

JERSEY / JUDGMENT

Shahnowaz v AG [2007]

JCA 072 (22 March 2007)

[2007] JCA 072

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COURT OF APPEAL

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COURT OF APPEAL

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March 2007

Before

:

The Hon. Michael Beloff, Q. C., President;

Peter. D. Smith, Esq., Q. C.; and

Michael S. Jones, Esq., Q. C.

Mohammed Shahnowaz

-v-

The Attorney General

Application for leave to appeal against

the sentence passed by the Superior Number of the Royal Court on 30

th

November, 2006 on 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 61(2)(b) of the
Customs and Excise (Jersey) 1999

.

1 count of:

Possession of a controlled drug with
intent to supply contrary to Article 8 (2) of the
Misuse of Drugs (Jersey) Law 1978

.

Leave to appeal was granted by single
judge of the Court of Appeal on 22
nd

January 2007.

N. M. Santos-Costa, Esq., Crown Advocate.

Advocate R. J. MacRae for the Appellant.

JUDGMENT

Smith JA The Background 1. On 30 November 2006 the Appellant was sentenced by the Superior Number of the Royal Court to five-and-a-half years in prison on a count of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug contrary to Article 61(2)(b) of the Customs and Excise (Jersey) Law 1999 to which he had pleaded guilty. At the same time he was sentenced in respect of a count of possession of a controlled drug under Article 9(1) of the same Law but that sentence does not form part of the subject matter of this appeal. 2. The circumstances surrounding the offences are as follows. The Appellant made arrangements for a young woman, Victoria Lockett, who was also dealt with by the Royal Court on 30 th November 2006 , to bring 26.68 grammes of heroin by air from Gatwick to Jersey on 8 February 2006. Both the Appellant and Lockett were residents of Jersey. The arrangements made by the Appellant, which he also financed, involved Lockett going to England and meeting and paying the individuals who supplied the drugs to her. Once back in Jersey, Lockett divided the heroin into two parts, one of which she retained in the flat in which she lived and the other she hid for the Appellant at another place. The police arrested Lockett at her flat and the Appellant just outside it after each of them had smoked some of the part of the heroin retained there. When arrested the Appellant was found to be in possession of 0.18 gramme of heroin and this formed the basis of the possession count. The police subsequently recovered the part of the consignment which Lockett had hidden and the remainder of the consignment retained in her flat which had been thrown out of the window when the police approached. The 0.18 gramme of heroin was from the same batch. The Grounds of the Appeal 3. Advocate R. MacRae, who appeared for the Appellant both in this Court and in the Royal Court, argued that the sentence was wrong in principle and/or manifestly excessive. He put forward three grounds: first, that the starting point was too high; second, that the Crown had overstated its case in the Royal Court; and, third, that the Royal Court had not allowed sufficient discount for mitigation. The Starting Point 4. Mr. MacRae's submissions on the starting point were based on the acceptance by the Royal Court that the drugs were for the Appellant's personal use. He argued, as he had argued in the Royal Court, that in the light of the decision in *Finnigan -v- Attorney General*

[2004] JLR 179 the guidelines in *Rimmer and Others -v- Attorney General*

[2001] JLR 373 did not apply and that the Royal Court ought to have adopted a starting point of fewer than seven years. 5. In *Rimmer* this Court said (at page 390) that, while there may be exceptional cases, it will be seldom that the starting point for trafficking in any amount of Class A drugs carried or sold in powder form will be below seven years. In *Finnigan* , however, a case in which the Superior Number was sitting on appeal from the Inferior Number, it was held that *Rimmer* does not apply to cases of importation of relatively small quantities of a Class A drug for personal use. 6. Crown Advocate N. M. Santos Costa for the Attorney General, invited us to hold that *Finnigan* was decided incorrectly. He pointed out that, unlike the offence of possession with intent to supply (with which the Appellant was not charged), the defendant's state of mind is not an ingredient of the offence in question.

