

JERSEY / JUDGMENT

Ali v AG 24th March 2005

[2005] JRC 032 (24 March 2005)

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JUDGMENT

THE DEPUTY BAILIFF: 1. This is an application for leave to appeal against total sentences of 4 years', imposed by the Inferior Number on 16 th July, 2004. On that occasion the applicant pleaded guilty to one count of supplying heroin to his co-accused Filipa de Freitas (count 3), one of possession of heroin (count 5), one of possession with intent to supply heroin (count 6) and one of possession of cannabis (count 8). Various concurrent sentences were passed but on the two main charges, that is counts 3 and 6, concurrent sentences of 4 years were passed. 2. The facts of the offences are as follows. On 29 th March, 2004, the applicant was seen to go into the home address of his two co-accused, de Freitas and Vitor Da Costa. Shortly afterwards the applicant and Da Costa came out; they were arrested. Da Costa was found in possession of £850 in cash wrapped in a note bearing the name of a Miss M. Hughes with her bank details. The applicant had £150 in cash on him. 3. At the police station Da Costa said the money belonged to the applicant. On being searched the applicant was found to have 416 milligrams of heroin hidden under the insole of one of his shoes. He also had a piece of paper in the same handwriting as the paper carried by Da Costa which also had the name and bank details of Miss M Hughes. He also had a receipt showing he had paid a cash deposit of £820 that day into an account in the name of Akbar. The applicant said he had no fixed abode in the Island. 4. The home address of Da Costa and De Freitas was searched. De Freitas was there and she pointed out seven wraps of heroin in her handbag containing a total of 477 milligrams of heroin. She said these had been given to her by the applicant for safe keeping. 5. From keys which were in his possession the police discovered that the applicant was staying at a guesthouse. On searching his room in that guesthouse they found four bags of heroin containing 1.43 grams. 6. When interviewed the applicant was originally not told of the discovery of his room in the guesthouse. He said at that stage that he had lived in Jersey for 5 years, until about a year ago. He had come back recently to collect a debt of £2,000 from various work colleagues to whom he had lent money when last over here. This was despite the fact that he said he was a poor man who moved around the United Kingdom performing odd jobs. He explained that he had recovered the debt. He had paid £820 into the account of a female friend in the UK; that was Miss Akbar; and he had asked Da Costa to pay the £850 which he had received as repayment of the loan into the account of another female friend Miss Hughes. He said he owed both these women money but he was unable to give Miss

Hughes' address or telephone number claiming not to have seen her for eight months. 7. He had asked Da Costa to pay the money in because he had already paid £820 that day and did not want to arouse suspicion. He denied any knowledge of the drugs found in de Freitas' handbag. 8. When confronted by the police with the finding of drugs at the guesthouse he then made certain admissions. Because the factual basis of sentencing is now raised on appeal we will set out exactly what was stated in paragraph 25 of the Crown's Summary of Facts in this respect: "When the police told Ali that they had also seized drugs from Lucerne Guest House, Ali finally admitted that he had in fact been supplying heroin and that all the monies seized, together with those that he had already deposited, were the proceeds of that trafficking. Ali then made full admissions regard the heroin found in his shoe (Count 5) and both the heroin (Count 6) and the cannabis (Count 8) found in the Guest House. He further admitted supplying De Freitas with the heroin found in her hand bag (Count 3)". 9. So in short, as outlined by the Crown, which it is accepted accurately stated what he said to the police, the applicant admitted having dealt in heroin and that the cash represented the proceeds of sale. The cash was made up of the various amounts which had already been paid into a bank account, those which were found with Da Costa and those which were found in the applicant's accommodation and guesthouse. The total amount involved, including that found on him when arrested, was some £2,985.00. He said on the other hand that he had arrived in Jersey with some £300. 10. No objection was taken by the defence to paragraph 25 of the Crown's Summary. On the contrary Advocate Mrs Pearmain, the applicant's very experienced counsel, specifically agreed with the Summary. 11. However, when he was seen by Probation the applicant told a rather different story. He admitted that the drugs were his and that he had supplied some to De Freitas for safe keeping. He also accepted that all the money was his. He denied that the money represented the proceeds of dealing in drugs. He said that he was holding the heroin as a ransom from the person to whom he had loaned the £2,000. The only person he intended to supply with the heroin was the person to whom it really belonged. This was elaborated by Mrs Pearmain when she came to speak in mitigation. She said that he had received the heroin as security for the debt which he was owed and when the debt was repaid he would return the heroin to the debtor. She said that the applicant had given some of the heroin to De Freitas simply for her to act as a minder for him. 12. During Mrs Pearmain's submissions the Bailiff intervened to indicate that it did not sound a very plausible story. Mrs Pearmain did not draw the Court's attention to the fact that the version which she was putting forward was quite inconsistent with the Crown case as summarised in paragraph 25 of the Summary, nor did the Crown Advocate intervene, nor did the Court itself specifically refer to the fact that it was faced with two rather different versions of events. 13. When passing sentence the Inferior Number said this: "The report of the Alcohol and Drugs Service draws the conclusion that Ali is an experienced drug dealer who manipulated his youthful and gullible co-accused. In our judgment that is a reasonable inference to be drawn from all the circumstances". 14. Before us Mr Steenson puts forward two grounds of appeal. First he submits that the Court passed sentence on the wrong factual basis. Secondly, he submits that the Court was wrong to categorise the applicant as an experienced drug dealer in the way that it did when there was no evidence to that effect. 15. We deal first with the first ground. Mr Steenson submits that there is a clear inconsistency between the Crown case, which was that the defendant had sold heroin and that the cash represented the

