

JERSEY / JUDGMENT

AG -v- MacKenzie and Richards

[2011] JRC 173A (31 August 2011)

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JUDGMENT

THE DEPUTY BAILIFF: 1. These cases were listed separately before the Superior Number for sentence on 31 st August at 2:30pm. It became apparent on hearing counsel in the case against AG-v-MacKenzie

[2011] JRC 171 and having read the papers in relation to the case against AG-v-Richards

[2011] JRC 170 that two similar issues arose in both cases. These were:- (i) What was the correct approach to be taken when sentencing on a charge of being in possession of controlled drugs with intent to supply when the nature of that supply was what has been described as a "social supply"? (ii) What was the correct approach to be taken on what has been described as the Valler uplift, applying Valler-v-AG JCA 2002/133. 2. Accordingly the Court decided it would be convenient to hear both cases together to ensure that all arguments in relation to those issues could be ventilated. This would obviate the possibility of the Court reaching conflicting decisions on a matter of sentencing policy or being constrained on the second case by its decision in the first when perhaps the different arguments had not been raised. Neither the Crown nor counsel for either defendant dissented from this course and indeed Advocate Bell, for Richards, welcomed it. 3. Sentence was passed in both cases on 31 st August and brief remarks were made at that time. Full reasons are now being delivered, as we then indicated would be the case. If there is any conflict between what was said then and what is contained in this judgment, which we hope will not be the case, these considered reasons should prevail. 4. It is necessary to set out on a broad outline of the facts in each case in order to understand the nature of the argument. AG-v-MacKenzie 5. MacKenzie fell to be sentenced on an indictment originally containing seven counts but count six was abandoned and a formal verdict of not guilty entered in relation to that count. Of the six remaining counts four were for possession of controlled drugs and two for possession with intent to supply. The simple possession charges related to 30 tablets of ecstasy, 2.18 grams of cannabis, and a small amount of diazepam and temazepam tablets, controlled under Part 3 of the Second Schedule of the Misuse of Drugs (Jersey) Law 1978 . The more serious offences were count two, which was a charge of possession of 30 ecstasy tablets with intent to supply, and count five which was a charge of

possession of 7,391 diazepam tablets with intent to supply. The Court was told that the local street price for ecstasy was £10 per tablet giving a street value of the ecstasy tablets which were the subject of the charge of possession with intent to supply of £300. The diazepam tablets which were the subject of count five had a street value of £1 per tablet and therefore the overall street value is £7,391. 6. MacKenzie entered a plea of guilty to the charge of possession with intent to supply ecstasy on 4 th April, 2011, and on 10 th June he entered a plea of guilty to the charge in relation to possession of diazepam with intent to supply. The Crown accepted the basis of the plea to count two which was that the defendant intended to use the majority of the ecstasy tablets himself, but that he would have supplied some of them to friends on the understanding that at some future date they would return the favour. In relation to the 7,391 diazepam tablets, the defendant's position, again which the Crown accepted, was that he was looking after the diazepam for a third party who he expected would reward him with some tablets for his personal use. Nonetheless he was aware that the third party owner of the tablets intended to supply them elsewhere and in those circumstances he was acting as a cog in the chain of supply. 7. In relation to the two different sets of drugs therefore, the defendant had a different intention - what might be termed social supply to friends, in relation to the ecstasy tablets, in the hope that the favour would at some point be returned, and a supply back to the owner of the diazepam tablets in order that he might supply them to others, the defendant receiving some of the tablets as a reward for his services. 8. The Crown submitted that on the application of the decision of the Court of Appeal in Bonner and Noon-v-AG 2001/212, possession of 30 ecstasy tablets fell into the guideline bracket where a starting point of seven to nine years should be taken, and, in relation to count two, that seven years would normally have been appropriate, had no other considerations arisen, notwithstanding that the defendant merely intended to supply some of the tablets socially and that that intention should be taken into consideration in determining what discount should be given from the starting point. In relation to count five, the possession of diazepam tablets with intent to supply, the Crown considered that a Valler uplift was appropriate. The quantity of tablets was significant. The defendant was a vital cog in the supply chain, and his criminality was indeed much greater in relation to the diazepam tablets than in relation to the ecstasy tablets. Bearing in mind that the maximum sentence for possession of diazepam with intent to supply is five years imprisonment, and bearing in mind the quantity of drugs involved, the Crown submitted that a Valler uplift of one year was appropriate, taking the total starting point in relation to the charge of possession of ecstasy with intent to supply to eight years. 9. By contrast, relying upon the cases of AG-v-Buckley

