6 pages.

ROYAL COURT
(Samedi Division) 98.

1st June, 1995

Before: The Deputy Bailiff, and
Jurats Le Ruez and Potter.

The Attorney General

- v -

Nicolette Tegan Melville

On 13th January, 1995, the accused entered guilty pleas to:

2 counts of being knowingly concerned in the fraudulent evasion of the prohibition on importation of a controlled drug, contrary to Article 77(b) of the Customs and Excise (General Provisions) (Jersey) Law, 1972.

Count 1: M.D.M.A.; and
Count 2: L.S.D.;

and not guilty pleas to:

3 counts of supplying a controlled drug, contrary to Article 5 of the Misuse of Drugs (Jersey) Law, 1978:

Count 3: M.D.M.A.;
Count 4: L.S.D.; and
Count 5: M.D.M.A.

1 count of selling a poison, whilst not an authorized seller, contrary to Article 16(1)(a) of the Pharmacy, Poisons, and Medicine (Jersey) Law, 1952 (Count 6: Ephedrine):

2 counts of possessing a controlled drug, with intent to supply it to another, contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978:

Count 7: L.S.D.; and
Count 8: M.D.M.A.;

4 counts of possessing a controlled drug, contrary to Article 6(1) of the Misuse of Drugs (Jersey) Law, 1978:

Count 9: L.S.D.;
Count 10: M.D.M.A.;
Count 11: Amphetamine Sulphate; and
Count 12: Cannabis Resin.

The accused was remanded on bail to be tried on Counts 3-12, and thereafter to receive sentence on Counts 1 and 2.

On 10th March, 1995, (*See Jersey Unreported Judgment of that date*), the Court granted the Accused's application to change her guilty pleas to not guilty pleas on Counts 1 and 2; and not guilty pleas to guilty pleas on Counts 6 and 12. The accused was remanded in custody for trial before the Inferior Number on 4th April, 1995.

On 4th April, 1995, the Accused informed the Court that she wished to plead to all counts; and was remanded in custody for sentencing before the Superior Number on 2nd May, 1995.

On 2nd May, 1995, the Accused made a written submission in mitigation to the effect that she was not guilty of the offences with which she was charged. The Court adjourned the Sitting to 13th-14th June, 1995, for a 'Newton' Hearing.

> Representation of the Attorney General asking the Court to find that, insofar as the Accused wishes the Court to decide that a certain set of facts exists within the framework of the prosecution evidence, the *onus probandi* is on the Accused to satisfy the Court that her version of events is true.

A.J. Olsen, Esq., Crown Advocate.
Advocate A.D. Hoy for the Accused.

JUDGMENT

THE DEPUTY BAILIFF: This case raises a new point of criminal procedure. It is not necessary for us to rehearse the background to the charges brought against Melville who is charged with a total of twelve offences, including the importation, supply, possession with intent to supply and possession of commercial quantities of Class A and other proscribed drugs except to say that finally on 4th April, 1995, through her Counsel, Melville pleaded guilty and was remanded for sentencing before the Superior Number on 2nd May.

On 2nd May, Melville was duly presented for sentencing. In an address which he told us lasted for some 40 minutes, Crown Advocate Olsen outlined the case for the prosecution and moved his conclusions. Advocate Hoy, who appeared for Melville, presented a written submission in mitigation which the prosecution had not seen.

One of the points in that mitigation is set out at paragraph 4:-

> *"The central theme of Mrs. Melville's mitigation is that she was not the prime mover nor the prime protagonist in the dealings described by the prosecution".*

On 2nd May, the Court was also shown a letter written by Melville which concludes in this way:-

> *"I would like to ask the Court to accept that I am pleading guilty for practical and pragmatic reasons. I am aware that the evidence is against me. This is the reason for my guilty plea, although I am not responsible for the crimes as charged".*

It appears that Melville wishes the Court to find that her husband was the party primarily responsible for the commission of the offences which formed the subject matter of the indictment and her role was entirely secondary to his. Mr. Melville is apparently in Australia and of course, Melville's version of events is exclusively within her own knowledge.

The Court called for an adjournment when these facts became apparent and ordered what it described as a "Newton" hearing for June 13th and 14th. It is the form that the hearing is to take that came before us for decision today.

We have had regard to certain law and to certain cases.

