

JERSEY / JUDGMENT

Paul Anthony LE PAVOUX v The Attorney General

COURT
COURT OF APPEAL

BEFORE
R.C. Southwell, Esq., Q.C., President;
The Hon. M.J. Beloff,
Q.C.; and
D.A.J. Vaughan, Esq., C.B.E., Q.C.
Paul Anthony LE PAVOUX
-v-
The Attorney General
Application of Paul Anthony LE PAVOUX for
leave to appeal against conviction on 28th
February, 2003, by the Inferior
Number of the Royal Court, “en police
correctionnelle”,

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[2003]JCA127
COURT OF APPEAL
14th July, 2003.

Before: R.C. Southwell, Esq., Q.C., President;
The Hon. M.J. Beloff,
Q.C.; and
D.A.J. Vaughan, Esq., C.B.E., Q.C.
Paul Anthony LE PAVOUX
-v-
The Attorney General
Application of Paul Anthony LE PAVOUX for
leave to appeal against conviction on 28th February, 2003, by the Inferior
Number of the Royal Court, “en police correctionnelle”,

on a not guilty plea to: First Indictment.
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
against conviction placed directly before the plenary Court, without first
being submitted to a Single Judge for consideration and determination.
Application of Paul Anthony LE PAVOUX for
leave to appeal against a total sentence of 11 years' imprisonment,
passed on 30th April, 2003, by the Superior Number of the Royal
Court, to which the appellant was remanded on 28th January, 2003, in respect of
the following counts laid in the First Indictment, and on 7th March, 2003, in
respect of the following count laid in the Second Indictment, after the said
conviction and after entering guilty pleas on 3rd October, 2002, to the
remaining counts in the First Indictment and on 7th March, 2003, to the count

laid in the Second Indictment:

First Indictment:

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, on which count a sentence
of 11 years' imprisonment
was passed
2 counts of:
possession of a controlled drug, contrary to
Article 6(1) of the Misuse of Drugs (Jersey)

Law, 1978:

count 2: cannabis,
on which count a sentence of a £100 fine or 1 week's imprisonment
in default of payment was passed; and
count 3: diamorphine,
on which count a sentence of 3 months' imprisonment, concurrent was
passed

Second Indictment:

1 count of:
possession of a controlled drug, contrary to
Article 6(1) of the Misuse of Drugs (Jersey)

Law, 1978:

count 1: cannabis,
on which count a sentence of a £100 fine or 1 week's imprisonment
in default of payment was passed.
The
application for leave to appeal against sentence placed directly before the
plenary Court, without first being submitted to a Single Judge for
consideration and determination.
Advocate M.L. Preston for the Appellant;
Mrs. S. Sharpe, Crown Advocate.

