



**Craig Alan Dodd & Oliver Robert Butler v
Law Officers of the Crown**
Court of Appeal
23rd July 2015

**JUDGMENT
34/2015**

Applications for leave to appeal against convictions imposed by the Royal Court on 10th November, 2014.

Approved Text
23.07.2015

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION – APPEAL NOS. 466 & 467

23rd July, 2015

Before:

**Sir Hugh Bennett, President
George Bompas QC
Sir Michael Birt**

Between:

CRAIG ALAN DODD

First Applicant

OLIVER ROBERT BUTLER

Second Applicant

V

LAW OFFICERS OF THE CROWN

Respondent

**Advocate P Cobb for the First Applicant
Advocate R Eeles for Second Applicant
Crown Advocate F Russell for the Respondent**

BIRT JA

THIS IS THE JUDGMENT OF THE COURT

1. At a trial before the Royal Court (Judge Finch and Jurats) beginning on 10th November 2014, the applicants faced an indictment containing two counts as follows:-

“Count 1

Statement of Offence

Being knowingly concerned in the fraudulent evasion of the prohibition on importation of goods; contrary to section 77(1)(b) and 77(2) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972, as amended.

Particulars of Offence

CRAIG ALAN DODD, on the 15th February 2013, in the Island of Guernsey or elsewhere, was knowingly concerned in the fraudulent evasion of the prohibition on importation of certain goods, namely Diamorphine, a controlled drug of Class A, in contravention of the prohibition on importation imposed by section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974, as amended.

Count 2

Statement of Offence

Being knowingly concerned in the fraudulent evasion of the prohibition on importation of goods; contrary to section 77(1)(b) and 77(2) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972, as amended.

Particulars of Offence

CRAIG ALAN DODD and OLIVER ROBERT BUTLER together, between the 11th and the 13th day of September 2013, in the Island of Guernsey or elsewhere, were knowingly concerned in the fraudulent evasion of the prohibition on importation of certain goods, namely Cannabis Resin, a controlled drug of Class B, in contravention of the prohibition on importation imposed by section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended.”

2. On 18th November 2014, the first applicant (“Dodd”) was convicted on both counts and the second applicant (“Butler”) was convicted on count 2, being the only count which he faced. Dodd was subsequently sentenced to seven years imprisonment on count 1 and six years imprisonment consecutive on count 2 making a total of thirteen years, and Butler was sentenced to six years imprisonment on count 2. Both now seek leave to appeal against their convictions.
3. The perfected grounds of appeal of the applicants are in substantially the same form and are as follows:-
 1. The verdict is unreasonable and/or cannot be supported having regard to the evidence.
 2. The verdict should be set aside on the grounds of one or more wrong decisions in law, namely that:-
 - (i) The counts on the indictment were joined.
 - (ii) There was a refusal to sever the counts on the indictment.
 - (iii) Cross admissibility of evidence in relation to the two counts was permitted.
 - (iv) The directions given to the Jurats on the cross-admissibility of evidence did not cure the position.
4. It seems to us that the various matters raised under the ground 2 logically come before ground 1 and we shall therefore consider ground 2 first.

Ground 2 – Wrong decisions in law

The case in outline

5. The indictment relates to two separate alleged importations of controlled drugs.
6. Count 1 concerns events on 15th February 2013. According to the prosecution, Dodd was seen to leave the QEII Marina in St Peter Port at about 10.30 a.m. on a jet ski. It was not seen again until about 9.30 p.m. at which time a jet ski was spotted offshore heading towards Fermain Bay at speed. When it arrived at Fermain Bay, it went up to the slipway and stayed with its engine idling for just a few moments. Customs officers were keeping watch and could see that there was just one person on board. Suddenly the jet ski turned abruptly and headed out of Fermain Bay at high speed towards St Peter Port. It came through the Marina gates at about 9.43 p.m. However, instead of going directly to pontoon K, which was the pontoon which the jet ski had left that morning, the rider took the jet ski towards the refuelling pontoon situated just inside the Marina gates by its entrance. The jet ski disappeared into the shadows by the refuelling pontoon for the next two or three minutes and after a short while it shot back into the centre of the Marina and made its way back to K pontoon where it moored up in the same place that it left that morning. The rider, who was Dodd, was arrested as he got to the top of the walkway leading out of the Marina. A search of the area around the refuelling pontoon was carried out after he had been arrested and a green carrier bag was found lodged between the refuelling pontoon and the walkway leading down to it. Inside were two grey coloured rocks and inside one of them, which looked like a briquette, there were subsequently found 253 grams of diamorphine (heroin). There was evidence (referred to in more detail later) to suggest that Dodd had been in the area of the bay of Vauville, north of Dielette in France during the course of that day. Forensic analysis was undertaken but no link was established between Dodd, the heroin or the bag in which it was contained.
7. Count 2 concerns events on 11th – 12th September 2013. In the early hours of 12th September customs officers were keeping observation in the area of Fermain Bay and Bec du Nez, a tiny little harbour which lies to the south of Fermain Bay. At about 1.30 a.m. a vessel was observed to pass slowly across Fermain Bay outside the bay. At approximately 1.45 a.m. a rib was seen moored in Bec du Nez. A small light was seen somewhere in the area of the slipway and at about 1.50 a.m. two men (there is no dispute that this was Dodd and Butler) climbed the steps leading to the cliff path. As they turned right into the path to Fermain Bay, they were arrested. A search subsequently took place with the help of a police dog and at approximately 3 a.m. a black rucksack was discovered underneath some planks of wood near an old fishing boat in the boat storage area of Bec du Nez. The bag contained several packages and it was ascertained that these contained a total of 7.65 kilos of cannabis resin. Forensic testing was undertaken but established no evidence linking either applicant to the cannabis resin or to the bag in which it was contained or the planks of wood covering the cannabis resin.
8. With that very brief summary we turn to consider the four arguments raised by the applicants under Ground 2. We think it convenient to take the first two aspects together.

(i) Joinder in one indictment

Rule 3 of the Indictment Rules provides:-

“Joining of charges in one indictment

3. ***Charges for any offence, whether felonies or offences other than felonies, may be joined in the same indictment if those charges are founded on the same facts, or form or are part of a series of offences of the same or a similar character.”***

(ii) Severance

Severance is dealt with at Section 4(3) of the Indictments (Guernsey) Law 1950 which provides:-

- “(3) Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or for***

any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such an indictment.”

