

JERSEY / JUDGMENT

Barra Hotel v AG [2000]

JCA 207 (26 October 2000)

[2000] JCA 207

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[2000] JCA 207 [New search] [Help] 2000/207 10 pages COURT OF APPEAL. 26 October, 2000.
Before: Sir David Calcutt, Q. C., President; R. C. Southwell, Esq., Q. C., and; P. D. Smith,
Esq., Q. C. Barra Hotel Limited -v- Her Majesty's Attorney General. Application of BARRA
HOTEL LIMITED for leave to appeal against conviction before the Inferior Number of the
Royal Court, en police correctionnelle on 17 th March, 2000, and against a total sentence
of £10,000 fine with £5,000 costs , imposed by the Inferior Number on 19 th May, 2000,
following a denial of the facts on 3 rd December, 1999, on the following charges. counts of
contravening Article 5(3) of the Fire Precautions (Jersey) Law, 1977 , by failing to comply
with a condition attaching to a certificate issued under the said Law, on which counts the
following sentences were imposed: count 1: £8,000 fine; count 2: £1,000 fine; count 3:
£1,000 fine. Costs of £5,000. Application for leave to appeal placed directly before plenary
Court, without first being submitted to a Single Judge. Mr. Barry Shelton, a Director of the
Appellant Company, for and on behalf of the Appellant; A. R. Binnington, Esq., Crown
Advocate.

JUDGMENT.

SOUTHWELL JA: 1. Barra Hotel Limited ("the Company") was carrying on in September 1999 the
business of a hotel, the Barra Hotel, in premises which the Company occupied in Kensington
Place, St Helier. The Company was charged in an indictment with three counts of contravening
paragraph (3) of Article 5 of the Fire Precautions (Jersey) Law, 1977 ("the 1977 Law") on 5 th
September, 1999, by failing to comply with conditions specified in schedule no.2 of the certificate
no. C.102/83/1 issued under the 1977 Law. The three counts concerned these conditions and these
alleged breaches of the conditions: Count 1 Condition no.4, which required all the emergency fire
escape doors specified on the plans annexed to the certificate not to be so locked or fastened that
they could not be easily and immediately opened by persons leaving the premises, was alleged to
have been broken because both of the two fire exit doors at the rear of the premises in Lewis

Street were locked with padlock and chain. Count 2 Condition no.1, which required (inter alia) that all means of escape in case of fire be kept free from combustible storage, was alleged to have been broken because combustible materials (mattresses, linen and furniture) were stored in one of the two staircase enclosures of the fire exits situated at the rear of the premises and in the first floor corridor opposite Room 108. Count 3 Condition no.1, which required (inter alia) that all means of escape in case of fire specified in the plans and schedule 1 should be kept free from obstruction, was alleged to have been broken because items and materials were stored in the staircase enclosure of the escape route at the rear of the lounge bar (five steel beer kegs) and on the landing of the first floor staircase (a bed and a chair).

2. The trial took place on 16 th and 17 th March, 2000, before the Royal Court (the Bailiff and Jurats Potter and Querée), sitting "en police correctionnelle". At the outset Mr B Shelton (a director of the Company who was permitted to represent the Company) sought recusal by the Bailiff on the ground that he is the brother of the Attorney-General who had signed the indictment. The Royal Court rejected this application for reasons given in a reserved judgment on 17 th April, 2000. Four witnesses gave evidence as part of the Crown's case: three had been guests in the hotel on 5 th September, 1999, and the fourth (Mr C S Britton) was a Senior Fire Safety Officer in the States of Jersey Fire Service. Two witnesses were called by Mr Shelton, Mr R Byrne who was a retired Fireman and had worked at the hotel in 1998, and Mr J Velosa who had been the manager of the hotel from 14 th July to 1 st October, 1999. Mr Shelton did not give evidence himself. The Royal Court convicted the Company on each of the three counts. Sentencing was on 19 th May, 2000, before the Inferior Number of the Royal Court (the Bailiff and Jurats Rumfitt and Bullen). The Company was sentenced as follows: Count 1 - £8,000 fine Count 2 - £1,000 fine Count 3 - £1,000 fine Total £10,000 The Company was also ordered to pay £5,000 towards the prosecution costs.

