

JERSEY / JUDGMENT

Breen Croke Crook and Buckley v AG

[2002] JCA 167 (13 September 2002)

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COURT

COURT OF APPEAL

BEFORE

R. C. Southwell, Esq., Q. C., President;
Sir John Nutting, Q. C., and
M. G. Tugendhat, Esq.,
Q. C.

Michael John BREEN;
Trevor CROKE;
Aimée CROOK;
Lee Thomas BUCKLEY.

-v-

The Attorney General.

Applications of

Michael John BREEN

for leave to appeal: (1) against

conviction

on 6th March, 2002, by the

Inferior Number of the Royal Court, en police correctionnelle", and (2)

against a

sentence of 10 years'

imprisonment with a recommendation for deportation

, passed on 29th April,

2002, by the Superior Number, to which he was remanded on 6th March, 2002,

following the said conviction on a not guilty plea to::

1 count of:

being

knowingly concerned in the fraudulent evasion of the prohibition on the importation

of a controlled drug, contrary to Article 61 of the Customs and Excise (Jersey) Law, 1999:

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COURT OF APPEAL

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September, 2002

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Before:	R. C. Southwell, Esq., Q. C., President; Sir John Nutting, Q. C., and M. G. Tugendhat, Esq., Q. C. Michael John BREEN; Trevor CROKE; Aimée CROOK; Lee Thomas BUCKLEY. -v- The Attorney General. Applications of Michael John BREEN for leave to appeal: (1) against conviction on 6th March, 2002, by the Inferior Number of the Royal Court, en police correctionnelle", and (2) against a sentence of 10 years' imprisonment with a recommendation for deportation , passed on 29th April, 2002, by the Superior Number, to which he was remanded on 6th March, 2002, following the said conviction on a not guilty plea to:: 1 count of: being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to Article 61 of the Customs and Excise (Jersey) Law, 1999:
count 6:	heroin. The applications for leave to appeal were placed directly before the plenary Court without first being submitted to a Single Judge for consideration and determination. On 24 th July, 2002, the applicant abandoned his application for leave to appeal against sentence. Application of Trevor CROKE for leave to appeal against a total sentence of 11 years' imprisonment with a recommendation for deportation , passed on 29th April, 2002, by the Superior Number of the Royal Court, to which he was remanded by the Inferior Number on 22nd
January, 2002, following a change of plea of guilty to:	2 counts of: possession of a controlled drug with intent to supply, contrary to Article 6(2) of the

Misuse of Drugs (Jersey) Law, 1961:	count 1: heroin (on which count a sentence of 7 years' imprisonment was passed); count 3: heroin (on which count a sentence of years' imprisonment, concurrent , was passed); 1 count of: being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to Article 61 of the Customs and
Excise (Jersey) Law, 1999:	count 6: heroin (on which count a sentence of 11 years' imprisonment, concurrent , was passed). The application for leave to appeal placed directly before the plenary Court without first being submitted to a Single Judge for consideration and determination. Application of Lee Thomas BUCKLEY for leave to appeal against a total sentence of 3 years' imprisonment (to follow consecutively a sentence of 6 years' imprisonment currently being served and imposed on 6th August, 2001, by the Superior Number) , passed on 29th April, 2002, by the Superior Number of the Royal Court, to which he was remanded by the Inferior Number on 21st January, 2002, following a
change of plea of guilty to:	2 counts of: possession of a controlled drug with intent to supply, contrary to Article 6(2) of the
Misuse of Drugs (Jersey) Law, 1961:	count 1: heroin (on which count a sentence of 3 years' imprisonment was passed); count 3: heroin (on which count a sentence of years' imprisonment, concurrent , was passed); The application for leave to appeal placed directly before the plenary Court without first being submitted to a Single Judge for consideration and determination. Application of Aimée CROOK for leave to appeal against a total sentence of 7 years' imprisonment , passed on 29th

	April, 2002, by the Superior Number of the Royal Court, to which she was remanded by the Inferior Number on 21st
October, 2001, following a guilty plea to:	1 count of: possession of a controlled drug, contrary to Article 6(1) of the Misuse of Drugs (Jersey) Law, 1961: count 5: cannabis resin (on which count a sentence of 1 month's imprisonment was passed). 1 count of: being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to Article 61 of the Customs and
Excise (Jersey) Law, 1999:	count 6: heroin (on which count a sentence of 7 years' imprisonment, concurrent , was passed). The application for leave to appeal placed directly before the plenary Court without first being submitted to a Single Judge for consideration and determination. [The Crown abandoned the prosecution against Trevor Croke and Lee Thomas Buckley on counts 2 and 4 of the indictment on 22nd January, 2002, following the change of plea by these two defendants to the other counts laid against them.] Advocate P. Harris for M. J. Breen; Advocate C. J . Scholefield for T. Croke; Advocate D. Gilbert for A. Crook; Advocate R. Juste for L. J. Buckley; Advocate B. H. Lacey, Crown Advocate.

JUDGMENT

NUTTING JA: CIRCUMSTANCES OF THE OFFENCES 1. In February 2001 the States of Jersey Police, assisted by Jersey Customs and Excise Officers, mounted an extensive undercover surveillance operation, targeting the Applicant Trevor Croke, a native of Southern Ireland and resident here for about 8 years. Since 1995 he had been under suspicion of involvement in the local drug scene but conventional methods of investigation had proved fruitless in providing direct evidence against him. 2. On 12 February 2001 authority was granted by the Chief Officer to install covert listening devices at Croke's home address in St Clement and also in his motorcar. Additionally a covert video camera was, with due authorisation, installed in premises near to his home address, enabling the recording of 'comings' and 'goings' from the premises. Extensive recordings were made of conversations inside Croke's home and in his motorcar. 3. The Applicant Aimée Crook was arrested on Sunday 24 June 2001 at Jersey Airport in possession of heroin on

