Ronald Anthony Rimmer v The Attorney General

Jurisdiction:	Jersey
Judge:	R.C. Southwell, M.J. Beloff, C.S.C.S. Clarke
Judgment Date:	19 July 2001
Neutral Citation:	[2001] JRC 148
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Text

[2001] JRC 148

COURT OF APPEAL

Before:

R.C. Southwell, **Esq., Q.C., President; The Hon**. M.J. Beloff, **Q.C., and** C.S.C.S. Clarke, **Esq., Q.C**.

Ronald Anthony Rimmer
Royston Andrew Lusk
Steven Gavin Bade
and
The Attorney General

Advocate A.D. Hoy **for R.A. Rimmer**.

Advocate R. Juste **for R.A. Lusk**.

Advocate S.E. Fitz **for S.G. Bade**

The Attorney General.

Authorities

Campbell & Ors v AG (1995) JLR 136 C of A.

Wood v AG (15th February, 1994) Jersey Unreported C of A.

Kenward v AG (14th July, 2000) Jersey Unreported; [2000/137]

Pagett v AG (1984) JJ 57 C of A.

Fogg v AG (1991) JLR 31 C of A.

Clarkin v AG (1991) JLR 213 C of A.

R v Bilinski (1987) 86 Cr.App.R 146; 9 Cr.App. R (S) 360; [1987] Crim LR 782.

AG v Campbell (1994) JLR N.12.

Carter v AG (28th September, 1994) Jersey Unreported C of A.

R v Aranguren (1994) 99 Cr.App. R. 347; 16 Cr.App. R. (S) 211.

AG v Schorah & Wright (22nd February 1999) Jersey Unreported; [1999/33].

Bruton v AG (14th July 2000) Jersey Unreported C of A; [2000/136].

Morgan & Schlandt v AG (24th April 2001) Jersey Unreported C of A; [2001/88]

AG v Batchelor (3rd May 2001) Jersey Unreported; [2001/96]

AG v Chadwick (30th October 1995) Jersey Unreported.

AG v Kane, Moyse & Speirs (30th May 2001) Jersey Unreported.

Ronald Anthony Rimmer

Appeal against a sentence of 8 years' imprisonment passed on 12th April, 2001, by the Superior Number of the Royal Court, to which the appellant was remanded by the Inferior Number on 9th March, 2001, following a guilty plea to:

1 count of: Being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to Article 6 1 (2)(b) of the Customs and Excise (Jersey) Law 1999:

Count 1: cocaine

Leave to appeal was granted by the Deputy Bailiff on 5th June, 2001.

Royston Andrew Lusk

Appeal against a total sentence of 8 $^{1}/_{2}$ years' imprisonment passed on 12th April, 2001, by the Superior number of the Royal Court, to which the appellant was remanded by the Inferior Number on 6th April 2001, following a guilty plea to:

2 counts of: Possession with intent to supply a controlled drug, contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978; Count 1: heroin, on which count a sentence of 8 years' imprisonment was passed; Count 3: heroin, on which count a sentence of 8 years' imprisonment, concurrent, was passed.

1 count of: Possession of a controlled drug, contrary to Article 6(1) of the Misuse of Drugs (Jersey) Law, 1978: Count 2: heroin, on which count a sentence of 3 months' imprisonment, concurrent, was passed;

1 count of: Escaping, without force, from lawful custody, contrary to Article 22(A) of the Prison (Jersey) Law, 1957, on which count a sentence of 6 months' imprisonment, consecutive, was passed.

Leave to Appeal was granted by the Deputy Bailiff on 10th May, 2001.

Steven Gavin Bade

Appeal against a sentence of 9 years' imprisonment, passed on 3 rd May 2001 by the Superior Number of the Royal Court, to which the appellant was remanded by the Inferior Number on 6 th April 2001, following a guilty plea to:

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

Count 1: diamorphine.

Leave to appeal was granted by the Deputy Bailiff on 5th June, 2001.

THE PRESIDENT:

1 This is the judgment of the Court. These three appeals have been heard together, not, the Court emphasises, because there is any connection between the three appellants or their cases, but solely because each of the three appeals raised issues as to the guidance provided by the Court of Appeal in *Campbell, Molloy and Mackenzie v Attorney-General* (1995) JLR 136 (to which we will refer as *Campbell*) as to sentencing in cases involving trafficking in Class A drugs. The particular issue to which the Deputy Bailiff drew attention when giving leave to appeal in two of the three cases is how to achieve consistency in deciding on the sentencing starting point in such cases. This Court wishes to express its

indebtedness to the Attorney-General and to the Advocates appearing for the three appellants (Advocate Ashley Hoy for Mr Rimmer, Advocate Rebecca Juste for Mr Lusk, and Advocate Sarah Fitz for Mr Bade) for their clear and helpful submissions.

