

JERSEY / JUDGMENT

Metzner -v- AG [2010]

JRC 053 (15 March 2010)

[2010] JRC 053

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Court of Appeal (Amendment No. 8) (Jersey) Law 2008 , which came into effect on 3rd August, 2009. This predated the decision of the Commissioner and the presentation of this *doléance* . This aspect only came to my attention in the course of preparing this judgment. However, as I have rejected the applicant's argument in any event, I do not think anything turns on it. 9. In relation to *doléances* in criminal matters, he refers to Article 22 and the proviso to Article 24(1) of the 1961 Law and points out, correctly, that the effect of these provisions is that the only appellate jurisdiction of the Superior Number in criminal matters is on an appeal against sentence imposed by the Inferior Number in certain defined circumstances. The *doléance* in this case is not an appeal against sentence and therefore, he says, must fall within the jurisdiction of a Court of Appeal. 10. He accepted that, if he was correct, the decisions in *Re Lagadec*

[1996] JLR N 9c and *Re AG-v-Michel and Gallichan*

[2006] JRC 089 , where the *doléances* in criminal matters were heard before the Superior Number, were incorrect, although he pointed out that no-one had taken the point as to the correct forum in those cases. 11. Finally, he pointed out that the Superior Number was an inappropriate forum for a *doléance* such as this. The decision made by the Commissioner was as to costs, which is a matter reserved under the Royal Court (Jersey) Law 1948 to the Bailiff. The Jurats have no jurisdiction to decide matters of costs. The effect of this *doléance* being heard before the Superior Number would be that the Jurats would be deciding a question of costs, which was prohibited by the 1948 Law. Decision 12. I pay tribute to the ingenuity of the argument put forward by Advocate Jones but in my judgment it is misconceived. Although occasionally judges - and I find that I am one of them as mentioned below - have used the word appeal in the context of a *doléance* , I am in no doubt that a *doléance* is not in fact an appeal in the strict sense of the word and is certainly not one for the purposes of the 1961 law. 13. The two leading cases on *doléance* in recent years are *Re Barker* [1985-86] JLR 284 and *Re Harbours and Airport Committee*

[1991] JLR 316 . In *Barker* the applicant was aggrieved by the decision of the Royal Court refusing to grant him a *Remise de Biens* and ordering that a *dégrèvement* should proceed. Under the terms of the *Loi (1839) sur les Remises de Biens* such a decision by the Royal Court was "*finale et sans appel* ". The court did not analyse the nature of a *doléance* but certainly at

no stage did it refer to it as an appeal. On the contrary, at 288 the court said:- "Hence, there being no appeal, this *doléance* is presented to this court..." As to the grounds for a *doléance* the court said at 291:- "Before allowing a *doléance*, the court has to be satisfied that there has been an excess of jurisdiction or a breach of natural justice which needs to be remedied, as a *doléance* is a remedy 'in last resort' when all other doors are closed and a grave injustice will remain unless remedied. This being so, the onus to show this is on the petitioner and can only be described as a heavy burden." 14. The leading authority on *doléance* is *Re Harbours and Airport*, a decision of Tomes, Deputy Bailiff, a judge well versed in the customary law and procedure of this Island. The case involved a decision of the Inferior Number of the Royal Court on a point of law raised on appeal from the Petty Debts Court. Under the provisions of the relevant statute, there was no further right of appeal from the Inferior Number. 15. Tomes, Deputy Bailiff carried out an exhaustive review of the texts and authorities concerning *doléance*. Although the head note refers to the dismissal of the appeal, a careful scrutiny of the judgment of Tomes DB makes it clear that, although he occasionally used the word appeal, he regarded the *doléance* procedure as more akin to judicial review. I would cite the following passages:- (i) Having considered the observations of Le Gros in his *Droit Coutumier de Jersey*, the Deputy Bailiff said at 325:- "For all practical purposes, therefore, we are concerned only with Le Gros' second category, where there is no right of appeal but the judgment contains a manifest judicial error, i.e. judicial review". (ii) At 329, having referred to a dictum of Denning LJ in *R-v-Northumberland Compensation Appeal Tribunal Ex p Shaw* 1952 1 All ER 122 at 127 to the effect that judicial review was not usurping to the court an appellate jurisdiction which had not been given to it, because the court had an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity but in a supervisory capacity, the Deputy Bailiff went on to say this:- "r Whelan argued that the *doléance* is analogous to the writ of certiorari and is available to bring before the Superior Number the decision of the Inferior Number in order that the Superior Number may exercise a supervisory jurisdiction, review the decision of the Inferior Number, and intervene to correct a decision which is erroneous in point of law. We agree that the *doléance* is analogous to the writ of certiorari but the analogy is not complete because the Queen's Bench does not substitute its own views for those of the Inferior Tribunal, as an appellate court would do, but exercises its control by means of a power to quash the decision, leaving it to the inferior tribunal to hear the case again and in a proper case commanding it to do so. In the case of the *doléance*, the Privy Council or the Superior Number decides the issues between the parties. The *doléance* provides an appeal where there is none. ..." (iii) At 332 the court said:- "Mr Sinel argued that Sir John Awdry's comment indicates quite clearly that the *doléance* applies only where someone is refused access to justice. We do not read it in that way. We take the broader view that it is a means of obtaining judicial review where no other means is available." Later on the same page the court said:- "If Commissioner Le Cras had wrongly decided the question, then a *doléance* was the only method 'in last resort' whereby the Committee could obtain a judicial review of the decision." (iv) Finally the court summarised its view of *doléance* at 334 as follows:- "In our judgment, therefore, a *doléance* is not to be regarded as

