

Judgment 53/2006

Barry Wickenden, Roger Wickenden, Vincent John Rowley and Arthur Maurice le Prevost – Court of Appeal (Criminal Appeals 346-349) – 12th December, 2006

Importation of Class A and Class B drugs – applications for leave to appeal against sentence – starting point of 11 years on the first count unobjectionable in isolation – addition by the Royal Court of 5 years to this starting point to reflect the second count was too much – sentences on all four appellants reduced from 10 years to 8 years on the first count

IN THE COURT OF APPEAL IN THE ISLAND OF GUERNSEY

The 12th day of December, 2006 before Sir de Vic Carey, presiding,
Jonathan Philip Chadwick Sumption, Esquire, OBE, QC, and
Peter David Smith, Esquire, QC.

THE LAW OFFICERS OF THE CROWN

V

BARRY WICKENDEN

ROGER WICKENDEN

VINCENT JOHN ROWLEY

ARTHUR MAURICE LE PREVOST

On the application of each of the above Applicants for leave to appeal from sentences imposed on them by the Royal Court on 19th May 2006;

THE COURT, having on 11th December 2006 heard Advocates S. Mallett, S. L. Brehaut and A. J. Ayres for the respective Applicants and Crown Advocate G. D. McKerrill, thereon, this day GAVE JUDGMENT in the terms attached hereto and:-

- i) GRANTED all the applications for leave to appeal, and

- ii) ALLOWED the appeals against sentence to the extent that the term of imprisonment imposed on all four Applicants in respect of the First Count WAS REDUCED from ten years to eight years, and all other sentences were to remain unchanged, but to be served concurrently with the said term of eight years' imprisonment, all to run from 31st August 2005.

K.H.TOUGH
Registrar of the Court of Appeal

12th December 2006

**IN THE COURT OF APPEAL
(CRIMINAL DIVISION)**

**Before Sir de Vic Carey, (presiding) J.Sumption,
Esq., OBE, QC and P.Smith, Esq., QC**

**Barry Wickenden
Roger Wickenden
Vincent John Rowley
Arthur Maurice Le Prevost**

Applicants

(Criminal Appeals 347,348,349 and 346)

CAREY, J.A.,

The Offences and Sentences Imposed

1. This is the judgment of the court on applications for leave to appeal against sentence which the single judge directed be referred straight to the plenary court. These four applicants appeared before Lieutenant-Bailiff Finch and 11 Jurats on 19 May 2006, to face an indictment containing four counts. Guilty pleas had been tendered at a previous hearing. Counts 1 and 2 featured all four applicants and involved similar offences namely that of being concerned in the fraudulent evasion of the prohibition on importation of goods under the Customs and Excise (General Provisions) (Bailiwick of Guernsey Law), 1972, as amended, in the case of the first count a controlled drug of Class A, cocaine hydrochloride and in the case of the second count, a controlled drug of Class B, cannabis resin.
2. The third and fourth counts involved Rowley alone, who was driving a vehicle in which he and Barry Wickenden were apprehended. The third count involved doing an act, which impeded or was calculated to impede the seizure of a thing liable to forfeiture under Section 5(b) of the Customs Law and the fourth count involved driving in a manner dangerous to the public.
3. The sentences imposed on the first and second counts was the same for all four applicants, namely 10 years imprisonment from the date of arrest on the first count with five years imprisonment concurrent on the second count. Rowley received three months imprisonment consecutive on the third count with one month's imprisonment concurrent and disqualification for 3 years on the fourth count. Rowley does not seek leave to appeal against the sentences on counts 3 and 4.
4. There were also findings in respect of drug trafficking, which do not concern this court. The quantities involved were in the case of the cocaine, 100.75 grams with a local resale value of between approximately £8,060 and £10,075 and 80 bars of cannabis resin weighing 19.59 kilograms with a local resale value of between approximately £137,130 and £176,310.