her return from Dublin. The Applicants Breen and Trevor Croke and the Appellant Buckley were each arrested the following day. 4. The nexus between the counts on the indictment was Trevor Croke's involvement over a significant period of time both as importer and dealer in commercial quantities of heroin. 5. Count 1 charged Trevor Croke and Buckley with possession with intent to supply heroin. At approximately 0430 hours on Tuesday 27 February 2001, a milkman on his early morning round noticed a green plastic bag in the bole of a tree in Upper Kingscliff, La Pouquelaye, St Helier. Within the bag was a tube of what appeared to be M & M sweets. Inside that tube were 24 individual cling-film wraps, each containing a substance which, when later analysed, was found to total 17.8 grams of heroin of 48% purity with a street value of between £5,300 and £8,000. 6. The following day a conversation recorded in Croke's car between him and Buckley directly linked the two men with the heroin found in the tree. That conversation confirmed that Buckley had concealed the heroin on the instructions of Croke. Croke was heard accusing Buckley of failing to hide the heroin properly. Subsequent forensic analysis confirmed Buckley's DNA to be present on one of the wraps. 7. Count 3 also charged Trevor Croke and Buckley with possession with intent to supply heroin. On Sunday 18 March 2001, police officers observed Trevor Croke's vehicle parked unattended opposite Buckley's home address in Mont à l'Abbé, St Helier. At about 10 pm a conversation was recorded in Croke's car between Croke and Buckley. Croke was apparently driving around with Buckley looking for a suitable place to conceal a further quantity of heroin. Croke advised Buckley that there was a carrier bag in the boot of the car in which he should place the drugs to protect the contents from water damage. Buckley then left Croke's car. 8. In a subsequent conversation on his return to the car a short while later Buckley reported that he had hidden the heroin in a bush. Officers deduced the location of this hiding place to be at the entrance to the premises of the Jersey New Waterworks Company at Westmount Road. A search in the early hours of the morning located a white plastic bag placed in the branches of a bush. The bag contained two sealed tins. One tin was found to contain ten small packages containing a total of 7.7 grams of heroin of 44.45% purity; the second contained fifteen packages, containing a total of 11.6 grams of heroin of 45.48% purity. The total weight seized on this occasion was 19.3 grams, with a street value of between £5,800 to £8,700. Buckley's DNA was subsequently confirmed to be present on one of the wraps recovered. 9. Once the package was removed from the bush, officers maintained undercover observations on the area. Shortly before 11 pm on 19 March 2001, Trevor Croke's vehicle was observed to drive up and stop near the entrance to the Jersey New Waterworks Company. Buckley was seen to leave the car and to approach the entrance of the premises. He was then observed rummaging in the flower beds and foliage. After a short while Croke joined Buckley and the two searched in the undergrowth. Eventually both returned to Croke's car and the listening device picked up a conversation between the two. It was clear neither man could understand what had happened to the heroin. 10. Count 6 related to Trevor Croke, Breen and Aimée Crook and the importation via Jersey Airport of a further large quantity of heroin. Recordings of conversations between, in particular, Croke and Breen, revealed that Croke had for some time experienced severe difficulty in successfully importing illegal drugs into the Island. Croke complained about the police and customs winning their battle against the importation of heroin and his lack of stock and money as a result. On 29 May 2001, extensive conversations were recorded throughout the day between

Croke and Breen. 11. Breen, a native of Southern Ireland and long-term heroin addict, had arrived in Jersey about two weeks earlier. The recordings revealed Breen's interest in the local drugs scene. He enquired about the profit to be made here from the sale of heroin, the problem of importing it and the number of addicts with money. 12. Breen was due to return to Dublin for a few days on 30 May 2001. He confirmed to Croke that he would speak to his contacts during his stay there to "set the ball rolling" for a quantity of heroin to be made available for delivery in due course to Croke in Jersey. 13. Following his return to Jersey, Breen was observed to visit Croke's home address on numerous occasions. On 9 June 2001, Breen told Croke in the latter's car, "We will have grams in a week". Croke replied "we'll be motoring then". This clearly indicated that an imminent supply of heroin had been arranged. Breen also confirmed that he has made contact with "Wayne" who, the Crown contended, was Breen's drug supplier or contact in Ireland. Croke and Breen then discussed how the courier travelling to Dublin would make contact with Wayne. 14. Croke mentioned that he was aware of a girl, a native of Jersey, who would shortly be travelling to Dublin to attend a wedding and who owed Croke "a favour". Breen and Croke then discussed that girl's suitability to do the drug run. Breen queried whether she could be trusted to bring the heroin back, whether she might panic or be closely watched by the police and whether she might use any of the heroin for her own purposes. 15. Contact was then made by Trevor Croke with Aimée Crook and in the afternoon of 12 June 2001, Croke and Breen drove to St Helier and picked her up in Croke's car. During a conversation recorded in the car it became clear that Croke was aware of police surveillance techniques and may have been concerned by then that he was a police target. 16. Aimée Crook flew out from Jersey on 14 June 2001. On 16 June 2001 a conversation was recorded between Breen and Trevor Croke in which Breen raised the question as to how the heroin once in Jersey should be 'dropped off'. Breen questioned Croke's assertion that the staff quarters at the Mayfair Hotel was not a safe drop-off point because of previous arrests there. 17. On 24 June 2001 Aimée Crook was detained at Jersey Airport on her return. Heroin was found concealed in her underwear. She was arrested. The heroin, which weighed 118 grams, had a street value of between £35,000 and £53,000 and was found to be of about 54% purity. 18. Count 5, not the subject matter of an application before us, related to Aimée Crook's possession on 8 May 2001 of a very small amount of cannabis resin for her own use. In relation to Counts 2 and 4, the Crown offered no evidence in view of the pleas of guilty to counts 1 and 3. 19. The Applicant Breen, having pleaded not guilty, was tried before the Deputy Bailiff and Jurats in March 2002. He was convicted. On 29 April 2002 he and the other offenders joined on the original indictment appeared before the Deputy Bailiff and Jurats for sentence. 20. Having considered the evidence in the case of each offender and the available mitigation, the Royal Court imposed sentence. 21. Trevor Croke was sent to prison for a total of 11 years in respect of the three counts concerning him. Breen was sentenced to 10 years for his shared responsibility with Croke for the importation in count 6. Buckley, already serving 6 years' imprisonment imposed in August 2001, was given a sentence which extended that period by a further 3 years, making an effective sentence of 9 years. Aimée Crook, the courier in count 6, was sentenced to 7 years' imprisonment. Recommendations for deportation were made in respect of Trevor Croke and Breen. 22. Breen applied to us for leave to appeal only against his conviction. 23. Trevor Croke, Buckley and Aimée Crook applied for leave to appeal against their sentences. 24. We deal first

with the Breen's application for leave to appeal against conviction. MICHAEL JOHN BREEN 25. This Applicant having been indicted before the Royal Court on 26 October 2001 on count 6 entered a plea of not guilty and was remanded for trial. 26. The Royal Court made provision for a pre-trial hearing on 21 January 2002 to enable the Deputy Bailiff to decide whether the evidence obtained by means of the surveillance devices in Trevor Croke's home and motorcar should be excluded. Counsel for both Croke and Breen submitted that the evidence was inadmissible. Having heard the application, the Deputy Bailiff dismissed it and gave judgment on 22 January 2002. 27. Thereafter Trevor Croke pleaded guilty, and the trial of Breen was adjourned till 4 March 2002 to enable Counsel to prepare and agree improved transcripts of the evidence of the listening devices. 28. On 6 March 2002 the Applicant Breen was convicted. 29. It was not suggested to this Court that the Deputy Bailiff did not have a discretion to admit the evidence, rather that he exercised his discretion wrongly. It is therefore necessary to understand the basis of that discretion. The nature of the discretion 30. The exercise of the discretion to exclude evidence in this jurisdiction was considered in *Clarkin -v- A. G.* 1991 JLR 232 . In the absence of any authority how such a discretion should be exercised here, the Court considered the position both in the English and Scottish jurisdictions. 31. The Court held that the law in Jersey is reflected in the Privy Council cases of *Kuruma Son of Kaniu -v- R A. C.* 197, *King -v-R* 1969 1 AC 304 , and in the English cases of *Jeffrey -v- Black* 1978 Q. B. 490 and *Fox -v- Chief Constable of Gwent A. C.* 281. Such authority not only coincided with that applicable in Scotland but was also consistent with the position in England following the enactment of section 78 Police & Criminal Evidence Act 1984. 32. The Court in *Clarkin* cited with approval the well known passage in the opinion of Lord Cooper (Lord Justice General) in *Lawrie v Muir* 1950 S. C (J) @ p.26-27: "From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict

