

JERSEY / JUDGMENT

## Hume -v- AG 15-Nov-2006 [2006] JCA 162 (15 November 2006)

[2006] JCA 162

COURT  
COURT OF APPEAL

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COURT OF APPEAL

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November 2006

Before

:

Dame Heather Steel, President;

M. S. Jones, Esq., Q. C.; and

G. R. Rowland, Esq., Bailiff of Guernsey.

Gareth Paul Hume

-v-

The Attorney General

Application for leave to appeal by

Gareth Paul Hume

against

convictions

by the Assize Court on  
the following charges:

2 counts of:

Conspiracy to supply a controlled drug.

J. Gollop, Esq., Crown Advocate

Advocate R. Tremoceiro for the accused

Applications for leave to appeal

convictions by a jury at an Assize trial in the Royal Court of Jersey on 28

th

February 2006

on the following charges:

- 1)  
Conspiracy to supply a controlled drug, namely a kilo of Diamorphine;  
and
- 2)  
Conspiracy to supply a controlled drug, namely 20,039 tablets of MDMA.  
The street value for these drugs was  
between £495,032 and £643,702 with a wholesale value of between  
£268,004 and £357,340.

## JUDGMENT

the president: This is the judgment of the Court. 1. The Applicant had been charged with two co-accused, Darren Leigh Roberts and Steven Lewis Brookes who each pleaded guilty to the same two conspiracy counts. The indictment also contained the names of Alan William Blampied, Ian Monteith Manson and Sarah Louise Traylen who admitted related charges. 2. On the 5<sup>th</sup> day of June 2006 the Applicant filed notice of his intention to apply for leave to appeal against his convictions. 3. On the 3<sup>rd</sup> day of October 2006 the Applicant gave notice that he wished to apply for leave to call further evidence, being a witness Darren Leigh Roberts his Co-Defendant. 4. The circumstances of the two offences of conspiracy concerned events which took place on the 26<sup>th</sup> and 27<sup>th</sup> August 2005. 5. The Crown's case was that the Applicant organised and/or orchestrated the conspiracies from his cell at La Moye Prison whilst on remand. He had access to a mobile telephone which provided a link to one of his co-conspirators Roberts. Roberts' role was to take possession of the heroin and the ecstasy tablets and to follow instructions issued by the Applicant. The two were in contact by mobile telephone and public telephone. Roberts had involved Brookes in the conspiracy and Brookes' involvement was to attend upon the Applicant to obtain further information for the onward supply and division of the drugs which were in Roberts' possession. 6. Further instructions were received by Roberts from the Applicant by way of telephone calls on the mobile phone. On 27<sup>th</sup> August Blampied took Roberts and Brookes to the prison so that Brookes could visit the Applicant and obtain further information and instructions. After leaving the prison Roberts received a further telephone call from the Applicant. 7. The three men then travelled to Roberts' mother's address and from there Roberts was observed to put a yellow plastic bag which contained the drugs into the rear footwell of the car driven by Blampied and in which Brookes was a passenger. The drugs were recovered and Roberts, Brookes and Blampied arrested. 8. The Applicant was found to be in possession of a mobile telephone and the calls recorded were noted and analysed. 9. At the trial, evidence was given by Surveillance Officers Deputy Constable Paul Kennea, Detective Constable Robbie Herd, Acting Detective Sergeant Diane Wheeler, Prison Officers Dingle and Muir and read from Prison Officer Fosse. The Co-Defendant Steven Lewis Brookes gave evidence as did Detective Constable Craig Jackson. Agreed written admissions were before the Court as were 3 telephone analysis schedules and photographs. 10. No submission was made that there was no case to answer. 11. The Applicant gave no evidence nor called any evidence. 12. The Applicant seeks leave to appeal his convictions on the following grounds: (i) that new evidence should be admitted from Roberts which directly contradicts the evidence given at the trial by Brookes which implicated the

