

JERSEY / JUDGMENT

Barette -v- AG 11-Sept-2006 [2006] JCA 128 (11 September 2006)

[2006] JCA 128

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September 2006

Before

:

The Hon Michael Beloff, Q. C., President;

Sir John Nutting, Bt Q. C.; and

J. W. McNeill, Esq., Q. C.

Andrew Charles Barette

-v-

The Attorney General

Appeal by

Andrew Charles Barette

against a

conviction

, by the Assize

Court on 15

th

February, 2006 and sentence passed by the

Inferior Number on 24

th

March, 2006 on a charge
of:

1 count of:

Fraud.

Advocate S. Nicolle, Solicitor General.

Advocate M. St. J. O'Connell for the

Appellant.

JUDGMENT

NUTTING J. A.: 1. This is the judgment of the Court. 2. On the 14th February 2006 the Appellant was convicted in the Royal Court of a single count of fraud. 3. The count alleged that between 1st May and 31st August 2002 he deliberately caused false representations to be made to Bel Val Farms Ltd as to the quantity of potatoes which that company had sold to the Jersey Produce Marketing Organisation Ltd with the intention of causing financial benefit to Barette and Gruchy Ltd and financial prejudice and loss to Bel Val Farms Ltd. 4. The trial took place before the Bailiff and a jury between 6th and 15th February 2006. On 24th March 2006 the Appellant was sentenced to serve twelve months imprisonment and ordered to pay £10,000 towards the costs of the prosecution. 5. An application for leave to appeal and bail was made to the Deputy Bailiff who, on 4th April 2006, gave leave and ordered that the Appellant be released on bail pending appeal. 6. On 11th July 2006 this Court heard the appeal and reserved judgement. 7. The Appellant had been charged before the Royal Court with another man, Ronald Green. They had each faced seven counts. In counts 2-7 the Appellant alone had been charged with similar offences to the one outlined above in respect of other growers whom he had allegedly defrauded. Green was charged in counts 8-14 with offences reflecting the same fraudulent conduct in relation to the same growers. 8. At the close of the prosecution case, having heard submissions from the Crown Advocate and Advocates representing the Appellant and Green, the Bailiff ordered that the jury should return verdicts of not guilty on counts 2-7 against the Appellant and counts 8-14 against Green. Since the latter counts represented the totality of the charges against Green, he was discharged and the trial of the Appellant continued on count 1. 9. As we understand the background evidence before the Jury, it was as we now set out. The Appellant was at all material times a director of Barette and Gruchy Ltd (B.&G.) of which he was, as the Bailiff described in summing up, 'a very minor shareholder'. Green was employed by B.&G. as a store man checker. B.&G. received potatoes on behalf of the growers, stored, packed and prepared them for shipment and sold them to the Jersey Produce Marketing Organisation Limited (JPMO) which marketed them and shipped them to buyers, usually supermarkets, in the United Kingdom. 10. The potatoes were dug according to a quota and delivered on a daily basis to a packhouse at Mont Mado in St John. The growers kept their own record of the quantity which left each farm in Field Identity Books. The potatoes were delivered by the growers in one tonne bins each of which was identified as belonging to a particular grower. The packhouse belonged to B.&G. and the associated office space was shared between them and JPMO. 11. The potatoes were stored overnight in a cooler at the packhouse. Next day the contents of each bin was emptied onto a grading machine and any substandard potatoes were removed and discarded. 12. Following this procedure the potatoes were packed into sacks or trays according to size. These containers were counted by Green and the details, in respect of each grower, were recorded by him on a Grower's Ticket, a copy of which was later sent to the grower concerned. 13. The details of the growers' tickets were summarised in a document known as the Packhouse Floor Summary, also compiled by Green, which recorded on a daily basis the total quantity of potatoes of each grower sent for shipment. 14. The sacks and trays were loaded onto pallets and thence onto

lorries. A JPMO employee compiled a consignment note recording the contents of each pallet before the lorry left the B.&G. yard on its journey to Ferryspeed and thence by ship to the UK. 15. Green's packhouse floor summaries formed the basis of the Grower's Return, a document which was sent weekly to each grower confirming the number of potatoes which had been shipped on his behalf. 16. It was the responsibility of a JPMO employee to reconcile Green's packhouse floor summaries, his growers' tickets and the JPMO consignment notes, using a JPMO database specifically designed for the purpose. Any discrepancies arising between the amounts packed and the amounts shipped (i.e. between the growers' tickets, the packhouse floor summary totals and the totals recorded in the consignment notes) were allocated by the JPMO employee to a surplus account identified as the BARE 4 account. 17. In due course, after shipment, JPMO invoiced the purchasers, and later having deducted expenses, paid B.&G. which in its turn paid the individual growers on a weekly basis, less expenses for commission, insurance, and packing. The Appellant was the person responsible at B.&G. for sending cheques to the growers, accompanied in each case by a grower's return recording the amount of potatoes sold. 18. On 10th May 2002, the process was changed at the instigation of the Appellant. According to his evidence, after that date, among other changes which he initiated mainly to cure the problems created by what he considered to be Green's shortcomings, he started to ascribe the unallocated potatoes on a random basis among the growers rather than to the BARE 4 account. Thereafter B.&G. did not provide JPMO with Green's growers' tickets, nor, after 10th May did JPMO receive the packhouse floor summaries. Instead they were sent a document known as the Packhouse Manifest Summary which was part of a software spreadsheet designed and compiled by the Appellant from the growers' tickets, the consignment notes and the Appellant's analysis of any discrepancies. 19. It is apparent, therefore, that after 10th May, although JPMO's administrative tasks were simplified, JPMO suffered the disadvantage that they were no longer provided with information revealing what B.&G. had told the growers about the number of potatoes actually shipped on their behalf, and was compelled to accept the Appellant's assertions, contained in the Packhouse Manifest Summaries, as to the number of potatoes which had been graded fit for shipment and actually shipped. 20. The Crown case was that after 10th May the Appellant deliberately manipulated the figures in the Packhouse Manifest Summaries enabling B.&G. to pocket substantial sums from the difference between what the buyers had paid and what the growers received. 21. In early August 2002, Mr de la Haye, the principal of Bel Val Farms Ltd (B. V. Farms), noticed from documents received from B.&G. that he had not been paid for potatoes dug and delivered on a particular day. He made enquiries, and having obtained copies of the relevant documentation, discovered that on 27th June 2002 there was a discrepancy of 20 trays between the numbers shipped on his behalf and the numbers for which he had been paid by B.&G. 22. Since each tray contained 20 kilos of potatoes, the discrepancy represented a considerable number of potatoes and therefore a significant sum of money. Further enquiries by Mr de la Haye revealed further discrepancies. 23. Mr de la Haye sought a meeting with the Appellant. The meeting was held on 14th August 2002. When confronted with the discrepancies, the Appellant blamed them on the JPMO computer system and later said that B. V. Farms was the only potential loser. The Crown suggested at trial that both statements were untrue and that the Appellant knew that. 24. In evidence the Appellant acknowledged that he had not told the truth to Mr de la Haye.