- (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods . . . Irregularities require to be excused, and infringements of the formalities of the law in relation to these matters are not lightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed. In particular, the case may bring into place the discretionary principle of fairness to the accused which has been developed so fully in our law in relation to the admission in evidence of confessions or admissions by a person suspected or charged with

crime. That principle would obviously require consideration in any case in which the departure from the strict procedure had been adopted deliberately with a view to securing the admission of evidence obtained by an unfair trick . . . On the other hand, to take an extreme instance figured in argument, it would usually be wrong to exclude some highly incriminating production in a murder trial merely because it was found by a police officer in the course of a search authorised for a different purpose or before a proper warrant had been obtained." 33. This passage was adopted by Lord Hodson in *King -v- R* , and by Lord Elwyn-Jones in *R -v-Sang* 1980 AC 402 34. Section 78(1) of the Police & Criminal Evidence Act 1984 enacts that "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." 35. The fact that this section has no force of law in Jersey did not, as the Court held in *Clarkin* , preclude its relevance in attempting to define the basis of the exercise of the discretion in this jurisdiction following, as the section did, the common law principles enunciated in the judgments of two Lord Chief Justices, that of Lord Widgery C. J. in *Jeffrey -v- Black* 1978 Q. B. 490 and Lord Goddard C. J. in *Kuruma*. 36. The Court in *Clarkin* concluded that the test in this jurisdiction may be thus described: "a discretion to exclude evidence otherwise admissible should be exercised when, having regard to all the circumstances (including the circumstances in which the evidence was obtained), the trial court is satisfied that the use of that evidence would undermine the justice of a fair trial. The power to exclude evidence on that basis is a necessary incident to the overriding duty of the trial court which is to ensure that the accused has a fair trial." 37. In his judgment on 22 January 2001 the Deputy Bailiff described the test for the admissibility of the evidence from the listening devices and followed the test laid down in *Clarkin* . The Application to leave 38. The issue at the Applicant's trial was a narrow one. He did not dispute the accuracy of the transcripts which were put before the Court in a form agreed by the Crown and the Applicant. Nor did he dispute that he was a heroin addict who had had numerous discussions with Trevor Croke on the subject of drugs. 39. He took issue with the Crown's interpretation of these conversations in so far as the conversations tended to show his intention to import heroin into the Island in a joint venture with Trevor Croke. He maintained that the conversations merely showed his interest in buying heroin for his own consumption from Croke once the drug had been imported. He gave evidence to this effect. 40. In the absence of any Codes enacted by the States, it was agreed by Advocate Harris and the Crown Advocate that the police of this Island should have followed the Intrusive Surveillance Code of Practice issued pursuant to s 101(3) Police Act 1997 , operative in England. That Code contains some sections which, it is conceded, have no application here. For example, in relation to the role of a Commissioner for which Part III of the Code makes provision, it is plainly impossible for the police in Jersey to take advantage of the supervisory guidance which, in England, the Commissioner is required to undertake. In his concession that Part III has no application in Jersey, Mr Harris submitted that the absence of such supervisory authority makes it the more important that "best practice" is undertaken

when an intrusive surveillance device is applied for and used in this jurisdiction. Mr Harris contended that in a number of respects "best practice" was absent in the instant case and that certain breaches of the Code, which he suggests occurred, should have resulted in the exclusion of the evidence because the trial of the Applicant was rendered unfair by its admission. 41. Mr Harris submitted there were the following breaches: (i) The police failed to maintain an authorisation record; (ii) The authorising officer failed to carry out periodic reviews of the authorisation; (iii) No consideration was given to the question of collateral intrusion; (iv) The Deputy Chief Officer and Chief Officer, who authorised the renewal of the warrant for intrusion on 11 May 2001, were misled by the investigating officers into believing that the evidence gathered against the Applicant and Trevor Croke in the preceding ten days was more significant than it was. 42. The relevant provision of the Code in relation to Mr Harris's first and second submissions is as follows: 2.30 An "authorisation record" should be created which records: (1) the time and date when an authorisation is given;

(2) whether an authorisation is in written or oral form; 2.31 The authorisation should also record:

(1) every occasion when interference with property or wireless telegraphy has occurred;

(2) the result of periodic reviews of the authorisation; and

(3) the date of every renewal. 43. The Crown accepted that an authorisation record, distinct from the original application and the various renewals did not exist but, the Crown Advocate maintained, the Code is silent on the precise nature of the "authorisation record" and merely stipulates what detail should be recorded. 44. She submitted that the applications themselves recorded the detail specified under the two provisions described above, and that since the accumulated applications were attached to each renewal application, there was an effective and continuous authorisation record and reviewing process including, importantly, the reasons why the application and the renewals were granted. It is true that there is no record of the time when the authorisations were given or renewed, but the Crown Advocate submitted that all the other criteria were met. She claimed that there was no breach of the Code. 45. It is not necessary for us to decide whether the Code, properly construed, makes provision for an "authorisation record" to be maintained separate from the documentation to which we have referred and which we have examined. We are satisfied that the police created a sufficient record of authorisation, that they abided by the spirit, if not the exact letter, of the Code and that there were periodic reviews. 46. In relation to Mr Harris's third submission, the Code provides: 2.5 "Collateral intrusion or interference is a matter of particular concern ... Particular thought should therefore be given to any collateral intrusion on, or interference with, the privacy of people other than the subject of surveillance ..." 47. We have examined unredacted copies of the applications dated 12 February 2001, supplied to us by the Crown, in respect both of Trevor Croke's house and car. It is clear that four specific areas of action were recommended to minimise the potential for collateral intrusion, and we are satisfied that appropriate consideration was given, and appropriate steps were taken, to meet the requirements of Section 2.5. 48. We have also seen unredacted

