

JERSEY / JUDGMENT

Durkin and Howard v AG [2005]

JCA 002 (11 January 2005)

[2005] JCA 002

COURT
COURT OF APPEAL

BEFORE

Sir John Nutting, Q. C., President;
J. P. C. Sumption, Esq., Q. C.; and
The Rt. Hon. Sir Charles Mantell
Laurence Anthony DURKIN,
Jeremy Edwin HOWARD.

-v-

The Attorney General
Applications by both appellants for leave
to appeal against conviction at a criminal assize on
18th August, 2004, following not guilty

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The Attorney General
Applications by both appellants for leave
to appeal against conviction at a criminal assize on 18th August, 2004, following not
guilty

pleas and conviction on:

1 count of:
Conspiracy to contravene Article 61 of the
Customs
and Excise (Jersey) Law 1999
(count 1).
Applications by both appellants for leave
to appeal against total sentences of 13 years' imprisonment in respect of each
appellant, made up as follows, and passed on 13th September, 2004, by the
Superior Number of the Royal Court, to which the Appellants were remanded by
the trial Judge on 18th August, 2004, on a guilty plea to all counts except

count 1:	LAURENCE ANTHONY DURKIN 1 count of: Conspiracy to contravene Article 61 of the Customs and Excise (Jersey) Law 1999 (count 1): count 1, on which count a sentence of 13 years' imprisonment was passed. 6 counts of: Possession of a controlled drug, contrary to Article 6(1) of the Misuse of Drugs (Jersey) Law, 1961 : Count 3 (heroin): on which count a sentence of 18 months' imprisonment, concurrent, was passed. Count 5 (heroin): on which count no separate penalty was passed. Count 7: (heroin): on which count no separate penalty was passed.
Count 9 (heroin):	on which count a sentence of 18 months' imprisonment, concurrent, was passed. Count 12: (cannabis resin): on which count a sentence of 1 month's imprisonment, concurrent, was passed. Count 15: (diazepam) on which count a sentence of 2 months' imprisonment, concurrent, was passed. 2 counts of: Supplying a controlled drug, contrary to Article 5(b) of the Misuse of Drugs (Jersey) Law, 1961 : Count 4 (heroin): on which count a sentence of 2 years' imprisonment, concurrent, was passed. Count 8 (heroin): on which count a sentence of 2 years' imprisonment, concurrent, was passed. 3 counts of: Being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to Article 61(2)(b) of the Customs and Excise (Jersey) Law, 1999 : Count 22 (heroin): on which count a sentence of 4 years' imprisonment, concurrent, was passed. Count 23 (heroin): on which count a sentence of 4 years' imprisonment, concurrent, was passed. Count 24 (heroin): on which count a sentence of 4 years' imprisonment, concurrent, was passed. The Crown accepted not guilty pleas to counts 2, 6, 10, 11, 13, 14, and 16.

The application for leave to appeal placed directly before the plenary Court, without first being submitted to a Single Judge for consideration and determination.

JEREMY EDWIN HOWARD

1 count of:

Conspiracy to contravene Article 61 of the Customs and Excise (Jersey) Law 1999 (count 1):

count 1, on which count a sentence of 13 years' imprisonment was passed.

1 count of:

Count 17, on which count a sentence of 1 month's imprisonment, concurrent, was passed.

2 counts of:

Being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to Article 61(2)(b) of the Customs and Excise (Jersey) Law, 1999

:

Count 22 (heroin): on which count a sentence of 4 years' imprisonment, concurrent, was passed.

Count 25 (heroin): on which count a sentence of 4 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.

Advocate J. Bell for L. A. Durkin;

Advocate R. Juste for J. E. Howard.

J. C. Gollop, Esq., Crown Advocate.

JUDGMENT

THE PRESIDENT: THE APPLICATIONS 1. Between 16 and 18 August 2004 Laurence Durkin and Jeremy Howard were tried at a criminal assize. Sir Richard Tucker sitting as a Commissioner presided at the trial assisted by a Jury. The indictment consisted of a single count of conspiracy to import a kilo of heroin into Jersey. Both men were convicted and sentence was adjourned until 13 September 2004. 2. At an earlier hearing the applicants had pleaded guilty to other offences in the same indictment and on the adjourned date the Commissioner and Jurats convened to consider the sentences to be imposed for all the offences. 3. In respect of the count of conspiracy both applicants were sentenced to serve 13 years' imprisonment. In respect of three counts of importing heroin the applicant Durkin was sentenced to 4 years' imprisonment concurrent and concurrent with the sentence passed on the conspiracy count. The applicant Howard was sentenced to 4 years' imprisonment in respect of two similar offences of importation with the same concurrent orders. 4. Both men now apply to the Full Court for leave to appeal their convictions for conspiracy to supply heroin and their sentences of 13 years for this offence and the 4 year sentences for the offences of importing heroin. 5. For completeness it is necessary to