He explained to the jury that when Mr de la Haye had confronted him he had put the blame on the first thing that came into his head and that thereafter had been too afraid of Mr de la Haye to admit the truth. 25. It is a fact that overnight on 14 th -15 th August 2002 the Appellant altered the JPMO computer records to correspond with the figures which had formed the basis of payments already made to B. V. Farms which he insisted were the correct figures. 26. On 16 th August 2002 he sent to Mr de la Haye the altered figures, explained that he had altered them to correspond with what he knew to be the true position, and claimed to Mr de la Haye that B.&G. owed no money to B. V. Farms for which they had not already accounted. 27. On 16 th -17 th August 2002 the Appellant altered the records of the B.&G. computer to correspond with the changes which he had made to the computer belonging to JPMO, and also altered the packhouse manifest summaries to correspond with both. 28. Mr de la Haye was not content to allow the matter to end there and complained to the chairman of JPMO who, with the agreement of B.&G., called in auditors, Ernst and Young, to advise. 29. The auditors concluded that sums of money were due from B.&G. to the seven growers, but they were unable with any precision to quantify what was owed to each grower. 30. In the event B.&G. made payments totalling approximately £88,000 to the growers, representing twice the total which the auditors had estimated was owing. 31. Notwithstanding these payments the matter was reported to the Jersey police who engaged the services of Deloitte Touche to assist their investigation. Mrs Robinson, a forensic accountant with that firm, gave evidence at the trial on behalf of the Crown. 32. In relation to the sum of money with which count 1 was concerned, the Crown alleged that the loss amounted to approximately £3500. Mr de la Haye gave evidence that there were thirty discrepancies between the amounts which the JPMO had received for potatoes from B. V. Farms and the amounts which B. V. Farms were paid by B.&G. during the period covered by the indictment. 33. At the trial Advocate O'Connell, for the Appellant, suggested that because these alleged discrepancies were based on figures which included the system of random allocation adopted by the Appellant, they were unreliable, and that it was not possible for the jury to be sure that any of the figures on the grower's returns of Mr de la Haye were necessarily false. 34. The Crown acknowledged that they were unable to put forward the sum of £3,500 with confidence as to its accuracy, but claimed that the nature of the system operated by B.&G., as disclosed by the evidence, made it inevitable that B. V. Farms had suffered at least some loss and that since no sum was specified in the indictment it was unnecessary for the jury to be satisfied as to precise quantity. 35. It became apparent during the cross examination of Mrs Robinson that some of the premises on which Deloitte Touche had based their calculations were fallacious. 36. Firstly at the relevant time Mrs Robinson was unaware of the random fashion in which the Appellant had credited potatoes to growers which, prior to 10 th May 2002, had been recorded in the BARE 4 account. Secondly she was not supplied by the police with the field identity books and was unable to use them in making her calculations. Thirdly, as the Bailiff reminded the jury in summing up, the allegation by the Crown in opening that the discrepancies were invariably in favour of B.&G. and against the interests of the growers was proved to be wrong; and he suggested, moreover, that there was significant evidence, contrary to the Crown's allegation, that Green was incompetent rather than dishonest. 37. The Bailiff's conclusion to the jury was: "...the net result is... that the calculations of Mrs Robinson may not be of great assistance to you". 38. It was also clear from the evidence that the

organisation of the Mont Mado packhouse, as the Bailiff expressed it, was "a shambles". Over time and prior to any allegation of dishonesty the amount of potatoes recorded in the packhouse accounts which could not be allocated to individual growers, and had been therefore credited by the JPMO employee to the BARE 4 account, consisted of many tonnes of potatoes which, by 9 th May 2002, in money terms amounted to £24,000. 39. The case for the Appellant as outlined by Advocate O'Connell in his submissions to the jury, was that no false representations had been made deliberately by the Appellant, that while there was evidence to show that B.&G. held money belonging to the growers (for which the Appellant claimed B.&G. would have made account to the growers at the year end) there was no proof to the necessary criminal standard that B. V. Farms was certainly owed money, still less how much. 40. Advocate O'Connell also asserted, based on the Appellant's evidence, that he had not acted dishonestly but had been trying to sort out the chaotic situation at Mont Mado caused in part by Green's frail mental and physical health and his inability during the relevant period properly to attend to his duties. 41. A preliminary point of importance arises in this appeal concerning the composition of the jury who tried the Appellant. 42. The Appellant contends that he did not have a fair trial because the circumstances of one of the jurors gave rise to an appearance of bias in the tribunal of fact i.e. the jury. 43. The history of the proceedings so far as concerns this point is set out as follows: (i) At a pre-trial review on 3 rd February 2006 Advocate O'Connell made submissions to the Bailiff about the composition of the jury. (ii) At the outset of the trial on 6 th February 2006, in consequence of those submissions, the Bailiff asked the jury as follows " whether any of you have any substantial connection with the agricultural industry in Jersey that might affect your ability to give an impartial verdict in this case" . The juror in question did not identify himself as falling within that category (nor did any other juror) (iii) When the trial concluded on 15 th February 2006, the jury were out from shortly after 11.00 am to approximately 3.30 pm on that day. (iv) At some point between 11.05 am and 3.25 pm Crown Advocate Lacey disclosed to Advocate O'Connell that a member of the jury had a connection with a growing background. (v) On 24 th March 2006 the Appellant was sentenced to a term of imprisonment of 12 months and ordered to pay £10,000 towards prosecution costs. (vi) On 28 th March 2006 Advocate O'Connell wrote to Crown Advocate Lacey seeking further information about the juror. (vii) On 29 th March 2006 Crown Advocate Lacey sent a letter to Bailhache Labesse indicating that enquiries were being made of the Viscount's Department. (viii) Between 29 th and 30 th March 2006 various emails and letters were exchanged between Advocate O'Connell, Crown Advocate Lacey and the Bailiff's Chambers relating to when the possible connection of the juror with the growing industry came to the attention of the Crown. (ix) On 30 th March 2006 the initial application for bail pending an appeal came before the Court presided over by the Bailiff. The application was refused but the Court indicated that it would be open to the Appellant to renew the application for bail once the juror's circumstances had been investigated more thoroughly and the facts were known. On the same day in the wake of that indication, Crown Advocate Lacey contacted Mr Truscott of the Viscount's Department to invite him to investigate matters. The Bailiff, on enquiry advised that he was content that the Attorney-General as Ministere de Justice should decide what, if any, investigation should take place. (x) On 30 th March 2006 Mr Truscott, Principal Enforcement Officer of the Viscount's Department wrote to the Bailiff enclosing a report containing the fruits of his investigation ("the Truscott Report").

