

JERSEY / JUDGMENT

Botrel v AG [2005] JCA 022 (02 March 2005)

[2005] JCA 022COURT
COURT OF APPEAL

BEFORE

R. C. Southwell,
Esq., Q. C., President;
Sir de Vic Carey,
and
The Hon. Lord Hodge
Peter Henri Francis Botrel

-v-

The Attorney General

Applications; (1) for an extension of
time within which to apply for leave to appeal; (2) for leave to appeal against
conviction, by the Inferior Number of the Royal Court on 29th June, 2004; and
(3) for leave to appeal against a total sentence of 3 years' imprisonment,
passed by the Inferior Number on 13th August, 2004, following not guilty pleas,

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time within which to apply for leave to appeal; (2) for leave to appeal against
conviction, by the Inferior Number of the Royal Court on 29th June, 2004; and
(3) for leave to appeal against a total sentence of 3 years' imprisonment,
passed by the Inferior Number on 13th August, 2004, following not guilty pleas,

entered on 16th April,
2004, to:

1 count of:
possession of a firearm, contrary to Article 2(1)(a) of the
Firearms (Jersey) Law 2000, (count 1, on
which count a sentence of 1 year's imprisonment was passed;
1 count of
discharging a firearm in a dangerous manner, contrary to Article
44(b) of the Firearms (Jersey) Law 2000,
(count 2, on which count a sentence of 3 year's imprisonment, concurrent was
passed.
[On 16th April, 2004, the Royal Court, in accordance with the conclusions
of the Crown Advocate, left over count 3 of the indictment.]
The applications for leave placed
directly before the plenary Court, without first being submitted to a Single
Judge for consideration and determination.
Advocate J. Bell for the Appellant;
S. M. Baker, Esq., Crown Advocate.

JUDGMENT

HODGE JA: 1. This is the judgment of the Court. 2. On 28 and 29 June 2004 Mr Botrel ("the Applicant") was tried by the Royal Court on the charges of possessing a firearm contrary to Article 2(1)(a) of the Firearms (Jersey) Law 2000 (which was Count 1) and of discharging a firearm in a dangerous manner contrary to Article 44(b) of that Law (which was Count 2). He was convicted on both Counts. The Applicant was sentenced by the Inferior Number of the Royal Court on 13 August 2004 to twelve months' imprisonment on Count 1 and three years' imprisonment concurrent on Count 2. 3. The Applicant applied for an extension of time within which to apply for leave to appeal on the ground that at the relevant time he was unrepresented and he did not have sufficient knowledge of the appeal procedure to be able to secure his position. 4. The Applicant sought leave to appeal against conviction and sentence. Advocate Bell presented his appeal against conviction on two grounds. First, he submitted that the Applicant had been the victim of a miscarriage of justice as he had been denied the opportunity to represent himself at his trial. Secondly, he submitted that the verdict of the Jurats on both Counts was unreasonable and that reasonable Jurats would have acquitted him. He also submitted that the sentence of three years' imprisonment on Count 2 was manifestly excessive and argued that an appropriate sentence would have been imprisonment for eighteen months or even a non-custodial sentence. 5. After hearing Advocate Bell for the Applicant and Advocate Baker for the Crown in relation to the appeal against conviction, we granted the Applicant's request for an extension of time within which to apply for leave to appeal and granted leave to appeal but we refused his appeal against conviction reserving the statement of our reasons until today. We now set out our reasons for refusing the appeal against conviction. 6. We have also decided to refuse the appeal against sentence and set out our reasons for so doing. The appeal against conviction (a) Denial of opportunity to represent himself 7. The Applicant submitted that he had been the victim of a miscarriage of justice as he had been denied the right to represent himself at his trial. He had written to his Advocate, who was Advocate Juste, and to the Acting Bâtonnier, who had