add that the same indictment also charged the applicant Durkin with other offences to which he pleaded guilty including two counts of supplying heroin to an habitual user of the drug named Rodney Bevis, four counts of possessing heroin, one count of possessing cannabis resin and one count of possessing diazepam. For these offences he was sentenced to various amounts of imprisonment not exceeding 2 years, which period he was ordered to serve concurrently with the sentences of 13 years and 4 years respectively. No application is made for leave to appeal these sentences. 6. Similarly the applicant Howard pleaded guilty to the theft of a mobile telephone and was ordered to serve one month imprisonment concurrent with the other sentences. He makes no application in respect of that sentence. 7. We address first the applications by Advocate Bell for Durkin and Advocate Juste for Howard for leave to appeal the convictions on the conspiracy count. THE EVIDENCE 8. The allegation of conspiracy consisted of three main areas of evidence, firstly summaries of transcripts of covertly recorded conversations between the two applicants from 20 th February to 2 nd April 2003, secondly evidence from Bevis who was charged in the same conspiracy, and thirdly evidence of answers given by both applicants when questioned by the police after their arrests on 29 th April 2003. 9. In essence the case of the Crown was that the conversations, confirmed by the evidence of Bevis, revealed an agreement by the two applicants to import heroin to Jersey through a third party. The Defence suggested that the conversations consisted of the musings and speculations of two heroin addicts and that Bevis had falsely implicated them. 10. During the relevant period the applicant Durkin lived at Flat 4, La Roserie, Bagot Road, St Saviour. The applicant Howard, who was living at an address in St Clement, was a regular visitor to Durkin's flat, as was (albeit on fewer occasions) the witness Bevis. The evidence disclosed that Durkin, who was unemployed during the period, was receiving regular sums of money from his mother and his brother totalling between £1,200 and £1,400: it was apparent that notwithstanding the receipt of these amounts he owed money to his landlord. The evidence also revealed that, during the same period, the applicant Howard had no job and no apparent means of financial support: shortly before his arrest he had applied for parish welfare relief. 11. Both men were admitted heroin addicts. The applicant Durkin told police in interview that since the beginning of 2003 he had been using heroin on a daily basis, but he insisted that the money supplied by his family in England was sufficient to enable him to make ends meet and to fund his drug habit. The applicant Howard also confirmed to police that he used heroin regularly, up to a gram per day if it was available and if he could afford to obtain it. He acknowledged that such an amount was priced at approximately £200 in Jersey, but that supplies on the mainland were more readily available and that a similar quantity could be purchased in England for only £30. 12. On 20 February 2003 the police installed a covert listening device in the flat at St Saviour's which enabled them to record conversations taking place within range of the device. Inevitably only a proportion of the resulting transcripts were relevant to the charge faced by the applicants and only the relevant portions were adduced in evidence at the trial. 13. The critical features of the conspiracy which the Crown had pleaded in the indictment, and which Advocate Gollop opened to the Jury, specified an intended importation by the applicants of a kilo of heroin into Jersey at a cost of between £18,000 and £20,000 through the agency of a Liverpudlian named Tony. References to weight, drugs, Liverpool, Tony, money and importation were all, therefore, of critical importance. 14. There was one reference to "kilo" in the transcripts: the applicant Durkin

said to the applicant Howard in a whisper " I will try and get that kilo to be here for Tuesday, Jerry" . There were several references to "gear" which, the Royal Court was told by a drugs officer, was a well recognised slang word for heroin and which both applicants acknowledged in interview had been used by them in their discussions as a euphemism for that drug. There were a number of references to Liverpool and nine references to Tony including apparent attempts by the applicant Durkin to contact Tony by telephone. There were also references to large sums of money including one thousand pounds, "the other four" thousand pounds, eighteen hundred pounds, and "eighteen to twenty grand". 15. Lastly there were passages in the transcripts which the Crown claimed referred to an intended importation including remarks by the applicant Durkin reporting " It's all boxed, yeah. He's been ringing my other number ... It's all boxed ... It's all ready to go but they haven't got the gear yet because there's no gear in Liverpool "; and remarks by the applicant Howard insisting " I was just telling you it were twenty grand that he ... if he sends it now, we'll pay twenty grand up front" ; and by the applicant Durkin repeating "... it's boxed, they're just waiting to get the gear ... eighteen to twenty grand "; and finally the applicant Durkin asserting " I'll try Tony ... " and Howard replying " Tell him we've wasted about three and a half grand in the last two days and it's ... stupid. We've been to England twice ... " 16. On 29 th April 2003 both applicants were arrested. The address of the applicant Durkin at St Saviour's was searched: a set of electronic scales was found, scientific examination of which revealed traces of heroin. He was interviewed, and various passages in the transcripts were put to him. In summary he claimed that he did not know "Tony" and that he had never made or received telephone calls to or from a man of that name. He acknowledged that some of the passages referred to large sums of money and to heroin but he said " A lot of things you say you don't mean ". He denied sending any sum of money from Jersey to England. He denied having access to £20,000 and he insisted " A lot of people talk things and it don't mean anything. I was off my head all the time ... When you are rattling (ie taking drugs) you'll discuss anything ". It was put to him that the transcripts quoted to him revealed that he was part of a conspiracy to import heroin into Jersey, he commented " At the end of the day half of them are just talk, bullshit ". 17. On the same day the applicant Howard's address in St Clement was also searched. Two sets of electronic scales were found, and examination established that both bore traces of heroin. Furthermore a sum of £5,970 was discovered hidden under a mattress in a bedroom of the premises. Howard too was interviewed and passages from the transcripts were put to him. He claimed that the references to large sums of money must have concerned someone else's business activities, and that such references certainly did not relate to payments by him for drugs. He acknowledged that he would have expected a kilo of heroin to fetch £18,000 to £20,000 in the UK. He was asked about the money found in his flat but claimed that it was money which he was minding and that it belonged to someone whom he refused to name. He too denied knowing the identity of Tony and he speculated that if the conversations in the flat, as the police asserted, concerned drugs they must have related to an importation to which he was not a party: he insisted that he had no money invested in any importation. 18. The witness Bevis gave evidence confirming the existence of the conspiracy. He told the Royal Court that he had been a regular visitor to the flat at St Saviour's in early 2003 and that the applicants discussed matters openly in his presence. He insisted that he had heard references to a kilo of heroin and to Tony whom he understood to be the UK supplier.

