

JERSEY / JUDGMENT

Wilkie v AG [2000] JCA 146 (26 July 2000)

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[2000] JCA 146 [New search] [Help] 2000/146 8 pages COURT OF APPEAL. 26 July, 2000. Before: R. C. Southwell, Esq., Q. C., President; Sir John Nutting, Bt. Q. C., and; D. A. J. Vaughan, Esq., Q. C. Seamus Martin WILKIE -v- The Attorney General. Applications for leave to appeal: (1) against conviction before the Inferior Number of the Royal Court, en police correctionnelle , on 18 th January, 2000, on a not guilty plea to count 1 of the charges set out below; and (2) against a total sentence of 6 years' imprisonment passed on 2 nd March, 2000, by the Superior Number of the Royal Court, to which the appellant was remanded by the Inferior Number on 18 th January, 2000, following conviction on the said count 1 and a guilty plea, entered on 3 rd September, 1999, to count 2 and a change of plea to guilty, entered on 18 th January, 2000, to count 3: count of: possession of a controlled drug with intent to supply, contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978 : count 1: MDMA, on which count a sentence of years' imprisonment was passed; count of: possession of a controlled drug, contrary to Article 6(1) of the Misuse of Drugs (Jersey) Law, 1978 : count 2: MDMA, which count is to remain on file ; and count of: intentionally obstructing police officers in the exercise of their powers under Article 17 of the Misuse of Drugs (Jersey) Law, 1978 , on which count a sentence of 3 months' imprisonment, concurrent , was passed. Applications for leave to appeal referred direct to the plenary Court rather than first to a Single Judge for determination. Advocate A. D. Hoy for the appellant; J. C. Gollop, Esq., Crown Advocate.

JUDGMENT.

NUTTING J. A: 1. On the 18 th January, 2000, Seamus Martin Wilkie, aged 23 years, appeared before the Deputy Bailiff and Jurats charged in an indictment containing three counts. In the first count he was charged with possession of MDMA with intent to supply contrary to Article 6 (2) of the Misuse of Drugs (Jersey) Law, 1978 . In count two he was charged with simple possession of the same drug; and in count three he was charged with intentionally obstructing police officers in the exercise of their powers under Article 17 of the Misuse of Drugs (Jersey) Law, 1978 . 2. On the day of his appearance he confirmed his earlier plea of guilty to the second count and pleaded

guilty to count three. Accordingly a trial took place in relation to count one. He was convicted and sentence was adjourned. On 2nd March 2000 he appeared before the Superior Number of the Royal Court and was ordered to serve six years imprisonment on count one and three months imprisonment concurrent on count three. Count two was ordered to lie on the file. On 24th July, 2000 he applied to this court for leave to appeal against both conviction and sentence on count one. We refused the application in relation to conviction but granted leave in relation to sentence. We now give our reasons for those decisions.

3. The circumstances which gave rise to the conviction can be stated shortly. At 2.30 am on Sunday the 23rd May 1999 two patrolling police officers noticed the appellant in Cattle Street, St Helier. He was in company with a young woman, later identified as his girlfriend Miss McNabb. His conduct gave the officers cause to suspect that he was in possession of drugs. They approached him and told him they wished to search him. He attempted to run away and was apprehended but he continued to struggle as the officers tried to restrain him. They sought assistance and eventually he was handcuffed, carried bodily to a police vehicle and driven to police headquarters.

4. He was put into a cell and searched. Twenty seven tablets were found in a plastic tub in one of his pockets. When analysed the tablets were each found to contain approximately 160 milligrams of MDMA: the evidence, unchallenged before the lower court, was that such tablets, known as Ecstasy, usually contained not more than 80 milligrams of MDMA. The police also found the appellant to be in possession of £150 cash in various denominations.