The Court of Appeal of England and Wales decided over thirty years ago, in Ribas

- [1976] 63 Cr. App. R. 147, that where the charge is importation the defendant's assertion that the drug is for personal consumption only falls to be considered as a matter of mitigation, the sentencing court being under a duty to examine the assertion to see what it amounts to. It follows that it is irrelevant to the fixing of the starting point which, it is clear from Rimmer , is to be determined before any allowance is made for mitigation. 7. In Finnigan the Applicant pleaded guilty to being concerned in the importation of 7 grammes of heroin and the Inferior Number had adopted a starting point of seven years Youth Detention. The prosecution conceded that the drug was for the Applicant's personal use. Her counsel argued that there were conflicting judgments of the Court of Appeal - Gregory -v- Attorney General
- [1997] JLR 1 and Conquer -v- Attorney General (Court of Appeal unreported 2002/73) - and that the Superior Number ought to follow the decision in Gregory and hold that the Rimmer guidelines did not apply. In passing sentence the Bailiff accepted that those judgments were indeed conflicting and said (at page 183) that "the Gregory approach" was preferable, for reasons which we shall examine in due course. 8. But are the judgments in Gregory and Conquer in conflict? We think not. Gregory was decided before Rimmer . At that time the relevant guidelines case was that of Attorney General -v- Campbell
- [1995] JLR 136 . As was recognised in Gregory (at p. 10) those guidelines were explicitly limited in their application to trafficking on a commercial basis. 9. In Rimmer this Court clarified and expanded the guidelines promulgated in Campbell . The judgment in Rimmer quotes or refers to the limitation expressed in Campbell on a number of occasions. However, after setting out starting point bands the Court then went on to purport to "... 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" but made no mention of the limitation. 10. It was not long before this apparent ambiguity was recognised in this Court. In Conquer (in which Southwell JA, who had delivered the judgment of the Court in Rimmer , presided) Carey JA, delivering the judgment of the Court, and after referring to the fact that the Appellant was entitled to be sentenced on the basis that the drugs were her own, said this (at para. 12): "After anxious consideration we have concluded that the bands in Rimmer should still apply as starting points in the case of all importation offences - to do otherwise may lead to artificial and subjective tests being introduced in situations where no such complications need arise. We regard the points arising in this case as essentially matters of mitigation personal to the Appellant." 11. In our opinion, therefore, there is no conflict between the decisions in Gregory and Conquer , but rather a difference between Campbell and Rimmer addressed by this Court in Conquer and resolved. 12. Turning to the two main reasons given by the Court in Finnigan we do not find them convincing. The first is that the answer to the question "Is the offence of bringing into Jersey enough heroin for a single injection as serious as importing 5g. of heroin for onward sale?" is clearly "No". But this begs the further question of whether the less serious nature of the importation should

be reflected in the selection of the starting point or by way of a deduction for mitigation. Rimmer and Conquer indicate that the latter is the proper course. 13. The second reason relates to transparency, and the sense of grievance the Applicant in Finnigan had apparently suffered as a result of the inability of defence counsel to explain to her how the sentence imposed by the Inferior Number had been arrived at, having regard to the adoption of the Rimmer minimum starting point of seven years. 14. We share the Royal Court's view that transparency is important, but guidelines serve valuable ends and, where they are applicable, we do not believe that it is appropriate to disapply them simply because they inevitably give rise to complexities which defendants may have difficulty in understanding. 15. Mr MacRae drew our attention to a series of cases in which Finnigan had been followed, either by the Inferior Number or by the Superior Number sitting on appeal from the Inferior Number. The amounts involved range from 1.15 gramme to just over 6 grammes of heroin imported, although not always exclusively, for personal use. In some cases the judgments do not make it clear what starting point the court adopted but it is reasonable to assume that it was invariably less than the Rimmer minimum of seven years. 16. The evolution in the Royal Court of a method of doing justice in cases involving the importation of small quantities of Class A drugs for personal use is not something to be criticised lightly by this Court. However, even apart from the fact that it is inconsistent with Rimmer and Conquer, we have serious misgivings as to its appropriateness. 17. The purpose of guidelines is to facilitate consistency and to avoid the problems inherent in attempting to compare and contrast previous decisions, often on the basis of incomplete information. There are no separate guidelines dealing with the importation of small quantities of drugs for personal use. There is no definition of what is or what it not a small quantity. Nor is there a yardstick from an authoritative source, apart from Rimmer, which can be applied to any particular quantity of drugs and from which a starting point may be derived. And there are already signs in the series of cases furnished by Mr. MacRae (see for example Attorney General -v- Davey

