James Paul Kelly v The Law Officers of the Crown **JUDGMENT**
Court of Appeal **49/2015**
30th September, 2015

Application for leave to appeal against sentence imposed by the Royal Court having pleaded guilty to three counts of being knowingly concerned in the fraudulent evasion of the prohibition on importation of goods (Classes A, B and C) and following the single judge's decision to refuse leave to appeal of 22nd July 2015.

Approved Text
30.09.2015

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION

Criminal Appeal No 470

30 September, 2015

Before: **Clare Montgomery QC, Presiding**
Robert Logan Martin Esq., QC
Deemster David Doyle Esq.

Between: **JAMES PAUL KELLY** **Applicant**

and

THE LAW OFFICERS OF THE CROWN **Respondent**

Advocate Samuel Steel represented the Applicant
Crown Advocate Fiona Russell represented the Respondent

Doyle JA

1. This is the judgment of the Court in respect of an application for leave to appeal against sentence only.

Guilty pleas

2. The Applicant pleaded guilty to the three counts in the indictment against him, each of being knowingly concerned in the fraudulent evasion of the prohibition on importation of goods contrary to sections 71(1)(b) and 77(2) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972, as amended:

- Count 1 concerned 53.93 grams of methylenedioxymethylamphetamine, otherwise known as MDMA or ecstacy, a controlled drug of Class A;

- Count 2 concerned 2.14 grams of herbal cannabis, a controlled drug of Class B which the court accepted was for personal use; and

- Count 3 concerned a total of 2,296 tablets of benzlylpiperazine (BZP), dibenzylpiperazine (DBZP) and trifluoromethylphenylpiperazine (TFMPP), controlled drugs of Class C.

3. On Count 1 a sentence of 6 years and 6 months' imprisonment was imposed. On Count 3 a sentence of 3 years and 6 months' imprisonment concurrent was imposed and on Count 2 a sentence of 1 month's imprisonment concurrent was imposed making a total of 6 years and 6 months' imprisonment. The Applicant received the same sentence as two other co-defendants who had been knowingly concerned with him in the importation of the drugs. The drugs had been concealed in the fuel contained in the petrol tank of a car brought to Guernsey on the Condor ferry from Weymouth.

4. The Applicant pleaded guilty to Counts 2 and 3 on 5 March 2015 (his first appearance before the Royal Court). He pleaded guilty to Count 1 on 16 April 2015 after Judge Finch, a judge of the Royal Court, had delivered a judgment following legal argument on the elements of the charge. An appeal against conviction that sought to criticise Judge Finch's judgment was abandoned.

Bailiff's decision to refuse leave

5. In a decision dated 22 July 2015 Sir Richard John Collas, Bailiff sitting as a single Judge of the Court of Appeal, refused leave to appeal against sentence. The learned Bailiff stated:

> "6. As regards leave to appeal against sentence, the grounds entered by the Appellant relate to the same issue. Firstly, he alleges that the Appellant's ignorance of the presence of the Class A drugs justifies a departure from the well-known Richards guidelines, which, as they state, are not an inflexible code. Secondly, in the alternative, he claims that his erroneous belief should be treated as a very exceptional circumstance justifying a departure from the guidelines, noting that it would appear that the Royal Court did not consider the issue of whether this was a very exceptional case.
>
> 7. The starting point is to be found in the Richards guidelines. Paragraphs 16 and 17 address the approach to be adopted by the Court where the accused states that he or she believes that the type or quantity of drugs that were to be imported were of a different class or smaller quantity than those in fact involved. The Court of Appeal held that in Guernsey, as in Jersey "*an erroneous belief as to the type of drug being carried is not a mitigating factor".*
>
> 8. There is a very good reason for holding that the precise nature of the type of drug being imported cannot be relied upon as a mitigating factor. If the Court of Appeal had held otherwise, it would have created an extra hurdle for the prosecution who might be unable to prove what the defendant did or did not know. In cases where a drug courier has carried a sealed package into the Island, it would be easy for the courier to say simply that he or she did not know the package contained, for example, a Class A drug and instead believed that the importation involved only Class B or C drugs. In many case (sic), the prosecution would be unable to prove otherwise.
>
> 9. I also reject the Appellant's submission that the Royal Court did not consider the issue of whether this was a very exceptional case. The issue had been well

presented by the Appellant's counsel before the Royal Court. It is addressed by the Royal Court in its sentencing remarks where it said

> *"We emphasise that an erroneous belief about the nature of the drugs does not help anyone in this case - see the guidelines"*.

