

JERSEY / JUDGMENT

Mortimore v AG [2003] JCA 203 (12 November 2003)

[2003] JCA 203

COURT

COURT OF APPEAL

BEFORE

R. C . Southwell, Esq., Q. C., President;

Miss E. Gloster, Q. C.; and

D. A. J. Vaughan, Esq., C. B. E., Q. C.

Jamie Marc MORTIMORE

-v-

The Attorney General

Application for leave to appeal against a
sentence of 5 years' imprisonment passed on 4
th

August, 2003, by the Superior

Number of the Royal Court,

to which the Appellant was remanded by the Inferior Number on 11th July, 2003, on a

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Before:

R. C . Southwell, Esq., Q. C., President;

Miss E. Gloster, Q. C.; and

D. A. J. Vaughan, Esq., C. B. E., Q. C.

Jamie Marc MORTIMORE

-v-

The Attorney General

Application for leave to appeal against a
sentence of 5 years' imprisonment passed on 4
th

August, 2003, by the Superior

Number of the Royal Court,

to which the Appellant was remanded by the Inferior Number on 11th July, 2003, on a

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(2)(b) of the Customs and Excise Law 1999:

count 1: diamorphine.
The application for leave to appeal
placed directly before the plenary Court without first being considered and
determined by a Single Judge.
The Appellant on his own behalf;
D. E. Le Cornu, Esq., Crown Advocate.

JUDGMENT

GLOSTER JA: 1. This is the judgment of the Court. Jamie Marc Mortimore pleaded guilty to one count of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, namely diamorphine, contrary to Article 61(2)(b) of the Customs and Excise (Jersey) Law 1999. He was sentenced on 4 th August 2003 by the Superior Number of the Royal Court to a term of imprisonment of 5 years. He applies to this Court for leave to appeal against that sentence. 2. The facts leading up to his conviction may be summarised as follows: At the time of the offence Mr Mortimore was 28. On 26 th March 2003 he arrived in Jersey on the Commodore Clipper from Portsmouth. He told Customs Officers at the Elizabeth Harbour Terminal that he had decided to come to Jersey for a short holiday. He knew no one in Jersey and had no accommodation booked. The Customs Officers suspected that the Applicant was carrying drugs concealed internally. The Applicant agreed to be x-rayed and to an internal examination. After the first x-ray proved inconclusive, and before the internal examination, the Applicant admitted that he had a package of heroin concealed internally. A package was removed from his rectum and found to contain 23.4 grams of powder consisting of heroin containing 24% by weight of diamorphine with a wholesale value of between £3,510 and £4,680 and with a street value in Jersey of between £7,020 and £10,530. The Applicant maintained that the drugs were for his personal use. 3. At the hearing before the Sentencing Court the mitigation put forward on Mr Mortimore's behalf by Advocate Juste who was then appearing for him, was as follows: he had been a habitual drug user since the age of 16, having begun after the death of both his parents; he had been addicted to heroin for at least the last 3 years; at the time of his arrest he had been working as a pizza chef, but he felt ashamed at the extent to which his drug use was spiralling out of control; he wanted to detoxify himself in order to be able to attend his brother's forthcoming wedding in August 2003, so that he could re-establish relations with the remaining members of his family; he had had a bad time at work and was depressed about his life generally; his intention was to come to Jersey where he knew no one and gradually to wean himself off heroin; the heroin he brought with him was for his own personal use in Jersey as part of the gradual detoxification process. Advocate Juste further submitted that the purity of the heroin was extremely low so, as explained in an expert report filed on Mr Mortimore's behalf by Terence Goldie De La Haye, a former member of the Jersey Police Force with extensive experience of drugs related investigations, it was unlikely that it would be further diluted or cut to increase its quality or value. She said that although Mr Mortimore had reserved his guilty plea at his first Court appearance on 28 th March 2003 until his indictment, he had at an early stage