[2008] JRC 144 , AG-v-Sampson

[2008] JRC 201 and AG-v-Dean

[2009] JRC 064 , Advocate Field contended that the starting point of seven years was too high and that in any event no Valler uplift should be applied. It was said that the primary offence - possession of ecstasy with intent to supply - was not a commercial possession with intent

to supply but an intention to make merely social supply, and the Court was therefore free to depart from the Rimmer guidelines. AG-v-Richards 10. Richards was indicted for some motoring offences, but more relevantly for the purposes of this judgment, possession of ecstasy with intent to supply and possession of diazepam with intent to supply. In relation to the ecstasy charge, 47 ecstasy tablets were found on the defendant's person, and at his home address, 917 diazepam tablets were found. The street value of the ecstasy tablets was put at £470 and of the diazepam tablets at £917. 11. The defendant's plea was entered on the basis, which the Crown accepted, that he was going out with a large group of friends and would probably have given some of the ecstasy tablets to his friends at some point or other during the evening. He personally used ecstasy infrequently. The difference between this case and the case against MacKenzie is that he did not expect to make the ecstasy tablets available to his friends for any reward nor did he expect the favour to be returned at some point in the future. In relation to the diazepam tablets, the defendant entered his plea on the basis that he would have used some himself and would have sold the remainder to friends at a price which would have allowed him to cover his own cost of the drug. This then was a slightly different form of "social supply" in the sense that money would be changing hands, but not for significant profit albeit that the defendant would have been able to have some of the drugs at no cost to himself. 12. The Crown contended that on the application of the Bonner and Noon guidelines, a starting point of seven years imprisonment was appropriate in relation to the ecstasy tablets, and the Crown did not argue that any Valler uplift ought to be applied. When pressed as to the reasons for this, it was suggested that the absence of commerciality should be taken into account and for that reason no Valler uplift was appropriate. 13. Advocate Bell, for the defendant, contended that this was not drug trafficking on a commercial basis at all. Bonner and Noon only applied to commercial situations. The defendant was not even selling the ecstasy tablets at cost. He was simply giving them away and he was going to do this not even on the basis of a promise that those who received the ecstasy would do him a good deal later. A supply to friends on a social basis was not a commercial supply. He agreed that no Valler uplift was appropriate. 14. So it is on this factual basis that the Court had to consider the issue of "social supply" and the issue of the Valler uplift. The Authorities 15. The perception of the 1960's and the 1970's was that the ladies of Auchtermuchty, an imaginary journalistic creation reflecting the last bastion of conservative traditionalists, would undoubtedly have blamed the contraceptive pill, the Beatles and/or the musical Hair for the permissive society and the increase in drug taking during those decades. Whatever the reason, the fact is that western societies and courts increasingly had to grapple with the problems associated with the growing popularity of illegal drugs. Jersey was not immune. Indeed the fact that the Island has been reasonably prosperous, coupled with some success on the part of the law enforcement authorities, has led to the trade in drugs in Jersey becoming remunerative for drug dealers and offending has risen in frequency. The courts' policies have developed over the period. In 1995, the opportunity was taken to convene a five judge court in the Court of Appeal to consider sentencing policy and in Campbell-v-AG

- [1995] JLR 136 , the appeal of Mr Campbell and two other appeals were heard contemporaneously in order that the Court could lay down new guidelines for the future. 16. At the time of Campbell , the Court of Appeal had settled on an approach to sentencing in drugs cases that required the sentencing court to identify a starting point which reflected the nature of the offending, before making such allowance as the sentencing court thought appropriate for the mitigation which existed. In *Clarkin-v-AG*
- [1991] JLR 213 , the Court of Appeal indicated that this guideline referred to cases of possession of a class A drug with intent to supply to others when the involvement of the defendant in drug dealing was comparable to that in the case of *Fogg-v-AG*
- [1991] JLR 31 . The defendant in that case was found in possession of a quantity of LSD shortly after his arrival in the Island. During that short time he had received the drugs and had set about the sale of them. In *Clarkin* , the Court of Appeal concluded:- "It is very seldom that the starting point for any offence of possessing a class A drug with intent to supply it on a commercial basis can be less than a term of six years". 17. In *Campbell-v-AG* , the Court of Appeal took the opportunity to revise the guidelines. At page 144 of its judgment, the Court set out its basis for doing so:- "We have no doubt that the Courts should indeed play their part in suppressing the evil of drug trafficking which has the capacity to wreak havoc in the lives of individual abusers and their families ... We desire therefore to make absolutely clear what is the policy of the Courts in this jurisdiction in relation to the sentencing of offenders who import or deal in drugs on a commercial basis . That policy is that offenders will receive condign punishment to mark the particularly heinous and anti-social nature of the crime of drug-trafficking." (Emphasis added) 18. The Court then endorsed the sentencing approach of *Clarkin-v-AG* :- "The proper approach is that the sentencing court should adopt a starting point which is appropriate to the gravity of the offence. Having established the starting point, the court should consider whether there are any mitigating factors and should then make an appropriate allowance for them before arriving at its sentence." 19. The decision in *Clarkin* had been that there was a band of starting points between 6 and 9 years imprisonment, with 9 years starting point considered appropriate for an offender whose involvement in drug trafficking was akin to that of *Fogg* . In *Campbell* , the Court of Appeal indicated that the appropriate starting point thereafter should be 12 years' imprisonment if the involvement of the defendant in drug trafficking is similar to that of *Fogg* , with a lower starting point if the involvement is less. Much would depend upon the amount and value of the drugs involved, the nature and scale of the activity and any other factors showing the degree to which the defendant was concerned in drug trafficking. The Court continued, at page 145:- "We propose also to vary the lowest point of the band established in *Clarkin* ; we accordingly state that it is seldom that the starting point for any offence of trafficking in a class A drug on a commercial basis can be less than a term of seven years. We have employed the term 'trafficking' deliberately. In the past, some distinctions may have been drawn between offences involving the importation of class A drugs and offences involving their supply whether possession with intent to supply. In our judgment, there is no justification for any such distinction. The guidelines

