

JERSEY / JUDGMENT

Mooney and Sumner v AG

[2005] JCA 023 (02 March 2005)

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COURT

COURT OF APPEAL

BEFORE

R. C. Southwell, Esq., Q. C., President;
Sir de Vic Carey, and
The Hon. Lord Hodge
Kevin Philip Patrick Mooney;
Scott Andrew McLean Sumner

-v-

The Attorney General

Appeal Kevin Philip Patrick Mooney

against a total sentence of 8 years' imprisonment passed on 1st November, 2004, by the
Superior Number of the Royal Court,
to which the Appellant was remanded by the Inferior Number on 9th July, 2004, on a guilty

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guilty

plea to:	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) of the Customs and Excise (Jersey)
Law, 1998:	count 1: MDMA, on which count a sentence of 8 years' imprisonment was passed. count 2: cannabis resin, on which count a sentence of 8 years' imprisonment, concurrent, was passed. Leave to appeal was granted by the Bailiff on 7th January, 2005. Appeal of Scott Andrew McLean Sumner against a total sentence of 2 years' imprisonment passed on 1st November, 2004, by the Superior Number of the Royal Court, to which the Appellant was remanded by the Inferior Number on 10th September, 2004, on a
guilty plea to:	2 counts of: being knowingly concerned in the supplying of a controlled drug, contrary to Article 5[c] of the Misuse of Drugs (Jersey)
Law, 1978:	count 3: MDMA, on which count a sentence of 2 years' imprisonment was passed. count 4: cannabis resin, on which count a sentence of 2 years' imprisonment, concurrent, was passed. 1 count of: possession of a controlled drug, contrary to Article 6(1) of the
Misuse of drugs (Jersey) Law, 1978:	
count 5:	cannabis resin, on which count a sentence of 1 month's imprisonment, concurrent, was passed. Leave to appeal was granted by the Bailiff on 7th January, 2005. [The other co-defendants named in the indictment have not appealed.] Advocate J. Bell for Kevin Philip Patrick Mooney; Advocate L. J Springate for Scott Andrew McLean Sumner; S. M. Baker, Esq., Crown Advocate.

JUDGMENT

CAREY JA: 1. This is the judgment of the Court in respect of appeals against sentence imposed by the Superior Number of the Royal Court on 1st November, 2004. The two Appellants were sentenced with two other persons who are not currently appealing. Leave to appeal was granted by the learned Bailiff on the 7th January, 2005. Although the grounds upon which the Appellants are appealing are separate and distinct it is convenient to deal with these appeals together as it is necessary to describe in some detail the factual background. 2. The Appellant Mooney pleaded guilty to two Counts on an indictment charging him, Sumner and two men called Kendrick and

Ayers respectively with being concerned in the fraudulent evasion of the prohibition on the importation of controlled drugs, namely in the First Count 3,875 ecstasy or MDMA tablets and in the Second Count 29½ kilograms of cannabis resin. Mooney and Kendrick pleaded guilty. Ayers was convicted after a trial. Sumner pleaded not guilty to these two Counts but guilty to two alternative Counts of supplying MDMA and cannabis resin, as well as a further Count of simple possession of a small quantity of cannabis resin. These pleas were accepted. 3. We now turn to the details of the offences and adopt the following summary from the report of the Royal Court Hearing) (AG v Kendrick and Ors