proceeds of such dealing, and the defence case, which was that the heroin was merely held as security and the cash came not from the selling of any heroin but from repayment of the outstanding loan or some of it. There had been no actual sale of heroin by the applicant. 16. We agree that both these two version are quite inconsistent. Where this occurs the Court is faced with a number of options. These are set out in Archbold 2005 Edition paras 5-73 to 5-75, and in rather more detail in the very helpful exposition in Whelan: Aspects of Sentencing in the Superior Courts of Jersey (2 nd Ed'n) : pp.123-4, and Ibid (Supplement to the 1994/1995 Noter Up): Newton and the Reverse in England and Jersey to which we have been referred. 17. The general rule is that where a dispute arises as to the factual basis upon which sentence is to be passed the court must resolve this by holding a Newton hearing. However, there are three exceptions to this: (i) Where the difference in the two versions is immaterial to sentence. The sentencing court need not hear evidence to resolve the matter but in those cases the court should specifically proceed on the defendant's version of events. (ii) If the defence's version is wholly implausible the court is entitled to reject it out of hand and pass sentence on the prosecution version. As was said in Connell

(1983) 5 Cr. App. R. (S) 360 there is a limit to the extent to which a judge need have his credulity stretched. (iii) Where the matters put forward by the defendant do not amount to a contradiction of the prosecution case but are rather extraneous matters of mitigation which are particularly within the knowledge of the accused then it is not necessary to hold a Newton hearing but it may be appropriate to hold what is known as a Reverse Newton hearing; but in that case the burden is on the defendant rather than the prosecution. 18. It is also clear that if a dispute as to the facts arises and the sentencing court does not hold a Newton hearing for one of the three reasons we have just referred to, the Court ought to make clear which course it is following and explain very briefly why it is taking that course. It ought also to give the defence an opportunity to make submissions upon the matter. 19. Mr Steenson, who has argued most eloquently on behalf of the applicant and has said everything that could possibly be said, submits that the Bailiff should have made it rather clearer that the Court was minded to reject the defence version as wholly implausible and that the Court in its judgment should also have articulated the process which it had gone through. He submitted that it was wrong to reject the defence version without a Newton hearing. This Court should now either conduct a Newton hearing, or should sentence on the defence version. 20. We agree with the first of Mr Steenson's

submissions.

