

JERSEY / JUDGMENT

O'Brien -v- AG 15-March-2006

[2006] JCA 035 (15 March 2006)

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COURT OF APPEAL 15 March 2006 Before: J. P. C. Sumption, Esq., Q. C. (President); Dame Heather Steel; and G. C. Vos, Esq., Q. C. Yvonne Katina Edmond O'Brien; v The Attorney General Appeal against sentence passed on 30 th July, 2003, by the Superior Number of the Royal Court, to which the appellant was remanded by the Inferior Number on 5 th June, 2003, following conviction on: 1 count of: assisting another to retain the benefit of drug trafficking, contrary to Article 17(1)(a) of the Drug Trafficking Offences (Jersey) Law 1988 (count 1). This conviction having been quashed by the Court of Appeal in November 2003 and subsequently re-instated by the Privy Council on Tuesday 14 th February 2006. Advocate D. Gilbert for Yvonne Katina Edmond-O'Brien; S. M. Baker, Esq., Crown Advocate;

JUDGMENT

STEEL JA: 1. This is the judgment of the Court. On the 5 th June 2003 the Appellant, who is now 57 years of age, was convicted of an offence, contrary to Article 17(1)(a) of the Drug Trafficking Offences (Jersey) Law 1988, of assisting her husband Michael O'Brien to retain the benefit of his drug trafficking. 2. On 29 th July 2003 a Confiscation Order was made against her in the sum of £505,028 with five years' imprisonment in default. 3. She was granted leave to appeal her conviction, and on 12 th November 2003, her conviction was quashed in the Court of Appeal. 4. The Attorney General pursued a successful appeal to the Privy Council in respect of the Court of Appeal decision to quash the Appellant's conviction, and on 14 th February 2006 the Privy Council made a recommendation that the conviction be restored, and that the outstanding issue of the Appellant's appeal against sentence be remitted to the Court of Appeal. The Privy Council's reasons have not yet been given. 5. On 15 th February 2006 the Deputy Bailiff granted leave to appeal sentence, and the Appellant was conditionally bailed. She had been in custody from the date of her conviction, 30 th July 2003 until her conviction was overturned on 12 th November 2003. 6. This matter now comes before this Court as an appeal against the sentence of seven years' imprisonment passed on 30 th July 2003. There is no appeal against the Confiscation Order. 7. The grounds of appeal are two: (i) That the seven year sentence was manifestly excessive; and (ii) Disparity of sentence between the Appellant's sentence and two of her Co-Defendants whose original sentences were reduced on appeal on 12 th November 2003. 8. The history of this case goes back to September 1998, when the Appellant's husband Michael O'Brien was arrested in

Portsmouth and found to be in possession of a substantial quantity of Class A and Class B controlled drugs. He had been the subject of a targeted investigation in Jersey since the end of 1997. 9. On 19 th February 1999 in the Portsmouth Crown Court he pleaded guilty to five offences on the first indictment of conspiracy to supply both Class A and Class B drugs between 1 st May 1997 and 15 th July 1998, and on a separate indictment to three further counts of conspiracy to supply Class A and Class B drugs. 10. On 14 th July 1999 he pleaded guilty to an offence of conspiracy to supply heroin. 11. On 19 th November 1999 he was sentenced to six years' imprisonment in respect of the Class A offences and three years in respect of the Class B offences, all sentences to be served concurrently. 12. An application for confiscation proceedings on 27 th September 2000 in the Portsmouth Crown Court failed because it was out of time. 13. Proceedings moved to Jersey. On 27 th May 2002 Michael O'Brien, the Appellant, Carol Lloyd and David Lloyd were arrested in England. Michael Dunne was arrested in Andorra and returned to Jersey. 14. On 13 th December 2002 Michael O'Brien pleaded guilty to two charges of transferring the proceeds of his drug trafficking contrary to Article 16 (a) (1)(b) of the Drug Trafficking Offences (Jersey) Law 1988 . The first of these charges related to the payment of cash representing the proceeds of his drug trafficking into the Jersey banking system between 15 th October 1997 and 20 th September 1998, through the agency of the Appellant. The second related to several cheque payments made by him which transferred the drug money into accounts held by Michael Dunne, Carol and David Lloyd. 15. On 5 th June 2003, after a trial before the Inferior Number, the Appellant was convicted of count 1, contrary to Article 17(1)(a); the other three Defendants were convicted of offences of assisting Michael O'Brien to retain the benefit of his drug trafficking. The benefit has been assessed at a figure in excess of £1.5 million, directly attributable to drug trafficking. 16. On 30 th July 2003, Michael O'Brien was sentenced to four years' imprisonment concurrent, Michael Dunne to nine years' imprisonment concurrent on three counts and the Appellant to seven years. Sentence was adjourned on Carol and David Lloyd, he being seriously ill, and they were later each sentenced to two years' imprisonment suspended for two years as an exceptional act of mercy due to the illness of David Lloyd. 17. The facts can be briefly stated. The Appellant married Michael O'Brien in 1984. Prior to these matters they were both of good character. They have one daughter. They lived in Jersey since their marriage and have together been involved in various businesses. These include a shop, a lodging house, an investment company and a Butcher's business. Although the businesses were jointly owned, the running of them was divided between them. The Appellant ran the lodging house and had little involvement with the butchery business except that she paid cheques and cash into the Bank accounts. The lodging house and the butchery were predominantly cash businesses and the turnover was substantial. 18. From 1997 Michael O'Brien was involved in trafficking in illegal drugs which were imported into Jersey in consignments of meat from Portsmouth to the butchery business where they were stored and from where they were distributed. 19. After he was arrested on 15 th September 1998 and his business premises searched the wholesale value of the drugs found in Portsmouth and Jersey was between £387,500 and £482,500. Michael O'Brien had assisted the authorities to recover these drugs. 20. When the O'Brien's home was searched the Appellant was present. £9,950 cash was found in a wardrobe, and in the same bedroom 2 plastic bags containing together £5,145 were found. Further cash was found in the dining room

