**Judgment 28/2013**

**Stephen Dale Risbridger v Law Officers of the Crown**
**Court of Appeal**
**Appeal No 452**
**11th September 2013**

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**Appeal against sentence imposed by the Royal Court on seven counts of being knowingly concerned in the fraudulent evasion of the prohibition on importation of goods (controlled drugs).**

Approved Text
11.09.2013

**IN THE COURT OF APPEAL OF GUERNSEY**

**CRIMINAL DIVISION APPEAL No 452**

**11th September 2013**

**Before:** **The Hon. Michael Beloff QC Presiding**
**John V Martin QC**
**Christopher G Nugee QC**

**Between:** **STEPHEN DALE RISBRIDGER** — **Appellant**

**-V-**

**LAW OFFICERS OF THE CROWN** — **Respondents**

**Advocate D Domaille for the Appellant**
**Crown Advocate C Dunford for the Crown**

**Authorities, laws & texts referred to:**

The Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972
The Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended
*Richards v The Law Officers* (17 April 2002)
The Court of Appeal (Guernsey) Law 1961
*O'Dette v The Law Officers* (28 March 2007
*R v Guy* [1999] 2 Cr App Rep (S) 24
*Jones v DAS Legal Expenses Insurance Co Ltd* [2004] IRLR 218
*Smith v Kvaerner Cementation Foundations Ltd* [2007] 1 WLR 370

**Judgment of the Court delivered by NUGEE, JA**

## Introduction

1. This is an appeal against sentence alone. Leave to appeal was given by the Bailiff, sitting as a single Judge of the Court of Appeal, on 13 June 2013.

2. The Appellant Stephen Risbridger pleaded guilty to 6 counts on a 7 count indictment (the remaining count, Count 6, did not apply to him but to his co-defendant Ms Kelly). Each charged him with being knowingly concerned in the fraudulent evasion of the prohibition on importation of goods contrary to section 77(1)(b) and (2) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972, as amended. In each case the prohibited goods were controlled drugs, the prohibition on importation being imposed by section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended.

3. He was sentenced by the Royal Court (Judge Finch and 9 Jurats) on 9 April 2013. The counts, and the sentences of imprisonment imposed, were as follows:

| | | |
|---|---|---|
| Count 1 | 5,402 tablets MDMA (Class A) | 12 years |
| Count 2 | 11.975kg Cannabis resin (Class B) | 6 years |
| Count 3 | 2 x 10ml phials Trenbolone Acetate (Class C) | 12 months |
| Count 4 | 1 x 10ml phial Boldenone Undecenylate (Class C) | 12 months |
| Count 5 | 2 x 10ml phials Testosterone Propionate (Class C) | 12 months |
| Count 7 | 0.35g Cocaine (Class A) | 7 days |

All the sentences were concurrent, so the total term of imprisonment was 12 years.

## Facts

4. We take the facts from the prosecution outline put before the Royal Court, which we were told was agreed as the basis for sentence.

5. The offences were all committed on Sunday 29 July 2012. The Appellant was at that time living with his then partner, Ms Kelly, in Hayling Island. On the previous Tuesday Ms Kelly booked the Appellant onto the Poole to Guernsey ferry as a foot passenger; the next day she booked herself onto the same ferry with a car, a Ford Puma. On Saturday the two of them travelled in the car from Hayling Island to Poole, and on Sunday they drove to the ferry terminal where the Appellant got out of the car and boarded as a foot passenger. Ms Kelly boarded the ferry with the car.

6. They interacted on the ferry but sat in their separate pre-booked seats. They disembarked separately and the Appellant passed through the terminal without being stopped. He waited for Ms Kelly for about 15 minutes. Ms Kelly disembarked in the car and was stopped by customs officers. The car was searched and a large package wrapped in gift paper was found in the boot. It contained the MDMA (ecstasy) tablets, cannabis and 6 phials, 5 of which were found to contain the Class C drugs, which were the subject of Counts 1 to 5.

