

JERSEY / JUDGMENT

Merikhi -v- AG [2016] JRC

187 (04 October 2016)

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JUDGMENT

THE commissioner: 1. This is an appeal against a sentence of 10 weeks' imprisonment suspended for 12 months imposed by the Assistant Magistrate on 5 th May, 2016, for one offence of having entered the Bailiwick without leave contrary to section 24(1)(a) of the Immigration Act 1971 ("the 1971 Act") as applied in Jersey pursuant to the Immigration (Jersey) Order 1993. 2. At the conclusion of the hearing, the Court announced that the appeal was dismissed but said that it would give its reasons later because this was the first such offence which had come before the Royal Court. This judgment constitutes those reasons. The facts 3. The facts as outlined to the Assistant Magistrate are as follows. Mrs Amanda Marreakhy is the sister-in-law of the appellant, being married to his brother Mr Arsalan Marreakhy. On 29 th January, 2016, she drove to Portsmouth in her car and caught a ferry to France. The following day, she arrived at St Malo in the same car in order to catch the Condor ferry to Jersey. When she drove on to the ferry, the appellant was concealed in the boot of the vehicle. 4. On arrival at Jersey harbour, her vehicle was stopped for examination by Customs Officers and she stated that she had nothing to declare. She was then required to open the boot of the vehicle and Customs Officers discovered the appellant lying on his back in the boot of the car. He was assisted from the boot and stated to the Officers that he was an Iranian national. He was arrested, as were Mrs Marreakhy and her husband, who was identified as being present at the harbour and awaiting the arrival of the vehicle. 5. The appellant was subsequently interviewed by Customs Officers. He informed the Officers that he had been at "the jungle" in Calais. He said that he had been approached by a people smuggler and informed that his family had paid for a safe passage to the UK. He said that he had been driven for several hours in a car before getting into the boot of the vehicle. He said that he had not seen the driver of the vehicle and did not know who was actually facilitating his travel. Shortly following his discovery in the boot of the vehicle, he made an application for asylum. At the time of the hearing before the Assistant Magistrate, that application had not been determined. The proceedings 6. On 2 nd February, the appellant, represented by a duty advocate, pleaded guilty in the Magistrate's Court to a single charge of having entered the Bailiwick without leave on 30 th January, contrary to section 24(1)(a) of the 1971 Act, as applied in Jersey. 7. On a later date, having been granted legal aid, the appellant applied for leave to withdraw his guilty plea. That application was based on the fact that section 31 of the Immigration and Asylum Act 1999 , as

extended to Jersey by the Immigration and Asylum Act 1999 (Jersey) Order 2003 contains a defence to certain offences in the following terms:- "31 Defences based on Article 31(1) of the Refugee Convention

- (1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the [Bailiwick of Jersey] directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he -
 - (a) presented himself to the authorities in the [Bailiwick of Jersey] without delay;
 - (b) showed good cause for his illegal entry or presence; and
 - (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the [Bailiwick of Jersey].
- (2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the [Bailiwick of Jersey], subsection (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country.
- (3) The offences to which this section applies are those -
 - (a) of fraud,
 - (b) of uttering a forged document,
 - (c) under section 24A of the 1971 Act (deception), or
 - (d) under section 26(1)(d) of the 1971 Act (falsification of documents), and any attempt to commit any of those offences. ...
- (6) "Refugee" has the same meaning as it has for the purposes of the Refugee Convention. ...
- (10) The States may by Regulations amend subsection (3) by adding offences to those for the time being listed there." 8. The Assistant Magistrate rejected the application on the ground that the offence with which the appellant was charged was not one of the offences listed in section 31(3). It was not specifically listed, nor could it be said that the offence of the appellant was one of fraud so as to fall within section 31(3)(a). 9. The appellant appealed by way of case stated against that ruling and this matter came before the Bailiff sitting as a single judge (as it was a point of law) on 7 th July. The Bailiff dismissed the appeal at the conclusion of the hearing but his reasons for doing so are not yet available. 10. Following his rejection of the application to vacate the guilty plea on 5 th May, the Assistant Magistrate proceeded immediately to a sentencing hearing. At the conclusion of this he gave a short judgment, parts of which we shall refer to later. He concluded that the offence crossed the custodial threshold and said in passing:- "It must clearly be understood by people inside and outside of the Island that breaching the Island's immigration laws is a serious matter and will lead to offenders facing a custodial sentence." 11. He went on to conclude that the appropriate sentence was three months in prison but that, taking into account the time