3. The Company now applies for leave to appeal against conviction and sentence to this Court. Eight grounds of appeal are set out in the notice of appeal as follows: "Grounds of Appeal or Application 1. The Judge wrongly refused to recuse himself; 2. The Judge wrongly refused to allow the Director of the Appellant Company to give evidence; 3. The Judge misdirected the Jurats as to the Legality of Service of an Amended Fire Certificate; 4. The Judge failed to direct the Jurats properly on the Appellant Company's Defence - in particular as to the weight of evidence required for the defence of due diligence and the lack of the Crown's rebuttal evidence. 5. No reasonable Tribunal could have come to the conclusion that the Court did. 6. The sentence was decided by two Jurats who did not sit at the Trial. This is unsatisfactory when the original Jurats are available. 7. The Judge failed to direct the Jurats to take into account the Financial position of the Company after promising to do so. 8. In all the circumstances the sentence and costs awarded were too severe." These grounds will be considered in turn.

Ground 1 : Recusal 4. The Queen has appointed Sir Philip Bailhache as Bailiff, and Mr W J Bailhache as Attorney-General. They are brothers. The Attorney-General is responsible for the conduct of all criminal proceedings in the Island on behalf of the Crown. Mr Shelton contends that, simply because they are brothers, this criminal prosecution should not have been brought before the Royal Court presided over by the Bailiff. His contention, if correct, would mean that the Bailiff could not sit in any criminal proceedings, whether in the Royal Court or in the Court of Appeal, so long as Mr W J Bailhache is Attorney-General.

5. Mr Shelton relies primarily on three English authorities: R v Gough

[1993] AC 646 HL(E); *R v Bow Street Metropolitan Magistrate et al, ex parte Pinochet Ugarte* (No.2)

[2000] 1 AC 119 HL(E); *Locabail (UK) Ltd v Bayfield Properties Ltd et al*

[2000] QB 451 ;

[2000] 1 All ER 65 CA. 6. As these authorities show, there are two different aspects to be considered in relation to the recusation of a judge. The first is where disqualification is automatic, as where the judge is a party to the action or has a financial or proprietary interest in its outcome or the outcome may lead to the promotion of a cause in which the judge is involved together with one of the parties. This was the case in *Pinochet* in which Lord Hoffman as chairman and director of Amnesty International Charity Ltd (AICL) was held to be involved in the promotion of the provisions of the Universal Declaration of Human Rights by Amnesty International, which controlled AICL and which had become a party to the appeal to the House of Lords, and he was therefore held to be automatically disqualified: see [2000] 1 AC per Lord Browne-Wilkinson at pp.132-135. This aspect is not relevant in the present case. 7. The second is where there may be a suspicion that the judge is not or may not be impartial, often described as cases of "apparent bias". In *Gough* the House of Lords held that the test to be applied is whether, in all the circumstances of the case, there appears to be a "real danger (or likelihood) of bias". This test their Lordships contrasted with a "reasonable suspicion (or apprehension)" test, i.e. whether a reasonable and fair minded person sitting in the court and knowing all the relevant facts would have a reasonable suspicion or apprehension that a fair trial by the judge was not possible. 8. This Court considered the appropriate test of apparent bias in Jersey law in *In the matter of Sinel*

(2000) JLR 18 in its judgment which I delivered. We reserved for later decision the question which of these tests is to be adopted in Jersey law, recognising that the decision in *Gough* had not been followed in other common law countries (e.g. Scotland, New Zealand, and the High Court of Australia in *Webb v R*

(1994) 181 CLR 41). We again reserve that question for subsequent decision, because the matter has not been argued fully before us. We take for present purposes the test which is most favourable to the Company, the reasonable suspicion or apprehension test. This is a stronger test than the real danger or likelihood test which was considered in *Locabail*. 9. In our judgment there is no basis for the contention in this case that the Bailiff ought to have recused himself. The Queen in Council has been advised as to the appointments she should make, in order to secure the best holders available of the offices of Bailiff and Attorney-General, and she has on such advice appointed two brothers to these offices. The fact that they are brothers does not give rise to any "reasonable suspicion or apprehension", where they are simply performing the duties of their offices, and no other fact is or can be relied on as the basis for an alleged case of "apparent bias". If some other relevant fact arose, for example (as the Bailiff mentioned in his judgment) if the Attorney-

