

JERSEY / JUDGMENT

Hume -v- A.G. [2005] JCA 090 (06 July 2005)

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COURT OF APPEAL 6th July 2005 Before: R. C. Southwell, Esq., Q. C President; D. A. J. Vaughan, Esq., C. B. E., Q. C.; and Lord Hodge Gareth Paul HUME v The Attorney General Appeal against two convictions under the Misuse of Drugs (Jersey) Law 1978 by the Inferior Number of the Royal Court on 1 st March, 2005. A. Belhomme, Esq., Crown Advocate Advocate M. E. Harris for the Appellant

judgment

HODGE JA (1) This is an appeal against conviction. (2) On 1 March 2005 the Appellant was convicted by the Inferior Number of the Royal Court of two charges of attempting to incite another to commit an offence under the Misuse of Drugs (Jersey) Law 1978 , contrary to Article 19(4) of that Law. The first charge (Charge

- 1) related to an attempt to incite Bridgette Ann Allan ("Mrs Allan") to supply him with diamorphine; the second charge (Charge 2) involved an attempt to incite the same woman to supply him with cocaine. On 21 April 2005 the Appellant was sentenced to eleven years' imprisonment on charge 1 and to five years' imprisonment on charge 2, the latter sentence to be served concurrently with the former. The circumstances of the charges (3) On 10 April 2004 Jeffrey Michael Carter imported into Jersey 1,489 grammes of diamorphine and 970 grammes of cocaine. The diamorphine had a street value of between £444,000 and £666,000 and the cocaine had a street value of about £77,000. On 11 April 2004 a Condor Ferries carrier bag containing the drugs was delivered to Mrs Allan's flat at Melrose Cottages. Le Vier Mont, Old Trinity Hill, St Helier and was received by her daughter Brooke Lianne Allan, whom her mother had telephoned and asked to take delivery of a package. Brooke Lianne Allan placed the package in a cupboard in the flat. Thereafter the package was stored in a garden shed at the rear of the flat, where the police discovered it when they searched the flat later that evening. (4) On 11 April 2004 (which was Easter Sunday) at 12.48 hours Gary Gallagher, an organiser of the importation, sent a text message about the drugs to Mrs Allan's mobile phone. The message stated: "DONT TOUCH THAT BRIDGE AND AS MUCH AS U KNOW ITS A GUYS TOOLS" (5) On the same day at 19.13 hours Mrs Allan received a telephone call on her mobile phone from the Appellant's mobile phone. The call lasted 42 seconds. The caller was a man who said that he would come round to collect the "tools". (6) The police arrested Mrs Allan in the course of 11 April. After the arrest, telephone calls were made from the Appellant's mobile to Mrs Allan's mobile at 22.30 hours and 22.35 hours on 11