Applicant in the conspiracies. (ii) that hearsay evidence was adduced at the trial both before and after a ruling by Sir Richard Tucker, the Learned Commissioner, that it should not be adduced. That no direction was given by the Learned Commissioner to the jury with regard to the value of the hearsay evidence. (iii) that the Learned Commissioner did not sufficiently direct the jury with regard to the scope of the evidence of the Applicant's mobile telephone being used to communicate with Roberts and others on the one hand and the Applicant himself using it on the other hand. 13. The Applicant submits that, had the evidence of Roberts been available at the trial, no reasonable jury properly directed faced with no more than circumstantial evidence arising from the telephone calls and texts analysis, with the two Co-Accuseds giving directly contradictory evidence, could have been sure of the Applicant's involvement in the conspiracies and would be bound therefore to return not guilty verdicts. 14. The Applicant contended that the combined effect of the new evidence, the improper admission of hearsay evidence and the inadequate direction in respect of the mobile telephone is that a miscarriage of justice has occurred. 15. The Court is invited to grant leave and to allow the appeal and to quash the convictions under Article 26(i) and (ii) of the Court of Appeal (Jersey) Law 1961. The Application for leave to call further evidence 16. Under Article 34 of the Court of Appeal (Jersey) Law 1961 the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice " ... (b) order any witnesses who would have been compellable witnesses at the trial to attend and be examined by the Court whether they were or were not called at the trial." 17. The principles to be adopted by a court in exercising its discretion under Article 32(b) of the Court of Appeal (Jersey) Law 1961 in considering applications for the reception of fresh evidence in Jersey are set out by the Court of Appeal in *Barnes v Attorney General* CA 1988 and further formulated in *Evans and Phillips v Attorney General* 1997 JLR 94 . The principles to be applied are: (i) the evidence sought to be adduced should have been unavailable at the trial (in particular the Court would be slow to hear the evidence of a Co-Accused who could have been called at the trial); (ii) that evidence had to be relevant; (iii) it had to be capable of belief; and (iv) if the evidence met these criteria the Court would go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the Appellant's guilt had that evidence been given at the trial. Each case had to be considered on its own facts but in general the reception of fresh evidence before the Court of Appeal should be considered wholly exceptional. 18. In the present case the Applicant and Darren Leigh Roberts his Co-Accused have each filed affidavits in support of the application to adduce fresh evidence. 19. The Applicant's affidavit is dated 10 th October 2006 exhibited to which is email correspondence pre trial between his legal representative and Roberts' representative. These communications relate to the question of Roberts giving evidence at the trial in support of the Applicant. An undated letter said to have been received by the Applicant from Roberts' pre trial is also exhibited. 20. The affidavit of Darren Leigh Roberts, also dated 10 th October 2006, is a lengthy attempt to exculpate the Applicant and to explain some of the admitted contact between himself and the Applicant as concerning the proposed purchase of a tracksuit. Paragraph 18 of this affidavit relates to pre trial legal advice received from his legal representative and acted upon by Roberts. 21. As the content of the paragraph indicated a possible intention to waive his legal professional privilege, on 17 th October 2006 the Court directed that Roberts' Advocate should swear and file an affidavit for the Court in respect of this matter. Such affidavit was not to be

disclosed unless or until Roberts waived his legal professional privilege in writing. 22. On 18 th October 2006 Roberts wrote a signed letter to his Advocate indicating a refusal to waive his legal professional privilege. 23. At the hearing on 13 th November 2006 the Court of Appeal was invited to rule on the issue as to whether in the circumstances Roberts had impliedly waived his legal professional privilege or whether his express refusal to do so should prevail. 24. The Court of Appeal, having considered the authorities of *R v Derby Magistrates Court ex parte B*

