

JERSEY / JUDGMENT

De Jesus v AG [2008] JCA 010 (23 January 2008)

[2008] JCA 010

COURT
COURT OF APPEAL

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COURT OF APPEAL

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January 2008

Before

:

Dame Heather Steel, President;

M S

Jones, Esq., Q. C.;

and

J V Martin, Esq., Q. C.

Roberto De Jesus

-v-

The Attorney General

Application for leave to appeal against

the sentence and recommendation for deportation imposed by the Superior Number

of the Royal Court on 21

st

August, 2007, following
guilty pleas to:

3 counts:

Being

knowingly concerned in the fraudulent evasion of the prohibition on the
importation of a controlled drug, contrary to Article 61(2)(b) of the Customs
and Excise (Jersey) Law 1999.

Advocate M. L. Preston for the Applicant.

Crown Advocate J. C. Gollop, Esq.

JUDGMENT

THE president: This is the judgment of the Court. 1. On 20 th December, 2006 the Applicant, who is now 20 years of age and was born in Venezuela, entered guilty pleas to three charges of being concerned in the importation of a Class A drug, namely heroin. His co-defendant, Noel de Jesus, who is unrelated, was remanded for committal proceedings. On 13 th April, 2007 the Applicant entered guilty pleas in the Royal Court and was remanded in custody for sentence. On 13 th June, 2007 the co-defendant was convicted by the Inferior Number of the Royal Court of the same three offences. Both were sentenced on 21 st August. 2. The three offences concern the importation of a substantial amount of heroin on three separate dates:- Count 1: On 21 st October, 2006, being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, namely diamorphine. Count 2: On 12 th November, 2006 being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, namely diamorphine. Count 3: On 4 th December, 2006 being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, namely diamorphine. 3. An application was made in accordance with the provisions of Article 3 of the Drug Trafficking Offences (Jersey) Law 1988 for confiscation orders, and the Court:- (i) determined that the Applicant had benefited from drug trafficking in the sum of £28,810.43; (ii) certified, in accordance with Article 8(3) of the said Law that the amount that might be realised from the Applicant is less than his proceeds of drug trafficking; (iii) determined that the amount to be recovered shall be the nominal sum of £1; (iv) ordered the Applicant to pay that sum. 4. The Applicant was sentenced to a term of eight years' youth detention on each of the three counts to be served concurrently. The co-defendant was sentenced to a term of ten years' youth detention on each of the three counts to be served concurrently. 5. Both the Applicant and the co-defendant had been given notice regarding their liability for deportation by virtue of the provisions of the Immigration Act 1971 , as extended to the Bailiwick of Jersey and modified by the Immigration (Jersey) Order 1993 . The Court recommended each for deportation. 6. The Applicant seeks leave to appeal his sentence and the recommendation for deportation. THE FACTS Count 1 7. On 16 th October, 2006 the Applicant, his Co-defendant and another man, Cardoso made a Condor Ferry booking for outbound travel that day from Jersey to St Malo. The booking included a Honda Civic motor car, and a mobile phone number was provided. The fare was paid in cash. All three passengers and the vehicle were confirmed as travelling. 8. On 21 st October, 2006 a Condor Ferry booking was made for the co-defendant and the Honda Civic to return to Jersey. The Applicant and Cardoso travelled on the same ferry. 9. On arrival, the Honda Civic, driven by the co-defendant was stopped by Customs Officers and the co-defendant was searched. The car was detained overnight and searched. Nothing of significance was found. The co-defendant admitted to Customs Officers that he lied to them about his travel to see how much they knew. 10. The Applicant and Cardoso were stopped as they left the ferry and told Customs Officers that they had been to France for five days to see a friend. Both were searched without result. 11. At 4 am on the morning of 22 nd October, 2006 the Applicant and his co-defendant were seen on CCTV by a Security Officer to be in a restricted area climbing over the boulders towards and under the roll-

