

JERSEY / JUDGMENT

Barnett -v- AG [2016]

JCA 064 (17 March 2016)

[2016] JCA 064

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Court of Appeal 17 March 2016 Before : James McNeill., Q. C., President; George Bompas ., Q. C., and; David Doyle, First Deemster & Clerk of the Rolls, Isle of Man Charles David Barnett -v- Her Majesty's Attorney General The Appellant appeared in person. J. C. Gollop, Esq. , Crown Advocate for the Respondent.

JUDGMENT

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Introduction

1. This is the judgment of the court delivered on 17 March 2016. 2. On 3 December 2015 the Appellant was found guilty in respect of Counts 1 to 5 inclusive and not guilty in respect of Count 6 of the Indictment:- (i) Count 1 was the offence of possession of 152 indecent still images of children under the age of 16 contrary to Article 2(1)(b) of the Protection of Children (Jersey) Law 1994 (the "1994 Law") between 29 December 2013 and 28 January 2014 with 137 at Level 1 on the Copine scale (described below), 6 at Level 2, 2 at Level 3, 5 at Level 4 and 2 at Level 5; (ii) Count 2 was the offence of making 21 indecent still images and 2 indecent moving images of children under the age of 16 contrary to Article 2(1)(a) of the 1994 Law between 5 July 2005 and 29 January 2014 on a Tiny computer with 20 still images at Level 1 and 1 still image at Level 5 and 2 moving images at Level 4; (iii) Count 3 was the offence of making 15 indecent still images and 1 indecent moving image of children under the age of 16 contrary to Article 2(1)(a) of the 1994 Law between 1 July 2012 and 29 January 2014 on a Dell computer with 11 still images at Level 1, 1 still image at Level 2, 2 still images at Level 3, 1 still image at Level 4 and 1 moving image at Level 3; (iv) Count 4 was the offence of making 6 indecent still images of children under the age of 16 contrary to Article 2(1)(a) of the 1994 Law between 1 May 2013 and 29 January 2014 on an external hard drive with 5 still images at Level 1 and 1 still image at Level 4; (v) Count 5 was the offence of possession of 3 still images of children under the age of 16 years being Level 1 still images contrary to Article 2(1)(b) of the 1994 Law between 29 December 2013 and 29 January 2014. 3. The Appellant seeks leave to appeal against both conviction and sentence. The appeal against conviction 4. In his notice of appeal against conviction the Appellant states that the court

erred:- " i in attaching too much weight to the evidence tendered by the prosecution and/or insufficient weight to the evidence tendered by the defence and/or reached conclusions contrary to the weight of the evidence"; ii in attaching insufficient weight to the Appellant's contention that Mrs Angela Amy is attracted to women and that the photographs may have been hers"; iii in failing to conclude that the trail of evidence linking the Appellant to the photographs was uninterrupted and/or untainted"; (presumably delete "in failing to conclude" and insert "in concluding") iv in attaching insufficient weight to the Appellant's contention that the images may have been planted on the computer on which they were found" 5. The notice of appeal states that the conviction is unsafe and should be quashed because of the conduct of the Appellant's trial advocate:- "(1) the Advocate representing the Appellant failed to understand fully or at all the conclusions reached by the Appellant's forensic expert in her report and/or failed, refused or neglected to call the Appellant's forensic expert to give evidence in order to enable the Appellant's Advocate to draw out the more important aspects of the Appellant's defence"; (2) "the Appellant's Advocate failed, refused or neglected to take any, or any sufficient notice of the Appellant's instructions" in respect of "questions which should have been put to [Mrs Amy in cross-examination/the Appellant's forensic expert in examination in chief?];" (3) "the Appellant's Advocate having failed to correctly understand and/or act upon the Appellant's instructions regarding the alleged ages of the children portrayed in the photographs (that they looked older than 16)." 6. The Appellant raises various other points in a series of documents filed in support of his appeal entitled:- "Contentions - C. D. Barnett" (5 pages unsigned and undated); "My Representation by Advocate Nicholls" (3 pages signed and dated 24 February 2016); "Statement of Contentions for the Court of Appeal" (3 pages signed and dated 24 February 2016 and a further 3 pages signed and dated 12 March 2016 and handed into court at the commencement of the hearing); "Appeal Notes for the Royal Court" with a request to "reconsider my sentence" (1 page signed and dated 24 February 2016); "Addendum Advice from my previous lawyer who was engaged prior to my lack of funds" (1 page signed by Appellant and dated 26 February 2016); "Statement of Contentions for the Court of Appeal" (2 pages signed by Appellant and dated 26 February 2016); "Observations of Advocate A P Begg" (3 pages signed by Appellant and undated and handed into the court at the commencement of the hearing); "Extracts from Cyfor Report 1. Ms Laura Collins BSc Bedfordshire" (2 pages signed by Appellant and dated 12 March 2016 and handed into the court at the commencement of the hearing). The grounds of appeal against conviction 7. In respect of the appeal against conviction the Appellant raises in effect four main grounds:- (i) the Appellant's trial advocate failed to call the Appellant's forensic expert (Ms Laura Collins of Cyfor Digital Evidence); ("Ground One") (ii) the Appellant's trial advocate failed to ask certain questions of Mrs Amy; ("Ground Two") (iii) the Appellant's trial advocate wrongly signed the Admissions dated 1 December 2015. The Appellant says "I did not give my unqualified consent, I acted under duress", the "duress" being that the Appellant's trial advocate "told me that if I did not agree that the images were of children under sixteen and indecent, the Royal Court would look unfavourably upon me if the Court had to undertake that exercise itself". The Appellant says he thought that the children portrayed looked older

than 16; ("Ground Three") (iv) that the convictions are against the weight of the evidence, in particular insufficient weight was attached to the Appellant's contention that the images may have been planted on the computers on which they were found. ("Ground Four") 8. The Appellant does not allege any misdirection in the court below (see his negative response on page 2 of the appeal notice to the question whether one of the grounds is a misdirection). The test in respect of appeals against conviction 9. The grounds for allowing an appeal against conviction are set out in Article 26 of the Court of Appeal (Jersey) Law 1961 ("the 1961 Law"):- "26 Determination of appeals in ordinary cases