In dealing with matters where "a "Newton" hearing" is unnecessary, it is stated at paragraph 5-46 and 5-47 of Archbold (1995 edition) as follows:

> ***"(a) The third exception is the case where the matters put forward by the defendant do not amount to a contradiction of the prosecution case, but rather to extraneous mitigation explaining the background of the offence or other circumstances which may lessen the sentence. These matters are likely to be outside the knowledge of the prosecution: see R. v. Broderick 15 Cr.App.R.(S.)476.***
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> ***It appears that in a case where the facts put forward by the defendant do not contradict the evidence advanced by the prosecution, the cases justify the following propositions.***
>
> ***(a) The defendant may seek to establish his mitigation through counsel or by calling evidence. The decision whether to call evidence to establish his mitigation is his responsibility, and he is not entitled to an indication from the bench that his mitigation is not accepted (Gross v. O'Toole, 4 Cr.App.R.(S.) 283).***
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> ***(b) The prosecution is not bound to challenge the matter put forward by the defendant, by cross examination or otherwise (R. v. Kerr, 2 Cr.App.R.(S) 54), but may do so (R. v. Ghandi, 8 Cr.App.R(S.) 391).***

(c) The court is not bound to accept the truth of the matters put forward by the defendant, whether or not they are challenged by the prosecution (Kerr, ante). See R. v. Broderick, 15 Cr.App.R.(S.) 476, following R. v. Connell, 5 Cr.App.R.(S.) 360 and R. v. Ogunti, 9 Cr.App.R.(S.) 325.

(d) The question of the standard of proof to be applied by a court considering matters of mitigation put forward by a defendant was considered in R. v. Guppy and Marsh, unreported, February 18, 1994, C.A. (transcript no. 93/2422/Z5). The Court held that there was a marked difference between the situation where the issue went directly to the facts and circumstances of the crime itself as presented by the prosecution and defence, and the consideration of extraneous facts in mitigation, which would usually be within the exclusive knowledge of the defendant himself. The Court held that in relation to extraneous matters of mitigation raised by the defendant, a civil burden of proof rested on the defendant, although in the general run of cases the court would accept the accuracy of counsel's statement."

Mr. Olsen referred us to three cases. In Gross v. O'Toole (1982) 4 Cr.App.R.(S.) 283 it was held that:

"If an advocate is going to put forward in mitigation something which is quite inconsistent with other information before the court, such as the defendant's previous convictions, it is for the advocate to indicate that he wishes to make good the submission; he takes the chance if he does not offer to call evidence to the fact in question. The magistrates were not obliged to tell the defending advocate that they did not accept his mitigation. (Appeal allowed on other grounds.)"

At page 285 of the judgment Ormrod L.J. said this:

"The main point of the mitigation is a rather interesting one. It involves the question as to what should magistrates do when they do not accept statements made by defending advocates in mitigation which are essentially statements of fact. Are they entitled to look at such propositions as mitigation in general terms? Are they entitled to relate what has been said to them to the other facts of the case, and perhaps, find themselves in difficulty in accepting the statements made by the advocate, as often happens, of course, in mitigation? I think, for my part, that if an advocate is going to put forward in mitigation something which is, on the face of it, quite inconsistent with the other information that the Magistrates have so far as sentence is concerned, e.g. the

list of previous convictions, it really is for the defending advocate to indicate that he wishes to make good the submission, as in this case, that there was no intention to charge any fare or seek any gain. I think he takes the chance himself if he does not offer to call evidence to that fact. Quite obviously this would, or could be, a totally misleading situation."

In the second case of Paul Francis Moss (1987) 9 Cr.App.R(S.) the headnote reads as follows:

"The appellant pleaded guilty to being concerned in the importation of a controlled drug. The appellant was stopped while driving his car through customs at Dover, and found to be in possession of 12 kilogrammes of cocaine (street value £2 million) concealed in crates of bottled beer in the boot of his car. Although the appellant claimed to be unemployed, he was shown to have bought a farm for £162,000 and to have made a number of flights to and from Brazil. The appellant put forward a story that he had acted as a courier for £3,000 in the belief that the drugs were a class B drug and not cocaine. The sentencer gave the defence the chance to have the prosecution witnesses called, and to allow the defendant to give evidence; this offer was declined by counsel for the defence, on the basis that the sentencer had the necessary evidence before him. Sentenced to 12 years' imprisonment. It was argued that the sentencer should have taken a more active role in securing a hearing of the evidence, in the light of Williams (1983) 5 Cr.App.R.(S.) 134 and Smith (1986) 8 Cr.App.R.(S.)169.

