

JERSEY / JUDGMENT

Waite v AG [2007] JCA 170 (11 September 2007)

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COURT OF APPEAL 11 September 2007 Before : Jonathan Sumption, Esq., Q. C., President; Geoffrey Rowland, Esq., Bailiff of Guernsey, Q. C.; and John Martin, Esq., Q. C. Michael Waite -v- The Attorney General Application for leave to appeal against the conviction by the Assize Court on 3 rd November and the sentence passed by the Superior Number of the Royal Court on 5 th December, 2006, on a not guilty plea to: 1 count of: Conspiracy to contravene Article 5 (b) of the Misuse of Drugs (Jersey) Law, 1978 . (Count 1). M. T. Jowitt, Esq., Crown Advocate. Advocate D. S. Steenson as Amicus for Mr Waite.

JUDGMENT

THE president: 1. On 3 rd November 2006, Michael Waite was convicted by the Royal Court on one count of conspiring with Thomas Mawer and Meena Broom to supply heroin in Jersey. Miss Broom, who was tried with him, was acquitted. Mr. Mawer pleaded guilty. Mr. Waite was sentenced to 11 years' imprisonment. He has applied to this court for leave to appeal against both conviction and sentence. On the hearing of his application, Mr. Waite represented himself, but was assisted by an amicus curiae, Mr. Steenson, appointed by the Court. Mr. Steenson was able to discuss the matter with Mr. Waite, and put Mr. Waite's points to us as persuasively as any Advocate could have done. However, at the conclusion of his argument, and after confirming with Mr. Waite that there was nothing that he wished to add, we indicated that we did not think that this was an appropriate case for leave to appeal, and rejected the application as to both conviction and sentence. We now propose to state briefly our reasons for that decision.

Conviction 2. As with so many appeals against conviction, it is necessary to start by pointing out the limited basis on which the Court of Appeal may review criminal convictions. Article 26(1) of the Court of Appeal (Jersey) Law 1961 substantially reproduces Section 4 of the English Criminal Appeal Act 1907. It empowers the Court of Appeal to allow an appeal against conviction only if it is unreasonable, or cannot be supported having regard to the evidence or was vitiated by an error of law or miscarriage of justice. There is no equivalent in Jersey of the wider power which has existed in England since 1968 to allow an appeal on the ground that the verdict is "unsafe or unsatisfactory" . The form of appellate jurisdiction which exists in Jersey confers what has been described by the Privy Council as a "limited right of appeal which precludes the court from reviewing the evidence and making its own valuation thereof" : *Aladesuru v R*