(1996) AC 487 and the Privy Council decision in *B & Others v Auckland and District Law Society* (New Zealand) 2003 UK PC 38 , was firmly of the view that Roberts had not waived his legal professional privilege and that it would therefore be wholly inappropriate to investigate further the contents of paragraph 18. 25. The Court so ruled indicating that Roberts' refusal would not be taken into consideration when assessing his credibility. 26. In the judgment of Lord Millett in *B & Others* at paragraphs 44 and 45 the well established principles set out by Lord Taylor CJ in *Derby Magistrates Court ex parte B* are confirmed: (i) the privilege remains after the occasion for it has passed unless waived - " once privileged always privileged ." (ii) the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings and whether by the prosecution or the defence; (iii) the refusal of the claimant to waive his privilege for any reason or none cannot be questioned or investigated by the Court; (iv) save in cases where the privileged communication is itself the means of carrying out a fraud the privilege is absolute. At paragraph 45 Lord Millett stated that it was well established that the privilege belongs to the client and not to his lawyer and may not be waived by the lawyer without his client's consent. 27. The Court was then invited to consider and rule on the application to receive fresh evidence from Roberts in accordance with his affidavit. 28. Advocate Tremoceiro submitted in relation to the necessary criteria: (i) that the evidence had not been available at the trial for the reasons set out in the pre trial email correspondence. From that it is clear that Roberts changed his stance from admissions made to the police in interview and answers he gave implicating the Applicant, to offer himself as a witness on behalf of the Applicant to exculpate him, and then to retract that offer indicating that he would confirm in evidence what he had said to the police; (ii) it was not in issue that Roberts was a competent and compellable witness but because of his stated unwillingness to give evidence it was submitted that the exculpatory evidence was thus not available to the Applicant at the trial. 29. The Respondent's case was that Roberts' evidence was clearly available to the Applicant at the trial. The decision not to call him was one which the Applicant had made on advice. The Applicant chose to call no evidence even though Roberts was both competent and compellable. 30. The Respondent referred the Court to the judgment of Judge LJ in *R v Stokes* 1997 CA No 95/5208/Y5 in which consideration was given to a similar application to call ' fresh ' evidence from a Co-Defendant who had pleaded guilty to the same offence as Stokes and thereafter post trial sought to exculpate Stokes, whilst not having been called to give evidence at the trial. The failure to do so being his unwillingness to be called. The judgment reads: "The evidence of Quinton would have been admissible. We have outlined the explanation for the failure to call it, namely

his unwillingness to be called. The problem with this explanation is that it overlooks an essential principle, which is that there should be one trial and in the course of that trial each side must put before the jury the evidence on which it seeks to rely. When the defence is aware of a potential witness available to be called and elects not to call him merely because of an expressed unwillingness on the part of the witness to give evidence, there will very rarely be occasions when the court would regard that as a reasonable explanation for failing to call him. If it were otherwise the principle that each side must adduce the relevant evidence at the trial would be significantly undermined. In this context too we bear in mind what we regard as a continuing principle: "... public mischief would ensue and legal process could become indefinitely prolonged were it the case that evidence produced at any time will generally be admitted by this court when verdicts are being reviewed." Per Edmund Davies LJ in *R v Stafford* and *R v Luvaglio Levalio*

[1968] 3 All Eng R 752. It is perhaps unnecessary in addition to spell out the obvious possibilities for manipulation and subversion of the entire trial process which could arise if it were possible for the defence to decide not to call a competent compellable witness to give evidence at the trial merely because of an asserted "unwillingness" to be called, and then after conviction to seek after all to do so. This consideration applies with particular force to a witness who was involved in, or connected with the crime of which the appellant has been convicted. One reason for not calling such a witness before a jury is that he may well be disbelieved by them, particularly if he has been convicted, whether on his plea or after a trial. Certainly his evidence would rightly be approached by the jury with considerable suspicion, and if less than utterly convincing would serve to tarnish the defence case in the eyes of the jury. ... Save in a very rare case he simply cannot decide not to call a witness at his trial and thereafter if convicted seek to call him as additional "fresh" evidence before the Court of Appeal." 31. Relying on the judgment in *R v Stokes* the Respondent submitted that the evidence sought to be adduced is not fresh evidence, it was available at the trial and should not be admitted. 32. The Court is satisfied that this application is neither wholly exceptional nor indeed exceptional such as to justify the reception of Roberts' evidence. 33. It was submitted on behalf of the Applicant that the evidence was relevant in that, if admitted, it contradicted the evidence of the Co-Defendant Steven Brookes, whose reliability had been impugned at the trial and if the jury had heard the evidence of Roberts, Brookes' credibility would have been further affected. 34. The Respondent's case was that as the proposed evidence was not credible or capable of belief it was not relevant. The Respondent did not accept that the credibility of Steven Brookes had been undermined by cross examination. 35. Advocate Tremoceiro invited the Court to conclude that the evidence of Roberts, if received, would be credible. He submitted that the admissions and answers Roberts gave to the police in interview which implicated the Applicant had been made when he was stressed and confused. This was not accepted by the Respondent. Further it was submitted that Roberts' explanations as to why he had implicated the Applicant and for his failure to give evidence were credible, and that the Court needed to hear Roberts give evidence in order to assess his credibility. 36. The Court