which we have set out above apply to any offence involving the trafficking of class A drugs on a commercial basis." 20. The Court then went on to lay down a scale of starting points for the importation of cannabis with some guidance with regard to street values in the case of offences involving amphetamines. 21. It is clear that the guideline case of Campbell-v-AG was concerned with trafficking in drugs on a commercial basis. 22. The next case of consequence in this series is the case of Gregory-v-AG

[1997] JLR 1 . In that case, the two significant charges brought against the accused related to the importation of 8.54 grams of heroin and 139 tablets of methadone. Originally, the accused had been charged not only with importation but also with possession with intent to supply. When he entered a plea of guilty to the charges of importation, the Crown abandoned the charges of possession with intent to supply. The basis for doing so was that the purpose to which the drugs were to be put was not a relevant consideration for sentencing. Mr Gregory maintained that the drugs imported were for his personal use. The Crown contended that the drugs would have been supplied by him to someone else and the Royal Court accepted the Crown's contention. In doing so, the Court demonstrated that the purpose of the importation was indeed relevant to the question of sentence. If it had not been relevant, there would have been no reason to resolve whether the drugs were imported for personal use or for onward supply. It seems to us that the Court was unquestionably right to approach the matter in this way because at that time the issue for the sentencing court was whether the guideline case of Campbell should be used to fix the starting points. Indeed the Court of Appeal in Gregory-v-AG approached the matter in just that way. At page 6 of its judgment, having decided that there was insufficient to justify the conclusion that this was a commercial importation, the Court of Appeal said this:- "Once it is established and accepted that sentence has to be passed on the basis that the importation was not for a commercial purpose the guidelines in Campbell are not applicable. That case deals only with cases of trafficking on a commercial basis." 23. It also seems reasonably clear from the Court of Appeal's decision in Gregory that the Court took the view that the purpose for which the importation was made was relevant to the offence rather than the offender. At page 4, the Court said this, when considering the Crown's contention that the plea that the drugs were intended for personal use did not contradict the Crown's case:- "We refer first to the injustice of the result. In terms of offence to the common good, importation of drugs for supply to others is clearly more serious than importation for the importer's own use ... The two situations of importation for commercial use and importation for personal use do stand on different levels from the point of view of the vice being introduced. It seems unjust and inexplicable that two acts so different in their results should be visited with the same penalty." 24. In that case the Court of Appeal reached the conclusion that the right starting point for the importation of that amount of class A drugs for personal use was six years imprisonment. It was clearly the non-commercial basis of the importation which was used to reduce the starting point, departing from the guideline case of Campbell . 25. In the case of Rimmer-v-AG

