HUSSEIN KAYNAK, TOMAS HONZ, MUSLUM SIMSEK AND ALI AKSU

COURT OF APPEAL (Lord Justice Hutchison, Mr Justice Mance and Judge Goddard Q.C.): February 3, 1998

Importing heroin—importing heroin on large scale— length of sentence.

Sentences varying from 30 years down to 20 years for being concerned in the importation reduced to reflect the varying roles played by the appellants.

One appellant pleaded guilty to conspiring to import a Class A controlled drug and the other appellants were convicted of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a Class A controlled drug. The appellants were concerned in importing a total of almost 200 kilogrammes of heroin at just over 50% purity (100 kilogrammes at 100%) valued at almost £14 million. (One appellant was convicted in respect of a single consignment of 66 kilogrammes.) Sentenced to 24 years', 26 years', 30 years', and 20 years' imprisonment respectively.

Held: (considering *Scaramonie* (1992) 13 Cr.App.R.(S.) 702, *Richardson* (1994) 15 Cr.App.R.(S.) 876, *Serdeiro* [1996] 1 Cr.App.R.(S.) 251, *Middelkoop and Telli* [1997] 1 Cr.App.R.(S.) 423, and *Mulkerrins and Sansom*, June 20, 1997 unreported), the third appellant (sentenced to 30 years) was described as a 'mid-ranker' in the conspiracy; his sentence would be reduced to 24 years. The sentence on the fourth appellant (who pleaded guilty) would be reduced from 20 years to 15 years; the sentence on the first appellant, who was described as a courier, would be reduced to 18 years. The sentence on the second appellant, who had supplied facilities on motor coaches for use in importing the drugs, would be reduced to 18 years.

Cases cited: *Scaramonie* (1992) 13 Cr.App.R.(S.) 702, *Richardson* (1994) 15 Cr.App.R.(S.) 876, *Serdeiro* [1996] 1 Cr.App.R.(S.) 251, *Middelkoop* and *Telli* [1997] 1 Cr.App.R.(S.) 423, and *Mulkerrins* and *Sansom*, June 20, 1997 unreported.

References: importing heroin, *Current Sentencing Practice* B11-2.3A.

A. Fraser, N. Shepherd, Miss C. Wade and *M. Wolkind* for the respective appellants.

MANCE J.: On May 22, 1996 in the Crown Court at Southwark the appellant Aksu pleaded guilty and on August 2, the other three appellants were convicted and all the appellants were sentenced as follows: Aksu for conspiracy to contravene section 170(2)(b) of the Customs and Excise Management Act 1979 in relation to the importation of a Class A controlled drug, 20 years' imprisonment; Honz, being knowingly concerned in the fraudulent evasion of the prohibition on importation of a Class A drug, 26 years' imprisonment; Simsek, being knowingly concerned in the fraudulent evasion of the prohibition on importation of a Class A drug, 30 years' imprisonment; and Kaynak, being knowingly concerned in the fraudulent evasion of the prohibition on importation of a Class A drug, 24 years' imprisonment. All four appellants appeal against sentence, in the case of Aksu, Honz and Simsek, by leave of the single judge, and in the case of Kaynak, by leave granted by the Full Court on December 4, 1997.

The facts, in outline, are these. The appellant Honz was a Czech coach driver. The other appellants were all residents of the United Kingdom. In July 1995 Honz's coach was seen by customs officers parked on the Albert Embankment in London. Honz was seen to hand packages to Simsek and Aksu. Officers maintained surveillance. On September 10, 1995 (a later occasion) Kaynak and Aksu were stopped driving a car that contained 66 kgs of heroin. Simsek was also stopped and found to have large sums of cash; and a bag identical to that in which the heroin was packed was in his possession. Aksu's car was parked in the car park of Simsek's apartment block and was found to contain a further 73 kgs of heroin. A yet further 9 kgs or so were found in Kaynak's flat. On September 15, 1995 Honz's coach was once again seen parked on the Albert Embankment. He was clearly waiting for someone, who did not turn up. Eventually Honz returned to Ramsgate Docks, with a view to leaving the country, but there the coach was searched and it was found to contain 50 kgs of heroin.

Honz raised a defence that he had been placed under duress to bring in the heroin; Simsek a defence that he had been associating with his co-accused for innocent purposes and did not know of the heroin; and Kaynak a defence that he had been placed under duress. None of these defences was accepted by the jury, and applications for leave to appeal against conviction on behalf of Honz, Simsek and Kaynak were refused by the Full Court.