He also claimed that he had learned that the applicants had agreed a price of between £18,000 and £20,000 in payment for the kilo and he said that he understood that the money was hidden at the premises of the father of the applicant Howard, and would be sent to Tony by post. GROUNDS IN SUPPORT OF THE APPLICATIONS FOR LEAVE TO APPEAL THE CONVICTIONS 19. The grounds of these applications relate to a number of different topics. Sufficiency of Evidence 20. Advocate Bell submits that the verdict was unreasonable and can not be supported having regard to the totality of the evidence (his skeleton argument para 7 - 11). Advocate Juste submits that the evidence was not sufficient to support a conviction (her skeleton argument paras 17 -30). In essence both submissions relate to the absence of evidence which, it is said, would surely have been present and available if, in truth, this conspiracy had existed. 21. It is submitted that the transcripts consist of snippets of discussions, that there is no flow to them and that there is a gap of 13 days in March during which there are no allegedly conspiratorial conversations, a fact say the applicants, which vitiates the existence of a conspiracy of the kind alleged in the indictment. They submit that after 20 March 2003 the discussions seem to have petered out and they assert that the Crown called no evidence of any actual importation of the kilo of heroin, no evidence of the transmission of any sum in payment, and no evidence of any records proving telephone calls to England. 22. In the same connection they highlight the evidence of Mr de la Haye, a former police officer who was called by the Defence at trial. He told the Jury that in his opinion, a conspiracy of this kind would necessarily include provision for importation, storage and distribution of the drugs and that the transcripts were silent on these matters. 23. We are not persuaded that this ground of appeal is sustainable. The issue at trial was the interpretation to be placed on the conversations between the two applicants recorded covertly by the police. The Commissioner put the issue to the Jury in apt and succinct terms. " Were they serious conversations upon which reliance can be placed, for example as indicating the true plans and intentions of the defendants, or were they drug induced and inconsequential ramblings and fantasies ... which should be disregarded". 24. We conclude that the fact that the transcripts do not reveal certain aspects of the conspiracy, which may or may not have been worked out at the relevant time, does not in any way invalidate the conclusions reached by the Jury on the evidence available to them. Moreover the fact that the Crown could apparently adduce no evidence in relation to certain specific matters has no bearing whether, on the evidence which was adduced, the Jury could be sure of guilt. In the judgment of this Court there was sufficient detail contained within the transcripts, apart from the confirmatory evidence, to justify the verdicts which the Jury returned. 25. It should be remembered that absence of evidence is not evidence of absence. It is a matter of common sense that the conversations which were recorded in the flat may not have represented the totality of the conversations between the applicants during the relevant period. The lack of evidence of importation or payment, and the apparent lack of provision for importation, storage and distribution does not mean that it was certain that no heroin had been imported, money paid or plans made for disposal. It meant, and only meant, that there was no evidence of these matters which could be placed before the Jury. 26. Moreover the point which Mr Bell advanced in relation to the evidence of Mr de la Haye effectively depends on the proposition that in order to prove such a conspiracy it was incumbent on the Crown to adduce evidence of the details of plans for importation, storage and distribution. Such a proposition is

manifestly false. 27. Additionally under this ground Advocate Juste contends in her skeleton argument (para 11) that " the prosecution case does not make economic sense ". Advocate Bell developed this point in argument. He asserted that no English supplier of heroin would sell a kilo of the drug to a distributor in Jersey for the same price, £18,000-£20,000, as that obtainable in England since he would be aware of the considerable premium which the Jersey distributor would receive from a sale here in excess of that achievable by his counterpart on the mainland. 28. In our judgment this point has no merit. If the Jury accepted the Crown's interpretation of some of the passages in the transcripts it was open to them to conclude that in this instance the English supplier was in fact willing, for whatever reason, to sell a kilo of heroin to the applicants in Jersey for the same price which he could have obtained if he had sold the drugs in England. 29. This matter was furthermore canvassed in evidence before the Jury. Two witnesses, qualified to give opinions about drug prices and practices, were asked their views. Mr de la Haye suggested that an English supplier would be likely to charge a premium for drugs once he knew that they would be sold within the Bailiwick. Detective Constable Hafey, who gave evidence for the Crown, disagreed. When the point was put to him in cross-examination he gave it as his opinion that the seller would want to rid himself of the heroin as soon as possible and to collect his money, and would, therefore, charge the same price wherever the distribution might take place. 30. The issue, having been raised before the Jury, was one for them to resolve in accordance with their best appreciation of the opinions of the two witnesses. In so far as this issue had any impact on the guilt of the two applicants, the Jury who heard the evidence of the two conflicting opinions were well placed to decide which witness was likely to be correct. Incomplete Disclosure 31. The second ground of appeal relates to a failure by the Crown in advance of the trial to serve on the Defence all the material to which they were entitled (Bell skeleton argument paras 13 - 31 and Juste skeleton argument paras 63 - 74). 32. The applicants point out that only 49 of a possible 121 transcribed tape recordings of conversations within the flat were disclosed to the Defence in advance of the trial. They say that the existence of additional transcripts became known to them only as a result of an article in the Jersey Evening Post published on 14 th September 2004 and that the transcripts were disclosed on 19 th October only as a result of a specific request to the Crown. The Applicants contend that the failure by the Crown to disclose this material in advance of the trial is a fundamental breach of the Crown's duty, that the Applicants have been denied a fair trial, and that this failure constitutes a material irregularity and has caused a miscarriage of justice. 33. Advocate Bell cites a passage in this recently served material, a tape recording of 26 th March 2003, in which the applicant Durkin stated his intention to leave the Island on 25 th April, an intention which, it is suggested, is inconsistent with the existence of the conspiracy and Durkin's participation in it. This example is also cited as justification for the claim that the verdict of the Jury has resulted in a miscarriage of justice. Advocate Juste associates herself with this argument on the basis that, although she cannot point to any specific item in the late disclosed material which is to the prejudice of the applicant whom she represents, she submits that if Durkin's conviction constitutes a miscarriage of justice, the conviction of the applicant Howard falls too since this was a closed conspiracy and, in accordance with the direction of the Commissioner to the Jury, the acquittal of one defendant must result in an acquittal of the other. 34. The applicants referred the Court to *Le Pavoux v Attorney General*