Held: the Court could not see what more the sentencer could have done. He indicated that he drew the inferences from the material before him that the appellant knew that he was importing cocaine, that he was more than a mere courier, and that he had been involved in an organised expedition. Making all the allowances for the plea, the sentence was not too long."

And finally in Akin Ogunti (1987 9 Cr.App.R.(S.)325 the headnote reads as follows:-

"The appellant pleaded guilty to possessing heroin and cocaine with intent to supply and possessing cannabis. The appellant was stopped by the police while driving a car in which packets of various drugs were found hidden. The appellant claimed that he had been given the drugs by a stranger and told to take them to Brighton where someone else would collect them; the appellant claimed that he had been threatened with violence if he did not comply and that he was to be paid £400. At the Crown Court, the judge

adjourned to allow the appellant to call evidence in support of this claim, which was not accepted by the prosecution. At the resumed hearing, it was indicated that the appellant did not wish to call evidence and the judge passed sentence, rejecting the appellant's explanation. Sentenced to five years' imprisonment, recommended for deportation, ordered to pay £1,000 costs and various items and £140 cash forfeited. It was argued that the sentencer should not have rejected the appellant's mitigation, relying on Newton (1982) 4 Cr.App.R.(S.) 308, Williams v. Another (1983) 5 Cr.App.R.(S.)134, Smith (1986) 8 Cr.App.R.(S.) 169, and Moss [1987] Crim. L.R.426.

Held: the sentencer was clearly entitled to take the view of the facts which he did. Although he was entitled to offer the appellant the opportunity to call evidence if he wished to do so, there was no need to adjourn or raise the matter of a possible trial as to the facts. There were cases where matters put forward in mitigation radically altered the part played by the defendant (such as in a robbery, where the prosecution claimed that the defendant took a leading part in the robbery, but the defendant claimed that he was merely a lookout or "wheelman") but that was far removed from cases such as the present, where in mitigation the defendant merely seeks to minimise the part he played, as can be inferred from the undisputed evidence before the Court. The Court could see nothing wrong in the inferences from the facts and statements made in sentencing by the judge, and the sentences were wholly justified."

We feel within the terms of the representation made to us that the use of the words "Newton" hearing is something of a misnomer in this particular case. The line of authority in the cases is perfectly clear and what the Court quite properly did on 2nd May was to adjourn the hearing to enable the defence <u>if it so requires</u> to call evidence to support its plea in mitigation. There is no necessity for the defence to call evidence and indeed, Advocate Hoy told us that there is contained within his written plea of mitigation all the factors that he wishes to bring out in order to lighten the responsibility that his client bears for the crimes with which she is charged. That may well be so. The choice is his. He can call evidence if he wishes. He need not call evidence if he does not wish. At the end of the day, the Court will (as it always does), weigh in the balance of justice the two versions that it has heard and decide upon which version it will proceed to sentence. What was essential for this hearing today to determine (and Advocate Hoy accepted that this was so), was to establish that Crown Advocate Olsen need go no further into outlining the facts than he has done already. There is not to be a trial where the prosecution has to prove each and every fact. The plea has been one of guilty. Mr. Olsen can either repeat the

arguments already rehearsed before the Court or indeed re-present them should he so wish in written form to the Court. If Advocate Hoy wishes to take the opportunity which has been given to him, he can call evidence and then his witnesses will be examined and cross-examined in the usual way. The only purpose of the hearing will be to establish which version of the events is to be taken as the basis for sentencing. It may be at the end of the hearing on 13th and 14th June (if the matter proceeds for two days), that the Crown will need a short adjournment in order to present its conclusions to the Court.

Authorities

Archbold (1995 Ed'n): paras. 5-46, 47.

Gross -v- O'Toole (1982) 4 Cr.App. R.(S.) 283.

Moss (1987) 9 Cr.App.R.(S.) 91.

Ogunti (1987) 9 Cr.App.R.(S.) 325.