[1956] AC 49 , at 54-5; cf. AG v Edmond-O'Brien

[2006] JLR 133 . The Court of Appeal may allow an appeal if there was no case to answer, or if there was no evidence which a reasonable jury could have accepted. Otherwise, it may allow an appeal only on the ground of error of law or miscarriage of justice. 3. In this case, although all the available statutory grounds are recited in the notice of application, it has not in the event been suggested that there was any error of law or miscarriage of justice. No complaint is made about the Deputy Bailiff's summing up, which was both thorough and impeccably fair. Nor is it suggested that there was no case to answer. The application is made on the ground that the conviction was unreasonable. 4. As in many cases of this kind, there was no direct evidence against Mr. Waite, but a great deal of circumstantial evidence. The story starts with Mr. Waite's co-Defendants, Mr. Mawer and Miss Broom, who arrived in Jersey in December 2005 and lived together, initially at the Ocean Walk Guest House at St. Brelade. Mr. Mawer was an unemployed heroin addict, who was undoubtedly engaged at this time in retailing heroin. A memorandum found at the time of his arrest was attributed on the basis of expert handwriting evidence to Miss Broom, and according to her evidence was dictated to her by Mr. Mawer. There was expert evidence, barely challenged by the defence, that it recorded the purchase or possibly a proposal to purchase five ounces (140 grams) of heroin for £3,000, which is a price consistent only with its having been acquired in the United Kingdom. The memorandum recorded a proposal to sell it in bags of 0.1 grams at £50 each, making a total turnover of £70,000 on that consignment. The proceeds were to be divided 20/80 between 'us' (Mr. Mawer and Miss Broom) and 'M' (by inference the importer into Jersey). 5. The Crown's case against Mr. Waite depended on inferences which they invited the jury to draw from the following principal matters: (i) Mr. Waite was an unemployed jobseeker, living in Derby, who came over to Jersey on two occasions, once from 6 th to 12 th January 2006, and once on 19 th January 2006. There was considerable contact between the three Defendants on both occasions. On the first visit, he checked into the Ocean Walk Guest-house in St. Brelade, where Mr. Mawer and Miss Broom were then staying, and spent time with them. On the second occasion, on 19 th January, he visited them at the flat to which they had by then moved, in St. Peter. Miss Broom gave evidence that while he was there he helped bag up the heroin in the flat. He then walked to the Ocean Walk Guest-house where he proposed to stay. Mr. Waite and Mr. Mawer were together at the Guest-house when they were arrested later that day. The mobile phone records of the three Defendants show much telephone contact between Mr. Waite and the other two before and during both of his visits. (ii) Until Mr. Waite's first visit, Mr. Mawer and Miss Broom appeared to have very little cash. Shortly afterwards, they began to spend money freely, paying within a short period for a wide-screen television, a moped and a deposit on the flat in St. Peter. (iii) Within a short time of his arrival on the island, Mr. Waite also appeared to have come into possession of large amounts of cash. On 10 th and 11 th January 2006, he paid into banks in Jersey for the credit of his account with Lloyds TSB in Derby £213 and £2,600 respectively in cash. On 12th, after returning to England, he paid £1,016 directly into the

Derby branch in Jersey bank-notes. Mr. Waite had left his Visa card with Mr. Mawer, and on 17 th January, Mr. Mawer paid £5,000 in cash into a Jersey bank for the credit of the Visa account. In addition, when Mr. Waite was arrested on his second visit, he had £2,300 on him in Jersey bank-notes. These sums approximately correspond to the 80% share of the receipts of the sale of one gram of heroin referred to in the memorandum. (iv) When he was arrested, Mr. Waite told the police that he had come to Jersey on a social visit, as he had been doing to see various friends for a couple of years. He later admitted that this was not true, and that he knew no one in Jersey but Mr. Mawer and Miss Broom. 6. At the trial, Mr. Waite's explanation of these facts was, in bald summary, that he had come to Jersey on both occasions to discuss a plan to go into business with Mr. Mawer and Miss Broom running a shop here. On the first occasion, Mr. Mawer was unable to get the key of the proposed shop premises, so he had to come back a second time. He said that the money which he paid into his account on 10 th , 11 th and 12 th January and that he had on him on 19 th was the proceeds of selling fake watches to some one called Tony in Spain who had paid him in Spain in Jersey bank-notes. He called two persons with criminal records from England to say that they had seen him with Jersey bank-notes in one case while he was in Spain, and in the other upon his return. Mr. Waite said that the £5,000 paid into his Visa account represented the repayment of some money that he had previously lent to Mr. Mawer. He had no explanation of why he should have kept Jersey bank-notes on him, which he could not spend in England, and then paid it into his account in Jersey, where he could spend it; nor was there any explanation of why he should have returned to England on 12 th January with at least £2,300 in Jersey bank-notes still on him. He denied that he had bagged up heroin with Mr. Mawer on the morning of 19 th January. 7. It can be seen that there was plenty of evidence from which it can be inferred that Mr. Waite was engaged with Mr. Mawer in the supply of heroin in Jersey. There was also evidence from Mr. Waite himself, backed up on one point by his two friends from England, to the contrary. As the Deputy Bailiff pointed out in his summing up, if the Jury thought that his explanation of what he was doing in Jersey and how he came by the Jersey cash was or might be true, it was their duty to acquit him. But if they thought that his explanations were incredible and involved far too many coincidences to be believed, they should convict. This is commonly the choice before Juries in cases like this. It is a classic Jury question which parts of a body of conflicting evidence they should accept. It is, as the Privy Council pointed out in O'Brien (at page 141), 'in the nature of circumstantial evidence that single items of evidence may each be capable of an innocent explanation, but taken together they establish guilt beyond reasonable doubt . ' The Jurors at Mr. Waite's trial had the opportunity to see and hear the defence evidence. They must have taken the view that the cumulative effect of the evidence for which there was no convincing explanation, established the prosecution case beyond reasonable doubt. It is not for us, who have not heard the evidence, to say from the transcripts whether we would have reached the same conclusion. It is quite impossible to contend that no reasonable Jury could have done so. 8. In support of his application Mr. Waite made a number of points, through Mr. Steenson. 9. First, he drew attention to the fact that there was no

