

JERSEY / JUDGMENT

Norris -v- AG [2014] JCA 087 (02 April 2014)

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Court of Appeal 2 April 2014 Before : The Hon. Michael Beloff, Q. C., President; Sir John Nutting, Q. C., and; J. V. Martin, Q. C.. Liam Thomas Richard Norris -v- The Attorney General Applications for leave to call new witnesses and for leave to appeal against the sentence passed by the Superior Number of the Royal Court on 11th October 2013. W. A. F. Redgrave, Esq. , Crown Advocate. Advocate S. Chiddicks as amicus curiae to the applicant.

JUDGMENT

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INTRODUCTION

1. On 11th October, 2013, this applicant appeared with his father, Richard Norris, in the Royal Court for sentence before Sir Christopher Pitchers, Commissioner, and Jurats. Both men had pleaded guilty to an indictment involving various offences concerning a controlled drug, namely cannabis. Sir Christopher had had conduct of the case at several preliminary hearings and was familiar with the allegations and the basis of plea eventually advanced by this applicant. 2. The applicant was sentenced to a total period of imprisonment of 8 years. This period was imposed in respect of an offence of conspiracy to import 246 kilograms of cannabis into Jersey, the most serious of the offences (count 1). The remaining counts involved amounts of cannabis significantly less than this quantity. In substance, they related to two counts of possessing cannabis with intent to supply contrary to Article 8(2) Misuse of Drugs (Jersey) Law 1978 (counts 3 and 7), three counts of possessing cannabis contrary to Article 8(1) of the same Law (counts 4, 6 and 8) and one count of supplying cannabis contrary to Article 5(b) of the same Law (count 5). In respect of these offences, the sentences, which were all measured in months rather than years, were ordered to run concurrently to the 8 year sentence imposed on count 1. 3. On 7th November, 2013 the applicant filed notice of his intention to seek leave to appeal and to call a number of witnesses in support of his application. 4. On 28th January, 2014, we heard both applications. The applicant appeared before us in person but Advocate Chiddicks acted as his amicus curiae. We should also add that because the applicant wished to call Advocate Yates as a witness as part of his application for leave to call evidence, Advocate Redgrave appeared before this Court for the Crown in place of Advocate Yates, who, hitherto, had had the conduct of these proceedings. On 31st January 2014 we rejected both applications. We now

give reasons for our decisions. In deference to the fact that the applicant was not represented before this Court, other than by an amicus, we deal with those reasons in some detail.

THE APPLICATIONS

5. The grounds of the application to call evidence were put on the basis that certain named witnesses could give relevant evidence to this Court in support of a reduction in sentence.

6. The grounds of the application for leave to appeal the sentence, as stated in the Notice, were in three parts:- (i) the sentence was passed on a mistaken factual basis; and (ii) the Royal Court improperly took into account certain matters.

7. The third part consisted of a complaint that these errors led to the Royal Court to pass a sentence which was too long and that, in any event, the sentence should be reassessed.

THE CASE FOR THE CROWN

8. The circumstances which gave rise to the Indictment were detailed and, in advance of the hearing, the Crown provided the Royal Court with a long opening note.

9. The material facts can be thus stated. The applicant and his father were arrested as a result of a joint operation by the States of Jersey Police and Customs and the police forces of the East Midlands, in particular that of the Staffordshire constabulary.

10. The applicant had lived in Jersey for many years and had business premises at Hangar Lane, St Brelades, from where he and a man called Gavin Samson ("Samson") operated a motor cycle business. Samson left Jersey in 2010 to live in Thailand. In the Indictment he was alleged to be a co-conspirator with the applicant, and the applicant's father, to import cannabis into the Bailiwick. Samson remains at large.

11. On 16th February, 2012, the applicant flew to the East Midlands Airport where he was met by his father who lived in Burton-on-Trent. On that day the applicant visited his mother, now Mrs Ellis, who lives in the same town, albeit at a different address.

12. That same day, too, father and son travelled to a storage lockup also situated in Burton-on-Trent, called Leavesley Container Services ("LCS"). Sometime before, they had leased three containers there in their respective names, including Container 27 in which the East Midlands police later recovered the 246 kilos of cannabis, the subject matter of count 1.

13. The following day, both men travelled in two cars to another storage depot in Stafford ("Unit 2"), which had been first rented by Samson in 2004. In 2010 the applicant had informed the landlords that he would be taking over responsibility for the tenancy because of Samson's move to Thailand. A copy of the rental agreement for the premises was found at the applicant's business address in Jersey after his arrest.

14. At Unit 2 that day CCTV images recorded unspecified items being loaded and unloaded by father and son from and to the vehicles. This was the lockup from which, the following month, Staffordshire police recovered some bitumen moulds which, the Crown alleged, were to be the hiding place in which the 246 kilograms stored at LCS would be secreted for their journey from the English Midlands to this Bailiwick, a method of transportation which, according to the Crown, the conspirators had used during the course of 2011 for other consignments of cannabis.

15. On 18th February, 2012, the following day, both men travelled again to LCS in Burton-on-Trent. They reversed the van in which they had arrived to Container 27 and opened the rear doors to access the container.

16. On 20th February, 2012, the applicant returned to Jersey.

17. On 6th March, 2012, two weeks later, Jersey Customs officers mounted a surveillance operation at Hangar Lane. The applicant and a man called Benjamin Bishop ("Bishop") arrived at the premises. They both entered but

returned outside shortly afterwards. Bishop was carrying a small white box. Customs officers approached to arrest them. Bishop threw the box under a nearby car. Both men were detained. The applicant had in his possession four mobile telephones and in excess of £6,000 in cash. 18. The white box was retrieved. Ten slabs of cannabis were found inside it weighing 1,045 grams, whose street value was estimated in a statement before the Royal Court at £12,000. Evidence from one of the applicant's telephones revealed a text message between the applicant and Bishop the day before relating to the purchase of ten slabs of cannabis. The applicant later pleaded guilty to supplying Bishop with this cannabis (count 5). At a separate hearing, Bishop, too, pleaded guilty to possession of this amount with intent to supply. 19. The Hangar Lane business premises were also searched. Two smaller amount of cannabis were recovered. One weighed just over 100 grams: the applicant pleaded guilty to possessing this amount with intent to supply (count 3). The second block of cannabis weighed just over 4 grams: the applicant pleaded guilty to simple possession of this amount (count 4). Also recovered were various objects associated with the supply of cannabis such as sets of scales and zip bags, as well as €59,000 found in the loft space, and several thousand pounds in sterling. 20. In the seat compartment of a red scooter, also found at the premises, was a sum of £1000 cash, a total of just over 25 grams of cannabis, which were included in the simple possession count referred to above (count 4), and bank paying in books in the names of two of the applicant's associates. 21. The officers also found some handwritten notes which the Crown alleged plainly described the dealing in commercial quantities of cannabis and constituted a stock control report. A number of brand markings referred to in this paperwork corresponded with some of the brand markings on some of the cannabis seized both in premises associated with the applicant in Jersey and in container 27 at LCS, Burton-on-Trent. 22. By reference to dates and other details recorded in the notes, a Customs officer, with experience of interpreting such matters, concluded that the documentation revealed that in November 2011, four months before his arrest, the applicant and his criminal associates had held 163.8 kilograms of cannabis in Jersey, purchased in the UK for a total of £465,000. The applicant's fingerprints were found on the document and a handwriting expert concluded that the applicant had written the entries. 23. The Applicant's home address at Bagatelle Parade was also searched. The officers found a sum of nearly £20,000 in cash, the bulk of which was recovered in separate white envelopes, money bags and another set of scales, as well as nearly 50 grams of cannabis, of which the applicant later acknowledged possession (count 6). Also seized were some Co-op pre-paid travel cards and National Westminster Bank paying in books recording payments by the applicant to his father, Richard, and his business partner, Samson. Pre-paid travel cards are a method of moving cash between countries. As long as a payee has a multi digit number, cash can be "loaded" onto a card which is in the hands of a third party in another jurisdiction who can then "withdraw" the money from the card. 24. Later the police searched a garage at Rica Court, which had been rented in the applicant's name. In the garage another motor cycle was found and in the compartment under the pillion seat the officers recovered £12,000 in cash, also in white envelopes, two blocks of cannabis weighing over 125 grams, which the applicant later admitted possessing with intent to supply (count 7), and a money bag