7. The Appellant went to the Cobo Bay Hotel. He had a mobile phone with him but it appeared not to be working as he asked if there was a payphone and then borrowed a phone from a man in the bar (not connected with the offence) to make a call. His contact later called back and the Appellant took the call. He then said to the witness words that he had got himself into right trouble. Shortly after this he was arrested at the hotel.

 

8. A small paper wrap containing cocaine was found on him. This was the subject of Count 7.

9. He was interviewed 4 times before charge. Beyond admitting the importation of the cocaine, he denied involvement in the offences, denying all knowledge of the package in the car. He also denied that Ms Kelly had anything to do with the offences, saying that she had not put the package in the car, and he wouldn't have dreamed of letting her drive the car if he had known about the package. He was then charged.

10. On 19 September 2012 (before any of the committal papers had been served on the defence) he indicated via his advocate that he would plead guilty; and he did plead guilty to all counts at a pleas and directions hearing on 18 October 2012. His case was adjourned for sentence pending the outcome of the trial of Ms Kelly.

11. After pleading guilty, the Appellant was asked if he would be prepared to speak to customs officers with a view to possibly giving evidence against Ms Kelly. He agreed to this and was interviewed. It was however decided, after reviewing what he said, and in the light of his previous lies in the pre-charge interviews and his attempts there to exculpate her, that he was not sufficiently credible to be used as a prosecution witness and so he was not called to give evidence in her trial. She was tried in February 2013. Save for Count 6 (which concerned the cocaine), she was acquitted.

12. The Appellant was also not able to provide any information to the Guernsey Border Agency beyond information already known about those potentially involved locally. Arrests were made of persons suspected to be involved who were resident in Guernsey but these arrests were prior to the Appellant giving any information to the GBA and no further action was taken against any of them. The view of the GBA and the prosecution was that the Appellant did not give any information of value to the investigation of anybody, including Ms Kelly.

13. In addition to the facts as set out above, all of which were detailed in the prosecution outline, the Royal Court, when sentencing the Appellant, also had before it two letters from him which contained some statements as to the facts, as follows.

14. According to the Appellant's account in the first of these letters, he and Ms Kelly had met a man on a previous trip to Guernsey who had asked if they could bring in some cannabis. They had exchanged phone numbers. He and Ms Kelly were later contacted. He had agreed despite his initial reluctance, only because Ms Kelly kept on at him about it. He had arranged to pick up the drugs, which he did at a motorway service station on the M5. He was given a phone number and entered it into his phone. He claimed that Ms Kelly was due to travel on a different ferry and he was dismayed to find she was on the same one; he had got out of the car and embarked as a foot passenger so as to distance himself from the affair.

15. Also according to the Appellant in these letters, he had agreed to speak to the GBA and tell them what he knew and the name of the man who had organised the importation and was due to receive the drugs in Guernsey. In prison he was told by an inmate that if he gave evidence against a certain person his life would be at risk. He was then moved onto a wing for vulnerable prisoners, where he found he could no longer work (as he had been doing) and he found himself sharing his life with those who had committed sexual offences against children. We were told by Advocate Domaille, on instructions, that he was moved because the conversation which contained threats against him was overheard by a prison officer.

**The sentences passed by the Royal Court**

16. We have set these out above. The leading case on sentencing for offences such as these is that of this Court in *Richards v The Law Officers* (17 April 2002) (*"Richards"*) and the Royal Court followed the guidance there given.

17. The reasoning of the Royal Court can be summarised as follows:

    (1) The more serious counts were Counts 1 and 2 which involved Class A and Class B drugs. It was the task of the Court to select appropriate starting points for each of those counts and then determine a total starting point.

    (2) The guideline band of sentences for these counts (as set out in *Richards*: see paragraph 10) were

    Count 1 (5,402 MDMA tablets)

    | | |
    |---|---|
    | 4,000 to 5,500 tablets (Class A) | 11 to 14 years |

    Count 2 (11.975 kg cannabis resin)

    | | |
    |---|---|
    | 10 to 30 kg (Class B) | 9 to 12 years |

    (3) Count 1 was therefore the more serious. The Court adopted a starting point of 14 years for this count, and 9 years for Count 2.