- [2001] JLR 373 the Court of Appeal conducted a further review of sentencing policy for drug cases. The key approach to the sentencing court was to have regard to the degree to which the defendant was concerned in drug trafficking. Weight or dosage of drugs was an important factor although not the sole factor in relation to the starting point. The Court rejected the Crown's contention that weight was the sole factor. There were different levels of involvement in the drugs trade, and the Court found that "to sentence the simple 'mule' and the ultimate drugs 'baron' identically would both be inappropriate, having regard to the degrees of harm which those at each level inflict on society and therefore the different levels of culpability, and plainly unfair to defendants at the lower levels of involvement. The length and the chain are not of equal strength or significance in the sentencing context." (paragraph 22). 26. The case of Rimmer expanded the Campbell guidelines by setting down tables of weights of drugs in powder form with commensurate starting point bands, but it did not seek to depart from the fundamentals of the Campbell guidelines. Rimmer should therefore be seen as a case which still required the sentencing court to make an assessment as to whether the defendant was trafficking in drugs on a commercial basis. 27. In Bonner and Noon-v-AG
- [2001] JLR 626, the Court of Appeal gave further consideration to sentencing guidelines where the drug trafficking offence involved class A drugs carried or sold in tablet or unit form. In paragraph 1 the Court of Appeal said this:- "We emphasise that in this judgment, as in the Rimmer judgment, the guidance given is as to the application of the Campbell guidelines, and neither judgment is intended to supersede those guidelines." 28. Both Mr Bonner and Mrs Noon carried a commercial amount of drugs - Mr Bonner brought with him 3,891 ecstasy tablets, and Mrs Noon brought with her 2,258 ecstasy tablets. The question of supply for social purposes, or personal use simply did not arise. 29. The Court's sentencing policy changed with the case of Conquer-v-AG 2002/73 [Court of Appeal - Jersey Unreported]. In that case, the Court was dealing with an appeal against a sentence of five years imprisonment passed by the Superior Number for being knowingly concerned in the importation of heroin. The defendant had concealed in her vagina approximately 17 grams of heroin with a street value of between £5,000 and £7,000. The Crown described this amount as "a small commercial quantity". In her question and answer interview, Ms Conquer had made it plain that she was a heroin addict and she brought enough heroin to support her, and for her to use. She came to Jersey simply to get away and she had no intention of supplying the heroin to others. The Court of Appeal was addressed on the remarks of the differently constituted court in Gregory-v-AG and said this at paragraph 8 of its judgment:- "She [the appellant] did not concede that the drugs were for other than personal use but chose not to jeopardise any discount to which she might otherwise be entitled by offering to amplify on oath what she told the customs. We have some doubts, despite what appears to be the ratio in Gregory-v-AG as to the appropriateness of the court when sentencing for importation holding investigations with a view to deciding whether a particular importer is going to hoard his importation for his own future use, share it with a few friends or stand on the corner of King Street selling it in small quantities to all

comers." 30. The Court of Appeal in Conquer found that there was no factual basis for the sentencing court having determined that the appellant was carrying the drugs for reward and that this was a commercial importation, even though a small amount of the drug might have been for her own use. The important passages in the judgment therefore continue at paragraphs 11 and 12:- "11 ... we have concluded that she is now entitled to be sentenced on the basis that the drugs were her own - they were the last thing she was going to part with and she was confident of financing her other needs from other resources thus obviating the need for onward disposal of any part of the consignment. No-one can say whether this objective would have been achieved.

12. We repeat the fact that her offence to which she pleaded guilty was that of importing over 17 grams of heroin. After anxious consideration we have concluded that the bands in Rimmer should still apply as starting points in the case of all importation offences - to do otherwise may lead to artificial and subjective tests being introduced in situations where no such complications need arise. We regard the points arising in this case as essentially matters of mitigation personal to the appellant." 31. It would seem from this case that if the Rimmer guidelines were to apply, then it must follow that the purposes of the importation were irrelevant to the starting point. 32. The apparently conflicting decisions of the Court of Appeal in Gregory and Conquer were then considered by the Royal Court in AG-v-Finnegan

[2004] JLR 179 . Essentially the Superior Number in that case, acting as an appellate court, considered that it had a choice as to which of the two Court of Appeal judgments should be applied, and determined that a starting point of five years imprisonment would have been appropriate given the fact that the drugs which had been imported were for the appellant's personal use and not for onwards supply. Very shortly after the decision in Finnegan , the Royal Court sat in the case of AG-v-Neal

[2004] JRC 088 . Mr Neal was arrested with one ecstasy tablet. He was taken to his home address which was searched and at that address the police found 15 ecstasy tablets and 5 wraps of amphetamine sulphate. When shown to the defendant, he said that these were "ecstasy and speed, it was something for a few friends tonight". During interview the defendant said the drugs seized were for his personal use. He clarified what he had said earlier by saying that if he had had an ecstasy tablet etc with him and had been requested by a friend, then he would have supplied it. The Crown accepted that factual basis for the purposes of the plea and sentencing and submitted that he was to be sentenced on the basis that he was not a street dealer and that his activities were more properly described as a 'social supply'. The Crown had regard to Finnegan and concluded that the Campbell and Rimmer guidelines did not apply and took a starting point of three years' imprisonment. The Court in its judgment accepted that any supply would have been a social supply and not with any commercial motive and sentenced on that basis. The conclusions were granted and accordingly the Court must presumably have accepted the Crown's starting point of three years. 33. Neal was applied in the case of AG-v-Sampson

