

JERSEY / JUDGMENT

Ahmed -v- A.G. [2005] JCA 121 (09 September 2005)

[2005] JCA 121

COURT

COURT OF APPEAL

BEFORE

The Hon. M. J.
Beloff, Q. C., President;
K. S. Rokison, Esq.,
Q. C.; and
Dame Heather Steel
Khalel
Siddique Ahmed

-v-

The Attorney General

Application for leave to appeal against
confiscation order and recommendation for
deportation
imposed by the Superior Number on 23
rd
May 2005 after guilty pleas

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Before:

The Hon. M. J.
Beloff, Q. C., President;
K. S. Rokison, Esq.,
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Dame Heather Steel
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Siddique Ahmed
-v-
The Attorney General
Application for leave to appeal against
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deportation
imposed by the Superior Number on 23
rd

May 2005 after guilty pleas

to:

2 Counts of:

Possession

of a controlled drug with intent to supply, contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978

Mrs S Sharpe Crown Advocate

The Appellant representing himself with

Advocate S Baker as Amicus Curiae

Leave to appeal

refused by the Deputy Bailiff on 28

th

July, 2005.

JUDGMENT

STEEL JA 1. This is the Judgment of the Court. 2. Khalel Siddique Ahmed, who is aged 34, renews his application for leave to appeal the sentence passed by the Superior Number of the Royal Court on 23 rd May 2005, he having pleaded guilty to two counts of a three count indictment. 3. The Crown accepted his not guilty plea to Count 1, importation of a controlled drug. Count 2 alleged that on 23 rd August 2004 he had in his possession, with intent to supply, a controlled drug namely diamorphine. Count 3 alleged that on 23 rd August 2004 he had in his possession a controlled drug namely cannabis. On Count 2 he was sentenced to 3½ years' imprisonment and on Count 3, 2 weeks' imprisonment concurrent. A confiscation order was made in the sum of £44,092.78 which was uncontested. The Court recommended to the Lt. Governor that the Applicant be deported from Jersey at the conclusion of the sentence. An order was made for the forfeiture and destruction of the drugs. 4. The Applicant applied for leave to appeal his confiscation order and recommendation for deportation on 12 th July 2005. 5. On 28 th July 2005 leave was refused. The Deputy Bailiff stated "1. Confiscation Order. The Applicant with benefit of advice from Counsel did not oppose the order. The Attorney General's statement contained ample material upon which such an order could properly be made and there is nothing in the Grounds of Appeal to suggest there are reasonable prospects of a successful appeal. 2. Deportation. The Court applied the correct test and carried out the necessary balancing exercise. The material in the Grounds of Appeal does not lead me to conclude that there are arguable grounds for believing that the Court of Appeal should overturn the Superior Number's decision." 6. On 20 th July 2005 Advocate Stephen Baker was appointed to act as "friend of the Court" to assist Mr Ahmed in all procedural matters and to speak on his behalf in Court. 7. The Attorney General does not take issue with the fact that the Applicant has gone beyond the parameters of his Notice of Appeal and now wishes to appeal against sentence. The Attorney General further takes no issue with the fact that the Applicant applies for leave to appeal out of time. We accordingly proceed on the basis that the application is competent. 8. The Applicant, who is of Bangladeshi origin, has lived in Jersey since 1995. He has the following convictions recorded against him. (i) On 10 th October 2002 he pleaded guilty to 4 offences. He was sentenced to 2 years' imprisonment by the Royal Court of Jersey for an offence of possessing a controlled drug, heroin, with intent to supply. For 2

