

JERSEY / JUDGMENT

Mario Capuano -v- AG

[2014] JCA 151 (30 July 2014)

[2014] JCA 151

COURT

Court of Appeal

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Court of Appeal

30 July 2014

Before

:

Sir John Nutting, Bt., Q. C., President;

Nigel Pleming, Q. C., and;

Richard

Collas

, Q. C., Bailiff of Guernsey.

Mario Romano Capuano

-v-

The Attorney General

Appeal against conviction by the Inferior

Number of the Royal Court on 27

th

November, 2013 on:

1 count of:

Conspiracy to commit a statutory offence

(namely to fraudulently evade the prohibition on the importation of a controlled drug, namely diamorphine (heroin), contrary to Article 61(2)(b) of the Customs

and Excise (Jersey) Law 1999

), contrary to Article 1(1)(b) of the

Criminal

Offences (Jersey) Law 2009

.

Advocate P. G. Nicholls for the Appellant.

J. C. Gollop,

Esq.

,

Crown Advocate.

JUDGMENT

THE president:

INTRODUCTION

1. This is the judgment of the Court. 2. On 26th November, 2013 the Appellant, Mario Capuano, appeared before the Bailiff and Jurats to answer a charge of conspiracy to evade the prohibition on the importation of heroin contrary to Article 61(2)(b) Customs and Excise (Jersey) Law 1999 . He was convicted after a two day trial. 3. The two Jurats who sat with the Bailiff were divided in their view as to whether the Crown had, as the Bailiff expressed it "satisfied....the criminal standard of....guilt." Accordingly the Bailiff exercised his statutory obligation to give a casting decision. Being himself satisfied as to that standard, he exercised his right accordingly. 4. On 6th February, 2014 the Appellant was ordered to serve a sentence of 11 years' imprisonment. 5. He appealed his conviction to this Court. We heard the appeal on 19th and 20th May, 2014. On 21st May we rejected the appeal. We now give our reasons.

BACKGROUND

6. The Crown alleged that during the course of April and early May 2013, four named individuals were involved in this conspiracy and that each played a distinct role. A man called McNally , a resident of Glasgow and close associate of the Appellant, was said to be the Scottish point of contact: he has not yet been arrested or tried for his part in the conspiracy notwithstanding that a warrant for his arrest was issued in May 2013 by the Strathclyde police. 7. The Appellant was alleged to be the principal organiser of the importation being the link between the Scottish and Jersey aspects of this conspiracy. He was born in Glasgow but has spent time in the Bailiwick during his adulthood. During the lead up to the importation, he was living at an address in St Helier belonging to Miss Mason, a resident of Jersey, with whom he was having a relationship: on 12th November, 2013 she pleaded guilty to her participation in the offence. 8. The courier of the drug was a man called McBride, also from Glasgow, who, on 2nd May, 2013 transported by air to Jersey eleven individual packages of heroin concealed internally: on 14th November, 2013 he also pleaded guilty to his part in the conspiracy but on the basis that he had conspired only with Miss Mason, a basis of plea which the Crown rejected. 9. In the light of the second ground of appeal, it is helpful to set out the evidence in some detail. 10. This revealed that the Appellant visited Jersey in early April 2013 and returned to Glasgow on 13th of that month. He came back to Jersey ten days later and was met at the airport by Miss Mason. From that date until his arrest, the Appellant stayed with her at her address at 28 De Quetteville Court in St Helier. 11. The Crown obtained evidence of transfers out of this jurisdiction of sums of money totalling £3,275. In particular, on 12th April a credit of £2,000 was made by Miss Mason to the bank account at Lloyd's TSB of her young child. The money was then transferred that same day to a Bank of Scotland account in the name of a former girlfriend

of the Appellant. The Crown asserted that this sum was used in part to purchase the heroin which was the subject matter of the importation. The Appellant could not explain in evidence why his current girlfriend in Jersey would pay so large a sum via an account in the name of her child to his former girlfriend in Scotland. 12. On 29th April a travel booking was made for McBride, the courier, to enable him to travel from Glasgow to Jersey the following day. The details of the flight, including the booking reference number and time of the flight were sent by text by the Appellant to McNally that evening, using a Nokia mobile phone with a SIM card and mobile number described at trial as "Capuano 3". This was the number, the Crown asserted, which had been in use by the Appellant for some time past and was much used by the Appellant during the course of that day and the next. Later, at 21:06 on 29th, the Appellant sent a text to McNally "Its mario can you give us a call please". 13. The following day, 30th April, at 07:46, McNally, the Scottish organiser of the conspiracy as alleged, forwarded to McBride that same text giving him the details of his flight that day. Later that morning courier McBride attended Glasgow Airport for his Easyjet flight but, for lack of photographic identification, was refused permission to board the aeroplane. 14. Shortly afterwards, at 08:31, Miss Mason texted the Appellant "Did he get on???X" and at 08:34 she sent a further text to him saying "Its only just gone half past so he might....." 15. On 1st May a further booking was made for McBride. It was a one way ticket for 2nd May and was booked on line by Miss Mason. Sometime later she sent a text to McNally giving him McBride's flight reference number and saying "... Has to check in by 9.00 am. Flight leaves at 9.55. With his id!!! HaHa ". 16. Later that same evening the Appellant apparently changed SIM cards in the Nokia. It was the Crown's case that he used a new number, known at trial as "Capuano 5", for calls and texts for the rest of 1st May and up to his arrest on the 2nd. At 20:31 on 1st May he sent a text via this new number to Miss Mason which read "He is coming to see his gran and a bird he met the last time he came to see his gran. He is staying with his gran in st marks road st helier (any number).....". McBride's grandmother does not live in Jersey. St Marks Rd is just round the corner from an address at which the Appellant used to stay in St Helier. 17. Later that evening there was a series of calls between McNally and McBride, the Appellant and McNally, Miss Mason and McNally and the Appellant and Miss Mason. 18. At 09:15 on 2nd May, McBride, using the ticket booked by Miss Mason, left by air from Glasgow Airport. On arrival in Jersey, shortly after 11:05, he told the Special Branch officer who temporarily detained him that he was visiting his girlfriend who lived at St Marks Rd., i.e. the same account of which the Appellant had forewarned Miss Mason the evening before. McBride was allowed to proceed out of the airport where he was met by Miss Mason in a Vauxhall Astra motor car lent her by her friend, Miss Davies. 19. Between 10:20 that morning and 11:09 when Miss Mason left Miss Davies' address to drive the car to the airport to collect McBride, there was considerable telephone contact between the alleged conspirators. The Appellant was in possession of the Nokia with the SIM card for Capuano 5. McNally telephoned the Appellant twice, and the Appellant, almost certainly situated at Miss Mason's address at De Quetteville Court where he was awaiting McBride's arrival, rang Miss Davies five times and Miss Mason twice. 20. Having collected McBride from the airport, Miss Mason telephoned the Appellant. The Appellant then rang her twice

