

JERSEY / JUDGMENT

Vladimirov v AG [2024]

JCA 161 (24 July 2024)

[2024] JCA 161

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Court of Appeal 24 July 2024 Before : Ms Clare Montgomery KC, President Sir William Bailhache JA Sir Adrian Fulford JA Between Aleksej Vladimirov Applicant And The Attorney General Respondent The Applicant in person Advocate C. L. G. Carvalho for the Respondent

judgment

clare montgomery ja:

Introduction

1. This is the judgment of the Court on the Applicant's renewed application for an extension of time to bring an appeal against conviction and his appeal against sentence. 2. The Applicant was convicted on his guilty pleas as long ago as 10 November 2023. If an extension of time for his application for leave to appeal his conviction is granted, the Applicant will seek to have his convictions quashed on the grounds that he did not understand the implications of his pleas because he was not provided with the assistance of an interpreter so that he could understand the language used by his lawyer and by the Royal Court (the translation issue). He also contends that he was wrongly advised that he was likely to be convicted and put under improper pressure to plead guilty (the improper pressure issue). 3. In the early hours of 6 September 2023, the Applicant and Dmitrijs Kuzmins were together on the Parade in St Helier. They had been drinking. Following an altercation between Mr Kuzmins and a resident of the [Redacted] Apartments (the apartments), Mr Kuzmins kicked in the main door of the apartments and then the door of a first floor flat occupied by Victim 1 and Victim 2 (the flat). Mr Kuzmins was followed into the apartments and then later into the flat by the Applicant. 4. Once both men were in the flat, Victim 1 was attacked, and the Applicant took hold of Victim 1 around the throat. Victim 2 evaded an attack by Mr Kuzmins and called the police. The Applicant and Mr Kuzmins left the apartments and were later arrested, still together, by the police. 5. The Applicant was interviewed by the police and denied doing anything wrong. He was able to express himself in English clearly and coherently. We have studied the transcript of his interview carefully and he appears to have had no difficulty in understanding the police questions and formulating his answers. He was shown CCTV of his entry into the apartments. He gave a large number of no comment answers but ended by

saying that he went into the apartments intending to take Mr Kuzmins away; " because I think that he was doing something wrong." He agreed: "It was wrong to kick the doors out. It was wrong. And to enter the property." However, he denied entering the flat or seeing the occupants. He said: "When I found this [Mr Kuzmins] inside, he was already walking away."

6. The Applicant appeared at the Magistrate's Court on 7 September 2023 and entered not guilty pleas. On 25 September 2023 Advocate Estelle Burns told the Crown that the Applicant wished to enter guilty pleas to all offences, save for the assault on Victim 2. The Crown were not willing to accept this partial plea offer and on 28 September 2023, Advocate Burns confirmed the Applicant would plead guilty to all counts. 7. On 10 November 2023 the Applicant pleaded guilty to 3 offences of breaking and entering and assault. On 15 December 2023 before the Inferior Number of the Royal Court (Lieutenant Bailiff Olsen and Jurats Austin Vautier and Entwistle) the Applicant was sentenced to 3 years imprisonment for breaking and entering and to 15 months imprisonment for the assault on Victim 1 and 1 month imprisonment for the assault of Victim 2. Both of the sentences for the assaults were ordered to run concurrently to the term of 3 years. He was recommended for deportation. Mr Kuzmins, who had also pleaded guilty (slightly before the Applicant entered his pleas) was also sentenced to 3 years imprisonment for the same offences as the Applicant, with consecutive sentences of 6 weeks for his involvement in offences of assault and malicious damage committed immediately before entering the apartments. 8. On 20 December 2023 the Applicant was advised by Advocate Burns that there were no viable grounds for an appeal against sentence. 9. The Applicant then raised the safety of his conviction and sought a second opinion having waived privilege. On 6 February 2024 Advocate Mark Boothman advised the Applicant that the merits of any appeal against conviction were poor and there were no arguable grounds for an extension of time. Advocate Boothman also advised that there were no viable grounds for an appeal against sentence. 10. On 26 March 2024 a Form 2 Notice of Appeal for extension of time in which to appeal conviction was filed by the Applicant. This was necessary as time to appeal his conviction expired 28 days after he entered his pleas on 10 November 2023. 11. On 29 March 2024 the Applicant filed a Form 1 Notice of appeal for leave to appeal against conviction. On 25 April 2024 Sir William Bailhache, JA sitting as a single judge of the Court of Appeal, refused the application for an extension for time to appeal against conviction. On 29 April 2024 the Applicant filed a Form 7 Notice of Appeal under Article 41 of the Court of Appeal (Jersey) Law 1961 renewing his application for an extension of time before the full Court. The conviction appeal 12. In accordance with the principles in *La Solitude Farm v Attorney General* [1985-6] JLR 1 the renewed application for an extension of time requires us to consider the extent of the delay, any explanation for the delay, the prospects of success if the extension is granted and any prejudice to the Applicant if the extension is refused. 13. All of these questions are bound up with the proposition advanced by the Applicant that he was not provided with adequate legal assistance as he did not understand the advice he was given or the choices he was required to make because he was not provided with interpretation and translation services contrary to his rights under ECHR Art 6(3)(c) (the translation issue). 14. The Applicant considers that the legal assistance he received was not practical and effective because he is not a native