JUDGMENT

(on appeal against conviction, delivered on 16th July, 2003) THE PRESIDENT: 1. This is the judgment of the Court. Mr Paul Anthony Le Pavoux (formerly Coppell) seeks leave to appeal against conviction (and if necessary also against sentence) on one count of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of diamorphine (or heroin, to use the common term). The applications for leave were by the direction of the Greffier Substitute, Mr F B H Sergeant, placed directly before the full Court of Appeal, to be heard as if they were appeals with leave. This judgment is concerned only with the application for leave to appeal against conviction. 2. Mr Le Pavoux is a chef by trade, who has lived in Thailand and worked there as a chef for a number of years. He stayed in Thailand because he was, and continued to be, a heroin addict, and apparently heroin is available and cheap in Thailand. In the course of the 1990s he met Mr Wolfgang Baumgartner, an Austrian national, living in Thailand who himself became a heroin addict. Le Pavoux returned to Jersey in early 2002. He opened a shop called "Asian Arts" offering for sale artefacts bought in Thailand. 3. In July 2002 Baumgartner flew to Vienna to see his parents, and then went by rail to Zurich where he bought 237 grams of heroin at a price substantially below the price obtainable in Jersey. He secreted the heroin internally. On Friday 5 July 2002 he flew to Jersey. He took a room at the Uplands Hotel where he excreted the heroin packages. 4. On Sunday 7 July 2002 Baumgartner met Le Pavoux at about 2 pm in St Helier in the street near Le Pavoux's shop. Baumgartner had not succeeded in making contact with Le Pavoux since arriving on 5 July 2002, and we emphasise that this encounter in the street was entirely by chance. The two men arranged to meet at 3 pm at the Beaufort Hotel. Baumgartner did not attend, apparently due to dislike for and distrust of Le Pavoux. Le Pavoux rang Baumgartner on his mobile phone four times shortly after 3 pm but without success. At about 7 pm the police arrested Baumgartner at the Uplands Hotel and seized the heroin in his possession. Just before this arrest he had spoken to Le Pavoux and arranged to meet at about 8 pm at the Beaufort Hotel. Le Pavoux was arrested when he had arrived for this meeting at the Beaufort Hotel. Le Pavoux was carrying in a bag a set of digital scales, a needles box, a small knife, a straw and other articles. Another man, Mr John Philip McConnachie, was arrested outside the hotel in his car. He had driven Le Pavoux to the hotel. He was later released without charge. 5. On 8 July 2002 Le Pavoux was charged with three counts: Count 1, with being knowingly concerned in the fraudulent evasion of the prohibition on the importation of diamorphine (heroin). This count was amended by consent on the first day of trial to allege that Le Pavoux was knowingly concerned between 1 March 2002 and 8 July 2002. Count 2, with possession of cannabis. Count 3, with possession of diamorphine. 6. Baumgartner was charged with three counts: Count 4, with being knowingly concerned in the fraudulent evasion of the prohibition on the importation of diamorphine. Count 5, with possession of diamorphine Count 6, with possession of diamorphine with intent to supply. 7. Baumgartner pleaded guilty to Counts 4 and 6, Count 5 having been withdrawn by the Crown. 8. Le Pavoux pleaded guilty to Counts 2 and 3, but not guilty to Count 1. 9. The trial of Le Pavoux in the Royal Court on Count 1 took place on 27 and 28 January 2003 before Commissioner Francis Hamon OBE and Jurats Mazel Joan Le

Ruez (née de Gruchy) MBE and Geoffrey Allo. On 28 January 2003 Le Pavoux was convicted on Count 1.

10. Shortly before this trial, on 22 January 2003, Le Pavoux was arrested and charged with possession of 1.76 grams of cannabis. On 23 January 2003 he pleaded guilty in the Magistrate's Court. His plea of guilty was renewed in the Royal Court on 7 March 2003.
11. On 30 April 2003 Le Pavoux and Baumgartner were sentenced by the Royal Court (Commissioner Francis Hamon and Jurats Philip de Veulle, Michael Rumfitt, Edward Potter ISO, Arthur Quérée and John Tibbo). The Royal Court first heard an application for a confiscation order under Article 3 of the Drug Trafficking Offences (Jersey) Law 1988, and decided that Le Pavoux and Baumgartner had benefited from drug trafficking in the sums of £37,260 and £3,860 respectively, and that the amounts to be recovered from (and paid by) them were £22,577.27 from Le Pavoux and £123 and 500 Swiss francs from Baumgartner.
12. Le Pavoux was sentenced as follows: Count 1 - imprisonment for 11 years Count 2 - a fine of £100 or in default one week's imprisonment in lieu, concurrent Count 3 - imprisonment for 3 months, concurrent and on the second indictment to a fine of £100, or one week's imprisonment in lieu. The report of the Commissioner shows that the Jurats were unanimous on both conviction and sentence.
13. Baumgartner was sentenced on Count 4 to 3 years imprisonment, and on Count 6 to 18 months imprisonment, concurrent, and was recommended for deportation. Baumgartner has not appealed.
14. By Count 1 Le Pavoux was charged with a criminal offence under Article 61(2)(b) of the Customs & Excise (Jersey) Law 1999. This statutory provision, derived from similar provisions in the statute law of England and Wales, is very widely drawn indeed. The legal ingredients of the offence which the prosecution had to prove were: (i) that the goods were a controlled drug and were subject to a prohibition on importation by virtue of an enactment; (ii) that a fraudulent evasion of the prohibition had taken place in relation to the controlled drug; (iii) that Le Pavoux was "concerned" in the fraudulent evasion; and (iv) that Le Pavoux was "knowingly" concerned in the fraudulent evasion.
15. There was no issue on ingredients (1) and (2): the heroin was a controlled drug subject to a prohibition on importation, and a fraudulent evasion had taken place by the internally concealed importation of the heroin by Baumgartner.
16. The central question, which depended on ingredients (3) and (4), was whether Le Pavoux was knowingly concerned in the fraudulent evasion by Baumgartner. As the English Court of Appeal observed in *R v Neal et al* [1984] 3 ALLER 156, the offence is widely drawn so as to cover not only those involved in planning and effecting the prohibited importation, but also those who might become involved after importation with the requisite knowledge and the requisite intention.

