9 pages.

ROYAL COURT
(Samedi Division)

139.

20th July, 1995

Before: The Deputy Bailiff, and
Jurats Myles, Bonn, Orchard, Gruchy,
Rumfitt, Potter, and de Veulle.

The Attorney General

- v -

Edward Robert Lundy

Sentencing by the Superior Number of the Royal Court, to which the accused was remanded by the Inferior Number on 8th June, 1995, following not guilty pleas and conviction on:

2 counts of	possession of a controlled drug with intent to supply it to another, contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978: Count 1 : Lysergide. Count 2 : Amphetamine Sulphate; and
2 counts of	possession of a controlled drug, contrary to Article 6(1) of the said Law: Count 3 : Lysergide. Count 4 : Amphetamine Sulphate.

AGE: 20

PLEA: Not Guilty.

DETAILS OF OFFENCE:

1) LSD 380 tabs value £1,900 - 88 micrograms. 2) Amphetamine sulphate 18 wraps value £270 460 mg. 2% by weight. Failed to stop when ordered by police; knocked over PC. Unco-operative, professional criminal.

DETAILS OF MITIGATION:

Claimed this was a technical offence - knew contents of packet were illicit - stolen gold chains or counterfeit money but not drugs - imputed knowledge - age - only a courier for a friend but no remorse.

PREVIOUS CONVICTIONS:

1/94	Possession of cannabis resin.	Binding Over Order.
6/94	No seat belt.	
8/94	Larceny of flag, receiving stolen property: £600.	Binding Over Order.

CONCLUSIONS:

Count 1: 9 years' Youth Detention.
Count 2: 1½ years' Youth Detention, concurrent.
Count 3: 1 year's Youth Detention, concurrent.
Count 4: 6 month's Youth Detention, concurrent.

SENTENCE AND OBSERVATIONS OF THE COURT:

Count 1: 8 years' Youth Detention.
Count 2: 1½ years' Youth Detention, concurrent.
Count 3: 1 year's Youth Detention, concurrent.
Count 4: 6 month's Youth Detention, concurrent.

Anonymous threatening letter shows dangers of being drawn into drug trafficking. Professional criminal. Carrying a short distance for a short time until stopped by police is not mitigation.

A.J.N. Dessain, Esq., Crown Advocate.
Advocate C.J. Scholefield for the accused.

JUDGMENT

THE DEPUTY BAILIFF: Edward Robert Lundy was convicted on 8th June, 1995, by the Inferior Number, of two counts of possession of a controlled drug with intent to supply it to another, contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978. The drugs were lysergide (LSD) and amphetamine sulphate and then there were two counts of possession of the same substances, contrary to Article 6 (1) of the Law.

It is not necessary for us to analyse the facts. Advocate Dessain read to us the judgment of this Court of 8th June, 1995, in which the facts were summarised. We do need, however, to refer to a summary of Warner -v- Metropolitan Police Commissioner (1969) 2 A.C. 256 which is set out at paragraphs 26-57 of the 1994 edition of Archbold. This passage is referred to at page five of the judgment of 8th June, and what we said was this:

"We have carefully examined in Court - and there was very little dispute in law between Counsel during the course of their addresses - the commentary which appears in Archbold (1994 Ed'n) at paragraphs 26-57, 26-58, and 26-59. I have explained to the learned Jurats the helpfulness of the propositions that emerge from the speeches in the case of Warner -v- Metropolitan Police Commissioner (1969) 2 AC 256. They are set out at paragraph 26-57 in Archbold (1994 Ed'n) in this way:

1. *A man does not have possession of something which has been put into his pocket or house without his knowledge.*

2. *A mere mistake as to the quality of a thing under the defendant's control is not enough to prevent him being in possession - for example, in possession of heroin, believing it to be cannabis or aspirin.*

3. *If the defendant believed that the thing was of a wholly different nature to that which in fact it was, then to use the words of Lord Pearce in Warner, the result would be otherwise.*

4. *In the case of a package or box, the defendant's possession of it led to the strong inference that he was in possession of the contents. However, if the contents were quite different in kind from what he believed, he was not in possession of them."*

Our judgement also refers to a passage from Warner and the judgement of May, LJ and that is on page six. It reads:

"Call it a policy decision if you will, call it a matter for the Jury, both Lord Pearce and Lord Wilberforce made clear that the question in the end is whether on the facts the defendant is proved to have, or ought to have imputed to him, the intention to possession or the knowledge that he does possess, what, is in fact a prohibited substance."

Advocate Scholefield makes the point that it is not apparent from the judgement of the Court whether the Court found Lundy guilty because he knew that the package contained drugs or whether he was believed when he stated, whilst in the witness box, that he thought it contained gold chains or counterfeit money.

