

JERSEY / JUDGMENT

Martins and Martins v AG

[2008] JCA 082 (22 May 2008)

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COURT OF APPEAL 22 May 2008 Before : Dame Heather Steel, President; M. S. Jones, Esq., Q. C.; and J. W. McNeill, Esq., Q. C. Fabio Andre Fernandes Martins Joao Carlos Ornelas Martins v The Attorney General Application for leave to appeal against the guilty pleas entered on the following charge after legal argument before Commissioner Hamon sitting as a single judge of the Royal Court on 6 th November 2007. 1 count Attempting to acquire property representing the proceeds of drug trafficking, contrary to Article 38(1) of the Drug Trafficking Offences (Jersey) Law 1988 . Advocate M. L. Preston for F. A. F. Martins. Advocate M. H. Temple for J. C. O. Martins. Crown Advocate S. M. Baker Esq.

JUDGMENT

THE PRESIDENT : This is the Judgment of the Court. 1. On 31st August 2007 an indictment was laid against the two Appellants and another, Claudio Rodrigues de Freitas in the Samedi Division of the Royal Court to which all three pleaded not guilty. The indictment charged all three with attempting to acquire property representing the proceeds of drug trafficking contrary to Article 38(1) of the Drug Trafficking Offences (Jersey) Law 1988 . The particulars of the offence were that on 13th March 2007 they attempted to acquire property representing, directly or indirectly, the proceeds of drug trafficking by Vitoriano Sousa Gomes. 2. The facts of the offence are that at the relevant time Fabio Martins was a serving prisoner. He believed that cash, which was the proceeds of drug trafficking by Vitoriano Gomes, might be hidden in a safe which was buried in or near his garden. Fabio Martins arranged for his friend Claudio de Freitas to try to dig it up one night and for his father Joao Martins to provide the implements and to drive de Freitas to the scene. Fabio Martins was the organiser, directing the operation from prison using his mobile phone. De Freitas and Joao Martins were observed and arrested. Nothing had been found, and a subsequent search revealed nothing. 3. The three defendants submitted to Commissioner Hamon at a preliminary hearing that the indictment was defective in two respects:- (i) That an essential element of the alleged offence, namely the knowledge that the property being sought was, directly or indirectly, the proceeds of the drug dealing carried out by the convicted drug trafficker Vitoriano Gomes, was omitted from the particulars; (ii) That there is no offence in Jersey customary or statutory law of attempting to commit the offence created by Article 38(1). 4. Having heard and considered the submissions and argument in relation to each of these matters on 6 th November 2007, the Commissioner ruled on 9 th November 2007 that:- "This is an