17. The only substantive evidence against Le Pavoux was that of Baumgartner, his alleged accomplice. The substantive ground of appeal was that Baumgartner's evidence at trial, when viewed in the context of the transcript of his interview by the police on 8 July 2002 and his witness statement provided on 9 July 2002, was not of sufficient reliability to enable the Jurats to convict Le Pavoux.
18. Advocate Michael Preston appeared before this Court on behalf of Le Pavoux. He did not appear below, Le Pavoux then having been represented by Advocate Gilbert. Mr Preston drew particular attention to alleged inconsistencies in Baumgartner's evidence as contained in (1) his interview by the Jersey police on 8 July 2002;
- (2) his written statement given to the police on 9 July 2002; and (3) his evidence at trial in the course of which he was cross-examined by Advocate Gilbert about some of these inconsistencies.
19. Crown Advocate Mrs Sally Sharpe appeared on behalf of the Attorney General both before the Royal Court and before this Court. In her opening address in the Royal Court, she accepted that Baumgartner "may not be entirely candid about his activities; and of course he will benefit [as regards sentence] from giving evidence against" Le Pavoux. She described Baumgartner as "a courier", a description which, with all respect, was not accurate, because Baumgartner had financed and organised the unlawful importation himself, and intended to deal in the heroin to his own financial advantage. Mrs Shape did not refer in opening to the stages preceding the importation, and concentrated on what happened after the importation into Jersey had taken place.
20. Before considering Baumgartner's evidence at the trial, it is convenient to consider first the evidence provided to the police on 8 and 9 July 2002.
21. The first in time was the interview by the police on 8 July 2002, in which Baumgartner indicated that he had visited Jersey two months earlier, about Easter 2002, having been encouraged by Le Pavoux to visit the Island with a view to considering whether to import heroin. During that visit, and while in Jersey, he had been encouraged to bring heroin into Jersey by Le Pavoux and by men to whom Le Pavoux had introduced him, Steve Cassin (also called Goldsmith) and a man called Phil who lived opposite Le Pavoux. He had also been so encouraged by a man referred to as "JD" (who was not further identified before or at the trial) who was a friend of Cassin and Le Pavoux (with parents in Jersey), and whom he met in Kent. Le Pavoux, Cassin and JD were interested buyers. Baumgartner indicated at Easter that he would probably come back two months later "with any amount of heroin". Le Pavoux and the other two men did not finance the importation, but they were the prospective buyers of the heroin. He had arrived in Jersey on 5 July 2002 and intended to return to Zurich on 11 July 2002. On arrival having excreted all the packages of heroin (except one which had opened in his stomach) he started "to phone people to get rid of it". On Saturday 6 July 2002 he first contacted Cassin and arranged to meet him in a pub where on arrival he was recognised by JD. He asked JD whether JD could move or sell the heroin, and JD said yes, he