Advocate Dessain argues that it makes little difference whether the Court imputes knowledge to or disbelieves Lundy, and in aid he calls, of course, the words of May, LJ.

There seems to us little doubt that the Jurats, having considered Warner, rejected Lundy's explanations. Advocate

Scholefield however, stresses that Lundy may have committed only a technical offence. He relies upon the Jersey Court of Appeal Judgement in Neild -v- A.G. (28th September, 1994) Jersey Unreported CofA. The guidelines followed by the sentencing Court were Clarkin, Pockett -v- A.G. (1991) JLR 213. Of that, the Appeal Court says at page 4:

> *"This case therefore is not the usual case of possession with intent to supply in that the Applicant did not intend to supply a user of LSD, but to supply a dealer from whom he had received the drugs for temporary custody. It may be that a more appropriate charge would have been one of being concerned in the supplying of a controlled drug, but a substitution of this charge would not have affected our opinion on the appropriate sentence.*
>
> *What we can and do say is that, in the circumstances, we do not find it appropriate to apply the guidelines laid down in Clarkin, Pockett -v- A.G. (1991) JLR 213, but untrammelled thereby we look at all the circumstances of the case to determine whether the sentence passed by the Court below was an appropriate sentence."*

That Clarkin, Pockett guideline which has now been replaced by the Court of Appeal's judgement in Campbell, Molloy and MacKenzie -v- A.G. (4th April, 1995) Jersey Unreported dealt only with the case of possessing a class A drug with intent to supply to others when the involvement of the defendant in drug dealing is comparable to the case of Fogg (1990) JLR 206.

In his work "Aspects of Sentencing in the Superior Courts of Jersey", C.E. Whelan says this in the recent noter up of May 1994-1995 at page 23:

> *"It is a matter for regret that in Neild and McDonough the Court generally rejects the guideline approach because of particular features of the cases which happened to be before it. The flexibility of the guideline approach seems simply to have been over looked ("To start from a bench mark before mitigation of 8 to 9 years' imprisonment in either of the hypothetical cases we postulated earlier in this Judgement would be patently excessive" (McDonough)).*
>
> *Additionally, it is noticeable that Neild is a problematic decision in any event. The Court approached questions of mitigation with a generosity for which it is difficult to see justification and which, frankly, collides with principle established in other cases. The accused seems (i) to have received credit because he was supplying a dealer, rather than individual consumers at first hand; (ii) to have received credit for having had earlier*

dealings with a drugs dealer, who was thus able to intimidate him; (iii) to have received credit for good character, despite a conviction for possession of a controlled drug two years earlier. It was true that the earlier case involved "only" a class 'B' drug, but the position, put flatly, is that the accused did not have a good character in the matter of controlled drugs, yet such was allowed in his favour.

Heads i) and ii) are especially worrying if they are to continue to attract mitigation. The stories are easy to concoct and impossible to test.

One can only observe that the decisions of the Court of Appeal in Neild and McDonough will stand until they fall."

The whole thrust of Advocate Scholefield's submission to us - and we have to say this: his submission was of the highest quality - was that he did not seek to challenge the seriousness of the situation. He asked us to accept, as he put it, that Lundy was merely the cats paw for Feagan, his accomplice, and that there was no evidence that Lundy was going to do anything other than hand over the packet to Feagan. He argued that knowingly transporting class A drugs in the belief that they were class B, is vastly different to transporting class A drugs in the belief that they were something quite different.

He was just doing Feagan a favour and had he not collected the drugs when he did, he felt that Feagan would have sought to obtain them himself that evening.

We see little merit in those arguments in the light of the decision that was reached by the learned Jurats in the court of trial.

But let us, for a moment, consider Advocate Dessain's points as he put them to us. He referred us to Campbell, Molloy and Mackenzie and drew some important matters from that important case. At page 5 the Court said this:

"The Attorney General submitted however that the local scene had changed since the Court had issued those guidelines in Clarkin and Pockett. There had been a dramatic increase in the amount of drugs coming into Jersey. He pointed out that this was a prosperous Island with low unemployment where the average disposable income was relatively high. There existed, particularly during the summer months, a comparatively young and transient population. Jersey was accordingly an attractive market for drug traffickers."

We have to say that in the large number of references passed to us there was an anonymous letter sent to Lundy in prison from London. It read *"So, Robby, word is out, you're thinking of burning your mother's house because that's what you'll be doing if you have already given any information to those cunts over there. I don't think you'll be as thoughtless as that would you, and remember after your family has got it, you'll be next so don't make it messy or else".*

There may be nothing in that letter at all, but it does show to us that somewhere, someone believes that Lundy had information to disclose. We are not going to make anything of that point except to bring this letter into the judgment to show that, apart from the dangers that may befall those who take these dreadful substances, those involving themselves in drugs can also be drawn into the most dangerous of situations.