The Facts

5. The Crown Advocate at the trial succinctly outlined these. It is immediately clear that apprehending the applicants involved a sophisticated surveillance operation on the part of the States of Guernsey Customs.
6. The first material observation was that Rowley was seen approaching Roger Wickenden who was seated in a motor vehicle in Allez Street at 11.12 am on the 23 August. Rowley appeared to have some paperwork in his hand. Later the vehicle 18898, which features in the third and fourth charges, was seen driving down Allez Street and into Vauvert. Likewise, Roger Wickenden's Mitsubishi was observed driving in the same direction with both Roger and Barry on board. Further observations were carried out on Barry Wickenden, who was seen to be going to the Bank and getting money, visiting the Condor ferry booking office and purchasing euros.
7. The observations then resumed on 31 August at 5.14 am when two men whom it appears were Le Prevost and Roger Wickenden were seen getting on a boat and going out of St Sampson's harbour. They returned about an hour later when it appears that they had had a problem with the operation of the vessel. Later that day at 1.40 pm, Roger Wickenden was seen to walk down the pontoon to this boat the Essequibo and he was followed by Le Prevost half an hour later. The vessel left St Sampson's harbour at 2.30 pm.
8. At 5.13 pm, Rowley was seen driving a white Bedford van 18898 along South Side. He then drove around to ascertain whether or not Customs Officers were in the vicinity (he admitted this was what he was doing in questioning). At about 5.34 pm, the Essequibo was observed approaching St Sampson's marina from the direction of Herm and a minute or so later 18898 was observed parking adjacent to the Vale Castle. Rowley was glancing out to sea in the direction of the Essequibo. The van was then taken back towards the Bridge and pulled into a parking space on the main road to the east of the area of quay known as Abraham's Bosom. The Wickenden brothers and Le Prevost were seen on board the vessel Essequibo, which went along side Abraham's Bosom.
9. Barry Wickenden ascended the ladder, whilst Le Prevost and his brother Roger remained on board. Rowley got out of the vehicle and was seen to place two holdalls into the passenger side of the van. Barry Wickenden then got into the front passenger side of the van and Rowley went to the driver's seat. The van moved off. Customs Officers tried to stop the van but were deliberately outwitted by Rowley who accelerated after an Officer touched his right arm. A second unmarked Customs vehicle started to drive out in front of the van, but was unable to effect a full road block as the van swerved around it and continued towards the Bridge.
10. As it continued, along North Side, a third unmarked Customs vehicle pulled across the opposite side of the road as the van approached and again the chase continued into Vale Avenue and Summerfield Road where a Customs vehicle clipped the back of the van as there was significant concern for the safety of other road users. The van came to rest on its side. Wickenden and Rowley were arrested and the bags removed from the vehicle. Meanwhile, the Essequibo moved from Abraham's Bosom and motored towards the pontoons on South Side. Roger Wickenden and Le Prevost were arrested as they walked along the pontoons through the South Side out of the marina exit gates.
11. After they were arrested, as always, the Customs carefully interrogated all four applicants. Their respective roles in the importation was explored, although as always in cases like this the information given by an accused person about himself and his co-accused can seldom be

verified and has to be treated by the sentencing court with a degree of caution. Certain further information was however gleaned from the interviews.

12. Firstly, it was established that Barry Wickenden had travelled to Holland and was met by a man who took him to another individual whom he called “the main man”, who sold him the drugs for (he says) approximately £5,000. The first man then drove him to Carteret and waited until his brother and Le Prevost picked him up. Barry Wickenden said that the suggestion for the trip had come from his brother Roger.
13. Le Prevost, who admitted to being the boatman, but initially denied any knowledge of the importation, had £540 in cash on him, which he said was not unusual as he had no bank account. [It later transpired that he had made a financial contribution to the purchase of the drugs]. He said he had been out in the boat to help navigate it a couple of times, but he was then told he had been observed on the boat on four occasions whereas he only admitted to having been out on it on two occasions. He accounted for this discrepancy by saying he had been confused.
14. Rowley admitted to being the driver and lookout and trying to get away from the Customs. He knew nothing of what had gone on in France, but had agreed with Roger Wickenden approximately two weeks previously that he would pick up the bags and he was expecting to be rewarded by one or two 9 bars of cannabis resin. There was also some enquiry into the ownership of the boat. It appears it was originally owned by Rowley, but then Roger Wickenden had paid the loan off on the boat, but the boat had remained in Rowley’s name until Barry Wickenden had come along approximately two weeks previously asking for a bill of sale, recording the consideration for the sale from Rowley to Barry Wickenden as £1. Rowley admitted to having been a user of cannabis resin in the past and this accounted for a pipe that had been found on his premises.
15. Roger Wickenden initially denied knowing anything about the controlled drugs in the holdalls and stated that Barry had “*got himself into something*”. After further questioning, Roger admitted that he had organised for Barry to meet the man in Holland. He said that for that sort of money he expected to get 5 kilos of cannabis resin, not 20 kilos and not cocaine as well. Roger admitted that he had spoken by telephone to the main man through someone else.