containing a small amount of cannabis which the applicant also later pleaded guilty to possessing (count 8). Also found was a piece of paper containing a column of figures which the Crown asserted could be linked to some of the pre-paid travel cards used to launder money. 25. In the garage itself the officers recovered a Postman Pat child's toy which contained a little less than 100 grams of cannabis, later charged as part of the amount identified in count 7. More impedimenta associated with the supply of drugs were also recovered, including another set of scales and two knives, all of which, when chemically tested, proved positive for the presence of cannabis. 26. Meanwhile, the Staffordshire police executed a search warrant at Richard Norris' address in Burton-on-Trent. They found cash in excess of £14,000, more than 65 grams of cannabis, documentation linked to Samson and to two more persons, Kevin Smyth ("Smyth") and Carol Howard ("Howard") who later pleaded guilty to money laundering some of the proceeds of the applicant's drug dealing activities. A mobile telephone was also recovered which had been used exclusively by Richard Norris to receive incoming calls from the applicant in the two weeks prior to the arrest of father and son. 27. That same day officers from the same police force searched the Unit 2 lockup in Stafford. They found wooden boxes and bitumen moulds, some with hardboard lids, a vacuum packing machine, and material associated with the making of such moulds and for melting bitumen, as well as more documentation in the name of Samson. A scientist who examined the contents of the unit concluded that there was a plausible link between the wooden boxes lined with bitumen and the individual blocks of cannabis found in Container 27, which, if packed in four stacks of five (making 80 blocks of cannabis), could fit comfortably into each of the boxes. 28. Evidence relating to bitumen was also later found in a van belonging to the applicant parked at Hangar Lane, St Brelades. Fragments of bitumen were found in the loading space in the rear of the van which also contained documentation relating to Unit 2, the lockup in Stafford. Also present was yet more correspondence relating to Samson and other documentation linked to the stock control notes in the applicant's handwriting found at his home. 29. Staffordshire police also searched the address of the applicant's mother, Mrs Ellis. There was a safe there, which Mrs Ellis claimed belonged to the applicant but to which she had a key. The safe contained nearly £2,000 in Jersey bank notes and £5,000 in English notes, more than 300 grams of cannabis, some digital scales, and more pre-paid travel cards. 30. On 7th March, 2012, Container 27 at LCS was searched. At the back of the container the Staffordshire police found 8 cardboard boxes each containing between 120 and 160 blocks of cannabis weighing between 11.4 and 15.6 kilograms. Also found were 3 laundry bags containing respectively 160, 184 and 300 blocks of cannabis weighing in total more than 63 kilograms; as well as 5 other fabric or plastic bags, the contents of which consisted of a number of packages containing blocks of cannabis ranging from a mere 30 blocks to 240 blocks: the average weight of these bags was approximately 13.4 kilograms. 31. The total amount of cannabis found in the container weighed precisely 246.67 kilograms. The street value in Jersey of such an amount, as estimated in a statement which was before the Royal Court, was £2,964,000 calculated at a selling rate of £12 per gram. It was, of course, the Crown's case that this cannabis was to be imported into Jersey secreted within the bitumen moulds some of which were recovered at Unit 2 in Stafford. 32.

On 7th March, 2012 the applicant was interviewed. He made no comment to most of the questions put to him. He did admit to using cannabis himself and buying it abroad, but insisted that it was for his own consumption. He denied importing any cannabis with intent to supply and denied supplying any to Bishop the day before. He claimed that the £51,000 worth of cash found on his person or at addresses associated with him, related to his motor cycle business and his need to pay cash for motor cycles. 33. Later, he denied that the €59,000 which had been found in the loft space at his business premises at Hangar Lane belonged to him. 34. Notwithstanding the evidence described above, he denied any knowledge of the handwritten stock control notes and insisted that he had never seen them before. He also denied any knowledge of the contents of Container 27 and, at first, denied having anything to do with LCS. However he did admit that the contents of the safe found at his mother's address was his property. JUDICIAL AND OTHER PROCESSES 35. On 29th August, 2012, the applicant's father and mother were brought to Jersey from the UK on backed warrants. On 22nd November, 2012, all three were committed to the Royal Court. When indicted on 18th January, 2013, the applicant entered a not guilty plea to count 1, but pleas of guilty to the remaining counts which concerned him, counts 3-8. His trial was set down for later in the year. 36. It is to be noted that count 1 was drafted as a conspiracy fraudulently to evade the prohibition on the importation of a controlled drug contrary to Article 61(2)(b) Customs and Excise (Jersey) Law . The particulars of the count alleged that the applicant and his father "between 1st January, 2010 and 29th August, 2012 conspired together and with Gavin Samson and others to import a controlled drug namely cannabis into the Island of Jersey." 37. On 8th February, 2013 the applicant changed his plea on this count to guilty. It is clear that he hoped to minimise his responsibility for his part in the conspiracy and to have a Newton hearing if agreement with the Crown could not be reached. 38. On 8th April, 2013, on behalf of the applicant, Mr Herold-Howes sent an email to Crown Advocate Yates setting out "the basis on which Mr Norris pleads guilty to count 1." That basis was an acknowledgement of conspiring to make a single importation into Jersey of 65 kilograms of cannabis with unidentified persons. The applicant insisted that he had not conspired with his father or Samson and that he had not been involved with multiple importations over the two and a half year period defined in the indictment. Advocate Yates rejected this offer and suggested that "the proposed basis of plea is so far removed from the Crown case that I am considering whether it is actually indicative of a 'not guilty' plea on Count 1." 39. On 23rd July, 2013 a second basis of plea was advanced to the Crown by the applicant's lawyers. The only change from the first proposal was that in relation to the amount of cannabis, the applicant acknowledged that he would have imported as much cannabis "as would have fitted in the special compartment that I had built in my van." This was estimated to be 116.2 kilograms. The van referred to was a red Vauxhall van. 40. On 8th August, 2013 the Crown rejected this basis of plea because:- (i) the applicant's insistence that this proposed importation would have been his first importation, flew in the face of the evidence gathered by the Crown as described above; (ii) the basis of the case against Bishop (which Bishop had acknowledged by pleading guilty) involved a kilo or more of cannabis which the applicant had supplied to him; (iii) three of those who had laundered the

applicant's money had already pleaded guilty to offences charging them with laundering the proceeds of the applicant's drug dealing activities between 2010 and 2012; (iv) so limited a basis of plea would prejudice the confiscation proceedings which the Crown intended to launch against the applicant; (v) the basis of such a plea would necessarily attract a lower starting point for sentence than any basis of plea acceptable to the Crown; (vi) the compartments in the van to which the offer made reference had been made, according to the Crown, after the applicant's arrest. 41. On 5th September, 2013, the applicant tried again. Advocate Christina Hall, who was now representing the applicant, wrote to Crown Advocate Yates saying that the applicant would be minded to agree a basis of plea limited to the following terms:- "(1) That Mr Norris would have imported 246 KG of cannabis into Jersey.

