

JERSEY / JUDGMENT

Motofelea -v- AG [2014] JCA 236 (28 November 2014)

[2014] JCA 236

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Court of Appeal 28 November 2014 Before : Jonathan Crow Esq., Q. C., President, Sir David Calvert-Smith and Robert Logan Martin Esq., Q. C. Paul Filimon Motofelea -v- The Attorney General Application for leave to appeal by Paul Filimon Motofelea against the sentence passed by the Superior Number of the Royal Court on 17 th March, 2014. 1 count of: Being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to Article 61(2)(b) of the Customs and Excise (Jersey) Law 1999 (Count 1). 1 count of: Possession of a prohibited weapon, contrary to Article 33(1)(b) of the Firearms (Jersey) Law 2000 (Count 2). Advocate C. M. Fogarty for the Appellant. Crown Advocate J. C. Gollop.

JUDGMENT

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Introduction

1. The applicant is Paul Filimon Motofelea who is a native of Romania and a resident in Italy. He pleaded guilty before the Magistrate's Court on 28 th October, 2013, to a charge of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug contrary to Article 61(2)(b) of the Customs and Excise (Jersey) Law 1999 . The applicant appeared with a co-defendant before the Inferior Number of the Royal Court on 7 th February, 2014, when he pleaded guilty to an Indictment containing the same charge (Count 1) and a charge of possession of a prohibited weapon contrary to Article 33(1)(b) of the Firearms (Jersey) Law (Count 2). The applicant was remanded in custody to appear before the Superior Number on 17 th March, 2014. On that date, the applicant was sentenced by the Superior Number (Bailhache DB and Jurats) on Count 1 to a term of imprisonment of 5 years and on Count 2 to a term of imprisonment of 12 months, such terms of imprisonment to run concurrently. The Royal Court made orders pursuant to Article 29 of the Misuse of Drugs (Jersey) Law 197 8 ("the 1978 Law") for the forfeiture of the drugs to which Count 1 related, the forfeiture of a mobile phone and SIM card belonging to the applicant, and the forfeiture and sale of an Audi A6 motorcar bearing the Romanian registration number BN-10-CUX. The Royal Court also found that the applicant had benefitted from drug trafficking and made a confiscation order in the sum of £204.41

pursuant to Article 3 of the Drugs Trafficking Offences (Jersey) Law 1988 . Finally, the Court made a recommendation for the deportation of the applicant pursuant to section 6(2) of the Immigration Act 1971 as extended to Jersey by the Immigration (Jersey) Order . 2. The circumstances of the offences were that the applicant had been stopped by Customs and Immigration Officers at Elizabeth Quay when driving the Audi motorcar and having disembarked from a ferry from St Malo. In answer to questions, the applicant admitted that there was a handgun under his seat and this was recovered and ascertained subsequently to be a prohibited weapon suitable for firing blank, rubber or similar projectiles. The car was searched and 89 packages were found in concealed places and these were subsequently analysed and certified to contain in excess of 17.67 kilograms of cannabis. The applicant was also found to be in possession of two mobile phones and a SIM card as well as €260 in cash (the equivalent being £204.41 which was the amount which was the subject of the confiscation order). The applicant admitted that he had been paid in cash to carry the drugs into Jersey. He had parked and left the car by arrangement at a particular location and the packages of drugs had been placed in it. The applicant had then concealed them behind door panels and behind the rear bumper. He had been provided with a mobile telephone SIM card and was instructed that after arrival in Jersey he would receive a telephone call advising him where to leave the car. He identified his co-defendant as a person whom he had met some years previously and he said that the co-defendant had spoken to the applicant by phone prior to his boarding the ferry. The co-defendant was detained and interviewed under caution, and he was subsequently apprehended as he tried to embark on a ferry to St Malo using a false identification card. 3. The sole issue for this appeal concerns the forfeiture order which was made in respect of the Audi motorcar. The applicant seeks leave to appeal against the order for the forfeiture of the car and for that appeal to be allowed, and for this Court either to overturn the order and remit the matter to the Royal Court for reconsideration or for this Court itself to determine that the forfeiture order should not be made. 4. The learned Deputy Bailiff dealt with the issue of forfeiture in his sentencing remarks which are recorded in his judgment of 17 th March, 2014, (ag v Motofrelea and Lucaciu-Dina