at 11:29 and 11:30. 21. It is clear that Miss Mason intended to drive McBride to her address; but she took a circuitous route, the Crown suggested, in order to evade any pursuing police officers. At 11:34 she telephoned McNally. A minute later the Appellant rang McNally and at 11:38 McNally telephoned the Appellant. 22. At 11.45 at Cheapside, the police decided to stop the Astra and to arrest the two occupants. At 11:48 McNally rang the Appellant at De Quetteville Court. They spoke for two minutes. After that the Appellant rang first Miss Davies and then tried unsuccessfully to speak to Miss Mason, who, of course, by that time was under arrest. 23. Meanwhile other police officers attended De Quetteville Court. The Appellant was arrested at 11:56 and dropped the Nokia mobile telephone, just as the officers approached to arrest him. The SIM card for Capuano 5 was missing from the Nokia. 24. Shortly after midday, McNally, having heard nothing from anyone in Jersey since 11:48 rang the Appellant on his Nokia twice and Miss Mason's mobile once. Then between 12:10 and 12.33, with apparent increasing frustration, he tried to contact the Appellant (9 times) and Miss Mason (6 times). At 12:33 he sent a text to Miss Mason "Wit the fuck is happening get mario ae phne me assp this is a fucking joke cant get in contact wae him." 25. Then between 12:36 and 21:39 McNally tried again to contact, by telephone and by text, the Appellant (14 times), Miss Mason (16 times) and McBride (10 times). 26. It was the Crown's case that the extraordinary volume of telephone traffic between these four persons during the four crucial days during and after 29th April, leading to the undoubted importation of the heroin by McBride, tells its own story. The Crown suggested that the pattern of contact demonstrates just the sort of co-ordination and regularity of contact which one would expect between a courier and his accomplices to an importation. By way of example and in summary of the above, after the arrests, McNally called the Appellant on two different mobile numbers 25 times, called or texted Miss Mason 24 times, and called or texted McBride 10 times. 27. On 2nd and 3rd May the Appellant was interviewed under caution. He refused to answer most of the questions put to him. He did, however, admit that McNally was a close friend, although he claimed that all recent mobile contact between him and McNally had related to a debt which he owed to McNally and that it was his belief that McBride had been sent to Jersey by McNally to threaten him over the debt. As detailed above, analysis of the co-ordinated telephone contact between the admitted and alleged conspirators rendered this assertion implausible. 28. In particular the Appellant was unable to account in interview for the coincidence of the text sent by him to Miss Mason setting out the false excuse for McBride's visit to Jersey and McBride's repetition of the same excuse to the Special Branch officer at the airport when questioned as to the reason for his visit. 29. Furthermore, the Appellant claimed in interview not to know McBride, notwithstanding that the courier had stayed at De Quetteville Court for a period of time the previous month when the Appellant was living there with Miss Mason. In the witness box the Appellant admitted that this attempt to distance himself from McBride was a lie and that he had met him during the course of that spring in both Jersey and Scotland. 30. Between 2nd and 3rd May McBride excreted the 11 packages of heroin. They were found to weigh a total of 110.22 grams. The street value of such an amount was estimated at trial to be approximately £110,000. 31. As described above, the telephone contact between the alleged and admitted conspirators