9. Both of these provisions are identical in all material respects to the equivalent provisions in England and accordingly all counsel agreed that assistance could be derived from English jurisprudence.
10. The applicants applied before trial for a ruling that the two counts were not validly joined in one indictment, alternatively that the indictment should be severed so that each count was tried separately. This application came before Judge Finch on 4th March 2014 and he delivered a judgment dated 12th May 2014 dismissing both applications. He reminded himself of the leading English case on joinder in one indictment, namely Ludlow v Metropolitan Police Commissioner [1971] AC 29. He referred to the similar features in relation to the two counts. He considered that there was sufficient nexus for the counts to be joined in the same indictment. He further held that there was no special feature present which meant that it would be unfair to try the two cases together; the matter could be dealt with by appropriate direction. He therefore permitted joinder and refused severance. He did not at that stage consider the cross admissibility of evidence in relation to the two counts.
11. The applicants submit that the judge reached the wrong answer on both of these issues.
12. There was no dispute between the parties as to the applicable legal principles. These are conveniently summarised in Archbold (2014 edition) at paragraph 1-239 as follows:-

“The question whether particular charges ‘form or are part of a series of offences of the same or a similar character’, such as to justify joinder pursuant to what is now rule 14.2(3) of the 2013 rules, has also been considered in a number of authorities. The fact that evidence in relation to one count was not admissible in relation to another count under the old ‘similar fact’ principle did not necessarily mean that those counts could not properly be joined pursuant to this limb of the rule: see R v Kray 53CR.App.R.569,CA, and Ludlow v Metropolitan Police Comr [1971] AC 29 HL.

In Kray it was held: (a) that two offences may constitute a “series” within the meaning of the rule, and (b) that although the relevant part of the rule does not require the offences to arise out of the same facts or be part of a system of conduct before joinder can be sanctioned, a sufficient nexus must nevertheless exist between the relevant offences; such a nexus is clearly established if evidence of one offence would be admissible on the trial of the other, but the rule is not confined to such cases; all that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together in the interests of justice, which include, in addition to the interests of the defendants, those of the Crown, witnesses and the public; a further relevant factor is the prejudice likely to arise in the second trial from extensive press reports of the first trial if the offences are tried separately. It was further held (at p.575) that it is not desirable that the rule should be given an unduly restricted meaning, since any risk of injustice can be avoided by the exercise of the judge’s discretion to sever the indictment.....

In Ludlow v Metropolitan Police Comr, the House of Lords, having considered the previous law and practice, held, in respect of rule 3 of the Indictment Rules 1915 (now rule 14.2(3) of the 2013 rules), that (a) two offences can constitute a series and (b) both the law and the facts should be taken into account when deciding whether offences are similar or dissimilar in character. They concluded that, in respect of the limb of the rule then under consideration, there must be a series of offences of a similar character; for this purpose there must be some nexus between the offences; nexus is a feature of similarity which in all the circumstances of the case enables the offences to be described as a series. Applying these principles to

the facts of the case before them (charge of attempted larceny from a public house in Acton and a charge of robbery at a different public house in Acton sixteen days later), it was held that the joinder had been proper; the offences charged were similar in both law and fact; they had the same essential ingredient of actual or attempted theft; they involved neighbouring public houses, and the time interval was only sixteen days. Their Lordships also cited, with implicit approval, the dictum in Kray ante, that the operation of the relevant part of the rule is not restricted to cases where the evidence on one charge is admissible on the other(s) and expressly approved of the dictum that the rule should not be given an unduly restricted meaning.”

13. As to severance, the position was conveniently summarised by Lord Pearson in Ludlow (at 41) where he said:-

“The judge has no duty to direct separate trials under Section 5(3) unless in his opinion there is some special feature of the case which would make a joint trial of the several counts prejudicial or embarrassing to the accused and separate trials are required in the interests of justice. In some cases the offences charged may be too numerous and complicated....or too difficult to disentangle....so that a joint trial of all the counts is likely to cause confusion and the defence may be embarrassed or prejudiced. In other cases objection may be taken to the inclusion of a count on the ground that it is of a scandalous nature and likely to arouse in the minds of the jury hostile feelings against the accused.....”

14. The applicants submitted that Judge Finch was wrong to find that there was sufficient nexus between counts 1 and 2 so that they could be validly joined in the same indictment. They accepted that the counts involved the same offence, namely importation of a controlled drug and that this was done by sea at night. However they submitted that there were key differences which meant that there was insufficient nexus. Thus the offences were seven months apart; count 1 involved only Dodd whereas count 2 involved Dodd and Butler; count 1 involved heroin whereas count 2 involved cannabis resin; count 1 related to a jet ski whereas count 2 related to a different form of vessel, namely a rib; they related to different landing areas because in count 1 the vessel had landed at the QEII Marina whereas in count 2 it had landed at Bec du Nez; the amounts of the drugs were different; and finally the bags used to contain the drugs were different in each case.
15. In our judgment the decision of Judge Finch that these two counts were a *“series of offences of the same or similar character”* cannot be faulted. He referred at paragraph 13 to the similarities, namely *“importation by sea at night under cover of darkness; large-scale importations (albeit of different drugs); geographical connections with the same place in France; initial landfall at Fermain; concealment of drugs in secluded locations; D1 [Dodd] found in close proximity of the drugs allegedly on both occasions, D2 [Butler] on the second occasion.”*
16. In our judgment, notwithstanding the differences referred to by the applicants, the similarities were more than sufficient to provide a nexus so as to justify joinder; indeed a decision to the contrary would have been clearly erroneous.
17. Turning to the question of severance, the Court begins by reminding itself that this is very much a decision for the discretion of the trial judge. Thus the Court of Appeal will interfere with the exercise of such discretion only if can be shown that the trial judge took into account irrelevant considerations, or ignored relevant ones, or arrived at a manifestly unreasonable decision – see the discussion in Blackstone, Criminal Practice (2013 edition) at D11.90 and the approval in R v Christou [1997] AC 117 at 128 of the following observation of Lord Lane CJ in R v Cannan [1990] 92 Cr.App.R.16 at 23:-

“It may well be that often the judge in sexual cases will order severance, as is clear from the various cases which we have already taken the liberty of citing.... But the fact remains that the Indictments Act 1915 gives the judge a discretion, and it is a well-known fact, and a well-known principle, as Salmon LJ in his usual clear

language sets out in the case of Flack [1969] 1 WLR 937 that that is not a matter with which this court will interfere, unless it is shown that the judge has failed to exercise his discretion upon the usual and proper principles, namely, taking into account all things he should, and not taking into account anything which he should not.”

The passage from the judgment of Salmon LJ in Flack referred to states as follows at 943:

“This, no doubt, is a matter about which different judges might take different views. Certainly it would as a rule be better, in circumstances such as these, that the counts be tried separately. This court will not, however, interfere with the decision of the judge in such a matter unless satisfied that there were no reasonable grounds upon which his decision could be supported, or that it may have caused a miscarriage of justice.”

18. In his judgment, Judge Finch reminded himself of the extract from the judgment of Lord Pearson in Ludlow mentioned in paragraph 13 above and also of the observation of Lord Taylor CJ in Christou at 128E as follows:-

“...The essential criterion is the achievement of a fair resolution of the issues. That requires fairness to the accused but also to the prosecution and those involved in it. Some, but by no means an exhaustive list, of the factors which may need to be considered are:- how discrete or inter-related are the facts giving rise to the counts; the impact of ordering two or more trials on the defendant and his family, on the victims and their families, on press publicity; and importantly, whether directions the judge can give to the jury will suffice to secure a fair trial if the counts are tried together. In regard to that last factor, jury trials are conducted on the basis that the judge’s directions of law are to be applied faithfully. Experience shows..... that juries, where counts are jointly tried, do follow the judge’s directions and consider the counts separately.”

