

Judgment 15/2012

**Dean Rodney Lamb & Peter John Fox v Law
Officers of the Crown – Court of Appeal
Criminal File Nos. 426 & 427
- 10th April, 2012**

**Appeals against sentences – co-accused – importation of a controlled drug – Class C Ketamine –
appropriate starting point for a large quantity drug of Class C – appeal dismissed.**

IN THE COURT OF APPEAL OF GUERNSEY

The 10th day of April, 2012 before Sir de Vic Carey, Presiding, Dame Heather Steel, DBE and
Jonathan Rupert Crow, QC

DEAN RODNEY LAMB

(Appellant)

-v-

THE LAW OFFICERS OF THE CROWN

(Respondent)

In the matter of the appeal, with leave, by the Appellant, from the sentence of 5 years 6 months
imposed on him by the Royal Court on 8th June 2011

WHEREAS on 12th March 2012 having heard Advocate D R F Domaille for the Appellant and
Advocate C Dunford for the Crown thereon;

AND WHEREAS, on the 13th day of March 2012 GAVE JUDGMENT and DISMISSED the appeal
and RESERVED its reasons;

THE COURT this day ISSUED JUDGMENT in the terms attached hereto.

J TORODE
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

The 10th day of April, 2012 before Sir de Vic Carey, Presiding, Dame Heather Steel, DBE and Jonathan Rupert Crow, QC

PETER JOHN FOX

(Appellant)

-v-

THE LAW OFFICERS OF THE CROWN

(Respondent)

In the matter of the appeal, with leave, by the Appellant, from the sentence of 6 years imposed on him by the Royal Court on 8th June 2011

WHEREAS on 12th March 2012 having heard Advocate A J Ayres for the Appellant and Advocate C Dunford for the Crown thereon;

AND WHEREAS, on the 13th day of March 2012 GAVE JUDGMENT and DISMISSED the appeal and RESERVED its reasons;

THE COURT this day ISSUED JUDGMENT in the terms attached hereto.

J TORODE
Registrar of the Court of Appeal

the Royal Court (Judge Finch and nine Jurats) on the 8th June 2011, following their guilty pleas to a joint charge of being knowingly concerned in the fraudulent evasion of the prohibition upon importation of a total of 943.5 grams of Ketamine, a controlled drug of Class C.

2. In granting leave, the Bailiff drew attention to the issue of the appropriate starting-point for a large quantity of Class C drugs and expressed the view that the time may have come for this Court to give some guidance on the issue. The Bailiff helpfully made certain requests of the Law Officers to furnish information for the benefit of this Court and we are grateful to the Crown Advocates for what they have produced.

Facts

3. The Appellants are 24 year old men from Southampton. Neither of them is a stranger to the misuse of drugs. Both have previous convictions. Fox was sent to prison in December 2008 for 23 months for supplying Class A drugs. Fox has had various labouring or manual jobs since that time. Lamb has had a steadier career as a refuse collector for the last six years.
4. Lamb says that he was forced into bringing the drugs across in order to settle a debt he owes to his supplier of drugs and that Fox came along to help him. Although they were known to each other and subsequent investigations showed they had both been involved in handling the whole consignment that they shared out between themselves prior to travel, on the Condor ferry they travelled separately. They arrived on the afternoon of 21st February from Weymouth. The first ashore was Fox who disembarked at 5.15 pm, followed 20 minutes later by Lamb. Fox was suspected of having drugs internally concealed. He was arrested and put into a paper suit in which he remained for two days until he passed the package of 69.32 grams of Ketamine. Lamb was found to have packages in his underpants which weighed 874 grams. Lamb did answer some questions. He said he felt his drug debt would be wiped out as a result of bringing the drugs to Guernsey. He was going to sail back to Portsmouth the same day and then get a train back to Southampton. He had been given the package the day before, together with £100 in expenses. He was going to meet somebody when he got to Guernsey but he could not say who or where. He denied any association with Fox. Fox made no comment to all the questions asked of him.

Ketamine

5. This is, we understand, the first importation of Ketamine to have involved the Royal Court. At trial Crown Advocate Dunford advised the Court of the information provided by Senior Customs Officer Falla who has developed expertise in the workings of the illicit drugs market. She said that Ketamine is legitimately produced as a general anaesthetic and had been used for this purpose on humans and animals, although it is commonly known as a horse tranquiliser. The legitimate drug is usually produced in liquid form which is injected. The illegally produced version comes as a crystalline white powder which is usually snorted up the nose or swallowed. So far as valuation, she proffered the belief that the Ketamine price in Guernsey would be 3.125 times higher than the UK price which is believed to be £25 a gram. Using this calculation she put a figure of between £70,762.50 and £75,480 on the consignment.

The comments of the Sentencing Court

6. Well composed pleas in mitigation were presented by Advocates Domaille and Ayres respectively. Both Advocates were sceptical about SCO Falla's valuation.
7. Judge Finch went on to say that this was by far the largest importation of a Class C controlled drug that the Court had come across. The Judge then referred to the Court having, as a general rule, taken as a starting-point around half that laid down by the Court of Appeal (presumably in *Richards* and other cases) for Class A drugs.