I therefore reject the Appellant's submission that the Royal Court failed to consider whether the Appellant's alleged erroneous belief was an exceptional reason to justify a departure from the guidelines. The Court's approach cannot be described as unreasonable and does not result in a sentence which could be said to be manifestly excessive.

10. In sentencing, the Royal Court adopted an overall starting point of 11 years which is not claimed to be manifestly excessive, and in my view, could not be claimed thus. The Court then applied a generous discount of more than one third in arriving at an overall sentence of 6 years and 6 months.

11. In my opinion, the sentence is not manifestly excessive. Leave to appeal against the sentence is therefore refused. …

13. The sentence is neither wrong in principle nor manifestly excessive and therefore leave to appeal against sentence is rejected."

Determination of the appeal

6. The Applicant was born in October 1988. He pleaded guilty to three Counts. Count 1 concerned 53.93 grams of a controlled drug of Class A. The Royal Court (Judge John Russell Finch and Jurats) specified a starting point of 9 years in respect of Count 1 and on Count 3 a starting point of "around 6 years". The Royal Court referred to the:

> "… combined total, bearing in mind the totality principle and reaffirming that this was a well organised importation is 11 years."

7. It is unsurprising that Advocate Steel, on behalf of the Applicant, takes no serious issue with the starting point in respect of Count 1, on the assumption that the guidelines in *Richards v Law Officers of the Crown* 2000-02 GLR 247 apply. It is the lowest starting point in the range (9-12 years of imprisonment) specified in *Richards* in respect of the importation or supply of Class A drugs in powder form with a weight in grams in the range of 50-100.

8. The Royal Court in its sentencing remarks delivered on 27 April 2015 referred to the Applicant's previous convictions as "relatively minor" and did not take them into consideration to his detriment. There were three convictions in February 2009 in respect of driving without L plates, no third party insurance and not being supervised by a qualified driver. The Magistrates dealt with them by way of fines totalling £600. The Royal Court was right to disregard these previous convictions.

9. The main issue before the Royal Court was the impact of the claimed state of ignorance of the Applicant in respect of the controlled drugs of Class A. On this issue the Royal Court stated:

> "We emphasise that an erroneous belief about the nature of the drugs does not help anyone in this case – see the guidelines."

10. It is submitted on the Applicant's behalf that it would appear that the Royal Court did not consider the issue of whether the *Richards* guidelines applied and if so whether this was a "very exceptional" case in view of the Applicant's assertion that he was ignorant of the existence of the controlled drugs of Class A and had specifically agreed only to the importation of drugs in Class B and C. We disagree. The Royal Court did consider this issue and as can be seen from

the quoted extract from the sentencing remarks at first instance concluded that it did "not help anyone in this case – see the guidelines."

11. The Royal Court also considered the report dated 27 April 2015 from the Guernsey Probation Service which, somewhat unrealistically, indicated at paragraph 14 that the author would ordinarily "consider a community disposal for this offence" and made reference to "a straight punishment such as Community Service Order (CSO) as a direct alternative to imprisonment." This frankly flies in the face of the well-established sentencing guidelines in this jurisdiction. The Royal Court recognised this when, during the sentencing remarks, it stated that the reference to a community service order was:

> "… not viable and wholly conflicts with a long line of binding legal authorities, such a disposal cannot be considered in a case of this gravity."

12. In fairness to the author of the report we should add that in paragraph 14 the author added:

> "The Court might feel that the quantity of substances and method of importation precludes such a sentence and Mr Kelly is under no illusions that a CSO would be considered. However if it were a viable option, arrangements can and will be made to provide work …"

13. We agree that a community service order was not appropriate in this case and Advocate Steel, adopting a sensible and realistic approach, did not endeavour to persuade us otherwise.

14. As the Royal Court in its sentencing remarks noted, this was "a well organised importation". Furthermore, the degree of concealment (packages in the fuel tank immersed in fuel) was an aggravating factor.

15. Taking into account the mitigation, the Royal Court felt "able to give a discount of substantially over one third to reflect the pleas and personal mitigation". The Royal Court considered that although "substantial sentences" were being passed, the Applicant was "getting a fair discount due to the mitigation put forward."

16. The principal factor in the Applicant's favour was his guilty plea. He had no relevant previous convictions. The Royal Court reduced the combined starting point of 11 years to 6 years and 6 months. There was a discount of one third to reflect the guilty plea and a further discount to reflect the personal mitigation including the lack of any relevant previous convictions. The discount to the starting point was a very generous discount.