April 2004. The caller was unable to contact Mrs Allan as she was then in custody. In addition, at 22.32 hours, after the first unsuccessful attempt to call Mrs Allan, a text message was sent from the Appellant's mobile to Mrs Allan's mobile. The message stated: "Its t's mate any chance of grabbing me tools now?" (7) On the following day, Easter Monday, there were ten phone calls between 11.17 hours and 15.14 hours from the Appellant's mobile phone to Mrs Allan's mobile phone but none of them were answered as Mrs Allan remained in custody. (8) The telephone calls and the text message from the Appellant's mobile phone to Mrs Allan's mobile phone were admitted by the Appellant. The Appellant in his evidence explained that on Easter Sunday he and his then girl-friend, Rachel Jordan, had invited a friend, Steven King, for lunch and then spent the afternoon and evening together in public houses, first at the White Horse and then at Le Soleil and at Squires. He suggested that his mobile phone would have been in his girl-friend's handbag during the afternoon and evening. (9) The Appellant sought to explain the telephone calls and text message on the basis that he frequently shared his mobile phone with his then girl-friend and that she may have allowed someone else to use the mobile phone. He accepted that he had used his mobile phone to telephone his family between 12.32 and 12.34 hours on 11 April. He accepted that there had been phone calls from his mobile phone to his girl-friend's mobile phone in the afternoon of 11 April but suggested that he had lent his mobile to her and had taken her mobile phone with him when he went shopping. He accepted that he was in his girl-friend's company on the evening of 11 April at the time the first telephone call was made to Mrs Allan at 19.13 hours and when the text message was sent at 22.32 hours, that a person would have had to have borrowed the phone from his girl-friend to make those calls and that some person would again have had to borrow the mobile phone in order to make the ten calls to Mrs Allan's mobile phone on the following day. (10) Jeffrey Carter pleaded guilty to offences relating to the importation of the drugs and Mrs Allan pleaded guilty to offences involving possession of the drugs with the intent to supply. The charges against Brooke Lianne Allan and the Appellant proceeded to trial. (11) The Jurats unanimously acquitted Brooke Lianne Allan of the charges against her and unanimously convicted the Appellant of the charges against him. The grounds of appeal (12) Advocate Harris on behalf of the Appellant advanced three grounds of appeal. First, he argued that there had been a miscarriage of justice as a result of an irregularity in the trial which may have revealed to the Jurats that the Appellant had previous convictions. Secondly, he submitted that the verdict of the Jurats was unreasonable having regard to the totality of the evidence. Thirdly, he submitted that there had been a miscarriage of justice because the Deputy Bailiff in summing up had suggested that the Appellant's explanation of events "stretche[d] credulity". (13) The first ground of appeal arose from a question of the Deputy Bailiff at the end of the examination in chief of the Appellant when he asked the Appellant's counsel whether he wished to adduce evidence of the Appellant's good character. The Appellant's counsel, in the presence of the Jurats, said that he did not. At the start of proceedings on the next day and the absence of the Jurats, the Appellant's counsel explained that he was unable to do so because the Appellant had pleaded guilty to drug-related offences which had been committed shortly after the events which are the subject of these proceedings. This issue

had been discussed by the defence and the Crown at pre-trial directions before the Deputy Bailiff and had been referred to in correspondence which the Deputy Bailiff had seen but which was not included in his trial papers. The Deputy Bailiff had unfortunately forgotten about the pre-trial discussions when he sought to assist Mr Harris by his question. He also asked Brooke Lianne Allan's advocate a similar question in the presence of the Jurats and that question elicited the answer that she had no previous convictions. (14) Mr Harris submitted that the brief exchange between the Deputy Bailiff and him amounted to a disclosure to the Jurats that the Appellant had criminal convictions and that this would have prejudiced the Appellant's case in the Jurats' minds and contributed to his conviction. As this could have "turned the scale" against the Appellant the conviction should be quashed. He referred the court to *Attorney General v Aubert* 1987-88 JLR N 102, *Goncalves v Attorney General* 1992 JLR N 6, *Teper v R*