would phone a few people and come back to Baumgartner. Cassin then arrived, and he was interested in buying the heroin. JD and Cassin discussed finding someone to finance “the whole lot” for Cassin. Baumgartner did not mind who bought the heroin as long as one of them did. He arranged with Cassin to deliver an ounce of heroin which Cassin would sell, and to carry on supplying it ounce by ounce as Cassin succeeded in selling. He gave an ounce to Cassin at 5pm on 6 July 2002 and later had dinner with Cassin. On Sunday 7 July 2002 he met JD about noon in the same pub. JD told him that a friend would provide finance to buy for £12,000 all the heroin for Cassin to retail. On 7 July 2002 at about 2 pm by chance he met Le Pavoux (not having been able to make contact by phone) in the street near Le Pavoux’s shop. He arranged to meet Le Pavoux at the Beaufort Hotel at 3pm but did not turn up. Le Pavoux then kept on phoning him, and another meeting at the Beaufort Hotel at 8pm was arranged, but because of the arrests did not take place. The meeting was for the purpose of selling 4 grams to Le Pavoux to shut him up, because Baumgartner had given his word to JD that he would sell the heroin to JD or his friend. He had no other contact with Le Pavoux on that visit.

22. The principal relevant features of Baumgartner’s story as appearing from this interview are these: (i) there was some general discussion with Le Pavoux in April 2002 about importing heroin into Jersey, in which he encouraged such importation but did not finance it or indicate or agree that he would buy any particular quantity of heroin; (ii) two other men (Cassin and JD) were involved in that general discussion; (iii) when Baumgartner arrived in Jersey he contacted Cassin and met JD and arranged to sell the heroin (except for the ounce to Cassin) to JD or JD’s friend who would finance the purchase which Cassin could then retail; (iv) it was only by chance that Baumgartner met Le Pavoux, and arranged to sell only 4 grams of heroin to him to keep him quiet;
- (v) Baumgartner disliked and distrusted Le Pavoux and this appeared to explain why Baumgartner had made so little effort to get in touch with Le Pavoux, for example at his shop.
23. We note that (1) the story which Baumgartner told in this interview pointed to Le Pavoux having been “knowingly concerned” in encouraging Baumgartner to import heroin into Jersey, but only as one out of three men all encouraging him; and
- (2) when Baumgartner had achieved the importation, Cassin and JD were involved to a much greater degree than Le Pavoux. We were told that no charges have been pursued against Cassin, and JD has not even been identified.
24. The interview ended at 5.18 pm on 8 July 2002. At 11.20 am the next morning (9 July 2002) Baumgartner started to give a witness statement to the police. Clearly there must have been some discussion between the police and Baumgartner before he agreed to give a witness statement. Given that Baumgartner might have been led to believe that he would receive a shorter prison sentence if he gave evidence against Le Pavoux (but apparently not in respect of Cassin or JD), and given the way in which the statement was focused on setting out a case

against Le Pavoux, it is possible that some such discussion did take place. Apparently, however, no record was kept of such discussion. Any such discussion ought to have been recorded in the usual way in accordance with the standard practice of the Jersey Police. It is in the interests of the accused as well as of the police that such recordings should be made.