provided much of the evidence against the Appellant. The Crown was able to ascribe 7 different telephone numbers to his use. 32. When the Appellant gave evidence he denied that some of the mobile telephones suggested to be his by the Crown had in fact belonged to him. He insisted that the Nokia handset which had been so much in use in the previous four days for Capuano 3 and 5 was in fact a common handset, a "house phone", used by visitors to the De Quetteville Court address. He claimed not to know who had changed the SIM card during the evening of 30th April substituting Capuano 5 for Capuano 3, and he blamed a visitor to the address on 2nd May for the removal of the SIM card for Capuano 5 in the seconds between the last call made by that number and the arrival of the police at De Quetteville Court. 33. The courier, McBride, gave evidence for the Appellant. He claimed that he and Miss Mason had had an affair behind the Appellant's back and that the pair of them had planned and executed the importation without any assistance from anyone else. FIRST GROUND 34. The first matter which was to have been raised by Advocate Nicholls before us was an application to call further evidence in the form of Miss Mason. In fact shortly before the hearing the application was withdrawn. Accordingly we say no more about it. SECOND GROUND 35. A further ground of appeal was that "the decision to convict was unreasonable and against the weight of the evidence." This submission by Advocate Nicholls was put in a number of complementary ways. It was said that there was no direct evidence linking the Appellant to the imported drugs. It also was submitted, in relation to McBride, that the Appellant could not be proved to have played any part in the purchase of the latter's aeroplane tickets, or the arrangements made in respect of the borrowed car and used to collect him from the airport, or the provision of accommodation for him during his stay. It was said, furthermore, that there was no evidence of any telephone contact between the McBride and the Appellant. 36. In relation to McNally, it was submitted that there was no cogent evidence as to the role he was alleged to have played, nor any evidence of who were the "unknown" co-conspirators mentioned in the indictment, still less any evidence that the Appellant was linked to any such persons. 37. Advocate Nicholls submitted that since McBride risked increasing the sentence which he might otherwise have received by giving evidence for the Appellant, there were compelling reasons for the court to accept his evidence as true. 38. In short, Advocate Nicholls submitted that the case against the Appellant was purely circumstantial, based on speculation and conjecture, and that it was unreasonable of the Jurat who found the case proved, and the Bailiff who supported that verdict, to reject, as he and the Bailiff must have done, the "real" evidence from McBride of the Appellant's innocence. 39. We do not agree. In relation to the case for the Crown, absent any evidence called by the defence, there was a compelling case against this Appellant. No submission was made at the close of the Crown's case. In the view of this Court, no submission could have been made with any prospect of success. In so far as Advocate English, who represented the Appellant at trial, made a conscious decision not to make such a submission, we conclude that he was right not to waste the time of the Royal Court. 40. A combination of the Admitted Facts and the Telephone Schedule provided persuasive evidence of the culpable links between all four named conspirators. In the light of the evidence recited above, the Royal Court was plainly entitled to draw inferences that the

Appellant had been concerned in the planning of McBride's abortive first flight to Jersey and closely concerned with his second and successful attempt to smuggle heroin, including the provision to McBride of the false story as to the reason for his visit. Moreover, the potential inferences to be drawn from the Appellant's regular telephone contact with other conspirators, alleged and admitted, during the time when McBride was in the air and after he had landed were not only permissible but clear and convincing. 41. In relation to the evidence called at trial on behalf of the defence, Advocate Nicholls invited us to hold that the evidence given by the Appellant, supported by McBride, also rendered the verdict "unreasonable and contrary to the weight of the evidence". 42. Again we do not agree. The Appellant's explanations of the calls and texts made by Capuano 3 and Capuano 5 from the Nokia handset, which was found at his feet when the police entered 28 De Quetteville Court, were improbable. The Appellant was constrained to admit in cross examination that the two texts from McNally in which reference was made to "mario" indeed referred to him. The first, detailed above, occurred on 29th April during the period of time between the transmission to McNally by Capuano 3 of the details of McBride's (abortive) flight and the transmission of that same information by McNally to McBride. The second was a text to Capuano 5 by McNally on 2nd May, also referred to above, after the arrests of the suspects in Jersey at a time when McNally was clearly becoming frantic for want of news of McBride's whereabouts post arrival in Jersey. 43. But the Appellant's denial that he had used the Nokia for any of the other calls and texts made by Capuano 3 and 5 and his insistence that some unidentified person present at De Quetteville Court must have used the Nokia to make or receive all other calls and texts, was not credible. Nor could he explain why Capuano 3 should have been listed in Miss Mason's mobile as "AA Mario", and Capuano 5 listed as "Mario X" if, as he asserted, this Nokia handset, which at different times contained the relevant SIM cards, was the "house phone" and that it was used during the relevant four days by another visitor to Miss Mason's flat to make and receive these incriminating calls with those with whom the Appellant was alleged to have conspired. 44. In the view of this Court, McBride's evidence was no more plausible. He admitted that his explanation to the Special Branch officer on landing for his visit to Jersey was a lie. He claimed that his account to police in interview that he had smuggled the heroin into Jersey to pay off a debt was also a lie. He asserted, furthermore, that the only person involved with him in the conspiracy was Miss Mason on whose behalf he had himself purchased the heroin in Scotland. He insisted that neither McNally nor the Appellant were involved in the conspiracy in any way, and he claimed that he had used McNally as an innocent conduit between him and Miss Mason because he did not want, himself, to have direct contact with Miss Mason for fear that his girlfriend in Glasgow might discover his true relationship with her. 45. In cross examination, McBride was taken through the telephone schedule and the interlinking calls between McNally, Miss Mason, his own telephone and the Capuano 3 and 5 numbers, including the pattern of communication between the four individuals named in the indictment as conspirators. He could provide no explanation for the inferences which arose therefrom during the four crucial days between 29th April and 2nd May. Nor could he explain why, on the evidence of the Appellant, a visitor to the flat was clearly involved in the conspiracy (by