[1952] AC 480 and Keane, "The Modern Law of Evidence" (fifth edition) p.81. He submitted that the disclosure of the bad character had been express, that it was not the fault of the defence, and that it would have served to emphasise to the Jurats the Appellant's lack of good character. (15) Secondly, Advocate Harris submitted that the only evidence associating the Appellant with the offences of which he was convicted were the phone calls and text message from his mobile phone. This was only circumstantial evidence and the Appellant's evidence was that he shared his mobile phone with his girl-friend, Rachel Jordan, and that it was often used by his friends. The Appellant gave evidence that he was not in possession of his mobile phone for much of 11 April or on 12 April. On the evening of 11 April it was either in his girl-friend's handbag or on a table in a public house. On 12 April his girl-friend had taken it with her and he did not know who may have used it. As other persons could have used the phone, it was submitted that there was insufficient evidence for the Jurats to convict the Appellant. Advocate Harris also referred the Court to an admission of facts which had been made since the trial to the effect that the person referred to as "T" in the text message had used two telephone numbers in 2003 and that neither of those numbers was identified in the forensic telecommunications service report for April 2004. There was thus no evidence that the Appellant knew or had communicated with "T". This created real doubt whether it was the Appellant or some other person who had used the Appellant's mobile phone to communicate or attempt to communicate with Mrs Allan on 11 and 12 April 2004. (16) Thirdly, Advocate Harris submitted in his written contentions that the Deputy Bailiff's repeated strong comment in his directions to the Jurats, that the Appellant's version of events stretched credulity, made his summing up unbalanced and unfair. The comments were improper and amounted to a miscarriage of justice. Advocate Harris however chose not to expand his written submission on this ground in his oral submissions. The disclosure (17) Before we heard the substantive appeal the Crown raised with the Court a question of disclosure. At the sentencing proceedings on 21 April 2005 Advocate Juste, who appeared for Mrs Allan, represented to the Court that Mrs Allan had told the police who "T" was. Although the police denied that she had done so, it has transpired that she had. Accordingly on Monday the Crown disclosed to Advocate

Harris the identity of "T" which Mrs Allan had stated to the police. In the light of this disclosure we adjourned the appeal for a day to allow Advocate Harris to consider his position and to obtain the Appellant's instructions. (18) On resuming the appeal hearing, Advocate Harris submitted that the non-disclosure was very material and had prevented the Appellant from having a fair trial. In particular the defence had been prevented from leading evidence before the Jurats which attempted to show that there was no connection between "T" and the Appellant or between "T" and other witnesses including Mrs Allan. In discussion it became clear that "T" had been convicted of drugs offences in Jersey and had absconded from a prison in the United Kingdom. It was therefore possible that the defence would not be able to obtain his assistance but there were other lines of enquiry of which they had been deprived. (19) In these circumstances, he submitted that there had been a material miscarriage of justice and that the Appellant should be acquitted. He argued that it would not be appropriate for the Court of Appeal as presently constituted to hear further evidence as it was aware of the Appellant's previous conviction. A retrial was not in the interests of justice as the passage of time might have weakened witnesses' recollection of events in April 2004. An alternative would be for the appeal to be adjourned so that any new evidence could be heard by a differently constituted Court of Appeal. The Crown's response (20) Crown Advocate Belhomme in his written submissions dealt first with the Appellant's second ground of appeal and submitted that there was ample evidence to justify the conviction. The fact that the evidence was circumstantial did not weaken its force. The Deputy Bailiff had been correct to reject the submission that there was no case to answer. The Appellant had given evidence and the Jurats had had the opportunity to assess his demeanour and thereby form a view on his credibility. The Appellant's explanation of how the calls came to be made was wholly incredible. In the event we did not call on Advocate Belhomme to address us on this issue. (21) In relation to the first ground of appeal, the Crown submitted that the Deputy Bailiff's reference to the Appellant's character was fleeting and no overt reference was made to previous convictions. He stressed that the inadvertent introduction of prejudicial information at a trial did not necessarily vitiate the trial. Every case depended on its particular

facts:

R v Weaver and Weaver (1967) 51 Cr. App. R 77 and R v Palin (1969) 53 Cr. App. R 535. In this case in any event the Deputy Bailiff in his summing up correctly referred to Brooke Lianne Allan's good character and made no reference to the Appellant's character, thereby allowing the experienced Jurats to infer that the Appellant might have previous convictions. (22) On the third ground of appeal, Crown Advocate Belhomme submitted that the Deputy Bailiff's three references in his summing up to the incredibility of the Appellant's case occurred in a passage in which he was summarising the prosecution's closing speech and that the Deputy Bailiff also summarised the case for the Appellant. The Deputy Bailiff in his summing up had informed the Jurats that they alone were the judges of fact and that they should not adopt any views which he might appear to express on the facts unless they agreed with them. It was open to the Deputy