It was unfortunate that the Court did not receive all the assistance that it might have in identifying that a factual dispute had arisen. Nevertheless, we think that the Court itself should have raised with counsel the fact that a factual dispute had arisen and explored with the defence the fact that the Court was considering proceeding without a Newton hearing on the basis that the defence case was implausible. 21. Furthermore, in its judgment the Court should have articulated the dispute of fact which had arisen and explained that it was rejecting the defence version as implausible. However, it is quite clear in our judgment that that is what the Inferior

Number in fact did. First the Bailiff raised with Advocate Pearmain during the course of her submissions the fact that the defence case could be considered to be implausible. Advocate Pearmain, therefore, had ample opportunity to deal with it. Secondly, by necessary implication, the Court clearly rejected the defence version when it described the applicant as a 'drug dealer'. 22. Accordingly, although we accept that the position could have been dealt with with greater clarity, we do not consider that any injustice was done to the applicant by the procedure which was followed. 23. The question for us now is whether the Court was right to treat the applicant's version as wholly implausible or whether we should now order a Newton hearing. We accept that the Court below was right to treat the applicant's version as wholly implausible. We say so for the following reasons: (i) The loan had apparently been unsecured for a year. Why suddenly was there the need to take security simply because the applicant had returned to Jersey? (ii) It seems inherently unlikely that a business man would take heroin as a form of security. If the security had to be realised because the debt was not repaid, the only way it could be realised would be to sell the heroin, and that would, of course, be to deal unlawfully in a Class A drug. (iii) What was put forward by Mrs Pearmain was wholly inconsistent with what the applicant had said to the police. He had admitted to the police selling heroin and that the cash represented the proceeds of sale. (iv) Why was the heroin put into wraps by the applicant and then given for safekeeping to De Freitas who lived in the house of a drug addict. (v) The version put forward by Mrs Pearmain was one of several different versions which the applicant had put forward at different times and Mr Steenson had to accept that before us. (vi) The version put forward by Mrs Pearmain and re-iterated by Mr Steenson is simply inconsistent with the position as to the cash. The defence version is that there was a debt of £2000. Yet in the short time that he was here the applicant on his own admission received something in the region of £2,700, even deducting the £300 that he had brought with him, and yet he still had possession of this heroin. It simply does not add up. 24. For all these reasons we have no doubt that the Inferior Number was quite entitled to reject the defence version as wholly implausible and therefore to conclude that there was no need for a Newton hearing. 25. We turn then to the second ground of appeal. We agree that it was unfortunate that when sentencing the applicant the Court relied upon a comment in the Drug and Alcohol Report on De Freitas to characterise the applicant as 'an experienced drug dealer who manipulated his youthful and gullible co-accused'. Advocate Pearmain had, of course, never seen that report, nor had her client. They therefore had no opportunity to comment on it or to address any arguments to the Court to correct the impression which was given. Furthermore, the Crown had not characterised the applicant in this way. 26. We accept that the applicant has no previous drug convictions and there was no evidence, therefore, that he was an 'experienced drug dealer' other than in the limited sense that he had carried out the dealing activities on his return to Jersey as outlined in the Crown case and as admitted by him to the police. 27. However, it is not every misstatement of fact, by a sentencing court which results in a sentence being reduced on appeal. We consider that the sentence of 4 years was absolutely correct for what this defendant did, even taking into account the incorrect attribution of his position. Any sense of grievance which may have resulted from the Inferior Number's description is in our judgment more than adequately addressed by the fact that this Court has not taken any note of that description and has not treated the applicant in that way. We have simply

considered the case as outlined by the Crown in the Court below, together with the mitigation put forward. 28. In our judgment the conclusions moved for by the Crown were absolutely correct for what this defendant did even accepting that he was not an experienced drug dealer who manipulated a youthful and gullible co-accused. We therefore grant leave to appeal, but we dismiss the appeal. Authorities Morgan & Schlandt-v-AG [2001 JLR 225]. Rimmer & Ors. -v- AG [2001 JLR 373]. A. G. -v- Welsh (3rd February, 2000) Jersey Unreported; [2000/21]. A. G. -v- Culkin (7 th December, 2001) Jersey Unreported; [2001/242]. R -v- Monfries [2003] EWCA Crim 3348. Whelan: Aspects of Sentencing in the Superior Courts of Jersey (2 nd Ed'n): pp.123-4. Ibid (Supplement to the 1994/1995 Noter Up): Newton and the Reverse in England and Jersey. A. G. -v- de la Haye & Kearney (15 th December, 1995) Jersey Unreported; [1995/248]. A. G. -v- Buesnel [1996 JLR 265]. De Jesus-v-AG [2003]JCA110. Connell (1983) 5 Cr. App. R. (S) 360. Guppy and Marsh (1995) 16 Cr. App. R (S) 25. Archbold (2005 Ed'n): paras 5-73 to 5-75. Page Last Updated: 14 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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