a personal attack on the integrity and honour of the judge; it is not 'odious'; it is a method of obtaining judicial review of a decision where there is no right of appeal and is to be allowed where the judgment contains a manifest judicial error; it is to be compared with the prerogative writs of certiorari and mandamus; it implies no disrespect towards the judge whose decision is thus reviewed; it is available as a remedy where a court makes an error of fact or of law..." I accept that in one of the passages there the Deputy Bailiff refers to *doléance* as an appeal but, when read as a whole, I consider that the clear tenor of his judgment is that it is in fact a form of judicial review, although it goes further because the Superior Number can reach its own decision rather than simply remit the matter to the Inferior Number. 16. Lagadec was on all fours with this case. The *doléance* was brought to try and overturn the decision of the trial judge to refuse to award costs to the defendant after he had been acquitted before the Royal Court. It is true that no point was taken as to whether the Superior Number was the correct tribunal but no-one suggested it was not and Bailhache, Bailiff did not use words which suggested that the *doléance* was any form of appeal. 17. In Michel a petition of *doléance* was brought to challenge the decision of the trial judge to refuse the defendant an adjournment of a criminal trial. Again, there was no suggestion that the Superior Number was the wrong tribunal to consider such a point. It is true that in delivering judgment, I used the word appeal but that observation must be seen in context. Para 9 of the judgment said as follows:- "We regard the cases [Barker and Harbours and Airport Committee] as not being inconsistent. Essentially the position is this. A *doléance* is not an ordinary appeal. It is a review and the Superior Number may only intervene to overturn a decision where the petitioner satisfies the heavy burden of showing that a grave injustice will result whether it be from an excess of jurisdiction, a breach of natural justice, an error of law or some other manifest judicial error." 18. I am in no doubt that a *doléance* is a form of judicial review. I accept, as did Tomes, Deputy Bailiff in Harbours and Airport Committee, that the analogy is not exact because the power of the court on hearing a *doléance* is wider than upon judicial review as it can reach its own decision and overturn that of the court below. A *doléance* does therefore have certain characteristics which are more redolent of an appeal. Nevertheless, the circumstances in which a *doléance* can succeed are extremely limited as set out in the cases and the whole procedure is more akin to that of judicial review. Furthermore it would be somewhat surprising if, in cases where a statute has provided that there is to be no right of appeal, the court were to ignore that and say that there was a right of appeal, although it happened to carry the label "*doléance*". 19. Of course even if some judges have occasionally in passing referred to *doléance* as a form of appeal, Advocate Jones can only succeed if he can say that a *doléance* is an appeal for the purposes of the 1961 Law. The Court of Appeal is a creature of statute and only has the jurisdiction conferred by the 1961 Law or conferred upon it by any other statute. In criminal cases the only right of appeal conferred by the 1961 Law is that referred to at Article 24 and this applies only to a person "convicted on indictment". No other person has a right of appeal under the 1961 Law in a criminal case. Other statutes confer rights of appeal in other circumstances eg Article 90 Police Procedures and Criminal Evidence (Jersey) Law 2003, but it is accepted that none of them

apply here. Thus, even if one considers a doléance to be some form of appeal, the fact remains the 1961 Law does not confer upon the Court of Appeal jurisdiction to hear a challenge to a decision of a judge of the Royal Court to refuse to award costs following an appeal. 20. As to Advocate Jones's argument referred to at paragraph 11 above, this cannot provide the Court of Appeal with original jurisdiction, which does not otherwise exist, to hear a doléance . The rôle played by individual members of the Superior Number in hearing the doléance will fall to be determined in accordance with Article 15 of the 1948 Law. 21. For these reasons I held that the procedure whereby doléances have always been brought before the Superior Number is the correct procedure. The Court of Appeal has no jurisdiction to hear a doléance . It is not an appeal. I therefore directed that the matter be listed for hearing before the Superior Number in due course. Authorities Medicines (Jersey) Law 1995. Court of Appeal (Jersey) Law 1961. Ex p Nicolle (1879-80) L. R. 5 App Cas . 346. Court of Appeal (Amendment No. 8) (Jersey) Law 2008. In re Lagadec

[1996] JLR N 9c. AG-v-Michel and Gallichan

[2006] JRC 089 . Royal Court (Jersey) Law 1948. In the matter of Doleance and Barker [1985-86] JLR 284. Re Harbours and Airport Committee

[1991] JLR 316 . Loi (1839) sur les Remises de Biens . R-v-Northumberland Compensation Appeal Tribunal Ex p Shaw 1952 1 All ER 122 . Police Procedures and Criminal Evidence (Jersey) Law 2003. Page Last Updated: 02 Aug 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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