

JERSEY / JUDGMENT

Finnigan v AG [2004] JRC 077 (04 May 2004)

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JUDGMENT

THE BAILIFF: 1. Danielle Finnigan seeks leave to appeal against a sentence of 18 months' Youth Detention imposed by the Inferior Number on 23 rd January, 2004, for offences of being concerned in the importation of heroin and possession of cannabis resin to which she had pleaded guilty. The heroin weighed about 7 grams and had a retail street value, in Jersey according to a police expert, of between £2,000 and £3,000. 2. The applicant admitted that she had procured that the heroin be sent through the post to her at her parents' address. The officers who executed the search warrant at the time of her arrest found another envelope similar to that which had contained the heroin and she admitted that she had carried out a dummy run a little while before. The cannabis was of a small quantity. 3. The Prosecution conceded that both the cannabis and the heroin were for the applicant's personal use, and intent to supply either drug was not alleged, although it is clear that the amount of heroin was, as the Deputy Bailiff put it, not insubstantial. 4. Counsel for the applicant made a number of submissions including a submission that the approach to sentencing had been wrong in principle and that the sentence of 18 months' Youth Detention was manifestly excessive. She contended that the Inferior Number had been wrong to take a starting point of 7 years' Youth Detention. This contention led to a discussion as to which of two conflicting judgments of the Court of Appeal should be followed in relation to the fixing of a starting point for the importation of drugs where the drugs are for the importer's personal use and no intent to supply is alleged. 5. There are four relevant judgments of the Court of Appeal. The first is the case of *Campbell, Malloy and Mackenzie -v- Attorney General*

[1995] JLR 136 , where a five man Court laid down guidelines for the sentencing of drug traffickers. The Court stated: "...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 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 trafficking of Class A drugs on a commercial basis". 6. The second case is *Gregory -v- Attorney General* ,

- [1997] JLR 1 , where the Court of Appeal laid down that the Campbell guidelines did not apply to cases where there was no commercial element, i.e. where it was accepted that the drugs imported were for personal use. The Court in that case applied a starting point of 6 years' imprisonment. The Court stated: "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
- v. Att. Gen. are not applicable. That case deals only with cases of trafficking on a commercial basis". 7. The Court of Appeal in Gregory explained its decision in this way. "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". 8. The third case is Rimmer, Lusk and Bade - v- Attorney General , [2001] JLR 136, where the Court of Appeal set bands of starting points for the importation of drugs by reference to the weight of powder involved. The lowest band embraced 1 to 20 grams of drugs in powder form and set a starting point of 7 to 9 years' imprisonment. The Court did not address itself to the question of importation for personal use but endorsed the Campbell guidelines by stating: "The Attorney General asked this Court to assist the Crown and the Royal Court by expanding the Campbell guidelines so as to give more detailed starting points by reference only to the weight of the drugs carried and sold in powder form such as heroin and cocaine". 9. Having set the guideline bands the Court then continued: "There may be exceptional cases in which on a particular count the starting point may be above or below the band otherwise appropriate. However, we reiterate what this court said in Campbell that it will be seldom that the starting point for any amount of drugs will be below seven years". 10. The fourth case is Conquer -v- Attorney General (4 April

2002) Jersey Unreported

- [2002] JLR Note 17 , where the appellant had imported drugs in powder form for her own use. The case of Gregory was drawn to the attention of the Court of Appeal but the Court nevertheless stated: "After anxious consideration we have concluded that the bands in Rimmer should still apply as starting points in the case of all importation offences". 11. These conflicting judgments of the Court of Appeal have been considered twice by the Inferior Number. In Attorney General -v- Frazer
- (2003) JRC 215 , the Court stated: "Turning to the importation offence, we must first consider the starting point. Here we face a difficulty. In the case of Gregory -v- A. G.

- [1997] JLR 1 , the Court of Appeal said that the Campbell guidelines did not apply to cases of importation where drugs were imported for the personal use of the importer. But in the recent case of *Conquer -v- A. G.* (4th April 2002) Jersey Unreported; [2002/73], the Court of Appeal said that the bands in *Rimmer & Ors*
- [2001] JLR 373 , which is the successor guideline case to *Campbell*
- [1995] JLR 136 , should still apply as the starting point in all cases of importation because to do otherwise might lead to artificial and subjective tests being introduced into situations where no such complications need arise. Faced with this apparent difference of view we believe we should follow *Conquer*. First it is the more recent decision; secondly we agree that *Gregory* can lead to difficulties because the facts are usually solely within the knowledge of the defendant and can only realistically be gainsaid by reference to the amount of the drug. However we understand *Conquer* to be saying that the fact that the drugs are for the personal use of the importer may be a mitigating factor, but clearly the force of that will depend upon the amount. If the amount is small it may well be a powerful mitigating factor. As the amounts get larger it will reduce and eventually disappear altogether". 12. And in the Court below *Conquer* was followed essentially for the same reasons. 13. We are sitting as a Court of Appeal and because we regard this as a matter of sentencing policy rather than of Law we consider it open to us to decide which of these conflicting approaches is to be preferred. 14. The essential difficulty is whether the intent to supply, or the commercial purpose of the importer, or indeed the absence of a commercial purpose, is a characteristic of the offence or a characteristic of the offender. If it is a characteristic of the offence it should be taken into consideration in setting the starting point. If it is a characteristic of the offender it is to be treated as part of the mitigation available to him or her. In *Gregory* it was treated as the former and in *Conquer* the latter. 15. It is possible to argue the matter both ways. However, we prefer the *Gregory* approach for two main reasons. First, if one asks oneself the question "Is the offence of bringing into Jersey enough heroin for a single injection as serious as importing 5 grams of heroin for onward sale?" The answer is clearly "no". But both offences are offences of importing a Class A drug and the logic of *Conquer* is that one must apply the same starting point of 7 years' imprisonment in both cases. In relation to the offence of possession of a dangerous drug the statute provides that the intent to supply is a characteristic of the offence and creates two separate offences. Importation is, of course, a single offence, whether or not there is an intent subsequently to supply. However, it seems to us sensible as a matter of sentencing policy to apply the same distinction. It is true, as the Court of Appeal reiterated in *Mortimore -v- Attorney General* ,
- [2003] JCA 203 , that the real evidence that is going to weigh with the Court is the quantity of drugs and not what the importer says about his intentions which might anyway change if the circumstances of the importer change. 16. The second reason relates to transparency. Defence Counsel drew our attention to the sense of grievance which the defendant has apparently suffered in this case as a result of the inability of Defence Counsel to explain