English speaker and his English comprehension levels were not high enough to understand the advice he was given about joint enterprise and accessory liability. He seeks leave to rely on the analysis of a retired police officer, Mr Keith Perchard and his wife Mrs Elena Perchard. Although this material was not provided to us in evidential form we have considered their

analysis

de bene esse together with further letters from Mr Perchard dated 22 and 23 July 2024. 15. There is no doubt that translation services must be provided to ensure that a defendant is able to communicate with their lawyer, whenever that is necessary, for the purpose of safeguarding the fairness of any criminal proceedings. A defendant must be able to explain their version of events to their lawyer, point out any statement with which they disagree, and make their lawyer aware of any facts that should be put forward in their defence. The advice that is given by the lawyer must be in language that the defendant is able to understand so that the defendant may make informed decisions in relation to their participation in the proceedings (including entering any plea). 16. The Court is not however persuaded that there is any sufficient evidence that the provision of interpretation was necessary to do justice in this case. Nor is the Court persuaded that the decision of the Applicant as to whether to plead guilty was even arguably affected by a lack of translation. 17. The ability of the Applicant to understand spoken English can be gauged by the uncontested evidence that he appeared to the police officers who interviewed him to be able to understand and communicate in English. The Applicant accepts that he told the officers he was content to be interviewed in English. He also had lengthy meetings with both Advocate Burns and Advocate Boothman in which he confirmed he was content to have those discussions in English. Neither advocate had any concerns that the Applicant was not able to understand the advice he was given. In neither instance did he say he needed assistance from an interpreter. 18. The Applicant cannot have been unaware that he would be able to request an interpreter to assist him if needed. Mr Kuzmins had requested and been provided with an interpreter who was in court when the plea and sentencing hearings took place. An interpreter was made available in the course of the Applicant's lengthy meetings with the Probation Service and was standing by to interpret the proceedings at court, if required. 19. The critical issue for the purpose of the translation issue is whether the Applicant understood that on his account (as advanced in this Court) he was not guilty of the offences as charged. He has confirmed that he did understand this. The Applicant says that he only decided to plead guilty because he was told by his Advocate his account would not be believed. There was no need for the Applicant to understand any of the juristic underpinnings of joint enterprise in these circumstances and nothing turns on whether he would have been able to understand those concepts. 20. It emerged with great clarity at the hearing that the Applicant's real complaint was the quality of the advice he was given that his account would not be believed and the fact that he did not have access to the underlying case materials. 21. We are satisfied that Applicant was well aware of the possibility of contesting the case on the basis that he did not know what Mr Kuzmins was doing and he had not assisted Mr Kuzmins in breaking and entering or in the assaults. He understood that this account would

