[2005–06 Gib LR 233]

VINER v. R.

COURT OF APPEAL (Staughton, P., Stuart-Smith and Kennedy, JJ.A.): September 19th, 2006

Sentencing—drugs—supply—5–7 year starting point for typical low-level retailer of Class A drugs—2½ years justified if no previous record of supply and no stock, supply merely to finance own drug habit, early guilty plea, subsequent good behaviour and desire to change life

The appellant was charged in the Supreme Court with supplying a Class A drug to another and possession of a Class A drug, contrary to ss. 6 and 7 of the Drugs (Misuse) Ordinance.

The appellant was 21 years old, separated from his family in England, and had lived in Gibraltar for 3 years. He was a drug user and had convictions for drug offences and petty violence but had no record of drug dealing. He was on bail at the time of the present offences which, as observed by the police, involved the supply to other men in public of very small quantities of heroin—when arrested, the total quantity recovered from him was 3.57g in small wraps, and the money in his possession amounted to only £75 and a few euros. He pleaded guilty and was sentenced by the Supreme Court (Dudley, A.J.) to 3 years 4 months' imprisonment.

On appeal, he submitted that the sentence was excessive, in view of the low level of supply and the absence of a record of supplying. He had no

known stock of drugs and was merely selling small quantities to be able to feed his own addiction. He had pleaded guilty at the first opportunity and the evidence was that he had behaved well in prison, was free of drugs and had expressed the wish to turn his life around.

Held, allowing the appeal and substituting a shorter sentence:

The sentencing bracket for a typical low-level retailer of Class A drugs was 5 to 7 years' imprisonment, subject to mitigation in the usual way. In the case of the appellant, however, a sentence no greater than $2\frac{1}{2}$ years' imprisonment was justified—his motive was only to finance the feeding of his own addiction, he had no record of supplying drugs and held no stock, he had pleaded guilty at the earliest opportunity, and was apparently behaving well, trying to overcome his addiction and change his life (paras. 13–20).

Cases cited:

(1) *R.* v. *Afonso*, [2005] 1 Cr. App. R. (S.) 99; [2004] EWCA Crim. 2342, *dicta* of Rose, L.J. applied.
(2) *R.* v. *Djahit*, [1999] 2 Cr. App. R. (S.) 142, *dicta* of Hooper, J. applied.
(3) *R.* v. *Gaiviso* (2005), Supreme Ct., unreported, referred to.
(4) *R.* v. *Ramos* (2006), Supreme Ct., unreported, referred to.
(5) *R.* v. *Twisse*, [2001] 2 Cr. App. R. (S.) 9, applied.

Legislation construed:

Drugs (Misuse) Ordinance, s.6:

> "(1) Subject to any regulations under section 11 for the time being in force, it shall not be lawful for a person—
>
> . . .
>
> (b) to supply or offer to supply a controlled drug to another . . .
>
> (3) Subject to section 29, it is an offence for a person—
>
> (a) to supply or offer to supply a controlled drug to another in contravention of subsection (1) . . ."

s.7: "(1) Subject to any regulations . . . for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession.

(2) Subject to [other provisions], it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) of this section."

N. Caetano for the appellant;
Ms. K. Khubchand, Crown Counsel, for the Crown.

1 **KENNEDY, J.A.:** This is an appeal by John Viner against a sentence of three years and four months' imprisonment, which was imposed by Dudley, A.J. on April 10th, 2006, for two offences.

2 First, possession of approximately 4g. of cocaine with intent to supply. And, secondly, for supplying to Andrew Roberts 0.1g. of a substance containing cocaine. Both offences where committed on October 7th, 2005, and there was a third offence, namely simple possession, to which the appellant also pleaded guilty and in respect of which no separate penalty was imposed.

3 The appellant is a Londoner born on December 4th, 1984, so he is now 21 years of age. We are told that his behaviour was such that he was required by his family to leave home when he was 17 years of age and he has, it seems, not been in contact with his family since then. He came to Gibraltar in about September 2003 when he would have been 18 years of age, and took up casual work in nearby Spain. We have before us no reports in relation to that employment.

4 In late 2003 and early 2004 he had two appearances in the Magistrate's Court in Gibraltar for theft and threatening behaviour, for which he was fined. And on June 2nd, 2005 he was convicted of being in possession of 60g. of cannabis resin and was fined £450. On August 19th, 2005 he was convicted of causing damage and was fined £120. And at some date, which is at the moment unclear, but at about that time, he was found to be in possession of 0.18g. of cocaine and, having been arrested, was granted bail. On October 7th, the date to which we have already referred, he was therefore in fact on bail.

5 At about 12.30 a.m. on that Friday morning, police officers were carrying out observations in the area of Gibraltar known as the West Place of Arms, near to the Market Place. They were able to see that the appellant was supplying something to a man named Andrew Roberts and apparently making another supply to another individual who was not identified. The appellant's behaviour indicated that he was nervous.

6 He was arrested. He was then searched. He was found to be in possession of 10 wraps secreted in a bag in the seam in the bottom left-hand corner of his jacket. Each wrap contained 0.3g. or 0.42g. of cocaine. The total amount of cocaine recovered was 3.57g. His observation when it was found was: "So you found some coke. I take coke."

7 When interviewed he made no reply and of course it will be clear from what we have already said that this was the first occasion on which he had been apprehended in respect of drug dealing. He was found to be in possession of £75 in sterling, and a very small amount in euros.

