

JERSEY / JUDGMENT

Mendes v The Attorney General

COURT

ROYAL COURT

BEFORE

M.C.St.J Birt,
Esq., Deputy Bailiff, and Jurats de Veulle, Rumfitt, Tibbo, Georgelin, Allo and Clapham.
Nuno Miguel MENDES

-v-

The Attorney General

Applications: (1) for

leave to withdraw a notice of abandonment of appeal; (2) for an extension of time within which to apply for leave to appeal; (3) for leave to appeal, and (4) for leave to adduce additional evidence from three witnesses in relation to so much of the sentence passed on 25th January, 2002, by the Inferior Number of the Royal Court, as recommended that the appellant be deported after completing

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[2003]JCA106

ROYAL COURT

(Superior Number)

(exercising the

appellate jurisdiction conferred upon it

by Article 22 of the

Court of Appeal (Jersey) Law, 1961)

30th June, 2003

Before:

M.C.St.J Birt,
Esq., Deputy Bailiff, and Jurats de Veulle, Rumfitt, Tibbo, Georgelin, Allo and Clapham.
Nuno Miguel MENDES
-v-
The Attorney General
Applications: (1) for
leave to withdraw a notice of abandonment of appeal; (2) for an extension of time within which to apply for leave to appeal; (3) for leave to appeal, and (4) for leave to adduce additional evidence from three witnesses in relation to so much of the sentence passed on 25th January, 2002, by the Inferior Number of the Royal Court, as recommended that the appellant be deported after completing

the 4 year total sentence
of imprisonment on a
guilty plea to:

1 count of:
conduct likely to cause a breach of the
peace (count 1, on which count a sentence of a £200 fine or 7
days' imprisonment in default of payment was passed);
1 count of
robbery (count 3, on which count a sentence
of 4 years' imprisonment was passed); and
1 count of
possession of a controlled drug [cannabis],
contrary to Article 6(1) of the Misuse of Drugs (Jersey) Law, 1961 (count 4,
on which count a sentence of a £200 fine or 7 days' imprisonment
in default of payment was passed).
[On 21st December, 2001, the
Crown accepted a not guilty plea to count 2 on the indictment.]
The application for
leave to appeal placed directly before the plenary Court without first being
submitted to Single Judge for consideration and determination.
Advocate P.C. Harris for the Appellant;
A.D. Robinson, Esq., Crown Advocate.

JUDGMENT

(on application for leave to withdraw notice of abandonment of appeal) THE DEPUTY BAILIFF: 1. On the 25th January, 2002, the applicant was sentenced by the Inferior Number to a total of 4 years' imprisonment for offences of robbery, breach of the peace and possession of cannabis. The Inferior Number also recommended that he be deported at the end of his sentence. 2. Following that hearing the applicant filed an application for leave to appeal against sentence on 31st January, 2002. The application related only to the recommendation for deportation. He did not wish to appeal against the prison sentence. Before the application for leave to appeal was heard, the applicant filed a notice of abandonment on 23rd April, 2002. 3. The result of that was that by virtue of Rule 8 of the Court of Appeal (Criminal) (Jersey) Rules 1964 the application was deemed to have been dismissed. Subsequently on 22nd August, 2002, following representations from the applicant, the Lieutenant-Governor informed the applicant that he was going to make a deportation order. 4. On 28th October, 2002, the applicant notified the Judicial Greffe of his intention to apply for leave to appeal out of time and the next day he filed an application for leave to appeal against the deportation recommendation on the grounds that it infringed his human rights. The law is clear that an abandonment of an appeal in general ends an appeal, because it is deemed to be dismissed. The appellate court becomes functus officio and has no jurisdiction thereafter to entertain an appeal. But if the court is satisfied that the notice of abandonment should be treated as a nullity then it may subsequently entertain an appeal. 5. The Court of Appeal in *Cuthbertson and Cairney –v- A.G.* (18th September, 1975) Act of Court of Appeal and *A.G. –v- Doyle* (1978) JJ93, has laid down that withdrawal of the notice of abandonment cannot be permitted unless it is shown that something amounting to mistake or fraud has taken place. Further assistance can be derived from the English case of *R-v- Medway* [1976] 1 All ER 527 where a five man Court of Appeal considered the issue. Our first task, therefore, is to consider whether