19. He also referred to the concurring speech of Lord Hope of Craighead in Christou, where, referring to the Scottish system, he said as follows at 130:-

“...But the practice of trying all outstanding charges against the accused on a single indictment has been established for a long time. It is seen to be in the public interest as well as that of the accused, in order that justice may be done expeditiously.

It is inevitable, if a series of unconnected charges are allowed to go to trial at the same time, that evidence will be led in regard to one charge which is inadmissible in regard to another. A material risk of prejudice to the accused is not thought however to arise merely because the charges relate to different kinds of crime committed at different times in different places and under different circumstances. Experience has shown that under proper directions juries are well able to consider each charge in an indictment separately. In practice motions of separating of charges are granted only in very clear cases, where fairness to the accused makes this necessary.”

20. Judge Finch considered these observations and held firstly, that he did not consider the counts to be of a ‘scandalous nature’ likely to arouse hostile feelings in the mind of the Jurats, and secondly that the Jurats could be relied upon to follow any directions as to the separate treatment of counts.
21. The applicants submit that this decision was erroneous. Advocate Eeles submits that the trial was rendered unfair as a result of the failure to order severance because the two counts were utterly discrete, there were no direct victims, the defendants were happy to have separate trials, and directions given by the judge would not be sufficient to ensure a fair trial. Advocate Cobb submitted to like effect. It was prejudicial to Dodd’s defence that the Jurats would hear evidence

in relation to more than one offence. Furthermore there would be no prejudice to any other party by reason of severance as there was no direct victim of the offences.

22. Questions of severance are often considered at the same time as issues of cross-admissibility of evidence in relation to different counts. Where evidence is admissible as similar fact evidence, the arguments against severance are particularly strong. Nevertheless, it is clear from the authorities (e.g. R v Christou) that severance is not necessarily required even where there is no cross-admissibility of evidence. A recent statement to that effect can be found in the case of H v Attorney General [2013] (1) JLR 210 at paragraph 28 where Calvert-Smith JA, speaking for the Jersey Court of Appeal, said this:-

“28. From those cases, we have drawn the following principles:-

(iv) The obiter dictum of Glidewell LJ in R v Wilmott (89CrAppRe at 345):-

‘Theoretically, even if evidence in relation to one offence is inadmissible in relation to another, the judge has a discretion nevertheless not to sever the indictment, in other words, to allow the counts alleging the separate offence to be tried together. Clearly such a course falls within Rule 9 of the Indictments Rules 1971. But in our view where evidence in relation to one matter is clearly inadmissible to prove another, it is normally right in such circumstances to sever the trial as to different offences.

- *was not being applied in English and Welsh courts at the time and has not been since. For instance, offences of dishonesty on the one hand or violence on the other are regularly charged and tried in the same indictment without objection at trial or appeal to the Court of Appeal, Criminal Division. Appeals brought to this jurisdiction – which follows the English and Welsh practice in this instance – solely on the basis of this dictum are therefore unlikely to succeed.”*

23. Judge Finch deferred consideration of whether the evidence on the two counts in this indictment was cross-admissible and accordingly reached a decision without consideration of that aspect. In our judgment, even assuming a lack of cross-admissibility of evidence, his decision not to sever the indictment cannot be criticised. The matter could satisfactorily be dealt with by a direction to the Jurats that they must consider the evidence in respect of each count separately. Accordingly, subject to the point addressed below at paragraphs 32 to 37, we reject this ground of appeal.

(iii) Cross admissibility of evidence

24. Following the judgment of 12th May 2014 on the issues of joinder and severance, there was a further hearing on the issue of cross-admissibility of evidence. Judge Finch gave his decision in a judgment dated 12th September 2014. He referred to the leading case of DPP v P [1991] 2 AC 447 and to the decision of the Jersey Court of Appeal of U v Attorney General 2012 (1) JLR 349. Applying the principles in those two cases, he rejected the submission of the applicants that the evidence on one count was not admissible on the other. He referred to the similarities discussed earlier and concluded that, at that stage of the proceedings, the evidence on count 1 appeared to be relevant and admissible in relation to count 2 so as to rebut any defence of accident or coincidence.
25. In relation to the test for admitting similar fact evidence, we think it is sufficient simply to refer to the decision of the Jersey Court of Appeal in U v Attorney General where Nutting JA said this at paragraphs 12 -14:-

“The test for admitting similar fact evidence

- 12. It is common ground that the relevant legal test for the introduction of similar fact evidence involves a two-stage analysis. The first is a hard-**

edged question of relevance, at which stage the question is whether the material has any probative value. The second stage involves a discretionary exercise to determine whether the evidence should, in all the circumstances of the case, be admitted.

13. *None of this is controversial or new. It is well established that similar fact evidence is admissible if it is relevant to an issue before the court, e.g. because it tends to prove one of the elements in the alleged offence, or to rebut a defence which would otherwise be open to the accused (Styles v Attorney General 2006 JLR 210, following O'Brien v Chief Constable (S Wales) [2005] 2 AC 534 at paragraph 67 (et seq) and ultimately Makin v Att-Gen for New South Wales [1894] AC 57. The question of coincidence lies at the heart of the analysis. Evidence is likely to be admissible if an attempt to explain it away by coincidence would be an affront to common sense, or would be against all probabilities, or would only be accepted as an explanation by “an ultra-cautious jury” (referred to in DPP v P [1991] 2 AC 447.*
14. *It is worth emphasising that, in order to admit similar fact evidence, it is not necessary for the prosecution to wait until a specific defence has been set up. It is sufficient if the defence is reasonably available (Harris v DPP 36 Cr. App. R at 52 – 54). Nevertheless, the prosecution must not be allowed to adduce prejudicial evidence by imputing to the accused an intention to set up some improbable or fanciful defence (Thompson v R [1918] AC at 232). This qualification is illustrative of the more general principle mentioned above, which requires the court to balance the probative value of any admissible similar fact evidence against its prejudicial effect, and to exercise a discretion in deciding whether to allow it to be adduced – a discretion which is exercised by reference to the interests of justice (Noor Mohamed v R [1949] AC at 192).”*
26. The applicants argued before Judge Finch and repeat before us that the test articulated by the Jersey Court of Appeal is not satisfied in this case. They submitted that because of the differences between the facts of the two counts (e.g. the gap in time between them, the different nature of the drugs and the different locations involved) it would not be an affront to common sense to conclude that Dodd was innocent of both counts and that it was merely a coincidence that he was found in the vicinity of two large packages of drugs.
27. In our judgment Judge Finch was correct to find that the evidence was cross-admissible in relation to Dodd. The evidence on count 1 was that Dodd had returned in a jet ski in darkness and that a stash of heroin had been found on the fuel pontoon at which he had stopped for a few minutes for no apparent reason before returning to the pontoon where the jet ski was moored. The evidence on count 2 was that, again when coming ashore from a sea going craft in darkness, a stash of cannabis had been found very close to the route which he had taken to get from the rib to where he was arrested.
28. Although no defence was put forward by Dodd prior to the trial (because he had declined to answer questions at interview), it was clearly foreseeable that the likely defence would be that he had no knowledge of either stash of drugs and it was just unfortunate that he had happened to come ashore from a trip at sea in the hours of darkness just near where drugs were found on each occasion. In our judgment, it was potentially very strong evidence to rebut this defence that he had apparently suffered this misfortune in similar circumstances on two separate occasions. The evidence clearly fell within the test outlined by Nutting JA, namely that an attempt to explain it away by saying that it was just coincidence that he happened to be so close to the stash of drugs in these particular circumstances on two occasions would indeed be ‘an affront to common sense’ or ‘against all probabilities’. We conclude therefore that the judge was correct to hold that evidence on each count was cross-admissible similar fact evidence against Dodd i.e. the evidence on count 1 was probative of his guilt on count 2 and vice versa.