responsibility for administering legal aid, on about 14 or 15 January 2004 stating that he no longer wished to be legally represented in the criminal proceedings. In his affidavit he stated that he subsequently met with Advocate Juste who said that she had spoken with the Acting Bâtonnier and that she would continue to represent him. He mistakenly interpreted this as meaning that he had to have legal representation and thereafter he co-operated with Advocate Juste in the preparation of his defence and in the trial. He denied having received at the material time a letter dated 27 January 2004 from the Acting Bâtonnier which made it clear that he could dismiss his lawyer. In the letter the Acting Bâtonnier stated among other things that " I have spoken with the lawyer representing you and for the time being, I will leave the legal aid certificate in issue but this obviously does not affect your rights to dispense with a lawyer if you so see fit ". The Applicant suggested that the letter had been lost in the post or in the prison and that if he had received the letter he would have dismissed his Legal Aid lawyer and represented himself. 8. The Applicant did not criticise in any way the professional service which Advocate Juste provided him in preparing the defence and representing him at his trial. He did not explain how he would have acted differently in the conduct of his defence if he had represented himself. His case appeared to rest on the contention that he had suffered injustice because he had had counsel forced upon him against his will. We were referred to the English case of *R v Woodward*

[1944] KB 118 in support of this proposition. In that case an assistant recorder erred in refusing the request of an accused person to defend himself when his counsel had withdrawn from acting for him at the last minute and had been replaced by a counsel whom the accused had not met before. 9. As this ground of appeal involved issues of fact on which Advocate Juste and the Acting Bâtonnier might be able to assist this Court, we had invited them to comment on the allegations and we were assisted by an affidavit and documents lodged by Advocate Juste and by a letter dated 25 February 2005 and documents lodged by the Acting Bâtonnier. 10. In her affidavit Advocate Juste set out the context of the letter on which the Applicant founded and of her meetings with him in January 2004. She had represented the Applicant in relation to the criminal proceedings and also in relation to events which had occurred in prison. In a telephone discussion on 14 January the Applicant had told her that he wished her services in relation to the matter concerning the prison but that he did not wish her help in relation to the criminal proceedings and that he had written to the Acting Bâtonnier to that effect. The Applicant stated that he would not plead guilty but that he would not offer a defence at the trial. She was concerned that this was not sensible and suggested to him that he should think about it for a couple of weeks. He was happy to do this. She produced an e-mail dated 14 January 2004 which she had sent the Acting Bâtonnier which supported her account. Among other things in the e-mail she stated: " I am hoping to try to persuade him that he should have legal advice re the criminal charges - the court needs someone to represent him and he does too really, so I have suggested he leaves his decision for a couple of weeks. He is going to think about it ". 11. Advocate Juste in her affidavit recorded her recollection of a meeting with the Applicant which took place on 15 January 2004. After referring to a discussion about civil proceedings relating to a matter concerning the prison, she recorded a discussion on the criminal proceedings in

the following terms: "I told him that he did not have to have a lawyer but I thought it was in his best interests to have one, as did the Acting Bâtonnier. I remember the Appellant saying "ok let's see how it goes" or words to that effect. I think that he had understood our conversation fully and that he understood that it was his choice. I considered therefore that the Appellant had changed his mind about not wanting me or a lawyer to represent him". Advocate Bell informed us that the Applicant had no recollection of this having been said. Advocate Juste also produced a contemporary file note of the meeting which had been prepared by her colleague, David Hargreaves. This note did not match her recollection precisely but was broadly consistent where it recorded: "RJ [i.e. Rebecca Juste] said that she wished to stay acting for now for the record and to see how it goes and she would see Peter [i.e. the Applicant] before the next court date." Advocate Juste in her affidavit went on to record how she informed the Acting Bâtonnier that she and the Applicant had agreed to see how it went. Thereafter she recorded the Applicant's cooperation with her in the preparation of her case. Advocate Bell accepted that the Applicant had cooperated in the preparation of the case and in the conduct of the trial without demur but asserted that this was because the Applicant had understood that he had to have legal representation against his wishes. 12. That he did so cooperate is clear but we find it difficult to accept that he did so in the belief that legal representation was compulsory. First, we observe that he wrote to Advocate Juste on 10 March 2004 recognising that she had declined to act in his bail application because she did not think that it had a chance of success and informing her that he had himself applied for bail. This is hardly consistent with a belief that he could not act without legal representation. Secondly, we find it strange that he should have submitted to being represented by Advocate Juste without any further reference between January and June 2004 (when the trial took place) to his wish to represent himself. But it was his position that that is what he did. As Advocate Juste recorded in her affidavit, from March 2004 onwards the Applicant and she corresponded by letter, on the phone and in person; " he participated fully in all decisions concerning his case. At no time did he suggest that he did not want to have a lawyer ". This was not disputed. 13. In our judgment there is no question of a miscarriage of justice in these circumstances. Advocate Juste represented him very well and Advocate Bell made no criticism of her preparation of the case or her advocacy. At best for the Applicant he had misunderstood what Advocate Juste had said to him at the meeting on 15 January 2004 and did not clarify matters thereafter. The case of Woodward is clearly distinguishable both because in that case the accused was faced at the last minute with the prospect of representation by a counsel who had not been fully briefed and because it was the Court which refused to allow him to represent himself. We have been given no reason to believe that the Applicant has been prejudiced in any way by the legal representation which he had at his trial. While recognising that appeals may involve more complex legal issues than a trial, we think it is significant that in his correspondence with the Acting Bâtonnier about legal aid for this appeal he acknowledged in a letter dated 30 November 2004 that it was quite obviously beyond his capability to represent himself. 14. We have therefore not upheld this ground of appeal. (b) The Jurats' verdict was unreasonable. 15.

