12 pages.

COURT OF APPEAL

87.

3rd July, 1991

Before: Sir Godfray Le Quesne, Q.C., (President),
J.M. Chadwick, Esq., Q.C., and
A.C. Hamilton, Esq., Q.C.

Her Majesty's Attorney General -v- John Clarkin.

Her Majesty's Attorney General -v- Duane Anthony Pockett.

Appeal of John Clarkin against the sentence of five and a half years' imprisonment, passed on him by the Royal Court (Superior Number) on 16th April, 1991, following conviction by the Inferior Number on 18th January, 1991, for an offence under Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978.

Appeal of Duane Anthony Pockett against sentence of four and a half years' imprisonment, passed on him by the Royal Court (Superior Number) on 16th April, 1991, following guilty pleas before the Inferior Number to an offence under Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978.

C.E. Whelan, Esq., Crown Advocate.

Advocate Mrs. S.A. Pearmain for Clarkin.

Advocate R.J. Renouf for Pockett.

JUDGMENT

THE PRESIDENT: This judgment covers two appeals against sentence, those of John Clarkin and Duane Anthony Pockett.

To a great extent, these appeals raise the same questions and, as will appear, a connection arose between them at the sentencing stage. We are therefore delivering judgment on the two appeals together, although they were argued separately.

Both these appellants were charged with possession of a Class 'A' drug, LSD, with intent to supply it to another, contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978.

Clarkin pleaded not guilty to this charge and his trial before the Inferior Number began on the 16th January. It was submitted on his behalf that critical evidence against him should be excluded by the Court because it had been obtained by an illegal search. The Court rejected this plea on the 17th January, and the trial then proceeded. On the 18th January, Clarkin altered his plea to guilty and was remanded to the 5th February for sentence by the Superior Number.

Pockett pleaded guilty on the 21st December, 1990, and was then remanded to the 5th February for sentence by the Superior Number.

On the 11th December, 1990, a man named Fogg had been sentenced by the Superior Number for drug offences, including the offence of possession of LSD with intent to supply it. For that offence he had been sentenced to seven and a half years' imprisonment. He was subsequently granted leave to appeal against his sentence and the hearing of the appeal was fixed for the 8th April.

On the 1st February, that is four days before Clarkin and Pockett were due to appear before the Superior Number, the Crown Officers Department told Pockett's counsel that the Bailiff wished to defer the sentencing of the appellant to a time after the Court of Appeal had given its decision in Fogg's appeal. The reason given to the appellant's counsel was that the Superior Number would work from any bench mark determined in the Fogg appeal when sentencing the appellant. The appellant did not object to the adjournment requested. On the 5th February, accordingly, Pockett was remanded further for sentence on the 16th April, 1991.

The same information was given to Clarkin. He did object to the delay of sentencing, but in spite of his objection on the 5th February he also was remanded for sentence to the 16th April. The Court held that (and I quote from what they said): "Logic and justice require that Clarkin be sentenced after the Court of Appeal has given its adjudication on the principles to be applied in cases of this nature".

On the 8th April Fogg's appeal came before the Court of Appeal, the Bailiff presiding over the Court.

The relevant circumstances of the case were that Fogg had been arrested in possession of 1,000 units of LSD. The Royal Court, when about to sentence him, had been informed that this was larger than any single seizure which had taken place in the British Isles. This information was in fact wrong.

Fogg had a previous conviction in England for importation of two kilograms of cannabis, although it is right to add that that had been eight years before the offence with which the Court was concerned. Fogg was also sentenced on the 11th

December for two other offences involving drugs; one of possession and one of supply of cannabis.

He had pleaded guilty to the charge of possession of LSD eventually. His original plea had been not guilty, but it had been changed to guilty at the last minute. There were also present what were described by the Royal Court 'as other mitigating factors', although it is not easy to tell from their judgment exactly what those factors were.