General were called as a witness or where his credibility were otherwise in issue, then the position might be different. It is also material, as was indicated in *States Greffier v Les Pas Holdings Ltd*

- (1998) JLR 196 at p.203, that: "1. Those who live and work in Jersey have to accept that the administration of justice depends to a great extent on the two senior Judges, the Bailiff and the Deputy Bailiff." 10. Mr Shelton referred also to a Consultation Paper: Codes of Practice dated 7 th July, 2000, issued by the Jersey Financial Services Commission. The Commission proposes that in relation to "Trust Company Business" a business must be actively managed by at least two or three skilled and experienced individuals, and that where the business is a family business one or more of such individuals must be entirely independent of the family. This paper is not relevant to the facts which we have to consider. The Bailiff and the Attorney-General are not joining together in managed decision-making, but fulfilling the requirements of two entirely separate and distinct offices with wholly different functions. Mr Shelton also made some criticisms of the Crown Advocate's oral submissions below and of the terms of the Bailiff's judgment. These criticisms carried his contention no further forward. 11. Mr Shelton referred to Articles 1 and 2 of the Departments of the Judiciary and the Legislature (Jersey) Law, 1965 as, he submitted, supporting his contentions. This was, however, misconceived. Article 1(1) provides for the existence of certain departments (including the Bailiff's Department and the Law Officers Department) and for the appointment of officers to such departments. Article 1(2) provides that: " No officer shall be appointed to the Bailiff's Department or the Law Officers Department without the consent of the Bailiff or the Attorney-General, as the case may be. " Mr Shelton submitted that Article 1(2) meant that the Bailiff had a veto over the appointment of the Attorney-General, and vice versa. That is not correct. It is clear from the wording of Article 1(2) that the words "No officer" do not include the Bailiff or the Attorney-General and that the right of veto over appointments is solely by the Bailiff as regards appointments to his own department, and by the Attorney-General as regards appointments to his own department. That Article 1(2) does not and cannot include a right of veto in respect of the appointments of the Bailiff and the Attorney-General is made clear by Article 2(1) which provides for the appointment of (inter alios) these office-holders by Her Majesty: plainly neither has a veto in respect of appointments by Her Majesty. 12. Mr Shelton made other submissions to which reference can be made briefly:- (1) He suggested that the Jurats are elected from a small electoral college. That is not correct, as appears from the full statement of the position as regards Jurats in re Sinel (above). (2) He referred to the fact that when findings of guilt or decisions on sentence are being made by the Jurats the Bailiff (if he is the judge) retires with them, and may in certain circumstances have a casting vote. This is correct, but it carries his argument on "apparent bias" no further forward. 13. In our judgment the Bailiff was right not to recuse himself. We also reaffirm what this Court said in *States Greffier v. Les Pas Holdings Ltd* about the making of ill-considered applications to judges to recuse themselves. Ground 2 : Alleged Refusal to allow Mr Shelton to give evidence. 14. Mr Shelton contends that the Bailiff "refused to