inchoate offence and what is required is the full intent to commit the offence contemplated and it is clear that the mental element of an attempt is an intention to bring the substantive offence into effect." He found that there is in Article 38(1) an element of knowledge, and stated that the fact that nothing was found as a result of the searches did not destroy the prosecution case. He referred to the authority of *Ruban v AG* [1987-1988] JLR 204 which confirms that it is an offence in Jersey to attempt the impossible. He went on to say that whether the acts done can be regarded as "immediately connected" with the crime contemplated is a matter for trial. He quoted the judgment of the Court in *Ruban* at p.218:- "In our judgment, in Jersey law an attempt consists of a step or steps taken towards the commission of an offence which the offender intends to commit if he can. Mere intention is not enough. Some act (actus reus) must be proved to have been done by the offender directly connected with the offence. There must be mens rea and actus reus. But it is no defence to prove that it was physically impossible to commit the full offence." (i) Having considered the provisions of Article 1(1) and Article 38(1) of the Drug Trafficking (Jersey) Law 1988, he ruled that Article 1 does not create the offence but it recognises the customary offence of attempting to acquire the proceeds of drug trafficking. Article 1(1) of the 1988 Law reads:- "Drug trafficking offence means any of the following: (e) an offence under Article 30, 37, 38, or 40. (f) an offence of conspiracy to commit any of the offences in sub-paragraphs (a) to (e). (g) an offence of attempting to commit any of those offences. (h) an offence of inciting another to commit any of those offences." Article 38(1) reads:- "If a person who, knowing that any property is, in whole or in part directly or indirectly represents, another's proceeds of drug trafficking, acquires that property or has possession or use of it, he is guilty of an offence." 5. The Commissioner ordered that the three Defendants be tried before the Inferior Number of the Court. On 30 th November 2007 the Commissioner, having heard the submissions of the Crown Advocate and Advocates for the Defendants, the Court, of its own motion and pursuant to the provisions of Article 94(4) of the Police Procedures and Criminal Evidence (Jersey) Law 2003, varied the ruling which related to trial before the Inferior Number of the Court, and ordered that the accused be tried before a Criminal Assize on a date to be fixed. 6. On 9 th January 2008, in the Samedi Division of the Royal Court the three Defendants were granted leave to withdraw their pleas to the indictment and pleaded guilty thereto. 7. On 15 th February 2008, the three Defendants were sentenced. De Freitas was sentenced to 150 hours' Community service, Fabio Martins to 12 months' imprisonment consecutive to his current sentence, and Joao Martins to 120 hours' Community Service. 8. The Appellants Fabio Martins and Joao Martins appeal their convictions pursuant to Article 24 of the Court of Appeal (Jersey) Law 1961 (as amended). Article 24(1) of the said Law provides that; "(1) A person convicted on indictment by the Royal Court, whether sitting with or without a jury, may appeal under this Part to the Court of Appeal -

- (a) against the person's conviction, on any ground of appeal which involves a question of law alone." The present matter involves a question of law alone, leave is therefore not required. 9. Neither Appellant appeals his sentence, and de Freitas does not appeal either conviction or sentence. 10. We are grateful to all the Advocates for their

submissions.

SUBMISSIONS

11. Neither Advocate on behalf of the Appellants invited the Court to consider the way in which the particulars of the indictment had earlier been alleged to be defective. 12. This appeal solely relates to the issue of whether the offence alleged in the indictment as " Attempting to acquire property representing the proceeds of drug trafficking, contrary to Article 38(1) of the Drug Trafficking Offences (Jersey) Law 1988 " exists. 13. It was submitted on behalf of each of the Appellants that as there is no specific attempt provision within Article 38(1) the Interpretation provisions of Article 1, which relate to the words " drug trafficking offence ", do not at
- (e) and (g) create the offence of attempt. It was further submitted that in Jersey law if Article 1 is interpreted as recognising an earlier customary and pre-existing common law offence of attempt to commit an offence, then there is no such customary offence of attempting to commit a convention or statutory offence. 14. This is the first time that the Court of Appeal has been invited to consider this submission. 15. Although attempt has long been recognised as an inchoate offence and part of the Jersey customary law, statutory law has only comparatively recently, (over the last twenty years or so) increased in volume and significance. 16. It is clear from the many statutes to which we have been referred in this case that the practice varies in relation to inchoate offences. Sometimes an Article which creates a specific offence includes an attempt provision, e.g. Article 27(1) and Article 28 of the Road Traffic (Jersey) Law 1956 , whereas sometimes, as in Article 8 of the Computer Misuse (Jersey) Law 1995 , which specifically concerns inchoate offences related to offences under that Law. In sub para 8(2) which refers to an offence under Article 5 of that Law, there is an implicit acknowledgment in the words " on a charge of attempting to commit an offence under Article 5", that the customary law does relate to a statutory offence or contravention. Sub-paragraph 8(1) recognises conspiracy to commit a statutory offence. Articles 8(4)(a) and Article 11 of the Misuse of Drugs (Jersey) Law 1978 specifically criminalise attempts. The Customs and Excise (Jersey) Law 1999 does not specifically refer to conspiracy. 17. Advocate Baker, on behalf of the Attorney General, referred the Court to the provisions of the Terrorism (Jersey) Law , which specifies in Article 9(2)(b) offences which are "always serious" "whether under customary law or any enactment" , and in 9(2)(c) "any of the offences mentioned in the definition drug trafficking offences in Article 1 of the Drug Trafficking Offences (Jersey) Law 1988" . Article 9(8) of the Terrorism Law reads "any offence of conspiring or attempting to commit a serious offence or aiding, abetting, counselling or procuring the commission of a serious offence is a serious offence" . He submits that this clearly supports his proposition, and is an example in Jersey of the way in which the customary offence of attempt is properly incorporated into the statutory offence. 18. He further cites the Criminal Justice (Anonymity in Sexual Cases) (Jersey) Law 2002 in support of his proposition. Article 2 of that Law, in which the meaning of sexual offences is set out at (a) to (g) reads at (h) "any offence of attempt to commit any of the offences in sub paragraphs

