

JERSEY / JUDGMENT

# Holley v AG [2003] JCA 019 (27 January 2003)

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COURT OF APPEAL Reserved 27 January, 2003: Handed down 27 th January, 2003. Before: R. C. Southwell, Esq., Q. C., President; Sir de Vic Carey, Bailiff of Guernsey; and P. S. Hodge, Esq., Q. C. Dennis Peter HOLLEY -v- The Attorney General Appeal by Dennis Peter HOLLEY against conviction at a criminal assize on 12 th July, 2002, on: 1 count of: Murder.

1. For the reasons set out in a Judgment that was delivered by the President on 17 th January, 2003, the Court granted leave to appeal, and allowed the appeal;
2. For reasons that will follow later, the Court refused to order a retrial, under Article 26A of the Court of Appeal (Jersey) Law, 1961, as amended; and
3. For reasons that will follow later, in accordance with the provisions of Article 26(2) of the said Law, substituted for the verdict appealed from a verdict of guilty of manslaughter; and in substitution for the sentence passed as a result of the trial passed a sentence of 8 years' imprisonment. Advocate J. C. Gollop for the Appellant; D. E. Le Cornu, Esq., Crown Advocate. JUDGMENT on refusal to order retrial; AND ON sentencing for manslaughter.  
THE PRESIDENT: Whether there should be a further retrial 1. Following the setting aside by this Court of the conviction of Mr Holley of murder, Mr Le Cornu for the Attorney General submitted that the Court should order a further retrial. 2. Both he and Mr Gollop for Holley agreed that, in deciding whether or not there should be a retrial, this Court had to make a balance between (i) the public interest in ensuring that those charged with serious criminal charges are convicted (or acquitted) by a verdict of a jury, in deterring violent crime, and in maintaining confidence in the criminal justice system, and (ii) the private interests of the accused, particularly where his defence may be prejudiced by lapse of time or otherwise. 3. Mr Le Cornu submitted: (i) in reliance on R v Henworth

[2001] EWCA Crim 120, a decision of the English Court of Appeal, there is no convention or other bar against the prosecution seeking a second retrial; (ii) there had been no undue delay by the prosecution during the period of under three years since the killing took place on 13 April 2000; (iii) it could not reasonably be argued that to proceed to a further retrial would be an abuse of process; (iv) the offence charged was the most serious of all, murder (and he relied on Forrester Bowe Jr v The Queen

- [2001] UK PC 19 , a decision of the Privy Council on appeal from Bahamas, for the proposition that after balancing the public and private interests, if there was no obvious prejudice to the accused the Court should decide in favour of a further trial); (v) two juries had reached unanimous verdicts of guilty of murder (though he accepted that this point was somewhat undermined by the fact that both verdicts had been reached after defective directions on the law); (vi) the defence would not be prejudiced in any way, whether in relation to the evidence or otherwise; (vii) there was a real prospect of obtaining a conviction of murder; (viii) though the Jersey community is small and close-knit, because the only issue concerns provocation, and there is no issue as to whether Mr Holley killed Mrs Mullane , the publicity in the Jersey media would be ignored by another jury, particularly if there was a strong direction to this effect by the judge, and there could not be any question of the previous publicity by itself causing a verdict in a further retrial to be set aside as a miscarriage of justice, relying in this regard on *R v Stone* (Michael John)
- [2001] EWCA Crim 297 , a decision of the English Court of Appeal, and the earlier authorities cited in *Stone* . 4. Mr Gollop submitted that it would be an abuse of process to have a further retrial and that it would be impossible for such a retrial to be fair. He submitted that (i) Holley had already served time in prison of nearly three years, the equivalent after remission of over four years; (ii) a further retrial would in fact be the fourth trial, taking into account the aborted retrial in April 2002, and Holley had already had to prepare himself for and experience two full trials and two appeals as well as the aborted retrial; (iii) at a further retrial Holley could be cross-examined on the basis of his evidence in the two previous full trials, his statements to the police, and his statements to the experts as recorded by them: he referred in this connection to the use made by Mr Le Cornu in the second full trial of the fact that Dr Beck did not record having been told by Holley of the alleged last words of Mullane ; (iv) in this case there had been a breakdown in the Jersey system of criminal justice, for which Holley was in no way responsible; (v) Jersey has a small community, and there could not be anyone who did not know that Holley had been convicted by juries of murder twice previously; (vi) killings are rare in Jersey (particularly those involving the use of an axe), and therefore the publicity was likely to have a much greater effect adverse to Holley than it would in a larger society: there had been publicity at the time of the killing, before and at the time of the first trial and the first sentencing, at the time of the first appeal, before and at the time of the second, aborted trial, before and at the time of the third trial, and in relation to the present, second appeal; (vii) it would be impossible to find twelve jurors in Jersey without knowledge of, and a settled opinion about, Holley and the killing. 5. Our task has been to achieve a balance between these factors relied on by prosecution and defence, and to determine what is the just course now to be followed. In our judgment justice requires that there now be an end to the criminal process relating to the killing of Mrs Mullane . 6. We consider first the public interest. There is, as stated by the Privy Council in *Forrester Bowe* at paragraph 39, a clear public interest "in convicting the guilty, deterring violent crime and maintaining confidence in the efficacy of the criminal justice system". Here the killing was a savage one, with an axe,