29. But the evidence in relation to count 1 was only probative of Dodd's involvement in count 2; it proved nothing against Butler because he had no involvement in count 1. It is unfortunate that in his judgment on cross-admissibility, the judge did not make it clear that the similar fact evidence was only evidence against Dodd. However, what is material for the safety of the conviction is what the judge said in his direction to the Jurats and it is that to which we shall now turn.

(iv) Direction to the Jurats

30. The relevant direction to the Jurats in the summing up on this topic was as follows:-

“Treatment of Counts and cross-admissibility – although you must consider each count separately, and in respect of count 2, the case for and against each defendant separately, and your verdicts need not be the same, you should not ignore the evidence of background circumstances. Your decision on one count may well assist you in coming to a conclusion on the other count, but you should reach a separate decision on each, and on count 2 in respect of each defendant. In other words, you are entitled in determining guilty in respect of a count, to have regard to the evidence in relation to the other count and any other relevant admissible evidence. I shall try to help you further. The offences are identical in legal terms. What has to be proved of evidence (?) of the offences is the same for each. On the facts you should consider the alleged similarities for yourselves, carefully, in the light of the burden lying throughout on the prosecution.

Counts 1 and 2 are two distinct offences on two distinct days and seven months apart. They are alleged large scale importations of drugs, albeit different drugs, into Guernsey. Put simply, the allegation is that Dodd is a serial importer of drugs, and on the second occasion Butler was party to the offence. The similarities that are suggested on the evidence, are that both counts relate to importations by sea, using private water transport, both under cover of darkness, both large scale, both originating allegedly from France. In both, the vessel, allegedly, is in the vicinity of Fermain initially, in both Dodd is found in close proximity to where the drugs were concealed, with Butler on the second occasion.

In respect of Mr Dodd, you have heard evidence that he committed two separate offences. If you are sure that the events, about which the prosecution witnesses have testified, took place, you must look at the whole of the evidence and ask yourselves, is the relationship between the circumstances of these occurrences, as set out a moment ago, so close that you are sure they are a series of two offences committed by the same person? If that is so, looking at the case against the accused Dodd, is it possible that Mr Dodd can have an innocent explanation for that? Consider carefully all the points made, by his advocate, in closing, as the only evidence available was put forward on behalf of the prosecution. If, but only if you are sure that there is no credible explanation, you may take the whole of the evidence into account, in deciding whether you are sure Dodd was a party, on these two occasions, to the unlawful importation of drugs. It is for you to evaluate this evidence to see if it helps you in your task.

You are, of course, aware that Mr Butler is not implicated in count 1. You consider Butler only in relation to count 2, and whether his presence and actions are indicative of guilt in this alleged unlawful importation, in the light of all the evidence adduced against him.

Your approach should be as follows; in relation to Dodd only, consider all the evidence, including the alleged similarities referred to. If you find he is guilty on count 1, that does not mean that he is necessarily guilty on count 2, just because he has done it once does not mean that he has done it again. You must be sure on all the evidence, including the suggested similarities, proved to the criminal standard and therefore in all the circumstances that he is guilty on count 2.

As indicated, Mr Butler is not implicated in count 1. If you come to the conclusion Dodd is acquitted on count 2, then it is very difficult, if not impossible, to say that Butler should not also be acquitted. If you approach your deliberations by considering Dodd on count 1 first, then proceed to count 2 and also form a view on Dodd. Then consider Butler on count 2. Remember the suggested similarities put forward to demonstrate Dodd's guilt on both counts 1 and 2. The case against Butler does not rely on those similarities as he only faces count 2. If you conclude that Dodd is guilty on count 2, then go on to look at the evidence against Butler.

If you reach that point, you are entitled to consider this evidence on the basis that Dodd is an importer of controlled drugs, and it is in that context you can assess Butler's actions and position. You should note carefully that just because you may find Dodd guilty on count 2, that does not necessarily entail Butler is guilty as well. Bear in mind the direction on joint responsibility and that the burden remains firmly on the prosecution throughout."

31. It might have been preferable if the judge had said in express terms that the evidence on count 1 was not admissible evidence against Butler in relation to count 2. But, in our judgment, the direction adequately makes that point to the Jurats. The judge makes it clear in the third paragraph quoted that it is only in relation to Dodd that the Jurats may consider the fact that there are two similar offences. In the ensuing paragraph he makes it clear that Butler is not implicated in count 1, and the case against him does not rely on any similarities. In our judgment, the Jurats can have been left no doubt that the evidence on count 1 was not admissible to prove the case against Butler (as opposed to Dodd) in relation to count 2.
32. As the oral submissions on this aspect developed, it became clear that criticism was directed not so much towards the terms of the summing up but towards the decision to allow cross admissibility of evidence and not to sever the two charges because, it was submitted, the prejudice caused by these two decisions could not be cured by any direction to the Jurats. This point was advanced particularly strongly by Advocate Eeles on behalf of Butler.
33. Her argument ran as follows. As a result of the decision not to sever and to allow cross admissibility, the Jurats were entitled to use the evidence on count 1 as evidence against Dodd in relation to count 2. Having found count 2 proved against Dodd (possibly having relied amongst other matters on the evidence in relation to count 1), the Jurats must by definition have been satisfied so that they were sure that the cannabis in count 2 was imported on the rib on the night in question. When turning to consider the case against Butler, they could not undo or ignore that finding and they would therefore be satisfied of that aspect of the case against him (i.e. that the cannabis was imported on the rib). The sole issue remaining therefore in respect of Butler was whether he was aware of the importation and concerned in it. Thus, submitted Advocate Eeles, the evidence in count 1 could have been used indirectly against Butler in proving that the cannabis was imported on the rib despite any direction to the contrary.
34. In our judgment, there was nothing unusual or irregular in these counts being tried together notwithstanding that the evidence on count 1 was only admissible against Dodd in relation to count 2. It is often the case that, when two persons are jointly charged with an offence, evidence is adduced which is admissible against one of the accused but not the other. A simple example is where one of the accused has made damaging admissions in police interview. Juries or Jurats are always directed in such cases that what is said at interview is admissible against the accused who made the admissions but not the other accused.
35. Let us assume that in this case there had been no count 1 but that Dodd had made admissions at police interview that he had imported the cannabis on the rib in September and had sought to explain away those admissions at trial. His admissions at interview would of course be evidence against him but not against Butler and the Jurats would have been so directed. It is inconceivable that the fact that Dodd had made admissions which were admissible against him but not against Butler would have led to separate trials. Such a situation is a common occurrence. Yet the chain of reasoning hypothesized by Advocate Eeles in paragraph 33 would be equally possible if the

evidence admissible against Dodd (but not Butler) consisted of admissions at interview rather than similar fact evidence of another importation.