- (2) That Mr Norris would have used his red Vauxhall ... van to import the cannabis.
- (3) That this importation would have been his first importation.
- (4) That Mr Norris conspired with unnamed persons to import the Cannabis and did not conspire with either Mr Gavin Samson or Mr Richard Norris." 42. Advocate Hall asserted that this basis of plea would not make any material difference to the sentence, which would inevitably be imposed on the applicant, in the light of his recognition of the quantity of cannabis which he now admitted he had intended to import, and that the Crown should therefore accept this basis of plea in acknowledgment of one of the principles relating to Newton hearings identified by Judge LJ (as he then was) in *R v Underwood*

[2005] 1 Cr App R 13 , para 10: "Where the impact of the dispute on the eventual sentencing decision is minimal, the Newton hearing is unnecessary." This principle was suggested for incorporation into this jurisdiction by the Royal Court in *Ali-v-AG*

[2005] JLR Note 11 , an incorporation which this Court approves and adopts. 43. On 9th September, 2013, the Crown Advocate responded by email. He made clear his view that no basis of plea was acceptable to the Crown which did not encompass the dates in the indictment. 44. On 19th September, 2013 the applicant's lawyers submitted a fourth basis of plea. The essence of this basis was as follows:- "1. This document is drafted for the purpose of determining sentence, and for that purpose alone. It is designed to reflect facts determinative of sentence length, and no others. This approach is consistent with the approach commended in the case of *R v Underwood* [2005] 1 Cr App R 13.

- 2. Mr Liam Norris accepted his criminal liability to be sentenced on Count 1, a conspiracy with others, for: (i) His role in importing 246 kg cannabis found in Container 27. (ii) His role prior to March 2012 in the conspiracy including post-importation dealings with wholesale quantities of cannabis (see Count 5)

3. Liam Norris does not accept his involvement in the 'bitumen block' importations relied upon by the prosecution. The prosecution maintains its assertion that Liam Norris was involved in the 'bitumen block' importations. The defence concedes that the entry point for the admissions at 2(i) and (ii) is 13 years. The prosecution concedes that the entry point of 13 years would be 13 years with or without the 'bitumen block' importations.
 4. At paragraph 10(e) of Underwood, Judge LJ (as was) stated: "(e) Where the impact of the dispute on the eventual sentencing decision is minimal, the Newton hearing is unnecessary. The judge is rarely likely to be concerned with minute differences about events on the periphery." A Newton hearing is not necessary to determine issues that do not significantly affect sentence. By agreement, the factual difference does not affect sentence at all and is therefore collateral. It is not an issue that the Learned Commissioner needs to decide for the purpose of sentence. In Newton itself Lord Lane states that a hearing (then obviously not known as a Newton hearing) should only be held if the difference between the prosecution and defence is "substantial" to sentence (p15).
 5. The absence of a finding per para 3 and 4 above insulates the prosecution from any concern that related defendants may deploy a defence friendly 'bitumen block' finding to their advantage. For completeness' sake, the defendant points out that in our (sic) view, any such application by a related defendant would be bound to fail. It is unnecessary in this document to rehearse the argument.
 6. This basis of plea is not evidence against Gavin Samson or Richard Norris that Liam Norris conspired with Gavin Samson or Richard Norris (See Underwood para 41).
 7. The conclusions of the prosecution would, as indicated on 9th September, 2013 by email, credit for guilty plea." 45. The Crown indicated its willingness to accept this basis of plea particularly in view of para 2(ii). 46. It has to be said plainly that this document, like the proverbial camel, bears the hall marks of a horse designed by a committee. We were told it was the work of several hands. 47. The applicant disputed the Crown's interpretation of the meaning of para 2(ii). We acknowledge that that paragraph, and indeed other parts of the document, could have been more happily worded, and we commend to those concerned para 5 of the judgment of Leveson LJ in R v Cairns; R v Morris; R v Raffiq and Another; R v Firfire and Another
- [2013] EWCA Crim 467 . However, we do not agree with the applicant's submissions in respect of para 2(ii). The Crown's asserted that the meaning was plain and that count 5 was inserted into the paragraph as an example of the applicant's acknowledged "role prior to March 2012 in the conspiracy including post-importation dealings with wholesale quantities of cannabis..." In the judgment of this Court such an interpretation makes sense of the wording. To suggest, as did the applicant, that, on a proper construction of the sub paragraph, count 5 was intended to be read as the exclusive illustration of such prior March dealing makes no sense at all. Nor did Advocate Hall make such a claim in her mitigation on behalf of the applicant in the Royal Court. THE APPLICATION FOR LEAVE

TO CALL WITNESSES 48. The power of this Court to hear witnesses on appeal, derives from Article 34 Court of Appeal (Jersey) Law 1961 :- "Supplemental powers of Court For the purposes of this Part, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice- ...

- (b) if it thinks fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial..." 49. In AG-v- Gorvel

(1973) JJ 2503 , the court determined the basis on which such evidence should be permitted to be adduced. Le Quesne, J. A., who gave the judgment of the court, cited the principles stated by the English Court of Appeal in the case of R. v. Parks 46 Cr. App. R. 29. In that case Lord Parker, C. J. said (at 32):- "Those principles can be summarised in this way: First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but evidence which is capable of belief. Fourthly, the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial." Le Quesne, J. A. said at 2505:- "... [W]e consider that those principles are the principles which ought to be observed by this Court in exercising its discretion to admit further evidence under Article 32 of the Court of Appeal (Jersey) Law.... The position, therefore, is that the Court will not admit the evidence unless the first three conditions stated by Lord Parker are satisfied. If those three conditions are satisfied, and the Court decides to admit the evidence, the Court will be guided by the fourth rule stated by Lord Parker in deciding what effect the new evidence ought to have." 50. The fourth principle identified by Lord Parker CJ, and approved by this Court in AG-v- Gorvel , and in a number of subsequent cases, see Evans and Phillips-v-AG

[1997] JLR 94 and Baglin-v-AG

[2005] JLR 180 , necessarily applies to appeals against conviction. Nonetheless, by parity of reasoning in appeals against sentence, if an Appellate Court decides to admit the evidence because the first three tests are satisfied, the Court must go on to consider what impact the evidence would have, if any, on the sentence passed on the offender. 51. The application to call evidence in this case related to five named witnesses, Aaron Machin, Alan Roberts, Warwick Horsfall, Paul Martin and Crown Advocate Yates. 52. We take the witnesses in order. 53. Aaron Machin is employed by the DVS. His evidence was disclosed by the Crown in a notice dated 26th June, 2013. The reason for the disclosure was that in his McKenzie statement prepared for the Newton hearing, see McKenzie-v-AG