allow him to plead not guilty. That was the basis of his original plea and his later partial plea offer. The real question that the Applicant raises is whether he was subject to improper pressure to admit his guilt (the improper pressure issue). 22. However, in our view, the advice that the Applicant received was well within the range of appropriate professional responses by a competent advocate. Most advocates confronted with the evidence in this case would have been inclined to advise the Applicant that he was not likely to be believed. 23. On the Applicant's own admission in police interview, he had followed Mr Kuzmins into the apartments after the main door had been kicked in, albeit having waited outside for a time. The Applicant later admitted that he had (contrary to his initial denial in the police interview) then entered the first floor flat which had also had its door forced open and there held Victim 1 by the neck while Mr Kuzmins struck him. The Applicant has ascribed the variation in his account to the fact that he had been drinking and to his reluctance to speak to the police. However his failure to advance this account to the police was bound to have an adverse effect on his credibility in any trial. 24. The Applicant claims that he was acting to defuse the situation in the flat however his actions were, even on his account, potentially unlawful. He accepted that he had no authority to enter the apartment or the flat and he does not claim to have been acting in lawful defence of Victim 1. The sole point advanced on his behalf is that he did not know what Mr Kuzmins was going to do and did not assist him in doing it, so that any liability was not a joint one. 25. The Applicant's claimed motivation and lack of knowledge were and are flatly inconsistent with the prosecution witness evidence. Amongst the evidence undermining the suggestion that there was no joint enterprise and any claimed benign motivation was the evidence from Victim 2 that both Mr Kuzmins and the Applicant came into the flat at the same time and the evidence of Victim 1 that both men were kneeing and punching him before the Applicant took hold of his neck. It is notable that both men left the flat together and stayed together until arrested by the police. Far from a common purpose being unproved and unlikely, it is strongly supported by the witness statements and CCTV evidence and was admitted by the Applicant in his pleas. The Applicant's claim that he had no choice but to follow Mr Kuzmins on his violent rampage was not credible and we do not consider that it would have been improper for Advocate Burns to advise, as the Applicant now claims "that it was his word against [the prosecution witnesses]". This would have been appropriate advice for her to give. It does not appear to us that this imposed any improper pressure on the Applicant. 26. It is notable that there was no suggestion, prior to the Applicant's sentence being pronounced, that he was acting under pressure or had failed to appreciate the consequence of his guilty pleas. In the course of 3 lengthy Probation interviews, which took place with the assistance of an interpreter, the joint nature of the prosecution case was explained: "Mr Vladimirov and his co-accused kicked open the door to the property of [Victim 1] and [Victim 2] and assaulted them both. During which, [Victim 1] was put in a head lock by the defendant and has been punched and kneed to the head by Mr Kuzmins, whilst [Victim 2] was grabbed by both arms." 27. The Report states: "Mr Vladimirov accepts limited responsibility. Although he accepts he committed his part in the offences, he told the report writer he cannot recall most of what happened that evening, and said he only knows what happened due to information provided to him by the Police. Mr Vladimirov was regretful of his actions and said he feels "terrible" about his behaviour. Whilst there were times where he proceeded to blame Mr Kuzmins for his involvement in the

offences, he also acknowledged that he was present and that his behaviour was not acceptable." 28. The transcript of the sentencing hearing also makes it clear that the prosecution case was one of joint responsibility and the Applicant must have understood that this was the basis for his guilty pleas and on which he was to be sentenced. 29. We do not consider that there is any reliable evidence, even on his own account, that Applicant was subject to improper pressure. The account given by his trial Advocate, Advocate Burns, undermines the suggestion that there was any pressure on him at all. Advocate Burns has provided a sworn affidavit dated 3 April 2024 in which she describes the first video conference with the Applicant on 21 September 2023. The Applicant was unequivocal that he did not need a translator. She says that the Applicant initially indicated he wished to plead guilty to all the counts before receiving her advice. She says that she discussed the evidence and described the concept of joint enterprise. 30. We accept Advocate Burns' evidence and we consider it is clear that the Applicant must have understood the discussion because his instructions following the conference were to offer pleas of guilty to the breaking and entering and assault on Victim 1 but to plead not guilty to the assault on Victim 2. We do not accept the claims advanced by the Applicant that he was not advised about the law of joint enterprise until after his offered pleas were rejected. The decision of the Applicant to offer partial pleas demonstrate that he had understood the advice and was able to make informed choices about his pleas. 31. Mr Perchard says that the later telephone call on 28 September 2023, as described by Advocate Burns, would not have been understood by the Applicant. There is however no evidence that the use of the words "participating" or "conditional intent" was such as to deny the Applicant appropriate legal advice or assistance. He understood that, on his account, he was not guilty of the assault on Victim 2. The issue for the Applicant was (as he told Mr Perchard) that he would not be believed. Even if, as he now claims he was told "it is your word against theirs", that appears to us to be an accurate summary of the evidential problem facing the Applicant and one that he had to take into account in considering whether to enter a plea of guilty with the benefit of a significant reduction for early pleas. This is precisely the dilemma of which he spoke in a recorded telephone conversation with Mr Perchard. 32. Finally, criticism is made of the advice given to the Applicant in Advocate Burns' letter of 16 October 2023. Her description of his participation as taking the form of joining in the commission of offences by Mr Kuzmins is clearly and simply expressed. If the Applicant disagreed with this as the basis of his pleas he was able to say so. He did not do so. There is no evidence that he was ever advised or ever understood that he could be guilty simply because he was there. 33. No application to vacate the pleas was made under Article 79 of the Criminal Procedure (Jersey) Law 2018 before sentence was passed. Even if the application had been made then, the power to vacate would have been exercised "sparingly" particularly since the pleas were entered with legal advice, see AG v F