indicated a guilty plea to the Customs Officer. She further said that at the hospital he admitted that he had heroin concealed internally before his examination, so was cooperative to that extent. Reliance was also placed on his relatively young age of 28, the difficult times which he had had since the death of his parents, his depression, the good references to his character, and his genuine remorse and desire to address and change his heroin habit. She also emphasised the fact that Mr Mortimore had no previous convictions, other than one for possession of cannabis in 1996. 4. The Crown's conclusions were for a 7 year term of imprisonment based on a starting point of 8 years. However the Sentencing Court accepted the submissions of Advocate Juste, that a starting point of 7 years was the correct one and that the appropriate sentence, taking into account the mitigation urged on his behalf, was 5 years. 5. Before this Court Mr Mortimore has appeared in person. He has contended that the sentence of 5 years was too harsh and that insufficient credit was given for the mitigation available to him, in particular the fact that the drugs were for his personal use, and not for commercial use, and for the fact of his guilty plea. 6. Mr Mortimore's principal submission to this Court, both in writing and orally, was in effect that it was clear from various aspects of the evidence that he was not importing the drugs for commercial purposes. He relied on the fact that he had used his own name and passport and not false identification, on the fact of his own appearance which would make him an unlikely courier, the quantity and quality of the drugs and the matters set out in the expert report of Mr De La Haye. He submits, in effect, that the Sentencing Court did not really accept his version of events in this important respect. 7. In response, Advocate Le Cornu for the Crown submitted that the Applicant's contention that the heroin was for his personal use was indeed accepted by the Court and that the Applicant was sentenced on the basis that his version of events was true, not on the basis that he was a courier. 8. As to this important point, we have a real concern as to whether the Sentencing Court did indeed proceed on the basis that they fully and unequivocally accepted that Mr Mortimore had imported the heroin for his personal use. In his opening comments to the Court, Advocate Le Cornu at pages 3 & 4 of the transcript cited at some length certain passages from the judgment of this Court in *Conquer-v-A. G.* (4 th April 2002) Jersey Unreported; [2002/73] and in *Gregory-v-AG* (15 th January,

1997) Jersey Unreported; [1997/4]. These passages emphasised the point that: "...one sees that as soon as the consignment grows to any substantial size i.e. "beyond a relatively small amount" the suggestion that there is an intent to put the drugs to commercial use becomes more compelling. The real evidence which is going to weigh with the Court is the quantity of the drugs and not what the importer says about his intentions, which anyway might change if the circumstances of the importer change." 9. We also refer to the discussion at pages 5 - 7 of the transcript between Advocate Juste, Advocate Le Cornu and Commissioner Hamon. Although this made clear that the Crown's position was that it was not going to dispute the fact that, as Mr Mortimore claimed, the heroin was for his personal use, nonetheless the discussion shows that the Crown's submission to the Court was that (whatever the Court had to accept because it could not prove beyond doubt that the amount imported was for commercial purposes) the case of *Conquer* could nevertheless be relied upon by the Court to enable it, in sentencing the Defendant, objectively to assess whether