copies of the two renewal applications dated 30 March 2001. We are satisfied that the question of collateral intrusion was kept under review during the course of the operation and, in relation to Mr Harris's submission, we find no breach of the Code. 49. We add only for completeness that it was never made clear to the Court, even assuming a breach in this connection, how a lack of attention by the police to the possibility of collateral intrusion of other people, not part of this drug conspiracy, could have rendered unfair the trial of this Applicant. 50. Mr Harris's last submission relates specifically to the renewal application submitted by D. I. Bonney on 11 May 2001 both to the Deputy Chief Officer who granted it and to the Chief Officer who also considered it and recorded his agreement to the grant. The application for both house and car was included in one document on this occasion and contained the following: "Present intelligence identifies that the principal subject, Croke, and an associate, Buckley are concerned in a forthcoming, perhaps imminent importation of a large commercial amount of heroin. This in turn, is supported by transcription evidence gathered over the course of the past ten days, that show Croke and Buckley making preparations for the receipt and particularly the packaging of the expected drug importation." 51. The Deputy Chief Officer's comment included the following: "I have reviewed the evidence and the intelligence to date. There is a clear indication that importation within the next 4 weeks is a very strong possibility and therefore recommend that the authority be extended for a further 4 weeks until 12/06/01." 52. Mr Harris contended that an examination of the transcripts of the conversations recorded by the intrusive surveillance devices demonstrated neither a forthcoming importation by the two men nor any preparations for receiving and packaging it. 53. It must be appreciated that those who import and supply drugs do not discuss their activities with a plainness of language which they might use for non criminal activities. Conversations are elliptical and involve the use of code words and euphemisms. Indeed at the trial a police officer, who had heard many hours of these transcripts, not confined to those to which the application of 11 May 2001 referred, gave evidence to explain some of the phraseology and to construe references in the transcript. We had the advantage of examining the relevant transcripts with Crown Counsel who assisted us as to the meaning of certain passages, as understood by the police. 54. We are satisfied that there was no deception of the senior officers responsible for agreeing to the application. We have concluded that D. I. Bonney accurately reflected in the application what he and those officers concerned in the investigation believed was revealed to them by the recordings as to the intentions of Trevor Croke and the Applicant. 55. The submission that, in all the circumstances, the admission of the evidence of the transcripts rendered unfair the trial of this Applicant is not sustainable. 56. The application for leave to appeal against this conviction must be dismissed. TREVOR CROKE The sentences of imprisonment 57. The sentence of 11 years' imprisonment passed on the Applicant Trevor Croke was made up of sentences of 7 years in respect of counts 1 & 3 and 11 years concurrent in respect of count 6. The starting point adopted by the Royal Court was 9 years for counts 1 & 3 and 14 years for count 6. 58. Advocate Scholefield urged us to reduce the sentence. He submitted: (i) The weight of heroin in the three charges total 155.85 grams, an amount which, by reference to the case of Rimmer and Others -v- A. G .

(2001) JLR 373 CofA, falls in the middle of the appropriate sentencing bracket of 10-13 years. (ii) There was nothing exceptional about the circumstances of this case to warrant a departure from the guidelines and, in particular, no evidence to show that the Applicant had made large profits from drug dealing. (iii) Notwithstanding the Crown's contention that the Applicant preyed on drug addicts to act as his couriers, Buckley is serving a six year sentence for heroin importation, Aimée Crook had a number of convictions at the relevant time for possessing heroin and other drugs, and the Applicant and Breen (who had a significant criminal record) were clearly involved in a joint enterprise in count 6 for which each had to take joint responsibility. (iv) By the same reasoning the distinction in sentence between the Applicant and Breen was not justified and because of their shared culpability for the criminal activity defined in count 6, the starting point for both offenders should have been the same for that count. (v) The Applicant was entitled to a significant discount for his plea notwithstanding that it was entered only after the Deputy Bailiff had ruled admissible the evidence against him because the law on the admission of such evidence was unsatisfactory and the Applicant was entitled to seek to exclude it before deciding what plea he wished to enter. 59. We reject these submissions. 60. The heroin which was imported by the Applicant as the subject matter of Count 6 was itself of such a quantity to fall within the 10-13 year bracket laid down in Rimmer . Moreover the judgment in that case includes this important passage: "We emphasise that these bands represent only guidelines, and are not to be treated as if embodied in a statute. The position of a particular defendant on a particular count within one of the bands is to be determined by reference to the weight of drugs and their role and involvement as principal factors, together with other lesser but relevant factors, as indicated above. The margins of these bands are also not to be treated as set in stone. There may be exceptional cases in which on a particular count the starting-point may be above or below the band otherwise appropriate." 61. In his approach to the sentencing problem posed by the Applicant's culpability, the Deputy Bailiff concluded: "We are quite satisfied that you are a professional drug dealer who has arranged the importation and onward distribution of heroin for gain. As you admitted in the taped conversations from the surveillance operation you have not been gainfully employed since your arrival in Jersey in 1993 and we have no doubt that in addition to your partner's earnings you have lived off your drug dealing activities. You have had no regard to the damage that your trade has caused to those who have purchased heroin nor to the distress that it has caused to the families of such people. We must sentence you today only for the offences to which you have pleaded guilty. However, we are told by the Court of Appeal to have regard for the nature and scale of your activities and the degree of your involvement in drug trafficking. So often the Court has to deal with a courier who on a single occasion for modest reward imports a consignment of heroin. We regard your activities as showing a much greater involvement in the drug trafficking trade than such a courier. You organised this importation. You recruited Aimée Crook as a courier and you would have benefited financially from the onward sale of the heroin which she brought in. Similarly the heroin in the other two counts was part of your stock in trade." 62. On the evidence before the Court we consider

that the Deputy Bailiff's remarks concerning the role and involvement of the Applicant were appropriate. He continued: "If the importation charges had stood alone then, in the light of the degree of your involvement in organising it, we consider that a starting point towards the top end of the 10-13 year bracket would have been appropriate. But we also need to take into account the additional charges which you face, for the reasons set out in AG v Valler (28 February, 2002) Jersey unreported; [2002/48], having regard to the nature and scale of your activities and the level of your involvement in drug trafficking for gain, we consider that this is one of those rare cases where we should step outside the bands in Rimmer and agree with the starting point suggested by the Crown of 14 years." 63. It is clear from the syntax of the first sentence quoted above that the "importation charges" to which the Deputy Bailiff was referring were intended by him to encapsulate count 6. His allusion to a single activity in the next line makes it clear he was referring to that single count and vitiates the suggestion that he was referring to counts 1 and 3: these are encompassed by the "additional charges" to which he refers later in the quotation we have cited. 64. The principle which the Deputy Bailiff had in mind by his citation of the case of AG -v- Valler is that which arises in a case which includes separate importations of different Class A drugs: "There is no Jersey precedent, other than this case, as to the proper approach in such circumstances where very substantial quantities of two different drugs are imported at the same time. However, this issue was dealt with by the Court of Appeal in Guernsey on the combined appeals in Mark Richards et al of 18 th April 2002, where five Appellate Judges, including the Bailiff of Jersey, decided (having examined the jurisprudence of both Bailiwicks: *ibid* paragraph 1) that: "It is a feature of some cases that two different drugs are imported at the same time, both in significant quantities. It may be two different Class A drugs, or a Class A drug and a Class B drug. In such cases the combined quantity is a relevant factor in determining the extent of the criminal conduct, which must be greater than if only one drug was imported. In such cases the court should assess the appropriate starting point in respect of each of the drugs, and then determine a "total" starting point, taking into account the overall quantity. Thereafter the mitigation will be applied to arrive at the actual sentences to be imposed. The court then provides for the total length of sentence by imposing a greater term of imprisonment than otherwise would have been imposed for the more serious of the two offences (if such can be identified) to run concurrently with the other sentences imposed. Consecutive sentences should not normally be imposed in such cases, since that may create a misleading impression that each offence is being sentenced more leniently than it is. The court must state in any such case both what the court considers to be the appropriate "total starting point" and how it is arrived at." "We consider that such an approach is also appropriate in this jurisdiction when the quantities of the different drugs are so significant. Were it otherwise, as the Deputy Bailiff aptly pointed out in his sentencing remarks, 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." 65. But the reasoning in Valler is not to be confined to cases of separate importations of quantities of different