[2014] JRC 069). At para 14, the Deputy Bailiff referred to the fact that the car had been used for the importation of the drugs and to the claim that the car belonged to the applicant's father who wished to realise its value to pay for medical expenses of his father and mother. The Deputy Bailiff noted that in a letter to the Court from the applicant's father, he did not describe the car as belonging to him. The Deputy Bailiff concluded by saying that as the car had been in the possession of the applicant and had been substantially adapted for carrying the cannabis, the making of an order for the forfeiture of the car was justified and the proceeds of its sale were to be applied to the Drug Trafficking Confiscation Fund. The grounds of appeal 5. In the Grounds in support of his appeal, the first and only remaining ground is that that the exercise of discretion to order the forfeiture of the car which was made by the Royal Court required to be made upon a correct factual basis. The Royal Court was informed on behalf of the applicant that the car was registered to and

insured by the applicant's father but the Royal Court had proceeded upon the basis that there was no evidence of this. There were however registration and insurance documents in the possession of the Customs and Excise which had been in the car and which confirmed the position but these documents were not disclosed to the applicant or to the Royal Court. The applicant also had a second ground of appeal which was that the Royal Court had proceeded upon the basis that the car had been "modified" to carry the drugs when this was not the case but Advocate Fogarty confirmed to the Court that this ground was not being maintained. 6. In the Contentions for the applicant, it is maintained that at all times the applicant claimed that the car belonged not to him but to his father in Romania. During the proceedings leading up to conviction and sentence, a number of documents were found within the car and disclosed to the applicant's solicitors but none of these documents related to the ownership of the car. It was submitted before the Royal Court that the father and mother of the applicant were in ill-health and that the value of the car would be used by them to fund medical treatment and that this should not be denied to them as a result of the applicant's offence. Immediately following the hearing, the applicant insisted that there were documents in the car which would verify its ownership by his father and his Advocate raised the matter with the Crown Advocate who maintained that so far as he was aware no such documents had been found. A few days later, however, on 21 st March, 2014, copies of documents in Romanian which had been found in the car were disclosed and following translation obtained by the Crown these demonstrated that the car was registered to the applicant's retired father, Philemon Motofelea, that Mr Motofelea Senior had purchased the car on 25 th May, 2013, and that he had insured the vehicle from 19 th June, 2013, and declared that he had given his consent for the use of the car in Romania and abroad by the applicant. The position for the applicant is that the registration, ownership and insurance documents along with their translation should be admitted as fresh evidence. 7. The applicant has also provided an affidavit sworn subsequently by Mr Motofelea Senior dated 12 th September, 2014, along with a translation. In the affidavit, his father confirms that he owns the Audi motorcar and sets out the need of the funds which would be derived from its sale for medical expenses. The applicant seeks the admission of the affidavit and translation also as fresh evidence. 8. In respect of all of these documents, the applicant contends that they are fresh evidence which was not before the Royal Court at the time of sentencing and that as a result leave to appeal should be granted, the additional documents should be admitted as fresh evidence by this Court and the appeal should be allowed, with either the Royal Court or this Court considering the matter of the forfeiture of the car again. 9. In the Contentions for the respondent, it is maintained that the making of the forfeiture order was a matter within the discretion of the Royal Court and that there is no basis upon which this Court should interfere with that exercise of discretion. In relation to the application to admit new evidence, the respondent contends that what is sought to be introduced is not fresh evidence which goes to the question which the Royal Court had to consider when exercising its discretion whether to make an order for the forfeiture of the car. It is said that the evidence which is sought to be adduced is relevant only to the request for

clemency and that the information was in fact already before the Royal Court. The respondent does not dispute that the car was purchased and owned by the applicant's father and that it had been insured in his father's name. The respondent relies upon the account given by the appellant when interviewed under caution by Customs Officers which was to the effect that within three weeks of the purchase of the car by his father, it had been insured for the applicant to drive and that he had had the car in his possession from the end of July 2013. It is contended that the comments made by the applicant were consistent with the car being treated by him as his own vehicle within a matter of weeks of its purchase. At interview under caution, he gave answers confirming that he had been using the car all of the time and he referred to it as "my car". There was ample evidence before the Royal Court which justified the decision to order the forfeiture of the car including the fact that the car had been "substantially adapted" to carry the drugs. In relation to the application to admit fresh evidence, the respondent refers to the principles adopted by the Court of Appeal in *Hume v AG*