- (1) 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 of 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 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. (2) Subject to the following provisions of this Part, the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered." 10. The application before the court is in effect for leave to appeal in respect of which the test is whether the proposed grounds are "seriously arguable" (Warren v AG

[2014] (1) JLR 383 at paragraph 37). Allegations of incompetence against trial advocates 11. The main thrust of the Appellant's appeal is that his trial advocate made certain mistakes and failed to act on his instructions. The Appellant says that in such circumstances his conviction should be quashed. 12. Criticisms of trial advocates are easily made by convicted defendants. Cases where it will be appropriate to quash a conviction on the basis of criticisms of a defence advocate's conduct at trial will be very rare. In such cases the issue is whether the appellant has been deprived of a fair trial. 13. The Hong Kong Court of Final Appeal in Chan Fat Chu v HKSAR

[2009] HKCFA 23 dealt with an appeal regarding allegations against trial counsel. Lord Woolf NPJ (with whom the other members of the court agreed) stated:- "The Need for Careful Investigation

8. One of the most important aspects of the rule of law is that a defendant should have the benefit of competent counsel when seeking to defend themselves against criminal charges of any substance. It is the responsibility of an effective justice system to ensure that such assistance is available as is made clear by the Hong Kong Bill of Rights. Unfortunately, in some trials in Hong Kong as elsewhere, a defendant does not have the benefit of that assistance. It can be because the defendant's lawyer is incompetent or it can be because in the particular case a lawyer of the highest reputation falls below the required standard. The reason does not matter. What does matter are the consequences of the failure. It is sufficient

that it can be shown that a defendant has not or may not have received a fair trial. If there is a case where a defendant alleges that this is what has happened, the allegation must be properly investigated and, if as a result of the investigation, the appellate court considers that the defendant has not or may not have had a fair trial, the failure must be corrected by setting aside a conviction or acquitting the defendant.

9. It is, of course, appreciated by the appellate courts that it is very easy for a defendant who has been perfectly satisfactorily represented to make allegations against the lawyers who had the responsibility for the conduct of the defence which are without adequate foundation. While lawyers are capable of falling below the required standard on a particular occasion, it is all too easy for false allegations to be made by a defendant aggrieved by a conviction although what happened does not mean that the conviction was obtained as a result of unfairness. The Procedure
10. In investigating allegations of this nature, the normal appellate court process for establishing whether the conviction was obtained wrongly has to be modified. The initial responsibility is on the appellants to place before the court material on which the court can conclude that an injustice has occurred which justifies its intervention but the court can be proactive in obtaining the evidence. This is because there has to be shown that there has been a grave and substantial injustice to a defendant (in the case of the Court of Final Appeal within the terms of s.32 of the Hong Kong Court of Final Appeal Ordinance, Cap.484) before it can be said that the defendant did not have a fair trial. This requires the manner of the conduct of the appellant's defence by his lawyers to have been seriously defective. The process is one which requires the cooperation of both the prosecution and the defence lawyers to ensure the investigation is thorough. The prosecution cannot, however, with propriety, ascertain from the defendant lawyers information as to how they conducted the defence or why they took or did not take particular action. For the prosecution to investigate, this would make an undue inroad into the normal strict rules which safeguard the need for confidentiality between a lawyer and his client. This means that it is essential that the appellants' lawyers, while sensitive to their clients' needs, take care to ensure that the court is not being misled. For this reason, a practice has been established both in Hong Kong and other jurisdictions whereby the court requires the lawyers against whom the allegations have been made being informed of the allegations by the court so as to enable them to make a response to what is alleged against them. To further this process, the appellant, so far as necessary, is required to waive his right to professional privilege. This is what happened here. Usually, this results in the appellate court being in a position to decide what other steps are appropriate including, for example, cross-examination. It is to be noted, however, that it is not sufficient for an appellant to show that, in a particular aspect of the proceedings, the lawyer has fallen below the required standard. It must also be shown that what has happened has resulted in unfairness or injustice. Achieving this may in a minority of situations require oral evidence. It also requires the court to make allowance for the problems that can arise for the lawyers in trying to balance the continuing obligation which they owe to their clients with their obligation to the court. The process, as a whole,

requires considerable sensitivity by all involved. Fortunately, there are now a number of reported cases which demonstrate how this can be achieved in many of the different situations that can arise. However, no two cases are exactly the same and the court must do its best to devise the procedure most suited to achieving justice in any particular case with the assistance of the parties and their lawyers; remembering that ultimately it is for the appellant to substantiate his grounds of appeal ... 51 ... In *Sankar v The State of Trinidad and Tobago*