36. Advocate Eeles was also critical of the fact that, when giving his ruling on cross-admissibility, Judge Finch had failed to go on to the second stage of the two-stage analysis referred to by Nutting JA in U v AG. He had not considered whether the probative effect of the evidence outweighed the prejudicial effect of admitting it.
37. It is true that the judge did not specifically address this aspect in his judgment and it would have been preferable had he done so. But in our judgment this did not lead to his decision being erroneous. As just stated, it is common for evidence which is only admissible against one co-accused to be adduced notwithstanding the prejudice which may thereby be caused to the accused against whom it is not admissible. It is generally accepted that the matter can be dealt with by appropriate direction to the Jurats or jury and the fact finding tribunal can be relied upon to follow those directions. In this case, we are satisfied that the probative value of the similar fact evidence greatly outweighed the prejudicial effect of its admission.
38. In summary, for the reasons given, we consider that Judge Finch was correct to allow counts 1 and 2 to be joined in the same indictment, not to sever them and to rule that the evidence on the two counts was cross-admissible in relation to Dodd. We further consider there was no misdirection in his summing up on the issue of cross-admissibility. It follows that we reject ground 2 of the grounds of appeal.

Ground 1

39. The applicants contend that the verdicts on both counts were unreasonable and/or cannot be supported having regard to the evidence.
40. Section 25(1) of the Court of Appeal (Guernsey) Law 1961 provides:-

“25(1) The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the applicant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

PROVIDED THAT the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the applicant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.”

41. This Court has on more than one occasion emphasised the limited nature of its ability to quash convictions on the basis that the verdict was unreasonable or cannot be supported having regard to the evidence. The position was conveniently summarised in the case of Pinto and others v Law Officers of the Crown 2013 GLR 83 at paragraphs 22 – 24 and we respectfully adopt the summary given by Montgomery JA in paragraph 24:-

“24. Accordingly we consider it appropriate to follow the guidance given in Taylor v Law Officers of the Crown (2007 – 08) GLR 207 by Beloff JA as to the approach of the Court of Appeal in Guernsey to grounds of appeal based upon the rationality of factual conclusions reached by the Jurats. The guidance may be distilled into three principles:-

(1) The jurisdiction of this Court is defined by the 1961 Law and the powers of [the] Court are more limited than those enjoyed by the Court of Appeal (Criminal Division) in England and Wales which incorporates the concept of an ‘unsafe’ verdict, and, by judicial gloss, that of a lurking doubt.

(2) Where an appeal is from the verdict of Jurats, which does not disclose the reasons upon which the verdict is based, ‘if the summing up is sound the court may well not be able to interfere unless the verdict is obviously wrong’ (Guest v The Law Officers (2003) GLR N-7). Furthermore, as Le Quesne JA observed in Tilley v Law Officers CA November 27th 1973, unreported (Guernsey CA Judgments 1964 – 1989, 88) ‘...the Jurats are holders of judicial office and are far more experienced in the affairs of law and legal procedure than the normal juryman in the United Kingdom’. A challenge to their verdict as unreasonable is especially difficult to make good.

(3) In assessing the rightness or wrongness of the verdict, the Court of Appeal must at all times bear in mind that the function of fact finding has been left to the lower court and that, particularly where credibility is an issue, the lower court, notoriously, has the advantage, denied to the Court of Appeal, of seeing and hearing the witnesses including, most importantly, the defendant.”

42. Similarly, in Attorney General v Edmond-O’Brien 2006 JLR 133, on appeal from Jersey (where the statute is in similar form), the Privy Council specifically approved the following observation of Lord Goddard CJ in R v Hopkins-Husson (34 Cr App R at 49):-

“... The fact that some members or all the members of [this] Court think that they themselves would have returned a different verdict is ...no ground for refusing to accept the verdict of the jury, which is the constitutional method of trial in this country. If there is evidence to go the jury and there has been no misdirection, and it cannot be said that the verdict is one which a reasonable jury could not arrive at, this Court will not set aside the verdict of guilty which has been found by the jury.”

43. The present case is of course one where the defendants did not give evidence and accordingly their credibility was not in issue. Furthermore, it is a case which was based on circumstantial evidence. Nevertheless, this Court must bear in mind the limitations on its role as articulated in Pinto and the other cases.
44. With that introduction in mind, we turn to summarise (as briefly as possible) the evidence in the case so as to consider the submissions of the applicants.

The Evidence

Count 1

45. A number of customs officers gave evidence as to the events on 15th February 2013. Evidence was given that they were conducting a surveillance operation and had placed cameras in the vicinity of the QEII Marina in St Peter Port which could be monitored. Dodd was seen to leave K pontoon in the marina on a jet ski number 4804 at 10.55 that morning.
46. That evening, officers were keeping observation in the area of Fermain Bay. Some of them had the assistance of night vision equipment. A jet ski was seen at about 21:27 out at sea heading at speed in a southerly direction. It headed towards Fermain Bay. There it was seen to enter the bay and slowly approach the slipway. There was one person on board and it was showing no lights. It got to within two or three metres of the shore, then it turned abruptly and left the bay at speed. It was seen at various points heading north to St Peter Port and at 21:43, a jet ski was seen to enter the QEII Marina via the monitored CCTV. It was seen to go immediately to the refuelling pontoon where it spent two minutes or so before then moving at some speed back to K pontoon in the marina. There is no dispute that this was the jet ski driven by Dodd because he was arrested shortly afterwards as he walked up the walkway from K pontoon at about 22:00.
47. Officer Woodington gave evidence that at about 22:00, she was instructed to search the area of the refuelling pontoon. She did so in company with Officer Nicolle. She found a plastic bag wedged between the walkway leading down to the refuelling pontoon and the pontoon itself. She

said that it was tucked in as far as it could be, wedged up against the wheel of the walkway. It was an ordinary green Marks & Spencer bag and there was no dispute that it contained two rocks, inside one of which (a briquette) was later discovered the heroin. She had to crouch down in order to see it and retrieve it because of the way it had been wedged in. She opened it to see the two grey rocks but did not appreciate the significance of the find at that stage. She said that she found the bag at approximately 22:15. She made a record in her notebook later that evening and then inserted additional clarification a few days later once the significance of her find had been established by virtue of the discovery of the heroin. She was cross-examined in some detail. She remained positive that the bag was firmly up against the wheel of the walkway, though she accepted that she had not made specific mention of the wheel in her notebook. She was challenged over the fact that in her original notebook entry it stated that she was searching the refuelling pontoon at approximately 23:30, whereas in her supplementary entry on 19th February she stated that it was 22:15. The officer was adamant that it was the latter entry which was correct because she had been instructed to search the area shortly after Dodd's arrest (which was at about 22:00), and it was only a few minutes later that she was on the pontoon. She thought perhaps the reference to 23:30 related to the completion of the search of the surrounding area (because they carried on searching for some time after the bag had been found, not having appreciated its significance) but accepted that the wording was not very satisfactory.