(He refers to having been asked by Crown Advocate Lacey " at the direction of the Court" to make the relevant inquiries: apart from the informal indication from the Bailiff such direction was in fact lacking). (xi) Between 31 st March and 5 th April 2006 there was further correspondence and email exchanges between Bailhache Labesse, Crown Advocate Lacey and the Viscount's Department. (xii) On 7 th April 2006 the Attorney General sent a letter to Advocate O'Connell enclosing a copy of the letter from the Attorney General to Crown Advocate Lacey together with a copy of the two affidavits dated 6 th April 2006, the one sworn by Mrs Iris Le Riche, the Viscount's Officer looking after the jury, the other sworn by the juror. (xiii) On 13 th April 2006 an affidavit of Ian Barette, brother of the Appellant was sworn. (xiv) On 18 th April 2006 the affidavits of the Appellant and Michael Boschat were sworn. (xv) On 20 th April 2006 there was a renewed bail application to the Court presided over by the Deputy Bailiff who granted bail pending appeal to the Appellant. (xvi) On 17 th May 2006 the Solicitor General sent a letter to Bailhache Labesse enclosing the affidavit of Crown Advocate Beverley Lacey dated 16 th May 2006. (xvii) On 19 th May 2006 the Solicitor General sent a letter to Bailhache Labesse enclosing the affidavit of Matthew Cook dated 19 th May 2006 (xviii) On 8 th June 2006 the Solicitor General sent a letter to Bailhache Labesse enclosing the affidavit of Nigel Truscott dated 8 th June 2006. 44. The enquiry accordingly produced the following material: (i) The Truscott Report, dated 30 th March 2006; (ii) The affidavit of Mrs Iris Le Riche, the Viscount's officer looking after the Jury, dated 6 th April 2006; and (iii) The affidavit of the juror, dated 6 th April 2006. The Appellant complemented this evidence with evidence of his own being: (iv) The affidavit of Ian Barette, the Appellant's brother, dated 13 th April 2006; (v) the affidavit of Michael Boschat, a defence witness, dated 18 th April 2006; and (vi) the affidavit of the Appellant himself, dated 18 th April 2006. 45. The first submission of the Solicitor General was that even if the evidence disclosed apparent bias on the part of the juror, the Court of Appeal was debarred from considering it by reason of the provisions of Article 10(a) of the Loi (1864) réglant la Procédure Criminelle which provides: .. "d'aucun jugement après le verdict ne sera sous cette titre d'annulation en raison d'un manque de satisfaire aux exigeants de la présente loi en ce qui concerne l'assignation ou la formation des membres de l'enquête ou de l'incapacité d'une personne à servir comme membre de l'enquête". 46. Her submission, disputed by Advocate O'Connell for the Appellant, was that " l'incapacité " referred to any factor which meant that a particular juror ought not to have sat, including apparent bias. Although she subsequently did not press the submission we heard full argument and will express our views on a point of obvious general importance. 47. The Court cannot construe the Article in the manner contended for by the Solicitor General for the following main reasons: (i) " l'incapacité " (or in English incapacity) seems to us to refer as a matter of language only to circumstances in which a juror is not qualified under the statutory criteria for jury service and not to any other matter. (ii) That construction is fortified by consideration of the structure of the legislation; Article 9 (which it is unnecessary to quote in full) gives a catalogue of persons who are " exempté de servir comme en d'enquête in 8 categories. Article 10 is a list of persons " incapables de servir comme en d'enquête". It seems to us accordingly that, in context, Article 10(a) refers sequentially to matters which concern the summoning or empanelling of members of the jury, and incapacity of a member of the jury i.e. so reflecting the sequence of Articles 9 and 10. (iii) Further assistance is provided by decision of this Court in *Marriott v AG*

- [2002] JLR 283 , when it felt compelled to quash a conviction on the basis that two members of the jury lacked capacity because they were disqualified by reason of their own criminal convictions. Prima facie Article 10(a) was designed to redress this position and nothing more. The Solicitor General helpfully furnished us with an explanatory statement laid before the States at the time when the amendment was being considered and which provided: "Article 3 of the draft law inserts a new Article 10(a) in the principal law to make it clear that a judgment of the Court following an assize trial is not liable to be set aside by reason of a technical failure to comply with statutory requirements concerning summoning or empanelling of jurors or by reason or incapacity of a person to serve as a juror". This statement which we consider to be an admissible aid to construction (see *R v Montilla*
- [2005] Cr. App. R. 425 per Lord Hope para 35 at p.436) certainly does not contradict the construction which we give to the Article and if anything strengthens it, by its reference to technical failure (albeit in respect of surmising or compelling of a jury not incapacity) which is the antonym of substantial injustice. (iv) It is a strong submission to suggest that Jersey law is prepared to ignore or override by legislation one of the two main rules of natural justice, encapsulated in the Latin maxim " Nemo iudex in causa sua ". If the Solicitor General's initial argument was correct, a Jersey Montagu could sit on a jury trying a Jersey Capulet something which would not by any standard seem fair. We would be loath so to find this to be so in the absence of compelling language. (v) Further assistance is given - at any rate in terms of perceptible policy - by reference to Section 18(1) of the Juries Act (1974) (applicable to England and Wales) which states that: "No judgment after verdict in any trial by jury in any court shall be stayed or reversed by reason of ...
- (b) that a juror was not qualified in accordance with Section 1 of this Act (which deals with qualification for jury service) ...
- (d) that any juror was unfit to serve". There is a consistent line of authority in the English Court of Appeal, Criminal Division (see *R v Chapman*, 65 Cr. App. R. 75, *R v Bliss* 84 Cr. App. R. 79, *R v Raviraj* 85 Cr. App. R. 93, and *R v Salt* The Times (February st
- 1996) to the effect that this provision would not prevent the Court of Appeal from exercising its appellate power to set aside a jury's verdict on the ground that it was unsafe or unsatisfactory, or where, arising out of the sitting of a disqualified juror, " a proper inference may be drawn that the defendant may have been prejudiced or may not in fact have received a fair trial", (see *Bliss* at page 7). All that Section 18 of the Juries Act does is to prevent a verdict being set aside by reason only of statutory disqualification or unfitness to serve, not to prevent a verdict being set aside wherever there is a statutory disqualification or unfitness to serve, irrespective of its impact on the fairness of the trial. English law in short points in the opposite direction to the Solicitor General's submission. 48. If she was wrong in her first submission, the Solicitor General accepted that we had a discretion to admit the evidence. Advocate O'Connell said that we had a duty to do so. In our view there are three distinct strands in the jurisprudence in this general area which should be

disentangled. The first is represented by the case of *R v Connor*

- [2004] 1 AC 1118 in which it was held by a majority in the House of Lords that allegations made by one juror against another of partiality (in that case, of racial prejudice) against the defendant, should not be investigated since investigation would be inconsistent with the principle of confidentiality of jury deliberations which underpin the independence and impartiality of a jury as a whole. The second is where there are allegations of extraneous influence on the jury in respect of which the Court may hear evidence; see *R v Young*
- [1995] QB 324 (where a juror brought an ouija board into the jury room to tap into outside assistance) and *Connor* cit.sup. per Lord Steyn para 15 and per Lord Hope para 106. The third is where an allegation is made not of actual bias (as might be illustrated by what transpired in the jury room) but of apparent bias constituted by a relationship between the defendant and a party to or witness in the criminal proceedings. In the case of *R v Gough*
- [1993] AC 646 after sentence had been passed, it was discovered that one of the jurors was the next door neighbour of the brother of the appellant who had been convicted. This was drawn to the attention of the judge who decided that he was by then functus officio. The juror was however interviewed by the police and swore an affidavit in which the fact of neighbourhood was admitted but she also said that this did not influence her thinking as a juror and did not mention the matter to her fellow members of the jury. That affidavit was unchallenged. 49. We consider that the present case falls into the third category. Cases such as *R v Miah*
- [1992] Cr. App. R.12 and *R v Quereshi*
- [2002] Cr. App. R. 33 (which were relied upon by the Solicitor General) were identified in *Connor*, in our respectful view correctly, as examples of the first category (see the speech of Lord Hope para 101 at p.1158) in which inquiry was debarred by reason of the paramountcy of the confidentiality of the jury process. 50. In *Gough* cit. sup. the House of Lords said that in the third category the issue was not one of the state of mind of the juror but of the objective circumstances pertaining to the juror. As Lord Goff put it at page 659: "A layman might well wonder why the function of a court in cases such as these should not simply be to conduct an inquiry into the question whether the tribunal was in fact biased. After all it is alleged that, for example, a justice or a juryman was biased, i.e. that he was motivated by a desire unfairly to favour one side or to disfavour the other. Why does the court not simply decide whether that was in fact the case? The answer, as always, is that it is more complicated than that. First of all, there are difficulties about exploring the actual state of mind of a justice or juryman. In the case of both, such an inquiry has been thought to be undesirable; and, in the case of the juryman in particular, there has long been an inhibition against, so to speak, entering the jury room and finding out what any particular juryman actually thought at the time of decision. But there is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias - a

point stressed by Devlin LJ in *R v Barnsley County Borough Licensing Justices, ex p Barnsley and District Licensed Victuallers Association*