- (2003) JCA 127 : "Prosecuting Counsel are required to act as a 'minister of justice' ... the obligation of disclosure of material which could assist the defence must be scrupulously observed."
35. They reminded us of the test, applicable in this jurisdiction, laid down by Jowitt J in *R v Melvin and Dingle* Unreported 20 th December 1993, and approved in *R v Keane*
- (1994) 99 Cr. App. R.1: "We would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)." 36. However the applicants also acknowledge that: "where ... full disclosure is made prior to the hearing of an appeal and the Court of Appeal is able to consider the impact of the new material on the safety of the conviction in the light of informed argument from the defence, the appeal proceedings are adequate to remedy the defects at first instance ..." *Snooks and Dowse v AG*
- (2002) JLR475. 37. We were referred to a document from the police dated 11 th June 2003, fourteen months in advance of the trial, sent to the two firms of lawyers representing the applicants. The letter claims, inter alia , that because of the volume of documentation in the case, it was considered unfeasible and unnecessary to give disclosure in the form of providing copies of all documents, but that all the material was available to the applicants and their lawyers to view if they were so minded. A schedule attached to the document records a total of 121 transcripts. It is an agreed fact that only 49 transcripts at that stage had been served on the Defence. 38. The Crown assert in their skeleton argument that it was apparent from this document that well under half the full number of transcripts had been provided and that it was made clear in the document that the applicants and/or their lawyers were at liberty to read any of the remaining 72 transcripts at their convenience. The Crown also point to the fact that there are numerous references within the 49 served transcripts to the fact that some recorded conversations had not been transcribed because, for example, they were considered to be irrelevant to the Crown's allegations. 39. We have some sympathy for the applicants in relation to the document of 11 th June 2003. We do not accept that it was as obvious as the Crown suggest that only a proportion of the transcripts had been served. In our view the document does not set out the position with the clarity to which the applicants and their advisors were entitled. The first paragraph of the document asserts: "With regard to the above named defendants, as you may be aware, the gathering of evidence was achieved by the use of an electronic listening device. The procedures with regards to recording this evidence and the subsequent continuity were subject to stringent policy. This document is intended to explain that procedure and to allow an insight into why the continuity statements for this evidence have not been disclosed as a matter of course." (Our emphasis.) 40. We take the view that this was an unsatisfactory way to alert the Defence to the existence of tapes, some of which had been transcribed and some not, but none of which had been served. The Defence may well have been misled by this paragraph and failed to appreciate the significance of the

subsequent paragraphs referring to material which they had not seen. 41. It is usual in cases such as this where a large amount of material has been collected during an investigation that the police should not undertake the expenditure in time and money of photocopying every page of evidence, or making additional tapes of every recording, amassed during the investigation with a view to providing the Defence with every page and every tape. 42. In such cases it is customary for the Crown to provide the Defence with a list of the unused material. Indeed we are told that such a practice has been followed recently by the Crown in this jurisdiction in a number of cases. We take the opportunity of endorsing such a practice. It should have been followed in this case. We regret that it was not so followed. The practice has the obvious advantage that the Defence will be provided with details of all the material which the Crown have not served or disclosed and misunderstandings of the kind which apparently happened in this case will be avoided. 43. However the document of 11 th June 2003, for all its imperfections, does reveal that there is material which has not been sent to the Defence and a mathematical check would have revealed that 72 transcripts had not been considered of sufficient relevance to be served as part of the Crown case. 44. Moreover the propositions concerning disclosure put forward by the applicants fall far short of establishing that the material not disclosed was of sufficient consequence to call into question either the fairness of the trial or the conclusions reached by the Jury on the guilt of the two applicants. 45. The applicant Durkin's intention to leave Jersey on 25 th April 2003, whether temporarily or permanently (a question which the transcript does not answer), in no way contradicts the remarks admittedly made by him to which we have referred above and which, if they were not " drug induced and inconsequential ramblings and fantasies ", necessarily constituted " serious conversations indicating (his) true plans and intentions " in the importation of heroin. 46. It is not realistic to claim, as Advocate Bell claims, that his conduct of the trial might have been different had he known of the existence of the passages in the undisclosed transcripts to which we have referred. It does not seem to us at all likely that an earlier disclosure of these transcripts would have lead to a different decision whether to call the applicant Durkin, and Advocate Bell stopped short of suggesting that he would have given serious thought to such a possibility. 47. What were Durkin's travel plans in late April was a matter within Durkin's knowledge and memory. If these plans had been of any consequence to the case they could have been canvassed in evidence. We reject the notion that the reference in the transcript would have had any impact on the course of the trial if its existence had been known sooner; and we reject this ground of application for leave to appeal. Changes in the way the Crown put its case concerning Bevis 48. The third ground concerns alleged changes in the way in which the Crown opened and closed its case against the applicants (Bell skeleton argument paras 32 -37 and Juste skeleton argument paras 31 - 50). 49. Before we address the point it is necessary to deal with another aspect of it. The applicants submit in their skeleton arguments that the evidence of Bevis as to what he had heard of the conspirational discussion was not recorded in any of the tape recordings, and that although there were 8 transcribed occasions when Bevis was present, on none of those occasions was there any