17. We are not persuaded that the Royal Court should have departed from the guidelines provided in *Richards*. We accept that such guidelines are not "an inflexible code" but they are nevertheless guidelines which should be followed unless there is good reason for them not to be followed. The guidelines are intended to be flexible guidelines, not rigid tram tracks. This was stressed at paragraph 5 of the judgment in *Richards:*

> "It cannot be stressed too strongly that this court is not attempting to establish for the Royal Court some sort of inflexible code that covers all of the issues involved in sentencing for such offences, some of which, as yet, be unknown and incapable of anticipation. These are general guidelines only; sentencing is always a matter for the court's discretion. It is an art and not a science."

18. The Royal Court at first instance still retains a sentencing discretion. As Macrae J in the Hong Kong Court of Appeal made clear at paragraph 20 in *HKSAR v Ma Cheuk Shing* (CACC 507/2012 21 August 2013):

> "… Even in cases where there are sentencing guidelines, a sentencing judge has an ambit of discretion in determining the specific sentence to be imposed."

19. On behalf of the Applicant it was submitted (see paragraph 39 of the Applicant's undated skeleton argument) that the Applicant's ignorance of the Class A drug should provide good mitigation. We do not agree. The Applicant was willingly involved in the importation into this Island of controlled drugs. He accepts he was party to a plan to import Class B and Class C drugs. Those who participate in such illegal activity must take the consequences of their actions, even if (as here) the Applicant was unaware that a consignment of Class A drugs had been added to the drugs imported. The *Richards* guidelines specifically contemplate that they will apply to persons who believe that the drugs that are the subject to their offending behaviour were different in type, quality or Class. It appears to us that the *Richards* guidelines apply to persons such as the Applicant even though his claim is one of ignorance rather than mistake.

20. In the words of Crown Advocate Russell (see paragraph 6 of the Respondent's submissions dated 10 September 2015):

> "… Ignorance of the existence or presence of any kind of a prohibited drug being imported may afford a defendant a defence to a charge in respect of that item, but where the defendant knows full well that other prohibited drugs are being imported in the same transaction and he has assisted in that enterprise, he cannot then claim that he did not know that he was importing prohibited drugs, whatever they later turn out to be."

21. The Applicant played an active role in the importation of the drugs. Ignorance of the content of the whole consignment does not (for the sound policy reasons explained by the learned Bailiff at paragraph 8 of his decision dated 22 July 2015 and referred to in *Richards* and *Campbell v Attorney General* 1995 JLR 136) provide "significant mitigation" in the particular circumstances of this case or justify sentencing without regard to the *Richards* guidelines.

22. On behalf of the Applicant it was submitted in the alternative (see paragraph 41 of the Applicant's undated skeleton argument) that if a departure from the *Richards* guidelines is considered inappropriate, the Applicant's sentence should have been mitigated due to his "erroneous belief" by virtue of "very exceptional circumstances".

23. This court (differently constituted) in *Richards v Law Officers of the Crown* 2000-02 GLR 247 stated:

> "16 An accused may state to the court that he or she believed that the type or quantity of drugs that were to be imported or were found in his or her possession were of a different class or a smaller quantity than those which were in fact involved. For example, it may be said that it was to be cannabis resin, not MDMA. A sentencing court might be sceptical at hearing such statements, which are, by their nature, difficult to verify. In some cases, they will be manifestly incredible. The court is fully entitled to reject, without a *Newton* hearing (see 77 Cr. App. R. 13), a version of events as to the quantity or type of drugs involved which is beyond belief *(R. v. Ghandi*). In some exceptional cases, a *Newton* hearing may be necessary if the court is not to proceed on the basis of the accused's stated belief. On this, there appears to be a difference of approach between the English and the Jersey cases. In *Campbell v. Att. Gen.*, a five-judge Jersey Court of Appeal case giving guidelines for drug trafficking, it was stated (1995 JLR at 145):
>
> > "In our judgment, a courier who knowingly transports illegal drugs must be taken to accept the consequences of his actions. As the Attorney General put it, the moral blameworthiness is the same, whatever the nature of the drugs transported. Furthermore, viewed from the perspective of the community, the evil consequences flowing from the dissemination of Class A drugs are not mitigated in the slightest by the erroneous belief of the courier that he was transporting a Class B drug. There may be very exceptional circumstances in which a genuine belief that a different drug was being carried might be relevant to sentence. But in general we endorse the Royal Court's view in the case of Campbell that an erroneous belief as to the type of drug being carried is not a mitigating factor."