[2005] JRC 125) of the recrudescence of the old disease, which guideline cases are designed to eradicate, of "try[ing] to calculate the exact effect given by the court in earlier cases to each factor and then to say that those effects must be reproduced in the case in hand" (see Wood -v- Attorney General (Court of Appeal unreported, 15 February 1994)). 18. There is another difficulty in endorsing Finnigan. It sought to apply "the Gregory approach" only to cases of importation of a small quantity whereas no such limitation is apparent from the judgment of this Court in that case. Assuming that the Rimmer guidelines would apply to larger quantities for personal use this would result in the paradox that in the first type of case the intention of the defendant bears on the starting point whereas in the second it is relevant only to mitigation. It is for this reason that the addition to the Rimmer guidelines of a lower starting point specifically for cases of personal use would not be a satisfactory solution. A more logical solution, albeit perhaps not a perfect one, would be to add a lower starting point band for small quantities. 19. This is not an appropriate case in which to make a definitive ruling on this issue which may require consideration at some point in

the future. The quantity of drugs in this case is far above that to which the relevant charge in Finnigan

- or the series of cases which followed it to which Mr. MacRae referred us - related. Even if we had concluded that Finnigan was correctly decided we should have still taken the view that the Rimmer guidelines are applicable to the instant case and that, therefore, the personal use factor is a matter of mitigation. The Crown Overstated its Case in the Royal Court 20. The Crown's written Conclusions, which were before the Superior Number, alleged that the Appellant "purposefully set out to get a minor addicted to heroin to enable him to use her in his subsequent importation" and went on to suggest that in sentencing "his corruption of a minor must be taken into account." In outlining the Crown case in the Royal Court Mr. Santos Costa repeated both allegations. 21. In fact the allegations were incorrect. Victoria Lockett had begun taking heroin before the Appellant began to supply it to her and at that time she was no longer a minor. 22. In our view it is of vital importance that the Crown does not make inaccurate allegations of fact against defendants when they are being sentenced. It is incumbent on the prosecution to get the facts right. Failure to do so may result in a defendant being prejudiced or leave a defendant with the understandable impression that he or she has not been fairly treated. Colourful phrases such as "the corruption of a minor" should be eschewed unless their use is precisely descriptive of part of the factual basis on which the defendant falls to be sentenced. In saying this we do not seek to discourage the Crown from placing all relevant information before the sentencing court. But it should be done coldly and dispassionately. The sentencing function should not be at risk of being performed in the heat of a reaction to emotive language. 23. Before us Mr. Santos Costa accepted that the errors to which we have referred ought not to have occurred. However, it is unfortunate that his responses to Mr. MacRae's protests in the Royal Court were not as clear cut. It is essential that whenever it becomes apparent that erroneous assertions of significance have been made by the prosecution against a defendant that they are explicitly and unequivocally withdrawn at the earliest opportunity. 24. Mr. MacRae also complained that Mr. Santos Costa initially disputed that the drugs were for the Appellant's personal use, only accepting late in the hearing the Appellant's statement to this effect which had appeared in the pre-trial Social Enquiry Report prepared by a probation officer. Given that the personal use factor was demonstrably taken into account by the Superior Number we do not consider that there is any force in this complaint. We deal with the significance of the incorrect allegations later in this judgment. Insufficient Discount for Mitigation 25. Mr. MacRae argued that the Appellant was entitled to a full one-third discount for his guilty plea and that there were other matters which ought to have been taken into account by way of mitigation which he conveniently summarised in his written contentions in the following terms: "The Social Enquiry Report described a hardworking young man who had done his best to stay off heroin over the years. This was far from being a "bad report". Both the Social Enquiry Report and the Drug and Alcohol Report spoke of a man who accepted responsibility for what he had done; expressed remorse; was ashamed of his behaviour; wanted to apologise to Miss Lockett, his partner and their daughter. He had also written to