In delivering the judgment of the Court of Appeal on the 8th April, 1991, the Bailiff said this:

> "It has been suggested by counsel for the Appellant that although he concedes that sentencing policy in this Court may differ from sentencing policy in England, the difference is or should be very slight. The Royal Court has always felt itself free to lay down its own distinguishing and separate principles dealing with the punishment of offenders, particularly in relation to drug offences. It has been said in the Royal Court, both by the Inferior Number and the Superior Number, that the Island is particularly vulnerable to the importation of drugs where we have a quite large group of young people susceptible to corruption by drug abuse. It is mainly for that reason that the Courts in this Island have taken what would be regarded outside the Island as a stricter approach to a sentencing policy".

Later in the judgment the Bailiff referred to the erroneous information which had been given to the Royal Court when sentencing Fogg, as I have said, and went on:

".... there is no doubt in the minds of this Court that it" (that is the erroneous information) "played some, although not necessarily a major, part in the deliberations of the learned Jurats when they came to consider the conclusions".

There then followed the most important part of the judgment, which I shall read:

"In cases of this nature it is always desirable that there should be an established benchmark. Indeed the judgment of the learned Deputy Bailiff indicates that the Court had a benchmark in mind; indeed the case of Singh" (that is an English case) "had been cited to them and they had considered it. But the benchmark would appear to have been fixed by the learned Superior Number at 10 years and they then made certain deductions to allow for the guilty plea.

"Allowing for the difficulties facing the Superior Number, particularly, as I have said, with regard to the erroneous information given to them, and looking at what was said in Singh, we have come to the conclusion that the benchmark was too high.

"Applying the English authorities to cases of this nature and allowing for a guilty plea, we think the benchmark would be established at some seven and a half years before mitigation is taken into account, which would reduce that figure either to six and a half or seven years. There was a contested case which was heard almost at the same time as Fogg's in the Southampton Crown Court. It was the case of Tidy where the accused, after being convicted, was sentenced to eight years' imprisonment on a count of possessing a controlled drug of Class "A", which was LSD,

with intent to supply contrary to section 5(3) of the Misuse of Drugs Act 1971, which corresponds to our own Law and the total involved was in fact 1,100 units. But of course one must be careful in making these comparisons to remember what I said earlier in de Havilland's case.

"We have come to the conclusion that a proper benchmark from which to start in cases of this nature would be seven and a half years, as I have said, and that the appropriate allowance to make for the mitigating factors would be one of eighteen months and therefore we will allow the appeal and reduce the sentence to one of six years".

The Court of Appeal clearly intended this judgment to serve as guidance to appropriate sentences in what they called cases of this nature. Unfortunately this object has not been achieved, because disagreement has arisen over the correct interpretation of the judgment. I repeat certain of the words which the Bailiff used: "Applying the English authorities to cases of this nature and allowing for a guilty plea, we think the benchmark would be established at some seven and a half years before mitigation is taken into account".

Counsel for the appellants in these two appeals, emphasising the words, "before mitigation is taken into account", have submitted that the benchmark intended was seven and a half years before any discount for a plea of guilty. The Crown Advocate, on the other hand, emphasising the words, "allowing for a guilty plea", has submitted that the benchmark intended was seven and a half years after allowing a discount for a plea of guilty.

In our view, the Crown Advocate's interpretation of the Court's judgment is right. We say this for two reasons. First

if seven and a half years were the appropriate starting point before the allowing of any discount and this were then to be reduced by anything like the usual one-third for a plea of guilty and by something more for other mitigating factors, it is impossible to see how the Court could have arrived, as it did, at a total discount of only eighteen months. Secondly, to say that the starting point should be seven and a half years before the allowing of any discount appears to us to be inconsistent with the Court's clear intention to take a stricter approach to sentencing than that adopted in England.

The correct view of the Court of Appeal's judgment, therefore, is that they were saying, and we wish to reiterate what they were saying, that for cases of this nature the starting point before effect is given to any mitigation on any ground must be a sentence of eight to nine years' imprisonment.

By cases of this nature the Court meant possession of a Class "A" drug with intent to supply it to others when the involvement of the defendant in drug dealing is comparable to that of Fogg.

The degree of Fogg's involvement was shown by the amount of LSD found in his possession, by the other offences which he had committed, and by his behaviour between his arrival in the Island and his arrest. We refer there to the fact that Fogg had only been in the Island a few hours and in the course of those few hours had himself received this large quantity of LSD and had set about the sale of it. Those were the factors which showed the degree of Fogg's involvement. It is possible that in other cases a defendant's degree of involvement might be shown by other factors.