was not persuaded that the evidence of Roberts was credible. Roberts, on his own admission, is a man who is prepared to lie on oath for his own purposes. The account he sets out in his affidavit is totally implausible and incapable of belief. 37. For the same reasons given in paragraph 36 we have concluded that had Roberts' evidence been given at the trial, it would not arguably have raised a reasonable doubt in the minds of the jury as to the Applicant's guilt. 38. There is no merit in this ground of the application, and the Court ruled that leave to call further evidence should be refused. 39. The Court then went on to consider the two remaining grounds on which this application is based. Hearsay 40. During the course of his evidence Brookes told the jury that Roberts told him that the person who called him on his mobile phone after the prison visit was the Applicant. After submissions, the Learned Commissioner in the exercise of his discretion ruled that the identity of the caller disclosed in this way was inadmissible. Thereafter Brookes voluntarily repeated the assertion in evidence that he was told by Roberts that the caller was the Applicant. 41. It was submitted that the jury having heard this evidence in this way, the fairness of the trial was affected. The jury were not directed in such a manner as to eliminate prejudice in that the evidence relating to the telephone call was not something which could be challenged. 42. The Court is satisfied that there was no prejudice or unfairness from this part of the evidence. There was evidence linking this call to the Applicant. First by a text from the mobile phone in the Applicant's possession to Roberts' phone and second, the timing of this call supports the link between the text and the Applicant and thirdly, the numbers stored in Roberts' telephone as a result of this call were shown to be linked to the records taken from the phone in the Applicant's possession. The evidence was not challenged because the Applicant elected not to call or give evidence. 43. The jury were directed correctly and adequately in respect of their approach to the evidence of Brookes. 44. There is nothing in this ground to indicate any unfairness or prejudice to the Applicant and no arguable ground to consider that a miscarriage of justice had occurred. The Evidence relating to the mobile telephones 45. It was submitted that the direction given to the jury regarding the evidence relating to the use of the Applicant's mobile phone was inadequate. 46. It was further submitted that the analysis of the mobile phone records showing the use of the mobile phone recovered from the Applicant did not establish beyond doubt that the Applicant was the user. Evidence had indicated that within a prison it was possible for others to use the phone. 47. No evidence was called by the Applicant to indicate that there was any other user and no evidence was called to displace the clear inference from the evidence and the schedules that the phone recovered from the Applicant was at all material times used by him. 48. The Crown's case was that the phone was the Applicant's and that he was the user. There was ample evidence to support this

**conclusion.**

49. The written admissions which relate to the mobile phone recovered from the Applicant are: "1. That during the 26 th August 2005 and the 27 th August 2005 Hume, whilst an inmate at HM Prison, La Moye, St Brelade had access to and the use of a mobile telephone (telephone number 07797 839 859). At the time that Hume had possession and use of the said mobile telephone he knew that it was a prohibited item under the Prison Rules 2. That Hume was in possession of the said mobile telephone when Prison Officers attended at Hume's cell at 18.30 hours on the 27 th August 2005. The said mobile telephone was seized by the Prison Officers. 3. That during the 26 th August and the 27 th August 2005 contact occurred by telephone and text messages between Darren Leigh Roberts and Steven Lewis Brookes. During the 26 th August 2005 and the 27 th August 2005 Hume was in contact by mobile telephone and by text messages with Darren Leigh Roberts. Hume was also in contact with Darren Leigh Roberts at a telephone kiosk. These telephone calls and/or text messages are accurately reflected in a summary which is attached hereto marked Schedule 1." 50. Before summing up, the Learned Commissioner fully explored with the Advocates the necessary legal directions and his directions in respect of this unchallenged part of the evidence cannot be criticised. 51. We are satisfied that there is no merit or substance in this ground. 52. There is nothing that we have heard or read in respect of any ground which leads us to conclude that there may arguably have been a miscarriage of justice or that the trial process was anything other than totally fair. We are grateful to the Advocates before this Court for their careful and helpful submissions. 53. The applications are refused. *Authorities Barnes v Attorney General CA Evans and Phillips v Attorney General 1997 JLR 94 R v Stokes 1997 CA No 95/5208/Y5 R v Stafford and R v Luvaglio Levalio [1968] 3 All Eng R 752 R v Derby Magistrates Court ex parte B*

(1996) AC 487 B & Others v Auckland and District Law Society (New Zealand) 2003 UK PC 38 Page  
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