25. Mr Preston sought to rely on alleged discrepancies between what was recorded in the interview on 8 July 2002 and what was set out in the witness statement on 9 July 2002. In our judgment the basic story as contained in the interview transcript and the witness statement was substantially the same story. The prime difference was that in the witness statement, to a much greater extent than in the interview transcript, Baumgartner's account was focused on a case against Le Pavoux alone, rather than on Le Pavoux as one of three or four men involved as encouragers of the importation and potential buyers of any heroin Baumgartner might bring into Jersey, the main other persons involved being Cassin and JD. Thus the change was primarily one of emphasis. Presumably this derived from the immediate wish of the police to be able to make out a case against Le Pavoux, who was being held in custody, rather than against Cassin or JD who were not in custody. The failure of the police to follow up Baumgartner's allegations concerning Cassin and JD was not explained by the Crown Advocate.
26. Baumgartner's interview transcript and witness statement were made available to the defence before trial in the usual way. The prosecution also had a statement from Cassin whom they did not call, and this was also made available to the defence (though it has not been shown to this Court).
27. We turn next to Baumgartner's evidence in chief at trial. It is an unfortunate feature of that evidence that, in the questioning by the Crown Advocate, reference was not made to two essential features of Baumgartner's story as set out in the interview transcript and the witness statement, namely (i) The involvement of Cassin and JD at Easter 2002 in encouraging Baumgartner to bring heroin into Jersey (in addition to the involvement of Le Pavoux); and (ii) The fact that, perhaps provisionally until money was paid, Baumgartner had in July 2002 sold all his heroin to JD (and perhaps Cassin also) before (and we emphasise before) Baumgartner met Le Pavoux by chance and offered to provide a small amount of heroin to Le Pavoux.
28. In the course of Baumgartner's evidence in chief, the only references to Cassin and JD were unexplained, and, if not subsequently explained in the course of cross-examination by Miss Gilbert, inexplicable to the Jurats.
29. This Court asked Mrs Sharpe whether she had deliberately excluded from the evidence she elicited from Baumgartner in chief evidence concerning the two matters referred to in paragraph 27 above. Mrs Sharpe apologised to the Court for having failed to elicit these matters, a failure which she accepted is open to criticism. But she indicated that this was simply a mistake, and not due to any conscious decision on her part, and she had been distracted by personal bereavement. The Court accepts her explanation. But it must be

observed that this failure could have been an unfortunate one, because, as examined after the event by this Court, it gives the appearance of a prosecution seeking to select from the evidence available from Baumgartner only those matters likely to lead to a conviction of Le Pavoux, rather than a prosecution acting (as it should) as a “minister of justice” and placing before the Jurats the full story, and not a selected part of that story.

30. At the close of Baumgartner’s evidence in chief Miss Gilbert was faced with a difficult position as the advocate representing Le Pavoux. On the one hand, she was given by the Crown Advocate the advantage of being able to emphasise to the Jurats the extent to which selection had been made from Baumgartner’s story as set out in the interview transcript and the witness statement. This was potentially a not inconsiderable advantage. On the other hand, in so far as Miss Gilbert would wish to draw attention to the involvement of Cassin and JD, she faced the difficulty that the more stress she placed on their involvement, the more that Le Pavoux’s involvement in encouraging Baumgartner to import heroin into Jersey was likely to be made apparent to the Jurats.
31. It is arguable that Miss Gilbert could at that stage have made submissions in the absence of the Jurats, to the effect that by Mrs Sharpe’s selective use of Baumgartner’s evidence the defence had been placed in an impossible, or at any rate a very difficult, position. Whether such submissions, coming at the middle of Baumgartner’s evidence, would have resulted in the trial taking a different course we cannot say. It certainly would have been a bold step to take at that stage.
32. Instead Miss Gilbert chose to continue and to make the best she could of the advantage we have described. We do not consider that she is necessarily to be faulted for electing to take that course, though in fact her wary and limited cross-examination necessarily drew attention to not only the involvement of Cassin and JD, but also Le Pavoux’s involvement, in encouraging Baumgartner to import heroin into Jersey.
33. Though we are critical of the way in which the case was handled, as already indicated, we consider that in the ultimate analysis this made no difference to the result of this trial. However much Cassin and JD may have been involved in encouraging Baumgartner to import heroin and even if it be accepted that all the heroin (except perhaps 4 grams for Le Pavoux) had been sold to JD and Cassin, it remains the clear evidence of Baumgartner that (i) The original encouragement of him to consider importing heroin illegally into Jersey came from Le Pavoux when they were both still living in Thailand; (ii) His visit to Jersey at Easter 2002 came about solely because of Le Pavoux’s encouragement; and (iii) During that visit to Jersey, he was encouraged to bring heroin into Jersey by Le Pavoux (as well as Cassin and JD). Such encouragement was capable in law of amounting to being knowingly concerned in Baumgartner’s subsequent importation. It was for the Jurats to weigh this evidence given by Baumgartner, against the contrary evidence given by Le Pavoux, and it was open to the Jurats on this evidence to decide to convict Le Pavoux on Count 1.