recorded discussion of matters relevant to the conspiracy. In fact it is clear from an exploration of the evidence that this is not accurate; and Mr Bell tailored his submissions to take account of this reality and relied on the point albeit in a differently constituted form. We must deal preliminarily with the alternative point he now takes. 50. He acknowledges that the transcripts in fact showed that Bevis was present on two relevant occasions, firstly when the applicant Durkin attempted to telephone Tony, the man whom Bevis understood to be the English supplier of the heroin (Paginated transcript p 69); and present too when Durkin told him " It's boxed, they're just waiting to get the gear ... (indistinct) ... eighteen to twenty grand. I'm gonna phone him ". (Paginated transcript p 77.) It is agreed that on neither of these occasions was the applicant Howard present. 51. It is a fact that Bevis claimed in interview that on the occasions when he learned the details of the conspiracy, both applicants were present, and that he had overheard them talking about it and that neither of the applicants explained directly to him what was going on. Mr Bell submits that these inaccuracies by Bevis were fatal to his credibility. We do not agree. 52. In truth the Jury may have been more concerned with the fact that the transcripts apparently confirmed what Bevis was saying about his presence when matters relating to the conspiracy were canvassed, than the narrower questions of whether his memory was correct that on every occasion both applicants had been present, and that on no occasion were remarks addressed directly to him about the conspiracy. 53. We now turn to Mr Bell's principal point. He reminded us that the Crown opened the case on the basis that "all the conversations which took place in the flat were all monitored and tape recorded" and that all relevant and decipherable matters would be adduced in evidence. 54. At the time when submissions were made to the Commissioner at the close of the case for the Crown, neither Advocate Bell nor Advocate Juste recollected the existence of the passages at pages 69 and 77 of the transcripts to which we have referred. Accordingly they asserted that Bevis' evidence that he had overheard talk of the conspiracy was not consistent with the transcripts and indeed was contradicted by them. (This is the same point which was repeated erroneously in the skeleton arguments). It is also clear that neither the Commissioner, nor Advocate Gollop appreciated that these submissions could be answered, and should have been answered, by reference to pages 69 and 77 of the transcript. 55. Accordingly in his closing address, Mr Gollop attempted to deal with the point which had been made in the submissions by the deployment of a different argument. He suggested to the Jury that " not all of the conversations which took place in the flat could be produced, for example, when the individuals were in their rooms, talking over each other or when the television was playing. " He continued " the fact that he (Bevis) may not appear in all of them (the transcripts) does not mean that he did not hear the discussions which took place between Durkin and Howard as, for example, those discussions could have taken place at some other location or the transcripts could be indistinct ." 56. We pause to say that if the reference to " some other location " was a reference to another address such a suggestion was misleading in view of Bevis's assertion that the conversations had taken place at Durkin's flat. But if the reference was confined to some other area in the flat than the area capable of recording conversations within its

eavesdropping boundaries, the point was prima facie valid. 57. The applicants point out that Mr Gollop's assertions were not consistent with the way the case was opened, that there was no evidence to justify this attempt to explain away the conflict and that the speculation caused "extreme prejudice" to the applicants. 58. The law on the question whether, in any given case, the Crown have changed the way the case has been put is clear from the seminal authority of *R v Falconer-Atlee* 58 Cr. App. R. 348 and the cases which follow it. In our judgment, on a proper analysis, the difference between what Advocate Gollop said in opening and what he said in closing his case does not constitute a change to the way the Crown put its case but rather was a means by the Crown of attempting to explain what the applicants had claimed was an irreconcilable conflict in the evidence. 59. Absent an appreciation by all concerned of the significance of the passages on pages 69 and 77 of the transcript during the course of submissions and in closing speeches, the fact is that if Bevis was telling the truth it followed, either that the words and phrases which he had overheard were part of the passages which had proved indecipherable, or the conversation had taken place out of the range of the covert listening device. These alternatives were reasonable possibilities to account for the alleged conflict and both arose from a commonsense understanding and appreciation of the evidence. 60. Notwithstanding the false basis of the way the Jury were addressed, in our judgment no valid criticism can be made of the way Advocate Gollop left the case to them which consisted of an attempt by him to reconcile the evidence which he had called on behalf of the Crown. Moreover since he had had advance notice of a point which he knew his opponents would make to the Jury, he was entitled to anticipate the point by attempting to provide an answer to it. *Re the Witness Bevis* 61. It is submitted on behalf of both applicants that the evidence of the witness Bevis was so inherently unreliable that his evidence should have been disregarded by the Jury and that the Judge failed to encourage the Jury to take this course or even adequately to warn them of the dangers of relying on his evidence. (Bell skeleton argument paras 12 and 41 - 43 and Juste skeleton argument para 27). 62. As a preface to a discussion of this ground it is necessary to understand the circumstances in which Bevis came to give evidence. 63. Bevis had been a user of heroin for some time prior to his arrest on 30 April 2003. On that date he was charged with participation in the same conspiracy for which the applicants were later tried. We have to say that, on the evidence available, it seems to us that the allegation of Bevis's participation in the conspiracy constituted an optimistic, not to say unrealistic, assessment of what that evidence proved against him. However that may be, on 20 January 2004 he gave a statement to the police insisting, as he had consistently done since his arrest, that he was not guilty of any such participation and implicating the applicants in the way already described. Ten days later those responsible for the prosecution informed Bevis that the charge of conspiracy against him had been dropped. 64. On 16 August 2004 during the trial of the applicants, Bevis gave evidence for the Crown. He was a man with a significant criminal record for drug offences and had served two separate sentences of imprisonment totalling ten years for offences of supplying drugs and possession of drugs with intent to supply. 65. Additionally, Bevis alleged that on remand at