2 The relevant facts in the three cases can be summarised briefly as follows.

3 *Rimmer*. Mr Rimmer travelled with another man, Mr Holding, by ferry to Jersey. They were stopped and questioned on their arrival on 20 December 2000. It was eventually discovered that Holding was carrying internally 102.42 grams of heroin of between 75 and 79% by weight diamorphine, and that Rimmer was carrying internally 156.97 grams of cocaine hydrochloride, of between 66 and 75% by weight of the drug. Both pleaded guilty when presented before the Magistrate's Court on 10 January 2001. They appeared before the Superior Number of the Royal Court for sentencing on 12 April 2001. There was evidence before the court that the street value of the heroin concealed by Holding was between £30,762 and £46,089, and the wholesale value was between about £15,300 and £20,500. Similarly there was evidence that the street value of the cocaine concealed by Rimmer was about £12,500, with a wholesale value of between £5,000 and £10,000. The purity of the cocaine was above the national average, and there was enough cocaine to make about 167 “wraps”. Holding was 23 years old, and Rimmer was 42 years old. Holding had no relevant previous convictions. Rimmer had several previous convictions, including his last conviction in January 1996 in Spain for acting as a courier of 50 kilograms of cannabis for which he had received a sentence of 4 years and 9 months' imprisonment. The Crown and the defendants were of common ground that sentencing should be on the basis not of a joint venture, but of the actual drugs which separately they were each carrying. They had not been charged as joint venturers, and the charge against Rimmer related solely to the cocaine which he imported. As will appear, this approach was not adopted by the Royal Court. The Crown's conclusions were:

The Royal Court did not approve the separate treatment of these two defendants and elected to treat them as engaged in a joint venture. The court decided that in the light of the *Campbell* guidelines the appropriate starting point was 10 years for both Holding and Rimmer, and imposed on Holding a sentence of 6 years' imprisonment, and on Rimmer a sentence of 8 years' imprisonment.

> (1) as regards Holding, for a starting point of 11 years, and after allowing for mitigating circumstances, including the early plea of guilty, his cooperation with the authorities (which however did not extend to naming the supplier or intended recipient), his youth and this being his first offence, for a sentence of 7 years' imprisonment;
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> (2) as regards Rimmer, for a starting point of 9 years (having regard to the smaller quantity and value of the cocaine he carried), and after allowing for mitigating circumstances including the early plea of guilty and similar cooperation with the authorities, but taking into account his age and criminal record, on a sentence of 8 years' imprisonment.

4 *Lusk*. Mr Lusk waived voluntarily his right to be present at the hearing of his appeal because of the serious illness of his mother in England. On 12 January 2001 Mr Lusk flew from Manchester to Jersey. After visiting his brother's flat he booked into the Mayfair Hotel for 3 nights. Later that evening Lusk met another man just outside the hotel, and both men were arrested. Heroin was found in Lusk's clothing weighing 82.5 grams at a concentration of 54%. His room at the hotel was searched and more heroin was found weighing 54.4 grams at a concentration of 57%. The total quantity of heroin in Lusk's possession was 136.9 grams. There was evidence before the Royal Court that the street value of the 82.5 grams of heroin was between £24,750 and £37,125, with a wholesale value of between £12,375 and £16,500, and that the street value of the 54.4 grams was between £16,320 and £24,480, with a wholesale value of between £8,160 and £10,880. Thus the total street value of the heroin in Lusk's possession was between £41,070 and £61,605. The evidence also showed that heroin is now usually sold in “50” bags, containing between 110 and 160 milligrams of powder, at £50 per bag, so that the total amount of heroin could have been split into between 821 and 1,232 “50” bags for street sale. Mr Lusk was charged on three counts, Count 1 for possession of the heroin in his clothing with intent to supply, Count 2 for possession of the heroin hidden in his room and Count 3 for possession of this heroin with intent to supply. Lusk pleaded guilty on each of these counts before the Magistrate's Court on 29 January 2001. He refused to assist the authorities with regard to lists of names and Jersey telephone numbers which were in his possession when arrested.

5 On 15 January 2001 Lusk was due to appear in the Magistrate's Court. On arrival at the court Lusk escaped from custody and ran away, but was soon after caught, having hidden in a dustbin nearby. He was therefore charged in Count 4 with escaping, without force, from lawful custody. He pleaded guilty to Count 4 as well on 29 January 2001.

6 Lusk is 27 years old. He has a bad record of criminal convictions, but only one of possession of a controlled drug committed when he was merely 16 years old. It was common ground between the prosecution and the defence that the explanation which he gave to the Probation Officer was accepted and should be the basis on which he would be sentenced. His explanation was that as a heroin user he incurred a debt of £700. This was to be cleared by him going from Liverpool to Jersey to test the quality of heroin which had been supplied to Jersey and the quality of which had been challenged by the Jersey drug dealer. As previously arranged, he left his hotel room unlocked and on his return found the heroin deposited there for him to test. He had tested three of the bags before he was arrested. He did not bring the heroin into the Island, and had it in his possession solely for the purpose of testing.

7 The Crown in its conclusions adopted a starting point of 10 years for Counts 1 and 3, and moved for the following sentences on the four Counts;

Count 1: 8 years' imprisonment

Count 2: 3 months' imprisonment concurrent

Count 3: 8 years' imprisonment concurrent

Count 4: 6 months' imprisonment consecutive to Counts 1 and 3

and therefore a total of 8 $^{1}/_{2}$ years' imprisonment.

8 Regrettably a small part at the beginning of the Royal Court's sentencing judgment was not recorded. Those responsible for the recording need to take care to inform the Court if the machinery is not working so that the Court can wait to deliver its judgment until after the recording machinery has been put into working order. Where there is no recording, it is the duty of the advocates for the Crown and for the defence to prepare an agreed note of the judgment (or the missing portion) and to submit this note to the judge who presided in the sentencing court for his approval or correction. These steps were not taken in this case.

