

JERSEY / JUDGMENT

Metzner -v- AG [2010]

JRC 106 (07 June 2010)

[2010] JRC 106

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

judgment

the bailiff: 1. This is a petition of doléance brought by Kevin Metzner ("the applicant") in respect of a decision by Bailhache, Commissioner, given on rd November, 2009, whereby he refused to award the applicant certain costs in connection with criminal proceedings which had been initiated against the applicant.

Background

2. The relevant facts can be shortly stated. We take these substantially from the Commissioner's judgment. The applicant was stopped by Customs Officers on 14 th May, 2009, at Elizabeth Harbour Terminal, having driven his car off the ferry from Portsmouth. He explained that he was on a short holiday to visit a friend who lived in Jersey. He stated that the friend had often visited him in England and had in fact borrowed his car a few days before. Customs found traces of cocaine on the steering wheel and on the passenger door. The applicant suggested that his friend must have been responsible for that. The officers then removed the spare wheel and an X-Ray revealed the presence of packages secreted inside the tyre. 3. The applicant was arrested. Six packages were found inside the tyre containing white tablets and pink powder. The tablets appeared to be ecstasy but were in fact benzylpiperazine (BZP) which is a synthetic derivative used for treating worms in animals. It is a medicinal product which was not controlled under the Misuse of Drugs (Jersey) Law 1978 at the material time. 4. The applicant was interviewed the next day but answered no comment to the questions put to him. He was charged with an offence of importing a medicinal product contrary to Article 8(3) of the Medicines (Jersey) Law 1995 ("the 1995 Law") and remanded in custody. Later he was presented before the Magistrate and reserved his plea. On 15 th June, 2009, there was an uncontested committal to the Royal Court on the papers. On 31 st July, 2009, he appeared before the Royal Court on Indictment and pleaded guilty to importing BZP without a product licence contrary to Article 8(3) of the 1995 Law. He was remanded for sentence to 4th September, 2009. 5. On that date, after the Crown Advocate had outlined the facts, defence counsel began mitigation. During counsel's address it became clear, for the first time, that the position of the applicant was that he knew nothing about the packages in the spare wheel. His counsel had advised that the offence

under Article 8(3) of the 1995 Law was an absolute offence and that no mens rea was required. This view of the law was doubted by the Bailiff as presiding judge who directed that the case should be adjourned for argument. 6. It was subsequently agreed that the case should proceed on the basis that mens rea was required and accordingly the applicant was given leave to change his plea to one of not guilty on 11 th September, 2009. He was remanded to a plea and directions hearing on 21 st October, 2009, and for trial on 23 rd November, 2009. 7. Following the applicant's change of plea to one of not guilty, the Crown undertook a review of the evidence and requested certain enquiries to be undertaken such as the analysis of telephone records, the forensic analysis of three hairs found on the pill packaging and other matters. Following the conclusion of those enquiries the Crown reached the conclusion that the evidential test had not been met and on 13 th November, 2009, the proceedings were discontinued and the applicant was discharged from the prosecution. 8. The matter subsequently came before the Commissioner on the matter of costs. Skeleton arguments were filed and there was a hearing. Advocate Gollop conceded that the applicant was entitled to his costs for the period from when he was given leave to change his plea (11 th September) to the date of his discharge from the prosecution (13 th November). Advocate Jones conceded that an order for costs should not be made for the period from the applicant's guilty plea on Indictment (31 st July) to the date when he was given leave to change his plea (11 th September). The only point at issue before the Commissioner was whether costs should be awarded to the applicant from the date of his arrest (14 th May) to the date of Indictment (31 st July). 9. The Commissioner reminded himself that the relevant statutory provision was Article 2(1)(c) of the Costs in Criminal Cases (Jersey) Law 1961 which provided:- "(1) Subject to the provisions of this Article, where any person is prosecuted or tried before a court to which this Article applies, the court may; (a) if the accused is convicted, order the accused to pay the whole or any part of the costs incurred in or about the prosecution and conviction; (b) order the payment out of public funds of the costs of the prosecution; (c) if the accused is discharged from the prosecution or acquitted, order the payment out of public funds of the costs of the defence". 10. The Commissioner also recorded that counsel were agreed that, although the Court had a discretion, costs should ordinarily be awarded to a person discharged from a prosecution. However, one of the circumstances where costs would not necessarily be awarded was where it could be said that the defendant's own conduct had brought suspicion upon himself and had misled the prosecution into thinking that the case against him was stronger than it in fact was. In AG-v-Bouchard