34. Four further items of evidence were relied on by the prosecution as providing independent confirmation of the case against Le Pavoux: (i) Le Pavoux in his interviews by the police stated that he went to the Beaufort Hotel (at which he believed Baumgartner to be staying) to spend the night, not to buy drugs. This the prosecution contended was plainly a lie, because Le Pavoux had no overnight bag with him, because this was inconsistent with the evidence of Mr McConnachie who had driven him to the Beaufort Hotel, and because this was inconsistent with Baumgartner's evidence. The Commissioner gave a Lucas direction in regard to any lies in interview by Le Pavoux and no complaint is made by Mr Preston in relation to that direction. (ii) Le Pavoux had drugs equipment, especially the digital scales, with him when he went to the Beaufort Hotel. (iii) The phone calls made by Le Pavoux to Baumgartner's mobile phone on 7 July 2002. (iv) The explanations given by Le Pavoux and Baumgartner for Baumgartner's visit to Jersey at about Easter 2002.
- (i) and (ii) were capable of providing independent confirmation, (iii) was no more than neutral, and (iv) did not provide such independent confirmation. But in our judgment, even without any such confirmation, the Jurats were well entitled to convict.
35. Accordingly this Court concludes that Mr Preston on Le Pavoux's behalf has failed to establish that the conviction on Count 1 amounted to a miscarriage of justice. We therefore grant leave to appeal against the conviction (there being arguable grounds for attacking the conviction), but dismiss the appeal.
36. But this conclusion leaves open for further argument, on the application for leave to appeal against sentence, the question on what basis Le Pavoux should have been sentenced. The decision of the Jurats on conviction was, like the verdict of a jury, a non-speaking decision, in that the Jurats did not and could not indicate to what extent Le Pavoux was to be held responsible for the importation by Baumgartner. We have therefore already indicated to counsel that we will expect to hear oral submissions about this when we hear the sentence application (though without repetition of submissions already made to us).
37. As in the course of this judgment we have ventured to make some criticisms, in particular, of the prosecution and the police, it may help if at the end of this judgment we summarise the main points we have made: (i) It is the duty of the Jersey police to record all discussions with a person in custody concerning an alleged offence. The failure of the police to record the discussion with Baumgartner on the morning of 9 July 2002 leading to his agreeing to give a witness statement was not a merely technical failure. The reasons why the police are required to record all such discussions are to protect the person in custody, and also to protect the police against subsequent allegations of misconduct. (ii) Prosecuting counsel are required to act as a "minister of justice", complying with the Farquharson guidelines for prosecuting barristers as laid down in England and Wales, and with the additional guidance given by the Attorney General for England and Wales from time to time. In particular the obligation of disclosure of material which could assist the defence must be scrupulously observed. We emphasise that there was no shortfall in this respect in this case by Mrs Sharpe. (iii) However disclosure is not of itself enough. Prosecuting counsel must exercise

judgment as to whether a witness, whose evidence is crucial to a case, is sufficiently reliable to be tendered before the judges of fact (here the Jurats) and must decide, where there are arguably inconsistent versions of that witness's evidence, on which version to rely. Mrs Sharpe concluded that Baumgartner's evidence was sufficiently reliable, and we agree with her assessment. However having so decided, it is not permissible for prosecuting counsel to select, in the manner in which selection occurred in this case, those parts of the evidence of a prosecution witness on which the prosecution wishes to rely which favour the prosecution, ignoring those parts which are less favourable to the prosecution case, though part and parcel of that version of the witness's evidence on which the prosecution has chosen to rely.

38. Finally, it is right that we should state that, despite those criticisms, we consider that in the end they did not make any difference so far as concerns the conviction of Le Pavoux on Count 1. The evidence against him on Count 1 (though challenged by Le Pavoux) was strong in respects on which the Jurats were entitled to convict. Where they may, or may not, make a difference will be in relation to sentence.