- [1995] 1 WLR 194, the Privy Council endorsed the views of Rougier J in *R v Clinton* [1993] 1 WLR 1181 that it was only in "wholly exceptional circumstances that the conduct of counsel could form the basis for an appeal." 14. The note in the Jersey Law Reports in respect of *Mendes v AG*
- [2003] JLR N25 a decision of the Royal Court (Birt, Deputy Bailiff and Jurats de Veulle, Rumfitt, Tibbo, Georgelin, Allo and Clapham) reads as follows:- "If the grounds of appeal involve the criticism of the advice of a previous advocate or his conduct in the court below, the new advocate must, at an early stage, procure from the previous advocate (a) the swearing of an affidavit as to the advice given; (b) the waiver of professional privilege; and (c) his response to what is now being alleged about his advice or conduct (*R v Doherty* [1997] 2 Cr. Ap. R. 218, followed)." 15. In *Lewis and others v AG*
- [2013] (1) JLR 325 this court, differently constituted, stated:- "268 Complaints are made against Advocate Pearmain, who appeared at the trial for the appellant Lewis, and Advocate Preston, who appeared for the appellant Cameron. The grounds are advanced by Advocate Blakeley for Lewis and by the appellant Cameron through his amicus, Advocate Baxter. Although there are common features of the two complaints, it is necessary to consider them separately. The complaint against Advocate Pearmain includes both specific complaints and a more general one that she failed to press the case for her client with conviction. The complaint against Advocate Preston also contains specific and more general allegations. It is important to assess the significance of these complaints against the authorities. There is limited jurisprudence in this jurisdiction: but there are two strands of authority emanating from appellate courts in London and elsewhere in recent years concerning cases of alleged incompetence by counsel during the course of a trial. The first strand evaluates the nature of the incompetence. The second focuses on the effect of the incompetence on the verdict. In regard to the first, in *R. v. Donnelly* (27), the Court of Appeal in London held that nothing less than flagrant incompetence would do. In *R. v. Day* (26), the court held that the single test was one of safety and that the appellant has to show that the incompetence led to identifiable errors and irregularities in the trial, which themselves (in accordance with the test on appeal in English statute law in respect of a criminal conviction) rendered the verdict unsafe or unsatisfactory. It is clear that in the mainland jurisdiction the second strand of authority is now to be preferred. In *R. v. Clinton* (25), the court held that since the sole issue is the safety of the conviction, a qualitative assessment of counsel's alleged ineptitude is less helpful than an assessment of

its effect on the verdict; see also Teeluck

- v. Trinidad & Tobago (45) where the Privy Council held that the appellate court ought to focus on the impact which counsel's errors had on the trial and the verdict, rather than to attempt to rate his conduct in accordance with a scale of ineptitude. It is clear, however, from Clinton that decisions made by counsel in good faith after proper consideration of the competing arguments and, where appropriate, after due discussion with the defendant will not, without more, render the conviction unsafe even though the Court of Appeal may disagree with those decisions. It is also clear from Lord Woolf's judgment in the Hong Kong Court of Final Appeal in the case of *Chan Fat Chu v. HKSAR* [[2009] HKCFA 23] (12 HKCFAR 775, at para. 10) that - "The initial responsibility is on the appellant to place before the court material on which the court can conclude that an injustice has occurred which justifies its intervention ... [I]t is not sufficient for an appellant to show that, in a particular aspect of the proceedings, the lawyer has fallen below the required standard. It must also be shown that what has happened has resulted in unfairness or injustice." The English test for a successful appeal is "unsafe or unsatisfactory." The test in Hong Kong is "grave and substantial injustice." The test in this jurisdiction is that of "a miscarriage of justice." Notwithstanding the different tests, we see no reason why the principles to which we have referred in those two other jurisdictions should not inform the jurisprudence of the Bailiwick. Accordingly, and against the background of these principles, we turn to deal, initially, with the specific complaints against Advocate Pearmain ... If the test is the safety of the convictions, as it must be, this court is unable to find that, in so far as Advocate Pearmain failed to cross-examine about some specific matters which another advocate might have explored, such failure calls into question the justice of the convictions recorded against this appellant. In any trial there must be a wide margin of discretion given to an advocate to conduct the case as he/she thinks fit. The strategy and tactics which an individual lawyer might adopt in defending his client, especially one as deeply involved as this appellant was in this case, necessarily varies from advocate to advocate. It is not for an appellate court to second-guess that strategy and those tactics, unless what the advocate did, or failed to do, can be said with confidence to have had a definite effect on the verdict or verdicts. Advocate Blakeley fairly conceded that cross-examining a witness in circumstances where the advocate is ignorant of the answers which the witness may give, involves "a judgment call." We consider that this concession was properly made and, in our judgment, the examples which he gives of Advocate Pearmain's alleged failures in cross-examination, if failures they were, fall a long way short of what is required to convince this court that those "failures" had such an impact in this case that the justice of the convictions can be called into question." 16. Thomas L J in *R v Babamuboni, Odigie and Malasi*
- [2008] EWCA Crim 2505 at paragraph 15, dealing with an appeal involving allegations against trial counsel stated that:- "... before an appeal is brought on that basis ... some steps [should be] taken to ascertain from counsel concerned what he has to say about the matter ..." 17. In *Smith*