[2006] JCA 162 . In particular by reference to the first of those principles, the evidence sought to be admitted was available at the sentencing hearing. 10. On behalf of the applicant, Advocate Fogarty emphasised that at the time of sentencing the Crown was in possession of what were relevant documents even if that was not known. What was not clear from the transcript was that the manner and tone of the sentencing hearing indicated that the car might not have been forfeited if the correct position had been known. Had the documents been before the Royal Court, that would have dispelled any lingering doubts about the ownership of the car. If that information had been available, it would have turned what was a claim by the applicant that the car was owned by his father into a matter of fact. This Court should bear in mind that the affidavit of the applicant's father had been sworn before a notary according to the laws of Romania and that the obtaining and translating of documents from there was a cumbersome process. The making of an order for forfeiture was a matter of discretion as indicated by the use of the word "may" in Article 29 of the 1978 Law: see Bennion on Statutory Interpretation , Fifth Edition, pp 50, 90, 144 and 1321-1322. Advocate Fogarty referred to the directions of the Commissioner in *AG v Michel*

[2007] JRC 203 in which he set out the approach to the making of a confiscation order and the exercise of discretion: see the judgment at paras 25-31. In relation to an application to admit fresh evidence, she accepted that the principles were set out *Hume v AG* and she referred to the earlier case of *AG v Gorvel*

(1973) 1 CA 95; 1973 JJ 2503 . Although there was no authority as to how these principles should be applied in the case of an appeal against sentence, she submitted that fresh evidence should be admitted where the sentencing judge "might have made a different decision". In relation to the disposal of the appeal, and if the appeal were to be allowed, this Court may either itself decide whether to make an alternative forfeiture order or may remit the making of an alternative order to the Royal Court. Such a power to remit can be inferred

from Articles 12 and 34 of the Court of Appeal (Jersey Law 1961 ("the 1961 Law")). 11. For the respondent, Crown Advocate Gollop emphasised that the Royal Court was entitled to exercise a discretion and it did so having regard to factors including the claim that the car belonged to the applicant's father and that he wished to sell the car in order to meet the medical expenses of himself and his wife. This was clear from the transcript of the sentencing hearing. In the United Kingdom, the power of the court to order forfeiture prohibited the making of an order until a person claiming ownership had been given an opportunity to show cause why the order should not be made: see section 27(2) of the Misuse of Drugs Act 1971 as amended; but the power of the courts in Jersey was not so fettered. In the present case, the ownership of the car was not an issue and the applicant had made it clear that he had been using the car. The Crown had intimated informally by email as early as February 2014 that it intended to seek forfeiture of the car. In relation to the contents of the affidavit of the applicant's father which was sought to be admitted as fresh evidence, Crown Advocate Gollop said that the Crown had doubts about aspects of it. When the applicant's father purchased the car, he had in mind that his son was going to use it. There were questions about its value because Mr Motofelea Senior claimed that it had a value of €10,000 whereas the purchase document demonstrated that he had purchased it for only €9,500. There was also information in the applicant's interview that the car needed work. There were questions regarding the claimed health problems. If the car was the family's only asset, why was it given to one of their children? In response to a question from the Court, Crown Advocate Gollop accepted that the registration, ownership and insurance documents showed that the car was registered to the applicant's father and that, as a result of the transaction which is recorded, Mr Motofelea Senior was the owner of the car. Crown Advocate Gollop said that the fact of ownership had to be balanced against the other factors and that the contents of the affidavit raised more questions than answers. He confirmed that there appeared to be no authority on the admitting of fresh evidence for the purpose of an appeal against sentence and he accepted by reference to *Hume v AG* that the issue was whether there might have been a different outcome if the sentencing court had been aware of the fresh evidence. In relation to the procedure to be adopted by this Court, Crown Advocate Gollop doubted that there was a power to remit a matter of sentence back to the Royal Court in the event that the appeal was allowed and the fresh evidence was admitted. Such a procedure would require specific statutory provision and could not be inferred from what is provided in the 1961 Law. The order for forfeiture 12. Article 29 of the Misuse of Drugs (Jersey) Law 1978 ("the 1978 Law") provides:- "The Court before which a person is convicted of an offence under this Law may order anything shown to its satisfaction to relate to the offence, to be forfeited and either destroyed or dealt with in such manner as the Court may order." It is not disputed that this provision applies to a conviction for a breach of Article 61(2)(b) of the Customs and Excise (Jersey) Law 1999 in a case such as the present one where the breach concerns an importation of controlled drugs which is prohibited by Article 4(1) of the 1978 Law (although the Court would record that it heard no detailed argument on this aspect). Nor is it disputed that an order for forfeiture is part of the sentence passed upon a convicted

