

JERSEY / JUDGMENT

AG v McLees [2000] JRC 2 (10 January 2000)

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JUDGMENT

THE DEPUTY BAILIFF: This is an application concerning three counts laid against Alexander McLees . If the Defence application is successful there will be two trials. It is unfortunate that this matter was only raised when the case had been set down for a three day hearing and some 23 witnesses have had to be stood down this morning no doubt at some inconvenience to many of them. It may be some time before the trial is able to proceed because other applications may follow from this

judgment.

In my view, the preliminary points of law should have been set down pre-trial because counsel is well aware of the pressures under which this Court operates. The facts are straightforward. On 6th May, 1999, a warrant issued by the Bailiff authorised a search under the Misuse of Drugs (Jersey) Law, 1978 of the premises at 14 Val Plaisant , St. Helier. Those are the premises occupied by Mr. McLees. On that day Mr. McLees was seen entering 'The Eagle Tavern' and police officers detained him there prior to attending the flat which he shared with his girlfriend. Outside 'The Eagle Tavern' was a hire shop van. Mr. McLees is employed by the Hire Shop and he had the keys of the van in his pocket. A nine bar of cannabis resin with a heart shape on it was found wrapped in a striped sock under the passenger seat. Cannabis with virtually the same design was also found in the flat. There were other matters, but I need not touch upon them here for the purposes of this judgment. Mr. McLees admitted possessing the cannabis in the flat, but denied any knowledge of the cannabis in the van. He is charged with having in his possession cannabis with intent to supply (the cannabis in the van); having in his possession cannabis with intent to supply (the cannabis in the flat); and possession of cannabis (the cannabis in the flat). Mr. Costa argues that the cannabis in the flat and the cannabis in the van were under Mr. McLees' control and should therefore be inseparable under the principles of similar fact evidence. I have heard wide ranging legal argument on this matter. The legal position is well explained in Baimbridge -v- A. G. (9th July, 1998) Jersey Unreported CofA;

(1998) JLR 221 CofA. At p.4, the Court of Appeal said this: "Rule 6(2) of the Indictments (Jersey) Rules 1972 provides that: "Where, before trial, ... the Court is of the opinion that an accused person may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, ... the court may order a

separate trial of any count or counts of such indictment." It can be seen the Deputy Bailiff has a discretion and in exercising that discretion he has to consider whether the evidence could be said to be similar fact evidence so as to make it admissible on the various counts in the indictment and, secondly, if it is such evidence, to satisfy himself that the probative value of that evidence clearly outweighs its prejudice to the accused. The Law on this matter is to be found in the case of DPP -v- P

- (1991) 2 AC 447. The questions posed for the House of Lords in that case were as follows: "1. where a father or stepfather is charged with sexually abusing a young daughter of the family is evidence that he also similarly abused other young children of the family admissible in support of such charge in the absence of any other 'striking similarities'. 2. where a defendant is charged with sexual offences against more than one child or young person, is it necessary in the absence of 'striking similarities' for the charges to be tried separately?" Lord Mackay of Clashfern, in giving the leading judgment in the House of Lords at p.462 said: "I would answer the first question posed by the Court of Appeal by saying that the evidence referred to is admissible if the similarity is sufficiently strong or there is other sufficient relationship between the events described in the evidence of the other young children of the family, and the abuse charged, that the evidence, if accepted, would so strongly support the truth of that charge that it is fair to admit it notwithstanding its prejudicial effect. It follows that the answer to the second question is no, provided there is a relationship between the offences of the kind I have just described." This was Lord Mackay's conclusion in answer to the questions. In the paragraph immediately prior to that conclusion, Lord Mackay said as follows: "When a question of the kind raised in this case arises I consider that the judge must first decide whether there is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it notwithstanding the prejudicial effect of admitting the evidence. This relationship, from which support is derived, may take many forms and while these forms may include 'striking similarity' in the manner in which the crime is committed, consisting of unusual characteristics in its execution, the necessary relationship is by no means confined to such circumstances. Relationships in time and circumstances other than these may well be important relationships in this connection." In rejecting the Royal Court's exercise of its discretion the Appeal Court said this: "In a word, ... the probative value of the evidence in the circumstances of this particular case did not clearly outweigh the very substantial prejudice which would have been caused to the accused if that evidence was admitted." Mr. Costa went on to say that in this particular case the quantity of cannabis under Mr. McLees' control must establish that he is a dealer. For ease of reference the total value of the seizure was £2,400 and that gave very approximately a value of £1,440 for the cannabis in the van and £960 for the cannabis in the flat. What was most compelling to the Crown was a statement made by Mr. Hubbard , States Analyst, which is presumably

incontrovertible. What Mr. Hubbard said in his statement is this: "I have been asked to comment on the markings found on the bar of cannabis resin. The item contained a bar of cannabis resin weighing 252.05 grams. Embossed on one side of the bar was a squashed heart shape design similar to a letter 'v'. Two of the smaller pieces of cannabis resin from item AC2 also show parts of this design." Stopping for a moment, of course, that was part of the cannabis found in the flat. "I do not recall having seen this design embossed on pieces of cannabis resin previously and no subsequent submissions to the laboratory have shown pieces of cannabis resin with this design or parts of this design embossed on them." On his own admission, Mr. McLees is no stranger to cannabis, using it, according to his statement, to help his back pain. The leading case on similar facts is the decision of the House of Lords in DPP -v- P