offences of possessing a controlled drug, being heroin and cocaine, he was sentenced to one year's imprisonment concurrent and for a further offence of possessing a controlled drug, cannabis resin, he was sentenced to one month's imprisonment concurrent. Deportation was considered but no recommendation made. The report of that hearing was before the Royal Court on 23 rd May 2004. (ii) On 9 th April 2003 he pleaded guilty to common assault and was sentenced by the Magistrates' Court to 2 week's imprisonment consecutive to any other sentence. (iii) On 19 th December 2003 following a plea of guilty to an offence of driving a motor vehicle having consumed excess alcohol, he was sentenced by the Jersey Magistrates' Court to a fine of £200 and was disqualified from driving for 12 months and until a test passed in Jersey. 9. Before we consider the submissions now made by and on behalf of the Applicant we set out the brief facts of the current offences. 10. On 23 rd August 2004 a search warrant was executed at 47 Liberation Court, St Helier, the home of Mrs Susan Robinson. Entry was forced at 9.50 am by Drug Squad officers who found the Applicant and his girl friend Mrs Robinson in bed together. Mrs Robinson's 17 year old daughter was occupying an adjacent single bedroom; a third bedroom was vacant. A woman police officer made a brief search of the daughter's room which proved negative. Officers commenced a search of the rest of the premises and almost immediately found a quantity of cannabis in the master bedroom. This consisted of 18.44 grams of cannabis resin and 947 milligrams of herbal cannabis. 11. The Applicant was arrested, cautioned and made no reply. A further search revealed a white plastic bag, tied with a large knot, in the kitchen bin under other debris. The bag was found to contain brown powder and the Applicant was arrested on suspicion of possessing a commercial amount of heroin. After caution he replied " What the hell is this ." 12. Mrs Robinson and her daughter were both arrested, cautioned and made no reply. The Applicant made the comment " She doesn't know anything " referring to Mrs Robinson. 13. On analysis the white plastic bag was found to contain 93.44 grams of heroin (c 3½ oz.) being 34% by weight diamorphine with a local street value between £28,032 - £42,048 and a local wholesale value £14,016 and £18,688. The herbal cannabis was valued at a street value of £5 and the cannabis resin at one of £104. If sold wholesale it would be worth between £74 and £90. 14. The Applicant was interviewed at Police Headquarters and claimed that his only form of income was his work as a full time chef at the Viceroy Indian Restaurant, earning £18,000 a year paid in cash on Sunday nights. This claim was later found to be inaccurate in that since 1998 he had worked a few weekend shifts in May 2004 and over some weekends in July and August 2004 earning £40 per night. 15. He told the police that he had visited the Golden Nugget casino in London where he had won £4,000. This was later substantiated. He described his heroin habit as between 2 - 3 grams a day which would have cost him £12,000 per month to sustain. He admitted selling heroin to fund his drug habit. He claimed he had one basic bank account at HSBC Bank in St Helier with a current balance of between £1,600 and £1,700. When asked if any large amounts had passed through it he replied less than £2,000. He said that the money had come from gambling. 16. A production order was made and investigations revealed four bank accounts held in the Applicant's name with HSBC. 17. When the account no. 21577832 was analysed £61,240.00 of unexplained income, mostly in cash, was shown to have passed through this account in the six months prior to the Applicant's arrest. 18. The only non cash payments represented 4 cheques totalling £9,000, discovered to have been drawn by the manager of the Viceroy Restaurant at the

request of the Applicant in exchange for cash. The manager apparently believed that the Applicant intended to send the cheques to his family in Bangladesh. 19. A further HSBC account no. 61591495, opened on 15 th July 2004, showed that a further £12,275 of unexplained income in cash was paid into this account in the 3 weeks between 23 rd July and 17 th August 2004. 20. It was established that the Applicant owed a total of £7,470 to Citifinancial, Black Horse Offshore and Barclaycard. 21. The Applicant indicated that he bet substantial sums at the Bath Street outlet of Stanley Bet. Enquiries at the Golden Nugget in London indicated that between 31 st May 2004 and 21 st August 2004 the Applicant placed £7,000 in bets and made a profit of £12,600. Stanley Bet indicated that in 2004 up to 19 th August he placed £4,145 in bets and his profit was £2,331.70. The monitored betting shows a maximum profit of £15,000 in 2004. 22. The Applicant was provided with a lengthy schedule of unexplained income and copies of the associated bank statements and in the course of further interviews he was asked to explain the source of his funds. He said that not all the money came from gambling, that his brother had given him £53,000 to look after for him and that he had spent £15,000 to £20,000 of that money on drugs. Analysis of bank accounts and further investigation showed that deposits into the basic bank account amounting to £18,750 were made between 14 th April 2004 and 21 st August 2004 in cash to London branches of HSBC at times when the Applicant is known to have been in London. 23. Much of what the Applicant said in interview has been demonstrated by other evidence to be untrue and other aspects stretch credulity to the limits. In particular, the assertion that a large proportion of the funds credited to his accounts was provided by his brother who, in effect, used him as his banker, and that consequently a large proportion of the sums to the credit of these accounts was his brother's money, required the Court to accept that his brother, an illegal immigrant, who worked as a chef in London, was able to save these very substantial sums out of his net earnings over that period of time. In this connection, it may be noted that, in relation to the question of deportation which we consider below, and in particular the question of the dependency of innocent third parties on the Applicant. A statement by Mrs Robinson in a paragraph referred to "financial pressure" from his family in India, that his brother, in England, "heavily relies" on him (which we take to mean as a provider of funds rather than a deposittee of savings). This is self-evidently inconsistent with the Applicant's version. 24. When the matter came before the Royal Court on 23 rd May 2005, on the basis of the Attorney General's statement which set out full details of the financial investigations, the Crown asked the Court to find that the Applicant had benefited from drug trafficking in the sum of £100,426 and to order that £44,092.78 be confiscated. That order was not opposed and the Applicant's advocate indicated to the Court that although the Applicant stands by the instructions he gave as set out in the Crown survey of facts he had chosen not to contest the order. Accordingly the Court made the order which is the subject of this application. 25. Before sentencing the Applicant the Court considered a Social Enquiry Report dated 14 th January 2005 which referred among other matters to the full investigation of a complaint of child abuse against the Applicant's daughter. Reference is also made to the payments alleged to have come from the Applicant's brother. Further the Applicant claimed Mrs Robinson was angry about him purchasing heroin and told him he must choose between her or his drugs and for that reason he threw the bag of heroin away in the kitchen bin. The Court had a psychiatric report from Dr Dale Harrison, Consultant Forensic Psychiatrist, dated 19 th May 2005. The Court also had an Alcohol

