

JERSEY / JUDGMENT

Marcus Oktavian Fiszer v The Attorney General

COURT

Application to seek leave to appeal sentence
imposed by the Royal Court

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Application to seek leave to appeal sentence imposed by the Royal Court
on 18th July 2016.
[2016]JCA217
Court of Appeal
23 November 2016

Before : W. J. Bailhache, Esq.,
 Bailiff, President;
 Miss Clare Montgomery, Q.C., and;
 David Anderson, Esq., Q.C.
 Marcus Oktavian Fiszer
 -v-
 The Attorney General
 The Appellant appeared on his own behalf with
 the assistance of Advocate L. J. Glynn as Amicus curiae.
 R. C. P. Pedley, Esq.,
 Crown Advocate for the Attorney General.

JUDGMENT

montgomery ja:

Introduction

1. The Applicant pleaded guilty to one count of possession of 97.12 grams of cocaine, with intent to supply, contrary to Article 8(2) of the Misuse of Drugs (Jersey) Law 1978 and one count of supplying of 53.31 grams of cocaine, contrary to Article 5(b) of the Misuse of Drugs (Jersey) Law 1978. On 18 July 2016, the Applicant was sentenced in the Royal Court Samedi Division (the Deputy Bailiff sitting with Jurats) to 7½ years' imprisonment. His co-defendant, Begley, who pleaded guilty to possession with intent to supply and supply of 78 grams of cocaine and possession of a small quantity of cannabis, was sentenced to 5½ years'

imprisonment (AG-v-Begley and Fiszer [2016] JRC 123). 2. The Applicant seeks leave to appeal his sentence on the grounds that it is excessive and that his conditions of detention (particularly his inability to apply for any early release scheme and his coeliac disease) render his imprisonment oppressive so as to warrant a reduction in sentence. The Applicant also sought to appeal against the confiscation order made in his case. On 21 November 2016 he withdrew this part of his appeal. 3. With the assistance of the Amicus he has identified three grounds for his claim that his sentence was excessive. First he contends the starting point for his sentence should have been 10 years, rather than the 11 years identified by the sentencing court. Second he argues that there was an objectionable disparity between his sentence and the sentence passed on Begley. Third he considers that he was given insufficient credit for his guilty pleas and other mitigation. The issues 4. The Applicant's arguments raise three issues: (i) whether the circumstances of the offences and the Applicant's pleas were properly reflected in the sentence passed; (ii) whether the non-availability of any early release scheme should lead to a reduction in sentence; and (iii) the impact of the Applicant's health on the propriety of his sentence. The circumstances of the offence 5. The starting point: Having regard to the guidelines in Rimmer, Lusk and Bade v Attorney General [2001] JLR 373, the appropriate starting point in a case involving between 100-250 grams of class A drugs is between 10 and 13 years. The Applicant's pleas covered the supply of more than 150 grams of cocaine. The starting point taken by the Royal Court of 11 years is entirely logical representing a point in the Rimmer range precisely corresponding to the weight of the drugs. We have had our attention directed to cases where a point below the logical starting point has been chosen. However in each of these cases the sentencing court was provided with evidence that allowed it to identify the offender as having minimal or lesser involvement so as to justify a reduction in the starting point. 6. The difficulty for the Applicant is that he did not provide any instructions to his representative, Advocate Grace, in the Royal Court to allow her to challenge the Crown's summary of facts. Privilege having been waived, Advocate Grace confirmed in evidence before us that the Applicant had the Crown's Summary of Facts translated and explained to him but that he merely shook his head and sighed. He did not give any instructions on his role relative to that of Begley and he did not tell Advocate Grace that he was not the organizer but acting jointly with Begley. 7. In the absence of any explanation in interview with the police, with the probation service or to his own lawyers, the Royal Court was entitled to operate on the assumption that the Applicant was the prime mover. He was the older man (39 years of age to Begley's 23) and he had been convicted of drugs offences in the past. It seems that, but for his arrival in Jersey, the cocaine would not have entered the Island. The Applicant maintained control over the main stock of drugs and had in excess of £3,000 in value in cash on him or under his control. In those circumstance we do not consider that there was any basis for the Applicant's claim that the sentencing process ought to have started at the bottom of the Rimmer range. 8. The Applicant has told us today that he was not the organizer but acting jointly with Begley. That is a contention that could and should have been advanced before the sentencing court. It does not persuade us that the sentence imposed was wrong in principle or excessive. 9. Disparity: It is accepted in the case of Begley that the appropriate starting point under the