this importation was for a commercial purpose, by reference to the quantity of drugs involved. The transcript of the discussion also shows that the Court, whilst accepting that there was no evidence upon which the Crown could rely to dispute the Applicant's statement, nevertheless took the view that it " had to balance that against what the Court said in Conquer " ; see top of page 7 of the transcript. In other words, the Court in reality appears to have approached the matter on the basis that it could form its own objective view of the purpose of the importation, notwithstanding that there had been no challenge to the Applicant's statement as to his purpose in importing the drugs. 10. This approach appears to have been reflected in the judgment of the Superior Number. Although the Court specifically said " we must accept your story ", this was prefaced by the statement " Mortimore, only you know the real truth of the matter, we are never going to work it out ". Moreover, earlier in the judgment the Court had made reference to the " valuable comments of the Court of Appeal in Conquer v A. G " . In context, this can only have been a reference to passages of the type to which we have referred above, namely that the evidence that weighs with the Court in relation to the purpose of the importation is the objective evidence about quantity, rather than subjective evidence of intention. 11. We are thus left with the impression that the Court approached the sentencing of Mr Mortimore on the basis that, although they paid lip service to an acceptance of his evidence that the drugs were for his personal use, they nonetheless left open the real possibility that the importation was for commercial purposes and retained doubts as to the truth of Mr Mortimore's story. 12. In our judgment (and whatever may be the position in those type of cases envisaged in Conquer where there may indeed be real doubt as to the plausibility of a defendant's version as to intent, which cannot evidentially be challenged by the prosecution), in this case the unchallenged evidence of Mr Mortimore, strongly supported as it was by the expert report of Mr De La Haye, was sufficiently cogent so as to preclude the Court from sentencing on any basis other than an unqualified acceptance that the drugs had indeed been intended for Mr Mortimore's personal use. We refer in particular to the unchallenged evidence that, on the basis that Mr Mortimore's rate of use ran at between 3 to 3.5 grams per day, the 23.5 grams of heroin (depending on whether he was slowing down his usage as part of the detoxifying process) would have lasted only a week to two weeks, during which time, as Mr De La Haye stated, it was highly unlikely that Mr Mortimore would have made local connections enabling him to sell the drugs. 13. Accordingly in our judgment there is substance in Mr Mortimore's complaint that implicitly the Sentencing Court, although apparently accepting his statement that the drugs were for his personal use, did not in reality approach his sentence on that basis. 14. Other points raised by Mr Mortimore do not impress us. He complained that sufficient regard was not paid to the fact that he admitted after the first x-ray, which was inconclusive, that he had heroin concealed internally. This limited cooperation was a fact placed before the Superior Number which they clearly took into account, in accepting Advocate Juste's submissions. Next he contends that the Superior Number may have been influenced by some of the "no comment" answers given in his interview which he said were given on legal advice. In our judgment there is no indication that the Sentencing Court were in any way adversely

influenced by this factor in coming to their conclusion. 15. Further he submits that the Sentencing Court did not give him sufficient credit for his guilty plea and they wrongly gave weight to the fact that he reserved his plea at his first court appearance. The circumstances of the Applicant's reserved plea were dealt with fully by Advocate Juste in her address to the Court and there is nothing to indicate that this reservation of plea in any way adversely affected the Court when sentencing. Moreover, we cannot quarrel with the fact that, in the circumstances of his apprehension, a full one third discount was not given for his guilty plea. Accordingly, in our judgment, there is nothing in this point. Next he complains that the Court did not pay sufficient regard to the fact that he only had one previous conviction for possession of cannabis, which only resulted in a fine and not any more serious sentence. The matter of the previous conviction was fully addressed by counsel on behalf of Mr Mortimore, although it does not appear to have been expressly referred to in the Court's judgment. 16. This Court does not interfere with sentences handed down by the Superior Number of the Royal Court unless such sentences are manifestly excessive. In our judgment, and notwithstanding the fact that a sentence of 5 years was the term contended for by Mr Mortimore's counsel before the Superior Number, a sentence of 5 years was, in our judgment, manifestly excessive in this case, given the fact that on the evidence before the Court the drugs were undoubtedly for the Applicant's personal use, and given the previous relatively good character of the accused with the exception of one offence for possession of cannabis, and given his particular personal circumstances. So whilst we agree with the Superior Number that the correct starting point, applying the principles in *Rimmer and Others*

[2001] JLR 373 , is 7 years, we would allow a further one year's discount from the starting point to take account of all relevant mitigation which was available in this case. Accordingly we allow Mr Mortimore leave to appeal, we allow the appeal and substitute a sentence of 4 years in place of the 5 years imposed by the Superior Number. Authorities. *Conquer-v-A. G.* (4 th April 2002) Jersey Unreported; [2002/73]. *Gregory-v-AG* (15 th January, 1997) Jersey Unreported; [1997/4]. *Chevalier-v-AG* (29 th September,

1999) Jersey Unreported; [1999/159]. *Rimmer and Others*

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Prepared on 29 October 2026 · Esheria