- [2008] JRC 201 . In that case the defendant was found in possession of 28 ecstasy tablets and 10.24 grams of amphetamine sulphate and charged with possession with intent to supply. The Crown accepted that this was a social supply as the defendant intended to supply the drugs to friends at cost price. What he did not sell he intended to use himself. The Crown took a starting point of four years in relation to the ecstasy, increased by six months to reflect the supply of amphetamine making a total starting point of four years and six months. The Court did not consider that a Valler uplift in relation to the amphetamine charge was appropriate on the facts, and took a starting point of three years. 34. In the case of AG-v-Dean
- [2009] JRC 064 , the accused was charged with one count of possession of 25 ecstasy tablets with intent to supply. The Crown accepted the basis of plea which was that the defendant normally purchased ecstasy for his own use but on this occasion the dealer was leaving the Island and gave the defendant the chance of acquiring just over 50 tablets at wholesale price. The defendant took advantage of this on the basis that he would sell up to half of these to friends or other persons who asked him for them, in order to cover his costs. 35. At paragraph 3 the Court said:- "In this case the Crown suggests dropping below the normal minimum starting point of seven years by one year and the Court agrees that it is exceptional in that way and six years is the correct starting point. In the event, and unusually, the Court found that having regard to other mitigation, it was possible to avoid a custodial sentence and community service was imposed." 36. Quite properly counsel also referred us to the case of Shahnawaz-v-AG
- [2007] JLR 221 . This was a case involving an appellant who had pleaded guilty to importation of 26.68 grams of heroin. The Crown accepted that the drugs were for the appellant's use rather than for supply. The appellant submitted that as this was an importation for personal use, the guidelines in Rimmer did not apply. It was said that there was a conflict between the Court of Appeal's decision in Gregory and the Court's decision in Conquer . The Court of Appeal dealt with that matter as follows:- "8. But are the judgments in Gregory and Conquer in conflict? We think not. Gregory was decided before Rimmer . At that time, the relevant guidelines case was that of Campbell-v-AG . As was recognised in Gregory , those guidelines were explicitly limited in their application to trafficking on a commercial basis.
9. In Rimmer , this court clarified and expanded the guidelines promulgated in Campbell . The judgment in Rimmer quotes or refers to the limitation expressed in Campbell on a number of occasions. However, after setting out starting point bands, the court then went on at paragraph 34 to purport to '... reiterate what this court said in Campbell that it will be seldom that the starting point for any amount of drugs will be below seven years' but made no mention of the limitation.
10. It was not long before this apparent ambiguity was recognised in this court. In Conquer (in which Southwell JA who had delivered the judgment of the court in Rimmer presided) Carey JA, delivering the judgment of the court, and after referring to the fact that the appellant was

entitled to be sentenced on the basis that the drugs were her own, said this:- 'After anxious consideration we have concluded that the bands in Rimmer should still apply as starting points in the case of all importation offences - to do otherwise may lead to artificial and subjective tests being introduced in situations where no such complications need arise. We regard the points arising in this case as essentially matters of mitigation personal to the appellant.' In our opinion therefore there is no conflict between the decisions in Gregory and Conquer , but rather a difference between Campbell and Rimmer addressed by this court in Conquer and resolved." 37. Later in its judgment, the Court of Appeal said this:- "15. The evolution in the Royal Court of a method of doing justice in cases involving the importation of small quantities of class A drugs for personal use is not something to be criticised lightly by this court. However, even apart from the fact that it is inconsistent with Rimmer and Conquer , we have serious misgivings as to its appropriateness.