Bailiff to comment on matters which had been given in evidence: R v Evans

(1990) 91 Crim. App. R 173. The summing up had been fair and the comments were not improper. (23) In relation to the issue of disclosure, the Crown initially sought to argue that the non-disclosure of "T"'s identity had not deprived the defence of any practical line of enquiry as "T" had absconded and was unlikely to be traced or if traced to assist the defence. In discussion however Advocate Belhomme accepted that it was possible that the defence had been deprived of other lines of enquiry. If the Court were minded to hold that there had been a miscarriage of justice based on the non-disclosure, it was not in the interests of justice that the Court should simply quash the conviction as the case involved a substantial consignment of Class A drugs. A retrial might involve substantial expense. It was competent for the Court of Appeal to hear such further evidence as the defence might wish to lead. Discussion (24) We deal first with the first ground of appeal. We are satisfied after careful consideration that the Deputy Bailiff's brief question and the defence advocate's answer referring to the Appellant's character at the end of his examination in chief would not have contributed to the Appellant's conviction. It is unfortunate that the question was asked in the presence of the Jurats. The problem should have been avoided by the Deputy Bailiff asking the question in the absence of the Jurats. But it revealed no more than was inevitably revealed by the quite proper reference in the Deputy Bailiff's summing up to the good character of Brooke Lianne Allan and the absence of a similar reference to the Appellant's character. As the Appellant was (quite properly) tried with Brooke Lianne Allan it was unavoidable that the Deputy Bailiff would mention one defendant's good character while saying nothing about the other. At worst this may have caused the Jurats to infer that the Appellant had one or more previous convictions but it did not suggest that the Appellant had any involvement in drugs. In addition, when we have regard to the nature of the evidence against the Appellant we are satisfied that there was sufficient evidence which associated the Appellant with the relevant phone calls. We conclude that the possible disclosure to the Jurats of a previous conviction or convictions for undisclosed crimes would not have played a material role in the Jurats'

determination.

We add in passing that we do not think that it is apposite to use in the context of disclosure of bad character Lord Normand's words in *Teper v R* where he referred to evidence which "turn[ed] the scale" against an Appellant; the test rather is one of fairness and whether there has been a potential for miscarriage of justice. (25) Turning to the second ground of appeal, we consider that the circumstantial evidence associating the Appellant with the use of the mobile phone was sufficient to be left to the Jurats and that a reasonable body of Jurats were entitled to convict the Appellant on the evidence available. It was admitted that the mobile phone belonged to the Appellant and that the relevant calls were made and the text message sent to Mrs Allan's phone. In addition several aspects of the Appellant's evidence might have been taken to support the Crown case. First, the Appellant accepted that he had been using the mobile phone on 11 April and that he had phoned his family at about 12.30 hours. Secondly, while he asserted that his girl-

friend had the mobile phone in her bag in the afternoon and evening of 11 April, he was in her company throughout the evening and in particular when the calls were made to Mrs Allan's mobile phone at 19.13 hours (when a man spoke to her) and later at about 22.30 hours when there were two unanswered calls and the text message. We consider that the Jurats were entitled to reject the idea that a male person would repeatedly borrow the phone from Miss Jordan without the Appellant being aware that this was going on. Thirdly, and most significantly, we consider that the Jurats were entitled to take the view that such a person would not borrow a phone in a public house to send a text which invited a reply from Mrs Allan to give him the green light to uplift the drugs. Having attempted unsuccessfully to speak to Mrs Allan, he would not know when Mrs Allan would pick up that text message and reply. Fourthly, the Jurats were entitled to conclude that it was unlikely that the Appellant's girl-friend would have lent the Appellant's phone to someone else for several hours or at least on several occasions on 12 April to enable him to make the ten unanswered calls to Mrs Allan. It is the combination and coincidence of circumstances that gives circumstantial evidence its strength: see *DPP v Kilbourne*