and Drug Report from Mr Gafoor dated 3 rd February 2005, two letters from the Applicant's brother in London dated 23 rd February 2005 and 3 rd March 2005, a letter signed by 9 members of his family being his mother and 8 sisters and a letter from his fiancée Mrs Susan Robinson. 26. The Court was referred to the case of Rimmer, Lusk and Bade v AG

(2001) JLR 373 CA and the Applicant's previous court hearing reported AG v Khalel Siddique Ahmed , 10 th October 2002/188. 27. In the present case Advocate Sharpe for the Crown took a starting point of 10 years' imprisonment and in light of all the mitigation moved for 5 years' imprisonment with 2 weeks concurrent for the cannabis offence. 28. The Court was invited to recommend deportation and to exercise its powers under Section 3(6) of the Immigration Act as extended to Jersey by the Immigration (Jersey) Order 1993 . The Applicant had been served with the requisite Notice of the Crown's intention in accordance with Section 6(2) on 10 th February 2005. The Court was referred to the guidelines set out by Lawton LJ in R v Nazari 1980 3 AER 880 which in summary are: (i) the Court has first to consider whether the offender's continued presence would be detrimental to the country, and (ii) the Court has then to take into consideration the effect a deportation order would have on innocent persons such as the offender's family and weigh these factors against each other. This test was followed and applied in Mendes v AG

[2003] JCA 106 and other cases within this jurisdiction. 29. The Bailiff in sentencing the Applicant on 23 rd May 2005 took into account the Applicant's plea of guilty, his negative test result when the Alcohol and Drugs Report was prepared and his assistance to the police, acknowledged in open court, which had led to the arrest and sentencing of another man and to the recovery of heroin worth c £3,000. The Bailiff referred to the Applicant's inconsistent accounts to the police and his prevarication. However he emphasised the significant discount due to those who assist the police and allowed a further 18 months' discount on the 5 years for which the Crown had contended. The sentence passed was therefore 3½ years' imprisonment. 30. In relation to the recommendation for deportation, the Bailiff applied the conventional tests set out in paragraph 28 above and having regard to the facts, that this was the Applicant's second conviction for a serious drug trafficking offence, and the Probation Officer's conclusion that the Applicant was at high risk of re-offending, stated that the Court had no hesitation in concluding that the Applicant's continued presence in Jersey was detrimental to the Island's interests. 31. The Court had considered carefully all the material placed before it in relation to the effect an order recommending deportation might have on others who are innocent persons. 32. In particular the Bailiff stated that the Court had considered the relationship with the Applicant's fiancée and her family and his relationship with his former wife and daughter, the latter relationship being the one to which the Court had given most anxious consideration but the Court concluded that " there is however no evidence that the applicant had provided any significant financial support for his daughter and for much of the daughter's life the Applicant had in fact been incarcerated in prison as a result of his drug trafficking activities ." The Bailiff went on to say, "On the other side of the balance is to be considered the considerable damage which we have no doubt will be caused to this