of a defenceless woman, though, if Holley is to be believed, a woman who had provoked him during their relationship and at the time of the killing. 7. However this has to be put in the context of the history of these proceedings. Given the history of two full trials, one aborted trial, and two appeals, there is countervailing public interest in bringing these proceedings to an end. 8. Though we have not formed any adverse view of the publicity concerning the killing at these proceedings, it is inevitable that in the small community of Jersey it is unlikely that any potential juror could be found who is not well aware of the case and that Holley has twice been convicted of murder. 9. The evidentiary position causes us concern, because it is apparent from the transcript of the second trial that evidence particularly from Holley is becoming overshadowed by arguments as to its consistency with previous statements and evidence. 10. In the light of these points, and the submissions of Counsel, this Court has now to decide whether a second retrial of Holley would be likely to be fair. In our judgment there is a sufficient degree of doubt about this to lead us to conclude that these proceedings must now be ended. 11. Accordingly this Court holds that Holley is guilty of manslaughter, to which he has throughout offered to plead, and enters this verdict. Sentencing 12. The charge of which Holley has now been found guilty involves, as already stated, the savage killing with seven blows with an axe of a defenceless and drunken woman. This was a particularly violent killing, whatever may have been the provocation which preceded it. The circumstances have been described in detail in the earlier judgment of this Court, and previously in this judgment, and we do not repeat the detail of those circumstances. Starting Point 13. The first question is where the starting point, before mitigation, should be placed. In this regard we repeat what this Court has previously stated, that the Courts of Jersey should always begin by determining such a starting point, before going on to determine any discount for mitigation, so that the defendant, the Crown, and any appellate court know how the final sentence has been arrived at. It is particularly difficult to determine a starting point in a case of manslaughter such as this, because the facts of manslaughter cases differ greatly, and in the past courts have made a practice of going direct to the sentence without first considering a starting point. 14. We begin with the assistance of previous Jersey cases, noting that neither Counsel referred to Jersey cases. In the second edition of Crown Advocate Cyril Whelan's valuable book on "Aspects of Sentencing in the Superior Courts of Jersey", previous manslaughter cases are summarised in paragraphs 634 et seq. Paragraph 634 of Whelan reads: "It is possible to identify a group of cases in which the accused has been acquitted by a jury on a charge of murder, but convicted of manslaughter. The group is small but demonstrates a sentencing range of 7-8 years in terms only of practical observation." 15. The first such case was that of O'Brien