HM Prison La Moye during a conversation in which he had asked the applicants to tell the police the truth and to clear him of the charge of which they knew him to be innocent, the applicant Durkin added the detail that he had hoped to import the kilo of heroin in a car and also repeated that the price was to be between £18,000 and £20,000. 66. Bevis was an acknowledged liar and deceiver. He admitted in cross-examination that he had said nothing to the police in interview after 30 th April 2003 to implicate the applicants in the conspiracy the details of which, in evidence, he claimed to have been privy. In interview he did not accept that any conspiracy existed, whereas in his statement he had asserted its existence but said that he was not a party to it. He accounted for the difference by saying that at the time he was interviewed he did not want to "grass" on the applicants. 67. Moreover he told the police that he had sold to the applicant Durkin a television set which he had himself stolen from his former employer, and that he had later secretly removed the same television from Durkin's flat with a view to reselling it. He also acknowledged that he had taken £500 from Durkin on the false pretext of buying drugs when, as he acknowledged, he intended to keep the money and use it for his own purposes. He further admitted defrauding his former employer and their customers of a total of £16,000. 68. It is apparent that Bevis was a man whose evidence required to be examined with special care. Apart from his tendency to have recourse to deceit whenever it suited him, he had a motive for avoiding the risk of imprisonment by implicating the two applicants in the conspiracy with which they were charged, and by giving evidence against them. 69. In deference to the obvious dangers of relying on the evidence of Bevis, the Commissioner dealt generally with his evidence thus: "Another important part of the Crown's case is the evidence of Rodney Bevis. He implicates the defendants in the conspiracy and gives details of the conversations which he had with them, or one or other of them, or which he overheard. Now, Bevis is a man with many convictions for drug related offences. The Defence challenge his evidence. They suggest he is lying and that he has a motive for doing so. It is suggested that by providing a statement implicating Durkin and Howard and exculpating himself he managed to persuade the Prosecution to drop the charge against him because he was at one time charged in this conspiracy. Moreover, it is suggested that he has a hope of reducing his sentence by making this statement and by giving evidence for the Prosecution. You must bear all those criticisms of Bevis in mind. I direct you that you should approach his evidence with caution and examine it with care. And bearing in mind the criticisms which have been made ask whether you can safely rely on his evidence". (Pages 6 and 7). 70. When he came to rehearse the detail of the evidence given by Bevis the Commissioner prefaced his summary by reminding the Jury of the warning he had already given to them. The summary of the witness' evidence is contained in 3 pages of the 20 page summing up. Two thirds of the summary consists of an exploration of the detail of the cross-examination of the witness by Advocate Bell and by Advocate Juste. The Commissioner concluded with these words: "Well there, members of the jury, is all the evidence for you to consider which you will do, I know, with care and in the light of the directions I have given you as you approach, and in particular to (sic) the evidence of Bevis". (Page 19). 71. Advocate Bell has referred us to *Benedetto v R*

- (2003) 1 WLR p1545 PC and to the speech of Lord Hope of Craighead who provided guidance to judges in cases where one prisoner gives evidence against another and where there are indications that the evidence may be tainted by improper motive. Lord Hope quotes with approval the directions given by the Privy Council in *Pringle v R*
- (2003) UKPC 9 at 30: "Where such indications are present the judge should draw the jury's attention to these indications and their possible significance. He should then advise them to be cautious before accepting the prisoner's evidence". He continues: "It should be noted that there are two steps which the judge must follow when undertaking this exercise and that they are both equally important. The first is to draw the jury's attention to the indications that may justify the inference that the prisoner's evidence is tainted. The second is to advise the jury to be cautious before accepting his evidence. Some of the indications that the evidence may be tainted may have been referred to by counsel, but it is the responsibility of the judge to examine the evidence for himself so that he can instruct the jury fully as to where these indications are to be found and as to their significance. Counsel may well have suggested to the jury that the evidence is unreliable but it is the responsibility of the judge to add his own authority to these submissions by explaining to the jury that they must be cautious before accepting and acting upon that evidence". 72. It is clear from the passages of the summing up to which we have referred that the Commissioner carefully followed the steps outlined above. In our judgment the criticisms of the Commissioner in this respect are misconceived. *Re the Summing Up* 73. Advocate Bell submits that the balance of the summing up favoured the Crown (his skeleton argument paras 39 -40). This ground is reflected in the complaint by Advocate Juste that the summing up was biased (her skeleton argument paras 51 - 60). Additionally Advocate Bell submits that the Commissioner did not repeat to the Jury some of the points made by him in his address to them. 74. It is important to remember that in this case no evidence was given by either applicant. In essence the Defence put the Crown to proof of its assertion that the transcripts of the covertly recorded conversations, the confirmatory evidence of Bevis and the applicants' inability sensibly to explain in interview certain important passages in the transcripts, admitted of the conclusion that the applicants had been engaged in a conspiracy to import heroin. It follows that the question for the Jury was the correct interpretation to be placed on that evidence and in particular what the transcripts proved, if they proved anything, about the applicants' thoughts and intentions. 75. Since the evidence at the trial consisted almost entirely of evidence presented by the Crown, and since the Defence consisted of a challenge to its meaning, it was inevitable that the Commissioner should feel obliged carefully to analyse that evidence with a view to reminding the Jury of its salient features. He emphasised that the selection of evidence was his, that the significance to be attached to any aspect of it was for the Jury and not for him, and that if he failed to remind them of evidence which they regarded as important, they must take that evidence into account and follow their own view of it. 76. Having identified the important passages in the transcripts to some of which we have referred above, the learned Commissioner continued: "... do they (the conversations) support the