The learned judge in sentencing used words which have their origin not only in, as he said, things that he had said in previous cases, but also in one of the authorities to which we have been referred, *Richardson*. Hard drugs, he said, caused mental and physical misery, injury to health, sometimes death and were often the cause of dishonesty and violence. Vast resources of the state were required to fight drug-related crime and to deal with the problems of addiction. He concluded that trafficking of drugs at this level was in the category of 'wholly abnormal offences', as defined by Lawton L.J. in *Turner* 61 Cr.App.R. 67. He pointed out that the total quantity in this case was just short of 200 kgs, which, at a purity of just over 50 per cent, was equivalent, at 100 per cent, to a quantity a little over 100 kgs, with a value just short of £14 million.

He expressed the view, and this is a matter to which significance attaches in the context of some of these appeals, that heroin had been imported not simply during the September trip by Honz but also during his previous July 1995 trip. He mentioned that expressly in respect of the sentence on Honz. In that regard, it seems to us that he was in error. Although no doubt the finding was fully justified by the material before him, the fact is that the only charge against Honz was being knowingly concerned in

the fraudulent evasion of the prohibition on importation of a Class A drug in September 1995. The quantity in September was at least 50 kgs, worth £3.5 million. It seems to us that, however obvious it may have been on the facts that Honz was involved in a previous importation, it was for the September importation that he fell to be sentenced; and that is a matter, as we have said, of some materiality when we come to consider his particular sentence.

The judge also indicated that he had no doubt that others should have been in the dock, who would, in all probability, have been higher in the chain of command than the appellants. That, on the evidence, was clearly made good: the codes Mr X and Mr Y were used to identify specific personalities, who the evidence disclosed to have been involved at a higher level even than Simsek. The judge said it was clear—and this is not in issue—that the appellants' further presence in the country was not conducive to the public good and he recommended all their deportations. Turning to the roles of the appellants, he identified them in a way which is absolutely central to this appeal, as follows:

> "Simsek, in my view, you were an active, enthusiastic and ruthless mid-ranker in this conspiracy. You were effectively involved, on the evidence, in all the drugs seized and all the events covered by this case, including July 2. Aksu, I take into consideration your plea and other matters that have been urged on me, but you too were a mid-ranker, if slightly below Simsek, and more or less as involved as he was. Kaynak, you were a courier-cum-errand boy of lower rank. Your involvement started on July 5, but you were found in possession of the 66 kgs of heroin, and . . . a smaller quantity was found in your premises, 7 kgs (or thereabouts) plus a kilo of material ready for sale on the street. Honz, you were a high-ranking courier with two coaches capable of carrying heroin in secret compartments and no doubt for very high reward. You were prepared to carry very large quantities and . . . were caught in September with no less than 50 kgs, worth £3.5 million."

Then he went on, in the passage on which we have already remarked, to say that he had no doubt that Honz had brought in heroin in July and that it was a substantial quantity, though he could only guess at what it was. He then passed the sentences which we have mentioned.

Before us, there appeared in the skeletons a substantial challenge to the proposition that the facts of this case fell within the category of the "wholly abnormal", within the definition of *Turner*. In the oral submissions which we have heard, however, attention was primarily focused on a number of authorities which were suggested to give direct guidance as to the appropriate level of sentencing. Bearing in mind that there can never be an absolute cut off between the "wholly abnormal" and the "normal", and bearing in mind that those are authorities coming from this area of criminal activity, it seems to us that that is a more useful approach to this particular appeal.

Counsels' broad submissions were that all the sentences were excessive as being out of line with these authorities. Counsel also submitted that they were out of line if one considered what period might in practice be likely to be recommended by a judge to be served by way of punishment and deterrence in the event of a life sentence. It seems to us that that is a less helpful approach and that it is more useful to look at the suggested comparable authority. Counsel also, on behalf of their individual clients, analysed each particular defendant's position with a view to showing that the judge had placed him at the wrong level. There is, as will appear, to our mind some force in the particular case of Honz in the argument that he was assigned too high a relative level of responsibility.