9 It appears that in its judgment the Royal Court, though it expressed some scepticism about Mr Lusk's explanation, made clear that it was sentencing on the basis of this explanation. The Royal Court adopted the Crown's conclusions including the starting point of 10 years, and sentenced Mr Lusk accordingly.

10 *Bade*. On 4 February 2001 Mr Bade and Ms Moss arrived at Jersey Airport from Southampton. They were stopped and questioned by customs officers. It was in due course found that Mr Bade had concealed internally 86.43 grams of heroin containing between 49 and 54% by weight of diamorphine, with a street value in Jersey of between about £26,000 and £39,000. Moss also had heroin concealed internally amounting to 83.28 grams of heroin. Both pleaded guilty to charges of illegal importation. Bade is 25 years old with already a bad record of prior convictions and has spent a substantial period in custody mainly for offences of burglary committed to pay for drugs. Ms Moss was 18 years old and had spent time in youth custody for supplying heroin. In both cases the Crown's conclusions were for a starting point of 12 years, with a sentence of 6 years' youth detention for Moss and of 10 years' imprisonment for Bade. In both cases the Royal Court took a starting point of 11 years, and it sentenced Bade to 9 years' imprisonment and Moss to 6 years' youth detention.

11 We should at this point make it clear that later in this judgment we will be returning to each of the appeals in greater detail, and at that stage will consider fully the mitigating circumstances relied on by each appellant.

The Guidelines

12 As the Attorney General made clear in his written submissions these and other cases involving sentencing for drug trafficking raise difficulties for the Crown and the Courts in deciding on the appropriate starting points on which such sentences are to be based. He produced a number of tables showing the starting points adopted in cases since the guideline case of *Campbell*, and pointed to apparent inconsistencies in greater detail than those mentioned by the Deputy Bailiff: see paragraph 1 of this judgment. The advocates for

the appellants as well as the Attorney General referred to a large number of other sentencing cases.

13 Before coming to the Campbell guidelines we consider it appropriate to cite and endorse part of the judgment of this Court in (*Wood v Attorney General* 15 February 1994, unreported) from pages 3 – 4. *Wood* was decided before *Campbell*, but what was said in *Wood* applies today just as much as in 1994. This Court said:

> ***"It is necessary to refer to earlier cases when dealing with appeals against sentence in order to ensure, as far as possible, that the right degree of consistency is achieved between one case and another.*** Indeed it is for this purpose that both this Court and the Royal Court have, on occasion, when passing sentence, not only dealt with the particular offender before them, but have also laid down guidelines to be followed in subsequent cases .
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> ***It is necessary and important however to remember that reference to earlier cases is made in order to see the principles and guidelines which have been laid down there and to follow them*** .
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> ***The purpose of referring to earlier cases is not to analyse the exact sentence which was then passed and the precise reasons why the Court arrived at it.*** This would be an impossible undertaking since sentencing is a discretionary exercise in every case and the reports do not include every feature which influenced the Court in exercising its discretion on earlier occasions .
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> ***We notice a tendency, particularly in appeals against sentence in drug related cases, to try to calculate the exact effect given by the Court in earlier cases to each factor and then to say that those effects must be reproduced in the case in hand.*** This is a misleading exercise since, as I have said, it is impossible from the reports to discover every consideration which influenced the Court. It is also an exercise which, if it could be achieved, would be inconsistent with the discretionary nature of the sentencing function. That discretion, like all discretions, has to be exercised on proper grounds and with due regard to relevant principles but the important fact remains that in deciding upon the sentence in every case the Court is exercising its discretion upon the facts of that case."

14 We add and similarly endorse this further quotation from the recent judgment of this Court in *Kenward v. Attorney General* (14th July 2000) Jersey Unreported C of A; [2000/137]:

> ***"At this juncture we would like to make an observation about the utility of the reference by Counsel in this area to other decided cases.*** Guideline cases of an Appellate Court are <u>always</u> *of assistance, that indeed is their purpose.* But a guideline case such as *Campbell* ***itself constantly refers to the principle, manifestly correct, that guidelines have always to be adapted to the facts of any particular case.*** It is therefore of limited utility to refer to decisions, particularly those of Courts sitting at first instance, which are (or

should be) applying those guidelines to the cases before them. Not only do such cases turn substantially on their own facts; the facts themselves available and taken into account by the Court may not always appear on the face of the judgments; and a read across from one set of facts to another is often a vain exercise. Moreover, in the Royal Court of Jersey (and Guernsey), unlike Courts in England and Wales, the Crown has no right to appeal against lenient sentences. We therefore express the hope that for the better conduct of court business, in future Counsel will be sparing and selective in what they cite, and make use of earlier cases (other than guideline cases) only where they can be said to illuminate, preferably expressly, a proper general approach to a common form factual situation."

