullible man who appeared to have chosen to help a friend with little regard to the consequences for himself and though he accepted that his loyalty to the appellant would inevitably result in a prison sentence Schorah could not contemplate refusing to help a close friend who was facing potentially serious consequences from a drug dealer.

The Probation Officer ended his report with these words

"(Schorah] appears to have expected only a moderate amount of money for his part in the enterprise, if any at all. There is no doubt that Mr. Schorah was aware of the illegality of his actions, although the Court may feel that his difficulty in asserting himself combined with his gullibility and close relationship with Mr. Wright, placed him in a position where refusal to co-operate would be extremely difficult for him."

It is true to say from the recital of the facts that neither the appellant nor Schorah had a right to expect that their pleas of guilty would entitle them to any great weight by way of mitigation. The drugs were concealed within their bodies and in the circumstances there was no real prospect of a successful not guilty plea in either case.

The appellant, in his grounds of appeal, acknowledges that the starting point of 13 years for which the Attorney General had moved in the Royal Court, was an entirely correct starting point for his sentence in accordance with the principles of Campbell, Molloy and MacKenzie -v- AG to which we have already made reference. What is complained about is that the reduction of 6 years made in relation to the co-defendant, Schorah, was wholly excessive and resulted in an unduly lenient sentence and therefore that there was a gross degree of disparity between the two sentences which has resulted in a sense of injustice and a sense of grievance in the appellant. We were referred by Advocate Gollop for the appellant to the case of R -v- Frankson [1996] 2 Cr. App. R.(S) 366. I need not recite the facts of that case to any great extent. It is apparent from reading the facts that there was effectively no great distinction to be made in terms of culpability between the two defendants in that case and it is clear from the summary of the judgment of Auld, LJ, that the trial judge had clearly given undue weight to the fact that the co-defendant was a woman who had three children and was expecting a fourth child. Auld LJ concluded that

"the part played by each of these persons was indistinguishable"

In these circumstances he held that the disparity in sentence, which varied between seven years' imprisonment for the male defendant and three and a half years' imprisonment for the female defendant, meant that

"something has gone wrong with this sentencing process"

We do not feel that we are much assisted by the comparison between the circumstances of that case and the circumstances of this. In the instant case, the part played by each man in the overall scheme of the offences was markedly different.

Mr. Gollop also referred us to two cases in this jurisdiction: the case of AG -v- Chadwick (30 October, 1995) Jersey Unreported and the case of AG -v- Jones & Rayner (6 June, 1996) Jersey Unreported in which reduced periods of imprisonment were imposed in circumstances in which, in each case, there was mitigation of a wholly different quality to the instant case. In both these cases the two defendants had assisted the customs officers to the extent of giving significant details about the background circumstances in which they had been carrying the drugs, including details of the supplier. Advocate. Gollop says that that sort of mitigation was not

available to Schorah and that in those circumstances it is clear the Royal Court placed undue weight on the personal circumstances of Schorah and therefore, says Mr. Gollop, the sentence passed on Schorah is unduly lenient.

We are not here to decide what might have been the appropriate sentence for Schorah had we been sitting as Judges at first instance. It is not for us to say whether we might or might not have allowed the same reduction as the Bailiff. The test for us to apply in deciding whether or not we ought now to reduce the sentence passed on the appellant does not depend on what sentence we might have passed on Schorah. I shall return later to the nature of that test.

The Crown in response to what is urged on behalf of the appellant suggests that the sentence imposed by the Royal Court on the appellant was in fact correct in substance and that the sentence passed on Schorah was not such as to give rise to any sense of justifiable grievance.

The Crown, in distinguishing between the appellant and Schorah, points to the following matters:

First, that the appellant was the instigator of the importation and that it was he who was the point of contact with the source of supply. It was he who had agreed to import the heroin for the supplier whose name he refused to give to the customs officers and it was he who wrapped and concealed the drugs at his home in preparation for the journey.

Second, says Advocate Le Cocq for the Crown, the appellant, unlike Schorah, was to benefit from the importation to the extent of about £5,500 in the way that we have already identified. By contrast, says Mr. Le Cocq, Schorah had no expectation of any gain from his illegal activities.

Third, the appellant persuaded Schorah to assist him in importing the heroin because the quantity was too great for one man to carry alone and Schorah agreed, purely out of a sense of loyalty to and friendship with the appellant in order to help him out with his debts. Schorah was, to use the phrase Mr. Le Cocq urged on us "a mere courier" as distinct from the appellant who was an instigator and organiser and far more deeply involved in the whole affair.

Fourthly, says Mr. Le Cocq, the relationship between Schorah and the appellant was extremely close and had existed since childhood. Mr. Le Cocq points to the vulnerable position of Mr Schorah as indicated by all the available evidence, vulnerable to persuasion by the appellant to engage in criminal activity by virtue of that close friendship.

Fifthly, says Mr. Le Cocq, there was no suggestion that Schorah had any involvement with heroin prior to this offence and that he was distant from the source of supply. The appellant on the other hand was a heroin addict and was close to the source of supply.