dresser amounting to £3,000, and £1,091 was found in a blue bag which the Appellant said was income from the lodging house. The total amount of cash found in the house was £19,439. The Appellant explained to the police that some of the cash was being held for friends, and that she and her husband held cash for the neighbours and paid their bills so that their friends did not have to pay tax. 21. During the period between January 1997 and September 1998 substantial amounts were paid into the various personal and business Bank accounts of the O'Briens. The Appellant would fill in the paying in books and make the payments into the accounts having received the paying in books, cash and cheques from her husband. At trial the Appellant gave evidence to the effect that she had failed to notice the increase in the numbers and amounts paid in and that she had therefore not asked her husband about this. 22. When the many accounts were scrutinised by the accountant on behalf of the Crown, he concluded that the sum of £770,943 which was paid into the business accounts may reasonably be explained by Michael O'Brien's legitimate businesses. However, he concluded that the sum of £1,799,434 which passed through the personal accounts cannot be justified by the level of income Michael O'Brien's legitimate businesses could have been expected to generate. 23. The monies thus deposited would then be transferred by Michael O'Brien into various accounts of the Co-Defendants Dunne, Carol and David Lloyd. The total sum thus paid out by Michael O'Brien by cheque between February 1997 and September 1998 was £1,307,313.63. Some of the money was used to fund an apartment in Andorra for Dunne, some for the Lloyds to fund the purchase of a public house in Wiltshire and some to buy £6,000 of bonds placed in an account of Dunne's wife in Andorra. 24. On 12 th November 2003 the Court of Appeal quashed the Appellant's conviction, having concluded it was unsafe. Appeals against sentence were allowed in the cases of the Co-Defendants O'Brien and Dunne. O'Brien's four year sentence was quashed and a sentence of one year was substituted. Account was taken of the fact that O'Brien had served the relevant portion of his six year sentence. The Court then considered the disparity between that sentence and the nine year sentence passed in the case of Dunne. Dunne's sentence was quashed. A sentence of five years concurrent for each of the three counts was substituted. The twelve year starting point was reduced to seven years. 25. This appeal is brought on the ground that the Appellant's seven year sentence is manifestly excessive and that there is disparity between O'Brien, Dunne and the Appellant having regard to their different roles and circumstances. The English courts have explicitly declined to set guidelines for money laundering cases as the circumstances vary so much from case to case, and the involvement of Defendants is infinitely variable. 26. The Court is invited to take into account the role played by the Appellant in the present case as the person who deposited money into the Bank accounts under the direction of O'Brien, and Advocate Gilbert invited the Court to regard her as a "smurf" who did not know the total sums involved, where the funds ended up, how they got there, what was purchased with them or who was involved. 27. This is not accepted by Crown Advocate Baker who draws the attention of the Court to the words of the Learned Commissioner who described the part that the Appellant played as a " vital role at the first and most important stage of the laundering process by persistently paying large sums of money into the banking system of Jersey." 28. The Appellant's conviction indicates that she handled the vast majority of the drug money that was deposited into the banking system, and did so in the knowledge that it was the proceeds of drug trafficking. It is submitted by the Crown that