15 Turning to *Campbell*, at 1995 JLR pages 140 – 141 this Court emphasised that Jersey as a separate jurisdiction sets its own sentencing levels to meet the social and penological needs of the community in this Island. We refer to and endorse as fully valid today the observations of Neill JA (now Lord Neill of Bladon QC) in *Attorney General v Pagett* (1984) JJ at pp. 64 – 65. This Court in *Campbell* then at pages 141 – 142 said as follows:

> ***"The approach approved by this court in relation to offences of dealing in Class A drugs was laid down in*** *Clarkin v. Att.* Gen. ***in the following terms*** (1991 JLR at 219):
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> > ***"The correct view of the judgment of the Court of Appeal, therefore, is that it was saying, and we wish to reiterate what it was saying, that for cases of this nature the starting-point before effect is given to any mitigation on any ground must be a sentence of eight to nine years' imprisonment.*** By 'cases of this nature' the court meant cases of possession of a Class A drug with intent to supply to others when the involvement of the defendant in drug dealing was comparable to that in *Fogg* ***...*** .
> >
> > ***The degree of the appellant's involvement in*** *Fogg* ***was shown by the amount of LSD found in his possession, by the other offences which he had committed and by his behaviour between his arrival in the Island and his arrest.*** We refer there to the fact that he had only been in the Island a few hours and in the course of those few hours had himself received this large quantity of LSD and had set about the sale of it. Those were the factors which showed the degree of his involvement. It is possible that in other cases a defendant's degree of involvement might be shown by other factors .
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> > ***The possession of a Class A drug must always be a grave offence but if of the defendant in drug dealing is less than that in*** *Fogg*, ***if, as it is sometimes put, there is a greater gap between him and the main source of supply, the appropriate starting-point would be lower.*** It is very seldom that the starting-point for any

offence of possessing a Class A drug with intent to supply it on a commercial basis can be less than a term of six years.

We repeat, so that there may now be no doubt, that the figures which we have stated are figures for starting-points before any mitigation is taken into account on any ground."

The Attorney General informed us that this approach had been very helpful and, indeed, had been adopted both by the Crown in moving conclusions and by the Royal Court in passing sentence in many subsequent cases."

16 The case of *Fogg v Att.* Gen referred to by the Court of Appeal in *Clarkin v Att.* Gen. is reported at 1991 JLR 31. The Attorney General before us correctly submitted that there are material differences between the facts of *Fogg* as there reported, and those set out in the above quotation from *Clarkin*. This Court in *Clarkin* and *Campbell* seems to have assumed that the defendant in *Fogg* had received the 1,000 units of LSD only after arriving in Jersey. But the Court's statement of the facts in *Fogg* at 1991 JLR p.35 shows that in fact *Fogg* brought a quantity of cannabis into Jersey, and having arrived in Jersey opened the cannabis blocks and found the LSD hidden within the cannabis.

17 This Court in *Campbell* then referred at pages 142 to 144 to the increasing burden of drug imports, drug abuse and other crimes committed in order to pay for drug abuse in Jersey, and the social harm this causes. What was there said remains entirely valid today. The greater the quantity of illegal drugs are brought into Jersey and sold and used here, the greater the harm done to the small community in Jersey. The policy of the Jersey courts must remain to impose strong punishments to mark the particularly anti-social nature of drug trafficking into and in Jersey.

18 In *Campbell* this Court proceeded to lay down guidelines for sentencing in relation to Class A drugs at pages 144 – 146. We consider it convenient and helpful to quote here the whole of this passage:

"Class A drugs

We begin by endorsing the sentencing approach laid down by this court in *Clarkin v. Att.* Gen. ***The proper approach is that the sentencing court should adopt a starting-point which is appropriate to the gravity of the offence.*** Having established the starting-point, the court should consider whether there are any mitigating factors and should then make an appropriate allowance for them before arriving at its sentence. A substantial allowance may be expected where a defendant has identified his supplier or otherwise provided information which is of significant assistance to the authorities.

In the passage from the judgment in *Clarkin* ***which we have cited above, this court laid down a band of starting points between six and nine years'***

imprisonment. A starting-point of nine years' imprisonment was considered to be appropriate for an offender whose involvement in drug dealing was akin to that in *Fogg v. Att.* Gen. Fogg ***had been arrested in possession of 1,000 units of LSD.*** He had arrived in the Island only a short time before his arrest. Within a few hours he had received this large quantity ***of LSD and had set about selling it.*** He was also sentenced at the same time for other offences involving the possession and supply of cannabis. He was a mature man with one previous conviction for a drugs offence. In our judgment, the appropriate starting point for a case of drug trafficking of that nature would now be one of 12 years' imprisonment. If the involvement of a defendant in drug trafficking is less than that of Fogg, the appropriate starting-point will be lower. If the involvement of a defendant in drug trafficking is greater than that of Fogg the appropriate starting-point will clearly be higher. Much will depend upon the amount and value of the drugs involved, the nature and scale of the activity and, of course, any other factors showing the degree to which the defendant was concerned in drug trafficking. We propose also to vary the lowest point of the band established in *Clarkin*; ***we accordingly state that it is seldom that the starting-point for any offence of trafficking in a Class A drug on a commercial basis can be less than a term of seven years.*** We have employed the term “trafficking” deliberately. In the past, some distinctions may have been drawn between offences involving the importation of Class A drugs and offences involving their supply or their possession with intent to supply. In our judgment, there is no justification for any such distinction. The guidelines which we have set out above apply to any offence involving the trafficking of Class A drugs on a commercial basis. We acknowledge that the maximum penalty for supplying or for possession with intent to supply a Class A drug is life imprisonment, whereas the maximum penalty for involvement in the importation of a Class A drug is only 14 years' imprisonment. We were told that that discrepancy resulted from a legislative oversight which would shortly be rectified. In the context of the offences embraced by these guidelines, however, the different maximum penalties are not relevant.