[1960] 2 All ER 703 at 715, [1960] 2 QB 167 at 187. In any event, there is an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart CJ in *R v Sussex Justices, ex p McCarthy*

[1924] 1 KB 256 at 259, [1923] All ER Rep 233 at 234 that it is - 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.' At all events, the approach of the law has been (save on the very rare occasion where actual bias is proved) to look at the relevant circumstances and to consider whether there is such a degree of possibility of bias that the decision in question should not be allowed to stand." Having set out the general principle applicable to perceived bias on the part of any tribunal of fact (a principle which has since been modestly modified, see below paragraph) Lord Goff also said at page 669: "There are however two features of jury cases to which I will briefly draw attention. The first is that the possibility of bias on the part of a juror may, as in *R v Spencer* itself, come to the attention of the judge in the course of the trial. In such circumstances the judge, in deciding whether to exercise his discretion to discharge one or more members of the jury, should apply the same test as falls to be applied on appeal by the Court of Appeal, viz whether there is a real danger of bias affecting the mind of the relevant juror or jurors. Even if the judge decides that it is unnecessary to do more than issue a warning to the jury or to a particular juror, and thereby isolate and neutralise any bias that might otherwise occur, the effect of his warning is not merely to ensure that the jurors do not allow any possible bias to affect their minds, but also to prevent any lack of public confidence in the integrity of the jury. It is unnecessary for me to say any more on this subject, to which no argument was addressed in the present case. Second, if any question of bias on the part of a juror arises on appeal, the Court of Appeal, having applied the real danger test, will then proceed in the light of its conclusion on that test to exercise its powers under s.2 of the Criminal Appeal Act 1968, in the normal way, as was done by your Lordships' House in *R v Spencer* ." 51. As to the approach to evidence allegedly illustrating apparent bias we should refer to, and rely upon, the decision in *Locabail (UK) Ltd v Bayfield Properties Ltd* and another

[2000] QB 451 at para 19 at p. 477: "It is noteworthy that in *R v Gough* evidence was received from the juror whose impartiality was in issue (see [1992] 4 All ER 481 at 484,

[1993] 2 All ER 724 at 727,

[1993] AC 646 at 651 and 658), and reliance was placed on that evidence (see [1992] 4 All ER 481 at 485,

[1993] AC 646 at 652); both in the Court of Appeal and the House of Lords it was accepted that if the correct test was the real danger or possibility test the appeal could not succeed, since the allegedly disqualifying association had admittedly not been known to the juror at the time when the verdict had been returned, and therefore there was no possibility that it could have affected her decision (see [1992] 4 All ER 481 at 485,

[1993] 2 All ER 724 at 729 and 738,

[1993] AC 646 at 652, 660 and 670). While a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he or she knew at any relevant time, the court is not necessarily bound to accept such statement at its face value. Much will depend on the nature of the fact of which ignorance is asserted, the source of the statement, the effect of any corroborative or contradictory statement, the inherent probabilities and all the circumstances of the case in question. Often the court will have no hesitation in accepting the reliability of such a statement; occasionally, if rarely, it may doubt the reliability of the statement; sometimes, although inclined to accept the statement, it may recognise the possibility of doubt and the likelihood of public scepticism. All will turn on the facts of the particular case. There can, however, be no question of cross-examining or seeking disclosure from the judge. Nor will the reviewing court pay attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision." 52. In those circumstances we determined that the evidence as to the juror's degree of connection with the Jersey farming community was admissible and indeed required to be considered. While it did not appear to us that there were significant differences of primary fact in the evidence adduced from each side, we were in any event guided by the assistance given by the Court of Appeal in *Locabail*, first that the evidence be assessed in a realistic and common sensual way, and second (and indeed this was common ground between the parties) that cross examination of a juror was impermissible. We would only add that if a situation of this kind arises in the future, any inquiry should be conducted under the direction of the Royal Court or, if need be, the Court of Appeal. However the fact that this procedure was not followed in the present case does not render the evidence inadmissible. 53. That being so, the issue arose as to what was the appropriate test and for this purpose we bear in mind the modification in *Porter v Magill*

[2002] 2 AC 357 of the Gough test which, reflecting jurisprudence in other Commonwealth countries, was articulated by Lord Hope in the following terms. "The question is whether the fair-minded observer, having considered the facts would consider that there was a real possibility that the Tribunal was biased." (paragraph 103 at p.494) 54. In our view it follows from that authoritative statement of principle that if any member of the jury failed that test of apparent lack of impartiality, the Appellant would not have had a fair trial. 55. The Solicitor-General nonetheless suggested that even if one juror failed that test, the trial

would not automatically be stigmatised as unfair. She relied on *R v Alexander Steen* CA (Crim Div) 28 July 2004. The case was concerned, however, not with the issue of whether a particular juror should not have sat but whether a particular juror had displayed actual bias. Moreover, it is clear from *Gough* that the presence on the jury of a single juror who ought not, because he failed the apparent impartiality test, to have sat would vitiate the verdict. 56. It is against that background that we now have to assess whether on the material that we have considered, such a real risk existed. 57. The Appellant's own affidavit succinctly summarised the points which in this context caused him concern. "From the contents of the documentation that I have been provided with (and, in particular, the Affidavit sworn by the juror), I consider the following matters to be significant: (a) The juror's maternal grandfather was a farmer (see paragraph 3 of the juror's Affidavit); (b) Both of his uncles, Eric and Roy, farmed in Jersey (see paragraphs 3 and 4 of the juror's Affidavit); (c) His cousins, David (Eric's son) and the son of Roy (who he does not name) took over their father's farming businesses (see paragraphs 4 and 6 of the juror's Affidavit); (d) The juror's cousin, David, farmed, amongst other things, potatoes (the subject matter of this prosecution) and when he (the juror) was younger he worked on his cousin David's farm, planting potatoes, etc (see paragraph 6 of the juror's Affidavit); (e) The juror's cousin, David, ceased farming potatoes but now works as a quality controller/inspector (for the Jersey Producers and Merchants Organisation - "the JP&MO". The Chairman of the JP&MO (and, therefore, effectively the juror's cousin's employer) is a Mr Peter Le Maistre, who was an important prosecution witness at my trial. Further, Mr Colin de la Haye of Bel Val Farm Limited (the victim of the one count that I was convicted of and a principal Crown witness) was a shareholder of that company (see paragraph's 9 and 10 of the juror's Affidavit); (f) The juror's mother telephoned him on the Saturday before the start of the trial to inform him that it was "the potato trial" that he would be sitting on (see paragraph 11 of the juror's Affidavit); (g) On the first day of the trial the juror disclosed to a person (who he believed was a Court officer) that he comes from "a sort of farming background" (see paragraph 12 of the juror's Affidavit); (h) The juror states that he was aware of "some farming terminology", For example, he knew how many bags of potato there were in a tonne, because of his background of working on a farm (see paragraph 16 of the juror's Affidavit); and (i) The juror noted during the course of the trial (he does not state exactly at which point but it must have been before the close of the prosecution case) that he, in fact, knew one of the victims of the alleged frauds committed by me (a Mr Coutanche, the owner of Clamer Farms Limited), as he used to drink with him at the same pub. He goes on to dismiss this connection on the basis that, firstly, Mr Coutanche did not attend trial to give oral evidence and, secondly, the jury were directed to enter a not guilty verdict on the relevant counts (count 2 regarding me and count 19 regarding Mr Green respectively) in any event. I am afraid that this gives me no comfort whatsoever and I wonder why the juror did not alert Mr Le Riche/the jury foreman/the Bailiff to this fact once he became aware of this information, in order that it could have been dealt with appropriately. On this issue, I also recall that Mr Coutanche attended to observe the trial on several days and his wife attended on each and every day, even after