- [2013] EWCA Crim 2388 the English Court of Appeal in a judgment delivered on 18 December 2013 at paragraph 90 criticised the:- "... growing and unwelcome tendency of convicted defendants to dismiss their original counsel and then to bring in new counsel to criticise their predecessors ... We deplore this strategy. Members of the Bar should not lend their support to this strategy unless there really is a proper basis for impugning the conduct of previous counsel. In this case there is none." 18. Where there is an attack against a conviction on the grounds of alleged incompetence by a trial advocate the question depends not upon a qualitative assessment of the degree of incompetence by the trial advocate or the nature of his conduct, but upon the effect of the failure on the defendant's right to a fair trial. It can only be said to have resulted in a miscarriage of justice if it has deprived the defendant of his right to a fair trial. The general rule is that a defendant was bound by the way the trial was conducted by his advocate regardless of whether that was in accordance with the wishes of the client, and it was not a ground for setting aside a conviction that decisions made by a trial advocate were made without, or contrary to, instructions or involved errors of judgment or even negligence. The crucial question is whether the appellant had had a fair trial and not how severely the defence advocate deserved to be criticised (see the judgment of the Hong Kong Court of Final Appeal in *Chong Ching Yuen v HKSAR*
- [2004] 7 HKCFAR 126). 19. Having considered everything that has been put before the court, including the transcripts of the hearings in the court below, we are driven to the conclusion that far from acting incompetently Advocate Nicholls, the trial advocate, in this case not only competently discharged his duty to his difficult client but in the best tradition of the Jersey Bar he also discharged his overriding duty to the Court to ensure in the public interest that the proper and efficient administration of justice was achieved (paragraph 2(2) of the Law Society of Jersey's Code of Conduct). No legitimate criticism can be made against Advocate Nicholls. Conclusions on the grounds of appeal against conviction 20. We have not been persuaded that any of the grounds of appeal advanced by the Appellant are "seriously arguable". We have not been persuaded that the guilty verdicts were, to use the language of Article 26 of the 1961 Law, "unreasonable" or "cannot be supported having regard to the evidence" or that there was "a wrong decision of any question of law" or that "on any ground, there was a miscarriage of justice". 21. We deal with each of the grounds of appeal as follows. Ground One 22. Our conclusions on Ground One are as follows. 23. Advocate Nicholls, the trial advocate, (in his comprehensive and helpful affidavit sworn on 3 March 2016) states at paragraph 10 that in his "professional opinion, nothing in the reports produced by Ms Collins suggested that producing her as a witness would have been beneficial to the [Appellant]" and at paragraph 13 states "it would have been highly damaging to have called Ms Collins to have given evidence." Advocate Nicholls plainly and properly understood the conclusions reached by Ms Collins. 24. Whether or not the Appellant's expert (Laura Collins of Cyfor Digital Evidence) was called to give evidence was a matter for the judgment of the defence advocate having considered the position with the Appellant. The Appellant's case is that this matter was considered by

him with his advocate but, in effect they had different views. Having read the reports of Laura Collins we can see how a competent defence advocate could make a reasonable tactical decision not to call her in this case. 25. An important part of the Appellant's case was that the images had been "planted". Laura Collins was instructed on behalf of the Appellant to provide expert reports. In her second report dated 11 September 2015 at page 9 she states:- "No evidence has been identified that would indicate that the images have been planted." At page 10 Laura Collins adds:- "In my opinion, it would take a user a great deal of time and knowledge to plant the indecent images and videos across the devices and cover their tracks in such a way that the dates, times and folder structure of the files are consistent with the other files residing in the same locations." 26. There was plainly a significant risk in calling Laura Collins to give evidence and the trial advocate made the reasonable judgment call not to call her. The Appellant's trial advocate cannot reasonably be criticised for not calling Laura Collins. Moreover, we are not persuaded that the decision not to call Laura Collins deprived the Appellant of a fair trial or caused there to be a miscarriage of justice. We are not persuaded that there is any merit in Ground One. Ground Two 27. Our conclusions on Ground Two are as follows. 28. In raising this ground the Appellant fundamentally misunderstands the trial process and the position of defence advocates. We endorse the dicta of Rose L J in *Hobson v R*

[1998] 1 Cr. App. R. 32 at 35 when he stated:- "Counsel's job, in the proper performance of his or her duties to the client and to the court, is to exercise judgment and discretion as to the way in which the client's case can best be presented, and to give such advice, if necessary, in forceful terms, as in his or her view, the circumstances required. Because a client wishes a particular question to be asked, point to be made or witness to be called it does not follow that the question must be asked, the point made or the witness called. Still less does it follow that counsel is in dereliction of duty if he or she fails to ask the question, make the point or call the witness. It depends on all the circumstances of the particular case, including what has passed by way of advice or otherwise between client and counsel." 29. In *R v Ulcay and Toygun*

[2007] EWCA Crim 2379 Sir Igor Judge, then the President of the Queen's Bench Division, at paragraph 27, stated:- "The correct meaning of the phrase "acting on instructions", as it applies to the professional responsibility of the advocate in any criminal court, is sometimes misunderstood, even by counsel. Neither the client, nor if the advocate is a barrister, his instructing solicitor, is entitled to direct counsel how the case should be conducted. The advocate is not a tinkling echo, or mouthpiece, spouting whatever his client "instructs" him to say. In the forensic process the client's "instructions" encompass whatever the client facing a criminal charge asserts to be the truth about the facts which bring him or her before the court. Those instructions represent the client's case, and that is the case which the advocate should advance. In practical terms, that will often mean that prosecution witnesses will be cross-examined on the basis that they are lying or mistaken, or have misunderstood or misinterpreted something said or done by the defendant; however there is almost always some evidence advanced by the prosecution

which, on the basis of the client's instructions, is not in truth in issue at all, either directly, or indirectly. Some decisions, of course, must be made not by the advocate, but by the defendant personally, for example, and pre-eminently, the plea itself, and in the course of the trial, the decision whether or not to give evidence. The advocate must give his best professional advice, leaving the ultimate decision to the client. It is however always improper for the advocate to seek to challenge evidence which is accepted to be true on the basis of the facts agreed or described by the client, merely because the lay-client, or the professional client, wishes him to do so. He may not accept nor act on such instructions." 30. In *R v Oliveria*