[1989] JLR 350 it was held that these phrases were to be read conjunctively so that the defendant's conduct should be such, not only as to have brought suspicion upon himself, but also to have misled the prosecution into thinking that the case against him was stronger than in fact it was. In his judgment the Commissioner recorded that there was no doubt that the applicant's conduct was such as to bring suspicion on himself as he had driven the car which contained prohibited medicinal products concealed in the spare tyre and where there were traces of cocaine found. The real issue was whether he had misled the

prosecution. The Commissioner recorded that Advocate Jones had submitted that the applicant did and said nothing to that effect. He had simply exercised his right of silence on legal advice. The Crown on the other hand contended that the applicant's silence had indeed misled the prosecution. He had had every opportunity to indicate that he did not know of the presence of the tablets and powder concealed in the spare wheel, but had not taken those opportunities. If his position had been made clear at an earlier stage, the prosecution would have been able to give consideration to the new situation. 11. The Commissioner summarised his decision as follows in paragraph 11 of his judgment:- "I prefer the submissions of the Crown Advocate. A defendant is of course not obliged to say anything to the police or other investigating officers, but this right is in fact a privilege against self-incrimination. Nothing prevents a defendant from giving information which might exonerate him. He cannot be compelled to give such information but, if he fails to do so, and as a consequence the investigating officers are misled into thinking that their position is stronger than in fact it is, there seems to me no reason why the public should pay the price of that silence. In the exercise of my discretion I decline to make an order for costs in favour of the applicant other than for the period conceded by the Crown Advocate, namely 11th September to 13th November 2009." *Doléance* 12. There is no right of appeal against a costs order made following an acquittal or discharge from a prosecution. Where there has been a conviction, a costs order may be treated as part of the sentence so as to confer a right of appeal. However, even in those circumstances, an appellate court will be very slow to intervene in what is a discretionary decision. As McNeill J A said in *Self-v-AG*

[2010] JCA 061 :- "Leaving aside instances where the applicant is successful on appeal, it is only in the most exceptional circumstances that an appellate court will interfere with an award of costs in the court below. Again, it is only in the most exceptional circumstances, usually when the disappointed party requests the court below to do so, that the court awarding costs will give written reasons for the decision. Accordingly, it is only where it is manifest that no court acting reasonably could possibly have reached the determination made by the court below that an appellate court will interfere ..." 13. Thus, even where there is a right of appeal against a costs order, the threshold for a successful appeal is very high. Where there is no right of appeal, the threshold must by definition be even higher as otherwise the Court will simply be conferring a right of appeal when none is conferred by law. This is reflected in the jurisprudence concerning *doléance*. It is made clear in *Re Barker* [1985/86] JLR 284 at 291, that *doléance* is a remedy of last resort when all other doors are closed and a grave injustice will remain unless remedied. Discussion 14. Essentially Advocate Jones repeated the submissions which he had made before the Commissioner. He argued that simply to exercise a right of silence could not possibly mislead the prosecution. The prosecution were not entitled to make any assumption or draw any inference from the fact that a defendant remains silent and exercises his right against self incrimination. He added that the Commissioner's decision would lead to considerable practical problems because the practice of Jersey Advocates was invariably