Prosecution case that there was a conspiracy to import a kilo of heroin from England? The Defence suggest that there was an absence of specific detail relating to the logistics of the operation and point out that there is only one reference to a kilo during the many hours of surveillance. Mr Advocate Bell suggests that there was no real intention to carry any agreement out. The Prosecution, on the other hand, submit that the existence and purpose of the conspiracy is proved by reference to the supplier Tony; to the amount, a kilo; to the place from which it is to come, Liverpool; and by the price £18,000-£20,000". (Page 6). 77. Later, summarising the transcripts, the Commissioner repeated the nature of the issue for the Jury: "... the Crown submit that these are obviously serious conversations not rambling and inconsequential fantasies". (Page 8). Later still having reminded the Jury of the references to the key words and phrases of the alleged conspiracy, he said: "... and the Prosecution ask: is this heroin addict rambling or is this sensible talk about what has gone on and what may go on in the future? These are all matters for you, Members of the Jury, I am simply putting to you the Prosecution's submissions to be balanced against the Defence explanation. Do these ... (indistinct) ... show that these two were in it together as parties to a conspiracy?" (page 19). 78. The Commissioner also reminded the Jury of the evidence of Mr de la Haye, the witness called on behalf of Durkin, who, as we have seen, had claimed that in his experience much planning would be required to import an amount of heroin as large as one kilo, and that it was surprising that there were no references in the recorded conversations to couriers, to storage, to safe houses and to other matters which, in his view, would be essential ingredients of the planning of so significant an importation and distribution. 79. We have considered carefully the allegations under this ground and the points made on behalf of the applicants to justify them. We conclude that the submissions on this point are fallacious. We are satisfied that in the passages which we have quoted above the Commissioner reminded the Jury in terms which were both adequate and appropriate. We reject the criticism of lack of balance or of bias in the summing up. 80. In amplification of his complaint that the Commissioner failed fairly or sufficiently to remind the Jury of the points which he had made in his address to them, Advocate Bell listed a number of matters which the Commissioner specifically failed to mention including the fact that there was no seizure of any amount of heroin, that the applicant Durkin was not found to be in possession of any large amount of cash, that Tony had not been identified, that there was no evidence of any money having been sent through the post and that the Crown had produced no telephone records. The matters to which Advocate Bell refers are features of the evidence which were absent from the case presented by the Crown. 81. In our judgment it is not incumbent on a judge in a criminal trial to provide a list for the Jury of matters on which they might have heard evidence or might have anticipated hearing evidence. As we have observed the question for the Jury was whether on the evidence which they had heard they were satisfied that there was a conspiracy of the kind defined and that the applicants were parties to it. To itemise matters on which the evidence was silent was to court the risk that the Jury would speculate what such evidence might have been. This was a matter on which the Commissioner, rightly in our judgment, gave a direction to the Jury on page

6 of the summing up. He said: " I warn you not to go behind any transcript ", referring them in the next sentence to the dangers of speculation. 82. But in any event, as is apparent from the passage quoted at para 76 of this judgment, the Commissioner did indeed remind the Jury in general terms of the apparent lack of detail relating to the logistics of the operation. He also reminded them of the evidence given by Mr de la Haye as to the lack of any reference in the transcribed conversations to couriers, safe houses etc. In our judgment these passages constituted a sufficient indication of the point which Advocate Bell had made to the Jury and we are satisfied that no valid criticism can be made of this aspect of the summing up. 83. We conclude that there are no grounds on which we would be justified in granting leave to appeal against the convictions of either of these applicants. Accordingly leave to appeal against conviction is refused in both cases. LEAVE TO APPEAL AGAINST SENTENCE 84. When on 13 September 2003 the applicants were sentenced, the Court had to consider the appropriate sentence not only for the conspiracy count but for the other offences to which the applicants had pleaded guilty. 85. Count 22 charged both men with being concerned between 2 & 4 March 2003 in the importation of 3.1 grams of heroin by means of a postal packet. Counts 23 and 24 charged the applicant Durkin with being concerned with Bevis in the importation for personal use, in the one instance between 2 & 3 March 2003 of 1.5 grams of heroin, and in the other between 7 & 8 March 2003 of 3.1 grams of heroin. In count 25 the applicant Howard was charged between 2 & 4 March 2003 with importing 3.26 grams of heroin by the means of a postal packet. 86. None of these offences, nor indeed those additional offences for which the applicants were sentenced to periods of imprisonment of up to 2 years and in respect of which no application for leave to appeal is made, involved conduct as serious as the conduct alleged in the conspiracy charge. 87. Nonetheless the Court could not ignore these other offences and had a choice whether to make sentences for them consecutive to the sentence for the conspiracy, or alternatively to reflect the additional mischiefs disclosed by them by ensuring that the overall sentence took into account the nature and frequency of all these heroin related offences, and to make the sentences for these offences concurrent. In any event bearing in mind the number of offences for which sentences had to be passed the Court clearly was obliged to have regard to the totality principle. 88. Mr Bell on behalf of Durkin submits that the starting point for sentence chosen by the Court was too high and that 14 years was a more appropriate starting point than 15 years. 89. A reduction of one year might be described as mere tinkering with a sentence of this length. Tinkering has been disapproved by this Court in a number of cases including *Morgan and Schlandt v Attorney General* (24 th April 2001) Jersey Unreported (2001/88), *Hunt v Attorney General*

(2003) JCA 128 , and most recently in *Harrison v Attorney General*

(2004) JCA 46. 90. In recognition of the cogency of these authorities, Mr Bell submits firstly that the Court should have fixed a starting point no higher than 14 years and that the Royal Court should have made greater allowance than 2 years for the mitigation available to this applicant. Secondly he says that in any event the disparity between the sentence passed

on the applicant in respect of the two counts in which he was jointly charged with Bevis, and the sentence passed on Bevis, is such that this Court ought to intervene. He relies on a passage at para 40 of Harrison : "Sometimes the Royal Court fails to create a sufficient disparity of sentence between offenders or creates an excessive disparity: a correction may again have to be made notwithstanding that it may result in a relatively minor change to the length of sentence." 91. In support of his submission that the starting point should have been 14 years, Mr Bell points out that this was a conspiracy to import, not an actual importation, and that the guidelines in *Rimmer v Attorney General* (19 th July