R. v. Bilinski was cited and fully considered, but not followed. In that case, Lord Lane, C.J. said (86 Cr. App. R. at 363): "We are of the view that the defendant's belief in these circumstances is relevant to punishment and that the man who believes he is importing cannabis is indeed less culpable than he who knows it to be heroin." Faced with this difference of approach, we consider that the approach of the Jersey courts is the one which the Guernsey courts should follow, but it will be a matter for consideration in the circumstances of each case."

24. *Campbell* was followed in *Rimmer v Attorney General* 2001 JLR 373 and at paragraph 14 of the judgment of the Jersey Court of Appeal in *Rimmer* it was emphasised that:

> "… Jersey as a separate jurisdiction sets its own sentencing levels to meet the social and penal needs of the community in this Island."

25. Guernsey does likewise. At paragraph 16 of the judgment in *Rimmer* the court added:

> "… The greater the quantity of illegal drugs brought into Jersey and sold and used here, the greater the harm done to the small community in Jersey. The policy of the Jersey courts must remain to impose strong punishments to mark the particularly anti-social nature of drug trafficking into and in Jersey."

26. The same comments are equally applicable to Guernsey. At paragraph 23 of the judgment in *Rimmer* the court stated:

> "23 The Attorney General submitted that every defendant seeks to minimize his role and involvement. He pointed to the difficulties which the prosecution faces in challenging the defendant's story in this respect. We acknowledge that difficulty, which is inherent particularly in cases in which the defendant pleads guilty before trial. But there are some remedies. If the defendant's story is not credible, the Royal Court can be asked to reject it as incredible. If on its face the story has some degree of credibility, it may be possible to challenge the story by means of a *Newton* hearing. In the judgment of this court, the risk that defendants may sometimes succeed in overly minimizing their role and involvement is no justification for excluding this as a principal factor, or in that respect departing quite radically from the *Campbell* guidelines, which in our view remain appropriate and effective."

27. The Jersey Court of Appeal in *Hamilton v Attorney General* 2010 JLR 313 followed *Campbell* and applied *Rimmer*. The court referred to the position in England and Wales where an erroneous belief by a defendant that he is importing a drug of a less serious category than the one which he is in fact importing may be regarded as a mitigating factor. The court stated:

> "68 In this jurisdiction a different approach has been taken …
>
> 69 In our judgment, the Royal Court in this case was correct to find that the same principle applies where the courier believes he is importing drug money (rather than a Class B drug) whereas he is in fact bringing in a Class A drug. In the first place, the moral blameworthiness is the same. As Lord Hope spelled out in his speech in *Forbes* [2002] 2 A.C. 512, at para. 15 those involved in organizing the importation of controlled drugs often give the minimum of information to couriers and will use sophisticated means of concealment to ensure that the true nature of the goods is known only to those at each end of the importation process. We would add that such organizers will also often tell the courier that the goods fall into a less serious category than they in fact do in order to induce the courier to undertake the smuggling operation.
>
> 70 In our judgment, a courier who agrees to import prohibited goods without knowing their exact nature and relying entirely on verbal assurances from the

> organizers of a criminal smuggling operation must be taken to accept the consequences of his actions if the goods turn out to be of a more serious category than he believed. He has put himself in a position where he is importing whatever the organizer has chosen to conceal. Furthermore, it would in any event be quite impossible in most cases to test the assertion of a courier as to his belief as to the exact nature of the goods. That indeed was one of the reasons given by Lord Hope for maintaining the rule that there is sufficient *mens rea* for a conviction if the defendant knows he is importing prohibited goods even though he does not know the exact category of prohibited goods (see [2002] 2 A.C. 512, at para. 24 and paras. 32-33). The point seems to us equally applicable when considering sentence.
>
> 71 Secondly, as stated in *Campbell*, viewed from the perspective of the community, the evil consequences flowing from the dissemination of Class A drugs in the Island are not mitigated in the slightest by the erroneous belief of the courier that he was transporting drug money rather than Class A drugs. In any event, the transportation of drug money is an integral part of the drug trade, in that the purchase price and sale proceeds of drugs need to be transported to and from the places of purchase and distribution if the trade is to succeed.
>
> 72 We agree that, following the reasoning in *Campbell*, there may be very exceptional circumstances in which a genuine belief that drug money rather than controlled drugs is being carried might be relevant to sentence. An example might be where there is convincing evidence that the courier took every possible step - *e.g*. by inspecting the goods as they were concealed – to ensure that the goods were of the type which he had been assured they were but was then hoodwinked by a subsequent switching of the goods.
>
> 73 There were no such exceptional circumstances in this case. This was a typical example of a courier placing himself entirely in the hands of the organizer and agreeing effectively to import whatever the organizer chose to conceal in the tyres. As Hamilton said in interview, he did not see the items being put in the tyres and did not think of checking to see whether or not they contained cash. He told the Customs officers: 'I didn't ask any questions. You don't ask questions.'"