the counts concerning her and her husband had been dismissed by the Bailiff at the close of the prosecution case (paragraph 18 of the Applicants Affidavit); and (j) Three of the juror's close friends come from a farming background. In addition to the above points, I understand from Mr Michael Boschat (a defence witness whose name was listed on the trial billet) that he (Mr Boschat) was a classmate of the juror at Les Quennevais Secondary School. Mr Boschat immediately recognised the juror at the trial and recalled that he (the juror) was from a farming

background.

The prospective jurors were asked whether they knew of any of the persons/companies listed on the trial billet but the juror did not advise the Court of his acquaintance with Mr Boschat." 58. With the exception of the reference to the juror drinking "with" Mr Coutanche at the same pub, we approach the issue on the basis that this was a fair summary of the juror's position. (The juror only accepted that he drank " at the same pub as Mr Coutanche" : Mr Boschat said that on an unspecified occasion or number of occasions, but 3-4 years ago, he had seen the juror and Mr Coutanche " drinking within the same group of people"). 59. Advocate O'Connell sought to suggest that aspects of the juror's behaviour as described in the Truscott report and, indeed his own affidavit, betrayed a concern on his own part that he might not be suitable to serve on a jury (see also Appellant's Affidavit paras 9f and g). We do not find it necessary to set out the passages relied on. Suffice it to say that in our view, the suggestion lacked realism. The juror himself has explained that he did not consider that he ought to put up his hand when the Bailiff asked the question whether any potential juror had " any substantial connection with the growing industry in Jersey " (paragraph 15 of the Juror's affidavit). His statement, which we accept, is inconsistent with any suggestion that he actually had any concerns. 60. We respectfully acknowledge the force of what was said by the Deputy Bailiff when granting bail i.e. that "there is a background of interest and animosity on this case between the farming community and the merchants". It was an appreciation of that fact which generated the nicely judged question posed to potential jurors by the Bailiff at the outset of the trial so as to avoid contamination of the trial process. The Bailiff and the Deputy Bailiff naturally enjoy conspicuous advantages in assessment of the culture and texture of the Jersey community which peripatetic appellate judges lack. 61. The issue, however, is one of substantiality of the connection between the juror and the farming community. This is a matter for appreciation of the primary facts viewed through the lens of the fair-minded observer. It is at this point that, in our view, the Appellant's case founders. Advocate O'Connell said that the Appellant came from a farming

background.

Background is not the same as foreground; and such connections as the Appellant had with the farming community were no more than historic, and where not historic, insubstantial. As was said in *Locabail cit. sup.* (para 25) "The greater the passage of time between the event relied on, as showing a danger of bias, and the case in which the objection is raised the weaker (other things being equal) the objection will be". As to Mr Coutanche he was not, in the event, a witness,

and could barely be described as a sometime acquaintance, certainly not a friend, of the juror. 62. We therefore reject this ground of appeal. We now turn to Advocate O'Connell's criticisms of the summing up. 63. It may be that the Crown could plausibly have put its case on the basis of a general defalcation in accordance with the principles of *Foster -v- AG*

[1992] JLR 6 . But the Crown chose instead to allege loss, albeit in respect of each loser unquantified, by all seven growers in counts 1-7; and as result of the Bailiff's ruling at the close of the Crown case the jury had to consider only one count. 64. There can be no doubt that the Bailiff's decision had a serious impact on the case for the Crown. As opened, the case was that Green had supplied the Appellant with figures which both knew to be false and which the Appellant then used to defraud the growers; but, as we have observed, the evidence in the trial revealed that Green was more incompetent than dishonest. Moreover by limiting the indictment to a single count the Bailiff reduced the sum which the jury had to consider as defrauded to about one tenth of the sum originally alleged. 65. Although the Bailiff did not give reasons for his decision in respect of the submissions made at that time, Advocate O'Connell submitted that the decision was based on the inadequacy of evidence relating to counts 2-7 and that the Bailiff had concluded that there was insufficient evidence adduced by the Crown to prove to the requisite standard that each grower had suffered loss. 66. In adoption of the argument which the Crown advanced at trial and in response to Advocate O'Connell's submissions to this Court, the Solicitor General argued that the decision which the Bailiff had reached was wrong. She urged this Court to adopt an approach to this appeal, so far as the Appellant was concerned, that there was sufficient evidence on all seven counts against him fit for the Jury's consideration. In particular she submitted that, granted the size of the overall loss, the nature of the system which permitted those losses to accrue and the period during which the losses were occasioned, it was inherently unlikely that any one grower would have been fortunate enough to avoid suffering at least some loss. 67. We have considered carefully whether we should accede to this submission. But we have concluded that it would not be right to revisit the decision of the Bailiff and substitute our own assessment of the evidence for the purposes of this submission. He heard the evidence, saw the witnesses and made a ruling on the sufficiency of evidence on most of the counts in favour of the Appellant. He was in a better position than we are to assess the impact of the evidence including, importantly, cross examination. 68. Accordingly after the Bailiff's ruling the issue was limited to a single count, and the Royal Court proceeded on the basis of the Bailiff's ruling during the course of the presentation of the Appellant's case; so, too, did Counsel during their speeches. In our judgement it would be impossible for this reason as well as those described above for this Court to approach the issues in this part of the appeal on the basis that the ruling was wrong and should not have been made. 69. One of the necessary results of the Bailiff's decision was that, in order to convict on count 1, the jury had to be satisfied that there was evidence, among other matters, first that the Appellant had acted dishonestly in relation to B. V. Farms and second that B. V. Farms had suffered prejudice and loss. It followed that evidence had to be identified by the jury which