48. The prosecution also adduced evidence on the following matters:-

- (i) A Mr Hobbs stated that he arrived at the car park adjacent to the refuelling pontoon between 20:00 and 20:30 on 15th February and when he arrived he saw two females walking away from the refuelling pontoon. He had not seen anyone else come up from the pontoon until he saw the vessel speeding through the marina at about 21:00 or 21:30.
- (ii) The i-phone which Dodd had on him at the time of his arrest was analysed and showed that it had been in the range of the French phone network at 12.37 GMT on 15th February.
- (iii) The handheld GPS found on Dodd's jet ski after his arrest was analysed. It showed a clear partial track on the GPS leading away from an area marked on the chart as the Bay of Vauville, which is to the north of Dielette, on a direct line back towards Guernsey showing a time of between 20:17 and 20:33 which, said the prosecution, was entirely consistent with the time at which Dodd arrived back at the Guernsey coast.
- (iv) Two shop receipts from Super U in the Vauville area dated 15th February (timed at 14:51 and 14:55 respectively) were found in Dodd's possession, one in his wallet on arrest and the other in the pocket of some jeans on the jet ski 4804.
- (v) A Nokia phone found at Dodd's home address had a number of text exchanges with French phone numbers in the days immediately before 15th February. One on Wednesday 13th February from the phone said "*Leave the stuff in the bunker and I'll leave the money when I get there. I'll call you when I'm on my way*". A further one says "*I've been sorting out the equipment which is done and I'm looking for a boat which can take some sea, so I can come now, so just bear with me, I'm trying my hardest*", and then a little later a further text "*No-one knows that spot, just keep sending someone to check if you worried, but you have no reason to be. I'm good, don't worry*". Other texts on the same day from the phone read "*It's pitch black here. I'll make my way slowly*". Then later on the same date "*I tried. It's too dangerous. I can only see half a mile*". The next text reads "*How can I cross when I can't see?*". There was evidence that there had been misty conditions that day.
- (vi) Finally, the prosecution relied upon an experiment carried out by Officer Hamilton to see if any assistance could be obtained as to how long the bag might have been on the refuelling pontoon before it was found by Officer Woodington. The angle between the walkway leading down to the refuelling pontoon and the pontoon itself increases as the tide drops and decreases as the tide rises because the wheels at the bottom of the walkway move accordingly. Thus the walkway is extended furthest when the tide is high and moves so that it is steeper as the tide drops until approximately half tide, at which stage it does not move further because the water in the marina is trapped by the sill at its entrance. On 15th

February high water was at 21:50, which was minutes after Dodd arrived back in the marina. Thus when he arrived at the refuelling pontoon, the walkway would have been at its gentlest incline and the wheels would have been close to their full extent on the metal runners on the pontoon. On the prosecution case, the package was found at about 22:15, which would be no more than twenty-five minutes or so after high water. The officer carried out an experiment on 1st May when the height of tide was similar to that on 15th February. He recreated a package similar to that which had been found and pushed it into the place where he understood the original package had been found at high water. As the tide went down, the wheels of the walkway slowly pushed the package along the runner and over the next three and a half hours (until the sill blocked any further fall in sea level) the package moved approximately sixty centimetres from its original position at high tide. When the tide started to rise again, the walkway moved back towards its original location but the package stayed where it had been pushed. It was effectively left marooned. The conclusion drawn by the officer was that, if the package found on the night in question was indeed firmly wedged against the wheel at the time of discovery, it could only have been put there a very short period of time beforehand. If it had been placed there some time before, it would have been marooned to a greater or lesser extent as the walkway moved towards its position at high tide. The prosecution relied upon this to support the contention that the package had been placed there by Dodd when he stopped at the refuelling pontoon rather than by some unrelated person at an earlier time. Officer Hamilton was cross-examined and conceded that if the time at which the package was found by Officer Woodington was incorrect (i.e. if she had found it nearer 23:30 rather than at 22:15) or if the location in which she said she found it was not as close to the wheel of the walkway as she said, the conclusions which he drew from the experiment would no longer be reliable. It was accepted that no photograph had been taken of the package in its location where Officer Woodington found it.

49. When interviewed, Dodd made no admissions and essentially offered no comment. The prosecution accepted that there was no forensic evidence linking him to the package containing the drugs.

Count 2

50. This concerns events on 10th – 12th September 2013. Customs had placed a camera at Grand Havre in order to keep observation on a Marsea Rib which was moored there on 10th September. On 11th September officers noted from the camera that the rib was no longer on the mooring and Officers Hamilton and Webb went up to Grand Havre at 3pm to investigate. There they saw the rib further out in deep water with Butler on board. It appeared that he was in the process of anchoring or mooring the rib in the deeper water. Having achieved this, Butler got a lift back on a dinghy rowed by another man.
51. In the early hours of the following morning, 12th September, a number of officers (again with the help of night vision equipment) were keeping observation in the area of Fermain Bay and Bec du Nez. At about 1.30 a.m. officers spotted a vessel moving slowly across Fermain Bay. It was travelling southwards just outside the bay. About fifteen minutes later they became aware that a rib - there is no dispute that this was the Marsea Rib – had moored in Bec du Nez. Officers heard the sound of voices and the sound of splashing. Shortly afterwards Officer Hamilton, admittedly from some distance away, saw a light moving in the vicinity of the top of the slipway in Bec du Nez. The evidence was that at the top of the slipway there is a boat storage area where a number of small dinghies are stored. In order to leave the harbour the natural route is to walk across part of the boat storage area to some steps which lead up to a grassy area from which one then takes a path leading to the main cliff path. Officer Hamilton saw the light go up the steps and it then disappeared from his view. He accepted that he could not say exactly where in the boat storage area the small light was because he was possibly some 400 metres away, but he believed it was near the top of the slipway. He did not see it in the part of the boat storage area where the rucksack containing the drugs was found shortly afterwards.
52. Two officers were concealed in the grassy area near the top of the steps leading up from the boat storage area. They too heard splashing and voices. They could not make out what the voices

were saying except for some reference to whether the boat might dry out. They hid as the two men – there is no dispute that it was Dodd and Butler – made their way up from the boat storage area and walked on up towards the cliff path.