    (4) The Court's combined starting point for both Counts together (and also the Class C offences in Counts 3 to 5) was 18½ years.

    (5) The Court then addressed mitigation. It gave full credit for the Appellant's good work record, early guilty pleas and long period without convictions. In relation to his offer to assist the prosecution it said

    > "We note your willingness to give evidence, but you lied extensively earlier on and understandably could not be relied upon, but the offer was there."

    Taking account of all these matters, the Court gave a discount of just over one third to reflect these factors. The Court said that it also noted the Applicant's letters which it had carefully considered as well.

**Grounds of appeal**

18. 5 grounds of appeal were advanced in the Appellant's Perfected Grounds of Appeal, referred to below as Grounds 1 to 5.

19. The Bailiff, in giving leave to appeal, said that he found no merit in Grounds 1, 2 and 4 but considered it appropriate to grant leave on Grounds 3 and 5. However it has not been suggested before us that this limits the right of the Appellant to argue all the grounds. This would seem correct, as section 24(c) of the Court of Appeal (Guernsey) Law 1961 simply provides that a person convicted may appeal to the Court of Appeal, with the leave of the Court, against the sentence passed on his conviction; and we have not been shown any provision or authority which would suggest that in giving leave the single Judge (or the full Court) can limit the leave to particular grounds.

20. In the event Advocate Domaille did not pursue Ground 5. This was in our view a realistic position to take for reasons we explain below.

**Ground 1: the Appellant's role**

21. Ground 1 is that the Royal Court was wrong to identify the starting point of 14 years for Count 1 as it did not take account of the limited role that the Appellant played, which

Advocate Domaille described as that of courier. He relied on the statement in *Richards* (at paragraph 8) that

> "The starting point has to be determined primarily by considering two factors, the quantity of the drugs and the involvement or role of the defendant in the commission of the offence."

22. In common with the Bailiff when considering leave to appeal, we do not consider there is anything in this point. The Appellant in his first letter sought to lay much of the blame on Ms Kelly but it was accepted before us that, she having been acquitted, we cannot proceed on the basis that she had any responsibility for his involvement; and in any event he falls to be sentenced for his own admitted role in the matter regardless of her position. On his own account, he was responsible for arranging to collect the drugs from the supplier, did collect them at the M5 service station and brought them down to Hayling Island; he was also the one who took the relevant contact number, and once in Guernsey, contacted the person due to receive the drugs. This seems to us to be a more active role than that of a simple courier; but what is important is not the label but the degree of involvement in the offence. The Appellant was fully involved in the arranging and carrying out of the importation; and his attempts to distance himself on the ferry by embarking and disembarking separately from the car in which the drugs were being carried does nothing to minimise his role.

23. In these circumstances we see no error in the Royal Court adopting the starting point that it did. The relevant band as set out in *Richards* covers quantities of between 4,000 and 5,500 tablets, and the quantity here imported was 5,402 or in other words very near the top of the band. If the quantity had been over 5,500 the appropriate sentence would have been "14 years upwards". We do not find it surprising that the Royal Court therefore said that on Count 1 the matter was at the top of the scale.

24. Advocate Domaille submitted that the Appellant was not as culpable as, for example, a drugs baron, and that if he received the maximum starting point within a particular band there would be no room for the more serious offenders. We do not think this point is right. The guidelines are said in *Richards* to be for cases which normally come before the courts in Guernsey (paragraph 9); and it is also expressly said that there may be cases where the criminality of the offender will call for an enhancement of the starting points (paragraph 8). The Appellant as we have sought to explain had a central responsibility for this particular importation, and it seems likely that his role or involvement was no less than many of those whose cases normally come before the courts. If a person came before the courts whose criminality was regarded as significantly greater, there would be no difficulty in departing from the guidelines to accommodate such a case.