on roll-off ferry ramp. The police were called and the Applicant and his co-defendant arrested. They were taken to the Police HQ where they were interviewed. The Applicant said they were in the area looking for the co-defendant's car which had been held by Customs Officers the previous day. He denied knowing that the area was restricted. 12. Both were charged with the offence of being in a restricted area, and appeared in the Magistrates' Court. They each pleaded guilty and were fined £100. 13. On 25 th October, 2006 Customs Officers searched the area where the men had been seen, and a package was seen within a rock space immediately to the side of the ramp. The package was found to be a dark blue coloured sock inside which was another identical sock which contained a red and white plastic bag with a brown parcel wrapped inside. Forensic examination later revealed the Applicant's fingerprint on the package and the contents to be 451 grams of heroin 31% by weight of diamorphine. When the Applicant was later interviewed about this offence he admitted that he had dropped the drugs package from the ferry ramp for later retrieval. Count 2 14. On 2 nd November, 2006, the Applicant and the co-defendant travelled on the Condor Ferry from Jersey to St Malo in a Vauxhall Astra motor vehicle. 15. On 6 th November, 2006 they returned as foot passengers from St Malo to Jersey. When questioned by a Customs Officer, the co-defendant stated that he had crashed his father's Astra vehicle in Northern Spain and the vehicle was a write off. 16. On Saturday 11 th November between 6 pm and 6.45 pm the green Honda Civic was seen to be parked outside the Condor Logistics freight shed facing towards the ferry terminal as the Condor Ferry arrived at 6.27 pm. The Honda was seen to leave the area at 6.45 pm. 17. Next day, 12 th November the Honda Civic was again seen parked facing the main underpass roundabout. The driver was the Co-Defendant. The Condor Ferry from St Malo arrived at 6.15 pm. At 6.35 pm a male left the passenger side of the Honda and got into the driver's side door of a white pick up vehicle. Both vehicles were then seen to leave the harbour area. At 6.25 pm a Mr John Rabat drove his Toyota vehicle off the ferry and through the customs shed at the Elizabeth terminal. 18. On Sunday 26 th November Mr Rabet was working on his vehicle at his house and, in the process of changing a wheel, he discovered a brown paper package stuck onto the shock absorber of the wheel and which was held by a magnet. He removed the package and the next day handed it to the police. When it was forensically examined it was found to contain 27.10 grams of heroin 22% by weight of diamorphine. Mr Rabet was to tell the police that he had returned with his family from his property in France with the car so that he could work on it. Count 3 19. On 28 th November, 2006 a blue BMW motor car, driven by the co-defendant was seen travelling towards the Elizabeth ferry terminal building. Two other males were seen in the vehicle. They were seen to hand over cash and receive a Condor ticket at the reservation desk. The ticket was for two males, Jose Macedo and Jose Abreu and was an open ticket for them to travel as foot passengers on the 6.15 pm ferry to St Malo on 30 th November. They were seen to depart on that ferry. 20. At 7 am on Monday 4 th December Customs Officers saw the blue BMW parked adjacent to the Aquasplash Swimming Pool facing the main underpass roundabout. At 7.59 am the green Honda Civic pulled up in front of the BMW and the male passenger in the BMW was seen to go to speak to the person in the Honda Civic. The Honda Civic then left the area and the male returned to the BMW. 21. At 8.30 am, following the arrival of the Condor Ferry from St Malo, Customs Officers selected a green Renault Laguna vehicle for examination. Two men, Paul Duffy and Anthony Cassidy were in the vehicle. During a search of