- [1991] 2 AC 447. Both the Crown Advocate and Miss Fitz read sizeable tracts from Archbold (1999 Ed'n): Chapter 13: Evidence of similar facts, and I do not need, for the purposes of this judgment, to recite all the passages quoted to me. However, I have borne them closely in mind in delivering this judgment. Miss Fitz particularly drew to my attention a passage from the judgment of Lord Morris in the case of DPP -v- Boardman [1975] A. C. 421. That passage commences at paragraph 13-7 of Archbold and reads as follows: "In Boardman, the significance of coincidence to the decision about admissibility was expressly referred to by all five Law Lords. Lord Morris referred to the fact that Lord Herschell in Makin had given certain examples of when similar fact evidence might be admissible. His Lordship continued: "In his speech in Harris -v- DPP [1952] A. C. 694 Viscount Simon pointed out, at p.705, that it would be an error to attempt to draw up a closed list of the sorts of cases in which the principle operates. Just as a closed list need not be contemplated so also, where what is important is the application of principle, the use of labels or definitive descriptions cannot be either comprehensive or restrictive. While there may be many reasons why what is called 'similar fact' evidence is admissible there are some cases where words used by Hallett J. are apt. In R. -v- Robinson (1953) 37 Cr. App. R. 95 he said, at 106-107: "If a jury are precluded by some rule of law from taking the view that something is coincidence which is against all probabilities if the accused person is innocent, then it would seem to be a doctrine of law which prevents a jury from using what looks like ordinary common sense". But as Viscount Simon pointed out in Harris -v- DPP [1952] A. C. 694, 708 evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt: so evidence of 'similar facts' should be excluded unless such evidence has a really material bearing on the issues to be decided" (at p.439)." At paragraph 13-8 of Archbold Lord Salmon said this: "The test must be - is the evidence capable of tending to persuade a reasonable jury of the accused's guilt on some ground other than his bad character and disposition to commit the sort of crime with which he is charged? In the case of an alleged homosexual offence, just as in the case of an alleged burglary, evidence which proves merely that the accused has committed crimes in the past and is therefore disposed to commit the crime charged is clearly inadmissible. It has however never been doubted that if the crime charged is committed in a uniquely or strikingly similar manner

to other crimes committed by the accused, the manner in which the other crimes were committed may be evidence on which a jury could reasonably conclude that the accused was guilty of the crime charged. The similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence ... the question of whether the evidence is capable of being so regarded by a reasonable jury is a question of law" (at p.462)." Miss Fitz gave us some homely but apposite examples. She said if a sock similar to the striped sock that was found in the van had been found in the flat. If the bar of cannabis in the van and the amount of cannabis in the flat came from the same bar. If fingerprint evidence had linked the bar in the van with the cannabis in the flat, there might have been some similarity. But none of those, of course, apply. Two matters have come to light which clearly took the Crown Advocate by surprise. Advocate Fitz had attended at the Police Station. She had a note from D. I. Bonney in his own handwriting which reads as follows: "Further to our telephone conversation today I have spoken to DC de la Haye. He is able, without re-examination, to confirm that there are marks on the Collins' cannabis that are capable of being construed as part of a heart shape or indeed part of any other shape." I pause here for a moment to say that the "Collins' cannabis" refers to another person who had been arrested at about this time. D. I. Bonney goes on to say this: "I might say if it helps, indeed, DC de la Haye will also say/concede it is possible even likely that there are/were other similarly embossed bars of resin in the Island other than those found in the possession of your client if only on the basis that those in his possession were only part of a larger importation that we haven't seen." He then makes a further note that there were no other significant seizures of cannabis at that time. The second point is this: five people at the business which employed Mr. McLees had potential use of the van which was one of two vans used by the firm that day. The statement of Mr. Mark Richard Evans, the assistant manager of the Hire Shop, Longueville, merely says this in his concluding paragraph: "Alex (that is Mr. McLees) was insistent that he had his lunch hour that day stating that he needed to go to his doctor for some injections and could he have his break after the appointment. I agreed to this. He left just before 12 o'clock. I gave him a mobile phone and he drove away in the Vauxhall Brava pick-up." That witness statement was made on 10 th May, 1999. Miss Fitz now says that she has a witness statement of her own for Mr. Evans (for there is no property in a witness) which says that he directed Mr. McLees to use that very van rather than the other van owned by the company. We also have the fact that the van is usually unlocked and that neither van is ever cleaned out at any time. We also heard that Mr. McLees had a reason to be in 'The Eagle Tavern'. He was apparently dropping off some keys to a witness that he will call, Mr. John O'Connor, as he was due to leave the Island to be married to his girlfriend in St. Lucia the following day or shortly afterwards. These additional pieces of information, as I have said, clearly took Crown Advocate Costa by surprise but they are in my view sufficient to sway the balance. On that basis I decline to order that the counts be tried together simply because the similar fact evidence is not so compelling that the similarity is "so unique or striking that common sense makes it inexplicable on the basis of coincidence." Authorities DPP -v- P. [1991] 2 A. C. 447. DPP -v- Boardman [1975] A. C. 421. Archbold (1999 Ed'n):

Chapter 13: Evidence of similar facts. Wells -v- R. [1991] 92 Cr. App. R.24. Baimbridge -v- A. G. (9 th July, 1998) Jersey Unreported CofA;

(1998) JLR 221 CofA. Indictments (Jersey) Rules, 1972. Indictments (Amendment) (Jersey) Rules, 1975. Page Last Updated: 02 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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