[2009] EWCA Crim 378, where the defendant had given the defence team precise instructions Lloyd Jones J, at paragraph 29, said this:- "The so called instruction as to the future course of the trial is, of course, a nonsense. It is not open to a defendant to dictate the course which proceedings should follow. He has to stand trial in accordance with the established procedures." 31. It is plain from the transcript of the hearing before the Royal Court that the trial advocate did put the Appellant's allegation of "planting" to Mrs Amy. Moreover, we do not believe that the trial advocate can be justifiably criticised for not putting further questions to Mrs Amy which would have amounted to an inappropriate and risky attack on her character. The precise questions to be asked of a witness are a matter for the trial advocate, taking into account his duties to his client and to the court. We are not persuaded that the trial advocate can be justifiably criticised for his questioning of Mrs Amy in this case or that the Appellant has been deprived of a fair trial. 32. We stress that just because a defendant wishes a particular question to be asked, it does not follow that the question must be asked. 33. There is nothing of any substance in Ground Two. Ground Three 34. Our conclusions on Ground Three are as follows. 35. The Appellant's trial advocate and his assistant viewed the images and advised the Appellant "in very clear and unequivocal terms that the Crown would have no difficulty in persuading the Court that the photographs were indecent and were of children (i.e. of persons under the age of 16) and that he should admit that the images were indecent images of children" (paragraph 52 of the affidavit of Advocate Nicholls). At paragraph 56 of his affidavit Advocate Nicholls states that the Appellant "was fully advised as to the effects of an admission". In the documentation provided to the court there is an email from Advocate Nicholls to the Appellant dated 27 November 2015 16:51 which refers to the admissions "agreed yesterday" and "you have admitted ... the photographs are indecent images of children" and "your defence is that you deny being responsible for or in possession of such photographs (i.e. because you say they were planted or got on to your systems in some other way)...". The Appellant responds on 28 November 2015 09:24 indicating that he had read the email. The Appellant does not in that email deny that he has agreed the admissions. 36. The Appellant himself before this court accepts that he gave his consent to the admissions but that it was not "unqualified consent". The Appellant alleges that he acted under the "duress" of his trial advocate. 37. We are not persuaded that there was any "duress" exercised by the trial advocate over the Appellant. Advocate Nicholls says that

he:- "... gave consistent and robust advice to the [Appellant] as to the merits of his defence, making clear that, in my opinion, a conviction was inevitable. I accept that the [Appellant] may not have liked that advice but I do not accept that the [Appellant] was ever "bullied."" The admissions signed by the defence advocate are, and were, binding against the Appellant. We are not persuaded that there is any merit in Ground Three. Ground Four 38. Our conclusions on Ground Four are as follows. 39. It will be a very rare case indeed where this court is persuaded to conclude that the Royal Court, which has the benefit of seeing and hearing the witnesses give evidence, has placed too much or too little weight on the evidence and that accordingly a miscarriage of justice has occurred. 40. In Attorney General for Jersey v O'Brien

[2006] UKPC 14 ;

[2006] 1 WLR 1485 this court (differently constituted) set aside a guilty verdict on the sole ground that it could not be supported by the evidence. The Attorney General for Jersey appealed to the Judicial Committee of the Privy Council and the appeal was allowed. Lord Hoffmann gave the judgment of their Lordships and having referred to the 1961 Law stated:- "... Questions of credibility are a matter for the jurors. It is not the function of the Court of Appeal to say that the evidence of the defendant should have been accepted." At paragraph 22 Lord Hoffmann referred to the comments of Lord Goddard C J in R v Hopkins-Husson

(1949) 34 Cr App R 47, 49:- "... If there is evidence to go to the jury, and there has been no misdirection, and it cannot be said that the verdict is one which a reasonable jury could not arrive at, this court will not set aside the verdict of guilty which has been found by the jury." At paragraph 23 Lord Hoffmann referred to the comments of the European Court of Human Rights recorded in Snooks and Dowse v United Kingdom

[2002] JLR 475 , 484, paragraph 19 including:- "... Jurats do not necessarily have a legal qualification, but are usually individuals with a known history of sound judgment and integrity, which has been consistently demonstrated throughout a lengthy professional, business or civic life." At paragraph 25 Lord Hoffmann in effect warned against the Court of Appeal usurping the fact-finding function of the Jurats. Lord Hoffmann commented that the Jurats had the opportunity to see the witnesses giving evidence:- "... They disbelieved Mr and Mrs O'Brien. The Court of Appeal did not have the same advantages and their Lordships consider that they were not entitled to disturb the verdict ..." 41. In Bhojwani v AG

[2011] JLR 249 this court (differently constituted) dismissed an appeal against conviction as it could not be said, under Article 26 of the 1961 Law, that the Jurats' verdict was unreasonable or could not be supported having regard to the evidence. The Jurats had ample evidence on which they could convict and the inferences to be drawn from it were necessarily a matter for them. When considering whether a verdict could not be supported having regard to the evidence, the Court of Appeal had to be careful not to usurp the

function of the Jurats. If there was evidence before the Jurats, and it could not be said that the verdict was one which reasonable Jurats could not have reached, the verdict would not be overturned. The Court of Appeal had to bear in mind that fact-finding was the function of the Jurats, who were experienced in doing so and had the advantage of seeing and hearing the witnesses. It would be very difficult to establish that the Jurats' verdict was unreasonable. The wider English test, namely that a conviction could be overturned on appeal if in all the circumstances there was a "lurking doubt" that it was "unsafe or unsatisfactory" was not part of Jersey law (although even if it were, the appellant's appeal in that case would not have been allowed under that test) (see paragraphs 143-152, 156, 166-173 and 186). At 146 Beloff J A referred to *Barette v AG*