[2004] JRC 187): "Kendrick drove a car containing a little under 29½ kilos of cannabis resin and 3,875 ecstasy tablets onto a ferry going to Jersey. The car had been modified to allow the drugs to be carried in the front and rear bumpers. He telephoned Ayers, who was then in Liverpool, both before boarding and after disembarking from the ferry. After speaking to Kendrick upon his arrival in Jersey, Ayers telephoned Mooney in Jersey. Upon disembarking from the ferry, Kendrick drove the car to the Monterey Hotel in St Helier. Shortly afterwards, Mooney went to the Hotel de France and made a booking for Ayers to stay the following night under a false name. Later the same evening Kendrick telephoned Ayers and confirmed that Ayers was travelling to Jersey the next day. Several minutes later, Sumner and Mooney arrived at the Monterey Hotel. Mooney went into the hotel and a few minutes later he and Kendrick came back out. They became engaged in animated conversation and on one occasion looked in Kendrick's car boot. Kendrick returned to the hotel. Mooney and Sumner got into Kendrick's car and Sumner drove it to Mooney's home. It was during this car journey that Mooney told Sumner for the first time that the car contained drugs. The car stopped and Sumner got out. Shortly later, he got back in again and continued the journey as intended. When they arrived at Mooney's home, Sumner's Switch card and e-mail address were used to book a flight over the internet for Ayers to travel from Birmingham to Jersey the next morning. Mooney telephoned Ayers to tell him that this travel booking had been made on his behalf. A little later, around 10.00 pm, Mooney went out. He came back with a bag containing over £62,000 in cash. The next morning, Ayers arrived in Jersey. He made his way to Mooney's address. All defendants were arrested shortly thereafter. Following Sumner's arrest, his home address was searched. A small piece of cannabis resin weighing 253 milligrams was discovered." 4. It would appear from the above summary that these offenders were only detected as a result of a painstaking surveillance operation mounted by the law enforcement authorities. So far as the involvement of Mooney is concerned the Crown Advocate said this about him: "Mooney was responsible for the Jersey end of this importation. The prosecution put Mooney immediately below Ayers in the chain of importation..." He goes on: "Kendrick was the courier; Ayers and Mooney were responsible for the importation." So far as Sumner is concerned the Crown Advocate said: "Sumner lies at the bottom end of this offending. This was not a premeditated offence by him. He was told of the presence of the drugs on the Monday while he was on the way to Mooney's house with Mooney and, as such, he was removed from the source of supply." The Sentences 5. The Crown set a

starting point of 16 years for Ayers, which was reduced by the Royal Court to 15 years. Similar reductions were made by the Court to the proposed starting points for Kendrick and Mooney resulting in Kendrick having a starting point of 13 years and Mooney having a starting point of 14 years. Ayers, as we have noted, pleaded not guilty, but the Crown only asked for a sentence of 6 years concurrent on each Count and despite reducing the starting point the Court upheld that conclusion. Kendrick was sentenced to seven years concurrent on each Count and Mooney to eight years concurrent on each Count; in each case this was one year less than the finishing point suggested by the Crown. 6. In the case of Sumner the Crown proposed a starting point of seven years. His criminality was assessed by the Deputy Bailiff on the basis of his involvement being very little. It involved firstly continuing to drive the imported car after he had discovered that there were drugs in the car, and secondly allowing his credit card to be used for booking Ayers' flight from England. There were six Jurats sitting with the learned Deputy Bailiff - three were persuaded that for the Appellant Sumner exceptionally a non-custodial sentence of probation and 240 hours community service was appropriate. The other three considered that two years imprisonment was required because of the seriousness of the supply of this quantity of drugs and the need to make it clear that even a small degree of involvement was likely to result in custody where this amount of drugs is being supplied. The learned Deputy Bailiff, to whose views as to sentence no more or no less weight must be given than those of the individual Jurats who sit with him, agreed with the views of the Jurats who were of the latter view, and so a sentence of two years' imprisonment was imposed. The Appellants' cases 7. The flavour of the somewhat different cases being put forward by the Advocates for the Appellants can be gleaned from the summary that we have related of the Crown's conclusions and the sentences handed down. The case of Mooney 8. Mr. Bell at the original trial emphasised the level of offending of Mooney and sought to remove him from the role of principal importer at the Jersey end. This, however, he could only take so far as there was clear evidence that Mooney was in touch both with Ayers and Kendrick shortly after the drugs arrived and that he in effect took possession of the vehicle and had available for Ayers the £60,000 which may have been the whole or part only of the money which Ayers was to receive for the drugs. No real issue is taken with the conclusion that Mooney had a role greater than Kendrick who has been described throughout as the courier, albeit a sophisticated courier with a specially adapted vehicle, with which to import the drugs. Certainly Mooney appears to make no complaint that he received a year more than Kendrick. Neither does he make a complaint that the Court has misapplied the Bonnar and Noon guidelines as amplified so far as importations of involving more than one type of drug is concerned in the case of Valler . His complaint is, understandably, the disparity between the way in which he was dealt with and the way in which Ayers was dealt with. Mr. Bell has conscientiously detailed all the mitigation that can be raised on behalf of Mooney - his plea of guilty, the fact he is 12 years younger than Ayers, his good record, his difficult background, his remorse and his character references. He also told us of the efforts being made by Mooney in prison to educate himself and get away from alcohol and drugs. 9. Mr. Bell cites as authority for looking at the principles