[2020] JRC 039A at para

12. The Applicant would have had to persuade the Royal Court that his pleas were equivocal. There is no evidence, even now, that they were. The pleas were not based on mere presence. 34. The circumstances in which a defendant may be permitted to go behind a plea of guilty on an appeal against conviction are even more limited. In R v Asiedu

[2015] EWCA Crim 714 ; [2015] 2 Cr App R 8, Hughes LJ at para 32 emphasised that the trial process is not a "tactical game". A defendant who pleads guilty is making a formal admission in open court that he is guilty of the offence. Once he has admitted such facts by an unambiguous and deliberately intended plea of guilty, there cannot then be an appeal against his conviction, for the simple reason that there is nothing unsafe about a conviction based on the defendant's own voluntary confession in open court. A defendant will not normally be permitted on appeal to say that he has changed his mind and now wishes to deny what he has previously admitted. 35. We do not consider that it is arguable that the Applicant was not able to make an informed and free choice about his pleas. He was given adequate legal advice and assistance which he understood and acted on. His initial offer of partial pleas demonstrated that he was able to make decisions about his plea based on the strength of the evidence as well as his own account. It is simply not arguable that the pleas that were ultimately offered did not represent a true acknowledgement of his guilt. In those circumstances we do not consider that there is any basis on which an appeal against conviction would succeed. For these reasons the application for an extension of time is refused. There is no good reason for the delay in making the application for leave to appeal and the appeal has no prospect of success. No possible injustice is caused to the Applicant by this decision. The sentence appeal 36. The application for leave to appeal was filed protectively on the nominal basis that the sentence was manifestly excessive. The appeal was originally made to the Superior Number of the Royal Court on the basis that the appeal was an appeal against sentence only. However, given the terms of Article 24(1) of the Court of Appeal (Jersey) Law 1961 we ordered that the appeal should be listed in this Court since the Applicant's appeal was not "solely against sentence" and it would be more convenient for the Court to deal with both his application for extension of time and his sentence appeal. 37. In broad terms, the test on an appeal against sentence has been set out in *Harrison v AG*

[2004] JLR 111 in which Nutting JA said, at paragraph 31: "The court will interfere:

- (a) where the sentence is not justified by law, in which case it will interfere not as a matter of discretion but of law; (b) where sentence has been passed on the wrong factual basis; (c) where some matter has been improperly taken into account or there is some fresh matter to be taken into account; or (d) where the sentence was wrong in principle or manifestly excessive." 38. In this case the Applicant claims that the total sentence of 3 years imprisonment was manifestly excessive and did not make sufficient distinction between him and Mr Kuzmins. 39. Having dismissed the application for an extension of time to apply for leave to appeal against conviction, we are bound to proceed on the basis that, on the Applicant's own admissions, he joined in with Mr Kuzmins and his offending. In our view, a violent entry into a residential property late at night followed by any assault on the residents is a grave form of the common law offence of breaking and entering. 40. In *Attorney General v Da Silva* [1997 JLR Notes 14A]

[1997] JRC 218 the court identified a 'bench-mark' of not less than 3 years' imprisonment for burglary of an occupied dwelling, on a guilty plea. The Court identified a number of possible aggravating factors, which included committing the offence at night, being violent and confronting the householder in his or her own home. 41. In our judgment, on a not guilty plea, the Applicant could have expected a sentence of up to 5 years imprisonment. We draw particular attention to the inevitable trauma caused to the inhabitants of the flat; the front door to their home was kicked in without any warning and they were subjected to a seemingly random drunken attack late at night. We consider that there is nothing manifestly excessive in the sentence of 3 years imprisonment. This reflected full credit for the Applicant's guilty pleas and his good character. 42. There is also no objectionable disparity between his sentence and that of Mr Kuzmins. Although Mr Kuzmins played the dominant role in the events, there is no reason to discount the Applicant's sentence since he chose to join in this very serious offending. The sentences on both men reflect the cumulative effect of their conduct viewed as whole. This is an appropriate reflection of the gravity of their behaviour and does not call for any distinction in sentence. The imposition of concurrent rather than consecutive sentences for the assaults was merciful and fully respected the need to have regard to the totality of the sentence. Authorities AG v Vladimirov and Kuzmins

[2023] JRC253 Court of Appeal (Jersey) Law 1961. La Solitude Farm v Attorney General [1985-6] JLR 1. Criminal Procedure (Jersey) Law 2018. AG v F

[2020] JRC 039A. R v Asiedu

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