distinguished count 1 from the rest. 70. If the jury failed to find evidence which distinguished count 1, and yet convicted, the necessary implication is that they had disregarded the Bailiff's ruling. If this Court were to accept the invitation of the Solicitor General, the Court would be permitting itself, equally by necessary implication, to do that which the Bailiff's ruling prevented the jury from doing. 71. As we have suggested, two of the issues which the jury had to resolve against the Appellant, if they were to convict him, related first to his dishonesty and second to prejudice and loss in relation to B. V. Farms. These were the two main aspects of the summing up to which Advocate O'Connell directed criticism. 72. It is convenient to deal first with the issue of dishonesty. In identifying evidence on count 1 the Crown prayed in aid the Appellant's activities on the night of the 14 th -15 th August 2002 as well as his explanation in the witness box of random allocation to growers of unattributable potatoes. It is plain that those activities were not specific to count 1. The evidence available in respect of that count, and potentially specific to it, was the admitted lie told by the Appellant to Mr de la Haye when the latter confronted the Appellant with the discrepancies which he had discovered shortly before 14 th August 2002. As we have already noted, confronted with the discrepancies, the Appellant apparently blamed them on the JPMO computer system and later told his fellow directors that B. V. Farms was the only potential loser. 73. These lies were plainly important pieces of evidence capable of establishing dishonesty on the part of the Appellant. Indeed the Solicitor General submitted firstly that they demonstrated that the Appellant knew that B. V. Farms had suffered loss; and secondly that he had told the lie to Mr de la Haye to conceal the extent of the loss from B. V. Farms. 74. Advocate O'Connell submitted that it would not have been open to the jury to draw either of these conclusions to the requisite standard of proof. On the Crown's first limb, directed to the Appellant's state of knowledge, he submitted that the nature of the Appellant's position at B.&G. would not have permitted him to know that any individual grower had suffered loss because there was no way of identifying individual losses. Advocate O'Connell also suggested that his cross examination of Mrs Robinson had amply demonstrated that Deloitte Touche had been unable to identify such losses and that there was no document which would have been available to the Appellant from which he could have identified the losses himself. The Solicitor General's response acknowledged the absence of such documentation but suggested that the Appellant might have kept records which would have revealed the losses to him but which he had later destroyed. 75. It is inherent in the Crown's response on this point that there was in fact no direct evidence before the jury to demonstrate individual as distinct from general loss, and that the jury, as Advocate O'Connell submitted, would therefore have been required to speculate on the existence of such records if they were to resolve this point against the Appellant. 76. In the light of our conclusions on this aspect of the appeal it is unnecessary for us at this stage and in this part of the judgment to resolve the contentions summarised above. 77. In relation to the second limb of the Crown's argument regarding dishonesty, referring essentially to the reason for the lie to Mr de la Haye, Advocate O'Connell submitted that it was wrong to assert that the only inference was that the Appellant wished to conceal the existence and extent of the losses. In this Court he

canvassed a number of other reasons why the lie might have been told, for example, out of panic, or in order to protect Mr Green, or to buy time to investigate the matter, or to excuse losses not due specifically to B. V. Farms. 78. It has been settled law in this jurisdiction for at least 25 years that lies can be relied on in proof of guilt provided certain defined criteria are met. In *R v Lucas* (R.) 78 Cr. App. R. 159, the Court of Appeal in England held that a lie told by a defendant can only strengthen or support evidence against that defendant if the jury are satisfied that a) the lie was deliberate, b) that it relates to a material issue, and c) that there is no innocent explanation for it. In *R v Goodway* 98 Cr. App. R. 11, the Court held that whenever lies are relied on by the prosecution, or might be used by the jury, to support evidence of guilt as opposed merely to reflect on the defendant's credibility, the trial judge should give a full direction in accordance with *R v Lucas*. 79. There were particular features of the evidence in this case which included the existence of losses albeit almost unquantifiable, and the existence of losers albeit disputed as to identity, and which also included the reduction of the original seven charges to a single count and the exculpatory explanations for the admitted lie. 80. In our judgment the jury were plainly entitled to use this lie as an essential element of guilt on count 1 if they were satisfied that the lie related directly to the count. 81. In this his summing up the Bailiff gave the jury a *Lucas* direction. Having described the lie and its circumstance on 14th August 2002, the repetition in the letter of 16th August and again at the meeting with Mr de la Haye and Mr Le Maistre on 17th August, the Bailiff continued: "Now in relation to these admitted lies I must give you another important direction on the law. Lies told by a defendant can be relied upon by a jury to support evidence of guilt but only if you are satisfied of three things. First that the lie was deliberate. Secondly that it relates to a material issue and thirdly that there is no innocent explanation for it. People do sometimes lie for other reasons. For example, because they are ashamed of what they have done or because they want to conceal disgraceful behaviour of some kind. Well these are all matters for you to consider." 82. No problem arises under the first limb of the *Lucas* direction: it was not suggested that the lie to Mr de la Haye was other than deliberate. Nor could it be contended that the third limb created difficulties because the defence at trial had canvassed extensively an innocent explanation for that lie. 83. The question is whether the Bailiff's reference to materiality without further elaboration was adequate to enforce the point that the lie had to be material to count 1. 84. It is often necessary to tailor a direction in law to the circumstances of a particular case. We take the view that the direction might have benefited from the elaboration that the concept of materiality had to be applied specifically to count 1, i.e to knowledge by the Appellant that Mr de la Haye, as the representative of B. V. Farms, had suffered loss, lest the jury should suppose that a more general and unspecific materiality to the case as opened and as originally pleaded in the indictment would have sufficed. That knowledge and accompanying motive was the material issue on this part of count 1 which was of course the only count left to the jury to consider. However that omission by the Bailiff, if omission it was, would not have caused this Court to review the jury's verdict. 85. We now turn to proof of loss as identified by the Bailiff, and to a more fundamental criticism of the summing up made by Advocate

O'Connell. 86. It is necessary to deal first with a dispute between the Solicitor General and Advocate O'Connell as to the proper interpretation of certain admissions made in the Court below. Indeed at one stage, and in the event that this Court thought it right to interpret the admissions as asserted by the Solicitor General, Advocate O'Connell sought leave to resile from those admissions. 87. The matter arose in this way. The Solicitor General submitted in argument to this Court that the proper construction of the admissions made at trial, without more, was sufficient to establish loss on all counts and specifically on count 1. 88. The relevant admissions are at paragraphs 40-42 of the document so entitled: "40. On 17 th August 2002 the proposed meeting between Mr Barette, Mr de la Haye and Mr Le Maistre took place. In that meeting Mr Barette stated that he had amended the J. P. M. O. Database on the night of 14 th August 2002. 41. B.&G. immediately confirmed to all of the affected growers that they would arrange to have the Produce Trading Account of B.&G. audited by Ernst and Young so as to ascertain the extent of any differences and to calculate any monies found to be due to the affected growers. 42. The growers were subsequently compensated by B.&G. by being paid approximately twice the amount that was calculated by the auditors as being due to them and this as a gesture of goodwill. The compensation received by the respective growers was: Bel Val £7,121:74." (The figures for the remaining six growers were tabulated thereafter.) 89. The Solicitor-General relied particularly on the reference to "all of the affected growers", which she contended constituted a concession that each grower had suffered loss. In the light of Advocate O'Connell's assertion as to the basis on which the Bailiff decided to direct verdicts of not guilty to counts 2-7, it necessarily follows that at trial the admissions were not treated as admissions of loss, still less as to the quantification of such loss. If the admissions had been so relied on, there could have been no question of a submission of no case succeeding on the ground which Advocate O'Connell identified. In all the circumstances therefore, we cannot accept the submission of the Solicitor General. 90. Moreover we are satisfied that it would be wrong to do so in the light of Advocate O'Connell's submission to this court that the figures in para 42 of the Admissions and the context in which the admissions were made at trial related to, and reflected, the commercial decision by B.&G. after the event to compensate the growers generally and that the figures did not represent a concession that each grower had surely lost money, still less a precise calculation of individual loss. 91. This submission was based on the evidence at trial from a witness, Mr Neal, who was a director of B.&G. He gave evidence that as a result of their investigations Ernst and Young had not been able to allocate precise losses to any individual grower and had suggested a formula for compensation based on the principle that where discrepancies were found to have occurred on a particular day, the monetary equivalent of the discrepancy would be apportioned pro rata according to the number of potatoes sent to the packhouse that day by the growers concerned. 92. Mr Neal said that B.&G. accepted this proposal as a means of compensating those growers who were potential losers and that, as a gesture of goodwill to the growers, B.&G. had doubled the payments represented by this formula in respect of each grower. 93. After discussion spanning several months the proposal was accepted by all the growers