Class A drugs. Indeed there is no logic in thus confining the principle which applies equally to separate importations of quantities of the same drug. In our view the Deputy Bailiff was correct to apply the principle enunciated in *Valler* to this case. 66. We have revisited the Deputy Bailiff's judgment in which he sets out with admirable clarity his reasons for using 14 years as a starting point for sentence. We can find no flaw either in the conclusions he reached on the evidence before him, nor in the way in which he applied the relevant sentencing law. 67. To suggest that the Deputy Bailiff should have added the total weight of heroin in the three charges and been thus constrained in sentencing the Applicant to the sentencing bracket for the total weight within the weight band, would have ignored the impact of the separate importations and the exceptional role of this drug dealer. 68. Moreover the fact that he was involved in three importations compared to Breen's single importation gives him no cause to urge that he should have been treated on the same sentencing basis as his confederate in count 6; and the fact that he chose to employ couriers who had convictions for drug offences does not negate the point that his reason for using their services was because, as addicts, they were dependent on continuous supplies of drugs and therefore easier prey. 69. We turn to Mr Scholefield's point that the Applicant was entitled to a greater discount than 3 years for his, albeit late, plea of guilty. We have concluded that the basis of the submission on this point is misconceived. The Applicant was certainly entitled to challenge the admissibility of the evidence against him and if it were the case that he was being penalised for so doing, this court would not hesitate to interfere. But that is not the sentencing principle which was deployed by the Deputy Bailiff, who made it clear that he was not punishing the Applicant for the lateness of the plea. Having defined the starting point of 14 years, the Deputy Bailiff turned immediately thereafter to a consideration of the factors which operated to reduce that figure. He went on: "In mitigation we take into account your guilty plea. This was not tendered initially; you denied it until the Court ruled against you on the admissibility of the surveillance evidence but then you admitted your guilt forthwith." 70. The Deputy Bailiff thereafter describes the additional aspects of mitigation which helped to reduce the 14 year starting point. 71. It is a fact that the surveillance evidence once admitted left the Applicant with little option but to plead guilty. The fact that he chose to await the outcome of his application to exclude deprived him of the advantage he would otherwise have gained from an early admission of guilt, accompanied by a submission that such a plea showed real remorse. His late plea merely prevented his advocate from making such a submission, but the Applicant received due credit for it. 72. We accept that there is no evidence, despite the Applicant's boast in the transcript, that he made large profits from drug dealing. Miss Hendry, his partner, has a good job and no doubt helped to pay the household bills. Moreover we take note of the fact that at the adjourned hearing of confiscation proceedings on 28 May 2002, having made such enquiries as they could, the Crown made no application in that connection. 73. The fact that the Applicant did not earn "huge" profits from his drug dealing, as submitted by Mr Harris, does not negate the fact that he had no apparent source of income during the relevant period and was known neither to the Social Security Department nor to the Tax authorities of this Island. 74. We

have considered the Deputy Bailiff's three year reduction for the mitigation available to this Applicant and can find no reason further to reduce it. 75. We have concluded that the eleven year sentence was appropriate and we dismiss this aspect of the application for leave to appeal. The Recommendation for deportation 76. We turn to consider the recommendation for deportation on which the Applicant has also sought leave to appeal. 77. Advocate Scholefield submitted that the Deputy Bailiff failed to undertake the appropriate balancing exercise and was wrong to make any recommendation. He emphasised that the effect of the Applicant's deportation on Miss Hendry, and on their five and three year old children, to whom he is manifestly devoted and whose welfare was his pre-occupation and responsibility, would be very severe. 78. Mr Scholefield told us that the Applicant's earliest release date is October 2008. He pointed to the fact that Miss Hendry who is a native of Jersey and who is employed here would be forced to live in Ireland if she wished to maintain her attachment to the Applicant on his release from prison and that the children, at a stage when they were about to enter their teens, would also be compelled to move away from their home to a new and different environment. 79. Mr Scholefield referred us to the case of Nazari and other cases

(1980) 3 All E. R. 880 and in particular to the circumstances involving the deportation of a Spanish national called Fernandes. This man had lived in England for many years and was married to a Spaniard who had come to England ten years before and by whom he had had children. Having been sentenced to a period of imprisonment for offences of violence and dishonesty, he was recommended for deportation. At the time of the commission of the offence he was a man of good character. 80. In emphasising the factors to be taken into account in making orders for deportation, Lawton L. J. said at p.885 and 886 of the report: "The next matter to which we invite attention by way of guidelines is the effect that an order recommending deportation will have on others who are not before the Court and who are innocent persons. This Court and all other Courts would have no wish to break up families or to impose hardship on innocent people. The case of Fernandes illustrates this very clearly indeed. Mrs Fernandes is an admirable person, a good wife and mother and a credit to herself and someone whom most of us would want to have in this country. As we have already indicated, if her husband is deported she will have a heart rending choice to make; whether she should go with her husband or leave him and look after the interests of the children. That is the kind of situation which should be considered very carefully before a recommendation for deportation is made." 81. We were asked to note the similarities between that case and the Applicant's, and in particular the similarities of dependent wife/partner and children. But the cases also show significant differences and in particular the different offences which the respective offenders have committed, conspiracy to commit robbery and aggravated burglary as compared with class A drug importation and possessing drugs for supply. Moreover the sentences passed show a wide variation, eighteen months for Fernandes and eleven years for the Applicant. Lastly, Fernandes was a man with no convictions recorded against him whereas the Applicant has a criminal record for serious firearms offences, larceny and violence, for which he has

