

JERSEY / JUDGMENT

Bevan v AG [2003] JCA 014 (17 January 2003)

[2003] JCA 014

COURT

COURT OF APPEAL

BEFORE

R. C. Southwell, Esq., Q. C., President;
Sir de Vic Carey, Bailiff of Guernsey; and
P. S. Hodge, Esq., Q. C.
Neil John BEVAN

-v-

The Attorney General

Appeal against a sentence of 5½ years'
imprisonment passed on 10th

October, 2002, by the Superior Number of the Royal Court, to which the Appellant was
remanded by the Inferior Number on 28
th

June, 2002, following a guilty plea to

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Before:

R. C. Southwell, Esq., Q. C., President;
Sir de Vic Carey, Bailiff of Guernsey; and
P. S. Hodge, Esq., Q. C.
Neil John BEVAN

-v-

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Appeal against a sentence of 5½ years'
imprisonment passed on 10th

October, 2002, by the Superior Number of the Royal Court, to which the Appellant
was

remanded by the Inferior Number on 28
th

June, 2002, following a guilty plea to

guilty to: 2 counts of:
possession of a controlled with intent
to supply, contrary to Article 6(2) of the Misuse of Drugs (Jersey)

Law, 1961:

count 5: MDMA.
Count 6: cannabis.
[On 28th June, 2002, the Crown accepted the
appellant's not guilty plea to count 7 of the indictment; the remaining counts
relate to a co-accused, who has not appealed.]
Leave to appeal was granted by the
Deputy Bailiff on 18
th
November, 2002.
Advocate Mrs. S. A. Pearmain for the
Appellant;
Mrs. S. Sharpe, Crown Advocate.

JUDGMENT

Carey JA:

Introduction

1. This is the judgment of the Court. The Appellant has been granted leave by the Deputy Bailiff to appeal against the sentence imposed upon him on 10th October 2002 when he appeared before the Superior Number of the Royal Court for sentencing. He was jointly indicted with another defendant David Alan Perry. 2. As the Deputy Bailiff has helpfully explained that his sole reason in giving leave to appeal was the possibility that there was an unfair disparity in the sentences imposed upon Perry and this Appellant we need to record what we understand were the facts of the case against Perry as well as those against the Appellant. 3. The offences to which Perry pleaded guilty and the sentences imposed were as follows: Count 3 Supplying Class A (453 MDMA capsules) 2 years Count 4 Supplying Class B (approx 2.75 kilos of cannabis resin) 2 years concurrent Count 8 Possession with intent to supply Class A (26 MDMA capsules) 2 years concurrent Count 9 Possession with intent to supply Class B (approx 250 grams cannabis resin) 6 months concurrent The indictment contained a further 2 counts to which the Appellant pleaded guilty: Count 5 Possession of Class A with intent to supply (453 MDMA tablets) 5½ years Count 6 Possession with intent to supply Class B (2.75 kilos of cannabis resin) 3 years concurrent Circumstances of the Offence 4. On the afternoon of 14 th May 2002 Perry left his address at David Place and walked to Dorset Street where he met the Appellant who apparently was waiting for him near the Dorset Tavern. Perry handed to the Appellant the white plastic carrier bag, which was in his possession. Both men stood in a doorway for some time looking up and down the road. The Appellant moved away and started walking down Great Union Road carrying the plastic bag, which had been handed to him by Perry. He was then approached by a police officer, who had been watching the two