- (1979) JJ 187, in which the Court of Appeal dealt with one of two men who went late one evening with the intention of assaulting any man whom they might meet in the La Collette gardens and whom they suspected of being a homosexual. They armed themselves with knives for the alleged purpose of defending themselves if those whom they attacked counter-attacked. A man whom they attacked died from knife wounds. O'Brien was acquitted of

murder but convicted of manslaughter. He was sentenced to 10 years imprisonment by the Royal Court, but this was reduced to 7 years by the Court of Appeal. There appears to have been no plea of guilty to manslaughter. The Court of Appeal, while treating the case as a serious one, distinguished cases close to murder for which they stated a 10 year sentence would be appropriate. 16. There are a small number of other cases to which reference is made by Whelan . They do not help on starting point, because it is not clear whether or not there was a plea of guilty to manslaughter. In Marks (7 February 1980) the defendant had an altercation with a stranger outside his house, in the course of which the stranger was shot and died. There was an acquittal of murder and a conviction of manslaughter. The sentence was 8 years imprisonment. Carrel (3 June 1982) concerned a gang fight in which Carrel took out a knife to defend himself, and a member of the rival gang ran onto the knife and was killed. Use of the knife was not justified by any similar arming of the rival gang. There probably was no plea. Carrel had four previous convictions involving violence, and the Royal Court indicated that its sentence of 7 years imprisonment was designed to show that the carrying of knives would not be tolerated. 17. In de Azevedo (8th January 1987) the defendant, who had savagely attacked and killed another man, pleaded guilty to manslaughter and succeeded in a defence of manslaughter by reason of diminished responsibility. The Court described it as "almost a marginal case of diminished responsibility". The sentence was 5 years imprisonment. 18. In Whelan reference is also made to cases in which manslaughter, not murder, was charged. One such case was that of Ricart (26 April 1984) in which a man of good character, under considerable provocation from a drunken man, kicked the man in the neck causing a wholly unexpected haemorrhage and killing the man. He was sentenced to 3 years imprisonment on the basis of prior English cases. 19. The "motor manslaughter" cases are of no assistance. Similarly, cases of manslaughter where death has arisen from the administering of illegal drugs depend on their special facts. 20. There is one relevant Guernsey case, that of John Tilley , reported in (1973) Guernsey Court of Appeal, Criminal Reports, no.7. Tilley was convicted of murder, the Jurats having rejected a defence of provocation reducing the verdict to one of manslaughter. The Court of Appeal set aside the conviction of murder on the ground of misdirection of the Jurats as to (inter alia) the defence of provocation, and substituted a conviction of manslaughter. Tilley had made a serious and cruel series of assaults, resulting in death, on a young woman who was a fellow-employee in a hotel. The Court of Appeal, per Le Quesne JA, held that the manslaughter was of particular gravity, and a substantial sentence was called for, and sentenced Tilley to 12 years imprisonment. 21. We were referred by both Counsel to English authorities, including passages in Archbold and Blackstone . We quote an extract from Blackstone (2001 edition) paragraph B1.31: "The sentencing bracket for offences of manslaughter committed after provocation has normally been set at a period between three and seven years, although longer sentences have occasionally been upheld. In A-G's Ref (No. 33 of 1996) [1997] 2 Cr App R (S) 10, however, the Court of Appeal accepted that in cases where an offender carries a knife as a weapon and uses it to cause death, even where there is provocation, a sentence of seven years is too low and that henceforth the appropriate sentence in a contested case would be

between 10 and 12 years. The decision was followed in A-G's Ref (No. 2 of 1997) [1998] 1 Cr App R (S) 27 where, following a period of animosity between the offender and the deceased, the offender obtained a revolver, went to the victim's house and shot him in the head. The Court of Appeal said that the sentence of seven years' imprisonment was unduly lenient and that the lowest sentence which the sentencer could properly have passed was 10 years. The appropriate punishment in these cases seems to turn upon the amount of provocation, the 'cooling-off' time, the extent to which the offender was at fault in bringing about the situation in the first place, and the means used to kill the victim." 22. Though no reference to a starting point is made in the English cases, it appears that if starting points had been considered they would fall within a wide range from 5-15 years. 23. Numerous cases are cited in Thomas, Current Sentencing Practice . It is difficult to draw much assistance from them, since no reference is made to a starting point. In R v Hussey

(1989) 11 Cr App R(S) 460 the defendant, of previous good character, was deserted by the woman with whom he had been living for 10 years. Subsequently he went to the house where the woman was living with another man and shot the man, who died immediately. The English Court of Appeal upheld a sentence of 8 years imprisonment. Attorney-General's Reference (No. 33 of 1996)

[1997] 2 Cr App R (S) 10 and Attorney-General's Reference (No. 2 of 1977)