the vehicle a brown wrapped package was discovered lodged between the bumper and the chassis. Both men were arrested and placed into Customs custody. 22. At approximately 8.45 am, when all the vehicles had departed from the ferry, the BMW left the area. The brown package was found to contain a magnet and a piece of string, also 55.66 grams of heroin 30% by weight of diamorphine. 23. The two men arrested were interviewed under caution. They denied any knowledge of the package or its contents. Both stated that they had gone to France to buy some wine for Christmas. There is no evidence linking either to the importation of the drugs. 24. At 8.55 am on 4 th December the Applicant and the co-defendant were arrested in St Helier and cautioned. Keys to the BMW were recovered from the co-defendant and a Samsung mobile phone recovered from the Applicant. Both men were taken into custody. 25. The room occupied by the Applicant and the co-defendant in Bellozanne Road, St Helier was searched that morning, and a number of mobile phones were seized. On top of a wardrobe a pair of trainers was found, in one of which was a piece of paper bearing the words 56091 Ren Lagun Cax. The trainers were subsequently identified by the Applicant as his and he had written the note. 26. When interviewed the Applicant denied any involvement in the importation of heroin, then made full admissions to having arranged and organised the three importations about which he was asked. He stated that all the importations had been for his own personal use. He confirmed that the Samsung phone was his. Forensic analysis of the telephones seized from the Applicant and the co-defendant revealed a number of calls made to each of two French landlines on nd December, 2006. A number of calls were received and answered from the French landlines by the Applicant's mobile phone. At approximately 6.30 pm on 2 nd December a text message was sent from the Applicant's mobile phone to the Co-Defendant's in the following terms " 07797756091 Renault Lagun a box on top ." The Renault vehicle driven by Mr Cassidy, and from which the heroin was recovered had a box on top and bore the Reg No J56091. 27. The total quantity of heroin represented by the three counts is 533.76 grams. Expert evidence is that the wholesale price of this quantity is between £94,100 and £105,392. The total street value in Jersey for this quantity would be between £106,752 and £266,880. SENTENCE 28. Save for the conviction which followed the events of 22 nd October, 2006 the Applicant was a man of good character. The Court had the benefit of a Social Enquiry Report from Barry Jordan, and a report from Michael Gafoor, director of the Alcohol and Drug Service. 29. The Crown drew the attention of the Court to the discrepancy in the Applicant's accounts to the writers of those reports, in that he told Mr Jordan that he was given just under £5,000 for his involvement, and said to Mr Gafoor that he had paid £25,000 for half a kilo of heroin and that he anticipated making £200,000 from the importation. 30. The role ascribed to the Applicant and his co-defendant was as the organisers of the three importations. 31. The Crown referred the Court to the guideline case of Rimmer, Lusk and Bade v AG

[2001] JCA 148 in relation to the appropriate starting point to be decided with regard to the quantity of the drug and the role played by a defendant. Here the total amount of the heroin is in excess of the highest band in Rimmer , and therefore the starting point should be fourteen years' imprisonment upwards. The Crown invited the Court to consider the role of the Applicant in that he together with his co-defendant travelled to France to

purchase the drugs, and that, after the first importation which failed, they then employed the more sophisticated method of concealing packages on the vehicles of innocent travellers. For this aggravating factor the Crown invited the Court to add twelve months to the starting point which it was submitted should then be sixteen years for each of the two defendants. 32. In mitigation the Crown referred to the Applicant's guilty pleas, his co-operation and his admissions. The Crown moved for a total sentence of eight years' youth detention. 33. On behalf of the Applicant Advocate Preston moved for a starting point of fifteen years, which he accepted as appropriate, but did not accept that the Court could properly add twelve months to reflect the aggravating circumstances. In addition to the mitigation available to the Applicant from his plea and co-operation, the Court was invited to consider his age, his hitherto good character and the fact that he saw this scheme as an easy way to make money to feed his own drug habit. He had no appreciation of the damage which would result. The Court was referred to his remorse, as expressed in a letter he had written to the Court. In custody he had completed a drug and alcohol course, and proposed to further his education and obtain a mechanical engineering qualification. The Court was invited to pass a total sentence of seven years from a starting point of fifteen years. 34. In sentencing the Applicant the Commissioner took a starting point of 15 years, accepting that it was inappropriate to add a further year for aggravating factors. He accepted that the Applicant was an organiser, and described the second and third importations as being "far more sophisticated and sinister" than the first, "in that the packages were concealed and attached by magnets on the cars of innocent parties, two of whom were arrested, placed into custody and interviewed. The involvement of innocent members of the public in this way, exposing them to the shock of arrest and custody and the potential of prosecution is a serious matter." The age of each defendant was taken into account. A non-custodial sentence could not be justified. In accordance with *AG v Gaish*