[1995] JLR 9, the applicant insisted that all the funds which he had transferred to England were legitimate business transactions and he identified evidence which would support this claim. In furtherance of his duty, the Crown Advocate then contacted Mr Machin who made a statement relevant to the matter on 20th June, 2013. 54. It was suggested to this Court in justification of the application to call him that Mr Machin could produce a list of approximately 150 motor cycles which were currently, or had been, registered to the business run by the applicant from the premises in Hangar Lane. The basis of the application, as advanced in early June 2013 and before this Court, was that this evidence refuted the claim that "the applicant's motor cycle business funded importations of cannabis and facilitated the applicant's involvement in crime." 55. This submission is misconceived. The Crown had not alleged any such thing. There was no dispute that the motor cycle business was legitimate. Nor was the applicant sentenced on the footing that this business was a front. There was, therefore, no "issue" between the Crown and the defence on this topic (see Lord Parker's second test). Advocate Hall was at pains to emphasise to the Royal Court in the course of mitigation that the business was a successful one: she was perfectly entitled to do so. Knocking at an open, or a partly open, door is a frequent feature of pleas in mitigation especially if, unfortunately, the plea has to be made in circumstances where either there are very few doors to open or such as exist are firmly bolted and barred against the defendant. 56. It is true that the Commissioner, citing the applicant's income tax return, queried how successful the business was; but it had not been suggested by the Crown, nor by the Commissioner, that the business was an illegitimate or a spurious one. The Crown did allege that certain businesses, including a roofing company, had been used to facilitate some of Samson's previous importations of cannabis, but not Jersey Motor Cycle Services. 57. Advocate Hall, though she decided to refer to the motor cycle business in her plea in mitigation, chose not to refer to Mr Machin's evidence which was, of course, for the reason identified above, among the disclosed material before the Royal Court. 58. The evidence of Mr Machin was certainly credible evidence and so passed the third of Lord Parker's tests but, being in the possession of the applicant and his lawyers since 26th June, 2013, it failed the first test; and being essentially irrelevant to the issues in the case, it failed the second. 59. Alan Roberts is a partner of Grant Thornton. The applicant's Contentions to this Court contained a letter of engagement from Grant Thornton dated 23rd September, 2013 agreeing the terms on which the firm would undertake some accountancy work on behalf of Viberts Jersey Lawyers and Advocate Hall, acting on behalf of the applicant, in relation to the trading income and expenditure of Jersey Motor Cycle Services. The applicant requested that we grant him leave to call Mr Roberts and to produce the letter. 60. The letter contains nothing beyond proposals for the scope and phasing of the work which Grant Thornton predicted would be required and the fees which they proposed to charge. There was no evidence before us that the work was ever undertaken or any report produced. We can only assume that, for whatever reason, Advocate Hall decided not to pursue this issue in mitigation. Advocates have a discretion how they conduct pleas in mitigation, what topics they rely on and what they omit, including any documentation to which they might choose

to refer. 61. But the document which the applicant wishes us to take into account, notwithstanding that it has been available since the applicant received it soon after 23rd September, 2013, can have no bearing on the case. The application to call Mr Roberts for the purpose of producing his letter of 23rd failed the same two of Lord Parker's tests. It was available and it is not relevant. 62. The third witness was Warwick Horsfall who is a Customs Officer. Like Mr Machin such evidence as he could give touched on the applicant's motor cycle business. Like Mr Machin he had made a statement pursuant to Advocate Hall's communication of the applicant's McKenzie statement to Advocate Yates in early June 2013. Like Mr Machin, Mr Horsfall made a statement. It was dated 17th July, 2013. (He had made an earlier one on another topic on 29th October, 2012.) Both statements were disclosed to the applicant. The July 2013 statement contained information requested by Advocate Hall concerning the Goods and Services Tax which had been paid by the business, having been incurred by the business, relating to the sale of certain motor cycles. The applicant wished the witness to be called before this Court to prove these payments. 63. For the same reasons which we have outlined above, this evidence was available to be called before the Royal Court and is not "relevant to the issues" in this case. It failed the same two tests identified by Lord Parker. 64. The fourth witness was Paul Martin, a Customs officer who interviewed the applicant after his arrest. As one would expect, his statement had been served as part of the prosecution papers. The applicant suggested that this officer could have given evidence of his cooperation. To the extent that this was apparent from the officer's statement, Advocate Hall was at liberty to refer to the statement when, as she did, she alluded during her address in mitigation to the issue of the applicant's entitlement to a discount for his plea. To the extent that any further information, not included in the statement, was available from the mouth of this officer, Advocate Hall could have either requested that the Crown confirm the position with the officer, and make an admission for use in mitigation, or request that the officer be tendered for cross examination during the sentencing hearing. There was no evidence put before us that any such steps were taken by Advocate Hall. The witness and the evidence were clearly available at the time of the hearing below. The evidence failed Lord Parker's first test. 65. In the circumstances we have outlined above and in accordance with the legal principles which we have identified, we declined to give the applicant leave to call any of these witnesses. 66. The last proposed witness was Advocate Yates who had appeared for the Crown at the sentencing hearing. The fact of the application necessarily debarred Advocate Yates from continuing to hold the brief for the Crown before this Court, which is why Advocate Redgrave appeared in his place. Such an application is unusual if not unprecedented. However, we should not have been deterred from granting it if we had thought it necessary and expedient to do so, although we were given scant information what it was that Advocate Yates, the advocate who had had conduct of the case against the applicant since its inception, could say by way of assistance to the applicant on the hearing of his application for leave to appeal. However in order to prevent the applicant being placed at an unnecessary disadvantage, and since Advocate Yates had made himself available to the Court on the day of the hearing, we asked him to attend and be present in

court during the hearing so that the applicant, through the Court, could request confirmation from him of any matter on which the applicant required assistance. THE GROUNDS OF THE APPLICATION FOR LEAVE TO APPEAL SENTENCE 67. We now turn to deal with the specifics of the first two points identified in the grounds of appeal, (i) that the applicant was sentenced on a mistaken factual basis and (ii) that the Royal Court improperly took into account certain matters. The applicant made a number of points on these topics which we will deal with seriatim. He also made a number of other miscellaneous submissions to which we shall refer at the end of this section. 1. The opening of the case for the Crown 68. In relation to the opening of the case against him in the Royal Court, the applicant contended that certain passages in the opening note, given to the Royal Court in advance of the hearing, should not have been included in it. He also contended that such matters should not have been opened to the court at the sentencing hearing. These matters are as follows:- (i) The references to the stock control notes and other pieces of paper in the applicant's handwriting seized during the searches. We reject this submission: the basis of plea makes clear that the applicant admitted "prior to March 2012.....post importation dealings with wholesale quantities of cannabis" of which count 5 is cited as an example, [see Basis of Plea para 2(ii)]. The notes are clearly admissible in relation to that admission. The Commissioner dealt with this issue during the sentencing hearing on pages 20 and 21 of the transcript in a way which can attract no possible criticism. (ii) Reference to the surveillance on the applicant after 16th February, 2012 when he visited Container 27 at LCS, Burton-on-Trent, the discovery of the 246 kilograms of cannabis in Container 27 and reference to its value. We reject this submission which is plainly contradicted by the applicant's admission in para 2(i) of the Basis of Plea. It is also contradicted by the acknowledgment in para 96 of the Contentions "The Applicant stands by his basis of plea." (iii) Reference to the criminal associates of the applicant who had pleaded guilty by the time of the sentencing hearing of the applicant including Smyth and Howard and Phillip McFeat ("McFeat"). We reject this complaint. These defendants had pleaded guilty to laundering the proceeds of the applicant's drug dealings. The matter was opened by the Crown Advocate without objection by Advocate Hall. Indeed no legitimate objection could have been taken to this aspect of the opening. (iv) Reference to the surveillance on the applicant after 16th February, 2012 during his visit to Burton-on-Trent when he visited Unit 2 and references in the opening note to the bitumen moulds which were found there. The applicant is on stronger ground concerning this matter. In para 3 of the basis of plea, the applicant makes clear that he does not accept his involvement in the bitumen block importations. The document goes on to assert that the Crown insist that he was involved. If the Crown had wished to maintain this allegation and that the applicant had intended to import the 264 kilograms found in Container 27 in similar such moulds, they were at liberty to invoke a Newton hearing. As it was they accepted a basis of plea from the applicant in which his association with the moulds is denied. They did so for good reason: that reason, in accordance with R v Underwood cit. sup. was that, in their view, as we have observed, the applicant's lack of involvement in the bitumen mould aspect of the case would not have materially altered the likely sentence to be imposed,

