

JERSEY / JUDGMENT

de Jesus v AG [2003] JCA 181 (15 October 2003)

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JUDGMENT

THE DEPUTY BAILIFF: 1. On 15 th February, 2002, the Applicant was sentenced to three years' imprisonment on one count of grave and criminal assault, and two months imprisonment concurrent for one count of possessing an offensive weapon. The Court also recommended that he be deported at the end of his sentence. 2. On 7 th February, 2003, the Applicant applied for leave to appeal against the recommendation for deportation. He does not seek to appeal against the prison sentence. Given that the Notice of Appeal was only filed approximately one year after sentence was passed, the Applicant needs leave to appeal out of time. 3. The matter originally came before this Court on 3 rd July, 2003. At that stage it became clear that the Applicant relied upon an allegation that incorrect advice on appeal was tendered by his advocate at the time of the hearing before the Inferior Number. This Court therefore adjourned the application in order that the necessary evidence could be obtained. That evidence has now been obtained and the Court has had an opportunity of reviewing a number of Affidavits. 4. In the light of what is disclosed in those Affidavits, the Crown no longer opposes the application to bring an application for leave to appeal out of time. We think that that is right. We think, on the face of the Affidavits, that there were grounds upon which the Applicant might have been under a misunderstanding and we therefore grant leave for him to bring this Application for leave to appeal out of time. 5. We now turn to consider the merits, before deciding whether to grant leave to appeal and if so, whether to allow the Appeal. This was a very nasty assault involving the use of a knife. However, at the hearing before the Inferior Number, the Applicant's counsel, Advocate Deacon, did not, in fact, oppose the recommendation for deportation. No doubt she did this largely on the basis that the Social Enquiry Report contained a passage which indicated that the Applicant and his girlfriend, who had only been in the Island since March 2000, had been thinking of returning to Madeira even before the offence was committed. In those circumstances we are not surprised that the Inferior Number made a recommendation for deportation. 6. However we have heard much more detailed information from the Affidavits which have been filed and this casts real doubt on whether the Applicant's case was properly put forward at the hearing below. We say that for the following reasons: 7. First, the Applicant was, at the time, acting through an interpreter and was clearly in a state of some distress at finding himself imprisoned on remand for the first time. Suffice it to say that we can accept that there might be scope for the Applicant not having said

what he meant or for a misunderstanding in relation to interpretation. 8. Secondly, and more significantly, the evidence suggests that Advocate Deacon did not, in fact, take specific instructions at any stage from the Applicant as to whether he opposed deportation and whether he agreed with the contents of the Social Enquiry Report about his possible attitude and that of his girlfriend before the offence. 9. Thirdly, as we say, Advocate Deacon did not oppose the making of a Deportation Order so that the Inferior Number was left with the impression that the Applicant was content for a Deportation Order to be made. 10. Fourthly, we find that, at any rate on the day of the hearing, the Applicant almost certainly did oppose deportation. We have read his Affidavit but even on Advocate Deacon's Affidavit it is accepted that there was some discussion with the Applicant, almost certain immediately after sentence, concerning whether he could appeal against the recommendation for deportation. Advocate Deacon explained in her Affidavit that, at the time, she was not certain of the law as to whether one could appeal against such a recommendation. 11. We now know that, on her instructions, Mr Powderhill, her assistant, very shortly afterwards, made enquiries of the Chief Inspector of Immigration who advised him that there was, indeed, a right of appeal and that a recommendation for deportation counted as a sentence for appeal purposes. There is no evidence unfortunately, that the contents of that advice were ever communicated to the Applicant. What it does show though, is that there was a discussion about whether the Applicant could appeal, because why else would Mr Powderhill, on Advocate Deacon's instructions, have been making enquiries about whether there was a right of appeal. 12. In the circumstances we conclude that the probability is that, at any rate, by the day of the sentencing hearing, the Applicant wished to oppose the making of a recommendation for deportation. However because of the misunderstandings we have set out, those instructions were never understood by his advocate and his advocate never put forward any objection to the deportation before the Court. 13. It follows that the Inferior Number was simply not presented with the Applicant's instructions and we, therefore, must revisit the matter in fairness to him because his case was not put. We have done so and we have, of course, had to take the position as we now find it to be because the position has undoubtedly changed over the period since the Inferior Number sat. 14. Having looked at all the matters in the round, our conclusion is that the recommendation should be withdrawn. We say that for a number of reasons: 15. First, we are satisfied from all the papers that the offence was wholly out of character. He only had one minor previous conviction. All the reports suggest he was shocked by what had occurred and that this was out of character. He is extremely remorseful and we do not find therefore that he is at high risk of re-offending. 16. Secondly, this has been supported by his conduct in prison where he appears to have been a model prisoner. So much so that he was, at the earliest opportunity, put on the work release scheme and since then has been on the tagging scheme. This means that he has, in fact, been living at home with his girlfriend and baby subject to various restrictions. 17. Thirdly, the lapse of time has meant that the family has become yet further established in Jersey. As we say, he has been living with his girlfriend and Jersey born baby. All the evidence before us is that he is an excellent father, the girlfriend is well established here and members of his family are also in Jersey. 18. Fourthly, it is clear that if they were to return to Madeira, this would not be a straightforward matter. Unfortunately it appears that his family will not accept her and her family will not accept him. There are therefore real difficulties in accommodation and in

blending in to the family situation in Madeira. 19. Fifthly, we have read the many references which have been supplied. It is clear that, apart from this incident, this young man has been a responsible citizen, he is hard working and, as we say, the offence appears to be out of character. 20. We therefore must undertake the well known balancing operation in deciding whether the detriment of the Applicant's continued residence in Jersey is outweighed by hardship which would be caused to innocent third parties such as his family, taking into account the right to a family life under Article 8 of the European Convention. Having carried out that balancing operation, we have concluded that it would not be proportionate to the matter to maintain the recommendation for deportation in the light of all the information which has been presented to us, which was not available to the Inferior Number for the reasons we have given. 21. We therefore give leave to appeal and we allow the appeal by revoking the recommendation for deportation. 22. We shall add as a postscript just this: this is the second case in recent times in which the Court has been faced with a situation where defence counsel appears not to have known that a recommendation for deportation is a sentence and that, therefore, if a person wishes to appeal against that recommendation, he must do so within the ten-day period allowed for appealing against a sentence. What has happened in this case is highly unsatisfactory because, by reason of the uncertainty of defence counsel, this appeal was long delayed. The result is that the Lieutenant Governor has made a deportation order and yet the Court is now revoking the recommendation. This only has to be stated for it to be seen as an unsatisfactory situation. We very much hope that counsel will do their duty and learn the law and appreciate that a recommendation for deportation is part of a sentence and therefore should be appealed against in the normal way if an appeal is desired. 23. Mr Tremoceiro you shall have your costs but the first hearing was wasted because the Applicant had not got his tackle in order in terms of Affidavits from former counsel etc. Accordingly I am going to ask the Greffier to note that I do not think that costs should be awarded in respect of the first hearing; only in respect of the present one and, of course, of all the preparations for this one, which would have taken place in any event. Authorities *Le Monnier -v- AG* [2000]JLR 396. *Mallet -v- AG* [2000]JLR 256. *Breen & Ors -v- AG* (13 th September, 2002) Jersey Unreported; [2002/167]. *AG -v- Antunes* [2003]JRC 074. *Nazari & Ors* (1980) 71 Cr. App. R. 87. Page Last Updated: 22 Jun 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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