that are to be applied in case of disparity the case of Bevan

[2003] JCA 014 a decision of this Court constituted as it is today. The case of Sumner 10. Again Sumner's grievance can be identified from the summary we have already disclosed. In Jersey it is the practice where the Jurats are split on the appropriate disposal for a Defendant, for the presiding judge to indicate their respective views and where, as in this case, the Jurats are equally divided, to indicate his own preferred disposal. 11. Mrs. Springate who appeared in the Court below and mitigated on behalf of Sumner has repeated her contentions before us. Emphasis has been made on the involvement of the Appellant being at the "the very lowest level" echoing some words used by the Crown Advocate in his address. She then goes on in paragraph 3 of her contentions to say this:- "He only suspected the presence of drugs whilst in the car in Jersey with Mooney, but was neither aware of the quantity nor type of the drugs. Once he suspected that there were drugs in the car he briskly pulled the vehicle to a halt, got out of it and walked away from it. With the use of mobile telephones, Mooney then called the Appellant, reassured him his fears were unwarranted and pleaded with him to return to the car and drive the short distance to Mooney's home. Unfortunately, the Appellant complied with Mooney's request. That was his sole involvement." 12. Mrs. Springate also reminded this Court of the plea of guilty, the remorse, the age (22), the lack of relevant previous convictions and the undoubtedly sad background outlined in the social inquiry and psychiatric reports. An overview of the offending 13. One must not lose sight of the fact that both Appellants have got to accept that they were part of a sophisticated drug smuggling enterprise involving sizeable quantities of ecstasy tablets and cannabis resin, which was only detected as a result of an equally sophisticated surveillance operation mounted by the law enforcement authorities in Jersey. We are not here dealing with an isolated incident of an individual who is picked up in the Arrivals Hall at the Harbour or the Airport and found to be carrying drugs. There is no real dispute that Mooney was the major player at the Jersey end of the operation. He was the one who was in communication with Ayers and was meeting Kendrick after his arrival on the island. He was the one found to be carrying the money which was to be paid to Ayers. Whether or not he was acting as a broker to other wholesalers in Jersey or was engaged in trading in drugs himself neither this Court nor the Court below can ever know. It cannot be denied that Mooney had problems of his own or that he was somewhat limited in what he could do because he was dependent on help from other people in Jersey. One of these was Sumner who agreed at the behest of Mooney to drive the imported vehicle, specially adapted, as we have said, for the carriage of drugs, to Mooney's address. Neither does Mooney appear to have had the wherewithal to pay for Ayers' ticket to Jersey and again the whole operation was rendered a not insubstantial service by Sumner who agreed to let his credit card be used to effect that transaction. The Court's conclusions (1) Mooney 14. Despite the efforts of Advocate Bell in the Court below there can be no argument as to the level of Mooney's involvement and neither can the sentencing approach proposed by the Crown Advocate and refined by the Court below be criticised in itself. We have noted the words of the Deputy Bailiff in

sentencing Ayers. He says this:- "He is a hard-working family man and there are references. We have read carefully the social inquiry report and noted his conduct in prison. We have had regard to all the mitigation that appears from the papers." 15. The Royal Court goes on to reach the same finishing conclusions as the Crown Advocate, namely that a sentence of six years concurrent on each Count is appropriate for Ayers notwithstanding his "not guilty" plea. 16. The Court below took a different view of the way in which the Law Officers seemed to have calculated the starting point for Ayers, Kendrick and Mooney by suggesting that an addition of two years to the starting point for a Class A importation of this quantity was appropriate to take account of the very large consignment of Class B drugs that were involved here, rather than the three year addition proposed by the Crown. There are two relevant decisions of this Court on disparity. 17. The first of these cases is that of *Rayner v A. G.* (25th September