that is the case here. 6. The applicant has filed an affidavit in which he says that Advocate Fogarty, who had been appointed on legal aid to act on his behalf in connection with his appeal, visited him at La Moye Prison on the 23rd April, 2002, accompanied by her assistant, Miss Theresa Campbell. He says that Advocate Fogarty advised him that there was no right to appeal against the recommendation of deportation, because it was not a sentence of the Court; it was merely a recommendation. 7. He says that he was told that his only remedy was to make representations to the Lieutenant-Governor. It was for that reason only that he signed the notice of abandonment there and then which was witnessed by Miss Campbell and subsequently filed on his behalf. 8. Advocate Fogarty, on the other hand, has sworn an affidavit in which she says that she advised the applicant that he could appeal against the deportation order recommendation, but that his grounds for doing so were weak to non-existent because the advocate who had appeared for the applicant in the Court below had rehearsed all the factors against deportation most thoroughly and these had also been fully addressed by the Inferior Number. 9. Before turning to consider this conflict we will deal with one preliminary matter of procedure. Crown Advocate Robinson in this case had to request the applicant's advocate to file an affidavit on the part of Mr Mendes referring to the nature of the legal advice he had received from Advocate Fogarty, and to request a waiver of privilege from Advocate Fogarty so that she could give her version of events.

10. Where grounds of appeal are based upon the nature of advice given by a previous advocate, or on the conduct of that advocate in the Court below, the procedure to be followed has been clearly laid down by the English Court of Appeal in *R -v- Doherty* (1997) 2 Cr. App. R. 218. In particular, it is clear that, at an early stage, the new advocate must procure the swearing of an affidavit, the waiver of privilege, and the obtaining of the response of the previous advocate to what is now said. That procedure is applicable here and must accordingly be followed in all future cases. The principles adopted are, as we say, to be treated as applicable in Jersey.
11. Returning to the facts of this case, because of the conflict in the affidavits we have heard oral evidence from Mr Mendes and from Advocate Fogarty. We do not think it necessary to rehearse what was said by each of them; broadly speaking it remained consistent with their respective affidavits. Having heard the evidence we are satisfied that Advocate Fogarty did advise that it was the merits of an appeal which were weak to non-existent. She did not advise that there was no right of appeal simply because this was a recommendation. She is supported in that evidence by the file note of a meeting on the 22nd April, between herself and Mrs Mendes; the file note having been prepared by her assistant, Miss Campbell, who was unfortunately not able to give evidence before us.
12. It is clear from that file note that the meeting was taken up with a detailed review of the personal circumstances of Mrs Mendes and her family. This was, of course, very relevant to consideration of the merits of any appeal. It would have been wholly irrelevant if, as is suggested, Advocate Fogarty had been advising that there was simply no right of appeal. If there was no right of appeal there was no need to descend into the merits. Nevertheless, English is not the applicant's first language. No interpreter was present at the meeting with

Advocate Fogarty nor at a previous meeting which took place between the applicant and Miss Campbell. Conversely, we note that on several occasions an interpreter was present at meetings with the Probation Officer for the purposes of preparing the Social Enquiry Report.

13. We think that there is a substantial possibility that the applicant misunderstood the advice which he had been given because of defects in his comprehension of the English language. He believed that he had been told that there was no right of appeal, whereas in fact, he had been told that the merits of his appeal were weak to non-existent. In the circumstances we think it would be very unfair to hold the applicant to the notice of abandonment if he only decided to file that notice by reason of his misunderstanding of the advice which he had been given by a lawyer speaking in what was not his first language.
14. In the circumstances we are, therefore, going to allow him to withdraw the Notice of Abandonment and we will therefore proceed to hear the appeal on its merits and, of course, the application for leave to appeal out of time.

