

JERSEY / JUDGMENT

AG v Batho [2002] JRC 216 (11 November 2002)

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[2002] JRC 216 [New search] [Help] 2002/216 ROYAL COURT (Samedi Division) 11 November, 2002 . Before: M. C. St. J. Birt, Esq., Deputy Bailiff, sitting alone. The Attorney General -v- Steven Maurice Batho. On 26 th July, 2002, the Defendant pleaded not guilty to the following counts and was remanded for trial before the Inferior Number of the Royal Court, en police correctionnelle : 1 count of: Possession of a controlled drug with intent to supply, contrary to Article 6(2) of the Misuse of drugs (Jersey) Law, 1978 : Count 1: cannabis. 1 count of: Possession of a controlled drug, contrary to Article 6(1) of the Misuse of drugs (Jersey) Law, 1978 : Count 2: ecstasy. Preliminary application by the Defendant for an Order excluding certain statements given by the Defendant during police interviews M. St. J. O'Connell, Esq., Crown Advocate. Advocate D. Cadin for the Defendant.

JUDGMENT.

THE DEPUTY BAILIFF: 1. The defendant is charged with possession, with intent to supply, of cannabis resin. He is the sexton of St. Saviour's Parish Church. He is responsible amongst other things for the maintenance of the cemetery. He is based in a shed in the corner of the church grounds. 2. In April, 2002, a quantity of bars of cannabis resin (approximately 7½ kilos) were found hidden in various places about the cemetery, most of them in close proximity to the defendant's shed. Upon arrest he was questioned about the cannabis and denied all knowledge of it. He said that someone else must have put the drug there. It was nothing to do with him. 3. The main issue at the trial, therefore, will be whether he was aware of the presence of the cannabis in the cemetery for which he had responsibility. Advocate Cadin has applied for certain parts of the police interviews to be excluded. These relate, first, to the defendant's use of cannabis and, second, to certain questions about his finances following what Advocate Cadin described as a reverse caution. There are some minor additional passages which Advocate Cadin also wishes to have excluded. The references to cannabis. 4. During his interviews the defendant was asked whether he used cannabis. Initially he said that he had done so once or twice in Europe, the last

time being a year ago. He agreed to provide a urine sample and confirmed that there was no reason why it should show traces of cannabis. It would seem from the text of the interview that the sample apparently proved positive because he then admitted to eating a cake which had been laced with cannabis the previous weekend at a friend's birthday party in Alderney. Later in the interview he admitted to smoking cannabis occasionally at home and said that he had probably last smoked it at the Alderney weekend. 5. Mr Cadin challenged the admissibility of this evidence. He reminded the Court of Article 2(2)(c)(i) of the Loi (1908) au sujet des Témoins et Informateurs which provides that an accused may not be asked questions tending to show that he has committed a previous offence unless it is admissible as evidence that he has committed the offence with which he is charged. I accept, of course, that evidence emerging at police interview is to be treated in the same way. 6. He submitted that evidence that the defendant was a user of cannabis was not relevant to prove that he committed the offence of possession with intent to supply in this case. He further submitted that, even if the evidence were technically admissible, its prejudicial effect greatly outweighed its probative value. In particular the fact that the defendant had lied about his cannabis use was important. I would have to give a Lucas direction. There was a real risk that the fact that he had lied about his cannabis use would divert attention from the real issue, namely, whether the use of cannabis was logically probative of guilt in relation to the charge of possession with intent to supply. I should therefore, said Advocate Cadin, exclude it in my discretion even if the evidence was technically admissible. 7. Advocate O'Connell submitted that the fact that the defendant was a user of cannabis and was familiar with the drug scene - for example he referred to "Amsterdam" in interview as "The dam" - was logically probative, once the defence raised was one of lack of knowledge of the cannabis resin found in this case. 8. He referred me to the line of cases described in Archbold (2002 Ed'n): paragraphs 25-471 to 25-475. A similar discussion is to be found in Fortson Misuse of Drugs and Drug Trafficking Offences (4 th Ed'n) at paragraphs 11-36 to 11-47. The line of cases can be listed as Willis (January 29, 1979); Thrussell (November 30, 1981); Alexiou (November 14, 1983); Madden [1986] Cr. L. R 804; Bagga (May 21, 1986); Morgan [1993] Cr. L. R.56; Peters [1995] 2 Cr. App. R.77; Yelman [1998] 2 Cr. App. R.269; Groves [1998] Cr. L. R . 2000; Esmieu (February 20, 1998) and Dellaway (April 7, 2000, CA). These cases do not establish new law. They are merely illustrations of the general principle stated by Lord Herschell in Makin -v-A. G. for New South Wales [1894] A. C.57 when he said at page 65: "...the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and decide whether a particular piece of evidence is on the one side or the other". 9. In essence the English Court of Appeal in all the cases referred to above, held on the facts of those cases that the prosecution was entitled to adduce and rely on evidence

concerning the finding of drug related material in the possession of the defendant, in order to prove the mens rea of the offence charged, or to rebut a defence of innocent association or plant. So for example in Morgan