to advise persons being interviewed following arrest that they should exercise their right of silence until details of the case against them were known; and this was almost invariably not the case at that stage. Such advice could properly be given because there was no disadvantage to a defendant in Jersey in answering no comment at interview because, under our system, the judge must direct the jury that they are not entitled to draw any adverse inferences from such silence. 15. Advocate Gollop, on the other hand, repeated his assertion that the appellant had misled the prosecution into thinking that the case against him was stronger than it was because he had at no stage asserted that he had not been aware of the existence of the tablets in the spare tyre. Had he said this, the prosecution would have carried out the investigations which they subsequently did and the prosecution would have been dropped at a much earlier stage, thereby avoiding the costs which were in fact incurred. He emphasised that he did not rely solely on the applicant's silence at interview. When the tablets were first found, the applicant expressed no surprise nor was there any immediate denial of knowledge which is what one would have expected if an innocent man was suddenly to be informed that there were tablets hidden in his spare tyre. Furthermore, the applicant had maintained his silence all the way to the sentencing hearing. This was not a case where, although a defendant had made no comment at interview, his Advocate had subsequently informed the prosecution that the real issue in the case was knowledge because he denied knowing of the tablets. Advocate Gollop accepted that this was because the defence had wrongly taken the view that lack of knowledge was irrelevant as mens rea was not required but said that responsibility for this should not be laid at the prosecution's door. 16. We have some sympathy with Advocate Jones' submission. We agree that, in normal circumstances, a simple exercise by a defendant of his right of silence by answering no comment at interview will not mislead the prosecution into thinking that the case against him is stronger than in fact it is. A no comment interview cannot amount to an admission. The prosecution is not entitled to assume that, because a defendant has not specifically denied a matter, he is thereby somehow admitting it. No comment means what it says. In most circumstances therefore, following a no comment interview, the prosecution must assume that they will have to prove all the elements of the offence in the same way as if the defendant had given a denial at interview. The prosecution will not have been misled simply by the defendant giving a no comment interview. 17. However this will not invariably be the case. Let us take an extreme example. Suppose a well known individual is addressing a public meeting. He is seen there by 50 impeccable witnesses. He is mistakenly identified as having carried out a robbery at the time of the meeting and is arrested. Suppose further that he answers no comment at interview and suppose further that he does not mention the fact that 50 witnesses can prove conclusively that he was at a meeting and is therefore not guilty of the offence until the defence case begins at an assize trial. Is a judge really prevented from finding that a defendant who acts in this way has misled the prosecution into thinking the case against him is stronger than it is and that the public should not therefore have to pay the costs of a prosecution which the defendant could have prevented at the outset? We think not. In such a case justice demands that the

defendant should bear his own costs which have been so needlessly incurred. We should add that we accept that the particular scenario described above would not normally continue until trial because of the existence of the rules requiring notice of alibi evidence; but the example is given simply to illustrate that there may be circumstances in which, by answering no comment at interview and by subsequently maintaining that position until trial, a defendant misleads the prosecution into thinking the case is stronger than it is. 18. Returning to the facts of this case, it is not of course for this Court to decide whether it would have reached the same decision as the Commissioner. There is no right of appeal, and a decision on costs is a discretionary one. The high threshold for a *doléance* has to be achieved before the Court can intervene. The Commissioner reminded himself of the correct legal principles and gave a reasoned judgment. Given that the applicant had not only answered no comment at interview but had also failed to react when first presented with the finding of the tablets and given further that his silence as to his lack of knowledge of the tablets was maintained right up until the sentencing process began, we cannot possibly categorise the Commissioner's decision as being so beyond the range of discretionary decisions open to him as to amount to manifest judicial error giving rise to a grave injustice, thereby entitling the applicant to the exceptional relief of *doléance*. Accordingly, the Court dismisses this petition. Authorities *Misuse of Drugs (Jersey) Law 1978*. *Medicines (Jersey) Law 1995*. *Costs in Criminal Cases (Jersey) Law 1961*. *AG-v-Bouchard*

[1989] JLR 350 . Self-v-AG

[2010] JCA 061 . Re Barker [1985/86] JLR 284. Page Last Updated: 02 Aug 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2010/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/metzner-v-ag-2010-jrc-106-07-june-2010>

Prepared on 28 October 2026 · Esheria