

JERSEY / JUDGMENT

Simpson v AG [2003] JCA 007 (16 January 2003)

[2003] JCA 007

COURT
COURT OF APPEAL

BEFORE

R. C. Southwell, Esq., Q. C., President;
Sir de Vic Carey, Bailiff of Guernsey; and
P. S. Hodge, Esq., Q. C.
Robert Anthony SIMPSON
-v-
The Attorney General
Application for leave to appeal against a
sentence of 9 years' imprisonment passed on 4th
November, 2002, by the Superior Number of
the Royal Court,
to which the Appellant was remanded by the
Inferior Number on 20th September, 2002,

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COURT OF APPEAL

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January, 2003.

Before:

R. C. Southwell, Esq., Q. C., President;
Sir de Vic Carey, Bailiff of Guernsey; and
P. S. Hodge, Esq., Q. C.
Robert Anthony SIMPSON
-v-
The Attorney General
Application for leave to appeal against a
sentence of 9 years' imprisonment passed on 4th November, 2002, by the Superior
Number of
the Royal Court,
to which the Appellant was remanded by the Inferior Number on 20th September,
2002,

following a plea of guilty
to:

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 (General Provisions)
(Jersey) Law 1999:

count 1: cannabis.
Leave to appeal was refused by a Single Judge of the Court of Appeal on 12th December, 2002, and on 17th December, 2002, the appellant exercised his entitlement, under Article 39 of the Court of Appeal (Jersey) Law, 1961, to renew the application to the plenary Court.
Advocate R. Juste for the appellant;
A. D. Robinson, Esq., Crown Advocate.

JUDGMENT

HODGE JA: 1. This is the judgment of the Court. Robert Anthony Simpson ("the Applicant") was sentenced by the Royal Court on 4th November 2002 to nine years' imprisonment for 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 . 2. The Applicant committed the offence on 28th May 2002 when he arrived at the Elizabeth Harbour on the ferry from St Malo in a black Sangyong Korando vehicle. A search of the vehicle revealed almost 72 kilograms (71,611.54 grams) of cannabis resin which would have had a street value in Jersey of £413,230. This is the largest importation of cannabis resin which the Customs and Police have intercepted in Jersey to date. 3. In this application the Applicant seeks leave to appeal against his sentence on the ground that the sentence was manifestly excessive. In particular he argues that insufficient account was taken of the mitigating factors available to him and seeks to substitute a sentence of six years. Preliminary Application 4. Before turning to the substantive appeal, we address a preliminary application which Advocate Juste made at the start of her submissions. In that application she invited Carey JA to recuse himself on the ground that he, acting as a single judge of this court in terms of Article 18 of the Court of Appeal (Jersey) Law 1961 and Rule 15 of the Court of Appeal (Criminal) (Jersey) Rules 1964, had refused the Applicant's application for leave to appeal to this court. By so doing, she submitted, he had caused her client to have a reasonable apprehension that he would be biased in considering the application. She recognised that Rule 15(5) of the 1964 Rules envisaged that a single judge who had refused an application for leave to appeal could sit as a member of the Court of Appeal hearing a renewed application for leave, but questioned whether that rule was compatible with the legal principles concerning judicial bias and the Applicant's entitlement to a trial by an independent and impartial tribunal under Article 6.1 of the European Convention on Human Rights . She accepted that the test for bias was whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or real danger that the judge would not be able to give him a fair hearing. See *Re Medicaments and Related Classes of Goods* (2)