bearing in mind the criminal activity which the applicant was eventually willing to acknowledge. But being bound by the basis of plea, Advocate Yates should have amended his opening note to make it clear that the reference to the bitumen moulds related to the case against the father, Richard, whose basis of plea did not specifically exclude knowledge of this means of transportation. But no mention of the moulds should have featured in what was said in the opening note or to the Royal Court about the applicant. Such evidence formed part of what was described during the sentencing hearing as "the wider conspiracy" involving, also, the missing conspirator Samson against whom there was evidence of significant earlier importations but with whom the applicant had always denied conspiring [see Basis of Plea para 6]. We were informed (see para 46 of the Crown's Contentions) that in the light of representations by Advocate Hall only minor amendments had to be made to the opening note prior to the sentencing hearing. The Commissioner was quick to point out the limitations of the basis of plea and is recorded as doing so as early as the bottom of the first page of the transcript of the hearing. On page 3, addressing the Crown Advocate, he summarised the position in relation to the applicant and his father thus:- "Well I think you're entitled to open it on the basis that this was the last of a number of transactions that others were involved in, but you're not entitled to open it on the basis that they were involved in, in those earlier transactions because they've not pleaded on that basis and they're to be sentenced on the basis of plea, serious enough, I don't want them to misunderstand what I'm saying, but they're sentenced for what they pleaded guilty to, not for anything else." Indeed, when later the Crown Advocate sought to explain the detail of the moulds, Advocate Hall objected but acknowledged that they might be relevant to the case against the father. In recognising the force of the objection in the light of the basis of plea, the Commissioner said "it doesn't matter how it was going to be clandestinely imported so far as he's (i.e. Liam) concerned." The applicant has a justified sense of grievance that the bitumen moulds featured in the opening of the case against him. But it is clear that the Commissioner did not allow that reference to influence the sentence passed on the applicant. He said in his sentencing remarks:- "...it must be understood clearly and by those who are involved and also, of course, by the public that where a basis of plea has been agreed between the Prosecution and the Defence that is the basis upon which the Court will sentence. The Court will not take into account matters which might have been part of the original Prosecution case but have not been admitted by the defendant where there has been no trial of other counts on the Indictment nor a Newton Hearing to determine a different factual basis." (v) Finally in relation to the opening of the case to the Royal Court, the applicant suggests in para 14/15 of his written "Contentions" that throughout the opening the Crown Advocate made "unnecessary and inappropriate comments about a wider conspiracy which went beyond the Applicant's basis of plea." 69. A comparison between the opening note served on the Royal Court and the transcript of the opening itself compels the conclusion that, with the exception of the matter referred to above, the Crown Advocate did nothing of the kind. He forbore to open paras 5-9 of the opening note which summarised the "wider conspiracy." Nor did he open paras 104-115 which concerned the details of a significant earlier importation by Samson.

Nor did he open paras 117-128 which concerned details of the financial transactions through the use of the travel cards which were relevant to the "wider conspiracy", apart from the fact of the arrests and pleas of Smyth and Howard and McFeat described in para 124 of the note. In the view of this Court there is no substance in this general complaint.

2. Re the Commissioner's sentencing remarks 70. In relation to these remarks, the applicant took issue with the words: "In your case, Liam Norris, you were to be the distributor of the importation in Jersey. You also admitted in your basis of plea that apart from that you had been involved in wholesale supply in Jersey of which the count involving Bishop, the kilo that went to him, was an example." 71. In the light of para 2(i) and (ii) of the Basis of Plea this Court sees nothing to criticise in this passage.
3. Re the credit given for the guilty plea 72. The next complaint related to the Royal Court's treatment of the Crown's recommendation for full credit for the applicant's guilty plea. 73. The background to this complaint is as follows. It is clear from correspondence that there had been discussions between the Crown and the applicant's lawyers on this topic in the period before the sentencing hearing. In the 5th September, 2013 letter to Advocate Yates from Advocate Hall, she asks to have confirmed that the Crown "would agree to giving Mr Norris the full third discount for his guilty plea." In his reply by email on 9 September 2013, Advocate Yates confirms that the Crown would be prepared to "recommend that your client receive the usual one third discount." 74. However in para 17 of their "Conclusions" the Crown state: "Both defendants have pleaded guilty and deserve the usual credit in this regard. However it cannot be said that they have been cooperative. In fact quite the opposite. The Crown takes the view that any delays that have arisen in the prosecution of this case lie squarely at the door of the defendants..." 75. The fact is, as the correspondence to which we have referred above shows, the Basis of Plea document was eventually generated after many months of the Crown's repeated rejection of carefully calibrated proposals by the applicant to limit the basis of his plea. In the light of what the applicant eventually acknowledged to be his involvement, it is difficult to resist the conclusion that these attempts constituted a series of cynical attempts by him to minimise his culpability. Such an attitude of mind is not usually consistent with the principles of law and practice associated with the entitlement of an offender to a reduction in sentence for the ready acknowledgment of guilt. 76. In the event the Royal Court was not minded to give the full discount for the applicant's plea of guilty and awarded 25% instead. In sentencing, and addressing the applicant, the Commissioner said:- "The full discount of one third is appropriate for those who, from the beginning, are straightforward, admit their guilt and plead guilty at the earliest opportunity. You have not done that. Whatever may have been your annoyance at what you perceived to be the treatment of your mother by the Crown, you did not cooperate fully from the beginning. It is not appropriate for you to receive the full one third discount. You have entered the plea of guilty which was acceptable so, of course, you are entitled to a discount and the Court allows a 25% discount from the starting point for your plea." 77. The law in regard to this area may be summarised as follows. It is a well-established principle of sentencing that some discount should be given for a guilty plea; see

the observations of Lord Taylor LCJ in *R v Buffery* 14 Cr. App. R. 511 @ 515:- "We therefore come to what is the crucial point on this appeal and the point of general interest: to what extent-when someone in the appellant's position does plead guilty and does save the holding of a very lengthy trial-ought the sentence which would otherwise have been imposed be discounted? ... It would be quite wrong for us to suggest that there was any absolute rule as to what the discount should be. Each case must be assessed by the trial Judge on its own facts and there will be considerable variance as between one case and another. But as general guidance-and I emphasise only as general guidance-this Court believes that something of the order of one-third would very often be an appropriate discount from the sentence which would otherwise be imposed on a contested trial." This approach was approved and applied in *Harrison-v-AG*

[2004] JLR 111 @ para 86. 78. However, as was made clear by the Court in *R v March*