community and to other young people if the Applicant does remain in Jersey. We consider that the balance tips in favour of deportation and will accordingly recommend to the Lt. Governor that Ahmed be deported from Jersey at the conclusion of his sentence." 33. In relation to the renewed application, this Court has 2 letters dated 9th May and 25th May 2005 from the Applicant and Mr Baker as amicus curiae has provided the Court with written submissions, supplemented by his oral argument. 34. This Application raises many new issues and the Applicant makes assertions without notice, which were not before the sentencing court and which are unsupported by evidence or applications for the admission of further evidence. 35. Advocate Baker invited the Court to grant the Application for leave to appeal so that the new assertions could be considered and new evidence could then be brought before the Court of Appeal to substantiate the assertions. He explained that full investigation of the Applicant's positive case at this stage would be expensive and potentially wasteful. The usual procedure on an Application for leave to appeal against Sentence is that all the relevant information and the evidence in support of the Application should be before the Court so that the Application can if the Court considers it appropriate become a hearing on the merits. The Crown must have Notice of such evidence and the opportunity to respond. 36. The Court was invited not to make or adhere to hard and fast rules in relation to this procedure but we must observe that it is difficult to conceive of a case where Advocate Baker's proposed procedure should properly be adopted. An Applicant for leave ought to put his best case forward on the application. If the Court had to deal with such an application on the basis of mere assertion, it might grant leave in a case which, on a full hearing, turned out to be an appeal wholly without merit. This would not be the best use of valuable Court time. Sentence 37. As amicus Advocate Baker accepts, custody was inevitable and that the Crown's 10 year starting point was in the correct sentencing band in accordance with *Rimmer, Lusk & Bade v AG*

- (2001) JLR 373 CA. This was accepted by the Superior Number of the Royal Court who also accepted the 5 year discount for mitigation sought by the Crown. The Applicant submits that the Court failed to take sufficient account of (i) The Applicant's timely plea; (ii) The statement and assistance he gave to the police; (iii) The stress he had suffered as a result of almost 9 months on remand in custody prior to sentence on 23rd May. 38. His application is that the discount he received was insufficient. All relevant matters in mitigation were taken into account by the Royal Court, and are reflected in the 5 year discount. The delay of eleven weeks between 3rd March and 23rd May 2005 was inevitable and gave rise to no prejudice to the Applicant. [That delay was occasioned when, through no fault of the Applicant, a new advocate had to be appointed to appear on his behalf who required time to familiarise herself with the case.] The assistance given to the authorities was, as we have noted, publicly acknowledged by the Court and resulted in a further 18 months' discount. 39. This sentence of 3½ years' imprisonment for a second serious drug trafficking conviction cannot arguably be said to be manifestly excessive. Confiscation Order 40. The Applicant addressed the Court in relation to the Confiscation Order. He submitted that there should have been no compensation order made and the matter

should have been fully contested. He told the Court that he has not benefited from drug trafficking, he had never sold heroin or any other drug, the bulk of the money recovered belonged to his brother, the rest was from his gambling successes. The heroin found in his possession he had bought for his own use, to use over a period of six weeks, not thinking to sell it. He nevertheless does not seek to appeal his conviction for possession with intent to supply. He told the Court that he pleaded guilty because (1) No one would believe his account and (2) He was advised by his lawyers that in relation to sentence it would be to his advantage. He accepts that the decision was his and the Court accepts that the plea was unequivocal. 41. He told the Court that although he consented to the making of the Compensation Order and to the figures on which it was based, he did so on advice which he later questioned, and that he now seeks to challenge the accuracy of that advice and the ability of his representative. This is a new assertion, unsupported by evidence, and one which should have been made in a form and at a time when it could have been investigated and a response prepared. In *Mendes v AG* the Deputy Bailiff at para 10 stated "where grounds of appeal are based upon the nature of advice given by a previous advocate in the court below, the procedure to be followed has been authoritatively laid down by the English Court of Appeal in *R v Doherty*

[1997] 2 Cr App R 218 . In particular it is clear that, at an early stage, the new advocate must procure the swearing of an affidavit, the waiver of privilege, and the obtaining of the response of the previous advocate to what is now said. These principles and this procedure we confirmed are to be treated as applicable in Jersey. In the instant case we will not go beyond the plea of guilty or the consent to the Compensation Order. 42. Contrary to the Applicant's assertions, the Compensation Order did not take into account the loans to which the Applicant referred or a payment from the Criminal Injuries Compensation Board as forming part of the benefit figure. There was ample material to support the figures with which the Applicant agreed and which were accepted by him and on his behalf on 23 rd May 2005. 43. There is no arguable ground of appeal in relation to the Compensation Order. Deportation 44. The Applicant bases his submissions principally on his relationship with his daughter. In addressing the Court he said " take my money, not my daughter ". He particularised the financial provision he has made for his ex-wife and daughter and the practical assistance he has given them. He repeated his concerns for the health of his ex-wife and her ability to look after the child. He referred to the distress caused by the alleged sexual assault upon his daughter and his dissatisfaction with the progress of the investigation into the matter and the lack of finality. 45. He had lived with Mrs Susan Robinson, his fiancée, prior to his arrest and his written submissions express concern that if he were to be deported he would be unable to marry her. When he addressed the Court he referred to her now having found a new partner. He wished the Court to take into account the financial provision he claims to make for his family in Bangladesh. 46. The appropriate principles of *R v Nazari* were most carefully considered and applied by the Royal Court and in all the circumstances of this case the recommendation for deportation cannot be faulted and was in our judgment properly