On all these approaches broadly the same authorities are relevant, starting with

Scamaronie [1992] 13 Cr.App.R.(S.) 702. A senior Peruvian diplomat was involved in importing a large quantity of cocaine with the aid of diplomatic paraphernalia; he was using, amongst other things, a Peruvian diplomatic pouch. He was identified by the judge as a senior figure in the Peruvian drug industry. He was working in this case with another, who was also identified as a prime mover. He eventually pleaded guilty to being concerned in the importation of a Class A drug. The drug in question was cocaine, almost 20 kgs, at 95 per cent purity, with a street value marginally in excess of £4 million, that is in March 1989, and imported through Heathrow Airport. The sentence which had been passed was 20 years. The appellant, the Peruvian diplomat, had been regarded as more deeply involved than the other appellant who also received 20 years. The appellant had been given a discount for his plea of guilty in the sentence of 20 years, and the Court of Appeal said this:

> "Suffice to say that the learned judge stated in terms that he was discounting this sentence to give effect to the plea and to the assistance given regarding Roman. We have no doubt that he was doing as he stated. We believe, indeed, that those mitigating factors are properly reflected in the sentence passed. But for them we have no doubt that the appropriate sentence in this case . . . would have been in the region of 25 years, or perhaps even more. It certainly cannot be said that a sentence of 20 years of itself indicates a failure to take proper account of the mitigating factors here present."

Then, turning to *Richardson* (1994) 15 Cr.App.R.(S.) 876. *Richardson* was described as "an important member of the team" with a "highly significant role in the whole enterprise" of importing drugs to a street value of £50 million, that is, 44 kgs of cocaine on one occasion and 144 kgs on another, plus 2 tons of cannabis. He was sentenced to 20 years' imprisonment, taking account of a plea of guilty. The Court considered apparent inconsistent authorities, *Garner* in the Court of Appeal in March 1991 and *Scamaronie*, to which we have referred, and evidently preferred *Scamaronie*; if they approved what was there said. However, it considered, on the facts of *Richardson* itself, that a deduction of five years from a 25-year sentence did not sufficiently provide the appropriate discount for his plea of guilty. Both those cases support the proposition that very important members of a team with highly significant roles, on conviction, can and should be sentenced to sentences in the region of 25 years or, possibly, sometimes even more.

In *Richardson* there were also words, which are of some relevance to the particular appeals of Simsek and Aksu, about the relevance of assistance to authorities; it is said at page 879:

> "Assistance . . . before sentence will also result in a reduction. The extent of the discount will depend on a number of factors such as the actual value of the assistance, the earnest that it may sometimes give of contrition, the risk to the offender and his family of possible reprisals, and any evidence as to the results of the assistance given."

The Court then went on:

> "However, assistance offered or purported to be given after sentence, with a view to obtaining a reduction in this Court, will not usually achieve that result, especially if the assistance could have been given before sentence."

That is confirmed by other authorities to which counsel referred us.

The further cases of *Serdeiro* and *Middelkoop* are primarily relevant to the appeals of Kaynak and Honz. In *Serdeiro* [1996] 1 Cr.App.R.(S.) 251, an importer of cocaine arrived at Heathrow Airport and was found to have over 20 kgs, with a purity of 90 per cent, in his suitcase. That had a street value estimated at no less than £3.25 million in 1992. The importer described how he had gone to Rio de Janeiro, where he had been given the suitcase and asked to bring it in. He was convicted rather than

pleaded guilty. The Court upheld a sentence of 18 years' imprisonment, pointing out that the fact that he had a good character was not of the same significance as in some other areas of the law, since couriers almost invariably are chosen for that amongst other features, pointing out also that he was not a big figure in the drugs trade, although he was a significant one, and stating that, in the circumstances, the proper sentence was at the upper end of the range for a courier. The Court concluded that a sentence of 18 years could not be said to be either wrong in principle or manifestly unjust.

Lastly, in *Middelkoop and Telli* the Court was concerned with two gentleman; both were convicted in respect of an importation of 90 kgs of 65 per cent pure heroin; there were also some lesser charges in respect of the export of heroin in the case of *Telli*. The appellant *Middelkoop* was apprehended after arriving by car ferry driving a vehicle which was towing a horsebox which was found to contain the imported heroin. The appellant *Telli* was the moving figure, acting at a very high level, as the judge concluded—in fact, in the judge's words "Mr Big", organising and orchestrating the arrangements for the importation of the payment for this large quantity of heroin to come into this country. Notwithstanding that, in the light of the fact that he pleaded guilty, the Court of Appeal felt it appropriate to reduce his sentence from 20 years to 18 years.

