JERSEY / JUDGMENT

# 1999/81 - Stevenson v AG [1999] UR 81 (10 May 1999)

**[1999] UR 81**

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COURT OF APPEAL 10 May 1999 Before: The Rt Hon The Lord Carlisle of Bucklow, PC, QC, (President) RC Southwell Esq QC The Hon M J Beloff QC IN THE MATTER OF The application, under Article 24(b) of the Court of Appeal (Jersey) Law, 1961, of ALEXANDER MCMILLAN STEVENSON for leave to appeal against his CONVICTION at a Criminal Assize on 3 November 1998, following a not guilty plea, entered on 17 July 1998, to: 1 count of robbery; and The application, under Article 24(c) of the Court of Appeal (Jersey) Law, 1961, of ALEXANDER MCMILLAN STEVENSON for leave to appeal against a TOTAL SENTENCE OF FOUR YEARS AND ONE MONTH'S IMPRISONMENT, passed on 2 December 1998 [1998.244] , by the Superior Number of the Royal Court, to which the Appellant was remanded on 3 November 1998, following his conviction on the said count of robbery, on which count a sentence of 4 years imprisonment was passed; and following a guilty plea, entered on 17 July 1998 to 1 count of possession of a controlled drug (cannabis resin), contrary to Article 6(1) of the Misuse of Drugs (Jersey) Law, 1978, on which count a sentence of 1 month imprisonment, consecutive, was passed. Leave to appeal against conviction and sentence was refused by the Bailiff on 4 January 1999. The Appellant exercised his entitlement, under Article 39 of the Court of Appeal (Jersey) Law, 1961, to renew the application to the plenary Court on 6 January 1999. Appeal against refusal by the Royal Court on 26 March 1999 [1999.059] , of an Application, under Article 35(2) of the Court of Appeal (Jersey) Law, 1961, for admission to bail pending determination of an application for leave to appeal against conviction and sentence, the said application for leave to appeal to be heard on 14 June 1999. Or, in the alternative, application to the Court of Appeal for admission to bail pending determination of the said application for leave to appeal TJ Le Cocq Esq Crown Advocate Advocate Mrs SA Pearmain for the Applicant

## JUDGMENT

SOUTHWELL, JA: Mr. Stevenson was convicted, following a not guilty plea, on 3 November 1998, on one count of robbery. He also pleaded guilty to one count of possession of a controlled drug. On 2 December 1998, the Superior Number of the Royal Court sentenced him to a total of 4 years and 1 month's imprisonment. On 4 January 1999, he was refused leave to appeal against conviction and sentence by a Single Judge. He renewed his application for leave to the plenary Court of Appeal. On 16 March 1999, this Court, having heard the application in part, adjourned it for rehearing so that another advocate could be appointed to represent him. On 26 March 1999,

he applied to the Royal Court, under Article 35(2) of the Court of Appeal (Jersey) Law, 1961, - which I will refer to as the 1961 Law - for admission to bail pending determination of his application for leave to appeal. That application for leave to appeal is to be reheard by this Court at the Sitting commencing on 14 June 1999. His application for bail was refused by the Royal Court, which applied the principles laid down in AG -v- Mallet (1 March 1991) Jersey Unreported, but noted in (1991) JLR N-7. Advocate Pearmain on his behalf applies to this Court relying either on a right of appeal to this Court, or on a separate jurisdiction of this Court to grant bail pending an application for leave to appeal. The application to this Court has involved, as the main issues on which submissions have been made:-