(a) to (g)", and sub paragraph (i) reads "any offence of conspiracy or incitement to commit any of the offences in sub paragraphs (a) to (g)". 19. Advocate Baker submits that the long established customary offence of attempt cannot be distinguished from the other inchoate offences of conspiracy and incitement which as a matter of practice form part of the law of Jersey in relation to statutory offences or conventions. 20. Advocate Baker does not discount the view that a statute can create an offence of attempt. In the present case he submits that the better view is that the statute recognises the customary law offence. 21. In support of his contentions Advocate Preston made the following submissions which were adopted by Advocate Temple. 22. He submitted that the law lacked clarity in Jersey, and that where there was at least a doubt as to whether the customary law offence of attempt exists in relation to statutory offences, that doubt should be resolved in favour of a defendant. Our attention was drawn to the English authorities of *R v Bristol Magistrates' Court*, ex parte E [1983] 3 All ER 798, and *Ad Valorum Factors Ltd v Ricketts*

[2003] EWCA Civ 1706 . We do not in any way dissent from the view that where there is ambiguity it must be so resolved. 23. In the Jersey Law Review June 1999 an article was published by Advocate Steven Pallot entitled "The Law of Attempt in relation to Crimes, Delits and Contraventions." This article sought to address what he described as a dearth of authority locally in the area of criminal attempt. At p.211 he considers contraventions. He writes:- "It is submitted that, unless the statute creating the offence refers to attempt or conveys an intention in the legislature to render an attempt an offence in its own right, there is no authority at customary law to charge a person with an attempt to commit a contravention. ... A contravention is a separate species of offence in its own right without any customary law attribute beyond the statute creating it. Only if the offence is stated to be a crime or a delit can it take on any customary law attribute, including the ability to charge an attempt. Thus in the absence of express provision in the wording creating a statutory offence, attempt cannot be charged no matter how serious the offence." 24. It was submitted on behalf of the Appellants that this academic writing strongly supported their argument that the offence, the subject of this appeal, does not exist. 25. Advocate Baker's response is that in the article Advocate Pallot provides no basis or authority for his conclusions, nor does he give good reasons for the distinction he draws between crimes and delits and contraventions. Further he referred the Court to the fact that the legislature frequently refers to attempts to commit offences. 26. He reminded the Court that it is for the Court to decide both the law and the principle having due regard to all the matters before it, and having considered all the authorities to determine what the Jersey law is. 27. On behalf of the Appellants we were invited to consider an extract from the Fourth Edition (2002) of F. A. R. Bennion's work entitled *Statutory Interpretation* . The chapter "Principle against Penalisation under a Doubtful Law" at Section 271 reads as follows: "It is a principle of legal policy that a person should not be penalised except under clear law ... The Court when considering in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to