person by reference to Article 44(1) of the 1961 Law which provides in part that:- "...sentence" includes any order (including an order of banishment or a confiscation order) made by a court when dealing with the person convicted, and the power of the Court of Appeal to pass a sentence includes a power to make any such order." This provision also confirms that were this Court to allow an appeal in respect of an order for forfeiture, it would be open to us in an appropriate case to make an alternative forfeiture order. 13. It is also not disputed that the Royal Court was entitled to exercise its discretion in the consideration of whether or not to make an order for the forfeiture of the car. The issue is whether the Royal Court exercised that discretion on a basis of fact which was erroneous and, if so, whether that error was sufficient to render the exercise of the discretion to order the forfeiture of the car as unjustified. 14. In dealing with the order for forfeiture of the car in his sentencing remarks, the learned Deputy Bailiff said:- "We have given consideration to the question of the forfeiture of the Audi car. In our view there is no doubt that this vehicle was used for the purpose of bringing in a substantial quantity of drugs. It is said by Ms Fogarty that the car belongs to the first defendant's father who is unwell and who wishes to have the car realised for the purposes of applying the proceeds of sale to medical expenses which the first defendant's father and mother have incurred recently in Romania. We note that the father's letter to us, giving a reference for his son, does not describe the car as belonging to him and we also note that the father appears to be in Romania and it any event the car, as we say, was in the possession of the first defendant and was substantially adapted for carrying the cannabis into the Island. In the circumstances we think it is right that the car be forfeited and sold and the proceeds applied to the Drug Trafficking Confiscation Fund and we so order." 15. It can be seen from this passage that the Royal Court made the order for forfeiture of the car having regard to the following factors. The first is that the car was used by the applicant to bring into Jersey a substantial quantity of controlled drugs. The second is that the applicant was maintaining that the car belonged to his father. The third is that the applicant's father was unwell and that he and the applicant's mother wished to realise the value of the car and apply the proceeds towards medical expenses which they had incurred. The fourth is that the Court had seen a letter from the applicant's father which did not contain any assertion that the applicant's father was the true owner of the car. The final factor is that the Court judged the car to have been "substantially adapted" for the carrying of the drugs. 16. Each of these factors was before the Royal Court and we are satisfied that all were factors which the Court was entitled to take into account in the exercise of its discretion. The grounds of appeal do not in essence dispute the relevance of these factors but they rely upon what is now said to be proof of the fact that the car is owned and insured by Mr Motofelea Senior. The power of the Court of Appeal 17. A person convicted on indictment by the Royal Court may appeal "with the leave of the Court of Appeal against any sentence passed on the person": Article 24(c) of the 1961 Law, Part 3 of which provides for appeals in criminal matters. In an appeal against sentence, this Court has the power "if it thinks that a different sentence should have been passed... to quash the sentence and pass such other sentence warranted in law by the verdict": Article 27(3). By reference to these provisions,

we are satisfied that were we to consider that the appeal of the applicant is sufficiently merited, we may dispose of the appeal by allowing it in respect of the order for confiscation of the Audi motorcar and may either pass such other confiscation order as is justified or make no other confiscation order. 18. In relation to the grounds of appeal, the applicant refers to Article 34 of the 1961 Law which provides insofar as relevant for present purposes:- "For the purposes of this Part, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice- (a) order the production of any document, exhibit or other thing connected with the proceedings if the production thereof appears to be necessary for the determination of the case; (b) if it thinks fit, order any witnesses who would have been compellable witnesses at trial and be examined before the Court, whether they were or were not called at the trial...; (c) if it thinks fit, receive any evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness...; (d) ... and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters...: Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence which was not given at the trial." 19. We are in no doubt that these provisions give to this Court the power to take into account fresh evidence in the determination of an appeal, including documentary evidence and affidavits which are tendered by those who could be witnesses. Article 34(a), (b) and (c) permit this Court to order and receive such new evidence in the interests of justice and Articles 24(c) and 27(3) respectively entitle the Court to grant leave and to allow an appeal against sentence in light of such fresh evidence. The issue is whether we should do so in the circumstances of the present case. 20. The principles to be applied to an application to receive fresh evidence were set out most recently by the Court of Appeal in the case of *Hume v AG* which is referred to by the respondent in which the President (Steel JA) said in the judgment of the Court (at para 17):- "The principles to be adopted by a court in exercising its discretion under [what is now Article 34(b)] of the Court of Appeal (Jersey) Law 1961 in considering applications for the reception of fresh evidence in Jersey are set out by the Court of Appeal in *Barnes v Attorney General* CA 1988 [reported at [1987-88 JLR 669]] and further formulated in *Evans and Phillips v Attorney General* 1997 JLR 94 . The principles to be applied are: (i) the evidence sought to be adduced should have been unavailable at the trial (in particular the Court would be slow to hear the evidence of a Co-Accused who could have been called at the trial); (ii) that evidence had to be relevant; (iii) it had to be capable of belief; and (iv) if the evidence met these criteria the Court would go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the Appellant's guilt had that evidence been given at the trial. Each case had to be considered on its own facts but in general the reception of fresh evidence before the Court of Appeal should be considered wholly exceptional." 21. This would appear to represent a consistent approach since at least the judgment of the Court of Appeal in *AG v Gorvel* in which the President (Le Quesne JA) said by reference to the decision of the Court of Appeal in England in *R v Parks*