Lastly, says Mr. Le Cocq, the appellant has significant convictions for drug offences; the last one in 1997. Schorah by contrast has a criminal record with no convictions relating to drugs at all.

Mr. Le Cocq encapsulates his submissions on this aspect of the case by saying that it is double-sided. Mr. Schorah would have had great difficulty, on all the evidence, in refusing to help a friend. The other side of that same coin was demonstrated by the ease with which the appellant was able to persuade Schorah to help. This was a case, says Mr. Le Cocq, of abuse of friendship by the appellant, utilising friendship for criminal purposes in relation to a man who was in no real position to say "nay".

The general approach which this Court must adopt in relation to an offence of this kind is to be found in the judgment of the Bailiff in the case of Campbell, Molloy and MacKenzie -v- AG

(1995) JLR 136

CofA to which I have already made reference. At p.144 of the judgment the Bailiff says this:

"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, CJ in R. v. Aramah referred in the context of Class A to the "degradation and suffering and not infrequently the death which the drug brings to the addict" (4 Cr. App. R.(S) at 408-409). Sadly the lives which are blighted by the abuse of drugs are usually young lives.

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 particularly heinous and antisocial nature of the crime of drug trafficking."

In his judgment in that case, the Bailiff goes on to indicate the starting point in cases of this kind, i.e. 13 years. He also describes the extent to which, if at all, people who are caught as he describes it

"in flagrante delicto"

in relation to the possession of drugs should receive any reduction in sentence and he also details the greater effect that the amount imported has in this jurisdiction compared to England and lastly he describes the street value and weight of the drugs as relevant factors for the Court to take into account. These are all matters which influenced the sentence passed on the appellant.

The

gravamen

of this appeal may be simply stated. It is conceded that the appellant's sentence, standing alone, is a proper sentence for the mischief encompassed by what he did. But, says Advocate Gollop, it does not stand alone. The co-defendant, Schorah, received what amounts to an unduly lenient sentence and that therefore- when all the facts are objectively judged - the appellant is entitled to a further reduction of two years from the sentence of eleven years that he received, to bring the sentences into line one with another.

It may, it seems to us, appear somewhat surprising that such a submission should be advanced on behalf of an appellant who has acknowledged repeatedly since his arrest that his co-defendant, an old friend, became involved entirely because of misplaced loyalty. One might suppose that such an appellant would be pleased that his co-defendant had been treated leniently by the Court, even unduly so. If we found that the test in this jurisdiction was a subjective one - viz. does the appellant have a justified sense of grievance - it might well be appropriate for us to determine this appeal on that basis and to dismiss it by concluding that the appellant was effectively attempting to utilise the lever of the sentence passed on Schorah (which he supported in the lower court) unjustifiably - one might almost say cynically - now to manipulate the Court of Appeal into reducing his own sentence. We are satisfied, however, that the test in this jurisdiction is not a subjective one. We have considered the case of *R-v- Fawcett* (1983) 5 Cr. App. R.(S) 158 where Lawton LJ had this to say about circumstances in which an appellant has received a sentence that is not excessive for his offence but a co-defendant, whose culpability is not significantly different, has received a less severe sentence which is unduly lenient. Lawton LJ said this:

"In our judgment, the approach is that which is set out in the decision of this Court in *Pitson* (1972) 56 Cr. App. R. 391, namely, would right-thinking members of the public, with full knowledge of all the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice? When the question is posed in that form, we are of the opinion that the public would say that something had gone wrong here, because Hardwick and Chatterton should clearly have received the same sentences."

In this jurisdiction it is quite clear too that the test is an objective one and is the same as that defined by Lawton LJ in *Fawcett*. We have been referred by Mr. Le Cocq to the case of *Rayner -v- AG* (25

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September, 1996) *Jersey Unreported CofA*. where judgment was given by Calcutt JA who held:

"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- AG* (8

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July, 1996) *Jersey Unreported CofA*; *Lynch -v- AG* (24

th

July, 1991) Jersey Unreported CofA; (1991) JLR N.15 CofA, and Hollman, Cummins -v- AG (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."

Accordingly, we have asked ourselves whether this is a case, by parity of reasoning with Fawcett, where it may be said that a member of the public with full knowledge of all the relevant facts and circumstances considers that something has gone wrong with the administration of justice. We do not believe that any member of the public applying that test would so conclude. We believe that the sentence passed on the appellant was a wholly appropriate sentence. If the sentence passed on Schorah was a lenient one, there were grounds for the Royal Court's taking such a course in his case. We cannot think that any member of the public would feel that Schorah's sentence could in any way be seriously questioned. In those circumstances we conclude that the appellant is not entitled to any further reduction in his sentence and we dismiss this appeal.

Authorities.

Campbell, Molloy and MacKenzie-v-A. G.

(1995) JLR 136

CofA.

R-v-Frankson (1996) 2 Cr. App. R. (S) 366.

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June, 1996) Jersey Unreported.

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