5. When questioned the appellant refused to reveal anything about the circumstances of his possession of the tablets, the money, or indeed about his accommodation or presence in Jersey. Miss McNabb, who was the tenant of a flat at Mimosa Apartments in which the appellant had also been living, provided the custody sergeant with a different address in the block for herself and the appellant. This flat was later searched on the authority of a warrant and its innocent occupants were no doubt much vexed to find themselves the subject matter of unjustified police attention.

6. Notwithstanding his silence in the police station, the appellant gave evidence at his trial. His case was that he had been abusing illegal drugs since leaving school in Ireland at the age of fourteen years. He claimed that by 1998 he was consuming up to ten Ecstasy tablets per night. He arrived in Jersey in January 1999 to escape from the environment of drugs in which he had been living with the sum of £1500 which his parents had given him as an incentive to make a fresh start; but soon after his arrival in St Helier he began once again to abuse drugs and also to consume alcohol in large quantities.

7. He told the court that by the end of February 1999 he had spent all the money which his parents had given him, and during the two and a half months prior to his arrest had lived a hand to mouth existence surviving on handouts from friends he had made during his short stay here, supplemented by occasional remuneration from labouring or painting and decorating jobs. He relied on his girlfriend for accommodation and food and the generosity of friends for other expenses including funding his drug habit. He estimated that in the period leading to his arrest he was spending an average of £200 per week on alcohol and drugs, usually Ecstasy, which he purchased from a number of suppliers for never less than £10 per tablet. He acknowledged that he had no bank account, no regular income and no savings.

8. He also gave evidence that shortly before his arrest he and his girlfriend, who was employed as a nurse, planned to move to a flat in Belmont Road from their accommodation in Mimosa Apartments and that on Saturday, 22nd May 1999

she had given him a sum £350 in cash representing the deposit due to be paid, the following Tuesday, as down payment on the new flat. He claimed that during the course of that same evening he went to the Warehouse and was approached by an unknown man in the lavatory who offered him an unspecified quantity of Ecstasy tablets for £200. These were the twenty seven tablets found on him after his arrest. He recognised in cross examination that in fact the figure of £200 reflected a price of £7.40 per tablet. He said that he had purchased the tablets for his own consumption that night but that in the hours between the purchase and his arrest had forgotten about them and neither consumed nor sold any of the tablets. 9. He called two witnesses, Mr Duff, to give evidence of his financial circumstances, and a clinical psychologist, Mr William Saunders, who had treated him on remand at the La Moye Prison and who has some experience and knowledge of drug abuse and addiction in this jurisdiction. 10. The Crown could provide no direct evidence of dealing by the appellant. Their principal witness was a police force drug liaison officer, DC De La Haye, who has been concerned in drug related investigations in Jersey since 1984 and who has experience in working undercover and with handling registered police informants. He is also recognised as being qualified to give expert evidence about drugs and has done so on prior occasions concerning their supply in Jersey, the United Kingdom and France. 11. In this case DC De La Haye gave evidence about Ecstasy prices, dealing and the habits of consumers. He said that in May 1999 the wholesale price of Ecstasy was £10 per tablet and that the street price varied between £15 and £20: a dealer could therefore expect to pay the former price per tablet for a bulk purchase and charge the latter range of prices per tablet to consumers. DC De La Haye told the court that he had never heard of Ecstasy changing hands here at a price of £7.40 per tablet, and suggested that steady demand made it unnecessary for dealers to discount prices or to sell at a loss. 12. He was asked about the circumstances in which drugs were sold in Jersey. He said that it was not in his view realistic to suppose that a drug deal such as the one allegedly struck by the appellant could take place in the manner suggested, firstly because the price described was unrealistic and secondly because fear of the presence of undercover officers forced dealers to limit their dealing activities to those whom they knew and trusted. 13. He acknowledged that medical text books documented cases of individuals who consumed up to thirty tablets of Ecstasy during, for example, the course of a weekend; and he said that he had personal experience of one consumer who admitted to taking that amount in the seventy two hours prior to his arrest, but that as a result the man had required four days of medical treatment before he was fit to be interviewed. He said the majority of those who abused Ecstasy consumed up to three tablets per night. 14. The issue for the lower court was whether or not the evidence for the Crown raised an irresistible inference that the appellant was in possession of the twenty seven tablets with intent to supply. Since he had made no comment in answer to questions put to him by police after his arrest on 23rd May 1999, the Jurats were entitled to look with particular care at the account given by him for the first time in the witness box at his trial. His evidence in chief and in cross examination covers forty six type written pages. He spent a considerable part of the time during his trial in the witness box. The Jurats were therefore in a good position to assess his creditability. They had to resolve the conflicts between the evidence of the appellant and that of DC De La Haye and to conclude whether or not the appellant was telling the truth, or might have been, especially in relation to matters germane to the issue in the case. 15. It is not for