[2006] JRC 109 the sentences were properly concurrent, and represented the total quantity imported. 35. The Applicant accepts that the Royal Court retains a wide discretion as to sentence, and accepts that it is not bound by the Crown Advocate's recommendations either as to starting point or final sentence. Further it is accepted that, having reduced the suggested starting point from sixteen years to fifteen years, the Court was not then bound to make a similar reduction in the final sentence of eight to seven years. It is however submitted that the reduced starting point created a legitimate expectation on the part of the Applicant that his sentence would be reduced by eight years, the Crown's suggested reduction for mitigation. It is however submitted that the Court was wrong in not imposing a seven year sentence, and that to do so now should not be considered as "tinkering". 36. Advocate Preston, on behalf of the Applicant, refers to his sense of grievance that the sentence was not so reduced by the Royal Court. He submits that the Court was under an obligation to give reasons for failing to follow the eight year discount suggested by the Crown. 37. We do not accept that it was incumbent on the Court to give such reasons or to embark upon any detailed analysis or to provide a precise explanation as to how the sentence was determined. 38. In sentencing, all the matters taken into

account were identified, and it was for the Royal Court to assess and determine the weight to be given to the information before the Court and to decide the appropriate sentence having regard to all the circumstances of the case. 39. Provided the proper sentencing principles are applied and explained, as was the case here, no more is required of the Court. Sentencing, as has frequently been stated, is not a precise mathematical exercise. 40. We have considered with care all the submissions made on behalf of the Applicant regarding the sentence of eight years' youth detention for these offences. The offences were serious, and due regard was given to all the available mitigation. In all the circumstances it cannot be argued that the sentence was either wrong in principle or manifestly excessive and this application for leave to appeal sentence is refused.

DEPORTATION 41. The Applicant was born in Venezuela, where he lived for some seven years before living with his family in Madeira for a further three years. He was ten years old when he came to Jersey in 1997 and has lived in Jersey for approximately ten years. His father resides in Venezuela and his mother lives in Jersey with his step father, a half brother and a half sister. He is single and has no dependants. He was said to be a citizen of Portugal. 42. The Court was referred to the case of *R v Nazari*

[1980] 2 Cr. App. R. (S) 84, and the well known principles set out in that case. The Court has to consider whether the defendant's continued presence would be detrimental to the community, and if the answer is in the affirmative, to take into consideration the effect that the deportation order would have on innocent persons, not before the Court, such as the offender's family. The Court of Appeal, in the recent case of *Camacho v AG*

[2007] JCA 145 fully considered the second aspect with regard to the application of Article 8(2) of the ECHR which has now been domesticated in Jersey by reason of the Human Rights (Jersey) Law 2000 and directed that when considering the effect that a deportation order would have on innocent persons, the family rights of a defendant as well as those of their families must be considered, even if, *ex hypothesi*, less weight is given to the offender in the balancing exercise. This approach is to be preferred to the traditional *Nazari* grounds. This will always be a fact specific exercise. 43. The Crown submitted that the Applicant had been an organiser with his co-defendant, of three very serious importations of commercial quantities of Class A drugs, heroin, from which they were to benefit financially. The seriousness of the offences was aggravated by the cynical use of innocent third parties. The Applicant is assessed as being at medium risk of re-offending. The Crown submitted that the first limb of the *Nazari* guidelines is met and that the Applicant's continued presence would be detrimental to the community. The Crown accepted that by deportation the Applicant would be removed from his family, but indicated that there were no strong ties to the Island. 44. The Court had received and considered letters from the Applicant's co-defendant's mother, father and three friends. 45. Advocate Preston on his behalf took issue on both grounds. His submission was that the Applicant had learned a very harsh lesson, had become drug free and was seeking to improve his educational standing. He had given cause to believe and hope that he would become a worthy member of society and someone who could benefit the Island. His remorse indicated that he would