served periods of imprisonment. 82. We were also referred, though by the Crown Advocate, to the case of *Samaroo -v- Secretary of State for the Home Department* 2001 E. W. C. A. Civ. 1139 in recognition of the importance of the nature of the offence in the consideration of the exercise of the discretion. At paragraph 40 of the Court's judgment Dyson J said: "In my judgment the challenge by Mr Samaroo must be rejected. It is not contended that the Secretary of State failed to have regard to a relevant factor or took into account an irrelevant factor. What is said is that the justification for a most serious interference with his and his family's rights under Article 8(1) is not made out. In my judgment the Secretary of State was entitled to regard Class A drug trafficking offences as very serious and ones which are particularly serious and harmful to society. He was entitled to attach importance to his general policy of deporting those convicted of importation of Class A drugs in order to protect those resident in the U. K. from the harmful effects of drugs and, by deterring others, in the interest of preventing crime and disorder." 83. It is perhaps worthy of note that Samaroo was in the opinion of the Probation Officer, who prepared a report upon him, at low risk of re-offending, whereas the Report on the Applicant, which we called for during the hearing, revealed that he is considered to be at moderate risk of re-offending as a dealer in drugs. 84. But the report on the Applicant also includes the information that it was his intention, at the time when he was interviewed by the Probation Officer, to leave this Island and to return to the Republic of Ireland once he had served his sentence. When this Court enquired whether that was still his intention, we were told that he had not yet fully made up his mind. 85. Whatever his intention, it is axiomatic that a deportation order should not have been made against him unless the appropriate criteria were satisfied. 86. Indeed a deportation order must be considered in two stages. Thought must first be given by the tribunal to whether the circumstances of the offender, including his background and the offence he has committed, justify the making of a recommendation. The second stage compels the tribunal to consider the impact on the offender's family having regard to Article 8(1) of the European Convention on Human Rights. 87. If the evidence before a Court is that, absent a recommendation, the offender intended to leave the jurisdiction on his release, to that extent at least the making of a recommendation, and consequent order, is not going to impact upon the position of the family save and in so far as the order prohibits his return. If the offender intends to leave voluntarily any dilemma for his wife and children, whether to join him or to remain, is a dilemma that is going to arise in any event. 88. The question in this case is whether, on the evidence before him, the Deputy Bailiff was justified in making the recommendation. In view of the Applicant's intention, as expressed in the Probation report, and in view of the lack of any evidence from Miss Hendry what hardship the Applicant's enforced departure would cause, we take the view that: (i) The Deputy Bailiff was correct in finding that the offences which the Applicant had committed were of sufficient gravity to warrant making a recommendation; and (ii) an analysis of the impact that such a recommendation, if carried out, would have on his family and their rights under Article 8(1) did not justify a reconsideration of it. 89. Accordingly we refuse leave to appeal against the recommendation for deportation. LEE THOMAS BUCKLEY 90. In our

view the issues raised by Advocate Juste justified the Court in granting leave to appeal. Miss Juste agreed that the application for leave could be treated as the substantive hearing.

91. The sentencing of this Appellant was complicated by the fact that at the time he appeared before the Royal Court in April 2002 he was already serving a sentence of 6 years' imprisonment for a similar offence imposed on him in August 2001. The sequence of dates was as follows: In August 1999 he was arrested for an offence of possessing with intent to supply 35.5 grams of heroin. He was later bailed. In February 2001 he committed the offence described in count 1 of the indictment before this Court, and in March 2001 he committed the offence described in count 3. In August 2001 he appeared before the Royal Court and pleaded guilty to the August 1999 offence, and in April 2002 he appeared for sentence on this indictment.

92. At the hearing in August 2001 the Bailiff, who presided, was told of his arrest for the February and March 2001 offences. He enquired whether in the circumstances it was appropriate to remand him so that all three offences could be dealt with together.

93. The Appellant's advocate submitted to the Bailiff that there was no certainty when the February/March 2001 allegations could be tried because of the involvement of other defendants, and because of the fact that the Appellant, according to his instructions, intended to plead not guilty to all charges arising out of those allegations. Accordingly the Bailiff, at Counsel's request, proceeded to sentence the Appellant for the August 1999 offence.

94. In mitigation the Appellant's advocate asserted to the Bailiff that the February/March 2001 allegations were wholly spurious, that the Appellant had not been concerned with heroin during the previous 11 months and that he had become a reformed character whilst on bail. He urged the Royal Court to reduce the sentence for that, and for other, reasons.

95. This was a bold submission and went further than the practice, usual in such circumstances, of inviting the tribunal to ignore the fact that the offender was awaiting trial on charges as yet unresolved. If the nature of the evidence on which the February/March 2001 charges were based had been known to the Royal Court in August 2001, the boldness of the submission would have been even more apparent.

96. The Crown have suggested to us that in August 2001 the Royal Court was persuaded to pass a more lenient sentence on the Appellant than was justified and by implication that, in view of the Appellant's subsequent pleas of guilty to the February/March 2001 offences, his instructions to his counsel in August 2001 were nothing more than a ploy, and that he manipulated the process of the Court in a dishonest and cynical fashion.

97. Indeed it is on that basis that the August 2001 mitigation was described by the Crown Advocate in April 2002 as an "affront to the Court". Whether or not the Bailiff was moved in August 2001 to reduce the sentence he passed on the Appellant by this aspect of the mitigation is not a matter into which we can now enquire. But the fact that the Appellant gave instructions to his advocate which were invalidated by his subsequent pleas is a matter to which we are entitled to have regard in assessing the overall sentence he should now serve not so much because his instructions were an "affront to the Court", but because, as was clear from his subsequent pleas of guilty, he committed further offences whilst on bail.

98. Advocate Juste emphasised three points.

99. First, she claims, the Deputy Bailiff did not make clear the basis for his sentencing decision in contravention of the directive in *Rimmer* and on

that basis alone that we should interfere. This directive is as follows: "The imminent coming into force of the Human Rights (Jersey) Law 2000 leads us to remind the Royal Court that in all sentencing, the reasoning of the Royal Court needs to be set out fully. The defendant is entitled to full reason and full reasons are needed by the Court of Appeal when considering sentencing appeals and applications for leave". 100. Was the Appellant deprived of the relevant knowledge? In order to answer the question, it is necessary to examine what was said in the Court below. The Crown in moving for sentence against the Appellant urged an approach in keeping with general sentencing principles. That approach consisted of deciding what the starting point should be for the instant offences and calculating the deduction to which the Appellant was entitled for mitigation. Once that exercise was complete, the Crown Advocate submitted that the Court should make the sentence consecutive to the August 2001 sentence in order to reflect the fact that the offences were separate in time, and then to have regard to the totality principle and reduce the consecutive sentence to reflect the overall sentence of imprisonment which the Appellant should serve for all three offences. The Crown Advocate moved for an effective sentence of 9 years. 101. In sentencing the Applicant the Deputy Bailiff devoted a page of the transcript to his case. Inter alia, he said: "Buckley, you are already serving a sentence of 6 years' imprisonment for possession with intent to supply some 35 grams of heroin in August 1999. You are now to be dealt with for two counts of possession with intent to supply in relation to an aggregate of about 37 grams. We accept that you were assisting Croke in the storage of two stashes of heroin pending their onward distribution. However these offences were committed whilst you were on bail awaiting trial for the offences for which you are now in prison and they give the lie to your assertion before the Court in August 2001 that you had not been concerned with heroin for some 11 months." 102. The Deputy Bailiff then describes the mitigating factors he intends to take into account and continues: "In the light of the fact that these offences were committed before you were dealt with for the other offences in August 2001, we have to try and stand back and see what would be the correct sentence for all these offences taken together; in other words three separate offences of possession with intent to supply the relevant amounts of heroin by storing them." He ends with these words: "... we think that the correct overall sentence for all three is, as the Crown suggest (our emphasis), a period of 9 years. In order to arrive at that sentence, the sentence for these particular offences will therefore be one of 3 years on counts 1 and 3 concurrent, but consecutive to the sentence which you are now serving." 103. It is true that the Deputy Bailiff did not rehearse the same mathematical exercise undertaken by the Crown, and in view of the direction in Rimmer to which we have referred, we consider that it would have been preferable had he done so. Nonetheless, in view of the clear basis outlined by the Crown for the sentence on the Appellant for which they moved, in view of the discussion which the Deputy Bailiff and the Appellant's advocate had during the course of the latter's mitigation revealed by the transcript and in view of the apparent adoption by the Deputy Bailiff in his sentencing remarks of the Crown's formulae, we do not believe that the Appellant can have been in any doubt as to the basis of the sentence passed upon him. 104. In the final analysis the question for us is