JUDGMENT

(on sentence appeal, delivered on 18th July, 2003.) THE PRESIDENT:

39. This continuation of the Court's earlier judgment contains the Court's determination of Mr Le Pavoux's application for leave to appeal against sentence on Count 1.
40. We have set out the sentences received by Le Pavoux: on Count 1 (11 years' imprisonment) and Baumgartner on Count 4 (3 years' imprisonment) in paragraph's 12 and 13 above.
41. There are two major factors which were not taken into account by the Royal Court in relation to sentence because they were not drawn to the attention of the Royal Court. (i) The first is that it had been held by the Court of Appeal in *McDonough -v- AG* (28th September 1994) Jersey Unreported; [1994/193] that the sentence guideline cases concerning the importation of, or dealing in, drugs are not to be treated as governing in the case of a defendant being knowingly concerned in a fraudulent evasion of a prohibition on importation of drugs, and more recently by the Deputy Bailiff in a valuable judgment in *AG -v- Antunes and ors* [2003] JRC072 that the decision in *McDonough* applies equally to the recent guideline cases such as *Rimmer and ors -v- AG* [2001] JRC373 CA (and *Noon and ors -v- AG* [2001] JLR 626.) The reasoning of the Deputy Bailiff is so persuasive that we adopt it without reservation in this judgment. These cases were not brought to the attention of the Royal Court in the present case as they should have been. Advocate Preston for Le Pavoux and Crown Advocate Mrs Sharpe rightly agreed before us that Le Pavoux ought to have been sentenced on the basis of those cases and not of *Rimmer*, on the basis of which the sentence of 11 years imprisonment was founded. (ii) The roles of Cassin and JD (as we have described them earlier in dealing with the conviction) were not properly brought to the attention of the Royal Court, who as a result seemingly sentenced Le Pavoux on the erroneous footing that he was the only person encouraging Baumgartner's importation, and the sole person likely

to purchase the heroin from Baumgartner. Mr Preston and Mrs Sharpe agreed before us that that had been an erroneous basis for sentencing and that Le Pavoux should have been sentenced on the basis of his actual involvement in the crime committed by Baumgartner.

42. It follows that this Court has to consider the sentence of Le Pavoux on Count 1 entirely afresh.
43. Mr Preston made a number of submissions in relation to Le Pavoux's actual involvement. He accepted that (as this Court has already stated) Le Pavoux alone was responsible in the first place for Baumgartner thinking of importing heroin into Jersey, and for Baumgartner coming to Jersey on his first visit at Easter 2002. But he pointed out that thereafter Le Pavoux was only one amongst those who encouraged Baumgartner and that each of Cassin and JD appeared to be involved in this encouragement at least as much as Le Pavoux. Once Baumgartner had imported the heroin Le Pavoux was, of the three men, the least involved. Baumgartner did not take obvious steps to get in touch with Le Pavoux, dealt with Cassin and JD, and agreed to sell the heroin to JD or the financial backer found by JD for Cassin to sell the heroin on at a retail level. Baumgartner met Le Pavoux only by chance, after he had agreed to sell to JD or JD's backer, and only agreed to let Le Pavoux have a small quantity (4 grams) of heroin for Le Pavoux's use in order to keep Le Pavoux quiet. It appeared that Baumgartner had not tried to sell the whole quantity of heroin to Le Pavoux because he disliked and distrusted Le Pavoux. Mr Preston submitted that the level of involvement of Le Pavoux, viewed overall, was less than that of Baumgartner who was the financier of and the dealer in the heroin, and less than that of Cassin and JD who were the people seeking to buy the whole quantity for onward sale. No explanation had been given by the Crown Advocate as to why the prosecution had been pursued against only Le Pavoux and not against either Cassin or JD. Mr Preston referred to the case of AG –v- Saraiva and ors [2003]JRC074 in which Miss Saraiva received a sentence of 2 ½ years, by contrast with Le Pavoux's sentence.
44. Mr Preston relied on the disparity between Le Pavoux's and Baumgartner's sentences. Even taking into account Baumgartner's plea of guilty (worth less because he was caught red-handed) and his assistance to the police, the disparity was, he submitted, excessive. He referred to the case of McGurk –v- AG (4th January 1988) Jersey Unreported CofA; [1987-88]JLR N.19 for the recognition that such a disparity might, of itself, give rise to a justified sense of injustice.
45. Mr Preston urged that this Court should consider what the starting point for Cassin and JD would be, and to fix a lower starting point for Le Pavoux. When pressed by the Court, he proposed a starting point of 6 years, to be reduced by reference to the available mitigation derived from the Social Enquiry Report and the Drugs and Alcohol Service Report, together with the determination of Le Pavoux to defeat his drug addiction.
46. Mrs Sharpe, for the Attorney General, accepted that the Royal Court had not been given the full picture and that it would be right for this Court to take a different view of Le Pavoux's level of involvement. Nevertheless Le Pavoux had been the source of the idea of importation