We turn now, as requested by the Attorney General, to deal with a number of subsidiary points. First, we are asked to consider the extent to which an erroneous belief in the identity of a drug in the possession of an offender can be a mitigating factor. In *R. v. Bilinski* the English Court of Appeal held that it was relevant to punishment and that “the man who believes he is importing cannabis is indeed less culpable than he who knows it to be heroin” (9 Cr. App. R. (S.) at 363). The extent to which the punishment should be mitigated would, however, depend upon all the circumstances, amongst them being the degree of care exercised by the defendant.

In the case of Campbell, one of the present appellants, the Royal Court declined to follow *Bilinski* ***and decided that in general an erroneous belief should not be held to be a mitigating factor*** (1994 JLR N-12). ***The Royal Court expressly stated however that it was not laying down a rigid rule.*** It ***acknowledged that there could be exceptional circumstances which would***

entitle it to consider the effect of a person's belief on the proper sentence.

In our judgment, a courier who knowingly transports illegal drugs must be taken to accept the consequences of his actions. As the Attorney General put it, the moral blameworthiness is the same, whatever the nature of the drugs transported. Furthermore, viewed from the perspective of the community, the evil consequences flowing from the dissemination of Class A drugs are not mitigated in the slightest by the erroneous belief of the courier that he was transporting a Class B drug. There may be very exceptional circumstances in which a genuine belief that a different drug was being carried might be relevant to sentence. But in general we endorse the Royal Court's view in the case of Campbell that an erroneous belief as to the type of drug being carried is not a mitigating factor .

Secondly, the Attorney General drew our attention to cases in which the view had been expressed that a guilty plea carried an entitlement to a discount of one-third. He submitted that this view was incorrect and that the discount to be allowed for a guilty plea depended upon the particular circumstances of the case. For example, where a courier was found with the drugs concealed inside him, he was really caught in flagrante delicto and had no option but to plead guilty. We agree and we reaffirm the statement made by this court in *Carter v. Att.* Gen. ***in the following terms***:

> ***"The Court now turns to such mitigation as there is.*** The applicant pleaded guilty to the indictment and for this he is entitled to a substantial discount. In *Clarkin* ***and again in*** *Wood v. Att.* Gen., C.A. February 15th, 1994, ***this court made a deduction of one-third for the plea of guilty.*** We accept that such a reduction is customary and in line with a well-established principle. Nevertheless we take the view that such a reduction is in no sense an inflexible rule and the precise deduction in each case must depend upon the circumstances in which the guilty plea came to be made. In some circumstances the evidence will make a guilty plea all but inevitable, but in other cases that may not be so."

This statement is, of course, equally applicable to cases involving Class B drugs with which we will deal below .

Thirdly, the Attorney General asked us to consider whether the test laid down by the English Court of Appeal in *R. v. Aranguren* ***for gauging the gravity of an offence was apt for adoption in Jersey.*** In *Aranguren* ***the court held that reference to the street value of the drug should be abandoned in favour of a formula related to weight and purity.*** This case was considered by the Royal Court in the case of *Campbell* (1994) JLR N-13. ***Crill, Bailiff, stated***:

> ***"It has never been the practice of this court to have regard solely to one or the other.*** This court has had regard to both the

> weight and the street value; it has never been disjunctive. It has been conjunctive and the court takes both into account. The court cannot sentence purely on the market principle alone and it must be stressed, as I said at the opening, that the effect on Jersey of importing even a small amount is far greater in proportion than it would be in England."
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> ***This approach appears to us to be entirely satisfactory having regard to the nature of drugs cases coming before the courts in this jurisdiction.*** Both the street value and the weight of the drugs are relevant factors for the court to know in assessing the level of involvement of the defendant in drug trafficking."

19 These are the guidelines relevant for the purposes of the present cases. In particular the Court of Appeal in *Campbell* was indicating that:

> (1) The starting point for any offence of trafficking in Class A drugs on a commercial basis could seldom be less than 7 years' imprisonment.
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> (2) In a case such as *Fogg* involving 1,000 units of LSD the appropriate starting point would be 12 years (and not the 9 years indicated in *Fogg* and *Clarkin*).
>
> (3) In cases where the defendant is involved to a greater or lesser extent than in *Fogg* the starting point will be appropriately higher or lower than 12 years. As this Court observed in *Campbell* at the bottom of page 144, "Much will depend upon the amount and value of the drugs involved, the nature and scale of the activity and, of course, any other factors showing the degree to which the defendant was concerned in drug trafficking".
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> (4) In Jersey both the weight of the drugs and their street value are factors to be taken into account, having regard to (inter alia) the point that the effect on Jersey of importing even a small amount is far greater in proportion than it would be in England.

20 The Attorney General subjected the subsequent application by the Courts of these guidelines to a number of criticisms. In doing so he indicated that he was not asking this Court to replace such guidelines with new ones: rather he was seeking much further clarification so as to assist the Crown and the Royal Court for the future, and to avoid the inconsistencies of sentencing starting-points which appeared plainly from the tables he supplied. We deal with his criticisms in turn.

21 He referred to the facts in *Fogg*, as set out in the extracts from *Campbell* we have quoted, and submitted that most of these facts, if relevant at all to sentencing, went to mitigation only and not to the determination of a starting-point. This went hand in hand with his submission that the weight or dosage of Class A drugs should be the only or almost the only factor to be used in deciding on a starting-point. As will appear, this Court does not

consider that weight or dosage, important factor though that is, can be the sole factor in relation to the starting point. Factors in *Fogg* such as the defendant's immediate sale of drugs after arrival in the island, showing that the drugs had been brought to Jersey as part of a pre-arranged plan, and the role of the defendant in the relevant drug trafficking, are likely to be relevant when deciding where, in the band of starting points appropriate to the amount of drugs trafficked in, the particular case should be placed.