spent in custody, a period of 10 weeks was appropriate and that, taking all the personal factors into account, he could suspend it. He therefore imposed the sentence referred to earlier, namely 10 weeks' imprisonment, suspended for 12 months. 12. The appellant's application for asylum was, we were informed, subsequently granted by the Lieutenant Governor on 4 th July, 2016, when the appellant was given leave to enter for a specific period, although neither the prosecution nor the defence were able to inform us whether this was two years or five years. However, nothing turns on that; the essential point is that he was subsequently granted leave to enter. Grounds of appeal 13. The notice of appeal is based solely on the ground that the sentence passed by the Assistant Magistrate was manifestly excessive and/or wrong in principle. However that simple ground was expanded in Advocate Landick's helpful skeleton argument and we would summarise the headings under which he makes his submissions as follows:- (i) The Court should have acknowledged the illogicality and unfairness of the fact that the section 31 defence did not apply to offences under section 24(1)(a) and should impose a very lenient sentence to reflect this illogicality and unfairness. (ii) The Assistant Magistrate was wrong to impose a deterrent sentence. (iii) The Assistant Magistrate was wrong to categorise the offence as passing the custodial threshold merely because it was an "intentional illegal entry" when that was an inherent element of the offence. (iv) The Assistant Magistrate wrongly ruled out a fine on the ground that the Appellant was unable to pay it. (v) The Assistant Magistrate wrongly rejected the possibility of community service. (vi) The Assistant Magistrate failed to give full credit for the guilty plea. Putting all these matters together, Advocate Landick submitted that a binding over order was the correct sentence on the specific facts of this case. Ground (i) 14. Advocate Landick submitted that, if the appellant had sought to gain entry into Jersey by use of, say, a forged passport, he would have been able to put forward an arguable defence under section 31 because that was an offence specified in section 31(3). It was illogical and unfair that the defence under section 31 was not available to the simple offence under section 24 of entering without leave. It was no more morally culpable for a person to try and gain entry by hiding in a boot than to try and gain entry by telling lies or using a forged document. Furthermore, the terms of section 31 appeared to be in narrower terms - and therefore did not fulfil the UK's treaty obligation - than Article 31 of the Refugee Convention, which provides:- "(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." 15. The Court acknowledges the force of the point made by Advocate Landick. It is hard to understand the logic of allowing the possibility of a defence under section 31 in the case of fraudulent entry or entry on the basis of a forged document but not in the case of simple entry without leave. However, where we part company from him is on the effect of this point. 16. Advocate Landick argues that, because it is illogical and unfair, the Court should impose only a nominal penalty to reflect the fact that there would or might have been a defence under section 31 had he sought illegal entry in a different manner. We do not agree that the Court could properly