reference to the calls and texts made by and to Capuano 3 and 5), in contradiction to his own evidence that the only two people involved were himself and Miss Mason. 46. Much was made of the fact by Advocate English at trial, and by Advocate Nicholls in this Court, that McBride ran a significant risk in relation to his sentence by giving evidence for the Appellant. According to McBride's account, the blame for the importation was confined to two persons rather than, as asserted by the Crown, (at least) four. McBride's sentencing hearing was postponed until after the outcome of the Appellant's trial; and at the sentencing hearing on 6th February, 2014, McBride received a sentence of 6 years' imprisonment. 47. In the view of this Court the point made by Advocates English and Nicholls has only a very limited trajectory. If, for whatever reason, McBride was willing to try to secure the acquittal of the Appellant by giving evidence of his alleged innocence, the Royal Court would have had some difficulty in sentencing him on the basis of the increased role which he had claimed for himself (and for Miss Mason), even if the Jurats at the trial of the Appellant had returned a verdict reflecting that account. His story flew in the face of the well based evidential involvement of at least two other persons alleged to be part of this conspiracy, McNally and the Appellant. In short, McBride's claim that McNally and the Appellant were innocent did not make the Crown's claim that they were guilty, wrong. 48. In truth, McBride would have had good cause for complaint to this Court if he had been sentenced by the Royal Court, whatever he had asserted on oath at the Appellant's trial, on a basis which was different from the basis for this conspiracy as asserted throughout by the Crown. 49. If, moreover, his evidence was disbelieved and the Appellant was convicted, then, although McBride would have failed in his desired objective of securing the Appellant's acquittal, the sentence on him could only have proceeded on the basis of the evidence which, in his case, was consistent with the evidence which the Crown had available against all four alleged and admitted conspirators. 50. We read the transcript of this two day trial with care. We considered carefully all the written submissions advanced on this limb of the appeal by Advocate Nicholls and we listened attentively to his oral argument. We came to the clear view that the Royal Court's conclusion that the Appellant's account was untrue and that McBride was also lying, was a perfectly permissible one. We were not persuaded that the verdict was "unreasonable" nor (in so far as it constituted a separate test) that the verdict was "against the weight of the evidence". We were left in no doubt that there was ample material on which the two members of the Royal Court who convicted the Appellant could have reached such a verdict. 51. Accordingly we reject that ground of appeal. THIRD GROUND 52. A casting vote by the Bailiff in a criminal trial derives from Article 15(4) Royal Court (Jersey) Law 1948. The relevant parts of that Article are:- "15(1) In all causes and matters, civil, criminal and mixed, the Bailiff shall be the sole judge of law..... 15(2) In all causes and matters, civil, criminal and mixed, other than criminal causes tried before the Criminal Assizes, in which cause the jury shall, as heretofore, find the verdict, the Jurats shall, subject to Article 17(2), be the sole judges of fact..... 15(4) In all causes and matters, civil, criminal or mixed, the Bailiff shall have a casting vote whenever the Jurats -

- (a) being 2 in number, are divided in opinion as to the facts.....or as to the sentence...." 53. In *Sheldon v AG*

[1996] JLR Notes 19b, the Royal Court held, albeit in a case concerning sentence, that the Bailiff's powers under Article 15(4) must be exercised judicially in the light of his own particular assessment of the case. In so far as he is required to exercise his power to assist in the sentencing process in an exclusively judicial fashion, plainly that same judicial approach must be applied by the Bailiff to his power to cast a determining vote for acquittal/conviction under the same Article. In this context "judicially" can only be construed to mean in accordance with the admissible evidence called during the trial. 54. Advocate Nicholls submitted to us that since the Bailiff was in possession of the trial bundle containing the Appellant's antecedents, which would not ordinarily be in the possession of a fact finder, "it was unjust" that the Bailiff should have had access to such information in circumstances where he might be called upon to exercise his casting vote. Advocate Nicholls submitted: "No assurance that the Bailiff could have 'put out of his mind' what he knew of the Appellant's antecedents can counter the fact that justice must be seen to be done and every trial must be perceived to be fair." 55. Since the role of the Bailiff, qua casting vote, is enshrined in statute and since Advocate Nicholls declined to assert that in this jurisdiction there should always be more than two Jurats at a criminal trial, he was driven to submit, as his first proposition, that the Bailiff should not have been sent the antecedents of the Appellant by the Crown in advance of this trial and that, in so far as it has been the practice to do so in this jurisdiction heretofore, the practice should cease. 56. In the alternative, as his second proposition, he submitted that prior to exercising the casting vote, the Bailiff should have directed himself publicly in relation to the Appellant's antecedents before announcing how he would exercise his vote. First Submission 57. The Bailiff was sent a file of relevant papers in the case including the witness statements and the Criminal Record Office details of the Appellant on 21st and 25th November by the Crown Advocate. Mr English was copied in to the correspondence. He raised no objection to the defined material being put before the Bailiff. Since this procedure has been common form for many years past and since the judges of this island are required to make use of their statutory obligation to cast a vote for conviction/acquittal only very rarely, we would not have expected Advocate English to have raised any objection. 58. The procedure here in Jersey causes no surprise to the judges of this Court, coming as we do from the mainland jurisdiction and from Guernsey. Moreover, since the Bailiff, as the judge of law, has the responsibility of ruling on all matters which affect the admissibility of evidence, we conclude that it is helpful, in advance of a trial, for him to familiarise himself with the papers in order to anticipate such matters of law which may arise, whether they relate, by way of example, to the admissibility of similar fact evidence, or evidence of "background", or evidence of previous convictions. 59. Judicial intervention is a feature of criminal trials and may arise in a number of different ways during the course of a trial. It is invariably better, for example, for a judge to prevent a witness from giving what is apparent from his statement is hearsay evidence, rather than to compel defence Counsel to rise to object.