whether the sentence passed was the right one. Miss Juste urges us to say that it is at least a year too long. 105. It is to that question that she directed her second submission. She claimed that the starting point of 9 years moved by the Crown was excessive, being the highest in the relevant bracket defined in *Rimmer*. She says that the facts of the case did not justify such an approach and that the Royal Court was wrong to follow it. We are not persuaded by her argument. 106. The Appellant's overall involvement had the following aggravating features which justified a 9 year starting point: (i) The February/March 2001 offences were committed when the Appellant was on bail for a similar offence. (ii) The three offences all involved the possession with intent to supply of commercial quantities of heroin. (iii) The offences were committed over an extended period of time, August 1999 - March 2001. (iv) The Appellant played an important role in the furtherance of a sophisticated and determined operation to import heroin to this Island. 107. Lastly, Miss Juste also urged us to reduce the sentence because the Royal Court failed to take account of all the mitigation available to this Appellant. First, she emphasised the plea of guilty. However this was proffered late and, in the light of the evidence from the tape recordings, the surveillance and the DNA results, was aptly described by the Crown Advocate as "extremely strong". Moreover it is clear that the Deputy Bailiff considered the plea to be one of the factors which he took into account in reducing the sentence. He said in his sentencing remarks: "... You have pleaded guilty to these offences from the outset and that stands to your credit." In view of the chronology, the use of the phrase "from the outset" may be thought to have been unduly favourable to the Appellant. We are not persuaded that the Deputy Bailiff failed adequately to reflect the Appellant's plea of guilty in the sentence he passed. 108. Secondly, Miss Juste claimed that the Royal Court attached insufficient weight to the various factors, the age of the Appellant, the matters contained in the Probation Report (and in particular the evidence of the Appellant's determination to turn over a new leaf), the background to the commission of the offences, and the letters from the Appellant and family which were put before the Court. 109. In our view there is no basis for concluding that these matters were not taken into account by the Royal Court. Indeed the Deputy Bailiff referred to them in his sentencing remarks. He said: "We have also read your letter and the letter from your parents and your girlfriend and we have taken careful note of what they say. It is clear to us that you are making determined attempts now to try to turn your life around and in particular to try to overcome your heroin addiction which has led to your commission of all these offences." 110. Later in defining the time to be served, the Deputy Bailiff indicated that he was: "taking account of your age, your plea of guilty to these offences and the other mitigation which has been put forward by your family and by you." 111. If the Deputy Bailiff was right to adopt a starting point of nine years on counts 1 and 3 and right to reduce the sentence by two years in reflection of the mitigation and right to make that sentence consecutive to the sentence which the Appellant is currently serving, the only question is whether the reduction of four years for totality was sufficient. 112. The introduction of sentencing guidelines in recent years has had the beneficial effect of making sentences more consistent. In cases involving the importation and supply of heroin, this Court has attempted to ensure

sentencing consistency by the use of the guidelines it has promulgated in *Rimmer* . 113. The Deputy Bailiff followed those guidelines. But in making allowance for the totality principle he had to follow judicial instinct and a sense of fairness rather than any guideline. He also had to bear in mind the criminal conduct of others charged in the same indictment and the relative responsibilities of each for the offences committed. 114. We have considered all the submissions which Miss Juste made to us. We are not persuaded that the Deputy Bailiff's reduction for totality ought to be increased. We think that the sentence of three years consecutive to the sentence which the Appellant is currently serving was correct. 115. Accordingly we dismiss Buckley's appeal. AIMÉE CROOK 116. The application before the Court by this Applicant relates only to count 6. On that charge she was sentenced to 7 years' imprisonment. The Crown suggested that the Royal Court should adopt a starting point of 11 years on the basis of the sentencing bracket of 10-13 years for amounts between 100 - 250 units of Class A drugs as approved in *Rimmer* . 117. The Royal Court refused to approach the sentence to be imposed on this Applicant on that basis, finding no justification for exceeding the minimum in view of the amount of heroin she imported, which was close to the bottom of this band, and the Applicant's role, which was that of a courier. The Royal Court therefore used a 10 year figure as the starting point. We consider this approach was correct. 118. Unsurprisingly Advocate Gilbert, who appeared for the Applicant, did not cavil at the starting point used by the Royal Court but suggested that the 3 year reduction for the mitigation available to the Applicant did not adequately reflect its value. 119. She pointed first to the early acknowledgement of guilt and the fact that it was maintained throughout the Court appearances. We see no warrant for concluding that the Court failed to reflect this important piece of mitigation in the sentence passed. Certainly the Deputy Bailiff emphasised it in his sentencing remarks. Moreover the fact that the Applicant had been detained with the packet of heroin concealed in her underwear made it difficult for her to suggest any innocent explanation for its existence on her person. This Court has said on numerous occasions that counts of first instance are entitled to give due consideration to the weight of evidence against an offender in assessing the appropriate reduction for a guilty plea. The Deputy Bailiff concluded that the Applicant had "little option but to admit her guilt". 120. Secondly Miss Gilbert suggested that the Royal Court failed to give due weight to matters mentioned in the Psychological report of Dr. Starkey and the Psychiatric report of Dr Berry, namely the impact on the Applicant of her father's death when she was 18 years of age, the death of a close friend a few years ago and her attempt at suicide on remand. We do not agree that the Royal Court failed to give appropriate weight to these matters. 121. In his speech in mitigation Advocate Winchester, who appeared for the Applicant at trial, expressly referred to the Psychological report and to "Miss Crook's suicide attempt which again is described in the report before the Court." 122. Indeed in sentencing the Applicant the Deputy Bailiff specifically referred to "your troubled background" and to "all the information contained in the reports" as matters which the Court had taken into account in reducing sentence. 123. Thirdly it was submitted the Royal Court paid insufficient regard to the fact that the Applicant was suffering from a medical condition at the time of

her appearance namely Hepatitis C. Neither the Psychological nor the Psychiatric report suggested that a custodial sentence would impose any special hardship on the Applicant because of her condition - still less that she would be deprived in prison of any necessary treatment for her illness which would be available to her in the community at large. This Court has recently considered the relevance of medical illness in the context of mitigation in *Valler -v- A. G.* (18 July 2002) Jersey Unreported; [2002/133] CofA: "The issue of health has been dealt with by the Court of Criminal Appeal in England in *Basil Mortimer Bernard*