1. Whether an appeal lies to the Court of Appeal from a refusal of bail by the Royal Court.
2. Whether the Court of Appeal has itself jurisdiction to grant bail pending an application for leave to appeal.
3. What are the correct principles to be applied to an application for bail after conviction and sentence and pending the hearing by this Court of either an application for leave to appeal or a substantive appeal?
4. Whether in the circumstances of this case, assuming that the Court of Appeal has jurisdiction to grant bail, bail should be granted to Mr Stevenson pending his application for leave to appeal against conviction and sentence. The Court has heard able submissions by Advocate Pearmain for Mr Stevenson and by Advocate Le Cocq for the Crown. JURISDICTION The question of jurisdiction depends on the interpretation of the provisions of Part III of the 1961 Law, as amended, which deals with criminal appeals. Article 1 of the Law, which applies to both civil and criminal appeals provides that: "There shall be a Court of Appeal with such jurisdiction as is conferred on it by this law." Turning to Part III, Article 24 permits a person convicted on indictment by the Royal Court to appeal to the Court of Appeal under Part III: "(a)against his conviction, on any ground of appeal which involves a question of law alone; and (b)with the leave of the Court of Appeal, or upon the certificate of the judge who presided at his trial that it is a fit case for appeal, against his conviction, on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court to be a sufficient ground of appeal; and (c)with the leave of the Court of Appeal, against the sentence passed on his conviction, unless the sentence is one fixed by law." And then there is a proviso to which it is unnecessary to refer. Article 42 provides in effect that the rights of appeal in Article 24 apply also to persons convicted by the Royal Court other than on indictment. The matter of bail pending appeal is dealt with expressly in Article 35(2) which provides: "(2)The Royal Court may, if it sees fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal." By Article 42(1) ""appellant" includes a person who has been convicted and desires to appeal under this Part of this Law". This includes a person such as Mr Stevenson who has made a written application for leave to appeal which is pending before this Court. The wording of Article 35(2) expressly places the jurisdiction in relation to the grant of bail in the hands of the Royal Court, not of the Court of Appeal. This may be

contrasted with the position in Guernsey, where the equivalent provision places the jurisdiction with the Court of Appeal, as did the predecessor to the 1961 Law, the Court of Appeal (Channel Islands) Order 1949. Thus at first sight it seems clear that the intention of the legislators in Jersey, when bringing the 1961 Law into effect, was that in Jersey the power to grant bail should be with the Royal Court, and not the Court of Appeal. That was the conclusion of this Court in Weston -v- AG (18 January 1980) recorded in the Act of Court.. Mrs Pearmain has however argued that the Court of Appeal has an inherent jurisdiction to grant bail, and in this connection she relies particularly on Article 28 of the 1961 Law which provides: "GENERAL POWERS OF COURT. The Court of Appeal shall, for the purposes of and subject to the provisions of this Part of this Law, have full power to determine, in accordance with this Part of this Law, any questions necessary to be determined for the purpose of doing justice in the case before it." The additional power given by Article 28 is restricted by the words: "for the purposes of and subject to the provisions of this Part of this Law" and "in accordance with this Part of this Law." Article 28 does not, on its face, give to the Court of Appeal a power which is, by the express words of Article 35(2), given to the Royal Court alone. What Article 28 enables the Court of Appeal to do is to determine questions including questions of law or fact which arise for determination in the course of an appeal, and which this Court must determine for the purpose of doing justice in the appeal. Article 28 does not extend the statutory jurisdiction of the Court of Appeal, but merely gives power to determine questions arising within that statutory jurisdiction. We are satisfied that Article 28 does not provide any basis for the Court of Appeal to assume a power to grant bail which by Article 35(2) is given to the Royal Court alone. Accordingly, on the proper interpretation of the 1961 Law, in our judgment this Court has no jurisdiction to grant bail. That jurisdiction could come into existence only if the 1961 Law were amended to make provision expressly for the Court of Appeal to grant bail. An English case, R -v- Secretary of State for the Home Department ex parte Turkoglou [1988] 1QB 398 CA, was referred to by a Member of this Court. In that case the Court of Appeal (Civil Division) concluded that in certain circumstances, in civil proceedings concerning judicial review of a decision of an immigration officer, the Court of Appeal (Civil Division) had an inherent jurisdiction to grant bail in proceedings originating in that Court. Having regard to the entirely different statutory framework, we do not derive any assistance from the decision in Turkoglou, and in any event we have some doubts whether the conclusion of the English Court of Appeal as to its inherent jurisdiction was a correct decision, having regard to the principles expressed in the House of Lords in Connelly -v- DPP [1964] AC 1254; [1964] 2 All ER 401 by Lord Morris at p1301. Those principles were adopted as part of Jersey Law by this Court in Le Masurier Ltd -v- Alker