16. The purpose of guidelines is to facilitate consistency and to avoid the problems inherent in attempting to compare and contrast previous decisions, often on the basis of incomplete information. There are no separate guidelines dealing with the importation of small quantities of drugs for personal use. There is no definition of what is or is not a small quantity. Nor is there a yard stick from an authoritative source, apart from Rimmer , which can be applied to any particular quantity of drugs and from which a starting point may be derived. And there are already signs in the series of cases furnished by Mr MacRae (see for example AG-v-Davey) of the recrudescence of the old disease, which guideline cases are designed to eradicate, of 'try [ing] to calculate the exact effect given by the court in earlier cases to each factor and then to say that those effects must be reproduced in the case in hand. (See Wood-v-AG).
17. There is another difficulty in endorsing Finnegan . It is thought to apply 'the Gregory approach' only to cases of importation of a small quantity, whereas no such limitation is apparent from the judgment of this court in that case. Assuming that the Rimmer guidelines would apply to larger quantities for personal use, this would result in the paradox that in the first type of case the intention of the defendant bears on the starting point whereas in the second it is relevant only to mitigation. It is for this reason that the addition to the Rimmer guidelines of a lower starting point specifically for cases of personal use would not be a satisfactory solution..." 38. In the event, therefore, in Shanowaz , the Finnegan approach was rejected, and the Court determined that the personal use factor is a matter for mitigation and does not go to the starting point. The contentions 39. There were essentially three contentions put before us in these cases:- (i) Shanowaz-v-AG was a case which involved importation and not a case involving possession with intent to supply. Accordingly, it was said that Shanowaz should not be applied to the instant case. (ii) The Court of Appeal decision in Bonner and Noon-v-AG , which was relevant to starting points for the possession of class A drugs in tablet form with intent to supply was based upon Campbell , and concerned therefore only with drug trafficking for commercial reasons. Accordingly, the Bonner and Noon guidelines did not apply to a 'social supply' of the kind which was envisaged in this case. (iii) In any event, the cases of AG-v-Neal and AG-v-Sampson showed

that the Court did exercise some flexibility, and that it was not fair to use the same starting point in cases where there was an intention to traffic in drugs as in those cases when that intention did not exist. The intention of the defendant should form part of the assessment as to the role of the offender in drug trafficking, and not in the area of mitigation. It was submitted that that was the essential problem of the decision in *Shanowaz-v-AG* and we were invited to fix a lower starting point accordingly. Decision 40. We deal first with the contention that *Shanowaz-v-AG* was only concerned with an importation charge and that we can apply a different principle to charges of supply and/or possession with intent to supply. We reject that submission. In *Campbell-v-AG* (supra) at page 145, the Court of Appeal said this:- "We have employed the term "trafficking" deliberately. In the past, some distinctions may have been drawn between offences involving the importation of class A drugs and offences involving their supply or their possession with intent to supply. In our judgment, there is no justification for any such distinction. The guidelines which we have set out above apply to any offence involving the trafficking of class A drugs on a commercial basis." 41. For this reason alone, it would seem to us to be inappropriate to contemplate re-opening any distinctions of past years in relation to the different drug trafficking offences. Furthermore, each of them carries the same maximum sentence today. In addition, it appears to us that the gravamen of each of the trafficking offences is sufficiently similar that one should not be looking to make any such distinctions. The drug trafficking offences are all concerned with addressing in their different ways the evil which drug taking visits upon drug users. For all these reasons, it appears to us that there is no basis for the distinction which was urged upon us by Advocate Fields. 42. We now turn to the second submission namely that *Bonner and Noon-v-AG* relies upon *Campbell-v-AG* and is therefore concerned only with the trafficking of drugs for commercial purpose. In our view, this submission is misconceived. It is correct that *Campbell* was a guideline case setting down rules for approaching sentence where there was a case of trafficking on a commercial basis. Both *Rimmer* and *Bonner and Noon* were commercial trafficking cases in any event. While one might have some difficulty in accepting at first glance the conclusion of the Court of Appeal in paragraph 9 of *Shanowaz* quoted in paragraph 36 above (that the Court in *Rimmer* had hinted at an expansion of the basis of the guidelines in *Campbell* by not referring to the limitation of trafficking for commercial purposes), the fact remains that the case of *Shanowaz* did make it plain that importation for personal use as opposed to importation for other purposes was a matter of mitigation, and was not relevant to the starting point. In our view, the cases of *Shanowaz* and *Conquer* qualify each of the guideline cases of *Campbell*, *Rimmer* and *Bonner*. To hold otherwise would be to disregard the system of judicial hierarchy which requires that proper regard be paid to decisions of the Court of Appeal. We therefore reject the submission that where one is concerned in drug trafficking in class A drugs in tablet form, the starting points set out in *Bonner and Noon* only apply in cases of trafficking for commercial purposes. 43. We now turn to the third argument which is as to whether it is fair to use the same starting point when there is no intention to traffic in the drugs as in cases where there is such an intention - in other words whether the intention of the defendant should form part of the assessment as to his role in the drug trafficking operation, and not fall in the mitigation

area. We deal with it only because the Court of Appeal has said on many occasions that in matters of sentencing policy, it will have very close regard to the views of the Royal Court.