8. The Court then identified that if it were dealing with over 400 grams of a Class A drug in powdered form, the starting-point would have been 14 years, but rather than choosing one half of that figure, the Court after reminding itself of the statutory maximum for this offence of 10 years took the view that the large amount called for a starting-point of 8 years. Quite rightly, in our view, the Court ended by concluding that the facts of the case were unique and that it was not appropriate to lay down specific guidelines. The Court considered that guilty pleas were inevitable and that full discounts were not appropriate. The prison sentence imposed for Lamb was five and a half years and for Fox six years.

Appellants' Arguments before this Court

9. In his written and oral submissions on behalf of Lamb Mr Domaille makes two points. The first is that the wrong starting-point was selected so the starting-point of 8 years is considerably higher than the Court would have given when sentencing for an equivalent quantity of a drug from the higher band, i.e. Class B drug. The Royal Court should either have discounted by two-thirds the Class A starting point for an equivalent weight (under the *Richards* guidelines) or discounted by one third the Class B starting point for an equivalent weight (under the *Turner* guidelines), rather than halving the band for the Class A drug in powdered form to reach the appropriate starting-point. Secondly, Mr Domaille argued that given that the maximum sentence for the importation of Class C drugs is 10 years, one would expect the upper end of the 10 year period to be reserved for the most significant importations in weight and sophistication and therefore the 8 year starting-point again is not appropriate.
10. In his written and oral submissions on behalf of Fox, Mr Ayres took a number of points. First, he said that the Royal Court wrongly differentiated between different drugs within Class C (contrary to the indication given in *Richards* at paragraph 13). Secondly, he submitted that it is wrong to adopt a tariff of one half of that applicable to the Class A drugs in powdered form. Instead it should have been one half of that applicable to Class B drugs in powdered form. The basis for that submission was the mathematical point that the maximum sentence for Class B drugs is twice that for Class C. Thirdly, he submitted that the starting point in this case was in any event too high all in the circumstances. In particular, he submitted that the sentence in this case left insufficient room for future cases which might involve significantly larger importations. Finally, he invited this Court to lay down guidelines for sentencing in relation to the importation of Class C drugs.

The Crown Advocates' Submissions following the request made by the Bailiff

11. The Crown Advocates have put in a helpful bundle of authorities and submissions. The position in England and Wales for an equivalent offence is to be found under Section 117(2) of The Customs and Excise Management Act 1979, and under Section 3 of The Misuse of Drugs Act 1971. The maximum sentence for offences under that legislation in respect of Class C importations is 14 years custody and/or an unlimited fine (the same as that imposable in respect of Class B drugs). That is in fact more than the maximum in Guernsey which is 10 years and considerably more than that in Jersey which is 5 years. The situation in Jersey is clearly different and there is only one relevant decision of the Royal Court of that Island – *Page and others*, where the Court imposed a sentence within the limits there imposed upon it. Apart from referring to the *Richards* guidelines and the Class C decisions of the recent past, the Crown Advocates reminded us of the Royal Court decision in *Turner* which was a relatively rare importation of amphetamine where the Court laid down suggested guidelines for importation of Class B drugs in powder or capsule form.
12. The Crown Advocate went on to append the Sentencing Council Drug Offence Definitive Guidelines, published on the 24th January of this year. Dealing with importation offences which in practice make up half or more of the cases coming before the Royal Court, the Council has directed that a court in England and Wales should determine the offenders' culpability (role) and the harm caused (quantity) with reference to tables which it has published. We will revert to issues of role later, but the *Richards* Guidelines are very clear in

dealing with weight or numbers where the Class A drug is in tablet or other individual dose form.

13. By way of example, we set out Category 2 of the English Definitive Guideline relating to quantity in importation cases. This identifies three Class A drugs, two Class B drugs and one Class C drug which happens to be Ketamine:-

<i>“Heroin, Cocaine</i>	-	<i>1 kg;</i>
<i>Ecstasy</i>	-	<i>2,000 tablets;</i>
<i>LSD</i>	-	<i>25,000 squares;</i>
<i>Amphetamine</i>	-	<i>4 kgs;</i>
<i>Cannabis</i>	-	<i>40 kgs;</i>
<i>Ketamine</i>	-	<i>1 kg”</i>

The Crown’s supplemental submissions

14. Following receipt of the written submissions of the Appellants’ counsel to which we have referred, Mr Dunford put in further submissions. These reminded us of the acceptance by this Court in *Richards* and other decisions of the development of a distinct sentencing policy for drug offences in Guernsey and the need for appropriate modifications of this to take account of changing circumstances. Mr Dunford also drew attention to the decision of the States in 2007 to increase the maximum sentence for importing Class C drugs to the levels pertaining in the UK, a resolution which has taken some time to implement in the form of a projet de loi currently before Her Majesty in Council. He also appends the full statement from SCO Falla in which she avers to her experience of street prices for all drugs being higher here than in the UK. He also introduces further information from SCO Falla on the way in which the illicit drugs market has developed here and elsewhere with the appearance of Emerging Drugs of Concern (“EDOCS”) commonly known as “legal highs” until they were outlawed by legislation adding them to the Schedules to the 1971 Law.
15. At the hearing, we were also presented with some further material, including the ACMD Technical Committee Report on Ketamine from 2004, which was not before the Royal Court. This Report provides helpful information on the effects of Ketamine.

