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COURT OF APPEAL

Before Sir Charles Frossard

John Murray Chadwick, Esq., Q.C.

Robert Donald Harman, Esq., Q.C.

Appeal of Ian Drew

against Sentence of six years

imprisonment, imposed on him by the

Royal Court, (Superior Number) on the

2nd July, 1986.

Appeal dismissed on the 6th January, 1987; reasoned

judgement reserved.

Advocate S. C. Nicolle, for the Crown.

Advocate C.M.B. Thacker for the Appellant.

Judgement

handed down 6th September, 1988.

(Reserved 6th January, 1987).

Ian Drew on 23rd May, 1986 pleaded guilty before the Nombre Supérieur of the Royal Court to the following offences -

Count One.

Statement of Offence

Larceny as Servant

Particulars of Offence

Ian Drew, between the 2nd and 22nd November, 1984, in the Parish of St. Helier, whilst in the employ of La Société Jersiaise, stole from the said society one thousand one hundred and eighty Armorican coins of the approximate total value of £23,000.00.

Count 2

Statement of Offence

Larceny as Servant

Particulars of Offence

Ian Drew, between the 1st and 5th January, 1986, in the Parish of St. Helier, whilst in the employ of La Société Jersiaise, stole from the said society six Edmund Blampied prints, two maps, seventy-three photographic negatives, one motor cyclist's helmet, fifteen books, five brass weights, one ribbon bar, one 1923 Jersey coin and one 1871 Jersey coin, of the total value of £351.00.

Count 3

Statement of Offence

Larceny as Servant

Particulars of Offence

Ian Drew, between the 1st July and 16th August, 1985, in the Parish of St. Helier, whilst in the employ of La Société Jersiaise, stole from the said society one Victoria Cross medal of the approximate value of £7,000.00.

Count 4

Statement of Offence

Larceny as Servant

Particulars of Offence

Ian Drew, between the 16th December, 1985, and the 5th January, 1986, in the Parish of St. Helier, whilst in the employ of La Société Jersiaise, stole from the said society seven hundred and forty Chinese snuff bottles of the approximate total value of £300,000.00.

Count 5

Statement of Offence

Maliciously setting fire to a building, contrary to Article 17(2) of the Fire Service (Jersey) Law, 1959.

Particulars of Offence

Ian Drew and Alain Mark Le Moeligou, at about 10.00o'clock p.m. on the 5th January, 1986, in the Parish of St. Helier, maliciously set fire to storerooms at the premises known as the Jersey Museum, 7 & 9, Pier Road, the property of La Societe Jersiaise -

in respect of which he was sentenced as follows:-

Count 1 three years' imprisonment concurrent

Count 2 six months' imprisonment concurrent

Count 3 three years' imprisonment concurrent

Count 4 four years' imprisonment concurrent

Count 5 two years' imprisonment consecutive.

He now appeals with leave against such sentences, his original grounds of appeal being, "I did not accept the sentencing because half the sitting Jurats are members of the Société Jersiaise. My co-accused for £300,000 theft and arson had three years' probation.". Advocate Thacker who appeared for the Appellant (but did not appear for him at his trial) supplemented the grounds of appeal in a letter dated 11th September, 1986 addressed to H.M. Solicitor General. The relevant parts of this letter read:-

"a) The Court was under a misapprehension in thinking that the overcrowding of prisons in England was "a factor which does not apply here" (page 33 of the bundle). Under an agreement between the States of Jersey Prison Board and the Home Office, prisoners serving a sentence imposed by the Royal Court in excess of four years' imprisonment are transferred to English Prisons so that the imposing of such a sentence is subject to the directions given in Bibi. (see Archbold 42 Edition, paragraphs 5 - 19, sub paragraph (f)). If Bibi had been considered, a shorter sentence would have been appropriate.

