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COURT OF APPEAL

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8th April, 1991

Before: The Bailiff, (President),
D.C. Calcutt, Esq., Q.C., and
Lord Carlisle, Q.C.

Her Majesty's Attorney General

- v -

Peter Thomas Fogg

Application for leave to adduce
further evidence.
Appeal against sentence.

The Attorney General.
Advocate G.R. Boxall for the Appellant.

Decision of the Court on Application
to adduce further evidence.

BAILIFF: Mr. Attorney, we do not think we need trouble you. Mr. Boxall, you have said all you could, but it occurs to us that we have already in our possession all the relevant matters which we will carry forward when we consider your client's appeal against sentence. We think that this is not a case where additional evidence should properly be called. Would you therefore now please address us on the sentence appeal.

Judgment of the Court on Appeal against Sentence.

On the 10th August, 1990, the Appellant, Peter Thomas Fogg, together with another man, William James Hillis, was indicted before the Inferior Number of the Royal Court on a number of offences in relation to drugs.

Count 4 of the indictment alleged possession of a controlled drug with intent to supply to another contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978. In effect it was said that the appellant had in his possession Lysergide, commonly called LSD, and the facts disclosed that he had 1,000 units of this drug in a particularly easily transportable form.

In the course of the proceedings he was eventually sentenced by the Superior Number of the Royal Court on the 11th December, 1990, after changing his plea in respect of Count 4. It is not necessary for us to go into the details of the way in which the Royal Court divided up the sentence between the Counts; suffice it to say that he was sentenced to a total of seven and a half years and the sentence in respect of Count 4 was seven and a half years.

Fogg now appeals against that sentence, having indicated to the Court, through his counsel, Mr. Boxall (who has most ably and fairly presented the case for the Appellant), that although he does not take the point, nevertheless the Crown in moving for sentence had in fact moved for six years, whereas the Superior Number of the Royal Court imposed a sentence of seven and a half years.

Although it is the practice in this jurisdiction for the Crown, either through the Attorney General or through a Crown Advocate, to assist the Court to a far greater extent than is permitted or is held to be desirable in the English jurisdiction as regards sentence, here the Court has to make up its mind between conflicting views. On the one hand the Crown moves for particular conclusions, on the other, counsel for the Defendant urges that the Court should not grant the conclusions, depending on the circumstances of the case. And the fact

that the Court alters the conclusions whether by reducing them, or by increasing them, indicates that it is for the Court to exercise its unfettered discretion in deciding on the facts of the case what the appropriate sentence should be.

If the Royal Court increases the conclusions of the Crown, that is not per se a ground for allowing an appeal against the sentence imposed. But it does mean that in an appeal where those facts apply then the circumstances of the conviction require the most careful scrutiny of the Appeal Court.

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.

That approach was referred to on the 25th January, 1989, in a judgment of the Full Court in the case of A.G. -v- Clohessy and Roberts. Speaking for the Court, as I was presiding at the time, I said the following:

> "The first thing the Court desires me to say is that the Court is mindful of its duty to deter all traffickers in illegal drugs by ensuring that adequate and sufficient penalties are imposed".

The Court added, at the end, having considered the case of Aramah:

> "I wish also to say this, so far as Aramah is concerned, that of course we have examined that case, but it is no more than a guideline to this Court. It is not binding and as we have said in

the past, we are inclined to have a slightly stricter approach in respect of drugs; and as counsel will gather from what I have said at the beginning, that approach is going to be continued, if not, indeed, increased".

It is therefore fair to say that the Royal Court has taken on itself the right, which it undoubtedly has, to lay down its own benchmarks in sentencing matters of this sort.

In every case of this nature the Court is referred to a number of statistics, but we think that an approach of that nature has to be examined with caution and we are reminded of what Dunn LJ said in the warning he gave in R -v- de Havilland (1983) 5 Cr. App. R (S) 109, 114:

"We think it desirable to say a few words about the increasing practice of citing decisions of this Court relating only to sentence. Apart from the statutory maxima and certain other statutory restrictions, for example, those on the sentencing of young offenders, the appropriate sentence is a matter for the discretion of the sentencing judge. It follows that decisions on sentencing are not binding authorities in the sense that decisions of the Court of Appeal on points of substantive law are binding both on this Court and on lower courts. Indeed they could not be, since the circumstances of the offence and of the offender present an almost infinite variety from case to case. As in any branch of the law which depends on judicial discretion, decisions on sentencing are no more than examples of how the Court has dealt with a particular offender in relation to a particular offence. As such they may be useful as an aid to uniformity of sentence for a particular category of crime; but they are not authoritative in the strict sense. Occasionally this Court suggests guidelines for sentences dealing with a particular category of offence or a particular type of offender .... But the sentencer retains his discretion within the guidelines, or even to depart from them if the particular circumstances of the case justify departure. The vast majority of decisions of this Court are concerned with the facts and circumstances of the particular case before it and are

directed to the appropriate sentence in that case. Each case depends on its own facts".

What I have read there applies equally well to the position in the Royal Court where the Attorney General moves for the conclusions.

I should just add this: in de Havilland the learned Lord Justice was referring to the Judge and of course sentencing in this jurisdiction is reserved to the Jurats in accordance with the provisions of the Royal Court (Jersey) Law, 1948, although the Bailiff or the Deputy Bailiff, as the case may be, has a casting vote should the Jurats be divided.

In the course of counsel's address, we were informed that certain information given to the Sentencing Court was erroneous, and it would be convenient now to set out very briefly the circumstances which gave rise to this appeal and the prosecution before it.

The Appellant came to Jersey with some cannabis which for financial reasons he agreed to bring over. According to what the Sentencing Court was told he would have made something like £1,500 from it which would have satisfied a debt he had incurred when, as a second-hand car dealer, one of his vehicles had been stolen and he had to replace it or find the money.

He brought the cannabis to Jersey and a very short time thereafter there was a police raid and he was found in possession of the cannabis. He had opened the cannabis which was in blocks which carried on them the trademarks of the particular type or source of the drug. In between the blocks he found the LSD, which he removed and eventually placed in a shirt which he left in the kitchen of the house where eventually it was found by the police. But it is fair to say that Fogg told them where it was when they raided the premises and when he and another man were present.

The information that was given to the Sentencing Court about the amount of cannabis found was based on information which had been given to the prosecution by the National Drugs Intelligence Unit of New

Scotland Yard to the effect that, at the time of the Appellant's arrest, the 1,000 LSD units (they are called 'trips') which were found in his possession constituted the biggest single seizure nationally. The information did say that there had been larger seizures since, but stated nevertheless that 1,000 'trips' or units is still regarded as a major find.

The Court itself, in passing sentence, in respect of that particular matter said this:

> "Mr. Whelan told us (Mr. Whelan was the Crown Advocate) that at the time of Fogg's offence 1,000 units constituted the biggest single seizure of LSD in the British Isles. There had been larger seizures since, but 1,000 units in a single haul continues to be regarded as a major seizure. Certainly it was the largest single amount by far ever to have been seized in Jersey and the Court must match the gravity of the offence with the length of the sentence in order to have maximum deterrent effect".

Although the information, which was erroneous, was qualified by the paragraph I have just read there is no doubt in the minds of this Court that it played some, although not necessarily a major part, in the deliberations of the learned Jurats when they came to consider the conclusions.

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 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.

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