22 Next the Attorney General submitted that the role of the defendant in the relevant drug trafficking was either not a factor at all, or a factor of small relevance, in deciding on the starting-point, because every person at every level in the drugs chain, from the ultimate organiser through the different levels of dealer to the couriers who regularly carry drugs and finally to the once-off courier (sometimes described as a "mule") whose sole involvement is a once-off carriage of a parcel which they may not even know contains drugs, is, he submitted, responsible for the introduction of the drugs into Jersey. Without each link in the chain the drugs would not enter Jersey.

23 This proposition is not consistent with the judgment in *Campbell*, and is not accepted by this Court. As this Court stated at pp.144–145 in *Campbell*:

> ***"Much will depend upon the amount and value of the drugs involved, the nature and scale of the activity and, of course, any other factors showing the degree to which the defendant was concerned in drug trafficking."***

What the Court in *Campbell* had in mind here was drug trafficking on a commercial basis. In the judgment of this Court there is a clear distinction to be drawn between the different levels of involvement in the drugs trade. For example, to sentence the simple "mule" and the ultimate drugs "baron" identically would be both inappropriate, having regard to the degrees of harm which those at each level inflict on society, and therefore the different degrees of culpability, and plainly unfair to defendants at the lower levels of involvement. The links in the chain are not of equal strength or significance in the sentencing context. We therefore reject this submission.

24 The Attorney General submitted that every defendant seeks to minimise their role and involvement. He pointed to the difficulties which the Prosecution faces in challenging the defendant's story in this respect. We acknowledge that difficulty, which is inherent particularly in cases in which the defendant pleads guilty before trial. But there are some remedies. If the defendant's story is not credible, the Royal Court can be asked to reject it as incredible. If on its face the story has some degree of credibility, it may be possible to challenge the story by means of a Newton hearing. In the judgment of this Court the risk that defendants may succeed sometimes in overly minimising their role and involvement is no justification for excluding this as a principal factor, or in that respect departing quite radically from the Campbell guidelines, which in our view remain appropriate and effective.

25 The maturity of the defendant, which was mentioned by the Court in *Campbell* as part of its recitation of the facts in *Fogg*, was not in our view intended to be identified as a factor

relevant to deciding on the starting point, and is not relevant in that context. It may, however, go to mitigation: youth may be a mitigating factor, whereas maturity may not be.

26 We turn next to consider the different ways in which the Courts of Jersey should, in line with the *Campbell* guidelines, assess the starting-point in drug trafficking cases.

27 The amount of drugs of Class A carried or sold must be a major factor. That was made clear in *Campbell*. In the case of drugs such as heroin and cocaine the appropriate measure of the amount is primarily by weight. We do not consider it appropriate in the case of such drugs which are usually carried and sold in the form of powder to measure by reference to dosages. Any given weight of heroin or cocaine may, depending in part but not solely on its purity, be converted into different numbers of dosages. For the time being we take the view that the weight of heroin, cocaine and any similar drugs should be used as the measure.

28 In *Campbell* the cases there being considered were cases involving trafficking in heroin. But as the extracts quoted above from the judgment show, the measure referred to, in connection with *Fogg*, was the number of tablets of LSD, i.e. what we have described as dosages. In relation to drugs carried and sold in tablet form, including LSD, Ecstasy and Amphetamines, the dosages rather than the weight will be the appropriate measure. We will return later to consider cases involving drugs in tablet form. For the present we concentrate on heroin, cocaine and similar drugs for which weight is the appropriate measure.

29 The Attorney General invited the Court to adopt the approach of the English Courts as exemplified by the guideline case in England and Wales of *R. v. Aranguren et al* (1994) 99 Cr. App. R.347 C of A, Crim Div. In that case it was decided that in future weight should be determined after converting to the equivalent 100% purity weight of the drugs, a process which involves in each case a mathematical conversion from the particular degree of purity to 100%. This is of some importance on the mainland because of the larger quantities of drugs involved, and the practice of “cutting” a consignment of drugs so as to reduce the average purity. However, there is no evidence of any material amount of “cutting” of drugs illegally brought into Jersey. Further, in the judgment of this Court, whether a consignment of heroin or cocaine is at the average of between 40–50% purity, or at a much lower degree of purity, or at a higher degree, is immaterial to the carrier of the drugs, and largely immaterial to those who sell and buy the drugs in Jersey. To know the degree of purity requires the carrying out of a scientific analysis, involving both time and expense. Such an analysis seems at present unlikely to be carried out by those who deal in this illegal trade in Jersey. In the judgment of this Court

(1) the Courts of Jersey should not at present adopt the *Aranguren* approach; and

(2) the degree of purity of a consignment of illegal drugs should generally not be taken into account.

30 However, if the degree of purity is very high, at about 75% or greater, then it may be appropriate in particular cases to increase the starting-point to take account of this, because, first, a consignment of such high purity is much more likely to be “cut”, and secondly, if it is not cut, it will do greater harm to those who consume the drugs. This approach was adopted by the Court of Appeal in *Kenward* and we consider that this is the right approach.