allow the Director[s] of the Appellant Company to give evidence." This ground of appeal is misconceived. Mr Shelton was the sole director. It was for Mr Shelton to decide whether or not he should give evidence. He apparently decided not to give evidence. There is nothing in the transcript on which reliance could be placed as amounting to a refusal to allow him to give evidence. As the Bailiff pointed out to Mr Shelton (transcript, tab 12, page 14), his closing speech did not constitute the giving of evidence: despite being so warned, Mr Shelton chose not to go into the witness box. Mr Shelton is not lacking in legal experience and understanding, as the high quality of his advocacy before this Court showed. Ground 3 : Service of Amended Fire Certificate. 15. It was accepted throughout by Mr Shelton for the Company that the original fire certificate issued in 1983 had been duly served at the registered office of the Company. But he alleged that the prosecution had failed to prove (as it was required to prove) that the fire certificate as amended in 1997 had been duly served on the Company. Article 4 of the 1977 Law lays down the requirements as regards fire certificates. Under Article 4(5), unless there is some other requirement laid down by the relevant committee making some other person responsible for any contravention of a fire certificate, the person responsible is the occupier, which here was the Company. Under Article 4(6), where an amended fire certificate is issued varying the requirements, if the existing person responsible is to be made responsible for any contravention of the altered requirements the Committee must previously have consulted that person about the proposed variation. Under Article 4(8): " A fire certificate issued with respect to any premises shall be sent to the occupier of the premises and shall be kept in the premises so long as it is in force ." 16. Article 5 makes provision in relation to offences. Article 5(3) provides (inter alia) for the person responsible for a contravention of fire certificate requirements to be guilty of an offence, subject to this proviso :- "Provided that a person shall not be convicted of an offence under this paragraph unless it is proved that his responsibility for contraventions of the requirement in question had been made known to him before the occurrence of the contravention in respect of which he is charged." Reference should also be made to Article 14 which provides (inter alia): "In any proceedings for an offence under this Law ... , it shall be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence." 17. Mr Shelton also referred to Article 72 of the Companies (Jersey) Law 1991 which provides that a document "may" be served on a company by one of the methods there set out. Clearly the word "may" in Article 72 is permissive, and not mandatory. 18. What appears from the evidence before the Royal Court is as follows: (1) Though amendments were made, particularly to the plans attached to the fire certificate, the basic requirements set out in the Conditions referred to in each of the Counts were not altered, and were well known to the Company from 1983 onwards. (2) The certificate as amended in 1997 was in force as at September 1999. (3) The amended certificate was held in the office at the Barra Hotel. (4) It was not made clear who had signed on behalf of the Company acknowledging receipt of the amended certificate. (5) The Manager in September 1999, Mr Velosa, had seen the amended certificate, and was aware of the relevant conditions contained in such certificate. 19. Thus the evidence

showed that the amended certificate had been received by the Company, and was held in the office of the Hotel, and its terms were known to the Company's Manager at the time.

20. In these circumstances Mr Shelton's submissions as to service fail. His point appeared in the end to amount to no more than the allegation that he as sole director had not seen the amended certificate. There was no evidence before the Royal Court to this effect, since Mr Shelton chose not to give evidence. The reality is that, as the evidence showed, the amended certificate was received by and held by the Company at the hotel (as required by Article 4(8) of the 1977 Law) and its terms were well known to the Company's Manager.

Ground 4 : Failure to direct the Jurats as to the Company's defence. 21. Mr Shelton made these points under this heading. The first was that the Bailiff in his summing up to the Jurats had not dealt in detail with the evidence, including the evidence relevant to the defence. In this Court's judgment the Bailiff correctly did not do so, because (1) the trial was short, and the evidence was fresh in the minds of the Jurats; (2) the Jurats are experienced lay judges, to be contrasted with an inexperienced jury; (3) appellate courts have regularly criticised judges at first instance for taking too long to summarise evidence which is fresh in the minds of members of a jury, thereby running the risk of muddling the jury in relation to their decision-making on guilt or innocence. 22. The second point was that the Bailiff had taken the question as regards service of the amended fire certificate out of the hands of the Jurats by his directions. This point was wrong. The Bailiff correctly directed the Jurats as a matter of law (page 4 of the summing up) that: " it is sufficient to give notice to the holder of a fire certificate under the 1977 Law to send it to the ordinary place of business of the certificate holder ." The Bailiff also correctly told the Jurats that it was for them to be satisfied, before they could convict, that before 5 th September 1999 it had been made known to the Company that it was responsible for any contravention of the requirements in question. 23. As regards the defence under Article 14, the Manager, Mr Velosa's , evidence was that he had deliberately caused the exit doors to be locked, though he knew this was a breach of the fire certificate conditions, and though Mr Shelton had told him to comply with those conditions. Ground 5 : No reasonable tribunal could have convicted . 24. Mr Shelton did not put forward this ground with any force in his oral submissions, and he referred only by way of example, to the question whether chairs in the means of escape (if they were there, for he contended that they were not) were metal and to that extent not combustible. Our conclusion is that on the evidence before the Jurats, it would probably have been perverse for them not to convict, since there was ample evidence before them on which they were entitled to convict the company on each of the three counts. 25. Mr Shelton then made submissions as to sentence. Ground 6 : Different Jurats sentencing from the Jurats who convicted. 26. Mr Shelton's submission was that the Jurats who convicted the Company should have sat as members of the sentencing Court with the benefit of all their knowledge of the case. 27. This submission has to be put in its proper context. If trial in the Royal Court is before a jury, then necessarily the Jurats who decide on sentence have not seen the case before. They rely on the statement of facts provided by prosecution counsel which has invariably been agreed with defence counsel. If there is a plea of guilty, again the sentencing Jurats