The incident which led to the conviction of the Applicant for the firearms offences involved the discharge of two cartridges from a shotgun into a van belonging to a Mr Eidukas which was parked outside his flat in Halkett Place at about 8 am on Saturday 13 December 2003. 16. The Crown case against the Applicant comprised only circumstantial evidence. There was undisputed evidence from the Applicant's diary that he had a history of ill feeling towards Mr Eidukas and that he felt that he and his family were threatened by him as a result of Mr Eidukas' belief that his niece had been introduced to illegal drugs by the Applicant's daughter. The diary, which parties accepted as accurate, also recorded threats by Mr Eidukas to the Applicant's family and the assertion that Mr Eidukas or his friends had assaulted the Applicant's wife and daughter. 17. The Crown also led agreed evidence of a telephone call on Monday 8 December 2003 to Mr Eidukas in which an unidentified caller asked him if he was still beating up women and invited him to meet the caller at a specified time if he had got any bottle. The Crown presented agreed evidence that the call was made from a public phone in the Co-operative Grande Marché supermarket, La Rue Le Masurier, St Saviour and presented low-quality CCTV evidence of a man who, the Crown submitted, resembled the Applicant entering the supermarket and using the relevant public phone at the precise time of the phone call to Mr Eidukas. 18. There was also extensive CCTV evidence of the Applicant's movements on the morning of the incident on 13 December 2003. Those pictures, which the Applicant accepted were of him, showed him in the car park close to his flat placing an object, which could have been a shotgun, wrapped in a fluorescent jacket in the boot of his car and then moving the object still wrapped in the jacket into the front passenger seat of the car before driving away. CCTV photographs from streets in St Helier showed the car in close proximity to Halkett Place at about 7.52 am. 19. Agreed witness statements from people in and around Halkett Place contained estimates of when they heard a noise like a gunshot on the morning of 13 December. A Mr Reilly who regularly left for work at about 7.50 am estimated that he heard the noise at 7.45 am, while two other witnesses, Kevin Mahoney and Jackie Thompson, suggested that they heard a loud bang at about 8.05 am. 20. There was also forensic evidence of traces of nitroglycerin and primer particles in the Applicant's car which, although not conclusive, was consistent with a shotgun having been fired in or in close proximity to the car. The findings were also consistent with the traces and particles having been transferred into the car by contact with items already contaminated with these residues. Traces of nitroglycerin were also found on the inside of the fluorescent jacket which the police recovered from the front passenger seat of the Applicant's car on a further examination of the car on 23 December. The forensic scientists for the Crown and for the Applicant agreed in their evidence that it could not be said from the scientific evidence which of the two explanations for the presence of the residues was more likely. There was evidence that the Applicant might have handled a gun case in his capacity as a baggage handler on the Condor ferry on about 10 December. 21. DC Hutcheson in agreed evidence recorded that the Applicant when questioned on 16 December 2003 informed the police that they would not recover the gun as it was "in deep water, far out". DI Bonney corroborated this account which the Crown argued was of the