28. In *Caldwell-Camp v R* 2003-05 MLR 505 (the leading Manx guideline case in respect of the importation and supply of Class A drugs) the Manx Appeal Division at paragraph 55 on page 529 stated:

> "A defendant may state that he or she believed that the type or quantity of drugs produced or found in his or her possession was a different class or a smaller quantity than that which is in fact involved. It will be for the court to determine whether to proceed with or without a *Newton* hearing. However, as a general premise, a courier who knowingly transports illegal drugs must be taken to accept the consequences of his or her actions …"

29. The Guernsey, Jersey and Manx guideline cases have deliberately taken a different approach in this area to that adopted by the English courts. There are sound policy reasons for this distinctive approach which have already been explained in previous judgments. They include the vulnerability of small island communities to the importation of controlled drugs and the adverse impact such offending behaviour can have on island communities. It is for each Island to determine, in respect of its needs and local community circumstances, the best approach to sentencing in respect of controlled drugs.

30. We consider that the reference to exceptional circumstances in paragraph 16 of *Richards* demonstrates that in the vast majority of cases, the fact that a defendant has a genuine but mistaken belief as to the nature of the drugs the subject of his offence, will not justify a departure from the *Richards* guidelines.

31. There will only be a limited range of cases in which ignorance as to part of the consignment being imported, or a genuine belief that a different drug was being imported, could provide some, albeit limited, mitigation. In our judgment it is clear from the decision in *Richards* that the fact that a defendant has such a belief will never be sufficient, on its own, to justify a departure from the guidance.

32. The exceptional circumstances, taken cumulatively, that may fall to be considered include:
[1] The reasonableness of the belief or the asserted ignorance in the circumstances of the case;
[2] The opportunity on the part of the offender to determine whether his belief/ignorance was justified, for example by inspecting the consignment or by specifying the contents of the consignment;
[3] A very substantial difference in quality, quantity or Class between the actual and putative consignment;
[4] A minor role giving limited control over the contents of the consignment; and
[5] Good character or other personal mitigation.

33. In most cases even where a sentencing Court is prepared to accept that a defendant may be genuinely ignorant or honestly hold an erroneous belief, we would expect evidence to be called to support any claimed exceptionality, not limited to evidence from the defendant. We do not intend, in making this observation, to limit the entitlement of the sentencing Court to reject, without a *Newton* hearing (see 77 Cr. App. R. 13), a version of events as to the quantity, type or Class of drugs involved which is beyond belief.

34. Applying the criteria suggested above to this case:
[1] The Applicant could not justify his ignorance objectively. He claimed to be ignorant because he said that the original plan involved only Class B and C drugs. However he had done nothing to inhibit or restrain his co-defendants from including Class A drugs in the importation;
[2] Although the Applicant was not able to inspect the consignment before importation, he made no effort to ask what was being imported even though he was in contact with his co-defendants;
[3] Although there is a difference between the maximum sentences imposed in respect of Class A and Class B drugs, the Applicant had provided guidance to his co-defendants that enabled them to hide large quantities of drugs in the fuel tank of the vehicle used for the importation. Even if he was only contemplating the importation of Class B or C drugs this could have enabled the importation of relatively large quantities of Class B drugs that would have attracted a similar sentence to that attaching to the importation of the Class A drugs in this case;
[4] The Applicant accepted his responsibility was similar to that of his co-defendants. In our view this concession probably underplays his standing in the scheme of importation. He gave instructions on the creation of the hiding place for the drugs and he appears to have been able to minimise his exposure to the risk of arrest by travelling to Guernsey by plane in advance of the importation rather than being directly involved. This type of activity appears to be more consistent with him playing a leading role. In any event his role cannot be described as minimal or lacking in control;
[5] Finally he appears to have little personal mitigation. His involvement in the offending behaviour took place without coercion and was motivated by greed.

35. In our judgment there is nothing exceptional about this case. The Applicant's asserted ignorance of the presence of Class A drugs in the importation does not provide any reason to depart from the *Richards* guidelines. There is thus no basis on which this Court could conclude that the total sentence imposed was wrong in principle or manifestly excessive.

Conclusion

36. We are satisfied that there was no merit in this application for leave to appeal against sentence. The total sentence imposed in this case cannot be justifiably criticised. We therefore dismiss the application for leave for the reasons specified in this judgment. We decline to grant legal aid

and we also decline to make an order under section 37 (3) (b) of the Court of Appeal (Guernsey) Law 1961.