Interventions from defence Counsel can give the impression to the tribunal of fact that the defence is over sensitive to the admission of evidence and has something to hide when, in reality, for want of proper control of the witness by Counsel for the Crown, the witness may well be about to give evidence which, on any view, is inadmissible. 60. By way of another example and particularly pertinent to the issues in this case, a judge has a duty to warn defence Counsel in circumstances where his questions, whether through inexperience or in the heat of a forensic moment, may be putting at risk the "shield" which prevents the admission into evidence of a defendant's criminal record unless certain conditions are satisfied. As judge of the law, neither the Bailiff in this jurisdiction, nor a judge on the mainland, is in any position to exercise that responsibility unless he is cognisant of the defendant's antecedents. 61. We have particularly in mind what was said in the leading case of *Selvey v DPP* [1970] AC 304 HL, as to the desirability of the trial judge giving a clear warning to defence Counsel when it becomes apparent that he is taking a course which may expose the defendant to the risk of cross-examination as to character if the defendant gives evidence; see also *R v Cook* 43 Cr. App. R. 138 @ 147. Advocate Nicholls submitted that the provision of the Appellant's antecedents to the Bailiff should have awaited the outcome of the trial because in truth they were only relevant to sentence. We disagree. The warning can only be given in accordance with *Selvey*, cit. sup. if the trial judge is aware of the antecedents of the person on trial. 62. Moreover if, subsequently, the Crown does seek leave to cross examine the defendant on his antecedents, the decision of the judge will necessarily involve a balancing exercise of discretion on which there is a plethora of authority. The use of such discretion will often involve a careful analysis of precisely how the defence case has been put in cross examination to the relevant Crown witness. 63. It will certainly be of advantage to the judge to have such matters in mind as he hears and notes such cross examination. But in order to foresee and prepare, the judge needs to know the broad extent and nature of the defendant's previous convictions. Only thus can he anticipate the problem rather than have it thrust upon him some time after the Crown witness has left the witness box. Foreknowledge and anticipation are useful, nay essential, tools for a good criminal judge. 64. Indeed it is interesting to note that the transcript in this case reveals that the Bailiff may have had just such an issue in prospect when, at the very beginning of the Appellant's evidence, he discouraged Advocate English from pursuing questions about scarring apparent on the Appellant's face. We know not what was in the Bailiff's mind which prompted his intervention, but since such scarring was plainly irrelevant to the issues then before the Royal Court, it is possible that the Bailiff may have been concerned that Advocate English was running a risk if the Appellant, for example, was to give evidence to account for the scarring in an exculpatory manner, lest the Crown had evidence to contradict the Appellant and wished to cross examine him on the issue, thereby, perhaps, revealing a previous conviction. 65. It hardly needs to be said that an experienced criminal judge can often prevent or avoid the occurrence of such difficulties in the course of a trial but only provided he is made cognisant of the material whose existence might create such difficulties. 66. A particularly good example of where the judge at trial should have available to him a complete

understanding of the details of the antecedents of the defendants occurred in the case of *Hume v AG*

[2005] JLR 327 . When the first defendant gave evidence in that case, the trial judge asked his advocate, in the presence of the Jurats, whether he wished to adduce evidence of his client's good character. The advocate replied that he did not and then explained, in the absence of the Jurats, that he could not adduce such evidence as his client had been convicted of offences subsequent to his arrest for the instant offence. His advocate appealed to this Court, *inter alia*, on the basis that his refusal to accede to the judge's invitation may have indicated to the Jurats that his client was a man with previous convictions. This Court concluded that although it was unfortunate that the question had been asked in the presence of the Jurats, nonetheless the possible inference that the defendant had previous convictions "would not have played a material role in the Jurats' determination." 67. In all the circumstances, we reject the suggestion that neither the Bailiff in this case, nor any judge in this jurisdiction in the future, should be provided with the antecedents of the defendant. Second Submission 68. We turn to consider Advocate Nicholls' alternative submission that, having been provided with the antecedents, the Bailiff should have directed himself in relation to them by way of reassurance that he had disregarded them when he came to exercise his casting vote. 69. The essence and background of this submission turns on the appearance of bias in a fact finder if, in a criminal trial, he is given information of a purely prejudicial nature. Since no application had been made to introduce evidence of the Appellant's bad character during his trial, the details of his antecedents consisted of potentially prejudicial, rather than probative, information. It is true that none of the convictions related to offences concerning drugs but, against that, the Appellant's credibility was in issue because of the evidence he had given. 70. Advocate Nicholls submitted that, in the circumstances, an objective and fair minded observer could not be sure that the trial had been fair. 71. There was a time when such an observer was invariably described as "the man on the Clapham omnibus" . As a representative of educated, intelligent but non-descript members of the general public, the concept was first used by Henn Collins MR in *McQuire v Western Morning News*