the Court, as had his partner. He had successfully detoxified from drugs and prison and taken voluntary swab tests - all were negative." 26. We deal with the discount for the guilty plea in our discussion, below, of the judgment of the Royal Court. As to the other factors, we would point out that it was a matter for the Superior Number to weigh these and give them such weight, if any, as it saw fit. We have no reason to doubt that this is what happened. The Judgment of the Royal Court 27. It was accepted in the Royal Court that allowance had to be made for the personal use factor and on this basis it reduced the Crown's starting point from eight years to one of seven years. In this it was mistaken. In our judgment, applying the Rimmer guidelines, the correct starting point was eight years and a deduction ought to have been made in respect of this factor as part of the discount for mitigation. Having said this, however, we consider that the allowance of one year is entirely reasonable irrespective of how the calculation is approached. 28. As for the deduction for the Appellant's guilty plea, not only did the Crown propose one-third in its Conclusions, but Mr. Santos Costa adhered to it when challenged as to its appropriateness by the Commissioner in the course of the hearing. However, in delivering the judgment, the Commissioner said that "... we cannot see, however closely we look at it, that the mitigation particularly of one-third for the guilty plea (given somewhat late in the day) is appropriate." A deduction of one-and-a-half years was made from the starting point of seven years so that the sentence actually imposed, five-and-a-half years, was the same as that for which the Crown had moved, although it was differently calculated. 29. In Campbell the Bailiff, delivering the judgment of this Court, reaffirmed (at p. 146) the statement made by this Court in Carter -v- Attorney General (Court of Appeal unreported 28 September 1994) which is in the following terms: "We accept that [a deduction of one-third for the plea of guilty] is customary and in line with well established principle. Nevertheless we take the view that such a reduction is in no sense an inflexible rule and the precise deduction in each case must depend on the circumstances in which the guilty plea came to be made. In some circumstances the evidence will make a guilty plea all but inevitable, but in other cases that may not be so." Thus, the sentencing court is not bound to make a deduction of one-third and obviously this remains the case even if it is invited to do so by the Crown. However, as was signalled by Mr. Santos Costa in withstanding the Commissioner's challenge to the Crown's stance, it might well have proved very difficult to have secured the conviction of the Appellant had he pleaded not guilty. The case against him on the count in question would have depended on the evidence of Lockett, an accomplice, who may or may not have proved a reliable witness if, indeed, she would have been prepared to go into the witness box. 30. There is no apparent explanation for the Royal Court's substantial reduction of the discount and none is given in the judgment. We endorse the emphasis placed on transparency in the judgment of the Bailiff in Finnigan (op. cit. at page 183). In the circumstances of the instant case the failure of the Royal Court to explain gives its decision on this issue the appearance of arbitrariness. In our opinion the deduction proposed by the Crown was justified and should have been allowed. 31. There are two other aspects of the judgment which concern us. One is phraseology which suggests to us that the Royal Court may have remained influenced by the Crown's inaccurate allegations notwithstanding that it had been acknowledged that they were mistaken. The parts played in

the importation by the Appellant and Lockett were described as "an extraordinary tale" whereas, on the face of it, there is nothing extraordinary about it. It is difficult to escape the conclusion that the Court was expressing a degree of scepticism. 32. Furthermore, the Commissioner went on to say that the Court "... can see aggravation in the use of a young girl for the purpose of which she had been put." The phrase "had been put" seems to us to imply pressure on the part of the Appellant whereas there was no evidence that this had been the case. And we do not consider that the use of Lockett as a courier can fairly be characterised as an aggravating factor. The logic of this conclusion on the facts of this case would be that every defendant who organises an importation aggravates the offence by using a courier even if he or she acts voluntarily. This obviously cannot be right. 33. We think it appropriate to reflect the concerns we have expressed in a further deduction of six months from the Appellant's sentence. Disposal 34. We substitute a sentence of four years imprisonment for the sentence imposed in the Royal Court Authorities Customs and Excise (Jersey) Law 1999. Finnigan -v- Attorney General

[2004] JLR 179 . Rimmer and Others -v- Attorney General

[2001] JLR 373 . Ribas [1976] 63 Cr. App. R. 147. Gregory -v- Attorney General

[1997] JLR 1 . Conquer -v- Attorney General (Court of Appeal unreported 2002/73). Attorney General -v- Campbell

[1995] JLR 136 . Attorney General -v- Davey

[2005] JRC 125 . Wood -v- Attorney General (Court of Appeal unreported, 15 February 1994). Carter -v- Attorney General (Court of Appeal unreported 28 September 1994). Page Last Updated: 20 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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