2001) *Jersey Unreported* (2001/148) were of limited applicability. He also points to the fact that the Commissioner in his sentencing remarks acknowledged that the conspiracy was neither well planned nor sophisticated. 92. We are not persuaded that the starting point fixed by the Court was wrong and that we should reduce it. The Commissioner and Jurats clearly took account of a number of factors of differing significance, in fixing the starting point including, firstly, the prevalence of the use of heroin in Jersey and the damage which it inflicts; secondly the weight of drug involved; thirdly the extent of the financial profit which would have accrued to the applicants; fourthly the fact that the offence was one of conspiracy to import, rather than, for example, simple possession; fifthly the market at which the importation was directed and sixthly the nature of the planning, experience and/or sophistication, or lack of it, which lay behind the offence. 93. Whether the appropriate starting point should have been 15 years as the Court fixed or 14 years as Mr Bell contends, it is clear in our judgment that the figure of 15 years was within the *Rimmer* guidelines and within the bracket plainly available to the Royal Court. Moreover we consider that *Rimmer* does provide a useful guide in a case such as this as to what was an appropriate starting point. 94. We turn to Mr Bell's second point. He submits that the Court paid insufficient heed to the applicant Durkin's relative youth, the delay of 16 months between arrest and trial, the time which the applicant spent on remand in prison as a consequence of that delay, and the mental and physical suffering which the applicant endured undergoing detoxification and withdrawal from heroin. 95. There can be no doubt that the Royal Court bore these matters in mind because the Commissioner so indicated when he gave the Court's reasons for the sentences passed. The question is whether a two year reduction for the mitigation was sufficient. 96. We have given the matter careful thought. In particular we were concerned about the delay between arrest and trial and the resulting long period on remand in custody. We have enquired into the reasons for this and we are satisfied that no reasonable criticism can be made of anyone in connection with the causes of the delay. Nonetheless we hope that a delay of this kind will recur only in circumstances where the offender consents to such a delay for good reason or is himself the cause of it or where the circumstances of such delay are fully justified. 97. We have considered whether the matters which the Royal Court took into account warranted a reduction greater than 2 years, but we have concluded that the reduction given was appropriate and that no greater reduction would be appropriate. 98. We turn to Mr Bell's final point about disparity. The test for disparity was established many years ago by Lawton LJ in *R v Fawcett* 5 Cr. App. R (S) 158

CA, approving *R v Pitson* 56 Cr. App. R. 391: "Would right thinking members of the public with full knowledge of the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?" 99. This test has been emphasised as applicable in this jurisdiction in *Wright v Attorney General* (12 th July 1999) Jersey Unreported 1999/125, *Bruton v Attorney General* (14 th July 2000) Jersey Unreported 2000/136 and *Bevan v Attorney General*

(2003) JCA 14 . In *Rayner v Attorney General* (25 th September 1996) Jersey Unreported CA, this Court in defining the nature of the difference between the relevant sentences said: "It is important, however, to understand the nature of that difference. It is not a difference which might strike a casual onlooker as unjust but only one in which there is full knowledge of all the relevant facts and circumstances." 100. In sentencing *Bevis* [2004]JRC163 the Commissioner said: "Your case is very different to that of the other defendants and it has caused us considerable concern. You are now aged 35; in fact the oldest of the defendants in the dock. However, you alone of the defendants have given evidence in his case. You made a statement to the police at an early stage and you pleaded guilty to such offences as you were concerned in. (He then describes the offences.) Not only have you pleaded guilty to those offences, but you have been very co-operative with the authorities and, as is public knowledge, you gave evidence in this Court in the trial of two of your co-defendants. You were courageous in doing so, particularly as you shared a prison with them. The Court recognises that those who co-operate in that way are entitled to expect a substantial discount in the sentences which would otherwise be imposed. And that discount, we feel, is applicable to you. In recognition of your pleas of guilty and co-operation and of the fact that you gave evidence for the Prosecution, we do not propose to sentence you to any further term of imprisonment. I say any further imprisonment because you have already served the equivalent of over 2 years' imprisonment and we can do nothing about that. If we were to impose a sentence of imprisonment, then having regard to the discount that we would apply, it would be such that you would probably be released immediately. ... The Court's order in your case is a Probation Order for 2 years." 101. Having regard to the exceptional circumstances which distinguished *Bevis* from all his co-defendants and in particular the two applicants, and having regard to the public interest in encouraging those capable of giving evidence for the prosecution to do so in appropriate cases, we are not persuaded that it would be right for this Court to reduce the 4 year sentence passed on the applicant to one which is more in line with that passed on *Bevis*. We do not accept that "right thinking members of the public" once they knew of the special factors present here would consider that "something had gone wrong with the administration of justice." 102. The application for leave to appeal the sentences on behalf of the applicant *Durkin* is refused. 103. We come finally to the application relating to the sentences on behalf of the applicant *Howard*. Since Miss Juste associates herself with the arguments concerning the starting point put forward by Mr Bell and since she does not seek to persuade this Court that there was any reason to select a different starting point for her client than for his co-accused, the Court's rejection of Mr Bell's arguments on

starting points is applicable to the applicant Howard. 104. As in the case of Durkin, it is clear from the transcript of the sentencing remarks that the Commissioner and Jurats took into account all relevant matters in mitigation and we can find no reasons for increasing the 2 year discounts for mitigation which was allowed to this applicant. 105. We turn to the question whether any distinction should be made between the two applicants in the 4 year sentences passed on each of them. It is true that Howard was involved in only two counts which attracted 4 year sentences while Durkin was involved in three such counts; but the total weight of heroin charged in all these counts as between these two men consisted of 7.7 grams of heroin (Durkin) and 6.3 grams (Howard). In our judgment the difference is insufficient to warrant a distinction in the sentences which these two applicants should serve for the offences of actual importation, and insufficient to justify a distinction in the total period of imprisonment which the applicant Howard should serve. 106. Accordingly his application for leave to appeal against sentence is also refused. Authorities. Rimmer & Ors-v-AG [2001] JLR373. Welsh-v-AG (4 th April, 2002) Jersey Unreported; [2002/72]. Finnegan-v-AG [2004]JRC 077. Aramah

[1983] 76 Cr. App. R. 190. Aranguren

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