nature of a confession. The Applicant's position was that he had gone along with a suggestion by the police as to where the gun was in order to discourage the police from disturbing his former wife by searching her flat. 22. Advocate Bell submitted that there was reasonable doubt and that reasonable Jurats ought to have acquitted the Applicant. The evidence of bad feeling between the Applicant and Mr Eidukas established only a motive and not that the Applicant had committed the crime. The CCTV pictures on 8 December were of poor quality. The evidence of the timing of the noise of the shots was not consistent with the Applicant being the perpetrator. If Mr Reilly were correct and the time was 7.45 am, the CCTV footage showed the Applicant in his car close to his home at that time. If Mr Mahoney and Ms Thompson were correct in their estimate that the time was 8.05 am, there was no evidence that the Applicant was anywhere near Halkett Place at that time. Nor would the Applicant have had sufficient time to drive to St John's Village to make a telephone call at 8.14 am from there to Mr Eidukas, which the police attributed to him. He submitted that the forensic evidence was inconclusive as was the alleged confession as to the resting place of the gun which was prompted by the police and which was designed to protect his former wife against intrusion. In all he submitted that there was doubt as to the timings, the forensic findings, the identification of the phone caller on 8 December and the alleged confession and that the Crown had not proved the Applicant's guilt. 23. In our judgment this ground of appeal must also fail. While the evidence was admittedly circumstantial, and many individual components of the evidence would not have been sufficient in themselves to justify a finding of guilt against the Applicant, there were sufficient components in the evidence which in combination entitled reasonable Jurats to convict the Applicant. A case against an accused which is based entirely on circumstantial evidence is often convincing not through the conclusiveness of any one component of the evidence but through the combination of the different components or strands of circumstantial evidence. In this case the Jurats were informed of a motive for the crime. There was photographic evidence of the person telephoning Mr Eidukas from the supermarket on 8 December. There was the CCTV evidence of the Applicant placing an object in his car wrapped in the fluorescent jacket and the Jurats were entitled to prefer the Crown submission that that was a gun rather than the fishing rod which the Applicant said he was returning to his friend, Mr Spanswick. The Jurats saw the Applicant give evidence and were entitled to reject his evidence that he had gone to Halkett Place early on a Saturday morning to return a library book. They were entitled to disbelieve his account that it was only on 15 December, after the firearms incident, that he had acquired the contaminated jacket which the police recovered from his car. In short, while the Applicant gave evidence which could provide an innocent explanation of each of the components of the circumstantial evidence on which the Crown relied, the Jurats were entitled to reject those explanations and to be satisfied that the combination of the components pointed to his guilt. 24. We have therefore not upheld this ground of appeal. Accordingly the appeal against conviction fails. The appeal against sentence 25. Advocate Bell submitted that the sentence of three years' imprisonment on Count 2 was manifestly excessive. The firearm had been used only to damage Mr Eidukas' vehicle and had not