[1998] 1 CR App R (S) 27 (already referred to) provide some support for starting points in similar cases of not less than 12 years. 24. Mr Le Cornu for the Crown drew to our attention the English case of R v Light

[1995] 16 Cr App R (S) 824. There the offender's wife formed a relationship with another man, and said that she wanted to leave the offender, who strangled her to death. He was sentenced to 7 years imprisonment and the sentence was upheld on appeal. In view of this case and others he submitted that the appropriate sentence for Holley was 7 years imprisonment. Mr Le Cornu did not indicate a starting point. 25. Mr Gollop for Holley referred to R v Suratan et al

[2002] EWCA Crim 2982 , in which the English Court of Appeal had to consider three applications by the Attorney-General for leave to refer cases to the Court of Appeal as being unduly lenient. Mr Gollop drew attention to a passage in Suratan in which the Court stated that, when sentencing an offender guilty of manslaughter by reason of provocation, the judge must assume in the offender's favour that (i) he had lost his self-control; (ii) he was caused to lose his self-control by things said or done by the victim; (iii) the loss of self control was such as to justify a conviction of manslaughter rather than of murder. The Court rejected, as a suggested aggravating factor, that the offender killed his spouse or partner, because it is typical of such cases that "the matters that go partially to excuse the homicide are so inextricably entangled in the domestic situation that it is unhelpful and artificial to isolate this as an aggravating feature of the offence." The Court referred to an ordinary sentencing range in "cases of manslaughter committed after provocation arising out of

possessiveness jealousy or unfaithfulness" of between 5 and 7 (or 8) years imprisonment. The facts of the three cases in Suratan are very different from the present case. 26. Mr Gollop did not deal with the starting point. After referring to the mitigating factors he asked for a lenient sentence not exceeding 5 years. 27. Having regard to all these indications of sentence, as opposed to starting point, and to the particular facts of the present case, which have already been set out in the two judgments of this Court setting aside the convictions of murder, this Court decides that the appropriate starting point in this particular case is 12 years imprisonment. We have taken particular account of the brutality of the attack with an axe, the relationship between Holley and Mullane, and the nature of the provocation as an integral part of that relationship. Mitigation and Sentence 28. In his speech in mitigation Mr Gollop drew attention to (inter alia) the following factors: (i) the background of previous provocation by Mullane; (ii) Holley's personal characteristics, including his dependence on Mullane; (iii) The final provocation by Mullane as she lay on the sofa speaking to Holley, and his immediate loss of self-control due to that final provocation; (iv) Holley's offer throughout to plead guilty to manslaughter, an offer which had throughout been rejected by the prosecution; (v) The burden on Holley of two full trials and appeals, and the aborted trial, over a period of nearly three years; (vi) The lifestyle of both Mullane and Holley; (vii) The physical state to which Holley had come in April 2000; (viii) Holley having been in prison on remand during the period since April 2000; (ix) Holley's remorse; (x) Holley not being a danger to society, and because he was likely to have the support of his family, he was unlikely to reoffend; (xi) His previous criminal record, including previous offences of violence, which in turn included violence against Mullane. Mr Gollop confirmed that Mr Holley was willing to be sentenced on the information before this Court, though the social enquiry reports were not recent. 29. In the judgment of this court, taking all these factors into account, the appropriate discount for mitigation is one-third, so that the appropriate sentence is one of 8 years imprisonment to run from 14 April 2000 when Holley was taken into custody. Authorities R v Henworth

[2001] EWCA Crim 120. Forrester Bowe Jr v The Queen

[2001] UK PC 19. R v Stone (Michael John)

[2001] EWCA Crim 297. Whelan: "Aspects of Sentencing in the Superior Courts of Jersey" (2nd Ed'n): paras 63 et seq. Tilley

(1973) Guernsey Court of Appeal, Criminal Reports, no.7. Blackstone (2001 Ed'n) paragraph B1.31. R v Hussey

(1989) 11 Cr App R(S) 460. Attorney-General's Reference (No. 33 of 1996)

[1997] 2 Cr App R (S) 10. Attorney-General's Reference (No. 2 of 1977)

[1998] 1 CR App R (S) 27. R v Light

[1995] 16 Cr App R (S) 824. R v Suratan et al

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