by Baumgartner, had introduced him to Cassin and JD, had encouraged him to import heroin and had been the vital link with Cassin and JD. Any mitigation was, she submitted, minimal. Though the guidelines in Rimmer did not apply directly, nevertheless, this Court should not ignore the fact that, even for a small amount of heroin such as 4 grams, the starting point under those guidelines would be 7-9 years' imprisonment. She proposed a starting point of 7 years, reduced to 6 ½ years for the very limited mitigation, which she said would give rise to no questions of disparity.

47. As this Court has emphasised before, it is essential that in relation to all offences coming before the Royal Court and the Court of Appeal, the process of analysis is followed of taking first a starting point or tariff for the particular offence, and then secondly deducting from the starting point a specified discount to take account of all mitigation available. This process is necessary so that the defendant knows how the final sentence is arrived at and what discount has been given for mitigation, and in the case of an appeal from the Royal Court, so that this Court knows how the Royal Court has arrived at the final sentence.
48. Sentencing is an art, not a science, and certainly not a purely mathematical process. Having regard to all the matters relied on by counsel, the members of this Court have concluded that the starting point for the sentence of Le Pavoux should be appropriately fixed at 6 years, having regard to his level of involvement described earlier in this judgment. His mitigation is weak, and we have some concerns about his determination to defeat his addiction because of his refusal of treatment and his previous episode of ceasing to take heroin and subsequently succumbing again to the addiction. But we have concluded that the appropriate discount on this occasion, in all his circumstances, is one year. Accordingly this Court grants leave to appeal against sentence and determines his sentence on count 1 as 5 years' imprisonment to be served concurrently with the sentences on counts 2 and 3, making a total sentence on these 3 counts of 5 years' imprisonment.
49. We do not consider that such a sentence would give rise to any disparity with Baumgartner. Though Baumgartner's sentence ended up at 3 years, the starting point for him was 12 years, which was substantially reduced by reference to: (i) his plea of guilty; (ii) his giving evidence (which was accepted) against Le Pavoux; (iii) his giving useful information to the authorities; and (iv) his wishing the fact of this assistance to be made public, a factor which the Royal Court regarded as being the most unusual feature of the sentencing of Baumgartner. Because of the distinctive features of the case concerning Baumgartner, his case could not usefully be compared to that of Le Pavoux.
50. Finally, Mr Preston wisely did not seek to disturb the Royal Court's order under Article 3 of the Drug Trafficking Offences (Jersey) Law 1988. Authorities R-v-Neal [1984] 3 ALLER 156. AG-v-Knowles (27th September, 2002) Jersey Unreported; [2002/178]. R-v-Russell-Jones (1995) 1 Cr. App. R. 538. Archbold (2003): 4/95; 4/273; 4/275; 7/82; Appendix 4.48. Blackstone: p.1417. McDonough-v-AG (28th September, 1994) Jersey Unreported; [1994/193]. Jenkins-v-AG (23rd January,

2001) Jersey Unreported; [2001/22]. AG-v-Antunes & Ors [2003]JRC072 AG-v-Le Pavoux & Anor [2003]JRC075 AG-v-Saraiva & Ors [2003]JRC074. McGurk-v-AG (4th January, 1988) Jersey Unreported CofA; [1988] JLR N.19. Wright-v-AG (12th July, 1999) Jersey Unreported; [1999/125

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