this court to make any assessment of the competing arguments which were put before the Jurats. We did not see or hear the witnesses. It is not our function to retry the case, but rather to investigate the proceedings below to see whether "the verdict should be set aside on the ground that it was unreasonable or cannot be supported having regard to the evidence" (Article 25 of the Court of Appeal (Jersey) Law, 1961). 16. We have had the advantage of reading the transcript of the proceedings below including the speeches of Counsel and the summing up of the Deputy Bailiff. We have considered carefully the written and oral submissions put forward on the appellant's behalf. 17. An analysis of the evidence reveals a number of issues which the Jurats had to decide and conflicts which they had to resolve. Some of the assertions which the appellant made, and explanations which he gave, required careful and perhaps sceptical consideration. We can find no warrant for the conclusion that the Jurats, as alleged in the grounds of appeal, failed to consider every relevant aspect of the case, nor that they attached unjustified weight to any particular piece of evidence called by the Crown, nor that they misdirected themselves on the evidence, much of which was admittedly circumstantial, nor that they took into account matters which they were directed by the Deputy Bailiff properly to ignore. 18. We have concluded there was ample evidence to warrant the verdict which the Jurats reached and that on a number of matters the evidence was such as to compel the conclusion that the appellant purchased the tablets with intent to supply them. 19. It is unnecessary to lengthen this judgement with an exhaustive list of such matters. Four examples will suffice, related directly to the key issue for the court, namely the circumstances in which the appellant came to be in possession of the twenty seven tablets, the circumstances in which he came to be in possession of the £150, the state of his financial position by mid May 1999 and what he did, or rather did not do, with the tablets between purchase and arrest. 20. The appellant's account relating to the drugs involved the assertion that he had bought an unspecified quantity of unusually high quality MDMA Ecstasy tablets for a substantial sum of money from a man he did not know and who had no reason to believe that he consumed drugs, at a cost per tablet which turned out to be significantly lower than the wholesale price and under half what a consumer could have expected to pay at the most favourable rate per tablet then prevailing. DC De La Haye's evidence was that such a scenario was "extremely unlikely". Mr Saunders went further and agreed, when the detail of the suggested deal was put to him by the Crown advocate in cross examination, "that's not going to happen, you're correct". 21. In relation to the money, the Jurats had to assess the likelihood that Miss McNabb, who apparently had a responsible job at the Guardian Nursing Home, would have been likely to entrust someone as unreliable as the appellant with £350 in cash, a full four days in advance of the occasion when the money would be required for the significant purpose of securing their future joint accommodation. The appellant provided the court with no material to understand Miss McNabb's decision which may well have appeared to be incomprehensible. Miss McNabb herself was not called as a witness to support the appellant's account. Moreover, Mr Duff, the appellant's witness, suggested that the cash represented the deposit returned to the appellant on the flat which he and Miss McNabb were quitting, not the deposit for the flat into which they intended to move. 22. On the question of money generally, the appellant's explanation for the payment of his living expenses in the months prior to his arrest may well have caused the Jurats to believe that he was extremely short of cash by late May 2000. He admitted in evidence that the