- [2001] 1 WLR 700 , Lord Phillips MR at p.727 and Magill v Porter
- [2002] 2 WLR 37 , at pp.83H - 84A. 5. Advocate Juste referred us to the statutory provisions which we have mentioned and to R v Crown Court at Bristol, ex p Cooper
- [1990] 2 All ER 193, Keir Starmer on "European Human Rights Law" para 8.11 and Blackstone's Criminal Practice para D 2.25. She also, very helpfully, referred us to a judgment of the English Court of Appeal, Sengupta v Holmes and Others , The Times 19 August 2002, although she recognised that it did not support her application. 6. We have carefully considered this submission but are satisfied that it is not well founded. We have addressed the involvement of a single judge in determining an application for leave to appeal against the test for bias which Advocate Juste advanced. We do not think that the requirements of Article 6.1 of the Convention are materially different from that test of bias. 7. It is important to observe that under Article 18(2) of the Court of Appeal (Jersey) Law 1961 every order made by a single judge under the Article may be discharged or varied by any judges of the Court of Appeal having power to hear and determine the appeal. Two of the three judges of this Court have had no prior involvement with the application. Advocate Juste, however, argued that the perceived unfairness and bias arose because her client perceived that one of the three judges had already made up his mind against the application. 8. We are satisfied that such a perception is not reasonable. When a single judge considers an application for leave to appeal he or she does not have access to all of the papers which are made available to the full Court of Appeal. The single judge will see only the papers which were before the court from whose decision an applicant wishes to appeal. Crucially, the single judge does not have the benefit of the written contentions and oral submissions of the parties to an application which can so often assist the court in focusing on the real issues in an appeal which may not be evident from consideration of the papers which were before the court of first instance. It is not uncommon that such contentions and submissions persuade the court to reach a view which is different from that which would have been reached on a consideration of some, or all of the papers, which were before the court of first instance. 9. In addition, in reaching a decision on an application for leave to appeal, a single judge knows that the application can be renewed to the full Court of Appeal. 10. We think that the single judge who reaches a decision on the limited information which is initially available to him does not thereby prevent himself from approaching with an open mind a renewed application for leave which is supported by the contentions and oral submissions and which may often involve consideration of authorities to which he has not been referred when taking his initial decision. 11. We are therefore not persuaded that an observer who knew all the facts could have a reasonable suspicion that the single judge as a member of the court would not be able to give him a fair hearing. Similarly we are satisfied that the involvement of one of our members in determining as a single judge an application for leave, which is then renewed before us, does not prevent this court from being an independent and impartial tribunal for the purposes of Article 6.1 of the Convention. 12. We are strengthened in our conclusion by consideration of the English Court of Appeal's decision in Sengupta v

Holmes and Others

[2002] EWCA Civ 1104 . In that case the court held that, in the absence of special circumstances, there was no reason as a matter of principle to regard a judge who had refused an application for permission to appeal, which permission was granted by other judges on a renewed application, as being anything other than a proper and impartial member of the court which was constituted to hear the substantive appeal. The Court of Appeal considered not only English authority but also the jurisprudence of the Strasbourg court. Laws LJ stated that in refusing an application for leave to appeal all that a judge has done is to conclude on the material before him that the result arrived at in the court below was correct. The single judge is well aware that an opportunity exists for the applicant to renew his application orally in open court. In the absence of special circumstances there is no reasonable basis for the apprehension that the judge by refusing an application for leave will have closed his mind either to a renewed application for leave or to the substantive appeal. 13. We therefore turn to the renewed application and to the substantive arguments in the proposed appeal. Factual background 14. The Applicant is sixty years old and will shortly be sixty-one. He has a long record of previous convictions for motoring offences and offences of dishonesty but not for the possession of, or trafficking in, drugs. He has a history of heart disease, having suffered a heart attack in 1998 (and he says an earlier heart attack in 1996) and he suffers from angina. He had a recent serious episode of bronchitis and pleurisy which resulted in him having to give up paid employment. Notwithstanding that, he is a heavy smoker. His age and his health have featured prominently in his plea for mercy to the Royal Court and in this application. 15. The importation was a sophisticated exercise and the Applicant was significantly involved in its preparation as a courier. He had travelled from Spain, where he was residing, to Amsterdam to collect the vehicle. The vehicle, which was registered in his name, had been altered internally to conceal drugs. He had carried out a dummy run to Jersey in the same car. He was paid £800 for the dummy run. While in Jersey he had effected repairs to the car in the area where the drugs were to be concealed. He undertook the importation for financial gain to alleviate financial difficulties. He was to receive £4,000 for his involvement. In view of the size of the importation and the Applicant's significant role in it as a knowing courier, the Royal Court took a starting point of twelve years. Advocate Juste, who appeared for the Applicant, accepted that that was an appropriate starting point for this very serious offence. We are therefore concerned only with mitigation, the discount which such mitigation merits and the plea for mercy which was made on the Applicant's behalf. Submissions on mitigation 16. The mitigating factors put forward on the Applicant's behalf were the following. First, his financial and emotional difficulties following the failure of his business in the mid-1990s and the breakdown of his second marriage left him vulnerable and suicidal. He attempted to rebuild his life in Spain and had met a new partner when ill health caused him to lose his employment and caused significant financial troubles. It was to extricate himself from those difficulties that he had been persuaded to involve himself in the importation of the drugs. Secondly, his attempts