[1903] 2 KB 100 @ 109. He attributed the concept to Lord Bowen who is said to have coined it as junior counsel in the *Tichborne Claimant* case in 1871 (see *Brewers Dictionary of Phrase and Fable*; 15 th Ed., Cassell

p. 761). 72. In *Porter v Magill*

[2002] 2 AC 357 , Lord Hope of Craighead suggested that a better test would be that of "a fair minded and informed observer, (who) having considered the facts, would conclude that there was a real possibility that the tribunal was biased." (para 103). In *Helow v Secretary of State for the Home Department*

- [2008] 1 WLR 2416 , Lord Hope added a gloss to his earlier definition by insisting that such an observer "is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious.... But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased." (para 2). This redefinition was approved by the Privy Council in *Yiacoub and another v The Queen*
- [2014] UKPC 22 @ para 11, per Lord Hughes. 73. That test, albeit in the context of *récusation* , was incorporated into this jurisdiction by this Court in *Baglin v AG*
- [2005] JLR 180 . In an earlier case, *In re Esteem Settlement*
- [2001] JLR 169 , Vaughan JA sitting as a Single Judge, adopted the approach of the English Court of Appeal in *Director General of Fair Trading v Proprietary Association of G. B.*
- [2000] 151 New L. J. 17 "which required the court, having first ascertained all the relevant circumstances which have a bearing on the suggestion of bias, to ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger (the two being the same), that the tribunal was biased." 74. Smith JA's judgment in *Baglin* , cit. sup., continues: "Subsequently, in *Porter v Magill*, the House of Lords endorsed this test with the deletion of the reference to "a real danger" (
- [2002] 1 All ER 465 , at paras. 103-105, per Lord Hope)." The judgment of Smith JA then continues: "Mr Santos Costa did not challenge the test adopted in *In re Esteem*.....we consider it appropriate to confirm that it is a part of the law of Jersey subject to the deletion of the words 'a real danger' (see *Porter v Magill*)." 75. Accordingly we have adopted the concepts associated with this test for the purposes of the instant case, culled from *Porter v Magill* , *Helow v Secretary of the Home Department* , *Director General of Fair Trading v Proprietary Association of G. B.* and *Baglin v AG* . The incorporation of the notions that the observer had to be "informed" , that he had to have "ascertained all the relevant circumstances" , that he had to have "understood both sides of the argument" , and that he had to perceive "a real possibility of bias" , is especially important in the context of what happened in the Royal Court in the instant case if a proper assessment is to be made of Advocate Nicholls' argument. 76. In truth, of course, the fact that a court hears evidence which is inadmissible is not an automatic or invariable ground for overturning a conviction. That much is well settled law here and on the mainland. Much will depend on the nature of the inadmissible information which has, for whatever reason, come into the possession of the tribunal of fact. Juries on the mainland and Jurats here are trusted to put out of their mind inadmissible material, whether such information has come to their notice from outside or inside court. Much will depend on the nature of the information, how relevant it is to the issues, how prejudicial to the defendant, and whether the mischief can be cured by a strong direction to disregard it. 77. And more than this, the fair minded and informed observer should be aware of the practice of professional

Magistrates, and even lay Magistrates, being able to put from their minds as tribunals of fact, information which has come into their possession as judges of the law during the course of the case. It is by no means unusual for a Magistrate in this Bailiwick to be required to rule on the admissibility of a piece of evidence and, if he declines to admit it, to ignore it when considering his verdict. Such evidence, by way of example, may relate to "similar fact", or to the defendant's previous convictions or to "confession" evidence. 78. The diligent researches of the Advocates in this case, have produced two cases in this jurisdiction which are in point. In *Michel and Gallichan v AG*

[2007] JLR Note 54 , the applicants had been charged with a number of counts. The case was opened on the basis of the evidence on all the counts. Early in the trial, the prosecution elected to proceed on only one count. The Jurats were excused from returning verdicts on those other counts which were tried subsequently by another court. In the summing up the Jurats were directed to ignore what they had been told about the other counts. The applicants were convicted. They appealed to this Court and submitted that a fair minded and informed observer must have concluded that there was a real possibility that the Jurats in the first trial were biased against them because of the material of which they had been informed which became relevant only to the second trial. In dismissing the application for leave to appeal, this Court held that "Jurats were recognised as possessing sound judgment and integrity and could not be held to be incapable of obeying a proper direction to ignore extraneous material." 79. The second case is *Le Cocq v AG*

[1991] JLR 169 . In that case *Tomes DB* held:- "The Police Court Magistrate, for the purpose of carrying out his functions, has of necessity to consider on the material before him what constitutes evidence admissible against the accused, whether on committal or deciding guilt or innocence. In the course of his duties, material may well be placed before him which is inadmissible but this does not invalidate a decision to commit the accused for trial and it does not invalidate a pronouncement of guilt, even though such material may be very prejudicial to the accused. Segregating admissible from inadmissible evidence is part of the examining Magistrate's function and the procedure contemplates that the Magistrate is capable of performing the duty of putting out of his mind all inadmissible material which he has seen or heard and of concentrating only upon the admissible evidence in coming to his decision whether or not it is appropriate to commit the accused to the Royal Court for trial upon a *prima facie* case or to convict and sentence the accused upon proof of guilt beyond reasonable doubt." 80. In the jurisprudence of England and Wales there are a number of cases where the High Court has had to consider whether the introduction of a piece of extraneous and prejudicial evidence warrants intervention. And the fact that the High Court in London has emphasised on many occasions that each case has to be considered on its individual merits and that each case is fact specific, only serves to underline the importance of considering the circumstances of each case and assessing the nature of the evidence and the nature of the tribunal concerned. 81. In *R v Metropolitan Stipendiary Magistrate, ex parte Gallagher*