JUDGMENT

(on application for leave to adduce further evidence) THE DEPUTY BAILIFF:

15. We do not consider this is one of those rare cases where it is right to hear oral evidence on appeal. We should add that, in any event, the appellant has not done what he ought to have done, which is to have filed an affidavit setting out the nature of the evidence so that the Court could consider whether it would be admissible; but nevertheless, we have been told by Mr Harris, broadly speaking what it would be. It would concern the development of the relationship since the sentence was imposed and in particular the fact that, on two occasions because of his wife's illness, the appellant, on release from prison, has looked after the children and the relationship has clearly developed. All of those matters can be put forward to us very clearly and fully by Mr Harris upon instructions. That is the correct way to proceed and therefore we do not grant leave to hear oral testimony.

JUDGMENT

THE DEPUTY BAILIFF:

16. This is an application by Nuno Miguel Mendes for leave to appeal against a decision of the Inferior Number made on 25th January, 2002. At the time the appellant was sentenced to a total of 4 years' imprisonment for three counts, namely conduct likely to cause a breach of the peace, robbery and possession of a controlled drug.
17. He does not appeal against the sentence of imprisonment. He does, however, wish to appeal against the recommendation which the Inferior Number made that he should be deported at the end of his period of imprisonment.

18. The facts of the offences can very briefly be stated. As to the breach of the peace: on 20th May, 2001, the applicant was walking home having been out drinking with his wife and some acquaintances. He had apparently consumed 4 whisky and cokes and made a derogatory remark to some of his acquaintances. A fight ensued, involving him, two males, and a female, all of whom with the exception of one of the males received minor injuries.
19. The serious offence was clearly the robbery, and that was summarised by the Inferior Number Judgment as follows by saying: “That it was a serious offence of robbery which must have caused extreme anxiety and, indeed, fear to the victim. This young woman awoke in the early hours of the morning to find the accused entering her bedroom. She was unclothed and vulnerable. He demanded and obtained money while ransacking the room. He threatened her with a steak knife and told her that if she told anyone, he would kill her. Later, he produced another smaller knife. He was also carrying a crow bar, which he used to break into the property. The accused took her bank cards and demanded to know the pin numbers. He searched her personal papers and took her jewellery, demanding to know if she had any gold. The incident lasted about 40 minutes and was brought to an end only when the victim managed to run out of the house and to seek refuge with a neighbour. The accused was arrested by the police later that morning.” Shortly afterwards a small amount of cannabis was found at his address. “When interviewed by the police, Mendes gave a false story that he had known the victim and that she owed him £160 in respect of a drug debt. He, thus, added insult to the injury he had caused by attacking her reputation as well. To his credit, that false story has been withdrawn today and he acknowledges that the victim was a complete stranger to him and moreover, that she has a blameless character.”
20. The test to be applied on deportation is the well established test in the case of R-v – Nazari [1980] 3 All ER 880. It is a two-stage test. Firstly, the Court has to ask itself whether the accused’s continued presence in Jersey is to the Island’s detriment. Secondly, it has to consider the effect which a deportation order would have upon innocent persons who are not before the Court. Dealing with the first issue, there is little difficulty in this case. The applicant was born and brought up in Portugal. He had convictions in Portugal. It is not entirely clear what they were but the Crown accepted that they were to be treated as those admitted by the applicant in the Social Enquiry Report, namely appearances before the courts in Portugal, about 7 times in a 12 year period, namely for breaking and entering into public houses to get money for his drug habit. He had been released from a period of custody in May, 1999, for his last offence.
21. He came to Jersey in May, 2000. He was convicted before the Magistrate’s Court in November, 2000, of a grave and criminal assault for which he was sentenced to 70 hours community service. He worked in the hotel industry. On 1st February, 2001, he returned to Portugal in order to get married. He came back to Jersey on 28th February, and began a labouring job. On the 20th May, 2001, he committed the offence of causing a breach of the peace to which we have referred. At the end of May, 2001, he went back to Portugal, where a nephew was very seriously ill, and sadly has since died. The applicant returned to Jersey on

28th June, and 6 days later he committed the robbery to which we have referred. Since then he has been in custody. In short, by the time of the robbery the applicant had been in Jersey for just over 1 year and during that time had committed two other offences as well as the serious offence of robbery. Furthermore, he had a history of offending in Portugal. He was described by the Social Enquiry Report as being at high risk of re-offending.