8 He pleaded guilty at the earliest opportunity and, as we have said, was a young man who had not previously been before the courts for drug dealing. He was at the time unemployed. He had no family support of any kind. The question of a social enquiry report or a probation report was apparently raised but if it was raised the need for the report was

dispensed with, because it was recognized that a custodial sentence was inevitable.

9 Since he was sentenced, he has been, we are informed, and it is apparently not in any way in issue, a model prisoner. He is said to be free of drugs and has been awarded privileges by the authorities here. He says before this court that he wants to turn his life around. Of course, this was not his first offence and at the time when he did commit the offence, he was on bail.

10 Sections 6 and 7 of the Drugs (Misuse) Ordinance of Gibraltar, mirror the provisions of English law, which were considered by the English Court of Appeal Criminal Division in *R.* v. *Twisse* (5) and in *R.* v. *Afonso* (1). In *Twisse*, Dr. David Thomas appeared as *amicus curiae* and the court took the opportunity to review the level of sentencing for low level retail suppliers in Class A drugs.

11 In *R.* v. *Djahit* (2), Hooper, J., giving the judgment of the court, said ([1999] 2 Cr. App. R. (S.) at 145): "In deciding the appropriate level it goes without saying that the sentence would largely depend on the degree of involvement, the amount of trafficking and the value of the drug being handled."

12 We are told that on the present occasion the value of the drug been handled was on the order of £200. Later, Hooper, J. continued by saying this (*ibid.*):

> "What then is the appropriate sentence following a trial for a typical low-level retailer of heroin or other Class A drug, with no relevant previous convictions, selling to other addicts in order to be able to buy drugs for his own consumption and to earn enough to live very modestly. It seems to us that he may expect about six years' imprisonment . . . A plea at the earliest opportunity will reduce that sentence by the appropriate margin of about one-quarter to a third. Personal circumstance may reduce it further. If the defendant is able to show he is no longer addicted to Class A drugs, then a reduction may also be appropriate."

13 In *Twisse* (5), after looking at a number of other decisions, that approach was confirmed. The court said this ([2001] 2 Cr. App. R. (S.) 9, at para. 10):

> "With the assistance of Dr Thomas we have looked at a wide range of reported cases dealing with all Class A drugs and the sentences imposed over a period extending from 1988 to date. All indicate a sentencing bracket, on the hypothesis put forward by Hooper J., of between five and seven years; in other words, as the judge said, an offender may expect about six years' imprisonment, which can be increased or mitigated in the way that he outlined."

14 In *Afonso* (1), the Court of Appeal again turned its attention to this type of offender, and the Vice-President (Rose, L.J.) said this ([2005] 1 Cr. App. R. (S.) 99, at para. 2):

> "Nothing which we say is intended to affect the level of sentence indicated by *Djahit* and *Twisse* for offenders, whether or not themselves addicts, who, for largely commercial motives, stock and repeatedly supply to drug users small quantities of Class A drugs; and, as was pointed out in those authorities, as well as other authorities, the scale and nature of the dealing are important when deciding the level of sentencing."

15 He then indicated (*ibid.*, at para. 3) that there is a special group of offenders, namely those who are out of work drug addicts, whose motive is only to finance the feeding of their own addiction, who hold no stock of drugs, and who are shown to have made a few retail supplies of the drug to which they are addicted to underground police officers only.

16 But where a drug treatment order is not appropriate, the Vice-President said (*ibid.*, at para. 4) that—

> ". . . adult offenders in the category we have identified, if it is their first drug supply offence, should, following a trial, be short-term prisoners, and, following a plea of guilty at the first reasonable opportunity, should be sentenced to a term of the order of two to two-and-a-half years' imprisonment."

17 So far as we can ascertain, Dudley, A.J. in the present case was not referred to *Afonso* (1) as we have been. Had he been so referred, it would no doubt have been pointed out that this particular offender did not supply only to undercover police officers (though of course the intention of the offender would be the same, whether the person supplied is a police officer or not). And it would also no doubt have been pointed out that he offended whilst on bail. But it can be said on his behalf, and indeed has been said, that the quantities supplied and to be supplied, on this one occasion, were small; and that must be a factor of some weight as Ms. Khubchand, on behalf of the Crown, has pointed out.

18 It could also be pointed out that this offender had no known stock, other than the drugs that which were recovered from him. He was not shown to be doing more than he did on this one occasion. There was no history of supply. He was, on the face of it, attempting to feed his own addiction, and, as we have said more than once, it was the first occasion when he had been involved in drug supply. He pleaded guilty at the first opportunity and we are in a position to appreciate that he has behaved well since he has been in custody.

19 Our attention has been drawn to a total of four local decisions, including the case of *R.* v. *Ramos* (4) in 2006; and *R.* v. *Gaiviso* (3) in

2005. Those authorities are of assistance to us but they do not seem to cast further light of great consequence upon the principles set out in the three authorities from which we have quoted.

20 In these circumstances, it seems to us that, in the light of all of the authorities, the sentence of 3 years and 4 months was somewhat too high. Custody, as has been said, was inevitable, and because of the aggravating features the case did certainly not fall at the bottom of what we may refer to as the *Afonso* bracket. But a sentence of $2\frac{1}{2}$ years would in our judgment have been appropriate. We therefore quash the sentence of 3 years and 4 months which was imposed, we substitute for it a sentence of 2 years and 6 months, and to that extent only, this appeal is allowed.

21 **STAUGHTON, P.** and **STUART-SMITH, J.A.** concurred.

Appeal allowed.