[1997] 1 Cr App R (S) where the Court set out four general principles in relation to ill-health as a mitigating factor. [(i) and (ii) are not applicable] (iii) A serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate; (iv) An offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate." We consider these principles also apply in this jurisdiction." 124. In adopting this authority, the Crown submitted to us that the Applicant's medical condition did not entitle her as of right to a lesser sentence than would otherwise have been appropriate, nor did it justify any special leniency on the basis that a reduced sentence was appropriate to reflect either the nature of her condition or its gravity. 125. We agree with that submission, although we were pleased to hear that the Applicant is receiving treatment in prison for her condition and is being given appropriate medication. 126. Finally Miss Gilbert submitted that having regard to certain first instance cases whose factual matrices appear to be similar to the Applicant's role in count 6, a fairer reduction of sentence in reflection of the mitigation available to her would have been 4 years rather than 3 years. She cited the cases of *A. G. -v- Price* (2 nd August, 2001) Jersey Unreported; [2001/170]; *A. G. -v- Moy* (10 th January, 2002) Jersey Unreported; [2002/7]; *A. G. -v- Cole* (25 th March, 2002) Jersey Unreported; [2002/69]; and *A. G. -v- Batchelor* (3 rd May, 2001) Jersey Unreported; [2001/96]. 127. We have considered the features of similarity between those cases and the instant case and we have also considered the inevitable differences. We have also borne in mind the recent observations of this Court in *Rimmer* reiterating the approach of the Court in an earlier case. "We add and similarly endorse this further quotation from the recent judgment of this Court in *Kenward -v- A. G.* (14 July 2000) Jersey Unreported CA 2000/137: "At this juncture we would like to make an observation about the utility of the reference by Counsel in this area to other decided cases. Guideline cases of an Appellate Court are always of assistance, that indeed is their purpose. It is therefore of limited utility to refer to decisions, particularly those of Courts sitting at first instance, which are (or should be) applying those guidelines to the cases before them. Not only do such cases turn substantially on their own facts; the facts themselves available and taken into account by the Court may not always appear on the face of the judgments; and a read across from one set of facts to another is often a vain exercise." 128. The background of this Applicant, her addiction, her inevitable dependence on people willing to feed her habit, her vulnerability to their requests (or demands) and

the consequences of her addiction on her personality and on her life, must necessarily excite the sympathy of any court with the unhappy task of sentencing her. 129. But in the final analysis, the Royal Court had to pass a sentence which was just, taking account of her circumstances but taking account, too, of the offence which she committed and the role that she played compared to those with whom she is jointly indicted. 130. We have considered whether it would be right to reduce this sentence. Since the Royal Court adopted the lowest starting point within the sentencing bracket for this amount of heroin, we have considered whether we would be justified in adopting a starting point lower than that defined. We can see no justification in the Applicant's case for so doing. 131. The only remaining question, therefore, is whether the allowance of three years made by the Deputy Bailiff for the mitigation was sufficient. We have concluded that we would not be justified in making any greater allowance than was made by the Royal Court. 132. Finally we have asked whether a sentence of two years' imprisonment lower than the sentence passed on Buckley is appropriate to differentiate their respective criminal responsibilities. We have concluded that the Bailiff's assessment of her role, and her role vis-à-vis her co-defendants, was correct. 133. Accordingly this application is refused. ADDENDUM 134. We desire to add one other matter. Under Article 35(4) of the Court of Appeal (Jersey) Law 1961, six weeks of the time, during which an applicant for leave to appeal is specially treated as such in pursuance of prison rules, is to be disregarded in computing the term of his sentence, except in these instances: (a) Where leave to appeal is given or the matter is certified as fit for appeal under Article 24(b) and; (b) Where the Court of Appeal directs otherwise. 135. In the past there may have been thought to be merit in such treatment of an applicant for leave to appeal where unmeritorious applicants in person made unarguable applications and where special treatment in prison of applicants clearly distinguished applicants from other prisoners. But today there is little, if any, difference in the treatment of applicants in prison. 136. Further, most applicants are represented by Advocates and if unarguable applications are made that is primarily the fault of the Advocates and it is not appropriate for the sins of Advocates to result in loss of time by their clients. Indeed, when the Human Rights Law comes into force there are likely to be further arguments available to the effect that Article 35(4) is not appropriate in the 21st century. This leads us to conclude that in the cases of Breen, Croke and Crook, where leave to appeal has been refused, this Court should direct, as it does, that no part of the 6 week period should be disregarded in these cases. 137. Further it appears to us that there may be strong arguments for considering the repeal of Article 35(4) and in the meantime for this Court to adopt a general policy of making directions under Article 35(4)(b). However, we have not heard argument about this in the present cases and the establishment or otherwise of such a general policy should await a later occasion when full argument can be heard. 138. Finally, we would like to thank all counsel for their assistance in these cases. Authorities Rimmer & Ors-v-AG

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2002) Jersey Unreported; [2002/7]. AG-v-Cole (25 th March, 2002) Jersey Unreported; [2002/69]. AG-v-Batchelor (3 rd May, 2001) Jersey Unreported; [2001/96]. AG-v-Valler (28 th February, 2002) Jersey Unreported; [2002/48]. Valler-v-AG (18 th July, 2002) Jersey Unreported; [2002/133] CofA. Welsh-v-AG (4 th April, 2002) Jersey Unreported; [2002/72] CofA. Kirkland-v-AG (24 th September, 2001) Jersey Unreported; [2001/200] CofA. Nazari & other cases [1980] 3 All ER 880. Clarkin-v-AG (1991) JLR 232 CofA. Human Rights (Jersey) Law 2000. R-v-Khan (Sultan) (1996) 3 All ER 289 . AG-v-Breen & Croke (22 nd January, 2002) Jersey Unreported; [2002/19]. Samaroo-v-Secretary of State for Home Department [2001] EWCA Civ 1139 . Kuruma Son of Kaniu -v- R 1995 A. C. King -v- R 1969 1 AC 304 . Jeffrey -v- Black 1978 Q. B. 490. Fox -v- Chief Constable of Gwent 1986 A. C. 281. Lawrie v Muir 1950 S. C (J) @ p.26-27 R -v-Sang 1980 AC 402 . Police & Criminal Evidence Act 1984: s 78(1). Jeffrey -v- Black 1978 Q. B. 490. Police Act 1997: s 101(3). Page Last Updated: 21 Jun 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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