We need to consider whether there is anything in the erroneous belief argument of Advocate Scholefield. Talking of a courier, the Court of Appeal in Campbell, Molloy and MacKenzie said this at page 9:

> ***"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 Campbell that an erroneous belief as to the type of drug being carried is not a mitigating factor."***

We must consider, in dealing with Advocate Scholefield's argument, whether or not Lundy took any care to establish what the packet contained, and in our view there is no evidence whatsoever (if he had been an innocent participant) that he took the slightest care or thought for a single moment of what the packet might contain.

There was no plea of guilty in this case and Lundy, on legal advice, retained his silence in his question and answer interview. Mr. Scholefield says that Lundy took a technical plea and even if he had pleaded guilty, this would inevitably have led on the facts to a "Newton" Hearing. That may well be, but we still have to face the fact that there was no plea of guilty made by Lundy at

any time, and that up to the moment of conviction he asserted that he was not guilty.

The value of the amphetamines was £270, the value of the L.S.D. was about £1,900 and there is no doubt that in both those cases there was a commercial quantity of both types of drugs.

The offence occurred when Lundy was still nineteen and before the Court of Appeal's judgment in Campbell, Mackenzie and Molloy. Nevertheless we have to say that the Court of Appeal said this at page 13:

> ***"Given the new guidelines now adopted by this Court, it would be impossible to say that the sentence of five and a half years was in any way excessive; indeed it would fall within the range of sentences commensurate with the seriousness of the offence. We would, therefore, not be disposed to alter the sentence, except for one factor relevant to the assessment of the seriousness of the offence, which has troubled us."***

We remain convinced, despite the arguments of Advocate Scholefield, that the starting point for this offence is between seven and twelve years. The accused is still young, but we have to say again, that youth is not a mitigating factor particularly where a commercial quantity of drugs are concerned. He has an enormous number of references which have been supplied to us and we have read all of these very carefully. They are impressive but none of them so much as hints at the facts of the defence as they were put to us, and which we repeated in our earlier judgment.

> ***"There are no bones about it, Lundy is a professional criminal, having learned his trade in Northern Ireland with Feagan. He went to school with Feagan and practised the art of selling stolen property at the numerous horse fairs which he attended on both sides of the Irish border. He described himself, at his present age of twenty, as highly successful; he only came to Jersey because he had apparently been threatened by the IRA: it appears that he was queering one of their pitches by his success and they ordered him out of Ireland for at least two years on pain of being shot, or at least knee- capped."***

Reading those references, it is a tragedy to note that someone with the skills, that Lundy undoubtedly has, should have chosen a life of crime. There is a criminal record for drugs: on the 6th January, 1994: possession of a controlled drug, namely cannabis resin. Lundy was bound over for six months on condition that he attend the alcohol and drug awareness course as directed, the drugs to be destroyed. We know nothing of that offence and

really it need not play a great part in our deliberations but we feel duty bound to point out that a conviction for a drugs offence as short a time ago as January, 1994, does exist.

There is, again, in our view, nothing whatsoever in Advocate Scholefield's argument of the fact that Lundy carried the drugs for only a short distance and for a short while before he was apprehended. In our view there is no merit in that argument at all.

Now Lundy, stand up, please. We feel, despite everything that your Counsel has said that you were deeply implicated in a very serious offence. Because the offence is so serious, there is no possible way that you can avoid a custodial sentence and your Counsel has accepted that in his address to us. I have to tell you, under Article 4 of the Criminal Justice (Young Offenders) (Jersey) Law 1994, that it is because of the seriousness of the offence that a custodial sentence is being imposed on you. I have also to tell you that when you leave prison you may be subject to a period of supervision in accordance with the provisions of Article 10 of that law.

Having regard to all the circumstances of the case and after listening carefully to everything that both Counsel have said, we agree that the starting band is completely right, but we are going to reduce the first count to one of eight years' Youth Detention. So our conclusions are that on the first count you will serve eight years' Youth Detention, on the second, one and a half years, concurrent, on the third, one year, concurrent, and on the fourth six months, concurrent, making a total of eight years' Youth Detention. We order of course, the forfeiture and destruction of the drugs, and a discharge of the binding over order.

Authorities

A.G.-v-Lundy (finding of Court) (8th June, 1995) Jersey Unreported.

Criminal Justice (Young Offenders)(Jersey) Law 1994.

Campbell, Molloy, and MacKenzie-v-A.G. (4th April, 1995) Jersey Unreported.

Neild-v-A.G. (28th September, 1994) Jersey Unreported CofA.

Whelan: "Aspects of Sentencing in the Superior Courts of Jersey": pp.16, 44, 45.

Whelan: "Aspects of Sentencing in the Superior Courts of Jersey": Noter Up: May, 1994 - May, 1995: pp.5, 21-24.