(1961) 46 CAR 29 [also reported at [1961] 1 WLR 1484]:- "The principles are shortly stated in a passage from the Judgment of the Court in the case of *R v Parks* which was delivered by Lord Parker, the Lord Chief Justice, and I read from Page 32 of the Report: "Those principles can be summarised in this way: First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but evidence which is capable of belief. Fourthly, the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial..." The position, therefore, is that the Court will not admit the further evidence unless the first three conditions stated by Lord Parker are satisfied. If those three conditions are satisfied and the Court decides to admit the evidence the Court will be guided by the fourth rule stated by Lord Parker in deciding what effect the new evidence ought to have." 22. In the present case we need to bear in mind that these principles are to be applied in a situation where there is no challenge to conviction but where fresh evidence is sought to be adduced in order to support an appeal against sentence. Although no authority was cited to us which dealt with the admission of fresh evidence in relation to an appeal against sentence, there is in our opinion no particular difficulty in doing so. 23. The first principle requires that the new evidence was not available at the trial, which for present purposes equates to the sentencing hearing. In the case of the registration, ownership and insurance documents, we have no difficulty in concluding that that requirement is satisfied. The applicant contended throughout that the car belonged to his father and that there were documents in it which could verify that. For reasons which are not explained, officers of the Customs and Excise either did not find the relevant documents before sentence was passed or failed to disclose them to the Royal Court. Whilst it may be that the documents had been discovered but were not disclosed or may not have been found by the time of the sentencing hearing, we can form no judgement about what did take place but it is unfortunate that the failure to disclose the documents at the time of sentencing has brought about an application and appeal to this Court which would have been unnecessary had the documents been disclosed at the appropriate time. 24. In the case of the affidavit from the applicant's father, we are satisfied that it cannot be described as fresh evidence falling within the first principle. Such an affidavit could have been provided for the sentencing hearing and its contents do not depend upon the registration, ownership and insurance documents which have since been disclosed. The contents of the affidavit might be relevant were we to be considering the making of an alternative order for forfeiture but we are satisfied that the affidavit does not constitute fresh evidence for the purposes of this appeal. We therefore do not consider the affidavit further for the purpose of deciding whether leave should be granted and the appeal should be allowed. 25. The second principle is that the fresh evidence is relevant, that is to say in this case that the registration, ownership and insurance documents constitute evidence which is relevant to