- 1996) *Jersey Unreported*; [1996/171]. *Rayner* was charged with being in the view of the Royal Court and the Court of Appeal "an important cog in a vicious machine in the distribution of drugs in Jersey." He received 11 years for his involvement in the importation of what was then the largest seizure of ecstasy tablets (5,469). His co-accused, the courier who brought the drugs in, received 4 years. The starting point for the co-accused was 11 years and for *Rayner* 14 years. The sole grounds for appeal were disparity. The Court of Appeal said this: "The principle that this Court will interfere where there is a glaring difference between sentences imposed on different defendants in the same case, such as to give rise to a real sense of injustice, is a principle which is plainly recognised in the law of Jersey: see *Mawdsley v A. G.* (8th July, 1996) *Jersey Unreported*, *Lynch v A. G.* (24th July, 1991) *Jersey Unreported CofA*; (1991) JLR N.15 C of A, and *Hollman, Cummins v A. G.* (4th April, 1995) *Jersey Unreported CofA*. 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. When the facts and circumstances of this particular case are fully considered, there is, in the opinion of this Court, no difference, such as to give rise to any legitimate sense of injustice." 18. The next case is that of *Bevan* to which we have already referred. In that case the Court was reviewing the treatment of two co-accused who again were in the drug business, but at a far lower level than those involved in this case. There the Court found that the sentencing Court had clearly drawn certain conclusions concerning the respective levels of criminality of the two co-accused which could not be properly inferred from the circumstances. The consequent disparity in the sentences that were handed down inevitably led to a justified sense of grievance. Accordingly, the sentence on the Appellant was reduced in view of the clearly lighter sentence that had been somewhat surprisingly imposed on his co-accused. This was notwithstanding the fact that viewed in isolation *Bevan's* sentence would have been unexceptionable. 19. We have looked carefully at all the circumstances surrounding the Appellant *Mooney's* offending and we cannot find fault with the sentence that was imposed on him. 20. In looking at the issue of disparity we find it helpful to rehearse the words of *Lawton, L. J.* in *Fawcett*

(1982) Cr. App. R (S) 158: "The approach of the Court was to ask whether right thinking members of the public with full knowledge of all the relevant facts and circumstances would consider that something had gone wrong with the administration of justice." 21. Having regard to the information that was before the Court below we have to respectfully agree that the Court was right to follow the conclusions of the Crown Advocate and sentence Ayers as it did. In such cases the co-accused will inevitably feel a sense of grievance, but he can be assured from all the guideline decisions that influence the Royal Court that the sentences that were handed down in his case were no more and no less than those appropriate having regard to his level of criminality. Having regard to all the circumstances therefore the appeal by Mooney is dismissed. (2) Sumner 22. We have already referred to the contentions urged by Mrs. Springate on the appeal. We think, with respect, there was a degree of looseness in the choice of words of the Crown Advocate when he referred to the Appellant as lying "at the bottom end of this offending". Whilst Sumner was not actually involved in the importation he actively assisted with handling the drugs after they had arrived in two regards. Firstly, he undertook to drive the motorcar of a stranger in circumstances where apparently no one else was able or willing to do so and in so doing got the drugs to a safe haven. Secondly, he facilitated the funding of the air ticket of the supplier in England to enable the transaction to be completed. This involvement was vital in waving the consignment along its way. We accept that Sumner is a young man with problems and we can understand the view of three of the Jurats that with three of the principal players in this conspiracy locked up for a considerable period some mercy could be afforded to him. With respect however we have concluded that the views of the majority in the Royal Court including those of the learned Deputy Bailiff in exercising his casting vote cannot be faulted. This young man sadly agreed to play a vital part in the progression of these drugs to the Jersey market and he also facilitated the end transaction by arranging for the U. K. principal to get across to the island to collect the proceeds of this substantial and distasteful enterprise. Anybody who facilitates even to a small part a complicated and sophisticated drug importation enterprise such as the Court sees in this case must expect to go to prison for their efforts. Undue mercy to Sumner would inevitably lead to complaints of disparity by his co-defendants. The Court finds no fault with the sentence handed down, albeit on a majority decision, and dismisses this appeal. Authorities. Bonnar and Noon v AG [2001 JLR 626]. Campbell, Molloy and MacKenzie v AG [1995 JLR 136]. Valler v AG (18 th July, 2002) Jersey Unreported; [2002/133]. Customs and Excise (Jersey) Law 1978: Article 61. Misuse of Drugs (Jersey) Law 1978: Articles 5 and 6. Le Pavoux -v- Attorney General

[2003] JCA 127 . Attorney General -v- Antunes & Others [2003 JLR 144]. Wright -v- Attorney General [12 th July, 1999] Jersey Unreported; [1999/125]. Rayner -v- AG (25th September, 1996) Jersey Unreported [1996/171]. Bevan -v- Attorney General

[2003] JCA 014 . Harrison v Attorney General

[2004] JCA 046. R -v- Fawcett (1983) 5 Cr. App. R.(S) 158. R v Rugg [1997] 2 Cr. App. R. (S.) 350. AG-v-Kendrick and Ors

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