[2006] JLR 407 at paragraph 87 where the position under Jersey law as to a criminal appeal was described as "more robust in regard to the upholding of a jury's verdict than the law which now exists on the mainland". The comment was also made that even if there was some error in the conduct of the trial, a verdict will only be set aside if the miscarriage of justice consequent upon such error could properly be described as substantial. 42. We have not been persuaded that it is "seriously arguable" that there was any error in the conduct of the trial or a miscarriage of justice, substantial or otherwise. 43. Issues of credibility and what weight should be attached to the evidence are classic issues for the court below which has the benefit of seeing the witnesses giving evidence and being cross-examined. In this case it appears that in respect of Counts 1 to 5 the court below believed the prosecution witnesses rather than the Appellant. In respect of Ground Four the Appellant complains that insufficient weight was placed on his contention that the images may have been "planted" on the computer. It was a matter for the Royal Court as to what weight they placed on the Appellant's evidence. We note that the Appellant's own expert could identify no evidence "that would indicate the images have been planted". 44. We are not persuaded that it is "seriously arguable" that the verdicts could not be supported by the evidence. We are not persuaded that it is "seriously arguable" that reasonable Jurats could not arrive at the verdicts they arrived at. We have not been provided with any material by the Appellant to make good his complaints under Ground Four. We are not persuaded that there is any merit in Ground Four. Overall conclusions on the appeal against conviction 45. We have not been persuaded on the basis of the information, documentation and submissions presented by the Appellant that any of the grounds specified in Article 26 of the 1961 Law are "seriously arguable". We are not persuaded that the court erred or that the trial advocate conducted the case before the Royal Court in such a way that the Appellant was deprived of a fair trial. In short, we are not persuaded that there has been any miscarriage of justice in this case. 46. Sitting back and considering all the complaints of the Appellant we have concluded that none of them, taken either individually or cumulatively, persuade us that it is "seriously arguable" that we should quash the guilty verdicts in this case. 47. Accordingly, we do not grant leave to appeal against conviction for the reasons specified in this judgment. The appeal against sentence 48. We now deal with the application for leave to appeal against sentence. 49. In the Appellant's "Notice of Appeal or Application for

Leave to Appeal Against Sentence" dated 19 February 2016 the grounds of appeal against sentence are specified as follows:- "... the sentence passed by the Royal Court was manifestly excessive and/or wrong in principle and/or was wrong in law and/or the Royal Court failed to take the mitigation before the court sufficiently into account." 50. The Appellant in his "Notice of Application for Extension of Time in which to Appeal" dated 19 February 2016, refers to being sentenced on 19 January 2016 and states:- "The Notice of Appeal seeking leave to Appeal should have been filed by the 16 February 2016. I therefore seek an extension of 3 days only". 51. We grant an extension of time to appeal against the sentence. We do not however grant leave to appeal against sentence because in our judgment none of the grounds of appeal against the sentences imposed in this case is "seriously arguable". 52. On 19 January 2016 the Appellant was made the subject of the notification requirements of the Sex Offenders (Jersey) Law (the "Law") and the Royal Court made a restraining order for five years subject to Article 10(4) of the Law. The following sentences were also imposed:- (i) on count 1

- eighteen months' imprisonment; (ii) on counts 2, 3 and 4 - two years' imprisonment; (iii) on count 5 - six months' imprisonment; such terms of imprisonment to run concurrently, making a total term of two years' imprisonment. 53. The Appellant was convicted in respect of 197 still images and 3 movies depicting indecent images of children under the age of 16 as follows:- Level Still images Movies 176 2 0 4 4 2 3 54. The Guernsey Court of Appeal in *Wicks and others v Law Officers of the Crown* [2011-12] GLR 482 referred at paragraph 30 to the levels defined as part of the Copine Project developed by the University of Cork as follows:- "Level 1. Images depicting erotic posing with no sexual activity. Level 2. Non-penetrative sexual activity between children, or solo masturbation by a child. Level 3. Non-penetrative sexual activity between adults and children. Level 4. Penetrative sexual activity involving a child or children, or both children and adults. Level 5. Sadism or penetration of, or by, an animal." 55. The Appellant asks this court to "reconsider my sentence to exclude custody" because he has already been in custody for some time, he is over 70 years of age and his communications business is suffering. 56. Article 26(3) of the 1961 Law states:- "On any appeal against sentence, the Court of Appeal shall; if it thinks that a different sentence should have been passed on the appellant in the proceedings from which the appeal is brought, quash the sentence and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal." 57. It is well established (*Harrison v AG*

[2004] JLR 111) that this court will only consider interfering with a sentence if:- (i) it was not justified by law; (ii) it was passed on the wrong factual basis; (iii) some matter had been improperly taken into account or some fresh matter needed consideration; or (iv) the sentence was wrong in principle or manifestly excessive. 58. The sentencing guidelines specified in *Wicks* were referred to by the Royal Court in *AG v De Nobrega*

[2012] (2) JLR Note 22 and adopted by the Royal Court in *AG v Godson and Crowley*