avoid adopting a construction which penalises a person where the legislator's intention is doubtful or penalises him or her in a way which was not made clear." 28. We do not dissent from that view. The Appellants contend that the above principle is fatal to this prosecution as the offence charged is not known to Jersey law or is at best ambiguous. 29. In further support of the appellant's case we are invited to consider the background documentation to the Draft Criminal Offences (Jersey) Law 200-. The Report and Explanatory Note to the Draft Law includes the words: "At the moment the customary law on aiding and abetting etc. possibly only applies to customary law offences so a special provision to cover the point is normally put into each law that creates an offence ." Advocate Preston emphasises the word possibly. 30. Mr Ben Griffiths, who is described as the States Research and Project Officer, is the author of a report in which he writes that one purpose of the Draft Law is " to clarify the law relating to attempt ". Under his reasons he wrote that the existing law relating to these offences is potentially unclear, then continued " this legislation relates to some of the most basic principles of criminal law in Jersey. It is considered an important step forward in clarifying and codifying the law. This is especially important with respect to removing uncertainty over the ability to charge persons with attempt, conspiracy and incitement when they are concomitant with statutory offences." Neither of these quoted conclusions is supported by authority. 31. We prefer the view expressed by Commissioner Hamon that:- "this Draft Law, which has yet to receive the sanction of the Privy Council, does no more than codify the law in relation to attempt (also incitement and conspiracy), to provide the mode of trial and to set out that the maximum penalty for an attempted statutory offence is the same as for the substantive offence." 32. The law in Jersey now tends to follow English law, and following the Criminal Attempts Act 1981 where an attempt is alleged in England, as in the Drug Trafficking Act 1994, s.1(3) (h) the words appear "which includes an offence under s.1 of the Criminal Attempts Act 1981 of attempting to commit any of those offences in the definition of drug trafficking offences." 33. In Jersey the Drug Trafficking Offences (Jersey) Law 1988 , varies only in that there is no reference to any statutory offence of attempt in Article 1, but we are satisfied that the meaning is nonetheless clear. 34. Mode of trial has not been the subject of this appeal. CONCLUSIONS Having considered all the matters before the Court:- 35. We find that there is no difference in principle in Jersey between customary offences and statutory offences. If Jersey customary law recognises attempts to commit a crime as an offence, that recognition should not be limited to customary law crimes. In either case the act being carried out by the alleged perpetrator is an attempt to commit a crime. 36. There is no difference in principle between the inchoate offences of conspiracy incitement and attempt. In Jersey conspiracy is frequently and properly alleged and prosecuted in relation to a substantive statutory offence. 37. We do not accept that in enacting sub para (g) of the Drug Trafficking Offences (Jersey) Law 1988 , the legislature sought to criminalise an offence which could not exist. 38. With reference to such Laws as the Computer Misuse (Jersey) Law 1995 we are satisfied that the legislation in the present case reflected the established acceptance that there is a customary law offence of attempting to commit a statutory offence or convention. 39. We do not accept

the Appellants' submissions that the present law regarding inchoate offences is ambiguous, doubtful or unclear either in principle or in application. 40. We were invited to consider the impact of the Human Rights (Jersey) Law 2000 which incorporates the ECHR into Jersey Law. Article 5 of the ECHR concerns the right to liberty except in specified cases including lawful imprisonment. In the light of our conclusion that the ruling of Commissioner Hamon in relation to the offence was correct, this submission is not relevant. 41. For the reasons herein set out we dismiss this appeal. Authorities Drug Trafficking Offences (Jersey) Law 1988. AG v Martins and Others

- [2007] JRC 207 . Ruban v AG [1987-1988] JLR 204. Police Procedures and Criminal Evidence (Jersey) Law 2003. Court of Appeal (Jersey) Law 1961 (as amended). Road Traffic (Jersey) Law 1956. Computer Misuse (Jersey) Law 1995. Misuse of Drugs (Jersey) Law 1978. Customs and Excise (Jersey) Law 1999. Terrorism (Jersey) Law 2002. Criminal Justice (Anonymity in Sexual Cases) (Jersey) Law 2002. R v Bristol Magistrates' Court, ex parte E [1983] 3 All ER 798. Ad Valorem Factors Ltd v Ricketts
- [2003] EWCA Civ 1706 . "The Law of Attempt in relation to Crimes, Delits and Contraventions." Jersey Law Review June 1999, Advocate S Pallot. Statutory Interpretation FAR Bennion, Fourth Edition (2002). Human Rights (Jersey) Law 2000. European Convention on Human Rights. Page Last Updated: 22 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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