25. As it is, we consider that the Royal Court was justified in regarding the combination of the quantity of drugs (being very nearly at the top of the band), and the Applicant's admitted role in the importation of them, as meriting a starting point of 14 years.

26. We reject this ground of appeal.

**Ground 2: lack of sophistication**

27. Ground 2 is that this was an unsophisticated operation. In *Richards* the Court said (at paragraph 8):

> "The greater the sophistication of the methods used to evade detection, the more seriously will the offence be regarded."

Advocate Domaille pointed to the fact nothing had been done here that could be described as an attempt to evade detection, the drugs being merely wrapped in gift paper and the parcel being left in the boot.

28. We agree that this was an unsophisticated, even crude, operation. But, again in common with the Bailiff, we do not think this can be used to reduce the starting point from what it would otherwise be. The starting point, as we have already said, is primarily based on the quantity of drugs and the role of the offender. No doubt, as said in *Richards*, the use of elaborate attempts to avoid detection can be an aggravating factor that justifies an increase in the starting point; but we do not think it follows that a failure to do so is in any sense a mitigating factor, or can be relied on to reduce the starting point.

29. We reject this ground of appeal.

**Ground 3: totality**

30. Ground 3 is that the total sentence imposed was a breach of the totality principle established in *Richards*.

31. The guidance given in *Richards* (paragraph 12) for the case where there are 2 different drugs imported at the same time is as follows:

> "It is a feature of some cases that two different drugs are imported at the same time, both in significant quantities. It may be two different Class A drugs, or a Class A drug and a Class B drug. In such cases the combined quantity is a relevant factor in determining the extent of the criminal conduct, which must be greater than if only one drug was imported. In such cases the court should assess the appropriate starting point in respect of each of the drugs, and then determine a 'total' starting point, taking into account the overall quantity. Thereafter the mitigation will be applied to arrive at the actual sentences to be imposed. The court then provides for the total length of 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. Consecutive sentences should not normally be imposed in such cases, since that may create a misleading impression that each offence is being sentenced more leniently than it is. The court must clearly state in any such case both what the court considers to be the appropriate 'total starting point' and how it is arrived at."

32. There is no dispute that the Royal Court followed the methodology there laid down. The complaint is that the total starting point, of 18½ years, was too high. Advocate Domaille referred us to the decision of this Court in *O'Dette v The Law Officers* (28 March 2007). In that case two appellants had imported 89.9g of cocaine (count 2). They also imported 404 tablets which they believed to be ecstasy but which were in fact made of uncontrolled substances; on this they were therefore charged with a conspiracy count (count 1). The Royal Court had adopted starting points of 11 years (count 2) and 8 years (count 1) and a total starting point of 12 years; the Court of Appeal varied this by adopting a starting point of 10 years for count 2 and a total starting point of 11 years. They did not identify a separate starting point for count 1, but the sentence ultimately passed for count 1 on one of the appellants was 4½ years.

33. Advocate Domaille's submission was that this indicated that an appropriate addition for the less serious count was a small addition – in that case only 1 year out of 4½ years or just under a quarter.

34. We do not think that any such principle can be extracted from *O'Dette* for a number of reasons:

(1) It is well established that sentencing is not a mechanical or mathematical exercise (as indeed the Royal Court said in this case). It varies from case to case. For this reason alone it is not safe to attempt to extract a principle or practice on the basis of a single case.

(2) *O'Dette* had an unusual feature in that count 1 involved an importation of a substance which turned out to be uncontrolled. The Court of Appeal regarded this as something which could not be ignored and which should be reflected in the sentence. Since they did not indicate what the starting point for this count would have been on its own, it is not possible to know what effect this factor had on the overall sentence.

(3) It was also a feature in *O'Dette* that the amount of tablets involved in Count 1 was only 404, that is within the lowest of the *Richards* bands for Class A tablets (0 to 500). That is not the case in the present case where the amount of cannabis involved in the less serious count was itself in the second highest band (10 to 30 kgs). The two situations are not necessarily comparable.