(1992) JLR 123 , and are inconsistent with any extension of the jurisdiction of this Court in criminal matters so as to include a power to grant bail pending the hearing of an appeal or an application for leave to appeal. EUROPEAN CONVENTION ON HUMAN RIGHTS We were also referred to the Convention so far as relevant to this matter. The Convention is not part of the Law of Jersey. In Benest -v- Le Maistre

(1998) JLR 213 this Court indicated the limits for the application of the Convention in domestic proceedings, adopting the approach of the English Court of Appeal in Derbyshire CC -v- Times Newspapers Ltd

[1993] 1 All ER 1011 : "None of the treaties has yet been incorporated into the domestic law of Jersey, although there are some proposals for the incorporation of the ECHR. Accordingly, their relevance for the purposes of Jersey law cannot be put higher than it was put by the English Court of Appeal in Derbyshire CC -v- Times Newspapers Ltd: (a) to resolve ambiguities in legislation; (b) in considering the principles on which the court should exercise a discretion; and (c) when the common law is uncertain." The Convention does not deal with bail specifically. However there is no doubt at all that the deprivation of a persons liberty "after conviction by a competent court" is expressly permitted by Article 5(1)(a) as was specifically referred to in the case of Wemhoff (10 January 1968) a decision of the European Court of Human Rights; I quote paragraph 9 which appears in the Lexis printout at p17: "It remains to ascertain whether the end of the period of detention with which Article 5(3) is concerned is the day on which conviction becomes final or simply that on which the charge is determined, even if only by a court of first instance. The Court finds for the latter interpretation. One consideration has appeared to it as decisive, namely that a person convicted at first instance, whether or not he has been detained up to this moment, is in the position provided for by Article 5(1)(a) which authorises deprivation of liberty "after conviction". This last phrase cannot be interpreted as being restricted to the case of a final conviction, for this would exclude the arrest at the hearing of convicted persons who appeared for trial while still at liberty, whatever remedies are still open to them. Now, such a practice is frequently followed in many Contracting States and it cannot be believed that they intended to renounce it. It cannot be overlooked moreover that the guilt of a person who is detained during the appeal or review proceedings has been established in the course of a trial conducted in accordance with the requirements of Article 6. It is immaterial, in this respect, whether detention after conviction took place on the basis of the judgment - as in the Federal Republic of Germany - by reason of a special decision confirming the order of detention on remand." In Wemhoff the Court also stated that there may be an entitlement to "release pending trial" if trial within a reasonable time cannot be guaranteed and I quote part of paragraph 5 which appears on p16 of the Lexis printout: "Article 5, which begins with an affirmation of the right of everyone to liberty and security of person, goes on to specify the situations and conditions in which derogations from this principle may be made, in particular with a view to the maintenance of public order which requires that offences shall be punished. It is thus mainly in the light of the fact of the detention of the person being prosecuted that national courts, possibly followed by the European Court, must determine whether the time that has elapsed, for whatever reason, before judgment is passed on the accused has at some stage exceeded reasonable limit, that is to say imposed a greater sacrifice than could, in the circumstances of the case, reasonably be expected of the person presumed to be innocent. In other words, it is the provisional detention of accused persons which must