44. The first thing to say is that it is in our view obvious that there is a considerable difference in terms of criminality between those who import drugs for personal use and those who import drugs for commercial purposes. We respectfully adopt the analysis in that respect of the Court of Appeal in *Gregory-v-AG* and also of the Court in *Shanowaz-v-AG*. The question is whether that difference should be reflected in fixing a lower starting point because the difference is part of the offence, or whether it should be applied in the area of mitigation as relevant to the offender. The current cases are not importation cases, but it is useful to consider the question first in relation to the difference between importation for personal use and importation for commercial purposes before going on to consider potential differences of intention in relation to the possession of class A drugs with intent to supply.

45. The gravamen of the offence of importation is that it results in the increase in the volume of dangerous drugs circulating in the country which, as described by the Court of Appeal in *Gregory* is itself an evil. If the drugs are not in the country, they cannot be consumed, in whatever fashion. Furthermore, applying the test in *Campbell, Rimmer and Bonner*, it is perfectly possible for someone who is importing the drugs for personal use nonetheless to be extremely close to the main source of supply. Whether the defendant is close to the main source of supply may sometimes be a matter which the Crown are not able to establish but in theory there is no reason why it could not be established in some cases. Accordingly, the involvement in drug trafficking can be assessed regardless of the purpose to which the drugs will be put once they have been imported.

46. Secondly, one could conceive of a theoretical position whereby a wealthy drugs importer considers for misguided reasons of his own that it would be in the best interests of the community or perhaps in his best interests if he were to give, and not sell, the drugs to his friends and acquaintances. To say at that stage that the importation was for the reasons of social supply and not commercial exploitation completely ignores the gravamen of the offence. In our view, this goes to show that the intention of the importer is not a factor in assessing the starting point which requires a review of the importer's role in relation to the offence.

47. In the example given, the importer's intention, which is perhaps best described as an underlying intention because it is not *mens rea* of the offence, may well be relevant to the question of sentence. If it is, it is a matter that is subjective to the importer - unsurprisingly because it reflects his intention - and therefore would form part of his personal mitigation which the sentencing court may or may not think is of significance.

48. In our view, similar principles apply to the supply of drugs or to the offence of possession with intent to supply. In each case, the gravamen of the offence is that drugs have been or are intended to be supplied to others, risking damage to their health and the structure of their lives. That they are willing participators in accepting that risk is neither here nor there as far as the offence is concerned. The drug trafficker who deals commercially prays on their vulnerability for monetary gain. The drug trafficker who supplies at cost with the hope of a reciprocal favour at some future date, or simply as a gift, similarly prays on their vulnerability albeit for a different purpose - not for money but for other benefits he perceives for himself. As far as

the gravamen of the offence is concerned, there is no difference. 49. Accordingly, we do not think that it is appropriate to have regard to what is termed as a "social supply" as a ground for reducing the starting point even if we were not constrained by the guidance which the Court of Appeal has already given, which we think we are. 50. Nonetheless, of course there is a difference between the supply of the drugs for profit and the supply of drugs as a "social supply". The extent of that difference will be a matter for the sentencing court to appreciate in considering the mitigation which has been advanced. If the social supply amounts to recovering the cost of the drugs so that the supplier in effect has his drugs for nothing or at a discounted price, it may be that the mitigation will not carry much weight. If the defendant has supplied the drugs to particularly vulnerable persons who were not in a real position to refuse by reason of their age or other vulnerabilities, it may equally be that the sentencing court will not give too much credit for the mitigation of a so called "social supply". There is a wide variety of factual possibilities in what has been termed a social supply of drugs, and we think it is better to leave the sentencing court to form its own assessment of the extent to which the explanations proffered on behalf of any defendant can properly be treated as mitigation. The Valler Uplift 51. In Valler-v-AG

[2002] JLR 383 the Court of Appeal was faced with an appellant who had imported 497.78 grams of heroin and 5,007 ecstasy tablets. The Royal Court had taken a starting point of 14 years' imprisonment in relation to the importation of heroin and added two years to take account of the fact that a substantial quantity of ecstasy had also been imported. Allowing for mitigation it then imposed a sentence of 11 years' imprisonment for the importation of heroin and 10 years' imprisonment for the importation of ecstasy, to run concurrently. The Court of Appeal held that in fixing the starting point for sentencing in a case of trafficking and substantial quantities of more than one type of drug, it was appropriate to take account of this fact by increasing the starting point for the most serious offence and imposing concurrent sentences for the two offences. Accordingly, the decision of the Royal Court to take a starting point of 16 years could not be considered excessive. Part of the rationale for that was that if it were otherwise, once the accused had imported a significant quantity of one drug, there would be no extra penalty imposed at all in respect of the importation of a very significant quantity of another drug, be it of the same class as the original drug or a different class. 52. In his sentencing remarks in the Royal Court in Valler , Birt D. B. said this:- "The only logical solution in our judgment is to take a starting point for the more serious offence which takes account of the fact that there are additional drugs of a different type which are the subject of another charge but arise out of the same incident. We emphasise that on many occasions it will not be necessary to do this; it will only be appropriate where there is a significant quantity of another drug." 53. It is clear from the case of Valler that the Royal Court and the Court of Appeal place some emphasis on the fact that there was a significant quantity of a second drug which was imported. How significant the additional importation was in the context of the particular case will vary from case to case. It does not seem to us to be necessary to go any further for today's purposes than to indicate that the sentencing court should make an assessment as to