[2002] 2 Cr. App. R. (S) 448, also quoted in *Harrison* @ para 85, the discount, certainly the full discount, need not be given in all cases. In emphasising that the list is not closed, the Court in *March* suggested that circumstances in which the discount need not apply included where, for example the plea was of a tactical nature or was practically speaking inevitable. As Lord Taylor made clear, the discount was discretionary. 79. In para 26 of his "Contentions" the applicant claims that the Crown "promise (d) one thing to the Applicant and then (to) renege (d) on that promise by actively inviting the Sentencing Court to draw on other adverse inferences." The applicant goes on to assert in the paragraphs which follow that the delays were due to the Crown rather than to himself. 80. The matter was raised in mitigation to the Royal Court by Advocate Hall; see pages 42-45 of the transcript. She urged the court to adopt the recommendation of a one third discount for plea on the basis that the Crown recommended a full one third in their Sentencing Conclusions. In the light of this submission the following exchange took place:- "COMMISSIONER: But sentencing is for the Jurats----- ADVOCATE HALL: Absolutely Sir----- COMMISSIONER: ----- it is not for the Attorney-General----- ADVOCATE HALL: It's not Sir. COMMISSIONER: ----- and the sooner that that is made clear and understood----- ADVOCATE HALL: Yes Sir that is accepted. COMMISSIONER: -----the Jurats sentence in this jurisdiction----- ADVOCATE HALL: Absolutely Sir. COMMISSIONER: -----not the Attorney-General and if the idea is getting about amongst Defence Advocates----- ADVOCATE HALL: It's not Sir. COMMISSIONER: -----that they can agree a deal on sentence----- ADVOCATE HALL: No Sir that's not----- COMMISSIONER: -----with the Attorney-General then the sooner they're disabused of that the better. ADVOCATE HALL: Sir that's not my submission, what I'm saying Sir is that the Crown makes recommendations and the reason the Crown makes recommendations to the Court is that they're aware of the case, they know, they've been on the ground, they know what's been happening between the two parties, and that's why they make their recommendations to the Court. They are recommendations and every Counsel in Jersey appreciates that." 81. Moreover in his sentencing remarks the Commissioner made the position clear beyond peradventure:- "...it is for the Jurats to decide the entry point, the starting point for sentence, and the nature and extent of any

discount for plea. Of course the Attorney General makes submissions and advances conclusions but ultimately those decisions are for the Jurats." And later:- "As I have indicated the Court deals with you on the basis of your plea, not on anything else that was alleged and has not been admitted." 82. It is important to emphasise that not the least of the important features of a guilty plea by an offender is an indication of remorse, a willingness to accept responsibility for wrongdoing and a frank and open recognition of the parameters of the criminal conduct concerned. The way in which over a period of many months this applicant sought to reduce his culpability on count 1 reflected none of these important features. In the view of this Court the applicant was not entitled to a one third discount for his plea and the conclusions drawn by the Royal Court cannot be faulted. 83. However, we wish to add a rider to this

conclusion.

In the circumstances of this case, the Court is surprised that the Crown should have decided to recommend to the Royal Court that this applicant should receive "the usual third discount." The lack of cooperation afforded by the applicant to Jersey police and customs followed by the unabashed series of attempts by him to minimise his involvement, all point to a situation in which the one third discount, as the Jurats rightly decided, should not be given to this applicant. This Court accepts that the issue in September 2013 when this matter arose in correspondence was not whether the applicant was willing to plead and on what terms: he had done that the previous February. What was then in issue was whether the differences between what the applicant was willing to offer by way of a basis of plea and what the Crown was willing to accept called for a Newton hearing. But the Crown must approach the process of what discount to recommend to the sentencing court with a realistic appraisal of the facts of the case and the summary of law provided above, well in mind. As it seems to this Court the recommendation to the Royal Court of a full one third reduction was not appropriate in this case. 84. We add for the avoidance of doubt, and in the light of the submissions made in paras 27 etc. of the applicant's Contentions, that we were not persuaded that during 2013 "the Crown played procedural games with Defence Counsel and refused to consider a reasonable basis of plea at earlier stages for its own reasons...."

4. Re newspaper reporting 85. The applicant also complained in para 20 of his Contentions that in reporting the sentencing hearing the Jersey Evening Post had misrepresented the position. Neither in the Contentions, nor during the hearing of his application, did either the applicant, or his amicus, condescend to the detail of this complaint. In any event such a newspaper report cannot have had any impact on the sentence imposed by the Royal Court since it is apparent that the report concerned post-dated the sentence hearing. We note from the documentation enclosed with the Contentions that the applicant has had correspondence with the editor of the newspaper concerned. 86. The Applicant makes a wider complaint in para 83 of the Contentions. There is, however, no material on which it would be possible for us to conclude that the sentencing court was in any way influenced by the press coverage, even if inaccurate.

5. Re the safe guarding of evidence. 87. The applicant complained (see para 82 of his Contentions) that the Crown had failed properly to safeguard "vital evidence" in the form of an important exhibit in the case, namely his red Vauxhall van, and that this had been to his prejudice. 88. This was the van in which the applicant alleged he had intended to import the 65 kilograms of cannabis in a "secret compartment" made to hold that limited amount of drugs, at a stage during the graduated approaches to the Crown for a basis of plea which minimised his involvement (see the letters referred to above dated 8th April and 23rd July, 2013.) 89. The sequence of events which gave rise to this alleged failure is as follows. On 8th April, 2013 the applicant's lawyers telephoned the Crown Advocate requesting that this red van, which was parked in the car park at B&Q and which, it was alleged by the applicant's lawyers had been there since before the applicant's arrest, should be seized. Photographs were taken of the van in situ by the police that day and it was later examined. 90. Suspicious that the applicant was up to no good, Jersey police and customs made enquiries. Instructively they established that the wood that had been used to make the "secret compartment" had arrived in Jersey in January 2013, nine months after the applicant's arrest, and that the van did not feature in any available aerial photographs of the car park during the period when the applicant alleged that the van was parked there. 91. There is no substance in this complaint by the applicant, which, in any event can have no relevance to his sentence. It should be noted too that the Royal Court were not told of this apparently blatant attempt by the applicant to manufacture evidence in support of his efforts to persuade the Crown to accept a basis of plea in the spring and summer of 2013 which was entirely spurious.
6. Pressure to plead guilty: the money lenders 92. The applicant complained (para 81 of his Contentions) that pressure had been put on the money lenders, Smyth and Howard and McFeat to plead guilty. No formal complaint has been made to this Court by them in this connection, so far as we know, although among the documents supporting the applicant's application for leave, there is a recent letter from McFeat who, notwithstanding his plea of guilty in the Royal Court and subsequent partially successful appeal against sentence, now asserts his innocence of any money laundering activity and claims he was pressurised by his lawyer into pleading guilty. 93. Whatever pressures may or may not have existed on other defendants who were associated with the criminal activities of this applicant, such pressures can have had no bearing on the appropriateness or otherwise of the sentence passed on him which is the issue with which this Court is concerned.
7. Re Mrs Ellis 94. On the topic of pressure to plead guilty, the applicant asserted in para 77 of his Contentions that "notwithstanding that the Crown had promised (expressly or impliedly) to drop the charges against the Applicant's mother for a guilty plea from the applicant, the Crown proceeded with its prosecution regardless." The claims in this paragraph need to be disentangled. 95. The facts are that the Crown agreed with the applicant's lawyers at an early stage that a plea by the applicant to count 1 would absolve the Crown of the need to try Mrs Ellis on the same count. We see nothing to criticise in this approach. It is often the case that, in the event of a plea by the most culpable offender to a particular count in an Indictment,