had only undertaken two week's work in the five and a half months since his arrival, that he was heavily in debt to his friends by mid May and that he was spending between £150 and £300 per weekend on Ecstasy. He also acknowledged that he regularly consumed large quantities of alcohol during the week. Allowing for the fact that Miss McNabb was willing to subsidise his rent and pay for his food, the Jurats were entitled to question whether by the date of his arrest the appellant's financial state was such that he was forced to turn to some other method of providing the wherewithal to fund his drug habit. It is common knowledge that many addicts are driven to act as suppliers to earn money to satisfy their addiction. 23. The Jurats were also in our view entitled to have had regard to the evidence that notwithstanding the appellant's claim that he had purchased all twenty seven tablets at approximately 11.15 pm on the Saturday for consumption that weekend, and notwithstanding the significant addiction which he had developed, and notwithstanding his claim regularly to consume about twenty Ecstasy tablets per weekend, he had "forgotten" about his purchase in the hours succeeding it and had not consumed any tablets by the time of his arrest at 2.30 the following morning. 24. We found no reason for interfering with the verdict in this case and accordingly we refused the application for leave to appeal against conviction. 25. We turn now to the question of sentence. By the time of the adjourned hearing the Deputy Bailiff had retired and it fell to a differently constituted court to consider the question of sentence. The Bailiff presided at that hearing and one of the Jurats who had attended the trial was also present. 26. In the summary of facts prepared for the court on 2 nd March 2000, the Crown referred to the abortive search by police of the flat at Mimosa Apartments at 6.45 am on 23 rd May 1999. The Bailiff apparently assumed that the false information had been provided by the appellant. The transcript of the trial, albeit by hearsay, clearly establishes that it was in fact Miss McNabb who provided the information. The Bailiff's error was, it must be acknowledged, understandable. The fact that false information was given to police in this case is an irrelevant fact unless that information emanated from the appellant. Since the Crown made mention of the matter, the Bailiff was entitled to assume it must have been the appellant who had wilfully and mischievously misled the police. 27. The remarks of the Bailiff in sentencing reveal the impact which this incident made on his mind and it is clear that he regarded the behaviour of the appellant in this connection as an aggravating feature of his conduct in the case. Indeed it was the only aggravating feature that the Bailiff mentioned. Having described the appellant as " a dealer in class A drugs, albeit at the lower end of the scale ", the Bailiff continued: " He did not co-operate with the police and indeed was fortunate in our judgment to escape a charge of perverting the course of justice by giving a false address and sending the police to execute a warrant at the premises of perfectly innocent people ". 28. This court must make an allowance in sentence for this error. 29. Both the Bailiff and this court suffered from a disadvantage vis-à-vis the trial judge. Neither the Bailiff, nor the members of this court, had the advantage of hearing the witnesses and making an assessment of the credibility and personality of the appellant. We have, however, been able to read the transcript of the trial and the authorities relating to the sentencing of offenders for similar offences. We have been much helped by our researches into both these areas and in differing from the Bailiff in our approach to the appropriate starting point for sentence, we wish to emphasise the value of that exercise which was denied to the lower court. 30. In this case the Crown moved that seven years imprisonment should be the appropriate

starting point. No doubt Advocate Gollop had in mind the observations of the Bailiff in the five judge court in the case of *Campbell, Molloy and MacKenzie v The Attorney General*