Grounds of Appeal & Submissions

16. The original grounds of Appeal for all four Appellants complain of the starting point of 16 years on the first count. The Royal Court chose to treat all four defendants in the same way and did not undertake a detailed review of the parts played by each defendant. However, in a very full Skeleton Argument, Mr Ayres sought to suggest that Rowley’s role had been to less than the others and in particular he had not been involved in financing the importation. His role had merely been that of driver. Roger and Barry Wickenden are represented by the same Advocate and she has put in on their behalf almost identical grounds of Appeal. .

The Submissions of Counsel before this Court

17. Mr Ayres drew attention to but did not repeat his points so clearly made in writing relating to Rowley’s perceived lesser role. On the starting point he reiterated the point that the starting point for the Class A count should have been ten and not eleven years and that in any event the increase in the starting point for the first count to take account of the second count was too great. He illustrated his point by endeavouring to identify what the appropriate sentence would have been had one had the indictment contained only one count of importing cocaine of a quantity twice the size of that which was imported. He suggested

that in such a case the starting point would not have exceeded 13 years. Miss Brehaut on behalf of Le Prevost restricted her submissions to the same point as did Miss Mallett on behalf of the Wickenden brothers.

The Conclusions Of This Court

18. Before considering the common issue of starting point we propose to look at the question of the roles played by each of the applicants. The main argument that there should have been allowance made for the different roles played by each offender comes from Advocate Ayres on behalf of Rowley. In our view Rowley's role was none the less a vital one if the operation in which all four men were engaged, was to succeed. He was the driver and look out. He did not go to France, but it was not a sudden decision on his part to assist his co-accused in this way. It was clear that he was in contact with them some days before the importation and that he knew that drugs were coming in on board the *Essequibo* and that he was to collect them. He was also happy to get involved in trying to save himself and his co-accused from detection by trying to outwit the customs including driving dangerously.
19. No such point is made on behalf of Le Prevost. At first he did not tell the truth about his involvement. He is however a man of 56 years of age and whilst the records of the other accused are really no longer material in considering sentencing, he does have the benefit of a completely clean record. The Court has given anxious consideration to the question of the role played by each participant particularly Rowley. The Court follows the conclusions of the Court below that it was in all the circumstances not appropriate to draw any distinction in the treatment of the four applicants. That said it seems inequitable that Rowley should be singled out for more severe treatment because of the way he conducted himself as driver of the getaway vehicle. Sensibly Mr Ayres has not troubled the Court with a separate application for leave to appeal against sentences on counts 3 and 4. We propose to order that all the sentences of imprisonment imposed in respect of Rowley should be served concurrently.
20. We now turn to the issue of starting point. The court was faced here with an importation of two drugs, a sizeable consignment of Cannabis resin, totalling nearly 20 kilos and a not inconsiderable quantity of Cocaine amounting to 100 grams. The bands for these quantities have been laid down in the decision of *Richards* which the court below endeavoured to apply. Clearly the bands for Class A drugs are generally higher than Class B, but the way that these two consignments fell to be treated was that if they had been imported separately, the bands for the individual importations would have been the same, namely 9 to 12 years. In the case of the Cocaine, 100 grams is right at the top of the scale and in the case of the Cannabis resin, 20 kilos is in the middle.
21. *Richards* gives guidance in paragraph 12 of the judgment as to how sentencing should be approached where two different drugs are imported at the same time. Basically the principle is, as the court below acknowledged that the court looks at both offences, decides what the appropriate starting point should be on each of them and then goes on to provide "for the total length of the sentence by imposing a greater term of imprisonment than otherwise would have been imposed for the more serious of the two offences (*if such can be identified*) to run concurrently with the other sentence imposed". The words in parenthesis are interesting because clearly the exercise is a little more complex where as in this case, the court is faced with two offences which call for roughly the same disposal.
22. One has to note that the Royal Court only imposed a sentence of 5 years imprisonment concurrent on the second count. The court admitted that the sentence here was less than it would have been had this charge stood in isolation, but with all respect the court may have

been misdirecting itself as to the totality principle in a case where that principle does not apply where the sentences are being imposed concurrently.

23. This Court does not consider it necessary to say that the starting point of 11 years on the first count looked at in isolation is wrong when the selection of 10 years would be unobjectionable on the part of these applicants. We do however see force in the argument that the addition of five years to that starting point is too much. No comparisons are foolproof, but it is interesting to note that had the offence been one of importing double the quantity of cocaine or one of importing double the quantity of cannabis resin the maximum starting points would have been 13 years and upwards of 11 years (30 kilos and above). We feel that here the starting point should have been 13 years and not 16. Leave to appeal is accordingly granted. Allowing a discount for plea and other mitigation the appropriate sentence should have been eight years imprisonment on count 1 and all other sentences to remain but to run concurrently. All four appellants will serve 8 years.