made. We find no grounds to interfere with the discretion of the Superior Number. For the reasons stated, this Application is dismissed. 47. Despite our refusal of leave to appeal, the Court directs, pursuant to proviso (b) to sub-section 37(4) of the Court of Appeal (Jersey) Law 1961 that no part of the time during which the Applicant was specially treated in pursuance of Prison Rules pending determination of the appeal shall be disregarded in computing the term of his sentence. Costs of Amicus Curiae 48. At the close of the hearing, an application was made by Advocate Baker, who acted as Amicus Curiae for the purposes of the appeal at the request of the Court, for an order for his costs to be paid out of public funds. 49. It appears that Advocate Baker was appointed pursuant to a request from the Bailiff in his capacity as President of this Court, to the Acting Bâtonnier to appoint an advocate to act as a "friend of the court" to assist Mr Ahmed in putting his appeal together. The request was communicated through the Assistant Judicial Greffier, and the Acting Bâtonnier invited Advocate Baker to perform this function. 50. The form which the Acting Bâtonnier used incorporated a Legal Aid Certificate, which purported to acknowledge that the Advocate/Solicitor appointed was entitled to charge a reasonable fee for his services. 51. The powers of this Court to make an award of costs in relation to an appeal in a criminal matter are governed by Article 3 of the Costs in Criminal Cases (Jersey) Law of 1961 ("the 1961 Law"), sub-section 3 of which provides that, whether or not the court makes an order under the provisions of this Article, a number of specified costs and expenses shall be defrayed out of public funds up to an amount allowed by the court. 52. Sub-sub-section

- (a) of sub-section (3) states, "as one of the categories, the fees and expenses of an advocate who has been assigned to the Appellant by reason of the insufficiency of the Appellant's means". No other category listed under Article 3 would appear to be arguably applicable, and sub-section (4) provides that "Except as provided in this Article, no costs shall be allowed on the hearing or determination of an appeal ... under Part 3 of the Court of Appeal (Jersey) Law 1961". 53. It seems to us clear that in principle Advocate Baker's reasonable fees and expenses should be paid out of public funds. The Court was referred to the case of *Green -v- A. G.*

- (2003) JCA 125A in which a court consisting of the Bailiff, Richard Southwell QC and the Hon Michael Beloff QC made an order for the payment of the costs of Advocate Renouf, who had been appointed as an Amicus Curiae to assist the Court in an appeal concerning the application of Article 35 of the Court of Appeal (Jersey) Law 1961. But there appears to have been no discussion concerning the source of the Court's power to make the order, and no indication of the basis upon which the Court reached its conclusion. 54. In our view, it is possible to construe Article 3(3)(a) as being sufficiently wide to cover a case such as the present, in which an Amicus Curiae is appointed to assist the Court, but to do so by giving assistance to the Appellant in the presentation of his appeal. But because we are of the view that the power of this Court to make an order should not be limited to cases when an Amicus gives assistance by presenting the Appellant's submission to the Court, we consider that the better view is that where an Amicus is appointed as a friend of the

Court, the reasonable fees and expenses of that Amicus should not be regarded as the "costs" of either party which are to be allowed (or not) under sub-section (4), but rather as part of the costs and expenses of the administration of justice which should be paid out of public funds in any event without the necessity for any order by the Court. Nevertheless, out of an abundance of caution, we make the order requested. Authorities R v Nazari 1980 3 AER 880. Rimmer, Lusk and Bade v AG

(2001) JLR 373 CA. AG v Khalel Siddique Ahmed , 10 th October 2002/188. Mendes v AG

[2003] JCA 106 . R v Doherty

[1997] 2 Cr App R 218 . Green -v- AG

[2003] JCA 125A . Court of Appeal (Jersey) Law 1961. Immigration (Jersey) Order 1993. Costs in Criminal Cases (Jersey) Law of 1961 . Page Last Updated: 14 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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