31 On the other hand, we do not consider that there should be a reduction in the starting-point where the degree of purity is below the average. Usually neither the carrier (as we have already noted) nor indeed the dealer have any regard to the degree of purity, and it would not be appropriate to make a reduction in such circumstances.

32 In *Campbell* the Court of Appeal approved the practice of having regard to both weight and street value of a consignment of Class A drugs. The Attorney General submitted that it is inappropriate to have any regard to street value, not least because that value may fluctuate over a period according to the ratio between supply and demand. In theory the more successful the Customs and Police in preventing the import of drugs into Jersey the higher the street value, and the less successful they are (and so the greater the supply of illegal drugs on the streets of Jersey) the lower the street value. So, the Attorney General submitted, the starting-point if fixed by reference to street values could go down at the very time when the social harm was greatest. There is force in this submission. But as Counsel for the appellants said, there is little evidence of any such fluctuation in Jersey (as opposed to the mainland), except perhaps over an extended period in respect of Ecstasy tablets. We agree with the Attorney General, to this extent, that street value is a factor of much less importance than the amount of drugs and the role and involvement of the defendant in drugs trafficking, which must be the principal factors. Nevertheless, street values should always be in evidence so that they can be taken into account where they are truly relevant. One example of this is in the case of Mr Rimmer, where it is clearly relevant to compare not only the amount of cocaine with the amount of heroin carried by Mr Holding, but also the street value of that cocaine against the street value of the heroin carried by Holding which was materially more valuable. Street value has a part to play in comparing the appropriate starting-points for Rimmer and Holding respectively.

33 The Attorney General asked this Court to assist the Crown and the Royal Court by expanding the *Campbell* guidelines so as to give more detailed starting-points by reference only to weight for drugs carried and sold in powder form such as heroin and cocaine. We have already indicated that weight though a principal factor cannot be the sole factor. Nevertheless we agree that further guidance is needed for such cases. We consider that the appropriate course is to give bands of starting points by reference to the weight of drugs, adjustment being made within these bands to take account of the role and involvement of the defendant, and of other less significant factors including street value.

34 These bands, which will apply only to heroin, cocaine and other Class A drugs carried or

sold in powder form, are as follows:

Weight in Grams	Starting-point in Years of Imprisonment
1 – 20	7 – 9
20 – 50	8 – 10
50 – 100	9 – 11
100 – 250	10 – 13
250 – 400	11 – 14
400 and over	14 upwards

35 We emphasise that these bands represent only guidelines, and are not to be treated as if embodied in a statute. The position of a particular defendant on a particular count within one of the bands is to be determined by reference to the weight of drugs and their role and involvement as principal factors, together with other lesser but relevant factors, as indicated above. The margins of these bands are also not to be treated as set in stone. There may be exceptional cases in which on a particular count the starting-point may be above or below the band otherwise appropriate. However, we reiterate what this Court said in *Campbell* that it will be seldom that the starting-point for any amount of drugs will be below 7 years. In this connection we refer to the recent case of *Morgan and Schlandt v. Attorney General* (24th April 2001) Jersey Unreported; [2001/88] in which, though Morgan was trafficking on a commercial basis, this Court took a starting-point of only 6 years. We consider that the case of *Morgan* is to be regarded as an exceptional case, and in general the *Campbell* guideline of a minimum starting-point of 7 years should be adhered to by the Courts of Jersey.

36 The Attorney General asked that similar guidance be given, in line with the *Campbell* guidelines, in respect of Class A drugs carried and sold in tablet form, including Ecstasy, LSD and Amphetamines. This Court is not in a position on this appeal to respond to this request. This Court does not have before it evidence of the degree of social and medical harm resulting from abuse of such drugs, evidence of any comparison of relative potency of such drugs as between themselves or as compared with e.g. heroin or cocaine, or evidence which would enable the Court to formulate bands of starting-points on lines similar to those set out above. Further, this Court has not been supplied with some of the relevant legal authorities, including the guideline cases in England and Wales, and the Court does not have detailed submissions from the Appellants' Counsel in this regard (rightly, because the appeals involve only heroin and cocaine). Further assistance from the Court will have to await suitable appeals in cases involving drugs such as Ecstasy.

37 In the above paragraphs the Court has not referred in detail to the helpful submissions of Counsel for the appellants, though all the points they made have been taken fully into account, and are reflected, for example, in the Court not accepting those aspects of the Attorney General's submissions which the Court regards as departing from the fundamentals of the *Campbell* guidelines. Therefore the Court does not extend this already long judgment by further exposition of their submissions.

38 The Court now returns to the three appeals in the light of the guidance already given.

39 *Rimmer*. In the view of this Court, the sentence passed by the Royal Court on Rimmer cannot stand. Rimmer was charged only in relation to trafficking in the cocaine he carried: he was not charged as a joint venturer with Holding, or in relation to the heroin which Holding carried. It was common ground between the Crown and the defence (and twice reiterated by the Crown during the course of the hearing before the Royal Court) that Rimmer was to be sentenced only in relation to the trafficking in cocaine with which he was charged. Though in some circumstances (which are likely to be rather rare) it may be permissible for the Royal Court to depart from the basis of sentencing which is common ground between the Crown and the defence, it is not permissible for the Royal Court to sentence a defendant on a basis outside the count charged, which has been the subject of a plea or finding of guilt, as has happened here.