adopt this approach. The Court must take the law as it is. It is not proper for the Court to act in a manner more consistent with what it thinks the law ought to be than what the law actually is. Advocate Landick stated that, because of the unfairness of the section 31 defence not applying to offences under section 24 (i.e. entry without leave), the prosecuting authorities in England and Wales did not usually prosecute for offences under section 24. As Advocate Maletroit pointed out, there is no evidence before the Court to support that assertion but, even if it is correct, the fact is that Jersey is a separate jurisdiction and the prosecuting authorities here are perfectly entitled to prosecute if they consider that an offence under Jersey law has been committed. 17. Section 24, as it applies in Jersey, provides that entry without leave may attract a penalty of up to six months' imprisonment. That is the expressed view of the legislature and it would in our judgment be quite wrong for the Court to adopt a policy of imposing only a nominal penalty simply because it thinks that the statutory defence under section 31 should be equally applicable to offences under section 24. 18. It follows that we reject Advocate Landick's argument on this ground. We would add that it is by no means clear to us that a defence under section 31 would have been available on the facts of this case even if section 31 were applicable to charges under section 24. Section 31(1) applies only where the refugee has come 'directly' from a country where his life or freedom was threatened. The appellant had on any view spent some time in France and therefore it is not clear that he came 'directly' from Iran. Furthermore, section 31(2) says that the statutory defence does not apply where the refugee has stopped in another country unless he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country. France is party to the Refugee Convention and it is not clear how the appellant would show that he could not reasonably have expected to be given protection under the Refugee Convention in France but could expect to be given protection in the UK when they are both party to the same Convention. Grounds (ii) and (iii) 19. For convenience we take these two points together as they are closely related. 20. Advocate Landick submits that, although he did not say so in specific terms, the Assistant Magistrate was imposing a deterrent sentence. He derives this conclusion from the passage of the Assistant Magistrate's judgment cited at para 10 above. He went on to argue that a judge should not impose a deterrent sentence without satisfactory evidence of the prevalence of the particular offence so as to justify deterrence. He referred to the 2016 edition of Archbold at para 5-467 which reads as follows (references omitted):- "In R -v- Oosthuizen ... it was said that, having regard to the 'Over-arching principles; Seriousness' guideline issued by the Sentencing Guidelines Council... a judge should not, in the absence of statistics or other evidence demonstrating a prevalence greater than that nationally of a particular type of offence (which evidence could and should be made available to the court by the CPS, the local Criminal Justice Board or otherwise), assume that prevalence of that offence was more marked in the locality of the court than it was nationally; to do so would be particularly hazardous where a guideline (whether in the form of a decision of the Court of Appeal or issued by the Sentencing Guidelines Council (Sentencing Council for England and Wales)) or specific guidance in relation to particular offences was intended to be of national application. The importance, having regard to the guideline on seriousness, of a

judge having sufficient evidence of local prevalence of offences of the kind committed to justify the inclusion of an element of deterrence in the sentence (on this account) was reiterated in *R -v- Lanham and Willis and R -v- Moss...*" 21. We do not agree that the Assistant Magistrate was imposing a deterrent sentence as such. The use of such expression is more correctly confined to the situation where a court imposes a sentence above the normal tariff specifically in order to deter. That is not the situation here. We were informed that this was the first prosecution for an offence under section 24 and accordingly there is no established tariff. The task for the Assistant Magistrate (and for this Court) is to consider the appropriate sentencing policy for such an offence. In assessing that policy, the Court may of course take into account, amongst many other factors, the need to deter repetition. To say, as the Assistant Magistrate did, that offences of this nature are likely to attract imprisonment is to do no more than the Royal Court regularly does in relation to drug trafficking offences. Advocate Landick argues this is to negate the legislation because that envisages the possibility of a fine. We do not accept that argument. It is also possible to fine for drug trafficking offences, but the Court has announced that its policy is normally to impose a prison sentence. We do not interpret the Assistant Magistrate's comments as being anything other than seeking to establish the Court's general policy for offences of this nature. 22. In any event, the extract from Archbold would have no direct application in this jurisdiction. Jersey is a separate jurisdiction and is entitled to set its own sentencing levels, which may take into account an element of deterrence which is specific to the Island. Thus in *Bryce-Richards-v-Attorney General*

[2006] JLR N16;

[2006] JCA 010 the Court of Appeal said at para 112:- "In relation to the latter consideration [i.e. the need to protect the reputation of Jersey as a financial centre] we take the view that the Royal Court was entitled, indeed bound, to have in mind the reputation of this Bailiwick. It is often appropriate for deterrent sentences to be passed for specific offences for particular geographical areas or particular jurisdictions and an appellate court would not likely interfere where a deterrent sentence has been passed with good reason. The Commissioner emphasised in his sentencing remarks that the sentence which would be passed was intended to deter others "minded to breach the trust reposed in them". The approach of the court was an echo of what was said in *Young -v- AG*