53. Shortly afterwards Dodd and Butler were arrested on the cliff path. Officers gave evidence that their clothing was wet. A pink Nokia mobile phone was found underneath Dodd (who had been taken to the ground). The back of it had been removed and the SIM card was bent. When asked about it he immediately denied that the phone was his, although the back of the pink phone was found in his jacket.
54. One of the customs officers immediately went to the steps above the boat storage area to ensure that no one else went down there. A police dog arrived some time later and a search of the boat storage area took place. The dog disturbed a plank of wood lying behind a blue boat at the far end of the boat storage area revealing a rucksack. This was subsequently found to contain 7.65 kilos of cannabis resin. The bag was dry.
55. There was no forensic evidence linking either Dodd or Butler with the rucksack or its contents. Although there were a number of fingerprints, two of which were capable of being matched, neither of these belonged to either of the applicants.
56. The mobile phone found underneath Dodd was subsequently examined. Although the damaged SIM card made it impossible for there to be proper analysis, there was a single text found on the phone itself which read *“You need to throw your phone away and I’ll throw mine, it’s sending a signal and we all know what to do”*. Officers brought the rib back to St Peter Port the next day. One of them, Officer Ashworth, gave evidence that the rib was full of water when he boarded it. He had to circle several times so that most of the water drained out. This took five or ten minutes. He found that when the throttle was open, the stern of the boat kicked around a lot which was very unstable. It subsequently transpired that the void between the hull moulding and the deck moulding was full of water and the officer believed that this water moving from side to side was causing the boat to skip around. He considered it not to be seaworthy and that a test run to France would have put customs officers at serious risk.
57. That same morning Officer Hamilton went aboard the rib before it was moved. He was a yacht master and had used boats for many years. When he turned on the GPS it showed a track. Although there was no time or date stamp, his evidence was that this would be the most recent track and was therefore the active track which was created the last time that the GPS was working unless the tracking system had been turned off. He accepted that there was no direct evidence as to when this was, so that if Dodd had been using the rib that night with the GPS off, it would not have laid down that track. The track which he found and which was exhibited before the Jurats showed a partial track leading from the bay of Vauville in France in the direction of Guernsey, in very much the same area as that of the jet ski in February. The track then skirted to the north of Sark, across to Herm and Jethou, passing the Lower Heads buoy and then ending up near Bec du Nez.
58. Both applicants were interviewed but made no admissions and broadly answered no comment.

The Verdict

59. Neither applicant gave evidence before the Royal Court. Advocate Mallett for Dodd and Advocate Eeles for Butler addressed the Jurats in detail pointing out various weaknesses in the case, as they saw it, and submitting that the Crown had failed to prove its case beyond reasonable doubt. Judge Finch summed up to the Jurats and no criticism is made of that summing up (other than the point in relation to cross-admissibility already dealt with). In due course the Jurats returned verdicts of guilty by a majority of 7 – 2 on count 1 and 8 – 1 in relation to both defendants on count 2. Dodd was subsequently sentenced to seven years imprisonment on count 1 and six years consecutive on count 2 making thirteen years in all. Butler was sentenced to six years imprisonment on count 2.

The submissions

(i) Count 1

60. On behalf of Dodd, Advocate Cobb made a number of submissions as to why the verdict was unreasonable and not supported by the evidence:-

- (i) There was no forensic evidence linking Dodd to the bag containing the heroin. The refuelling pontoon was open to anyone and there was evidence of two unidentified females walking away from the refuelling pontoon earlier that evening. There was simply no direct evidence that Dodd had ever had anything to do with the bag or the heroin.
- (ii) The evidence as to the time at which the bag was found was extremely poor. This was important because of the relevance of the time for the experiment carried out by Officer Hamilton. Officer Woodington said in evidence that she found the bag at 22:15. Yet in her initial entry in her notebook made later that same evening, she had said that she was searching the refuelling pontoon at approximately 23:30. It was only in a supplementary entry in her notebook made the following Tuesday 19th February that she gave a more detailed explanation and put the time of finding the bag at 22:15. Her explanation, namely that when specifying the time of 23:30 she had been referring to the time that she had been looking in the immediate area surrounding the refuelling pontoon after she had found the bag, was not satisfactory.
- (iii) The unsatisfactory evidence as to the timing was compounded by the evidence of Officer Nicolle who stated both in her notebook and in a statement (made after she had become aware of the significance of the bag because of the presence of heroin in the briquette) that the bag was found at 23:25. She had been at the top of the walkway and had seen Officer Woodington find it. In evidence she said that what she meant was that she had made up her notebook at 23:25 because they had continued to search in the area near the pontoon and the breakwater for some time. She agreed that this was misleading and that she had not clarified the position in her subsequent statement. She said that she had her timings wrong and that 23:25 was when she made up her notebook after the search had been completed. She said in evidence that they had arrived to begin the search at about 22:30 – 23:00, but she said she could not be sure what time the bag was found.
- (iv) Advocate Cobb also criticised the evidence of Officer Woodington in relation to the location of the bag. Although the officer was very positive in her evidence that the bag was wedged right next to one of the wheels of the walkway, she had made no reference in her notebook or in the subsequent statement to the bag being in front of the wheels. Her evidence was therefore not satisfactory.
- (v) These uncertainties meant that the experiment carried out by Officer Hamilton could not be relied upon. In particular, if the timing was uncertain, then the state of the tide was similarly uncertain, so the angle of the walkway would not necessarily have been the same as on the night in question. If the location was incorrect, it would have been possible for the bag to have slid through the gap between the walkway and the pontoon so that it could have been there for days, weeks or even months. Furthermore, it was unsatisfactory that the package used for the experiment had not been kept so as to be available for inspection by the defence.
- (vi) It was accepted that there was evidence that Dodd had been in France that day, but there was nothing suspicious about that and there was nothing to link the bag or its contents to France; indeed it was a Marks & Spencer carrier bag which was a very English brand.
- (vii) Furthermore it was clear that the customs officers themselves initially felt that there was insufficient evidence to charge Dodd on this count. They made a decision to take no further action and it was only when Dodd was arrested in September in relation to count 2 that they took the decision to charge him with the February offence.