- (1995) JLR 136 CofA at page 145. " We accordingly state that it is seldom that the starting point for any offence of trafficking in a class A drug on a commercial basis can be less than a term of seven years ". 31. We have been referred to a number of cases in which the offender was charged with possession of a class A drug with intent to supply including *The Attorney General v Postill* (2 nd October
- 1995) *Jersey Unreported; Attorney General v Brownlie* (22 nd January 1996) *Jersey Unreported; Attorney General v Howard* (8 th August 1997) *Jersey Unreported; White v Attorney General* (17 th March 1999) *Jersey Unreported CofA; Attorney General v Such* (9 th June 1999) *Jersey Unreported; Attorney General v Chevalier* (9 th June 1999) *Jersey Unreported and* (29 th September 1999) *Jersey Unreported CofA; Attorney General v Rowe* (18 th June 1999) *Jersey Unreported; Attorney General v Bray* (8 th November
- 1999) *Jersey Unreported; Attorney General v Edingborough* (20 th January 2000) *Jersey Unreported; and Attorney General v McMinn* (7 th March 2000) *Jersey Unreported*. 32. . It is axiomatic that no two cases are precisely similar, that the process of sentencing is an art rather than a science and that the value of previous reported decisions is limited in deciding the appropriate sentence in any given case. However we have found these authorities helpful in assessing whether the starting point of seven years imprisonment defined in *Campbell and others v Attorney General* (op.cit.) should be applicable in this case or whether it would be more appropriate to apply the exception for which the passage quoted above makes provision. 33. Having carefully considered the authorities, we consider that the appropriate starting point in this case is six years. 34. It is also pertinent to bear in mind that this appellant falls to be sentenced on one count arising from the discovery of the twenty seven tablets. It is true that his description of his lifestyle in the weeks leading to his arrest provide grounds for suspecting that he may well have possessed drugs with intent to supply on an occasion prior to 23 rd May 1999. But for the purposes of sentencing him we must put that suspicion from our minds and confine our considerations to the events of that night. 35. We have weighed up those factors which in our judgment mitigate the appellant's conduct, including the Bailiff's conclusion that the appellant should be treated as a dealer " at the lower end of the scale ". We have also taken into account that it is unlikely that the appellant would have sold all twenty seven tablets bearing in mind his own addiction. 36. We have not, of course, been able to give the appellant credit for any remorse or regret since, unlike almost all the offenders in the cases described above, he maintained his not guilty plea and gave evidence in support of an account which the Jurats found to be untrue. 37. Nor have we been able to ignore his previous record which includes convictions resulting in imprisonment for offences of violence and dishonesty. It is also a regrettable fact that in early April 1999 he was sentenced in the Jersey Magistrates Court to a total of one month's imprisonment for two drugs offences including one for the possession of MDMA, and therefore that the instant offence was committed a matter of

days after his release from prison. 38. We have, however, of course, ignored any suggestion that the appellant contributed in any way to the waste of police time in the execution of the search warrant in the early hours of 23 rd May 1999. 39. In the event we have decided that the appropriate sentence on this appellant is one of 4½ years imprisonment. To that extent his appeal against sentence is allowed. This is a low sentence for the offence of which he was convicted, but it reflects a special feature, the remarks made by the Bailiff when sentencing which were, as we have indicated, erroneous. To that extent this is a one-off sentence. 40. No appeal has been pursued in relation to the sentence of 3 months imprisonment concurrent on the third count. That sentence, therefore, stands making a total sentence on the appellant of 4½ years imprisonment. Authorities. Campbell, Molloy and MacKenzie v The Attorney General

(1995) JLR 136 CofA The Attorney General v Postill (2 nd October 1995) Jersey Unreported. Attorney General v Brownlie (22 nd January 1996) Jersey Unreported. Attorney General v Howard (8 th August 1997) Jersey Unreported. White v Attorney General (17 th March 1999) Jersey Unreported CofA. Attorney General v Such (9 th June 1999) Jersey Unreported. Attorney General v Chevalier (9 th June 1999) Jersey Unreported. Chevalier-v-Attorney General (29 th September 1999) Jersey Unreported CofA. Attorney General v Rowe (18 th June 1999) Jersey Unreported. Attorney General v Bray (8 th November 1999) Jersey Unreported. Attorney General v Edingborough (20 th January 2000) Jersey Unreported. Attorney General v McMinn (7 th March 2000) Jersey Unreported. Page Last Updated: 22 Mar 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/je/cases/UR/2000/2000_146.html

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