[1973] AC 729 and the Scottish case of *Moorov v H M Advocate* 1930 JC 68 . (26) By proving that the Appellant's mobile phone had been used to communicate or to attempt to communicate with Mrs Allan in the circumstances which we have narrated, the Crown made out a sufficient case which entitled the Jurats to convict the Appellant unless he answered that case in a way which gave rise to reasonable doubt. The Jurats had the opportunity to see the Appellant give evidence and to form a view on his credibility. It is clear from the Jurats' unanimous verdict that they did not believe the Appellant's account of events. The evidence entitled them to reach that conclusion. (27) We can deal with the third ground of appeal shortly. The Deputy Bailiff correctly identified that the main issue in the Appellant's case was whether he was the person who made the phone calls and sent the text. He then summarised the Crown's case, correctly identifying that the Crown submitted that the Appellant's story was wholly incredible. He then went on to summarise fairly the defence case that the evidence was entirely circumstantial and the Appellant's account of how the phone would have come to have been used by another person. While the defence take issue with the Deputy Bailiff's use on two occasions of the expression "stretching credulity", this was no more than his summary of the Crown's case. A judge is entitled to comment on the evidence of witnesses provided that he warns the Jurats that it is for them to decide the facts and that they should disregard any comments he may make with which they may disagree: *R v Evans*

(1990) 91 Crim App. R 173. In this case the Deputy Bailiff gave a warning to that effect. His comments were in the event only a summary of the Crown case and while it would have been better to avoid repeated reference to incredibility, we do not consider that the summing up was in any way improper or amounted to or caused any miscarriage of justice. (28) That leaves only the additional matter of the disclosure. In our judgment the failure of the Crown to disclose the identity of "T" has deprived the defence of the opportunity to explore lines of enquiry as to whether the Appellant had connections with the person who is "T" and to lead evidence from associates and other witnesses which

might tend to show that there was no such connection. The Crown's case against the Appellant is circumstantial. Lord Normand stated in *Teper v R*

[1952] AC 480 (at p.489) " It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference ". As the sender of the text at 19.13 hours on 11 April 2004 presented himself to Mrs Allan as "t's mate", evidence which tended to show that the Appellant was not a friend or associate of the person who is "T" might go some way to weaken the inference to be drawn from the series of calls made from the Appellant's mobile phone, by suggesting that someone else had indeed used the phone. (29) In all the circumstances we are satisfied that there has been a miscarriage of justice in this case as a result of the non-disclosure of the identity of "T", which has deprived the Appellant of a fair trial. Having regard to the significance of the consignment of Class A drugs in this case, we are satisfied that it is in the interests of justice that the Appellant should be retried on a fresh indictment to be brought in the Royal Court within two months of today's date. We do not consider that the matter can be dealt with adequately in an adjourned hearing in the Court of Appeal as it is important that those deciding questions of fact should see both the Appellant and any other witnesses whom the Crown and the defence choose to call. We observe that under the Second Schedule to the Court of Appeal (Jersey) Law 1961 (as inserted by the Court of Appeal (Amendment No 7) (Jersey) Law 1998) there is scope for the parties with leave of the Royal Court to agree that the transcript of evidence given by a witness or witnesses at the original trial be read as evidence in a retrial. There may be scope for the parties here to reach such an agreement in relation to some of the witnesses in this case. (30) We therefore quash the conviction of the Appellant and order that he should be retried on a fresh indictment to be brought before the Royal Court within two months of today's date. *Authorities Attorney General v Aubert 1987-88 JLR N 102 Goncalves v Attorney General 1992 JLR N 6 Teper v R [1952] AC 480 R v Weaver and Weaver (1967) 51 Cr. App. R 77 R v Palin (1969) 53 Cr. App. R 535 R v Evans*

(1990) 91 Crim. App. R 173 *DPP v Kilbourne*

[1973] AC 729 *Moorov v H M Advocate* 1930 JC 68 Keane, "The Modern Law of Evidence" (fifth edition). Page Last Updated: 15 Oct 2015 BAILII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

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