- [2013] (2) JLR 1 (Birt Bailiff and Jurats Le Cornu, Morgan, Marett-Crosby, Nicholle and Olsen). We are content, at this appellate level, also to adopt the guidelines specified in Wicks . However, for the reasons explained below, these guidelines are not, strictly speaking, applicable to two of the counts on which the Defendant was found guilty. 59. In Wicks the court referred to various categories and indicated that the sentence referred to is the "initial figure"; having selected this figure as the starting point, the court should then adjust it to allow for the aggravating and mitigating factors of the offence and include a discount to reflect personal mitigation and a guilty plea (paragraph 37). The "initial figure" is based on a number of premises - that the offender was an adult, without relevant convictions involving sexual activity, the number of images was small, the "making" of the image was intended to be for the benefit of the offender himself or two or three other adults; and the sentencing results from a contested trial (paragraph 41). The categories specified at paragraph 37 were as follows:- Category 1 : concerned in any way in taking or producing an image within Levels 4 or 5 - an initial figure in the region of 6 years' imprisonment; Category 2 : similarly involved in taking or producing an image within Levels 2 or 3 - an initial figure in the region of 4 years' imprisonment; Category 3 : similarly involved in taking or producing an image within Level 1 - an initial figure in the region of 2 years' imprisonment; Category 4 : making an image within Levels 4 or 5, or possessing such an image for distributing or showing - an initial figure in the region of 3 years' imprisonment; Category 5 : making an image within Levels 2 or 3 - an initial figure in the region of 18 months' imprisonment; Category 6 : making an image within Level 1 - a fine or community sentence preferably with a condition of treatment. If any relevant aggravating factor is present, the court may feel that the custody threshold is passed and may consider a sentence of up to 6 months' imprisonment; Category 7 : making a pseudo-image
- the court may take the view that the custody threshold has not been passed and may consider a fine or community sentence, with or without conditions. If the image is "particularly grotesque," however, and an aggravating factor is present, the court may conclude that the custody threshold has been passed. There was no intention that the categories should be rigidly divided from each other, since it was anticipated that the application of aggravating and mitigating factors might result in a sentence falling within the sentencing level for a higher or lower category (paragraph 48). Possible aggravating factors would include the existence of a large (over 100) number of images and/or a significant period of time during which the images had been collected, indicating the accused's high level of personal interest in such images (paragraph 38). 60. At paragraph 36 of the judgment in Wicks it was stated:- "None of the counts in any of the indictments with which these appeals are concerned relates to simple possession of indecent images and since, importantly, that offence carries a different maximum sentence, we do not include advice on sentencing for this offence within the categories listed below, although no doubt the Guidelines will provide general assistance to the Magistrates Court and the Royal Court in such cases." 61. At paragraphs 50 and 51 of the judgment in Wicks the following was

stressed:- "50. We emphasise that these guidelines are indeed only guidelines. They are not designed to inhibit the Royal Court from passing an individualised sentence in any case where such a sentence would be justified, or to provide any sort of straitjacket for the courts of this Island. Sentencing should always involve the judgment and discretion of the court at first instance. 51. This court will exercise its supervisory jurisdiction by reviewing any sentence appealed from the Royal Court and interfering with such sentence only if the sentence was wrong in principle or manifestly excessive." 62. There is one slight concern which we have with what was put to the Royal Court by the prosecution in submissions on sentencing. It will be appreciated that in the present case the Defendant had been convicted on two counts of possession of indecent images (Counts 1 and 5), and had been convicted on three counts of making indecent images (Counts 2, 3 and 4). The possession offences however, were those under Article 2(1)(b) of the 1994 Law, ("simple possession ", to borrow the language in paragraph 36 of the judgment in Wicks) not those under Article 2(1)(d) of the 1994 Law (that is to say, possession for distribution or showing). Under Article 2(2) a person guilty of an offence under Article 2(1)(b) of the 1994 Law is liable to a maximum term of imprisonment of 5 years, whereas a person guilty of an offence under Article 2(1) (a) or (d) of the 1994 Law is liable to a maximum term of imprisonment of 10 years. 63. In Wicks none of the counts with which the appeals were concerned related to simple possession offences and the Court of Appeal of Guernsey were at pains to stress at paragraph 36 of the judgment that they were not including "advice on the sentencing for this offence". It is important that sentencing courts appreciate that the sentencing guidelines in Wicks do not relate to simple possession offences. In Godson and Crowley (where some of the counts did relate to simple possession offences) the Royal Court at paragraph 27 was, insofar as it was relevant to the counts before it, content to "follow the sentencing structure established in Wicks and apply the level of sentencing indicated in that case, always recognising that guidelines are not tramlines and that sentences must always be tailored to the facts of the individual case". In respect of Godson the Royal Court (as noted at paragraph 37 of the judgment) imposed on the simple possession count two years and six months' imprisonment and on the making counts five years and six months thereby distinguishing between the seriousness of the offences. 64. We therefore cannot accept the suggestion made in the present case to the Royal Court by the prosecution concerning the possession offences, namely "that the Defendant's case falls within Category 4 of the sentencing guidelines" (paragraph 46 of the Crown's summary of facts and conclusions). The short point is that Category 4 in the Wicks guidelines is concerned with more serious offences than "simple" possession. A simple possession offence under Article 2(1) (b) of the 1994 Law would not normally be treated as comparable in seriousness with either of the other two (making under Article 2(1) (a) or possession for distribution or showing under Article 2 (1) (d) of the 1994 Law). Specifically, Category 4 of the sentencing guidelines in Wicks is concerned with the Guernsey equivalent of offences under Article 2 (1) (a) and (d) of the 1994 Law involving images within levels 4 or 5, but not with simple possession offences under the Guernsey equivalent of Article 2 (1) (b) of the 1994 Law. 65. The suggestion made to the Royal Court was repeated in the sentencing remarks given by Commissioner Sir