men. There was a struggle but the Appellant was restrained and handcuffed. The bag was retrieved and the drugs which form the subject of counts 3 and 4 of the indictment, so far as Perry is concerned, and counts 5 and 6, so far as the Appellant is concerned, were retrieved therefrom. The police arrested Perry who initially ran away. A warrant to search Perry's home, which had already been obtained, was then executed and further drugs were found therein which formed the subject matter of counts 8 and 9. 5. To return to the arrest of the Appellant, his immediate response to being arrested on suspicion of being in possession of controlled drugs with intent to supply was to say that it was fishing tackle in the bag. Perry's account of this transaction so far as it was presented to the court was that the Appellant had lent him £400 to go home to attend his grandmother's funeral. He did not know the Appellant's surname but about 2 weeks earlier had agreed to store some drugs for him in return for which the debt would be cleared. So far as the drugs found at Perry's house were concerned, he said that one block of cannabis resin was left behind accidentally when he collected up the consignment to take to the Appellant. The 26 MDMA tablets found in a cup in his kitchen were the property of the Appellant. Perry said that the Appellant had been round to his house on a number of occasions during the time he was holding the drugs for him. We remind ourselves that most of the above comes from Perry's mouth and is in no way confirmed from other evidence. 6. We then look to what the Appellant said about this matter. He said he was staying in Jersey with a friend, he had no money, he had abused cannabis for the last 12 - 14 years, he seemed to have spending money, to socialise, and he had had a job as a bricklayer for £100 a day. On the day of his arrest he had got up, had a bath, played a game of golf and then in his words "he got nicked". He then gave the explanation of meeting Perry in a pub and arranging to meet him to receive some fishing tackle. Later he admitted that he knew there was weed in the white bag but not tablets. His intention was to give the cannabis to the person it belonged to. The Appellant denied knowing about the MDMA and claimed to have no knowledge of the value of cannabis although he did make certain admissions later as to its weight and value. The Appellant admitted having lent money to Perry. 7. Conclusions were offered by the Crown Advocate and a starting point of 8 years was taken in the case of Bevan, and 7½ years for Perry in accordance with the guidelines for 1- 500 units of Class A drugs in tablet form. A similarly reduced starting point to take account of the differing roles was suggested in the case of the Class B drugs. The total imprisonment recommended for the Appellant was 5½ years and for Perry 5 years. The Defence at Trial 8. Advocate Berry, who represented the Appellant at trial took the line that the Appellant was, like Perry, a minder for their owner, an unknown dealer whom he was not able to identify and who had asked him to keep the drugs for three weeks in return for a payment of £500. As he, the Appellant was moving he asked Perry to mind them in return for £400. 9. His counsel re-iterated the Appellant's denial of knowledge of MDMA in the consignment which was allegedly being looked after for the unknown third party. Reference was made to a social enquiry report, which revealed that the Appellant was not prepared to discuss his offence with the Probation Officer. However it was clear from that report that he had problems with drug abuse over a number of years, and that he had had an unhappy start in life in Manchester. He claimed to have come to Jersey in August

1999 and his criminal record shows that he has committed a number of public order offences since that time. However there is only one simple possession of cannabis offence recorded. His criminal misbehaviour in the past seems to have been caused more by drink than by drugs. The Co-accused's Mitigation 10. Perry had the benefit of the services of a skilful and conscientious defence advocate who appears to have said all that could be said on his behalf. This involved distancing Perry as far as he could be distanced from the serious situation that somebody carrying drugs of this amount around the streets of St Helier normally finds himself in. Very fairly his advocate quoted from Mr Whelan's work on the position of a minder which this court had occasion to consider in the case of Welsh

[2002] JLR N.17. Where Perry could perhaps be given some credit was in the fact that the person for whom he said he was minding the drugs was indeed standing alongside him in the dock.. It is far more difficult for a court to give credit to a minder when the minder is unable to identify the person for whom he was minding the goods. In such situations there will be occasions where the position of the minder is, as Mr Whelan says, "one which justifies the conclusion that he is more seriously involved in the drug trade than the courier." 11. Further mitigation personal to Mr Perry was made available to the court. We do not feel it necessary to review that in detail except to say that we accept that in sentencing co-accused the sentencing court is entitled to differentiate between offenders not only on the basis of their separate involvements in the offence but also on their personal circumstances, record and general character. It is interesting to see that Perry's advocate ended up in suggesting a 3 year term in total for his client. The Royal Court's judgment 12. The Royal Court was even more generous to Perry than his advocate suggested the Court should be. As we have said the total imprisonment imposed on him was 2 years. He was assessed as being gullible and having been drawn into this matter by some evil manipulators. This was apparently gleaned from information furnished to the Probation Officer concerning the circumstances of the offence and handing the drugs back which was not actually touched on by Perry's counsel. The Appellant's submissions 13. Mrs Pearmain appeared before us for the Appellant. She argued that the sentences were manifestly excessive and quoted in support a recent Royal Court decision in AG v Layton (4 th July 2002) Jersey Unreported; [2002/126]. The main thrust of her argument was disparity in the light of the leniency shown to Perry. In this regard she quoted from some Jersey authorities, but perhaps more helpfully from R. v Rugg 1997 2 Cr App R (S) 350 , which confirms the principle that where an appellant has a justifiable grievance a sentence which was not excessive could properly be reduced if the appellant's co defendant had received a less severe sentence, which was unduly lenient . Decision 14. We reject the argument that this sentence was manifestly excessive. The starting point was within the bands delineated in Bonnar and Noon