her assistance was flagrant and persistent. Without her assistance the entire laundering process could not have commenced. The money laundering operation in this case was sophisticated and successful. 29. The Respondent concedes that the decision of the Appeal Court in November 2003 inevitably means that in the context of this case the sentence passed by the Superior Number is manifestly excessive. The Appellant's sentence is now disproportionate to the sentence passed on her Co-Defendant Dunne, and the Court of Appeal should now quash that sentence. 30. In considering the sentence which should be substituted, this Court has to take into account two matters. First, how the role played by the Appellant relates to that of the other Defendants, and secondly what effect should be given in mitigation as a result of the events which have taken place since her conviction. 31. The Respondent submits that each of the Defendants was involved for a similar period of time in the processing or laundering of £1.8 million through the system. The Crown's case is that there is little to distinguish the role each played and that each should have the same starting points. 32. Michael O'Brien can be distinguished from the Appellant and Dunne, where the Court of Appeal took into account his six year sentence which reflected the assistance he gave to the police, the relevant part of which had been served and the fact that his total sentence would have been ten years, and disproportionate. 33. David and Carol Lloyd can be distinguished by reason of his illness (and subsequent death) and their appropriately exceptional sentences. 34. The Court has therefore to consider and compare the roles played by Dunne and the Appellant and decide whether a further distinction should be made between their sentences to reflect matters which have occurred post conviction. 35. The Court is impressed by the submissions regarding the lengthy period from the Appellant's first interview in December 2000, her arrest in May 2002, her conviction, release on Appeal and the current sentencing process in March 2006. 36. She now faces a return to prison after that lengthy period, and if a sentence of immediate imprisonment is passed she will be the only serving prisoner amongst her Co-Defendants. The delay has been caused through no fault of the Appellant. 37. The Respondent accepts that there is an increased burden on a Defendant who remains incarcerated when her Co-Defendants, who received longer sentences, are free. 38. The Respondent also invites an analogy with a Defendant awaiting the outcome of an Attorney General's Reference in England and the operation of double jeopardy considerations. 39. This Court is invited to adopt a starting point of seven years, as in the case of Dunne, and to reduce the Appellant's sentence to three years. This it is submitted represents a 40% reduction in line with Dunne, with an additional year to represent the strain of the pending Court of Appeal decision. 40. Advocate Gilbert, on behalf of the Appellant, accepts that a starting point of seven years would be appropriate, but invites the Court to reduce the sentence to two years and to order that the sentence be suspended (under the provisions of the Criminal Justice (Suspension of Prison Sentences) (Jersey) Law 2003 , due to the exceptional circumstances of this case. 41. As we indicated at the conclusion of the submissions we propose to allow this appeal, quash the sentence of seven years' imprisonment and substitute a sentence of two years' imprisonment suspended for two years under the provisions of the Criminal Justice (Suspension of Prison Sentences) (Jersey) Law 2003. 42. The reasons for taking this exceptional course result from the extensive and unusual mitigation now available to the Appellant. We do not accept Advocate Gilbert's submissions regarding the relative roles played by the Appellant and her Co-Defendant Dunne, or that the Appellant should be regarded as

significantly less culpable than Dunne. Her role was described by the Learned Commissioner. Having conducted the trial of the Appellant, Dunne, and David and Carol Lloyd, he was well placed to make the assessment of the relative involvement and roles of the Appellant and Dunne. 43. We support the starting point of seven years reduced from twelve, which is accepted by both the Appellant and the Crown, and the approximate 40% proportional reduction sought by the Crown. The three year sentence invited by the Crown is not inappropriate having regard to the offence committed and the Co-Defendants' sentences reduced on appeal. However we conclude that the mitigation now available to the Appellant merits a reduction of two years rather than the one year proposed by the Crown so that the sentence imposed should be a total of two years' imprisonment. In ordinary circumstances a reduction of four years would be entirely appropriate, but here the circumstances are extraordinary and warrant an extraordinary disposition. 44. When the Appellant was sentenced in July 2003 the Learned Commissioner took into account her previous good character, the reports then available, which were the Social Enquiry Report, the psychological reports and the report from Dr Blackwood, Consultant Psychiatrist. There were also character testimonials and the Court took into account the emotional trauma resulting from the delay to July 2003. 45. We are now urged to take into account, and we do: (i) the Appellant's age; (ii) the effect upon her life that will result from the implementation of the Confiscation Order. She will lose her home and all her assets; (iii) her marriage is destroyed; (iv) her continuing mental health problems as set out in a second report dated 3rd March 2006 from Dr Blackwood who has treated the Appellant as an out-patient since May 1999, and continues to do so; (v) most significantly, the length of time since the start of these proceedings has been singularly extraordinary. This has run from the time of Michael O'Brien's arrest in 1998, continued through the Appellant's interview, arrest, conviction, and release on appeal until the final resolution of this matter in March 2006. Throughout that period the Appellant has undoubtedly suffered substantial stress and uncertainty as to the outcome of this case. 46. We conclude that to pass a sentence of immediate imprisonment now, when her Co-Defendants have been released from their sentences, does not serve the public interest nor that of the Appellant. 47. In these exceptional circumstances we order that the two year sentence of imprisonment should be suspended for two years. 48. We conclude by stressing that this case is peculiar to its own facts and should not be regarded as setting any sentencing guidelines for general application. Authorities Drug Trafficking Offences (Jersey) Law 1988. Criminal Justice (Suspension of Prison Sentences) (Jersey) Law 2003. Page Last Updated: 26 Jun 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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