whether the overall criminality is properly reflected by the starting point taken for the more serious of the two drug offences. We do not think that the question as to whether or not the Valler uplift should be applied should be affected by any analysis of the intentions of the offender as the Crown contended in the case of Richards . These go to the mitigation of the offence and not to the offence itself. If, for the reasons given above, the intentions of the defendant are irrelevant to the starting point, then it must follow they are also irrelevant to whether the starting point should be uplifted on Valler principles. There remains room to make appropriate adjustments to the actual sentence by having regard to the defendant's intentions, to the extent they are relevant, when considering the reduction from the starting point in the light of the mitigation. AG-v-MacKenzie 54. The defendant is to be sentenced for six drugs offences arising out of his arrest on 4 th March, 2011. The most serious of these offences is count two, the possession of 30 ecstasy tablets with intent to supply. The next most serious charge is count five - possession of 7,391 diazepam tablets with intent to supply. 55. The Crown has accepted the guilty pleas on the basis that, in relation to the ecstasy tablets, the defendant intended to use most of them himself, and supply some of them socially to his friends, as we understand it for free on the basis that the favour would at some stage be returned, whereas in connection with the diazepam, the defendant intended to return the diazepam tablets to the supplier where they would be supplied onward into the community, and in return he might receive some of the tablets free for himself. 56. For the reasons given above, we do not think that the different intentions are relevant to the question of the starting point. We take a Bonner starting point of seven years' imprisonment in relation to the ecstasy tablets. We reach that point not simply because of the number of tablets which are involved, but also having regard to all these circumstances which are set out in the Crown's summary of facts which is not in dispute. We do not think it is necessary to apply a Valler uplift to reflect the overall criminality of the defendant. There is a substantial volume of tablets, but they are class C drugs as opposed to ecstasy which is a class A drug, and the maximum sentence which can be imposed for this offence would make it disproportionate, having regard to the discount for the guilty plea which will be applied, to increase the starting point on count two. 57. From the starting point of seven years' imprisonment, we allow a full discount for the plea of guilty and we have taken note of the other points in mitigation - good references, a positive work record, the expression of remorse and the other items of personal mitigation which have been mentioned by Advocate Field in her summary to us. Having regard to all that material, the Court considered that a sentence of three and a half years' imprisonment on count two was justified. On count five, the position of the diazepam tablets with intent to supply, the Court imposed a sentence of two years' imprisonment concurrent, on counts three and seven a sentence of one week's imprisonment on each count concurrent with count two, and in respect of counts one and four no separate penalty. 58. The Court has also ordered the forfeiture and destruction of the drugs. AG-v-Richards 59. In relation to Richards the Court was faced with a defendant who was charged with two motoring offences, the possession of 47 ecstasy tablets with intent to supply and the possession of 917 diazepam tablets again with intent to supply.

For the reasons which are set out above, the Court has taken a starting point of seven years, having no regard to the intentions which the defendant has expressed in relation to each set of drugs, namely that he would have given some of the ecstasy tablets to his friends at some point, and that he would have sold some of the diazepam tablets to friends to allow him to cover his own cost of the drug. 60. The Crown did not move for any Valler uplift, and we agree that no such uplift would be appropriate having regard to the principles set out above. 61. We have taken into account the mitigation which has been put before us - we give full credit for the guilty plea, and have noted the co-operative stance of the defendant on interview. We also have noted that he is doing well in prison and has provided good references. We have had regard to his intentions in relation to the different classes of drugs. In the circumstances we sentenced the defendant to one month's imprisonment on count one, two months' imprisonment on count two with a disqualification of 24 months, three years' imprisonment on count three, the possession of ecstasy with intent to supply and 15 months' imprisonment concurrent on count five, the possession of diazepam with intent to supply. In addition we ordered that the drugs be forfeited and destroyed. Authorities AG-v-MacKenzie

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