and the agreed sums were paid to them by B.&G. 94. Mr Neal's evidence was significant in explaining the admissions generally and in particular the phrase in Admission "calculated by the auditors as being due to them". 95. Advocate O'Connell's complaint, on which he laid stress in this appeal, was that, in the light of what the Bailiff said, and failed to say, on this topic in summing up, the jury may have reached a verdict of guilty reflecting the same wrong interpretation of Admissions 40-42, which had formed the basis of the submissions of the Solicitor General to this Court of the proper construction of the admissions. 96. In summing up this aspect of the evidence at trial, the Bailiff set it in the context of the Crown's obligation to establish first whether there were false representations made to B. V. Farms as to the quantity of potatoes actually sold, and second, if there were false representations, whether they had the consequence of benefiting B.&G. and causing prejudice and loss to B. V. Farms. The Bailiff continued: "Now it is not disputed by the Defence that Barette and Gruchy were holding money that did not belong to the company and actually belonged to the growers. The Defence here is not dissimilar to the Defence on the first question and that is that you cannot be sure that Bel Val Farms actually lost out financially. What is said is that the system was in such a mess that you cannot be sure that any of the money retained by Barette and Gruchy belonged to Mr de la Haye's company. It is accepted by the Defence, however, that Barette and Gruchy did actually pay out money to Mr de la Haye. I remind you that you do not have to be sure that Barette and Gruchy retained any particular sum of money belonging to Mr de la Haye; you have only to be satisfied that some money of Mr de la Haye's was retained for this element of the case to be made out." 97. Advocate O'Connell has submitted that this recital of the evidence was misleading and inadequate. He asserted that, absent a rehearsal of Mr Neal's additional evidence about the payments made to the growers and about which Mr Neal was not cross examined by the Crown, the exigencies of the case required a careful direction to ensure that the jury did not use Admissions 40-42 to close the evidential gap, as alleged, of proof of loss on count 1. That evidential gap was at the forefront of his submissions to the jury. 98. We have considered with care, in the absence of any references to Mr Neal's evidence in the summing up and in the light of what the Bailiff said to the jury on this topic, whether there existed a risk of the kind identified by Advocate O'Connell and whether in all the circumstances of the case the rehearsal of the evidence on this important issue was adequate. 99. We have born in mind that this evidence was compartmentalised and set in the context of the second of the three elements i.e. prejudice and loss to B. V. Farms which the Crown were required to prove (the third, we mention for completeness, concerned the element of dishonesty), and was the only evidence described by the Bailiff going to this issue. This underlines the importance of the evidence. 100. In the event we have been persuaded that there was a risk that the jury may have been inadvertently misled by the assertion of the Bailiff that "Barette and Gruchy did actually pay out money to Mr de la Haye" , bearing in mind the Bailiff's earlier assertion that it was the case for the defence that the jury could not be sure that "Bel Val Farms actually lost out financially" . 101. Without further elaboration the two sentences were irreconcilable. If, after the event, B.&G. had paid money to B. V. Farms it is reasonable to assume, in the absence of further

explanation, that B. V. Farms had been deprived of money actually due to them during the relevant period. 102. It is a necessary feature of the conflict that what the Bailiff reported to the jury as to the factual position i.e. that B.&G. did pay money to the company, undermined the defence submission that there was no evidence that B.&G. had lost out financially. 103. The assertion by the Bailiff of the factual position must have been based on Admissions 40-42. But that evidence was incomplete without the important uncontradicted explanation and qualification placed on those paragraphs by Mr Neal. His evidence highlighted the points that Ernst and Young had not been able to allocate losses on an individual basis and that the decision to compensate the growers, as Advocate O'Connell described it, was a commercial one and was made without concession as to liability of any kind. Without that evidence the defence assertion that there was no proof of loss made little sense in the light of the admitted payment of £7, 121:74. 104. It is rarely necessary for a judge to remind the jury of all the evidence on the issues in the case, particularly where, as here, he reminded the jury of the defence submission on the point. Indeed, in our judgement, the Bailiff's summing up in this case was a model of clarity and brevity: the case contained a large number of documents and was not free of either difficulty or complexity. 105. But in respect of this important issue the problem is that the way the matter was left created the unhappy impression that the admitted facts contradicted the defence submission (an impression which the Bailiff would not, of course, have wished to leave to the jury), and that the admission in respect of B. V. Farms alone could be used to prove the element of loss. 106. We have concluded that the jury may have been misled on this issue to the disadvantage of the Appellant and that, since this disadvantage related to an element of the offence, the effect on the verdict may have been significant. 107. Advocate O'Connell must forgive us if we do not deal with the other points which he made in his submissions. If we do less than justice to them and to the cogent and careful responses of the Solicitor General, it is because we have concluded, in the light of our decision on one of the grounds of appeal that we do not need to lengthen this judgement by dealing with them individually. In our view neither individually nor in combination do they fall within Article 26 (1) of the Law. (On 11 th September 2006, the Court heard submissions on the application of the proviso in the light of the judgment above; and, having indicated that the appeal would be dismissed, proceeded to hear argument on the appeal against sentence.) 108. Having heard submissions yesterday on the application of the proviso, and having indicated our view in relation to those submissions, and having subsequently heard submissions on the appeal against sentence, we now propose to deal with both those matters. 109. Jersey law provides by Article 26(1) of the Court of Appeal (Jersey) Law 1961 that: "Subject to the following provisions of this Part, on any appeal against conviction, the Court of Appeal shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the Judgment of the Court before which the Appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that, on any ground, there was a miscarriage of justice, and in any other case shall dismiss the appeal: provided that the Court may, notwithstanding that

it is of the opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred." This Article reflects section 4(1) of the Criminal Appeal Act 1907 (applicable to England and Wales) which was first amended by section 2(1) of the Criminal Appeal Act 1968, then by section 44 of the Criminal Law Act 1977 and thereafter by section 2(1) of the Criminal Appeal Act 1995. The affect of these amendations has entirely altered the appellate jurisdiction in England and it can be fairly said that the law on this matter, as it pertains to Jersey, is more robust in regard to the up-holding of a Jury's verdict than the law which now exists on the mainland. 110. The language of the relevant provisions of the Jersey Law, reflecting the 1907 Act, is not altogether happily drafted but in substance, notwithstanding some error in the conduct of the trial, a verdict will only be set aside if the miscarriage of justice consequent upon that error can properly be described as "substantial". 111. The locus classicus is the judgment of the Court of Appeal in *R v Haddy* [1944] 29 Cr. App. R. 182. The Court consisting of Humphreys, Asquith and Cassels JJs reviewed the authorities post 1907 which had given guidance as to the proper test to be applied where Courts of Criminal Appeal had been constrained to consider whether or not to apply the proviso. Humphreys J giving the judgement of the Court in *Haddy* quoted what Channell J had said in the *R v Cohen and Bateman* [1909] 2 Cr. App. R. 197 at 207: "If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events, no substantial miscarriage of justice within the meaning of the proviso." Humphreys J. continued: "That statement of the law has stood for thirty-five years and, so far as we are aware, has never been the subject of adverse comment, though judges in giving the decisions of the Court of Criminal Appeal have used varying language and many different expressions". The test propounded by Channell J. was approved by the Lord Chancellor, Viscount Simon in *Stirland v DPP* 30 Cr. App. R. 40, with whose speech the other members of the House concurred. 112. Accordingly this Court must make its own assessment of the strengths of the evidence in deciding whether or not to apply the proviso. 113. We recall that out of the three ingredients of the offence charged (1) false representations (2) dishonestly made, leading to