22. The Inferior Number found that his continued presence in the island would be detrimental to the interests of the community. We have no doubt that they were absolutely right to so conclude, and Mr Harris has not sought to persuade us otherwise.
23. The real issue in this case is the second part of the test namely the effect which a deportation order would have upon innocent persons, in this case his family. In particular the Court must bear in mind the right to respect for family life conferred by Article 8 of The European Convention on Human Rights. As we have said the applicant married in February, 2001, his wife was Christine Smith, a British woman. She has three children who are now aged 13, 18 and 22. The 22 year old lives separately and has a child of her own. The 18 year old daughter is now employed. Accordingly, it is on the 13 year old boy, and Mrs Mendes herself, that we must concentrate our attention, because they are now the applicant's immediate family, in the sense that they live with him and would depend on him if he were released.
24. The 13 year old boy is at secondary school in Jersey. He will take his GSE exams in the summer of 2006. None of the children speak any Portuguese nor does Mrs Mendes speak Portuguese. The applicant is due to be released in the early part of March, 2004. It is clear that, at that stage, Mrs Mendes will be faced with a very difficult choice. If she accompanies her husband to Portugal she will have to decide whether to take her son with her or not. If she does it will uproot him completely from everything he has known so far, and move him to a place where he does not speak the language. On the other hand she is concerned about leaving him here in the care of his father because at present he has limited contact with his father, namely two hours a week. She does not believe that the father would be suitable to have full time care of her son.
25. Alternatively, she would have to choose to remain here in Jersey for so long as her son needed her, before, presumably, accompanying her husband to Portugal or elsewhere. Mr Harris has updated us on events since sentencing in January, 2002. The applicant is now on day release and has been working in the east of the Island; since then he has seen his wife and certainly the two younger children every day. He has also been granted two periods of compassionate release, each one lasting some 10 days when his wife was ill. During those two periods he has looked after the family as a father, the bonding process has developed, and the relationship between him and the step-children has become ever closer.

26. We accept that the relationship has developed as Mr Harris has outlined, but it is clear to us that the Inferior Number anticipated that the relationship would continue, because it referred to the choice which would face Mrs Mendes when the applicant was released. Mr Harris has accepted that the Court below conscientiously carried out the very difficult balancing exercise which has to be undertaken in a case such as this.
27. This Court too has given the matter anxious consideration. We have borne in mind all the very difficult issues which may arise and the points made by Mr Harris. We have also borne in mind the right to family life conferred by Article 8. That is, of course, not an absolute right; it is a question of proportionality and a question of balancing the detriment to the Island by his continued presence against the hardship which will be suffered by the family.
28. Having given the matter our anxious consideration we see no reason to differ from the conclusions of the Inferior Number. The decision of the Inferior Number is only a recommendation; it is ultimately a matter for the Lieutenant-Governor as to whether he makes an order. If there were to be a change of circumstances by the time of the applicant's release, it would, of course, be open to him to make fresh representations to the Lieutenant-Governor which we have no doubt the Lieutenant-Governor would carefully consider. But we repeat we can see no flaw in the reasoning of the Inferior Number and having considered the matter anxiously ourselves we do not think that they got the balance wrong.
29. Accordingly, we grant leave to appeal, because this is clearly a matter which merited leave but we refuse the appeal. *Authorities Cuthbertson & Cairney -v-AG* (18th September, 1975) Act of Court of Appeal. *R -v- Nazari* [1980] 3 All ER 880. *Attorney General -v- Doyle* (1978) JJ 93 CA. *R -v - Medway* [1976] 1All ER 527. *Blackstone's Criminal* (2002 Edition) – paragraph D23.20. *R -v- Docherty* (1997) 2 Cr. App. R.218.

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