been pointed at a person. He referred us to the English case of *R v Avis*

[1998] 2 Crim. App. R. (S) 178 and the factors which the Court of Appeal listed as relevant considerations in sentencing for firearms offences. In this case, he submitted, the relevant considerations were that the weapon was a loaded shotgun, two shots were fired to cause minimal damage to property, there was no intention to cause personal injury, there had been considerable provocation by Mr Eidukas who had placed the Applicant's family in a state of fear, and, while the Applicant had previous convictions in the past including convictions for violent crime, he had reformed and stayed out of trouble for many years. He also had a history of depression. 26. In support of his submission that the Applicant's prison sentence should be reduced to 18 months or even to a non-custodial sentence, Advocate Bell referred us to three Jersey cases involving firearms. In *Attorney General v Le Flock* (31 st January, 1997) Jersey Unreported; [1997/18] (a case decided in 1997 which therefore predated the Firearms (Jersey) Law 2000) the Royal Court sentenced Le Flock to one year's imprisonment for having an offensive weapon in a public place contrary to Article 27 of the Firearms (Jersey) Law 1956. In that case Le Flock, who was drunk, fired shots from a shotgun while travelling in a car in the early hours of the morning and in circumstances in which the risk of injuring members of the public was remote. The Court described the events as "a lunatic and dangerous journey". 27. In *Attorney General v Ware* (13 th February, 2001) Jersey Unreported; [2001/37] Mr Ware pleaded guilty to firearms offences when he had purchased a shotgun with the intention of using it on himself. He entered his ex-wife's house and in her absence fired several cartridges within the house damaging furniture, clothing and other property. In the particular circumstances of the case the Crown concluded for a non-custodial sentence and the Court, while expressing initial surprise at the Crown's suggestion, made a three year Probation Order, with a condition that Mr Ware should not possess a firearm during that time. In giving judgment the Deputy Bailiff stated that the Court wished to emphasise that those who carried and used loaded shotguns unlawfully could expect to receive a custodial sentence save in very exceptional circumstances. 28. In *Attorney General v Ewens* (3 rd May 2002) Jersey Unreported; [2002/94] Mr Ewens pleaded guilty to possession of a sawn-off shotgun without a valid Firearms' Certificate and other firearms offences including being in possession of a firearm with intent to endanger life. After a disagreement with his employer and having lost his employment, he took the gun to his employer's place of work and showed it to various workmen, threatening to "knee cap" his employer. But he did not threaten his employer directly nor did he point the gun at any person. The defendant was not a dangerous man; he had no previous convictions and reports suggested that there was a low likelihood of re-offending. Exceptionally the defendant was given an individualised sentence of 240 hours' Community Service and Probation for two years. In giving judgment the Deputy Bailiff stated that following the enactment of the Firearms (Jersey) Law 2000 with its increased and more realistic penalties, the Court, in common with the English Courts, wished to make it clear that the unauthorised possession of firearms was a serious offence. The Deputy Bailiff also stated that but for the individualised sentence, the

Court would have sentenced the defendant to two years' imprisonment. 29. Advocate Baker for the Crown submitted that the sentences imposed in these Jersey cases were astonishingly low and did not reflect the gravity of the offences. The Jersey Courts, he submitted, should follow the lead of the English Courts and impose deterrent sentences. While the Royal Court had not fixed a starting point and then specified a reduction for mitigation, the sentence could be analysed as amounting to a starting point of four years with one year's mitigation for the Applicant's personal circumstances. The offence was towards the top end of the statutory offence in its gravity. It was important that the Court should deter the increased use of firearms. The sentence of three years' imprisonment was not manifestly excessive. 30. We consider that the Crown is correct in its submission that the sentence is not manifestly excessive. The maximum sentence under the Firearms (Jersey) Law 2000 for the offence of discharging a firearm in a dangerous manner (Article 44(b)) is five years. Where the discharge of a weapon causes injury or is intended to maim or kill there are common law offences with which the Crown can charge a perpetrator in addition to the statutory offences. The five years' maximum is for the statutory offence on its own. This case is a bad example of the dangerous use of a firearm in a public place in circumstances in which a member of the public could have been seriously injured. The shotgun pellets which were fired through Mr Eidukas' van entered the hallway of the flats at 100 Halkett Place and could have caused serious injury to anyone who happened to be in the hall at the time. Fortuitously, no one was there when the shots were fired. 31. The Court does not consider that the three Jersey cases to which we were referred should be used as a benchmark for sentencing for firearms offences. While the appropriate sentence in each case must be determined on its own facts we consider that it is appropriate in most circumstances to impose deterrent sentences for the possession of firearms without holding a valid firearms certificate, for discharging a firearm in a dangerous manner and other firearms offences. 32. We therefore refuse the appeal against sentence. Authorities. R-v-Woodward [1944] KB 118. AG-v-Le Flock (31 st January, 1997) Jersey Unreported; [1997/18]. AG-v-Ewens (3 rd May, 2002) Jersey Unreported; [2002/94]. R-v-Avis

[1998] 2 Cr App R (S) 178 . R-v-Campbell [1998] 1 Cr. App. R. (S) 264. Evans-v-AG

(1965) JJ 527 . AG-v-Ware (13 th February, 2001) Jersey Unreported; [2001/37]. Page Last Updated: 27 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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