the Crown reviews the position of those less culpable on that same count, especially if there is another count reflecting additional or alternative responsibility in respect of that lesser offender. In the Indictment concerned, Mrs Ellis was also charged in count 2 with an offence of money laundering. Accordingly, on 9th February, 2013 count 1 was amended to exclude her name in view of the applicant's plea of guilty to that count; and the Crown indicated their intention to proceed against Mrs Ellis on count 2. 96. Shortly before 6th June, 2013, Advocate Hall raised with the Crown Advocate the position of Mrs Ellis on count 2 in the light of the applicant's McKenzie statement prepared for the Newton hearing then in contemplation. At a hearing which took place before the Commissioner on 6th June, 2013 Advocate Hall suggested that the Crown might be in difficulty trying Mrs Ellis on that count in the event that the applicant's case at the Newton hearing was accepted. 97. On 5th September, 2013, as we have seen, Advocate Hall put forward a third basis of plea which was rejected by Advocate Yates on 9th September. In his response the Crown Advocate set out the Crown's position by confirming, materially, that the only concession which the Crown would be willing to make in relation to a basis of plea by the applicant was an acknowledgment that the applicant had conspired with unnamed rather than named persons. In confirming, in addition, that he was willing to recommend to the Royal Court that the applicant should be given the full one third discount for plea, Advocate Yates added that, in the event that the applicant put forward an acceptable basis of plea, the Crown "might also be prepared to consider its position on Count 2." 98. Advocate Redgrave told this Court that Advocate Yates had had discussions with Advocate Hall between 9th September, 2013 and the submission of the final Basis of Plea document ten days later. During those discussions, Advocate Yates confirmed that only an acceptance of the Crown's case and a full basis of plea would trigger reconsideration of Mrs Ellis' position on count 2. 99. In the event, of course, the Basis of Plea put forward fell short of such full acceptance and it was only for practical reasons based on the principles in *R v Underwood* cit. sup. that the Crown accepted it as a plea to count 1. The Crown later proceeded against Mrs Ellis on count 2. 100. It has to be said plainly that inducements by the prosecution to persuade a person to plead guilty to a criminal charge have no more place in the criminal justice system than do inducements to confess offered in a police station. 101. Great care must be taken by any prosecuting authority to avoid even the appearance of holding out an inducement to persuade a defendant to plead guilty or to undertake any other course of action which the law permits him to undertake. It is legitimate for the Crown to indicate, as happened in this case, that in the event of a plea of guilty by the main conspirators, it would not be in the public interest to have a trial on that same count of the single remaining defendant who, on the evidence, played only a minor role in the conspiracy. 102. But we echo what the Commissioner said in an exchange at the sentencing hearing with Advocate Heywood, who acted for Richard Norris, that to trigger a plea of guilty by using "a member of the family as a bargaining tool would be quite wrong." We emphasise, as did the Commissioner, that was not the situation in this case. The applicant had pleaded guilty many months before and had devoted the intervening time to trying to wear down the Crown into accepting that he had played a lesser role than the evidence established. 103. But count 2 was a separate count in which Mrs Ellis was charged

alone with money laundering. We do not know what lay behind the indication of a willingness to reconsider Mrs Ellis' position if the applicant had made a complete acknowledgment of the Crown's case and whether, in the circumstances, the Crown would have been justified in offering no evidence on that single count to which, in any event, Mrs Ellis pleaded guilty. But if the only motive had been to increase the pressure on the applicant to offer an acceptable basis of plea, we do not consider that that would have been a proper motive. In the event, of course, it did not induce the applicant to do so. 104. From the applicant's point of view, it must be recognised that he and his father may have felt in something of a quandary during those months between their arrest and trial. They may well both have felt a real sense of anxiety, responsibility and guilt for having involved Mrs Ellis in their criminal activities and may well have wished to do whatever they could to persuade the Crown not to proceed against her. Their actions had caused her arrest, detention, extradition to Jersey and, for some weeks, the threat of conviction on a serious drug conspiracy charge. Between the preferment of the indictment and the applicant's decision to plead guilty to count 1 on 8th February, 2013 and between that date and shortly after 9th September, 2013 when the basis of plea was agreed, the applicant's determination to minimise his own role and his concern for his mother's situation were in clear conflict. Certainly in his sentencing remarks, addressing the applicant, the Commissioner acknowledged the applicant's "annoyance at what you perceived to be the treatment of your mother by the Crown." 105. But the question for this Court is whether, in so far as that annoyance was justified and insofar as recognition of the point impacted on sentence, that perceived annoyance should have resulted in any greater reduction in sentence than was allowed by the Royal Court. In so far as the Jurats considered that this was a matter relevant to mitigation it is plain that they took it into account. We deal below with our conclusions in relation to the applicant's request for a reassessment of his sentence but we were not persuaded that the general allowance which the Royal Court made for factors which they took into account in mitigation, including the specific points made about Mrs Ellis, would have justified any greater reduction than was given to the applicant by the Royal Court.

8. Re Samson, disclosure generally and the venue of trial. 106. We mention these issues only for completeness. They were raised by the applicant in his Contentions prepared for the hearing. They include the failure by the Crown successfully to extradite Samson from Thailand, the alleged "late" disclosure of statements, during the summer of 2013, whose disclosure had in fact been triggered solely by the applicant's McKenzie statement, and the prosecution of this conspiracy by the Attorney General of Jersey rather than by the Crown Prosecution Service in England. We are not persuaded that any complaints associated with these topics are made out but, in any event, none of them are relevant to the question whether the sentence passed on this applicant was appropriate. 107. Thus we turn to the question of a reassessment of the sentence. REASSESSMENT OF SENTENCE 108. This was the last of the applicant's requests in his application for leave to appeal. 109. The power of this Court to change a sentence imposed on an offender derives from Article 24 Court of Appeal (Jersey) Law :- "Right of appeal (1) A person convicted on indictment by the Royal

Court, whether sitting with or without a jury, may appeal under this Part to the Court of Appeal -

- (c) with the leave of the Court of Appeal, against any sentence passed on the person for the offence (whether passed on his or her conviction or in subsequent proceedings), unless the sentence is one fixed by law." 110. It is well established that this Court will only change a sentence, absent special features, strictly in accordance with well-established principles. These were summarised, and the genesis of appellate sentencing law in this jurisdiction was discussed, in the five judge Court of *Harrison-v-AG*

[2004] JLR 111 as follows:- "25. The powers of this court were inspired by those granted to the English Court of Criminal Appeal (as it then was), established by the Criminal Appeal Act 1907. Section 4(3) stated: "On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal." This section was substantially repeated in s.11(3) of the Criminal Appeal Act 1968 which created the modern English Court of Appeal (Criminal Division). 26. It is important to note the way in which the words "if they think that a different sentence should have been passed" have been subsequently interpreted. Within a year of the passage of the 1907 Act, in *R. v. Sidlow* (41), Lord Hewart, C. J. asserted (1 Cr. App. R. at 28) that- "The court would not interfere with a sentence unless it was apparent that the judge at the trial had proceeded upon wrong principles, or given undue weight to some of the facts proved in evidence. It was not possible to allow appeals because individual members of the Court might have inflicted a different sentence, more or less severe." 27. Five years later, the court further clarified its approach in *R. v. Shershewsky* (40). In reporting the judgment, the text reads (28 T. L. R. at 364): "The principles on which the court acted were, first, to consider the facts of the particular case; and secondly, if the sentence was manifestly excessive, to reduce it and make it appropriate to the crime. The Court did not assert any right to review a sentence merely because they thought that if they had had to try the case themselves they would have given a sentence which would not have been quite so high or quite so low; they only reduced a sentence when it was manifestly excessive." 28. This court was established by the Court of Appeal (Jersey) Law 1961. Article 25(3) provides: "On any appeal against sentence, the Court of Appeal shall, if it thinks that a different sentence should have been passed on the appellant in the proceedings from which the appeal is brought, quash the sentence and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal." 29. In view of the similarity between the wording of the Jersey article and the section in the English statute, it is hardly surprising that the principles by which the English Court of Appeal has operated in criminal matters have been followed, if not to the letter then certainly to the phrase, in this jurisdiction. In *Att. Gen. v. Sampson* (9), the Court of Appeal held (1965 J. J. at 499) that- "this Court, following the principles applied by

the Court of Criminal Appeal in England, will not normally interfere with a sentence unless it is one not warranted in law or unless it is excessive or inadequate to such an extent as to show that there was a failure to apply the right principles; the Court will not alter a sentence merely because the members of the Court might have passed a somewhat different sentence." 30. In *Att. Gen. v. Gorvel* (3), this approach was further refined by reference to the English authorities. The judgment contains this passage (1973 J. J. at 2511): "The practice of this court in considering appeals against sentence is to change a sentence only if satisfied that it is either manifestly excessive, in the circumstances of the case, or for some reason wrong in principle." The adoption of this approach rather than the literal construction of the English statute or the Jersey law has been of considerable benefit in excluding unmeritorious applications for leave to appeal in both jurisdictions, and the importance of the principle has frequently been asserted by this court, most recently in *Morgan v. Att. Gen.* (25): "It is not the function of this court to tinker with sentences which were well within the range open to the sentencing court simply because we might ourselves have fixed a lower level of imprisonment." The approach was also re-emphasized in *Hunt v. Att. Gen.*