- [1972] 136 JP 80, Lord Widgery LCJ said:- "It is a commonplace that in magistrates' courts the court may have knowledge of the accused's previous record simply by virtue of the fact that the court may have sat to determine previous charges against him. It is no doubt desirable in many instances that an accused person should come before a magistrate who does not have an intimate knowledge of his record. But that desirability cannot be elevated to a proposition of law sufficient to deprive the magistrate of jurisdiction..... Having said that, the court would, however, stress the desirability that a magistrate should not try an information when he has intimate knowledge of the accused's background." 82. In *R v Weston-Super-Mare Justices*, ex parte Shaw
- [1987] QB 640, the Divisional Court emphasised that it was a matter for the discretion of the lower court whether it should try an information in circumstances where it has been made aware of the previous convictions of the defendant and that the appeal court would not interfere provided the lower court applied the proper test. 83. In *R v Downham Market Magistrates' Court* ex parte Nudd [1989] RTR 169, Lord Justice Watkins VC, emphasised that each case turned on its own

facts.

In that case the chairman of a bench of lay magistrates had tried the applicant previously, and most recently a mere month before the instant case, and had imposed a sentence of suspended imprisonment on him for an offence involving threats to kill his wife. At those previous hearings the chairman had considered medical and social enquiry reports on the applicant. He also had detailed knowledge of the applicant's previous convictions which were extensive and some of them material to the case in question. The Divisional Court held that, in such circumstances, the chairman should have recused himself, not on the grounds of actual bias, but on the principle that justice "must not only be done but it must be seen to be done." (@ p. 173). 84. In *R v Hereford Magistrates' Court* ex parte Rowlands and others

- [1997] 2 Cr App R 340, Lord Bingham LCJ having reviewed the authorities including *R v Downham Market Magistrate's Court*, ex parte Nudd cit. sup., continued:- "Those authorities support the proposition that not every disclosure of previous convictions will give rise to a real danger of bias. Magistrates will, from time to time, inevitably be aware of a defendant's criminal past, particularly in an area where some appear before them with depressing regularity: see Tudor Evans J. in (*R v Birmingham Magistrate's Court*) Ex parte Robinson ([1985] 150 JP 1), at p. 3. In *R v Blythe Valley Juvenile Court*, ex parte S. [1987] 151 JP 805 a juvenile's application for legal aid disclosed to the justices previous offences. In addition a further charge was also revealed. Despite an application for a fresh panel an adjournment was refused and the magistrates continued to hear his case. Kerr LJ stated at p. 809 that the decision to quash: "should not be taken as laying down any general rule that the mere presence on the bench of a juvenile or magistrates' court of a member of the court who had been present on a previous occasion when the same accused had faced some criminal charge, or who might otherwise have been familiar with the record of that

person due to previous occasions, would necessarily provide a ground for quashing the later decision. In some courts and in relation to some defendants it may be almost unavoidable for that to occur." 85. In *Robinson v Sutton Coldfield Magistrates' Court*

[2006] EWHC 307, the Divisional Court had to consider the way in which the lower court had handled a prosecution application to adduce evidence of bad character as well as an application to adduce that evidence out of time, under Section 101 Criminal Justice Act 2003. The Court said: "There is an important distinction to be made between being aware of the facts of a conviction and taking those facts into account in arriving at a decision as to whether or not to extend time. It is the type of situation with which justices are familiar. Where an application is made to adduce bad character evidence before a magistrates' court, the justices will, of necessity, hear details of the conviction in order to rule on the application. If the application fails they will put the convictions out of mind when they hear the case. The fact that they know the details of the previous convictions does not disqualify them from discharging their role as finders of fact in the trial." (para 21). 86. The English Court of Appeal has also had to consider the impact of Public Interest Immunity ("PII") applications to the trial process. In the case of *R (DPP) v Acton Youth Court* [2001] 1 WLR 1828, it was held (as per the head note):- "...that the judge who conducted a trial, whether a lay justice, a district judge, or a judge of the Crown Court or High Court, had final responsibility for ensuring justice at that trial; that, where there had been an ex parte application for non-disclosure on the grounds of public interest immunity, justice could best be achieved by the same tribunal then conducting the trial since, if anything unforeseen then occurred, it would be in a position to protect the defendant; that, unless there were special circumstances, the fact that justices and district judges were judges of both fact and law should not prevent them from conducting a fair trial after they had made an interlocutory ruling." 87. The decision in the *Acton Youth* case was expressly approved by the House of Lords in *R v H and others*