Rimmer guidelines was in the range of 9-11 years. The Royal Court adopted a starting point of 10 years' imprisonment but made a greater allowance in Begley's case for his personal mitigation. Begley may have been fortunate in relation to the decision to charge him with a lesser quantity of cocaine but that good fortune does not in our judgment give rise to an objectionable disparity. The sentences passed on both men reflected the charges to which they pleaded guilty.

10. The Applicant asserts that his sentence should have been reduced to reflect the fact that some of the cocaine was physically in the possession of Begley or in the flat associated with Begley which the Applicant had occupied for only two days. However this assertion ignores the fact that the Applicant was, on his own admission, guilty of possession with intent to supply and supply to Begley. His written letter of remorse, placed before the Royal Court, accepted responsibility for his actions in terms.
11. That it was Begley who was required to take the risk of having the drugs in his possession and who provided the flat used by the Applicant is at best a neutral factor. It cannot mitigate the Applicant's offences and may in fact represent an aggravating feature, suggesting that Begley was subordinate to the Applicant and required to take the risks involved in physically handling and concealing the drugs in order to protect the Applicant. The presence of the Applicant's fingerprint on the wrappings on the cocaine in Begley's sock provides some support for this analysis of the facts. The fact that the drugs were in the flat or in Begley's physical possession does not appear to us to warrant any reduction in sentence for the Applicant or to suggest that Begley's sentence ought to have been higher.
12. In those circumstances the sentence does not appear to us to give rise to any arguable grounds of appeal based on disparity.
13. Credit for guilty pleas: The Applicant complains that he was not given full credit for his guilty pleas. By our calculation, a full one-third credit would have resulted in a sentence of 7 years 4 months' imprisonment. There was no other personal mitigation of any weight. We consider that the Royal Court was entitled to withhold a small measure of full credit by passing a sentence of 7 years 6 months. The Applicant did not make admissions at the earliest opportunity and declined to explain his role to the court. On any view the sentence cannot be described as manifestly excessive on this ground. The early release scheme
14. The Applicant argues that the fact that he cannot take advantage of any early release scheme (because he is to be deported) should have led to a reduction in his sentence. The difficulty with these submissions is first the Applicant must have realized that he was at risk of these consequences when he committed his offences. He had a previous conviction in Jersey but nonetheless chose to travel to Jersey and commit the offences.

15. Second these submissions were not made to the sentencing court. Given the gravity of his offending, an order for his deportation was inevitable (he had previously been excluded from Jersey for 3 years). If there was a point to be made it should have been raised in the Royal Court.
16. In any event the point is without merit. It is not incumbent on a sentencing court to make any allowance for the fact that a defendant will not benefit from early release. As a matter of general principle early release, licence and their various ramifications should be left out of account on sentencing. They are matters for statute or executive policy and not for the courts, see *R v Round* [2010] Cr App R (S) 45. The Applicant's health
17. The Applicant submits that his coeliac disease causes difficulty for him and for the prison. There is however no suggestion that the treatment provided is not adequate or that the disease is not controlled. His illness did not prevent him committing offences. In those circumstances the Applicant's health does not provide any ground for a reduction in sentence, see the principles identified by the Court of Appeal in *Valler v AG* [2002] JLR 383.

Conclusion

18. For these reasons we consider that the application for leave to appeal against sentence is unarguable and we dismiss it. We are grateful for the measured and sensible submissions made by the Amicus. Authorities *AG-v-Begley and Fiszer* [2016] JRC 123. *Misuse of Drugs (Jersey) Law 1978*. *Rimmer, Lusk and Bade v Attorney General* [2001] JLR 373. *R v Round* [2010] Cr App R (S) 45. *Valler v AG* [2002] JLR 383.

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Prepared on 29 October 2026 · Esheria