(2001) JLR 626 CofA and Campbell and ors

- (1995) JLR 136 . The discount was appropriate where the Appellant was caught red handed and where his personal circumstances were such as those of this Appellant. We repeat what this Court has said time and again that references to other cases decided at first instance on their own facts are seldom of any assistance. 15. There will be cases where the way in which a co-accused is dealt with will have little relevance to the disposal of the other offender. This will be the case where the principal participant in the offence is being sentenced alongside somebody who is merely on the periphery and is involved to a far lesser extent. The Court must interfere if the disparity leads to a justified sense of grievance. We adopt the words of Judge Colston Q. C. in Rugg
- (1977) 2 Cr. App. R (s) 350 at page 352: "There was cited to us, properly, the well-known passage from the judgment of my Lord, Lawton LJ, in the case of Fawcett
- (1983) 5 Cr. App. R(S) 158, where my Lord dealt with a case which has similarities to this, in the sense that two separate judges on two separate occasions were involved. It is sufficient to read a short passage from the headnote: "In the present case, the sentences imposed on the three appellants were right in principle, and the sentences imposed on H were inadequate. The approach of the Court was to ask whether right-thinking members of the public, with full knowledge of all the relevant facts and circumstances, would consider that something had gone wrong with the administration of justice." That is the test which we need to apply. The second principle which can be drawn from the cases can be put in this way: where an appellant has received a sentence which 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, the Court of Appeal may reduce the appellant's sentence if the disparity is so substantial that the appellant has a justified sense of grievance." It seems to us that there will inevitably be a justified sense of grievance if the Court draws certain conclusions concerning the levels of criminality of two co-accused which cannot be properly inferred from the circumstances. 16. The picture presented by the prosecution could only be of a man who clearly was already under surveillance handing a bagful of drugs in the street to another man. The rest of the facts of the case can only be inferred from what the two accused told the police and later to the Court through their counsel. Crown Advocate Sharpe, who in our view fairly analysed the levels of culpability of the two offenders was prepared to give some credit to the co-accused on the basis that he was returning drugs to the next person in the line. The Court however in our view fell into serious error in reducing Perry's sentences down to a total of 2 years. We can see no excuse for departing from the guidelines of this Court and the conclusions of the Crown in this case to this extent. As Mrs Sharpe indicated, were it possible to appeal against an unduly lenient sentence this sentence would be the one which the Crown would appeal. 17. As part of its explanation of the disparate approach it was adopting the Royal Court has clearly disclosed an unjustifiably serious view of the conduct of the Appellant. The following passage indicates the flavour of the Court's view of the Appellant: "We have no doubt that the starting point for Bevan is 8 years. Bevan is the manipulator, he has sufficient funds, even though he is not working, to lend money to an acquaintance who

does not even know his surname; he gives drugs to this acquaintance, which must have cost a considerable sum to acquire - some £15,000 worth." The Appellant maintained that he too was a minder. The fact that he had been in funds to make a modest loan to Perry (he had received some compensation from a car accident) did not justify the conclusion that necessarily he had financed the purchase of the drugs or manipulated Perry. As we have said the Appellant cannot complain that the starting point and the finishing point concluded by the Crown Advocate and supported by the court were outside the guidelines laid down for this level of offence. That is not however the point. The point is that by imposing such a lighter sentence on the co-accused in these particular circumstances the Appellant clearly has grounds for a realistic sense of grievance. 18. Solely on the point of disparity and the inexplicable mercy afforded to the co accused we allow the appeal and will substitute lower sentences. Some differential between the two accused was justifiable and in the circumstances we reduce the sentence on Count 5 to one of 4 years and that on Count 6 to one of two years three months concurrent: *Authorities Campbell and ors v. AG*

(1995) JLR 136 . *Bonnar and Noon v. AG*

(2001) JLR 626 CofA. *AG*

v. Layton (4 th July 2002) Jersey Unreported; [2002/126] *Rimmer etc*

v. *AG*

[2001] JLR 373 . *Jenkins*

v. *AG* (23rd January 2001) Jersey Unreported; [2001/22] *McClements*

v. *AG* (18 th July 2002) Jersey Unreported; [2002/132] *Rugg* (1977) 2 Cr. App E(s) 350. *Welsh v. AG*
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