(4) Finally, it may be noted that the Royal Court in *O'Dette* had increased the starting point for Count 2 from 11 years to 12 years in arriving at its total starting point or in other words it only added 1 year for Count 1. Since the Court of Appeal itself took a less serious view of Count 1 (because of the consideration that the tablets were not in fact a controlled drug), it might have thought it inappropriate to increase the starting point by any more than a year, although one can see that they did not reduce it.

None of this is a safe guide to what the Court in *O'Dette* would have thought appropriate if the less serious count had involved, as it did here, a substantial quantity of controlled drugs. We therefore do not find the attempt to extract from *O'Dette* a mathematical correlation between the starting point for the less serious offence and the appropriate addition to the total starting point a useful one.

35. Nevertheless we must ourselves stand back and look at the total starting point selected by the Royal Court to see if we consider it manifestly excessive. We do not think it is. It is clear from the guidance in *Richards* that the importation of two drugs at the same time merits an addition to the starting point. The appropriate addition cannot be nicely weighed; in the present case the Royal Court took into account that the quantity of cannabis would by itself have merited a starting point of 9 years (a figure which they described as merciful, being the lowest tariff for that band); and they also took into account the Class C drugs. In these circumstances we do not think the addition of 4½ years to make a total starting point of 18½ years can be regarded as manifestly excessive, or one with which we can interfere.

36. We therefore reject this ground of appeal.

**Ground 4: credit**

37. Ground 4 is that insufficient credit was given to the Applicant for the combination of his early guilty plea and the offer of assistance to the prosecution. As set out above, the Royal Court reduced the sentence from the total starting point of 18½ years by "just over a third" to reach a sentence of 12 years. (The discount is in fact about 35%).

38. Advocate Domaille concentrated his oral submissions on one point, which is that the Royal Court had taken insufficient account of the consequences for the Appellant of his having expressed willingness to assist the prosecution, namely the threats to him which led to his being moved to the Vulnerable Prisoners wing.

 

39. He referred to the decision of the English Court of Appeal in *R v Guy* [1999] 2 Cr App Rep (S) 24, where the Court referred to the earlier decision of *R v King* (1986) 82 Cr App Rep 120. In that case Lord Lane CJ said this (at 122):

> "One then has to turn to the amount by which the starting figure should be reduced. That again will depend upon a number of variable features. The quality and quantity of the material disclosed by the informer is one of the things to be considered, as well as accuracy and the willingness or otherwise of the informer to confront other criminals and to give evidence against them in due course if required in court. Another aspect to consider is the degree to which he has put himself and his family at risk by reason of the information he has given; in other words the risk of reprisal. No doubt there will be other matters as well. The reasoning behind this practice is expediency."

*Guy* was cited with approval in *Richards*, but with one qualification which we refer to below.

40. *Guy* indicates as one would expect that there are a number of factors of which account has to be taken when considering a discount for the offer of assistance to the prosecution. One is the quality and quantity of the information. In the present case that is of little assistance to the Applicant. The agreed facts which formed the basis of sentence were that the evidence he was willing to give against Ms Kelly was not regarded as of value by the GBA or the prosecution; and the other information he provided was not of value either. This was for two reasons: it did not give the prosecution any leads that were not already known to them, nor, in the light of his lies when first interviewed, was he regarded as a witness that could be put forward with any credibility. As the Royal Court said,

> "We note your willingness to give evidence, but you lied extensively earlier on and understandably could not be relied upon, but the offer was there."

41. Advocate Dunford cautioned us against attempting to form our own view of how useful his offer of assistance had been. We have not seen the information he provided, nor any explanation of why it was not thought to be of value beyond what we have already referred to. He said that it must be for the prosecution to assess whether information provided is of any real value, or an offer to give evidence is in the event one that the prosecution regard as worth taking up. Although there is clearly a public policy (referred to in *Guy* and in *Richards* itself) in encouraging criminals to give information and evidence against others, there is also a danger if the sentencing court too readily gives credit for an offer of assistance that in the end is adjudged to be of no value. It would be all too easy for a person to claim to be willing to offer assistance in the hope of attracting credit but to avoid telling the authorities anything they did not already know.