not offend again. 46. Advocate Preston referred the Court to the Applicant's family, and submitted that to deport him would be unnecessarily oppressive. His relationship with his mother was said to be strained as a result of the Applicant's conduct of which she strongly disapproves. His step-father is seeking to repair that relationship. His father lives in Venezuela, and the Applicant had spent ten years in Jersey and had no contacts anywhere else. The Court was invited to take into account his age and the effect being deprived of his family would have on him. On his deportation he would be deported to Madeira, where he has no ties at all, save for a grandfather with whom he has only ever had minimal contact. 47. The Court concluded that the Applicant's continued presence on the Island would be detrimental to the community for the following reasons: "firstly, notwithstanding his age he set about organising the importation of commercial quantities of heroin, a Class A drug in amounts which exceeded the highest band in the Rimmer case. Secondly, the importations continued over some three months and involved the sophisticated and sinister method of concealing the drugs on the exterior of cars of innocent people. Thirdly, the Applicant is assessed as being of medium to high risk of re-offending." The Court referred to the judgment in *Camacho*, set out the Applicant's personal history and indicated that very careful consideration had been given to the family rights of each Defendant, and took into account all the documentation before the Court. The Commissioner went on to say "We take a very serious view of these offences", he referred to the quantity of the drugs and the method of importation and, by a majority, "the Court is of the view that the need to protect the community and the need to deter others overrides the rights of the Defendants and their families. Drug trafficking of Class A drugs is very serious and particularly harmful to this community. This Court wishes it to be known that it will not hesitate to protect that community". Deportation was recommended. 48. On behalf of the Applicant this Court is reminded of the wording of Article 8 of the ECHR which states: "Right to Respect for Private and Family Life Everyone has the right to respect for his private and family life. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of National Security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." 49. The Crown Advocate is said to have made only a cursory reference to *Camacho* and to have based his submissions on the *Nazari* tests. Advocate Preston submits that insufficient regard was given to the Applicant's family ties, and that it was wrong to suggest that the Applicant, who had lived in Jersey since he was ten, had no strong ties to the Island. The Court was referred to the "bonds of friendship" indicated by the letters received by the Court, and the fact that the Applicant's relationship with his mother was improving. 50. The Crown is further criticised, in the context of deportation for having failed to refer to the Applicant's good character. The Court is referred to the case of *Breen and Others v AG*

[2002] JCA 167 in which the reasoning was approved in Camacho in relation to the significance of previous offences. 51. It is submitted that the recommendation for deportation should not have been made, it is manifestly excessive and should be reversed. 52. We have considered all these matters and conclude that the Royal Court properly took into account all the matters relevant to the difficult balancing exercise which must be carried out before such a recommendation can be made by the Court. 53. The first limb of the Nazari principles is, on the facts of the case, met, and the Court concluded that the seriousness of the offences reflected in both the quantity of Class A drugs and the Applicant's role indicated that his continued presence would be detrimental to the Island. The reasons are set out in the judgment quoted in paragraph 47 herein. 54. In relation to the second limb, whilst the Applicant is a young man whose only previous conviction concerns his involvement in Count 1, he is single with no dependants, he has not lived with his family for some two years and is estranged from his mother. He committed the offences for financial motives and there is a medium risk that he will re-offend. 55. The Court had due regard to the principles as refined and set out in Camacho and the necessity to take into account the effect that a deportation order would have both on innocent persons and the Applicant's family rights. 56. The Court which consisted of the Commissioner and six Jurats, by a majority, decided that the protection of the community was here the overriding consideration and that the Applicant's personal situation was not such as to render a recommendation for deportation inappropriate. 57. We are satisfied that the recommendation was not arguably wrong in principle nor manifestly excessive, and the application for leave to appeal that recommendation must be refused. Authorities Drug Trafficking Offences (Jersey) Law 1988. Immigration Act 1971. Immigration (Jersey) Order 1993. Rimmer, Lusk and Bade v AG

[2001] JCA 148 . AG v Gaish

[2006] JRC 109 . R v Nazari [1980] 2 Cr. App. R. (S) 84. Camacho v AG

[2007] JCA 145 . Human Rights (Jersey) Law 2000. Breen and Others v AG

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