Count 2

61. Turning to count 2, the applicants made the following points:-

- (i) There was no evidence as to when the Marsea Rib had left Grand Havre. Although Officer Hamilton had looked at the CCTV footage to see when this was, he could not recall the time and had not made a note, nor was the CCTV produced, nor was any viewing log given in evidence. There was accordingly no evidence that there had been sufficient time for the rib to leave Grand Havre in time to get to France and return to Bec du Nez when it did.
- (ii) There was in fact no evidence that the rib had ever left Guernsey waters. There was accordingly no evidence that there had been an importation. Unlike in relation to count 1, there were no receipts and no evidence of presence in France via any mobile phones.
- (iii) It was true that there was a GPS track suggesting that the rib had come from the same area in Vauville as the jet ski and had travelled from there to the Bec du Nez area. However there was no date or time stamp in relation to that GPS track and it could have been made at any time. It was accepted that the evidence produced to the Court was to the effect that that track would have been the track laid down when the GPS system was last used, but there was no evidence as to when that had been and it could have been days or weeks earlier.
- (iv) An additional feature pointing against the rib having been to France was its condition. The customs officer had described it as unseaworthy and had not been willing to undertake a test drive with customs officers to France for reasons of safety. The same officer had accepted that there was equipment on the rib which was consistent with fishing.
- (v) There was no evidence that, when coming ashore from the rib, the applicants had gone to the area of the boat storage area where the blue boat (behind which the cannabis was found) was situated. That was at the opposite end from the natural route from the slipway through part of the boat storage area to the steps leading up to the grassy area. All the witnesses agreed that that was the natural and only route to gain access from the slipway to the cliff path. Officer Hamilton had stated specifically that he did not think that the light he had seen was in the area of the blue boat and the two officers hiding in the grassy area had simply heard voices from the boat storage area but could not say whereabouts in the storage area they were coming from. They were unable to observe the boat storage area from their position.
- (vi) There was no evidence linking the rucksack to the rib or the applicants to the rucksack. This was either because possible tests had not been undertaken or they had proved negative. On the contrary there were some thirteen marks and two of them were sufficient for comparison purposes, but the two fingerprints were not those of Dodd or Butler.
- (vii) It was not possible to say how long the rucksack had been hidden under the planks by the blue boat. The rucksack was a 'dry' bag and was in fact dry when discovered. It was not possible to know its exact position under the planks because the dog had disturbed the planks at the time of the discovery so that the photographs did not show the position as it would have been before such disturbance. The likelihood was that the planks would protect the rucksack from the elements, so it could have remained dry and have been hidden for some time. The dryness of the rucksack was to be contrasted with the wetness of the applicants' clothing upon arrest.

62. In response, Crown Advocate Russell said that there was strong circumstantial evidence in relation to both counts. She reminded the Court of the well-known statement of Pollock CB in R v Exall [1866] 4 F&F concerning circumstantial evidence as follows:-

“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one

link breaks, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the chord may be insufficient to sustain the weight, but three strands together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which may raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.”

63. To like effect is the observation of Lord Hoffmann in A G V Edmond-O’Brien (supra) at para 26:-

“It is in the nature of circumstantial evidence that single items of evidence may each be capable of an innocent explanation but, taken together, they establish guilt beyond reasonable doubt.”

64. She pointed out that all of the points raised by the applicants in this appeal had been made by their advocates to the Jurats in the course of their closing submissions. It was for the Jurats to assess the points made and to consider whether they were nevertheless sure that, when put together, the various pieces of circumstantial evidence made them sure of the guilt of each of the applicants.

Decision

65. We have carefully considered the points made by Advocate Cobb and Advocate Eeles. But we are in no doubt that there was ample evidence upon which the Jurats could properly conclude that they were sure of the guilt of each of the applicants on the charge(s) against them.
66. In relation to count 1, there was convincing evidence (which was not challenged) that Dodd had travelled on the jet ski to France that day and had returned in the hours of darkness. That trip was made against the background of the texts found on his phone, which certainly suggested that he was going to pick something up and leave some money in its place. He returns in the early hours to Fermain Bay but apparently changes his mind at the last moment and heads back to the QEII Marina. However he does not, as one might expect, travel straight back to the place where the jet ski has its mooring; on the contrary he diverts to the refuelling pontoon for a couple of minutes for no apparent reason before returning to pontoon K. Not long afterwards a bag containing heroin is found placed between the walkway and the refuelling pontoon. The evidence from Officer Woodington was clear in that the bag was wedged against the wheel of the walkway and it was for the Jurats to assess the reliability of that evidence given the fact that she had not referred to the wheel in her notebook or statement. As to the time at which the bag was found, it was for the Jurats to assess the reliability of Officer Woodington’s evidence to them that it was at 22:15 weighed against the original references to 23:30 in her notebook and to the rather unsatisfactory evidence of Office Nicolle. It was also for the Jurats to assess the effect which this had on Officer Hamilton’s experiment. If they accepted that the bag was indeed wedged against the wheel and was found at 22:15, the experiment provided compelling evidence that it could not have been there long and supported the inference that it must have been Dodd who placed it there.
67. In relation to count 2, the Jurats were entitled to take into account, insofar as Dodd was concerned, the likelihood of his being struck by the misfortune of twice being found in immediate proximity to a stash of controlled drugs having just landed in the hours of darkness from a sea going craft. It is true that on this occasion there was no conclusive evidence that the rib had been to France, but the evidence of the GPS was very powerful if the Jurats were satisfied that it related to the trip which the rib had just done. Given the evidence that it would be the track laid down when the GPS was last used, it would only not have been laid down on the trip which the rib had just undertaken if the GPS had not been used for that trip. That required the Jurats to consider how likely it was that Dodd and Butler were using the rib in darkness without the assistance of GPS or had turned off the tracking system. They were also entitled to consider the similarities with the partial GPS track laid down by the ski jet driven by Dodd in February.

68. We accept that the evidence in relation to the time that the rib left Grand Havre was very unsatisfactory. It appears that there was CCTV evidence which showed the time although it was not produced at trial. It further appears that Officer Hamilton had viewed that CCTV evidence and was therefore aware of the time of departure of the rib but he had not made a note of it or refreshed his memory before giving evidence. Accordingly he was unable to assist on this point. We have to say that this does not appear to have been the prosecution's finest hour but it is a somewhat peripheral point. It was simply not known when the rib had left but there was nothing positive to suggest that it had left too late to accomplish the trip to the Bay of Vauville and return to Bec du Nez by 1.30 am the following morning. Ultimately, this point together with all the other points made on behalf of the applicants (including for example the lack of forensic evidence linking the applicants with the rucksack or the rucksack with the rib), were matters for the Jurats to consider. All of the criticisms of the evidence made to us were also made to the Jurats.
69. The Bailiwick's system of justice (like that of Jersey and the United Kingdom) provides for trial by a court at first instance, not trial by a Court of Appeal and this Court may only interfere in the limited circumstances described earlier. In our judgment, there was powerful circumstantial evidence of guilt to which because, as they were entitled, the applicants did not respond by giving evidence, there was no explanation or response put forward by the defence. We have no doubt that the Jurats were fully entitled to find that counts 1 and 2 were proved to the requisite standard against Dodd and count 2 against Butler. We therefore reject ground 1 of the grounds of appeal.
70. In the circumstances we therefore refuse leave to appeal against conviction.
71. By way of postscript, we would mention two matters:
- (i) We repeat the comments of the court in its judgment in Finigan v Law Officers which has just been delivered. Where a case has been reported in the Guernsey Law Reports, it is that report which must be produced to the court.
 - (ii) There was some suggestion in the papers that Advocate Eeles and Advocate Mallett (who appeared for Dodd in the Royal Court) had declined to assist Judge Finch in the appropriate directions to be given to the Jurats on the topic of cross-admissibility because they disagreed with his decision on severance and cross-admissibility. Having considered the transcript, we acquit both of them of any such suggestion. There are no grounds for criticism. However, we emphasize that, where a judge seeks assistance on the terms of his summing-up on a particular point, he should produce a draft for consideration by counsel. It is then counsel's duty to assist the court by commenting on the draft with a view to ensuring that it correctly and accurately addresses the position. This duty exists regardless of any views which counsel may have on whether some earlier decision leading to the need for the direction was right or wrong. It is part of counsel's overriding duty to assist the court.