- (1993) Cr. L. R.256 the defendant was charged with importing cocaine concealed in two boxes in her luggage containing recording tapes. She said that she was an innocent dupe on whom the drugs had been planted. During her police interview she told officers that she had smoked cocaine and allowed others to smoke cocaine at her premises. The prosecution contended that her answers were relevant because they showed that she had a link with cocaine and that it was a strange co-incidence that of all the people coming in from Jamaica on the particular flight it was the defendant who had that link. She appealed on the ground that the evidence should not have been admitted but her appeal was dismissed on the basis that the judge had been entitled to admit the evidence. 10. In Peters the Court of Appeal said that Willis which was the first of these line of cases, was: "...clear authority for the proposition that, when knowledge is in issue, which carries with it the implication that the defendant is the "innocent victim" of some other person who has concealed drugs in the defendant's luggage, or in his vehicle, then evidence showing that the defendant was connected with the kind of drugs inside the United Kingdom is relevant and admissible subject to the court's power to exclude it on grounds of undue prejudice..." 11. It is true that Fortson and Archbold express some reservation as to whether the Court of Appeal was correct in all these decisions. The principle seems, nevertheless, to be well established and the view of the English Court of Appeal has been consistent. 12. In this case the offence was not one of importation, but in my judgment that makes no difference. Nor were the drugs concealed in the defendant's suitcase or car; they were secreted in the immediate vicinity of his hut over which it is alleged by the prosecution he exercised dominion and control. His defence is that he knew nothing of their presence. In my judgment he is in no different position to the courier who says that he was not aware of the drugs secreted in his car or in his suitcase. In each case the issue is as to the defendant's knowledge. Was he involved in the stashing of the drugs in and around his hut, or is he the innocent victim of someone else's action? 13. It seems to me on the basis of the cases I have referred to, that the prosecution is entitled to say that it would be a strange co-incidence that the premises which these other persons happened to choose for hiding their drugs, were premises under the control of a person who himself uses cannabis and is familiar with the drug scene. 14. Advocate Cadin accepted that, faced with cases such as Peters, he would have been in difficulty in maintaining his submission if the evidence which the prosecution sought to adduce was that of finding a personal amount of cannabis at the defendant's home. He submitted, however, that an admission of cannabis use at police interview was different. I am unable to agree. In each case the essence of the evidence is that the accused is a cannabis user. The exact mode of proving that he is a user, either by finding cannabis at his home or relying on his admissions would seem to be irrelevant. Furthermore, I note that in Morgan the evidence of cocaine use arose entirely from admissions at police interview. 15. I, therefore, hold that the evidence of cannabis

use by the defendant is logically probative to disprove the defence raised by the defendant that he was unaware of the existence of the cannabis resin stashed in the region of his hut. It is, therefore, admissible. 16. I must then consider whether I should, nevertheless, exclude such evidence in my discretion on the ground that its probative force is outweighed by its prejudicial effect. On this aspect Advocate Cadin refers particularly to the fact that Advocate O'Connell accepted that he would be relying on the fact that the defendant lied about his cannabis use as evidence to support his case against the defendant in relation to the cannabis found near the hut. Advocate Cadin contends that this would be very prejudicial. It is hardly surprising, he says, that a person does not initially admit to a criminal offence unrelated to the one about which he is being interviewed. Such lies do not indicate guilt of the offence charged. There was a risk of undue weight being placed on his lies despite any Lucas direction which might be given. 17. Decisions as to whether prejudicial effect outweighs probative value turn very much on the specific facts of the case in question. In my judgment, given the nature of the evidence in this case, the probative force of the defendant's cannabis use is not as strong as in a number of the cases in the English Court of Appeal to which I have referred. That probative force has to be balanced against the prejudicial effect of admitting evidence of the commission of a criminal offence other than that with which the defendant is charged. It is finally balanced. I am just persuaded by Advocate Cadin's submissions that, having regard to the circumstances of this particular case, the prejudicial effect would outweigh the probative value. Accordingly, in my discretion, I exclude the passages of the various interviews dealing with cannabis use. The reverse caution. 18. The defendant underwent a number of interviews on the 30 th April. He was arrested at about 8 a.m. and cautioned. The first interview began at 10.10 at which time he was again cautioned. It ended at 10.53. Interviewing recommenced at 13.15 when he was again cautioned. The tape was changed at 14.00 and he was re-cautioned when the interview recommenced at 14.01. The interview was suspended at 14.33 and recommenced at 16.31 when the defendant was again cautioned. He was cautioned again after a change of tape at 17.15. The interviews on that day ended at 17.49. At the first interview the defendant was, amongst other things, asked about his financial position. He went into some detail concerning his income and expenditure and certain loans. 19. Advocate Cadin's submission arises out of a comment from the investigating police officer, DC Kennea , about half-way through the interview which took place from 14.01 to 14.33. When referring to the source of the defendant's cash DC Kennea said this at page 124: "I want to know exactly where it's come from. You're obliged to tell me where it's come from because there will be a financial investigation into you". 20. Advocate Cadin submits that this completely undid the effect of the caution. It is therefore a breach of Code C, and all that followed should be excluded. Advocate O'Connell submits that most of what followed was repetition of what had been said by the defendant earlier about his financial position. The only new aspects were, first, that the defendant referred to an inheritance which he had received; and, secondly, that he agreed that, allowing for electricity and other outgoings, his disposable weekly income dropped to £31, rather than the figure of £50 which he had accepted in the earlier interview. No prejudice