[1999] JCA 013 where this Court held that any sentencing court must have regard to the effect of the offences on the reputation of Jersey as a financial centre." (First emphasis added). 23. Advocate Landick was also critical of the passage in the Assistant Magistrate's sentencing remarks where he said:- "Because this was an intentional illegal entry, an entry without leave, it is, to my mind, clear that it crosses the custodial threshold." 24. Advocate Landick correctly pointed out that it was an integral element of an offence under section 24 that the illegal entry be intentional. Thus the relevant wording of section 24(1) is:- "(1) A person who is not a British citizen shall be guilty of an offence punishable with a fine or with imprisonment for not more than six months, or with both, in any of the following cases:-

- (a) if contrary to this Act he knowingly enters the Bailiwick of Jersey... without leave." [Emphasis added] 25. We accept that the words used by the Assistant Magistrate may be said to infer that the offence only crossed the custodial threshold because the illegal entry was intentional. However, when taken in the round, it is clear to us that what the Assistant Magistrate was in effect saying was that, for an offence under section 24, custody would normally be appropriate. 26. We entirely endorse that sentiment. Jersey lies only a short distance from the French coast. It is clear that there is a real risk of the Island being regarded as a form of back door entrance into the United Kingdom. It is in our judgment entirely proper that the courts of this Island should have regard to the importance of seeking to ensure that the Island is not so used by those seeking illegal entry to the United Kingdom. We therefore endorse the Assistant Magistrate's view that a breach of the Island's immigration laws is a serious matter and will lead to offenders facing a custodial sentence. That is not to negate the statute. There may be exceptional cases where a fine or other non-custodial sentence is appropriate, but we consider that such circumstances are likely to be rare. Grounds (iv) and (v) 27. Again we think it convenient to take these two together. 28. Advocate Landick referred to the following passage from the Assistant Magistrate's sentencing remarks:- "The maximum sentence for this offence is six months in custody and/or a fine. He has no funds with which to pay a fine. This matter is too serious to consider a binding over order. There is no apparent need to consider probation reports or a probation order and, with his restricted English and his physical disability, community service does not seem to be an option." 29. Advocate Landick submitted that, if a fine is the appropriate penalty, it is an incorrect sentencing approach to impose a prison sentence merely because a person has no funds with which to pay a fine. That was the implication of the Assistant Magistrate's remark. Similarly, if community service was an appropriate sentence as an alternative to custody, it would be discriminatory and wrong to impose a prison sentence rather than community service merely because an offender had restricted English and a physical disability. 30. Again, we can accept that the language used by the Assistant Magistrate could be read in the way suggested by Advocate Landick. However, this was an *ex tempore* judgment and is not to be interpreted as if it were a statute. The ultimate decision for us is whether the sentence imposed by the Assistant Magistrate was manifestly excessive or wrong in principle. We consider that the imposition of a fine would have been wholly inadequate to reflect the seriousness of the offence. We take the same view in relation to community service and the Assistant Magistrate had in any event earlier made it clear during exchanges with Advocate Landick that he would never send someone to prison just because it was impractical to impose a community service order. Ground (vi) 31. Finally, Advocate Landick was critical of the fact that the Assistant Magistrate appeared not to have given the appellant full credit for an early guilty plea on the basis that the Assistant Magistrate said when passing sentence:- "Mr Merikhi entered a guilty plea at an early stage, albeit in these circumstances he had little option but to do so. There is some credit for a guilty plea." 32. Advocate Landick submitted that it was wrong not to give full credit for a guilty plea even where there was little option for a defendant but to plead guilty. We do not think that this is the occasion in which to consider that submission. That is because the

Court is in no doubt that, even if full credit for a guilty plea is given, the sentence of the Assistant Magistrate cannot be criticised.

Conclusion

33. The test on appeal is whether the sentence was wrong in principle or manifestly excessive. For the reasons which we have given, the sentence in this case was not wrong in principle in that a prison sentence was appropriate. Nor can a period of 10 weeks be said to be manifestly excessive. On the contrary, we consider that the sentence was entirely reasonable and indeed the appellant was quite fortunate that it was suspended and that it was not longer. It is for these reasons that we dismissed the appeal. Authorities Immigration Act 1971. Immigration and Asylum Act 1999. Immigration and Asylum Act 1999 (Jersey) Order 2003. Archbold 2016 Edition. Bryce-Richards-v-AG

[2006] JLR N16. Bryce-Richards-v-AG

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