It is evident, in the light of the citation of *Scamaronie* and *Richardson* in that case, that the Court must have started with a level of around 25 years, or possibly even slightly more, on a conviction. As to *Middelkoop*, he was a 26-year-old Dutch citizen, married with two young children, with only two minor offences of dishonesty on his record. He was not at the same level in the hierarchy of the conspiracy as *Telli*, and the Court concluded that the sentence which had been passed on him of 20 years should be reduced to 16 years, having regard to the much lesser part that he played, and having regard also to what the Court described as his youth and the hardship of his serving a sentence in a foreign country. Those are factors which have some particular application to Honz, although he is slightly older than *Middelkoop* was.

There is one final case that was put before us which appears to us to involve a different level of offending to any of the other cases or, indeed, to the present. That is *Mulkerrins* and *Sansom* (June 20, 1997 CA, unreported), a case involving some 795 kgs of cocaine, with a street value of approximately £125 million. Although in the course of the judgment the Court recorded that the judge recognised that there was evidence of others involved in this criminal enterprise at a level even higher than the two appellants, nonetheless it is quite apparent that both the appellants in that case had very high-ranking involvement; indeed, *Mulkerrins* was said to be the financier. He had certainly been heavily involved in both the purchase of the boat which was used for the importation and in visiting New Orleans to supervise its fitting out for the purpose. He had also been involved in changing huge sums of money at a foreign exchange shop, some £1.2 million into Swiss Francs, to buy drugs. Sansom, the other appellant, was also heavily concerned; he was no doubt responsible for the distribution of the drugs at this end. They each received 30 years, and those sentences were upheld.

Looking at the present sentences in the light of those authorities, it seems to us that counsel's submissions that the present sentences were too high generally are made good. There is no doubt that Simsek was a significant figure, the most significant figure of all those before us, described by the judge as "an active, enthusiastic and ruthless person" but nonetheless also described as a "mid-ranker" in this conspiracy, for reasons which we have already indicated. He was not at the same level as *Mulkerrins* and *Sansom* or even, probably, *Scamaronie* or *Richardson*. It is clearly established there were others who were the dominating minds. It seems to us, in the

light of those conclusions, that the right sentence in respect of him is one of 24 years, and to that extent the sentence of 30 years passed will be varied and reduced to 24 years' imprisonment. In respect of him, such assistance as may have been tendered after the event counts for nothing in terms of mitigation, for reasons which we have already mentioned.

Turning to Aksu next, he was also described as a mid-ranker, slightly below Simsek, and that must be reflected in the starting point. There must also be reflected in respect of him, and this counts as a very important factor in these cases, his plea and such assistance as he tendered. In the circumstances, looking at those matters, his sentence of 20 years should be reduced to 15 years' imprisonment. Kaynak, described by the judge as a courier-cum-errand boy of lower rank, clearly played a significant part. He had possession and was evidently responsible for distribution, but equally clearly, on the evidence before us, he was not an organiser, not a part of the real brains of this organisation. He was being used, no doubt willingly, but he was not even in the middle rank, being essentially a cog. It seems to us that his sentence of 24 years was again considerably too high and should be reduced to 18 years.

Honz was more than a mere driver or courier, the description which counsel has consistently urged on us. He supplied facilities on coaches, of which, on any view, he had sufficient control to enable their adaptation and use for drug smuggling, even if he was not also their owner or operator. Counsel has put that last matter in issue, but it seems clear on the statements before us that, whether or not he was, and he may well have been despite the drugs trafficking enquiry findings, is ultimately immaterial. He had sufficient control over them to adapt and use them for the relevant purposes, and clearly did so. On one view, perhaps a more severe attitude might be taken towards his involvement than that of, for example, *Serdeiro's* who was merely involved in the carriage to this country of a suitcase. On the other hand, we must have regard to the treatment given to *Middelkoop* in the authority to which we have referred. Overall, and perhaps this is the most important consideration, it seems to us that he has, in the context of this case, the same level of general culpability, albeit in a different role, as Kaynak. The right sentence in respect of Honz, therefore, is one which somewhat varies the relationships of the sentences which the judge thought appropriate and reduces Honz's sentence of 26 years to 18 years.

Those then are the varied sentences which this Court thinks appropriate in respect of these appellants, and to those extents the appeals will be allowed.