the sentence which was passed. Once again, we have no hesitation in concluding that this requirement is satisfied because, by reference to the sentencing remarks of the Deputy Bailiff, he clearly had in mind the possibility that the car did belong to the applicant's father. Had the documents found in the car been disclosed to the Royal Court at the time, that possibility would have been rendered a certainty. Advocate Fogarty described this as dispelling a lingering doubt but we consider that the position is more emphatic than that. Disclosure of the documents would have rendered what the Deputy Bailiff considered to be uncertain into something which was certain. 26. The third principle is that the new evidence is capable of belief. Crown Advocate Gollop has not disputed the veracity of the Romanian ownership, registration and insurance documents in their original form and the translations which were obtained by the Crown. This means that this third principle may be taken to be satisfied. 27. Pausing at this point, and having regard to what was said by the Le Quesne JA in *AG v Gorvel*, and by reference to the judgment of Lord Parker LCJ in *R v Parks*, satisfaction of the requirements of these three principles means that the Court could only allow the appeal against forfeiture if we were satisfied that that the requirements of the fourth principle were satisfied. 28. In the case of an appeal against conviction, the fourth requirement is whether the fresh evidence "might have raised a reasonable doubt in the minds of the jury" as to the guilt of an accused person. In the case of an appeal against sentence, we are satisfied that the equivalent standard is whether the fresh evidence might have led to a materially different sentence. If the Court of Appeal finds that requirement to have been satisfied in an application or appeal in respect of sentence, then the appeal should be allowed and the Court should proceed to consider the passing of an alternative sentence by an exercise of the power provided in Article 26(3) of the 1961 Law. In the circumstances of this case, this means that we have to decide whether the fresh evidence might have meant that the order for the forfeiture of the Audi motorcar would not have been made. 29. We are satisfied that this has not been demonstrated. In his sentencing remarks, the Deputy Bailiff acknowledged that the car was the means whereby the drugs were brought into Jersey and that the applicant had adapted the car in order to conceal the drugs, the latter conclusion being one which is no longer being challenged by the applicant, rightly in our view. The Deputy Bailiff also acknowledged that it had been claimed that the car belonged to the applicant's father and that the proceeds of its sale would be used to meet medical expenses. He was therefore aware that the car was something which had potential value to the applicant's father and that did not depend upon certainty as to its true ownership. We consider that in phrasing his sentencing remarks as he did, the Deputy Bailiff was acknowledging the possibility that the car might actually belong to the applicant's father but nevertheless because it was used by the applicant himself as the vehicle of illegal importation this meant that its forfeiture was justified. The fact that the ownership of the car has now been demonstrated therefore makes no difference. The Royal Court was entitled to exercise its discretion as it did and the fourth principle is not satisfied. 30. In reaching this conclusion, we have not placed any weight on the directions regarding the making of a confiscation order which were relied upon by Advocate Fogarty. In our judgment, the considerations which apply to

confiscation can be distinguished from those applying to forfeiture, at least in a case such as the present. The car was used by the applicant as an essential part of the crime and that is an important factor in the justification for its forfeiture. That is not that same as the situation where a confiscation order is sought of what may be regarded as the proceeds or consequences of a crime. Disposal 31. The Court is satisfied that, because the first three principles set out in *AG v Gorvel* and *Hume v AG* have been satisfied in this case, it would be appropriate for us to grant leave to appeal pursuant to Article 24(c) of the 1961 Law and to admit the fresh evidence. Having considered that fresh evidence, we are not satisfied that the learned Deputy Bailiff might not have ordered the forfeiture of the Audi motorcar and we accordingly refuse the appeal. 32. Were we to have allowed the appeal, we would have regarded it as appropriate ourselves to consider whether any other forfeiture order should be made rather than to refer that issue back to the Royal Court. This is because it appears to us that only this Court has the power upon allowing an appeal against sentence to pass an alternative sentence: see Article 26(3) of the 1961 Law and, in the case of a successful appeal against an order, the definition of the expression "sentence" in Article 44(1). Advocate Fogarty referred to the power contained in Article 34 of the 1961 Law whereby the Court of Appeal may "exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters". Part 2 of the 1961 Law applies to appeals in civil matters and it includes Article 12 which in paragraph (2) provides the power for this Court to order "a new trial or hearing". We do not accept that this power, which applies directly in a civil context, can be extended to allow this Court in the context of a criminal appeal to order a new hearing before the Royal Court where an appeal against sentence has been allowed. Although the matter does not arise directly for our decision as we have refused the appeal in this case, we are inclined to agree with Crown Advocate Gollop that a right to remit the determination of a new sentence to the Royal Court is something that could only be provided by specific legislation. *Authorities Customs and Excise (Jersey) Law 1999*. *Firearms (Jersey) Law 2000*. *AG v Motofrelea and Lucaciu-Dina*

[2014] JRC 069 . *Hume v AG*

[2006] JCA 162 . Bennion on Statutory Interpretation, Fifth Edition. *AG v Michel*

[2007] JRC 203 . *AG-v Gorvel* (1973) 1 CA 95; 1973 JJ 2503 . Court of Appeal (Jersey) Law 1961. Misuse of Drugs Act 1971. *R v Parks* (1961) 46 CAR 29; [1961] 1 WLR 1484. Immigration (Jersey) Order 1993. Page Last Updated: 23 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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