Michael Birt. What was said at paragraph 2 of those sentencing remarks was "Now the Crown Advocate says that because of the existence of some images at levels 4 and 5 then the matter falls within category 4 as set out in the leading case of AG v Godson and Crowley

[2013] JRC 091 so that an initial figure of 3 years is appropriate in principle...". 66. It is clear however that the Royal Court recognised the distinction in gravity between "simple" possession of indecent images contrary to Article 2(1)(b) of the 1994 Law and the making of indecent images contrary to Article 2(1)(a). At paragraph 5 of the sentencing remarks Commissioner Sir Michael Birt said "Count 1 : 18 months imprisonment, because we think that, possession offences having a lesser maximum, they should attract a lesser sentence...". And this led the court to reject the Crown's suggestion that the sentence on Count 1 should be the same as that on each of Counts 2 to 4, and instead to give a shorter sentence (18 months against 2 years). 67. In the circumstances we are not persuaded that it is "seriously arguable" that there has been a miscarriage of justice. 68. We are not persuaded that it is "seriously arguable" that the Royal Court failed to take sufficient account of the mitigation. Commissioner Sir Michael Birt delivering the sentencing comments of the Royal Court on 19 January 2016 stated:- "2. ... You pleaded not guilty so that means that the mitigation for a guilty plea of up to one third off the sentence is not available to you. 3. But there is mitigation. Your advocate has referred to your age (70), to the fact that you are essentially of good character, and we do treat you as a person of hitherto good character, because the offences concerned were very minor, of a totally different nature and a long, long time ago. We have also had regard to the references which have been supplied to us." 69. It is also clear from the Commissioner's comments in refusing to adjourn the sentencing hearing pending the appeal against conviction that the court plainly understood "the consequences for Mr Barnett's business" (paragraph 2). 70. The Appellant in reality had very little mitigation available to him. The offending behaviour took place over many years. It is correct that the Appellant had no previous convictions involving indecent images or criminal sexual activity. It is also correct that the vast majority of the images were at Level 1, but some of the images were at Level 4 and Level 5. The Appellant had chosen to contest the charges and had been found guilty of 5 of the 6 charges against him. Moreover, the Appellant had sought to suggest that other named individuals had "planted" the images. 71. Some of the contents of the Social Enquiry Report make disturbing reading. The Appellant appears to show little, if any, remorse and fails to understand the significance of his offending behaviour. At paragraph 49 of the Social Enquiry Report it is stated that the Appellant "presents a medium risk of committing further sexual offences." The Appellant appears more concerned with his own welfare and business interests than the welfare of the victims who appeared in the images, the subject matter of the various convictions against him. Every time those images are viewed the victims are further abused. 72. The Appellant was aged over 70 at the time of the sentencing hearing but his age does not mean that a custodial sentence of two years in the particular circumstances of this case was manifestly excessive or wrong in principle. The fact that the commercial business of the Appellant has apparently suffered due to the

Appellant being in custody is an inevitable consequence of the Appellant's offending behaviour and is not a factor which persuades us that the sentences are wrong in principle or manifestly excessive or that it is otherwise appropriate to interfere with the sentences imposed in this case. 73. The sentences imposed by the Royal Court in this case were, insofar as concerned the relevant Counts (2, 3 and 4), well within the guidelines specified in Wicks . In respect of count 1 the Royal Court cannot be justifiably criticised for imposing a sentence of 18 months' imprisonment because they thought that "possession offences having a lesser maximum, they should attract a lesser sentence". It is correct that possession offences under Article 2(1)(b) have a specified maximum sentence of 5 years, whereas the other offences carry a specified maximum of 10 years' imprisonment (Article 2(2) and (3)). Moreover the sentence of 6 months' imprisonment on Count 5 cannot be said to be wrong in principle or manifestly excessive or otherwise appealable. We have not been persuaded that it would be appropriate to grant leave to appeal against sentence and we do not do so. Authorities Protection of Children (Jersey) Law 1994. Court of Appeal (Jersey) Law 1961. Warren v AG

- [2014] (1) JLR 383. Chan Fat Chu v HKSAR [2009] HKCFA 23. Mendes v AG
- [2003] JLR N25. Lewis and others v AG
- [2013] (1) JLR 325. R v Babamuboni , Odigie and Malasi
- [2008] EWCA Crim 2505 . Smith
- [2013] EWCA Crim 2388 . Hong Kong Court of Final Appeal in Chong Ching Yuen v HKSAR [2004] 7 HKCFAR 126. Hobson v R [1998] 1 Cr. App. R. 32. R v Ulcay and Toygun
- [2007] EWCA Crim 2379 . R v Oliveria
- [2009] EWCA Crim 378. Attorney General for Jersey v O'Brien
- [2006] UKPC 14 . Attorney General-v-for Jersey O'Brien
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- (1949) 34 Cr App R 47. Snooks and Dowse v United Kingdom
- [2002] JLR 475 . Bhojwani v AG
- [2011] JLR 249 . Barette v AG
- [2006] JLR 407 . Sex Offenders (Jersey) Law 2010. Wicks and others v Law Officers of the Crown [2011-12] GLR 482. Harrison v AG
- [2004] JLR 111 . AG v De Nobrega
- [2012] (2) JLR Note 22. AG v Godson and Crowley

[2013] (2) JLR 1. Page Last Updated: 28 Apr 2016 BAILII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

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