The possession of a Class "A" drug must always be a grave offence, but if the involvement of the defendant in drug dealing is less than that of Fogg, if, as it is sometimes put, there is a greater gap between him and the main source of supply, the appropriate starting point would be lower. It is very seldom that the starting point for any offence of possessing a Class "A" drug with intent to supply it on a commercial basis can be less than a term of six years.

We repeat, so that there may now be no doubt, that the figures which we have stated are figures for starting points before any mitigation is taken into account on any ground.

We now come to deal with the two cases before us. The relevant circumstances of Clarkin's case are that he was arrested in possession of 832 units of LSD; he had no previous conviction for any drug offence; he had come to Jersey in January, 1990, in order to find work, and had in fact been working until compelled by some back trouble to stop working about three weeks before his arrest; he had pleaded guilty once his challenge to the inadmissibility of evidence had failed.

Advocate Pearmain on his behalf has urged these points upon us and has also submitted that the difference of six months between the sentence on her client and the sentence which had been passed on Fogg did not reflect adequately the difference between the two cases.

Our conclusion on this case is that Clarkin can only be viewed as a man who was arrested in possession of a large quantity of a dangerous drug, to wit, LSD. Although he had no previous conviction for offences involving drugs, he was, when arrested, dealing in drugs on a serious scale.

Applying the principles which we have stated, and making all appropriate allowance for the mitigating factors which are present, we do not consider that five and a half years is a sentence excessive or wrong in principle. Clarkin's involvement in drug dealing may not have been equal to that of Fogg, but the difference between them we consider to be adequately reflected in the difference between the two sentences. Clarkin's appeal against sentence must therefore be dismissed.

The circumstances of Pockett's case are that he was arrested in possession of 73 units of LSD. He had no previous conviction for any offence connected with drugs; he had been, as the Crown acknowledged, very frank and forthcoming from the moment of his arrest and his plea of guilty had been of value to the prosecution.

Advocate Renouf in addition to emphasising these facts submitted to us that Pockett was a supplier on an altogether smaller scale than either Fogg or Clarkin and this should have led to a greater difference than one year between the sentence passed on Pockett and the sentence passed on Clarkin. In Pockett's case the appropriate starting point must certainly be lower than either in the case of Fogg or in that of Clarkin. His plea of guilty, furthermore, coupled with his co-operative behaviour from the moment of his arrest, deserved greater consideration than could be given to the much later pleas of guilty in those two cases.

Bearing in mind, on the one hand, the gravity of any offence of possessing a Class "A" drug with intent to supply it, and on the other hand these factors to which I have just referred, as well as the other grounds of mitigation which were present, we consider that the appropriate sentence on Pockett would have been a sentence of four years' imprisonment. This

would have been only six months less than the sentence which was in fact passed, and it is not normally right to allow an appeal against sentence in order to give effect to so small a difference of judgment.

In this case, however, we consider that there are special circumstances. Clarkin's and Pockett's cases were both deferred until the Court of Appeal's decision on the sentence on Fogg had been given. They were then both sentenced on the same day. In these circumstances comparison between the two sentences is both natural and inevitable to an exceptional degree. We consider that Pockett would be entitled to feel aggrieved by a difference of only one year between the sentence imposed on him and that imposed on Clarkin.

In these particular and special circumstances we shall therefore allow Pockett's appeal to the extent of reducing his sentence to a sentence of four years' imprisonment.

Before parting with these cases, we wish to make two comments upon what was said by the Royal Court when it sentenced Pockett. The words used by the Royal Court might be read as suggesting that the Royal Court would be entitled to vary or to depart from principles of sentencing laid down by this Court. We do not believe that the Royal Court meant to express such a view, which would be inconsistent with the structure of Courts established by the law of this Island.

Both in Fogg's case and in this case this Court has laid down guidelines which the Royal Court thought to be desirable. We refer to the words quoted earlier in this judgment which the Royal Court used when deferring sentence upon Clarkin. We have no doubt that these guidelines will now be followed in all cases to which they apply.