b) The Jurats of the Royal Court were directed by the Deputy Bailiff that the guidelines set out by the Appeal Court in the case of Barrick (1985 Criminal Appeal Reports page 78) were not to be regarded because they were "born out of expediency not unconnected with the overcrowding of Her Majesty's Prisons". The Jurats were in that respect misdirected in that the guidelines set out in the case of Barrick, overtook, or amended, previous sentencing directions on breach of trust cases, such as those referred to by the Deputy Bailiff on page 32 and 33 of the bundle and, on the basis of which, he directed the Jurats. The new guidelines were not limited to the category of cases referred to in Bibi which were related to overcrowding of prisons, but had general application. In any event, the directions in Bibi were relevant to this case for the reason set out in (a) above. Consideration of the factors referred to in Barrick would have indicated a lower sentence.

c) The Jurats of the Royal Court, on the Deputy Bailiff's direction, took into account that "there was a great value in the totality of the collection", and that the coins "have a special value outside the saleable value" (pages 33 to 34 of the bundle). Both these propositions were speculative, on the information available to the Court and should not have been taken into account in determining the sentence.

d) The cash value of the coins was placed in dispute at the trial by the plea of the accused. The dispute was resolved by the Jurats in favour of the prosecution, but it is apparent from the Deputy Bailiff's observations on page 33 of the bundle that in directing the Jurats on this issue i) he placed the onus of proof on the defence; ii) he did not direct the Jurats that there was a duty on them as sentencers to resolve the dispute in favour of the defence unless they were sure that the facts asserted by the defence were false. On a proper direction the dispute should have been resolved in favour of the defence.

e) The Court (at page 33) regarded the mitigating factors as tending to be negated because i) it believed that there was a strong element of financial

gain in the offences; ii) there was an unhealthy influence on a co-accused; iii) the offences were "a sophisticated operation"; iv) the offences, in the Court's view, affected "the totality of the collection".

As regards i) the actual, as distinct from potential but unrealised, financial gain to the accused was not very great, but in any event, in this instance also the Court appears to have rejected the accused's explanations of additional motives for the offences presumably on the basis of the same direction as to onus of proof as that given regarding the value of the coins.

As regards ii), the Court appears to have acted upon the Co-accused's version of his relations with the Appellant, which said version as set out by the Co-accused in his statements to the Police and instructions to his Counsel was not evidence against the Appellant. The Appellant was not charged with any offence against the Co-accused, so that the truth of the various assertions made by the Co-accused against the Appellant was never tested in cross-examination. Despite his youth, the Co-accused took more of a principal's part in the offences than the Court allowed for, and was less dominated by the Appellant's influence than he claimed to be. The Court, in this part of its findings, seems to have condemned the Appellant for moral turpitude over and above the turpitude of the offences themselves.

As regards iii), although the offences were undoubtedly premeditated and planned with some care the execution of the offences involving the medal and the snuff boxes was not a success and the net financial gain to the Appellant and net financial loss to the employer was far less than the figures set out in the indictment would suggest, which has relevance to the criteria suggested in the Barrick case for determining the level of sentence.

As regards iv), the Appellant reiterates the contents of paragraphs c) and d) above.

In the premise, the Court did not give the due or any weight to the mitigating factors affecting sentence, several of which, such as his youth, his plea of guilty, his being a first offender, and his relatively lowly status at the museum should have counted considerably in his favour. The Court appears to have treated the mitigating factors as nugatory.

f) The Jurats imposed a consecutive sentence for the arson offences, but do not appear to have been directed to consider the application of the one-transaction rule to these offences, nor to have considered whether consecutive sentences were appropriate in all the circumstances of the case. The form of sentence appears contrary to that recommended by the Court of Appeal in Harrity (June 1986)(Supplement to 42nd Edition of Archbold).

g) The totality of the sentence was excessive. "

In compliance with the direction of this Court, Mr. Thacker and Miss Nicolle, who appeared on behalf of the Attorney General, submitted an agreed statement regarding the composition of the Court which passed sentence on the Appellant in the following terms:-

1. The Appellant's sentence of six years' imprisonment was imposed by the Superior Number of the Royal Court on the 2nd July, 1986.
2. The Jurats who determined the sentence were Jurats Perrée, Coutanche, Vint, Lucas, Blampied, Myles, Orchard, Bonn, Le Boutillier, Baker and Dupré.
3. All the above are members of the Société Jersiaise with the exception of Jurats Myles, Orchard and Dupré.
4. The quorum of the Superior Number of the Royal Court is seven Jurats, but under the provisions of the Code of 1771, a copy of the relevant part of which is attached hereto, the quorum can be reduced to three in the following circumstances (Translation):-

"In conformity with a certain Order of His Majesty's Privy Council of the twelfth of June, 1731, all causes which, according to the custom of the Island, should be heard before seven Jurats, can be dealt with before three Jurats when a larger number who are not subject to challenge cannot be assembled."

