

JERSEY / JUDGMENT

Gomes v AG 13-Aug-2019

[2019] JRC 157 (13 August 2019)

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JUDGMENT

THE COMMISSIONER: 1. On 29 th May, 2019, the Appellant was sentenced in the Magistrate's Court to 12 months' imprisonment on three counts of larceny. The Magistrate also recommended that the Appellant should be deported at the end of her sentence. She now appeals solely against the recommendation for deportation. 2. At the conclusion of the hearing, we allowed the appeal and set aside the recommendation. We now give our

reasons.

The offending 3. The victim in this case is a woman in her 50s who suffers from Korsakoff's dementia. The Appellant was employed by a company which provides carers to those in need of care. The Appellant worked as one of the carers for the victim for some two years prior to the offending. On three occasions in January, June and August 2018, the Appellant wrote out a cheque from the victim's cheque book payable to herself. The Appellant obtained the victim's signature to each cheque. The cheques were respectively for £3,000, £3,000 and £4,000 i.e. £10,000 in total. The victim did not have the mental capacity to decide to give these sums to the Appellant. 4. The offending was discovered when a friend of the victim, who assisted her with her finances, discovered the withdrawals from the victim's bank statements. When interviewed by the police, the Appellant admitted what she had done and was in due course charged with three counts of larceny to which she pleaded guilty. 5. It appears that she used the proceeds of her offending to pay for herself and an elderly family friend to travel to Madeira to attend a wedding, to travel to Madeira on another occasion for her father's funeral and contribute towards his funeral expenses, to buy a new car and for general living expenses. 6. The victim's bank has reimbursed her account with the £10,000 so that the loss caused by the Appellant's dishonesty has fallen on the bank rather than the victim. It appears that, as a result of her dementia, the victim has no recollection of what occurred and is not therefore distressed by it. 7. The probation report prepared for the Magistrate assessed the Appellant as being at low risk of reconviction. In mitigation before the Magistrate defence counsel emphasised her previous good character, the low risk of re-offending, her remorse and the fact that she was under financial pressure when she obtained the first cheque. When imposing sentence, the Magistrate emphasised that this was a clear breach of trust in relation to a vulnerable victim which had taken place on three separate

occasions. She found no exceptional circumstances to justify a non-custodial sentence and held that 12 months' imprisonment was appropriate. The Appellant has very properly accepted that there are no grounds for appealing against the level of sentence. 8. Turning to the issue of deportation, the Magistrate applied the well-established test in *Camacho -v- AG*

[2007] JLR 462 . She concluded first that the Appellant's continued presence in Jersey was not conducive to the public good given the seriousness of the offending. She then considered the Article 8 ECHR rights of the Appellant. She noted that the Appellant had been here for a considerable period and had no dependents in the Island. She concluded on balance that the Appellant's Article 8 rights did not outweigh the fact that her continued presence was not conducive to the public good and accordingly recommended deportation at the end of the Appellant's sentence. The background of the Appellant 9. It is convenient at this stage to summarise the factual position in relation to the Appellant. She was born and brought up in Madeira and is now 49. She first visited Jersey when she was 22 and worked as a seasonal waitress for a number of years, returning to Madeira in the winter months. She moved to live permanently in Jersey when she was 26 and has been here ever since, i.e. some 23 years. 10. She worked in the retail trade for several years and in 2008 obtained employment with a particular hotel in Jersey. She worked there as a barmaid for some 10 years before taking up employment with a care agency, which employment she held for some 3½ years prior to her dismissal as a result of the present offences. She then returned to work for the hotel until her imprisonment. The hotel has stated that it would be happy to re-employ her at the end of her sentence subject to there being a vacancy at the time. 11. She is not married and does not have any children. One of her brothers lived and worked in Jersey for some 30 years prior to his death in 2017. He has four children and accordingly the Appellant has two nephews, aged 4 and 14 and two nieces aged 24 and 28. She is close to the nephews and nieces and to their mothers. She is particularly close to the mother of the eldest nephew (the "sister-in-law") who has been very supportive during the present proceedings. The sister-in-law has said the Appellant can live with her following release from prison. 12. The Appellant has only one previous conviction, namely driving with excess alcohol in 2012, for which she was given a community service order and disqualified from driving. She received a good report following completion of her community service. The probation report in the present case says that her friends live pro-social lives, there is no evidence to suggest any use of illegal drugs and she is assessed as being at low risk of re-offending. 13. As to family in Madeira, her mother (who is in bad health), two sisters and four brothers live there. Her father also lived in Madeira but passed away in 2018. There is one sister who lives in Norway. This appeal 14. Article 8 ECHR is in the following terms (so far as relevant for the purposes of this case):- "Right to respect for private and family life. Everyone has the right to respect for his private and family life, his home and his correspondence. 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 ... for the prevention of disorder or crime ... or for the protection of the rights and freedoms of others." 15. The decision in *Camacho* confirms