- (3) loss, only the last is in issue and it was in respect of that element only that we ventured any criticism of the otherwise admiral directions of the Bailiff. 114. We are clear that no reasonable Jury considering the evidence as a whole would come to any conclusion other than that loss was sustained by the grower B. V. Farms, the only consideration of whose loss was left to the Jury. 115. It is indisputable that as a group the 7 growers, including B. V. Farms, suffered loss. It was urged upon us that a Jury could not have been sure that B. V. Farms had been one of the losers. The system, if such it was, permitted by the Appellant was bound to cause loss to the growers who were subject to it. No evidence was adduced to suggest that there was reason to differentiate between the growers in general and B. V. Farms in particular. 116. The Appellant's manipulation of the documentation was provoked

by the challenge from Mr de la Haye of B. V. Farms as to the discrepancy between the amount of potatoes produced for shipment and the amount of potatoes shipped, as identified from documentation provided by B.&G.. The Appellant's response was dishonestly to suggest this was the product of computer error. He then promptly embarked upon a course of conduct to alter the figures to show that B.&G. owed no more money to B. V. Farms than had already been paid to date and, further, forged documents to support this untruth.

117. We can see no explanation for this conduct other than that the Appellant well knew that B. V. Farms was one of the losers. Furthermore, without any provocation the Appellant thereafter suggested to his Board that B. V. Farms was the only victim of the system. Whilst this was clearly untrue regarding the growers other than B. V. Farms, the admission inherent in the false statement that B. V. Farms was among the losers, in our view can only be held against him.

118. It is essential to approach matters of this kind with a sense of realism and by reference to the overall evidence direct and indirect. The valiant efforts by Advocate O'Connell to segregate the issues of the lies and the loss wholly fail to do justice to either of these considerations.

119. For these reasons the proviso must be applied in this case and we dismiss the appeal against conviction.

120. We turn finally to the appeal against sentence. Advocate O'Connell urged this Court to suspend the period of imprisonment in accordance with the Criminal Justice (Suspension of Prison Sentences) (Jersey) Law 2003 . He reminded us firstly that, although B.&G. was a family business, the Appellant had little to gain from the fraud because he had only a small share holding in the business. Secondly, Advocate O'Connell submitted that the sum which B.&G. stood to gain from the offence was a gross figure and, by concession of a witness during the trial, should be reduced to approximately £1700 after appropriate and justifiable costs had been deducted. Thirdly, although he conceded that the offence involved a breach of trust, Advocate O'Connell suggested that the Royal Court should have found, in relation both to motivation and to the period concerned, and for the reasons cited above, that this offence falls at the lower end of the scale of breach of trust cases, and therefore that a non-custodial sentence was appropriate having regard to *Kirkland v AG* unreported [2001/200]. Fourthly, Advocate O'Connell reminded us that this Appellant was not just a person with no previous convictions, but a man with a positive good character about whom those who knew him, some of whom had testified during the trial, spoke in generous terms. Finally, Advocate O'Connell asked us to give consideration to the lengthy period of time between the inception of the investigation in late 2002 and the trial which took place in February 2006, a period in excess of 3 years.

121. We accept too that as a professional man the Appellant will in all likelihood face disciplinary action from his professional body and therefore that these proceedings will not be the last which result from the activities covered by the period of this indictment.

122. In response, the Crown maintained, firstly, that the case involved a serious breach of trust by a professional man who owed a duty of honesty and candour to busy potato growers, who had no option but to use the services of his company at the Mont Mado packhouse to market their produce and who relied on him to deal fairly and competently with their produce, and to pay them their due. Secondly, the Crown Advocate submitted that the Appellant had compounded the deceit by lying to Mr de la Haye, altering the records to prove to him (and, if necessary, to other

growers who might join his quest) that he was owed no more than what had been paid to him, an assertion which the Appellant knew to be untrue. Further, that these falsifications had been made with a significant degree of sophistication involving copying hand written entries from original documents onto altered copies in order to pass them off as original. Thirdly, the Appellant had lied to his fellow board members by conceding that B. V. Farms had suffered loss but that no other grower had suffered in a similar fashion, a fact which he knew to be untrue. Fourthly, the Crown Advocate submitted that the amount of loss was secondary to the breach of trust and that the period during which the fraud was perpetrated was sustained and was in no sense a sudden surrender to temptation or an impulsive and opportunistic lapse. Finally, the Crown Advocate reminded us this fraud was brought to an end because Mr de la Haye became suspicious, not because the Appellant called a halt to the system which had enabled the fraud to continue successfully. 123. In the view of this Court this case involved a serious, deliberate and prolonged breach of trust by a professional man in whose business integrity those with whom he had commercial dealings were entitled to place confidence. It would be quite wrong to suspend the period of imprisonment which is an inevitable result of conviction for an offence of this kind. Nor can we fault the period of imprisonment passed by the Royal Court who were obliged to mark the gravity of this offence. We conclude that the period of 12 months was a sentence well within the appropriate parameters for this sort of wrongdoing and indeed was the correct period both to punish this offender and to mark society's disapproval of his conduct. 124. However, there is one aspect of the history of this matter which has caused us concern. It was a point on which Advocate O'Connell laid appropriate emphasis. The sentence of imprisonment was imposed by the Royal Court on the 24 th March 2006. Thereafter the Appellant spent a period of 4 weeks in custody until his release on bail pending appeal on the 20 th April 2006. He has remained on bail since that time. As a result of the decision of this Court, he must now be returned to custody. 125. The effect of re-admittance to custody for an offender who has been on bail for a period of 4 months is a factor which we have concluded we cannot and should not ignore. Bail pending appeal is common neither in this, nor in the mainland jurisdiction. The usual practice of causing a convicted person to remain in custody, notwithstanding that he has submitted notice of his intention to apply for leave to appeal (and even in cases where leave has been granted) reflects a judicial concern at the additional hardship on an offender who is compelled to return to custody having served a small part of his sentence prior to release on bail. For that reason, and for that reason alone, we have decided to reduce the sentence to one of 9 months imprisonment. 126. The order for costs has been appealed but not on any ground which would cause this Court to quash or vary the award. In particular it has not been suggested that the Appellant cannot pay it. In the light of the total figure for the costs of this prosecution we consider that the figure assessed by the Royal Court is reasonable and we dismiss that aspect of the appeal against sentence. 127. In all the circumstances and notwithstanding the dismissal of the appeal against conviction, we refuse the Crown's application to make a further order against the Appellant in respect of the costs of this appeal. 128. In the event therefore we allow the appeal against sentence in part and substitute a sentence of 9 months imprisonment for the sentence passed by the Royal

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