to back out of this involvement had resulted in threats to kill him and his girlfriend. Thirdly, his financial difficulties were not the result of drug debts to drug suppliers. Fourthly, his guilty plea, which he made on committal for trial on 27th June 2002 and when indicted before the Royal Court on 26th July 2002, was by no means inevitable because of the involvement of another man called Palmer in the importation and the absence of forensic evidence implicating him in handling the concealed drugs. Fifthly, the Applicant's age and relatively poor health were in combination an important mitigating factor as the applicant could not be expected to live a long life. Finally, we were referred to the Applicant's letter expressing remorse and to a touching letter from his partner, Jessica Omorogbe. 17. We think that the guilty plea had value to the Crown. Advocate Robinson for the Crown conceded that, although he argued with some force that the Crown would have been able to mount a strong case against the Applicant. We think that there was some significant value in the guilty plea and that the Applicant was entitled to material credit for it. 18. We attach no weight to the threats as it was the Applicant's decision to involve himself in trafficking drugs that brought him into the milieu in which such threats are commonplace. We note also that the Applicant has a poor criminal record but that between 1982 and 2000 he appears not to have had any convictions as a result of his involvement in legitimate business activity in the 1980s and early 1990s. We also do not give much weight to the fact that his debts were not drug-related. The harsh truth is that he sought to alleviate his financial difficulties by involving himself in trafficking very large quantities of drugs which, directly or indirectly, cause serious harm to others. 19. In our opinion the significant factors of mitigation are his guilty plea which followed on a prompt admission of his involvement, and the combination of his age and ill health. We recognise that ill-health of itself does not as a matter of general principle allow a court to impose a lesser sentence than would otherwise be appropriate. But a serious medical condition may in exceptional circumstances result in a lesser sentence as an act of mercy by the court. See *Valler v AG* (18 th July 2002) Jersey Unreported; [2002/133] at paragraph 9. 20. In this case, as we have said, the Applicant has a history of heart disease and has suffered at least one heart attack (and perhaps two); he has high cholesterol; he suffers from angina; he has suffered from serious bronchitis and pleurisy within the last year. He has required and requires antidepressant medication. We have seen the report of Dr Sharkey which concludes that his health is poor and his long-term physical prognosis is not good. These significant medical problems, combined with his age and his prompt guilty plea have persuaded us that it is appropriate that the court in this exceptional case, and in the exercise of mercy, should give the Applicant more than three years discount for mitigation. 21. In all the circumstances we grant leave to appeal, allow the appeal and substitute a sentence of seven and a half years. Authorities *Valler -v- AG* (18 th July 2002) Jersey Unreported. CofA; [2002/133] *AG -v- Chartier* (4 th October 2002) Jersey Unreported; [2002/180] *AG -v- Murphy* (14 th April 2000) Jersey Unreported; [2000/68] *Welsh -v- AG* (4 th April 2002) Jersey Unreported. CofA; [2002/72] D. A. Thomas 'Principles of Sentencing' (2 nd Ed'n): pp. 195-7. *Sengupta -v- Holmes*

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"European Human Rights Law" para 8.11. Blackstone's Criminal Practice para D 2.25.
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