not, according to Article 5(3), be prolonged beyond a reasonable time. This is, moreover, the interpretation given to the text by both the German Government and the Commission." The submission by Mrs Pearmain that there is an entitlement to or expectation of bail pursuant to Article 6(2) fails on the express words of that provision which reads: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". The presumption of innocence upon which the appellants counsel relied to establish a right to liberty - and hence to bail - pending appeal against conviction, accordingly does not survive the conviction itself. This is implicit in the passage from Wemhoff which we have cited. It follows, that even if, which we reject, there were any ambiguity in the governing legislation, the Convention could not be prayed in aid to confer a jurisdiction on the Court of Appeal which is not expressly conferred upon it by that legislation. THE TEST Though strictly not necessary in view of our decision on jurisdiction, we have been asked to state whether the test applied by the Royal Court in considering applications for bail under Article 35(2) is in fact the correct test. Article 35(2) states: "The Royal Court may, if it sees fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal." It gives to the Royal Court an unfettered discretion and is to similar effect to the words to be found in section 19 of the English Criminal Appeals Act, 1968. How, then, should that discretion be exercised, bearing in mind that the Court is inevitably dealing with cases where a conviction has already occurred? In R -v- Watton (1978) 68 Cr. App. R 293 the then Lord Chief Justice, Lord Lane, said that the general effect is that bail is granted only where it appears prima facie that the appeal is likely to be successful or where there is a risk that the sentence will have been served by the time the appeal is heard. He went on to say "... the true question is, are there exceptional circumstances, which would drive the Court to the conclusion that justice can only be done by the granting of bail?" That is the test that has been applied by the English Courts and has equally been adopted by the Jersey Royal Court as the correct test to apply - see AG -v- Mallet (already cited) and R -v- Swanston (11 September 1998) Jersey Unreported. We would emphasise the importance of the words "which would drive the Court to the conclusion that justice can only be done by the granting of bail." We consider that to describe such ‘circumstances’ as would lead to that conclusion as ‘exceptional circumstances’ is correct. We bear in mind that the Convention can be used to inform a judicial discretion (Benest -v- Le Maistre). We do not, however, consider that there is anything in the Convention which should compel a retreat from or adjustment of the Watton formula, which has stood the test of time. Finally, it was argued before us that in this case the learned Bailiff was wrong in not finding that such exceptional circumstances existed. Since we have concluded that we have no jurisdiction to hear this application for bail and have expressed our view that the test applied by the Royal Court was the correct one, we see no need to comment on the merits of this particular case. Indeed, in view of the fact that the application is to be heard by this Court at its next sitting in June of this year and that any such comments would require us to take a preliminary view about the merits of the appeal we consider that it is undesirable that we should do so in advance of that hearing. The application is accordingly dismissed. Authorities Court of

Appeal (Jersey) Law, 1961: Articles 1, 24, 28, 35(2), 42 Court of Appeal (Guernsey) Law, 1961; Article 37(1) Court of Appeal (Channel Islands) Order 1949 McMahon & Proberts -v- AG

(1993) JLR 108 In Re an Advocate

(1978) JLR 193 R -v- Jefferies (1968) 3 All ER 238 R -v- Collins (1969) 3 All ER 1562 Weston -v- AG (18 January 1980) Act of Court of Appeal Criminal Appeals Act, 1907: ss 1(7); 14(2) C Le Masurier Ltd and Clarke -v- Alker and Northern Inn Ltd

(1992) JLR 123 Connelly -v- DPP [1964] AC 1254; [1964] 2 All ER 401 AG -v- Mallet (1 March 1991) Jersey Unreported; (1991) JLR N.7 R -v- Watton (1978) 68 Cr. App. R 293 Young -v- AG (25 November 1998) Jersey Unreported [1998.235] AG -v- Swanston (11 September 1998) Jersey Unreported [1998.187] Whelan: "Aspects of Sentencing in the Superior Courts of Jersey": pp 74-75 Ibid: 1994-1995 Noter Up: pp29-30 König -v- FRG A27 (1978). Eckle -v- FRG A51 (1982) Benest -v- Le Maistre

(1998) JLR 213 CofA Derbyshire CC -v- The Times Newspapers

[1993] 1 All ER 1011 Bassington Ltd & Ors -v- HM Procureur (14 th December, 1998) Court of Appeal of Guernsey Criminal Appeal Act 1968: s19 Wemhoff (10 January 1968) ECHR R -v- Home Secretary, ex parte Turkoglou [1988] 1 QB 398 CA Dhillon -v- Home Secretary (1988) 86 Cr. App. R 14 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII


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