evidence that he had ever seen Miss Broom's memorandum and no direct evidence that he was the importer referred to in it; that there was no scientific evidence against him, and that he had not been found with any traces of drugs on his person or any drugs, paraphernalia or deal lists in his possession; and that there had been no direct evidence of the content of incriminating telephone conversations with his alleged co-conspirators. All of this is true, but it is only another way of saying that the evidence against him was circumstantial. It does not follow that there was no other material from which sufficiently conclusive inferences could be drawn. 10. Secondly, Mr. Waite said that Mr. Mawer should have been called. He was a co-Defendant, but he pleaded guilty and did not give evidence. Mr. Waite says that he instructed his Advocate to call him, but his instructions were not followed. We have been told that there is no written record on his Advocate's file of such instructions. But however that may be, we have no reason to believe that Mr. Mawer's evidence could have helped him. Mr. Mawer having pleaded guilty to possession with intent to supply, could hardly have denied that he was himself concerned in selling heroin. He made a short statement for the purposes of his sentencing hearing, which was supplied to Mr. Waite in prison. In it, he said that Mr. Waite had nothing to do with the scheme described in Miss Broom's memorandum. But it is apparent from the prosecution's memorandum of facts for sentencing purposes that in the course of questioning by the police Mr. Mawer incriminated Mr. Waite, while denying that the memorandum referred to any deal in which he was involved. The only advice that a responsible Advocate could have given to Mr. Waite is that it was not in his interest to call Mr. Mawer as his own witness and expose him to cross-examination by the Crown. 11. Thirdly, Mr. Waite complained about the publication in a local newspaper of the allegations against him and Mr. Mawer. The article in question was an accurate report of the case as presented to the Jury in the opening for the prosecution. 12. In our judgement, an appeal against conviction would have no prospect of success, and accordingly we refuse leave. Sentence 13. It was agreed between the Crown and the defence that the Rimmer guidelines indicated a starting point for this offence of between ten and thirteen years. The Crown proposed a starting point of twelve years, which the Deputy Bailiff accepted. Then, having observed that there was 'very little' mitigation, he passed a sentence of eleven years. 14. The only point made in support of Mr. Waite's application as regards the sentence is that the starting point was too high, because mathematically the quantity which he conspired to supply was closer to the lower end of the bracket. The question where within the relevant Rimmer bracket to place the starting point was considered by this court in *O'Connor and Others v AG*

[2007] JCA 104 . It is not a simple mathematical proration of the quantity across the bracket. It depends on a combination of the quantity and the gravity of the offence, measured mainly by the significance of the Defendant's role in it. This had been the practice in sentencing in drug cases for many years. In his sentencing remarks, the Deputy Bailiff said that the choice of starting point was made 'having regard to the amount and subject of the conspiracy ... and also having regard to your role as organiser of this conspiracy .' This was

the correct principle, and we cannot fault his application of it. 15. In our judgment this application also must be rejected. Authorities Court of Appeal (Jersey) Law 1961. Criminal Appeal Act 1907. Aladesuru v R

[1956] AC 49 . AG v Edmond-O'Brien

[2006] JLR 13. O'Connor and Others v AG

[2007] JCA 104 . Rimmer, Lusk and Bade v AG

[2001] JLR 373 . AG v Mawer and Waite

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