was therefore suffered, says Advocate O'Connell, as a result of the erroneous comment by the police officer. 21. It is accepted that the officer was not acting in bad faith. It is true that a financial enquiry for the purposes of deciding whether to make a confiscation order under the Drug Trafficking (Jersey) Law does oblige a defendant to answer. But such obligation is for that limited purpose only. It is accepted that the officer inadvertently confused the two. 22. Nevertheless, in my judgment this was a significant breach of Code C. Advocate O'Connell referred to it as a partial undermining of the caution given at 14.01 and on earlier occasions. I think it was more than that. A caution tells the accused that he is not obliged to say anything. If there is no caution the position is neutral, in that the accused has not been informed that he need not say anything but nor has he been told that he must speak. The present case in my judgment is more serious than a failure to give a caution, because the defendant was told, quite wrongly, that he was obliged to tell the police where his cash had come from. It took away the voluntary aspect of the interview. It took away the right of silence. 23. I conclude that to admit the contents of this interview after such a comment from a police officer would have such an adverse effect on the fairness of the proceedings that justice requires it to be excluded. The comment was, however, made only in relation to financial information, and therefore, only that part of the interview which relates to financial matters is to be excluded. That is pages 124 to 130, about 5 paragraphs from the bottom, and from page 132 beginning with the comment: "We've detracted from the question ..." to page 138. 24. The question then arises as to whether any subsequent interviews, when the caution was again properly administered, are tainted and should be excluded. In my judgment they are tainted only to the extent that the police officer puts to the defendant the contents of what the defendant said for the first time during the inadmissible interview and asks him to confirm them. The officer was entitled to put to the defendant things which he had said before the inadmissible interview, because the information was given to him voluntarily by the defendant after a properly administered caution. 25. It will be for counsel to review the subsequent interviews in detail to see whether any part of them has to be excluded on the basis that I have described. However, from a quick inspection, the only part which I have found which falls to be excluded is that which follows the words "60 pounds a week" at the end of the penultimate question of the police officer on page 141 of the bundle. But as I say I will, of course, hear any applications on this aspect if counsel cannot agree on the question of subsequent interviews. Other matters 26. A further interview was held with the defendant on the 27 th May. By then the police had established that the defendant's fingerprints had been found on a bag; with cash in it which had been stashed near the hut, and on the cellophane wrapping around one bar of cannabis which was similarly hidden. In that connection the police officer asked these two questions of the defendant: Question: "I can also tell you now, that experts from UK forensic science services have told us conclusively that your fingerprints are identical to that found on some of the exhibits. Can you offer an explanation for that?" Later on in the interview the officer said: "So how do you explain your fingerprints being on money bags inside the tin containing all of this cash?" 27. Advocate Cadin says that both these questions were unfair and that the answers should

therefore be excluded. He says that the first question is too general; it does not specify which exhibits contained the defendant's finger prints. He submits that the second question is inaccurate because it refers to money bags (in the plural) whereas his prints had, in fact, only been found on one such bag. In my judgment these submissions have no merit. The key point is that the officers were quite rightly giving an opportunity to the defendant to comment on the fact that his prints had been found on some of the hidden items. No prejudice was caused by the nature of the questions and I rule that they are admissible together with the answers. *Authorities* *Loi* (1908) *au sujet des Témoins et Informateurs*. *AG-v-Buckley, Croke, Crook and Breen* (22 nd January,

2002) *Jersey Unreported*; [2002/19]. *AG-v-Dowse and Heys* (18 th December, 1996) *Jersey Unreported*. *R-v-Groves* (1998) Cr. L. R . 200. *Archbold* (2002 Ed'n): 15-12 to 15-19; 15-251 to 15-253; 15-357 to 15-442; 25/471 to 25/475. *Fortson: Misuse of Drugs and Drug Trafficking Offences* (4 th Ed'n) para 11-36 to 47. *Makin-v-AG for New South Wales* (1984) A. C. 57. *Morgan* (1993) Cr. L. R.56. *Madden* [1986] Cr. L. R.804. *Peters* [1995] 2Cr. App. R77. *Groves* [1998] Cr. L. R.2000. Page Last Updated: 02 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/je/cases/UR/2002/2002_216.html

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