Our second comment concerns the Royal Court's statement, "for offences of this nature, insofar as we are able, we wish to impose more substantial sentences than those imposed in the United Kingdom, certainly not less".

The sentencing practice of the Courts of Jersey ought not to be tied in this way to the practice of Courts in the United Kingdom. The Courts of Jersey must impose sentences required in the circumstances and conditions of Jersey, which in important respects differ from the circumstances and conditions of the United Kingdom. This has obliged the Royal Court and this Court in recent years to impose and to uphold for some offences sentences heavier than those customary in the United Kingdom, but the reason is the Court's duty to protect public order in Jersey, not any need to maintain a particular differential between sentences in the United Kingdom and sentences here.

Authorities before the Court in both Appeals

A.G. -v- Fogg (8th April, 1991) Jersey Unreported C. of A.

A.G. -v- Fogg (11th December, 1990) Jersey Unreported.

A.G. -v- Hillis (12th October, 1990) Jersey Unreported.

A.G. -v- Clohessy & Roberts (25th January, 1989) Jersey Unreported.

A.G. -v- Brown (26th April, 1985) Jersey Unreported.

A.G. -v- Brown (1st July, 1985) Jersey Unreported; (1985/86) JLR N.21.

Thomas' "Principles of Sentencing" (2nd Ed'n): Offences connected with Drugs: p.p. 182-190.

Thomas' Current Sentencing Practice (2nd Ed'n):

R. -v- Bott & Ors (1979) 1 Cr. App. R. (S) 218;

R. -v- Aramah (1982) 4 Cr. App. R. (S) 407;

R. -v- Martinez (1984) 6 Cr. App. R. (S) 364;

R. -v- Ahmad (1980) 2 Cr. App. R. (S) 19;

R. -v- Taylor & Ors (1980) 2 Cr. App. R. (S) 175;

R. -v- Bennett (1981) 3 Cr. App. R. (S) 68;

R. -v- Virgin (1983) 5 Cr. App. R. (S) 148;

R. -v- Bowman-Powell (1985) 7 Cr. App. R. (S) 85;

R. -v- Gerami & Haranaki (1980) 2 Cr. App. R. (S) 291;

R. -v- Singh (1988) 10 Cr. App. R. (S) 402;

R. -v- Ocheja (1988) 10 Cr. App. R. (S) 277.

R. -v- Young (1980) JJ 281.

Authorities before the Court in the Clarkin Appeal

R. -v- Meade (1982) 4 Cr. App. R. (S) 193.

R. -v- Skilton & Blackham (1982) 4 Cr. App. R. (S) 339.

R. -v- Boyd (1980) 2 Cr. App. R. (S) 234.

R. -v- Robertshaw (1981) 3 Cr. App. R. (S) 77.

R. -v- Fraser (1982) 4 Cr. App. R. (S) 254.

R. -v- McLoughlin & Simpson (1979) 1 Cr. App. R. (S) 298.

R. -v- Davis & Ors. (1980) 2 Cr. App. R. (S) 168.

R. -v- Stabler (1984) 6 Cr. App. R. (S) 129.

R. -v- Sullivan (1987) 9 Cr. App. R. (S) 492.

R. -v- Hollington & Emmens (1985) 7 Cr. App. R. (S) 364.

R. -v- Hoult (1990) 12 Cr. App. R. (S) xxx.

Archbold (43rd Ed'n) para. 7-66.

A.G. -v- McConnachie (7th January, 1987) Jersey Unreported.

R. -v- Ashraf & Huq (1982) Cr.L.R. 132.

R. -v- Bilinski (1988) 86 Cr. App. R. (S) 146.

R. -v- Ross (1981) Cr.L.R. 291.

R. -v- Humphrey (1981) Cr.L.R. 63.

R. -v- Lawson (1987) 9 Cr. App. R. (S) 52.

R. -v- da Silva Vivancos (1988) Cr. App. R. (S) 189.

R. -v- Lane (1989) 11 Cr. App. R. (S) 548.

Authorities before the Court in the Pockett Appeal

R. -v- Olumide (1988) 9 Cr. App. R. (S) 364.

R. -v- Lawson (1987) 9 Cr. App. R. (S) 52.

R. -v- Large (1981) Cr.L.R. 80.