inevitably have not seen the case before. They rely on the prosecution's statement of facts, if agreed, or if this is not agreed, they decide the relevant facts by means of a 'Newton' hearing. 28. In any event the advantages and disadvantages of having the same or different Jurats are not at all clear cut. The Jurats who convicted might carry with them into the sentencing process preconceptions, derived from the evidence at trial, as to the appropriate sentence: this could in some cases be a disadvantage. In other cases it might make the sentencing hearing shorter if the same Jurats were involved. These are no more than examples which we give to illustrate our conclusion that there is no basis for Mr Shelton's submission that, in effect, there should always be the same Jurats finding guilt and sentencing. Ground 7 : The Judge allegedly failed to direct the Jurats to take into account the financial position of the company. 29. This submission is unfounded, as the judgment of the Bailiff on sentencing shows. At the first sentencing hearing Mr Shelton indicated that the Company could not pay any fine. The hearing was then adjourned to allow Mr Shelton time to produce the accounts of the Company and any further information necessary to establish its financial circumstances. Mr Shelton then himself prepared some informal accounts, and he produced these accounts, but no further evidence, such as bank accounts or confirmation of the Company's financial position by the accountants for whose services Mr Shelton's accounts recorded the Company having paid £1,200. The Royal Court reached this conclusion : " It is sufficient, we think, for us to state that we do not find the material placed before us satisfactorily establishes those circumstances " [i.e. the Company's financial position as being unable to pay any fine]. In these circumstances, to suggest that the Bailiff should have told the Jurats to accept the inadequate accounts prepared by Mr Shelton is misconceived. We add that in our judgment the accounts produced by Mr Shelton were correctly described by the Royal Court as not satisfactorily establishing the financial position of the Company. Ground 8 : In all the circumstances the sentence and costs were too severe. 30. This Court considers that the sentences on each of the three counts and the costs order were not too severe. Three principal matters are relevant : (1) The offences of which the Company was convicted were serious offences. If the fire alarm had related to an actual fire in the hotel, the breaches of the fire certificate conditions could have led to the deaths of or serious injury to guests and staff in the hotel. This Court like the Royal Court takes a very serious view indeed of locked fire exit doors, obstructions to means of escape, and the leaving of combustible materials in the means of access. The Court particularly keeps in mind that most deaths and injuries when there is a fire in a building result from the large volumes of smoke which are generated, and that it is vital that all in such a building can and do escape rapidly and without material difficulty before they are injured or killed. (2) Though Mr Shelton had specifically told the Manager of the hotel to comply with the fire certificate, the Manager explained in his evidence that he had deliberately caused the exit doors to be locked, knowing that this was in breach of the fire certificate requirements. (3) There was no satisfactory evidence of the Company's inability to pay the fines and costs imposed. 31. Accordingly leave to appeal is refused. Authorities R -v- Gough

[1993] AC 646 HL(E). Locabail (UK) Limited -v- Bayfield Properties Ltd & Another

[2000] 1 All ER 65 (CA);

[2000] QB 451 . Fire Precautions (Jersey) Law, 1977. R -v- Bow Street Metropolitan Magistrate et al, ex p. Pinochet Ugarte (No. 2)

[2000] 1 AC 119 HL(E). In re Sinel 2000 JLR 18 . Webb -v- R

(1994) 181 CLR 41. Greffier of the States -v- Les Pas Holdings, Ltd 1998 JLR 196 . Departments of the Judiciary and the Legislature (Jersey) Law, 1965: Articles 1 and 2. Companies (Jersey) Law 1991: Article 72. Page Last Updated: 02 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/je/cases/UR/2000/2000_207.html

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Prepared on 24 October 2026 · Esheria