- (21) and we endorse it. The summary in Archbold , Criminal Pleading, Evidence & Practice (2003 ed.) provides a helpful resumé of the position which we adopt for this jurisdiction (op. cit., para. 7-136, at 966): "In broad terms, it is submitted that the court will interfere: (a) where the sentence is not justified by law, in which case it will interfere not as a matter of discretion but of law; (b) where sentence has been passed on the wrong factual basis; (c) where some matter has been improperly taken into account or there is some fresh matter to be taken into account; or (d) where the sentence was wrong in principle or manifestly excessive." This is the basic point from which the Court of Appeal starts its analysis of a Royal Court sentencing decision." 111. It must be acknowledged that 8 years is a significant sentence of imprisonment. It needs also to be acknowledged that the criminality associated with this conspiracy was at the top end of such an offence. This importation, had it been successful, would have been, by a considerable margin, the largest known importation of cannabis to this Bailiwick. The potential profit to this applicant and his co-conspirators was huge. The evidence before the Royal Court was that 246 kilograms of cannabis would be likely to have cost about £691,000 on the mainland. The local wholesale value in Jersey, by contrast, would have been between £1,482,000 and £1,976,000. A successful importation would, therefore, have secured for the conspirators an immediate uplift in the value of the cannabis of 2.5 times. 112. But on any realistic appraisal, it was not, of course, the intention of the applicant and his associates to thus limit their profit. Once divided into 12 gram individual deals, the potential for gain increased significantly and, as we have seen, the estimated return to the importers and their dealers was nearly £3,000,000. This was cannabis importation on an industrial scale. 113. In these circumstances, the Crown moved in its Sentencing Conclusions for a starting point of 13 years' imprisonment, a figure which, as we have seen, the applicant acknowledged in his Basis of Plea. Having regard to such mitigation as there was and making an allowance for the full one third discount which, as we have

seen, the Crown was prepared to recommend to the Royal Court, the conclusion reached by the Crown for the appropriate sentence for count 1, was 8.5 years' imprisonment, the sentences on counts 3-8 to be concurrent. 114. In fact the Royal Court chose 12 years as a more suitable starting point, made a 25% allowance as the discount for plea and then, apparently, reduced the sentence by a further year to take account of mitigation, arriving at a sentence of 8 years' imprisonment, sentences on the other counts to be concurrent. 115. The statutory maximum in this case pursuant to Article 61(4)(b) Customs and Excise (Jersey) Law 1999 is 14 years' imprisonment. Sentencing case law in this field derives from Campbell and ors -v-Attorney General

- [1995] JLR 136 . This five judge Appeal Court recommended that for trafficking in quantities of cannabis over 30 kilograms, the appropriate starting point for sentence was a minimum of 10 years' imprisonment. The total weight of cannabis in this case was 8 times this figure. 116. In AG-v-Warren and others
- [2009] JRC 234 , the amount of cannabis which the defendant Warren and his confederates were planning to import was 180 kilograms in their plan to import cannabis from Amsterdam to Jersey. This was 6 times the figure contemplated in Campbell. In sentencing in the Warren case, the Commissioner, Sir Richard Tucker, said:- "...the amount of the drugs was massive and valuable. It is believed to be the largest ever planned importation to come before this Court. The amount contemplated was 180 kilograms. If it had reached the streets of Jersey it would have realised a value of £1 million. This would have represented a considerable mark-up from the price paid in Amsterdam, where it was planned to purchase the consignment and from where it was intended to transport it, first to the Normandy coast, and then by boat to a secluded bay in Jersey. Those involved in the conspiracy were playing for high stakes and must have expected to make a considerable profit out of it.
2. As was their right, none of the defendants gave evidence at their trial so the Court has no direct evidence from the defence of the parts which each of them played in the conspiracy. In these circumstances, while the Court must not speculate, we are entitled to draw reasonable inferences from the facts established by the prosecution. This is relevant to the fact that three of the defendants, Woodward, Hunt and Lucas, agreed to be interviewed by probation officers for the purpose of producing social enquiry reports. In one case a defendant gave a limited account of how he came to be involved but such an account was never revealed in evidence to the Jury and therefore there is nothing before the Court to substantiate it.
 3. In deciding the sentences appropriate for each defendant, the Court must look first at the overall seriousness of the offence and then at the individual blameworthiness and involvement of the offenders. Reference has already been made to the fact that this was to be a very substantial importation on a commercial scale. It is, or ought to be, well known that the Courts of Jersey will impose severe sentences in such circumstances, so as to reflect the gravity with which the Court views them and in an attempt to deter future offenders. The

Court has made it clear that both the street value and the weight of the drugs involved are factors to be taken into account by the Court in determining the appropriate sentence." Warren was described by Sir Richard Tucker as "a prolific drug dealer who had operated at the highest levels of the international drugs trade." The starting point for sentence in his case was 13 years and Warren, having contested the Indictment, received no deduction for mitigation of which there was a conspicuous absence. 117. In the view of this Court, the Royal Court would have been justified in the instant case of adopting the starting point for sentence as 13 years. Indeed Advocate Hall confirmed the validity of this starting point, which of course had been urged by the Crown, in her mitigation. She said: "Now, Sir, in the round the Crown's Conclusions are accepted by the Defence, the starting point was accepted by Mr Norris in his basis of plea as being one of 13 years, however it is also completely recognised, Sir, that it is for the Court to decide the starting point and not for Counsel." 118. Having reviewed the sentence of 8 years' imprisonment, we concluded that there were no arguable grounds for reassessing it in accordance with the request in the application for leave. In the view of this Court, the applicant would not have had an arguable case for review if the starting point chosen by the Royal Court had been a year longer with such corresponding effect on the total sentence. 119. As we have indicated, we also considered whether the points advanced by the applicant under the twin headings that the sentence was passed on a mistaken factual basis and that the Royal Court had taken certain matters into account improperly, were arguable points. We concluded that, for the reasons we have given, they were not and that none of them could serve to call into question the correctness of the sentence passed. 120. Accordingly we declined to grant leave to appeal. Authorities Misuse of Drugs (Jersey) Law 1978. Customs and Excise (Jersey) Law 1999. R v Underwood

[2005] 1 Cr App R 13 . Ali-v-AG

[2005] JLR Note 11 . R v Cairns; R v Morris; R v Raffiq and Another; R v Firfire and Another

[2013] EWCA Crim 467 . Court of Appeal (Jersey) Law 1961. AG-v- Gorvel

(1973) JJ 2503 . R. v. Parks 46 Cr. App. R. 29. Evans and Phillips-v-AG

[1997] JLR 94 . Baglin -v-AG

[2005] JLR 180 . McKenzie-v-AG

[1995] JLR 9 . R v Buffery 14 Cr. App. R. 511. Harrison-v-AG

[2004] JLR 111 . R v March [2002] 2 Cr. App. R. (S) 448. Campbell and ors -v-Attorney General

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