[2004] 2 AC 134. Lord Bingham of Cornhill said:- "If PII applications are confined, as they should be, to material which undermines the prosecution case or strengthens that of the defence, the bench will not be alerted to material damaging to the defendant. If it is, the principles which should govern the court's decision whether to recuse itself are the same as in the case of any other tribunal if fact, but the court's duty of continuing review ordinarily militates in favour of continuing the proceedings before the court which determines the PII application." 88. It is clear, therefore, that the principle that a fact finder can play no part in the essential decision of fact merely because he is privy to knowledge of the defendant's antecedents or other prima facie prejudicial material, has no basis in law. The question whether "a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" needs to be answered bearing in mind the requirement of English common law that a tribunal of fact is capable of ignoring considerations which, perforce, had to be included in the trial process but which turned out to be irrelevant to a consideration of the verdict. 89. If lay and professional magistrates are required to put from their minds a defendant's

antecedents, or other prejudicial material, and if they are considered capable of doing so in order to reach a fair minded verdict, *ex hypothesi*, a trained judge with experience such as the Bailiff of this Bailiwick possesses, must be expected to do so and is plainly capable of doing so. Moreover a fair minded and informed observer should include those matters in "his consideration of the facts" (see *Porter v Magill* cit. sup.) as part of his assessment of the appearance of bias. 90. In applying this test to this case, we decline to hold that such an observer would conclude either that the Bailiff had failed to put the Appellant's previous convictions from his mind or that, because he had failed to state positively that he had done so, there was any appearance of bias. 91. Advocate Nicholls' submission that the Bailiff should have so directed himself is not supported by any authority. In none of the cases to which we have been referred, nor in any of the other cases which we have consulted, have we found any encouragement to magistrates, lay or professional, to state in open court the details of any factor which they should not, and have not, taken into account in reaching their decision. 92. In acknowledging that each case is fact specific, we recognise that there are circumstances which might cause the fair minded and informed observer to conclude in the context of Article 15(4) that it would be difficult to avoid the appearance of bias. If, for example, a judge has tried a defendant on a recent previous occasion and, when sentencing the defendant, had commented unfavourably on the defendant's veracity in the witness box, it might be better for such a judge to recuse himself from trying the defendant on another charge later, lest he might have to exercise his casting vote in accordance with Article 15(4). 93. Similarly, if, as a result of a previous case or cases, a judge had acquired the sort of "intimate knowledge" of a defendant, his background and his antecedents in circumstances envisaged above (see *ex parte Gallagher* cit. sup. and *ex parte Nudd* ditto), particularly if those antecedents involved relevant or scandalous offences, the fair minded and informed observer might conclude that there was indeed an appearance of bias. 94. We decline to lay down any hard and fast set of rules for such eventualities, any more than the High Court in London has ever done. Indeed just as the Divisional Court in *ex parte Shaw* cit. sup. was content to leave matters to the good sense of the clerks to the justices to avoid an inevitable appearance of bias, so we are content to leave it to the good sense of judges of first instance in this jurisdiction to reflect that, in any given case, they may have to exercise a casting vote under Article 15(4) and to bear that fact in mind in respect of any defendant whom they may be asked to try. 95. We add this coda. Although the Bailiff did not direct himself to exclude evidence of the Appellant's previous convictions when he became a fact finder, he did direct the Jurats on the basis on which they should judge the case. He said this in his summing up: "You must decide this case only on the evidence which has been placed before you, there will be no more." In the light of this direction, we do not consider that any fair minded and informed observer would have regarded it as credible that this Bailiff, having thus directed the Jurats, would have allowed himself to include a consideration of the antecedents of this Appellant, which, of course, had not been placed before the Jurats, when he had to assume the role of fact finder himself. 96. The final matter with which we need to deal in this judgment relates to *Snooks and Dowse v United*

Kingdom

[2002] JLR 475 in which the European Court of Human Rights considered the system of trial by Jurat in this jurisdiction. It is true that the Bailiff's casting vote under Article 15(4) was not in issue in that case but we regard it as not without significance that in a review of the domestic law of trials in this Bailiwick, the European Court did not make any criticism or suggest any incompatibility of the 1948 Law with European law. Advocate Nicholls conceded that if the European Court had had concerns about Article 15(4) it is likely that they would have said so in their judgment. He also conceded that he had no grounds for suggesting in the instant case that the Appellant's Article 6 rights under the Convention had been infringed.

CONCLUSION

97. For all these reasons we dismiss this appeal. Authorities Customs and Excise (Jersey) Law 1999. Royal Court (Jersey) Law 1948. *Sheldon v AG*

[1996] JLR Notes 19b. *Selvey v DPP* [1970] AC 304 HL. *R v Cook* 43 Cr. App. R. 138. *Hume v AG*

[2005] JLR 327 . *McQuire v Western Morning News*

[1903] 2 KB 100 . *Porter v Magill*

[2002] 2 AC 357 . *Helow v Secretary of State for the Home Department*

[2008] 1 WLR 2416 . *Yiacoub and another v The Queen*

[2014] UKPC 22 . *Baglin v AG*

[2005] JLR 180 . *In re Esteem Settlement*

[2001] JLR 169 . *Director General of Fair Trading v Proprietary Association of G. B.* [2000] 151 New L. J. 17. *Michel and Gallichan v AG*

[2007] JLR Note 54 . *Le Cocq v AG*

[1991] JLR 169 . *R v Metropolitan Stipendiary Magistrate, ex parte Gallagher* [1972] 136 JP 80. *R v Weston-Super-Mare Justices, ex parte Shaw* [1987] QB 640. *R v Downham Market Magistrates' Court ex parte Nudd*

[1989] RTR 169. *R v Hereford Magistrates' Court ex parte Rowlands and others*

[1997] 2 Cr App R 340 . *Robinson v Sutton Coldfield Magistrates' Court*

[2006] EWHC 307 . *Criminal Justice Act 2003. R (DPP) v Acton Youth Court* [2001] 1 WLR 1828. *R v H and others*

[2004] 2 AC 134 . *Snooks and Dowse v United Kingdom*

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