40 Rimmer was a carrier of the cocaine of which the weight was 156.97 grams, with a street value of about £12,500. Though the relevant band set out above would indicate a starting-point of between 10 and 13 years, this Court considers that it would be unfair for Rimmer to be sentenced on the basis of the bands now set out for the first time, having regard to the history of the case set out above, and that the fair course is to assess the starting-point as at the time when the case came before the Royal Court. At that time the Crown correctly assessed the starting point at 9 years, and this Court adopts that period.

41 Rimmer does not have a great deal of mitigation, beyond his early but inevitable plea and his limited cooperation with the authorities. His record is not a good one, and he seems to have learned nothing from his recent sentence for drug trafficking in Spain. Nevertheless this Court considers that 2 years (out of 9 years) should be allowed for the mitigating circumstances. Therefore this appeal will be allowed and a sentence of 7 years will be imposed.

42 *Lusk*. He appeals only against the concurrent sentences of 8 years' imprisonment on Counts 1 and 3 of possession of heroin with intent to supply. The Royal Court adopted a starting-point of 10 years. The total quantity of heroin in his possession was 136.9 grams with a street value of between £41,070 and £61,605. He was engaged as a tester of the quality of the heroin, performing a vital service as between the dealers in England and the dealers in Jersey in resolving a dispute which had arisen as to the quality of the supply. While we entirely accept the explanation of his role which Mr Lusk gave, we consider that such role and involvement was at a higher level in the drugs trade than that of courier.

Having regard to these factors, and to the bands set out above, this Court can see no basis whatever for reducing the starting point below the 10 years adopted by the Crown and the Royal Court, which was at the time a starting-point entirely in line with the *Campbell* guidelines.

43 In his favour we take as mitigating factors his age, his lack of a relevant record of drug convictions (despite his bad record of conviction of other offences), and his early guilty plea to all counts. Miss Juste fully argued a number of points on mitigation to which we refer in turn:

(1) That he was given insufficient credit for an early guilty plea. We consider this submission to be unfounded as regards the Royal Court, but in any event this Court has given full credit for such plea.

(2) That insufficient discount was given for his role in the offences. This submission is based on a misapprehension as to the seriousness of his involvement. As already stated, his role as a tester was clearly at a higher level of involvement than that of a mere courier.

(3) That his explanation was treated with undue scepticism. This submission appears from the judgment to be unfounded. But in any event this Court entirely accepts his explanation.

(4) That he was wrongly regarded as going to be in possession for 2 – 3 days. It is clear that he would have had the drugs during at least 2 days.

44 We have anxiously considered all Mr Lusk's mitigation and all that has been said on his behalf by Miss Juste with considerable force and care. Despite the cogency of her submissions, this Court is satisfied that 2 years was the correct discount for the mitigation available to Lusk, and accordingly his appeal is dismissed.

45 *Bade*. Mr Bade was a courier carrying 86.43 grams of heroin with a street value between about £26,000 and £39,000. By reference to the bands set out above a starting-point of 10 years was appropriate. The Royal Court took a starting-point of 11 years. This was in any event too long, and there was an inexplicable inconsistency between the starting-point for him and the starting point of 10 years adopted by the Royal Court on the same day in the very similar case of a defendant named *Batchelor*. In our judgment 10 years is the correct starting-point.

46 As regards mitigation, he is 25 years old, pleaded guilty early, but has a poor record of convictions. Miss Fitz accepted that a 2 year discount for mitigation, as the Royal Court held, is appropriate. This Court agrees, and accordingly allows the appeal and substitutes a sentence of 8 years' imprisonment.

47 Article 35(4)(b) of the Court of Appeal (Jersey) Law 1961. In the case of each defendant the Court orders that no part of the time in custody pending appeal is to be disallowed in computing the time served in prison.

Further Matters

48 The Court now turns to some further matters which need to be set out in this judgment for future consideration by the Royal Court and the legal profession in Jersey.

49 The imminent coming into force of the Human Rights (Jersey) Law 2000 leads us to remind the Royal Court that in all sentencing the reasoning of the Royal Court needs to be set out fully. The defendant is entitled to full reasons, and full reasons are needed by the Court of Appeal when considering sentencing appeals and applications for leave.

50 The Consolidated Practice Direction of the Court of Appeal is set out at 2000 JLR Notes pages 32 *et seq*. Copies have been supplied to every practising advocate. In none of the criminal appeals heard by the Court of Appeal this week does it appear that any attention has been paid to the requirements of the Direction as regards the preparation of files of documents and authorities set out in paragraphs 3.3 and 3.4 of the Direction, even by the Law Officers Department. In some instances essential documents before the Royal Court were omitted. In every case authorities, whether from Jersey or from England and Wales, were jumbled together and then mixed with the court documents in the instant case. Relevant authorities, though referred to in the outline contentions, were omitted. There was duplication of authorities and documents. It seems not to be appreciated by the profession that;

(1) these were unnecessary breaches of the Court's Direction;

(2) they made the Court engage in the time-consuming task, which should have been unnecessary, of disentangling authorities and documents, and making certain that missing documents and authorities were supplied.

51 The Court of Appeal trusts that this is the last occasion on which it will have accepted files not assembled in accordance with the Direction, whether in criminal or civil appeals. In future if in any appeal or application the files are not assembled in accordance with the Direction the appeal may be stood out of the list, and the advocate concerned may be ordered personally to pay the costs thrown away, as indicated in paragraph 2.6 of the Direction.