Discussion & Conclusions

16. Although in *Richards* no mention is made of specific drugs (other than cannabis resin) when setting out the bands for Class A and Class B drugs in powder or tablet form it appears that only three or four drugs have featured in the majority of prosecutions before and after that decision. The Class A drugs in powder form have been diamorphine (heroin) and cocaine including crack cocaine and in tablet or individual dose form MDMA and in earlier times LSD. Class B importations have been almost entirely of cannabis and cannabis resin. As was made clear at the time in the decision in *Turner* amphetamine and other Class B importations have become rare.
17. However, Class C appears to be a much wider category including many different (and an increasing number) of drugs. As a result, it may in due course become appropriate to revisit the views expressed in paragraph 13 of *Richards*, namely that no differentiation should be made between different drugs within the same Class. However, that is unnecessary in this case, because we see nothing to suggest that the Royal Court did differentiate between Ketamine and any other Class C drug. The Sentencing Remarks were directed towards the large volume of drugs involved, the fact that this was the first recorded importation of Ketamine to Guernsey, and its likely value. That disposes of Mr Ayres’ first point.

18. We also reject his third point. If it were correct, it would lead to the result that the Royal Court could never impose the maximum sentence in any given case, because no matter how large an importation might be, there would always be the possibility that an even larger one might be encountered at some point in the future. We consider that the Royal Court in this case was entitled to sentence on the basis that this was the largest importation of Class C drugs yet encountered in Guernsey.
19. The harder question is whether one half of the Class A tariff is the correct starting point in relation to a Class C drug case. So far as that is concerned, we would make the following observations. First, any starting point is to some extent arbitrary. Secondly, any starting point for one Class of drugs which seeks to derive its legitimacy from a mathematical comparison of the maximum sentences for that Class and another Class of drugs is necessarily dependent on the respective levels of those maximum sentences, which can obviously change from time to time depending on medical and political considerations. Thirdly, as we have already mentioned, Class C drugs appear to represent a wider constituency than Classes A and B. Fourthly, we do not consider that this Court is currently equipped, on the basis of the material available in this case (which continued to be added to during the hearing) to set down general guidelines for Class C sentencing. With these factors in mind, we feel constrained to decline the invitation to provide such guidelines.
20. That leaves us with the narrower question whether the Royal Court erred in arriving at 8 years as the starting point in this particular case. We do not consider that it did. Without suggesting that one half of the Class A tariff is necessarily or generally the appropriate starting point in all Class C cases, in this particular case we consider that it provided an appropriate starting point, bearing in mind the special factors that were present here. The Court below referred to the consignment being a large quantity and we find support for that assertion in the reference in the English decision of *R v. Johnson* to a consignment of 612 grms of pure Ketamine in liquid form being sufficient to make just over 2600 deals. It is suggested that the Ketamine trade in Guernsey may have been stopped in its tracks by the arrest of these Appellants. We know not, but the way in which these Appellants conducted themselves before and after apprehension points to this being a sophisticated attempt to bring drugs into the island in a similar manner to many importers of Class A and B drugs who have gone before. Earlier case law has tended not to explore the significance of a defendant's role in any given case of importation, and indeed it is usually impossible to place the average carrier of drugs through the Island's ports in the hierarchy of that particular part of the drugs trade. One has to acknowledge that the captains of that industry are hardly likely to be dicing with potential loss of liberty in the baggage halls of the ports of Guernsey, but these Appellants seem to know what they were doing and it appears likely that they were to have been handsomely rewarded for their troubles. If Lamb (who was the more communicative of the two) is to be believed the benefit in his potential release from substantial indebtedness would have been significant. We know less about Fox's motivation as he said nothing in interview but like the Royal Court we take note of his recent drug trafficking conviction in England.
21. The sentences imposed here were substantial, but we find no fault with the approach of the Royal Court in sentencing these particular offenders and that notwithstanding that the starting point selected was four fifths of the current maximum sentence. The sentences are not manifestly excessive and both appeals are dismissed.
22. Before leaving this appeal one of our number was the presiding judge in the Royal Court in the case of *Turner* when the Court transposed the bands in *Richards* applicable to Class A drugs to provide that where Class B drugs were involved the tariff should be 2/3 of that for Class A. Whilst *Turner* is not binding and amphetamine importations have remained rare we were told that *Turner* is still of relevance as a number the EDOCS referred to above have been added to Class B. The problem which we identify is the arbitrariness of laying down parallel scales for the same drug depending on whether it is in capsule or powder form. Medicinal drugs in capsule form are regularly manufactured in different strengths depending

on the clinical needs of patients. As we have noted, in sentencing offences involving Class A Drugs the problem does not arise as Class A tablet cases have concerned almost exclusively MDMA and powder cases almost exclusively cocaine and diamorphine. These will be issues for the Royal Court if called upon to revisit Turner.