how the sentence of 18 months' Youth Detention was arrived at, having regard to the high starting point of 7 years. That lack of transparency would be removed if the Court were to take a starting point which reflected the true gravity of the offence and the absence of any commercial motive. 17. We therefore state that if the defendant imports a relatively small quantity of a Class A drug for personal use, that importation should not be taken as being of equal gravity for sentencing purposes in settling the starting point as the importation of the same quantity for commercial purposes. Where there is a dispute as to whether there was an intent to supply that question must be resolved as laid down in Gregory by a Newton trial. 18. Counsel for the applicant went on to submit that the Inferior Number had misapplied the test set out in Article 4 of the Criminal Justice (Young Offenders) (Jersey) Law, 1994, and wrongly concluded that a custodial sentence should be imposed. What the Court stated was: "The court is satisfied that you have shown a failure to respond to previous non-custodial sentences and the offending is so serious that a non-custodial sentence cannot be justified, therefore we have decided we must proceed by way of a custodial sentence". 19. That was a shorthand version of two separate limbs of the test to be applied which is set out in Article 4 (2) as follows: "A court shall not pass a sentence of youth detention unless it considers that no other method of dealing with him is appropriate because it appears to the court that - (a) he has a history of failure to respond to non-custodial penalties and is unable or unwilling to respond to them; or (b) only a custodial sentence would be adequate to protect the public from serious harm from him; or (c) the offence or the totality of the offending is so serious that a non-custodial sentence cannot be justified; and the court shall state in open court its reasons for imposing a sentence of youth detention and shall explain to the person that on his release he may be subject to a period of supervision in accordance with Article 10". 20. Counsel pointed out that the Inferior Number did not in fact explain to the applicant that she would be liable on release to a period of supervision in accordance with Article 10. 21. As to that last point we agree that such an explanation should have been given. However, we consider that the statutory provision is directory and not mandatory and that the failure of the Inferior Number to give this explanation is not fatal to the sentence imposed. We are also satisfied that the members of the Court below were, in fact, fully aware of the proper test to be applied notwithstanding the shorthand that was employed in giving

judgment.

The test itself had been read out in full to the members of the Court by the Crown Advocate during the course of his conclusions. 22. The Court has given anxious consideration to the submissions of Counsel for the applicant that a custodial sentence should not have been imposed and that the balance tipped in favour of a non-custodial sentence. In our judgment, however, on balance the Inferior Number was entitled to conclude, having regard to the criminal record of the applicant and all the circumstances of the case, that no other method of dealing with her was appropriate other than the imposition of a custodial sentence. We think that the Inferior Number was entitled to come to that conclusion both on the basis that the applicant has a history of

failure to respond to non-custodial penalties and is unable to respond to them, and on the basis that the offence of importing heroin is so serious that a non-custodial sentence cannot be justified. 23. Where does this leave the application, having regard to the Court's conclusion on the question of the proper starting point which we have outlined above? We think that the proper starting point in this case was in fact one of 5 years' Youth Detention. Having given full weight to all the mitigating factors available to the applicant we think that the sentence arrived at by the Inferior Number of 18 months' Youth Detention was fully justified. We do not however want the applicant to be left with any lingering feeling of grievance. The submissions of her Counsel as to the proper approach to the starting point in cases of importation where there is no commercial motive have been accepted. We propose therefore to make a small allowance in the sentence to avoid any possible feeling of grievance enduring. We therefore allow the application for leave to appeal. We quash the sentence of 18 months' Youth Detention imposed by the Inferior Number and we substitute a sentence of 12 months' Youth Detention. We point out to the applicant, as required by the law, that she will be liable, to supervision by a probation or other officer on her release from Youth Detention or imprisonment. 24. The Court is grateful to both Counsel for their very full and helpful submissions. Authorities Campbell, Molloy and Mackenzie -v- AG, [1995]JLR136. Rimmer, Lusk and Bade -v- A G, [2001]JLR373. Conquer -v- A G (4 th April 2002), Jersey Unreported [2002/73]. Gregory -v- A G, [1997]JLR1. Mortimore -v- AG , [2003]JCA203. Criminal Justice (Young Offenders) (Jersey) Law, 1994: Article 7. AG -v- Frazer [2003]JRC215. Page Last Updated: 24 Jun 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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