42. There is considerable force in these submissions and we certainly acknowledge how difficult it is for a sentencing court itself to assess the value or utility of any information provided. But in *Richards* this Court said that it accepted *Guy* with one qualification, which was explained as follows:

> "But it is not just the willingness of the accused to give such information, nor the risk that he or she runs, that is relevant. Other circumstances of the case are beyond the accused's control and may be very much a matter of chance. For example the accused may not in fact have the opportunity to give evidence. In many cases the credibility of the accused will be weak, by the nature of the crime in which he has been involved. It may be a matter of chance whether there is available corroboration which might make his evidence more credible. However none of these difficulties must be allowed to erode the principle we have expressed to the effect that in all

> cases where there is a genuine attempt to provide information credit should be given."

These words fit the present case. It was not disputed that there had been a genuine attempt to provide information, and it was a matter of chance whether that information told the GBA anything new or (as turned out to be the case) did not. We think that loyalty to the decision in *Richards* requires that some credit should be given.

43. In addition as we have said Advocate Domaille concentrated his submissions on the fact that there was evidence that the Applicant had received threats which were sufficiently credible for the prison authorities to move him for his own protection. The Royal Court was not specifically referred to *Guy*, although they were referred to *Richards* which as we have already said cites *Guy*; Advocate Domaille also referred them to the fact that in one of his letters the Applicant explained that he was moved because of fears to his safety. In their sentencing remarks, the Royal Court referred to having carefully considered these letters.

44. It is not however clear from their sentencing remarks to what extent the Royal Court had regard to the guidance in *Guy* and *Richards*. But whether they did or not, the question for us is whether in these circumstances the credit given of just over a third was sufficient. In our judgment it was not and paid insufficient regard to the principles we have sought to identify from *Guy* and *Richards.* We consider that an appropriate discount would be of the order of 40% rather than 35%. With a total starting point of 18½ years, this would result in an overall sentence of 11 years.

45. We will therefore substitute a sentence of 11 years' imprisonment for Count 1. It is not necessary to disturb the sentences on the other counts.

**Ground 5**

46. We add a footnote on Ground 5, although it was not in the event pursued by Advocate Domaille as we have noted above and therefore does not affect our decision.

47. Ground 5 was based on the fact that certain of the Jurats who participated in the sentencing exercise had also participated in Ms Kelly's trial. In the course of her trial she had given evidence more adverse to the Appellant in terms of his responsibility for the offence and his past involvement with drugs than the agreed facts on which he was to be sentenced.

48. The Bailiff said that he would have given leave on this ground as

> "the issue raised … has not, to my knowledge, been raised before in exactly the same circumstances."

49. We do not need to consider whether there are any, and if so what, circumstances in which it may be a ground for reducing a sentence (or, if there has been a trial, for quashing a conviction) that Jurats involved in that process have previously participated in proceedings in which evidence adverse to an Appellant had been given, although we note, and agree with, the observations of the Bailiff that

> "Unlike an English jury, the Jurats are established jurymen. *"The Jurats are holders of judicial office and are far more experienced in the affairs of law and legal procedure than the normal jurymen in the United Kingdom"* as Le Quesne JA observed in *Tilley v The Law Officers* (27 November 1973)."

We think there is likely to be much to be said for the proposition that Jurats can generally be trusted to put out of their minds matters which are not properly relevant to the sentencing exercise.

50. Be that as it may however, there was in this case a complete answer to this Ground, namely that with full knowledge of the composition of the Court objection to it was expressly disavowed. Informed waiver is a defence to an allegation of breach of the rule against apparent bias: *Jones v DAS Legal Expenses Insurance Co Ltd* [2004] IRLR 218, *Smith v Kvaerner Cementation Foundations Ltd* [2007] 1 WLR 370. As we have said Advocate Domaille abandoned this ground at the outset of his submissions, and in our view he was wise to do so.