that, before it can make a recommendation for deportation, the Court must conclude:- (i) that the defendant's continued presence in Jersey would be detrimental to the public good; and (ii) deportation would not be disproportionate having regard to the rights of the offender and her family to respect for family life under Article 8. 16. In relation to the first limb of the test, the Court of Appeal in *Camacho* said this at para 17:- "17. The first limb of the *Nazari* test has seldom given rise to difficulty. The continued presence of the offender being "to the public detriment" and other formulation such as "not in the public interest" or "not conducive to the public good" have been applied in England broadly in line with the dictum of Judge LJ in *N (Kenya) -v- Home Secretary ...*:- "The 'public good' and the 'public interest' are wide-ranging but undefined concepts. In my judgment ... broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged. They include an element of deterrence ... so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of serious crime may well be deportation." In the *Bailiwicks*, similar principles are applied. In Jersey, the courts have sometimes expressed it in terms of abuse of privilege (see *AG -v- Dubiel* and *AG -v- Martins*)." 17. Advocate Binnie submitted that the first limb of the test was not satisfied as the Appellant's continued presence would not be detrimental to the public good. She emphasised amongst other matters the Appellant's excellent work record, the availability of accommodation on her release, the strong support network which she has in Jersey as shown from the many family references provided, her positive circle of friends and acquaintances, the fact that she was effectively of previously good character (her only previous conviction was a motoring offence) and the fact that she was assessed as being at low risk of re-offending. As to the offending, it was out of character and occurred at a time when the Appellant had troubles in her own life in that her father and brother had died and she was suffering financial pressure. She had been a carer to many other vulnerable people during the course of her employment with the care agency and there was no suggestion of any other dishonesty on her part. 18. Despite these submissions, we agree with the Magistrate that the first limb of the *Camacho* test is satisfied. This was a clear breach of trust which involved a significant sum of money stolen from a vulnerable victim. Furthermore, the offending was repeated on three occasions over a period of just over six months. As the Bailiff stated in *Bunea -v- AG*

[2019] JRC 056A at para 13, the gravity of offending is clearly a very material factor when considering whether the defendant is a person whose presence is conducive to the public good of the Island. These were serious and repeated offences and accordingly, notwithstanding the various matters outlined by Advocate Binnie, we conclude that the Appellant's continued presence is detrimental. 19. We turn therefore to consider the second limb of the *Camacho* test. The Court, being a public body, must not act in breach of a person's rights under ECHR. Article 8 permits interference with the family life of an offender if it is necessary "... for the prevention of disorder or crime ... or for the protection of the rights and freedoms of others." As the Bailiff said in *J -v- Lieutenant*

Governor

[2018] JRC 072A , at para 53, this imports the need for an assessment of proportionality.

Balancing the interests of the community against the Article 8 rights of the Appellant and her family, is it proportionate to recommend deportation? 20. We have concluded that it would not be proportionate in this case. We would summarise our reasons as follows:- (i) Most significantly, the Appellant has been resident in Jersey for some 23 years, almost half her life. It is her home and has been for a long time. She has strong roots here. (ii) During that period, she has contributed to the community. She has an excellent work record and has been self-sufficient throughout her period of residence. The hotel referred to earlier speaks highly of her. Apart from her present offending, she has displayed no anti-social tendencies. There is no suggestion of the consumption of any illegal drugs, she has no previous convictions other than the motoring offence referred to earlier and she has pro-social friends and acquaintances. She is assessed as being at low risk of re-offending. (iii) The evidence is that she has a close bond with her nephews and nieces whom she has known all their lives and this is a not insignificant matter given the death of their father in 2017. She is the only remaining member of their father's family who lives in Jersey. Whilst the weight to be attached to the interest of wider family members is much less than those of children or partners, it is nevertheless something to be taken into account. (iv) We take account of the gravity of her offending, which constituted a serious breach of trust in respect of a vulnerable victim where the amount involved totalled £10,000 and the offending occurred on three occasions. However, we ask ourselves whether, despite the gravity of this offending, it is necessary for the prevention of crime or the protection of the rights of others that she be deported after 23 years of law abiding and pro-social living in Jersey in circumstances where she has strong family connections with her wider family in Jersey and we conclude that it is not necessary and would not be proportionate. 21. It was for these reasons that we allowed this appeal and set aside the recommendation for deportation. The Appellant should however understand that in the event of any further offending of any significance, she is likely to be deported. *Authorities Camacho -v- AG*

[2007] JLR 462 . *Bunea -v- AG*

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Prepared on 22 October 2026 · Esheria