5. It would have been possible, on 2nd July, 1986, to have assembled three Jurats who were not members of the Société Jersiaise.
6. The Société Jersiaise is a body incorporated by Act of the States of Jersey dated the 11th August, 1879, a copy of which is attached hereto, which Act reads as follows (in translation):-

"The States, having this day taken into consideration a certain Petition addressed to them by the Members of the Société Jersiaise, and having taken into consideration that the said Society is a scientific and literary association which has been formed in the Island of Jersey and has above all the purpose of the study of the history, the language and the antiquities of the Island, and their conservation, as well as the publication of historical documents, the States, with a view to encouraging such a praiseworthy and useful object, have resolved, subject to the approval of Her Most Excellent Majesty in Council, to grant the said Société an Act of Incorporation, so that the said Société, thus constituted, shall have successorial and perpetual succession in the person of its members, present and future; that it shall have the right both to have ~~to have~~ and to use a special seal to authenticate all acts,

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contracts, agreements and undertakings; that it shall have the right to acquire, hold and possess all kinds of movable and immovable property and to receive, hold and possess all kinds of legacies which have been made to it in the past, as well as those which may be made to it in the future; that it shall also have the right to appear before all Courts and Tribunals through its officers or other persons authorised to that effect by the Society."

7. The Society has perpetual duration in the person of its members and will remain in being until it is dissolved.

8. In the event of the dissolution of the Society, its assets will be dealt with as set out in Rule 22 of the Rules of the Society (a copy of which Rules is attached hereto), which provides as follows:-

" Dissolution of Society.

22. Should the Society at any time be dissolved, the gifts made to the Library or to the Museum shall be returned to the donors or to their heirs if such a condition has been imposed: If no such restriction exists they shall be offered to the States of the Island, unless a resolution to the contrary shall have been carried by at least two-thirds of the members present at an Extraordinary General Meeting convened for that purpose. The Society cannot legally be dissolved except at an Extraordinary General Meeting convened for that purpose and unless two-thirds of the members of the Society vote for its dissolution. Any member not attending the meeting may, in this matter only, register his vote by letter sent to the President prior to the meeting."

9. That Counsel do not at the present time know, but are seeking to ascertain, and hope to be able to inform the Court at the hearing of the appeal, whether any of the assets of the Society mentioned in the indictment laid against the appellant were the subject of any condition of reversion such as is mentioned in the said Rule 22.

Mr. Thacker invited the Court to consider whether there was bias by the Jurats in passing sentence. Out of eleven, eight were members of the Société Jersiaise, those not being members could have sat and formed a quorum by virtue of an Order in Council of twelfth June 1731.

Mr. Thacker referred to the following English Authorities -

- 1) Wade & Phillips Constitutional Law, 8th Edition, pps 647 and 648 -

The Rule against Bias: No man a judge in his own cause

The essence of a fair judicial decision is that it shall have been made by an impartial judge. The rule against bias laid down in *The Queen v. Rand* is that disqualification of a judge from acting in a particular case can arise in two ways: (a) where he has any direct pecuniary interest, however small, in the subject matter of inquiry - thus a judge who is a shareholder in a company appearing before him as a litigant must decline to hear the case, save by consent of all the parties; (b) where, apart from direct pecuniary interest, there is a real likelihood that the judge would have a bias in favour of one of the parties. Where bias is alleged, the reviewing court does not decide whether the decision was in fact biased, but whether in the circumstances a reasonable possibility of bias was established. *The King v. Sussex Justices, ex parte McCarthy* is an extreme instance of the principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

The acting clerk to the justices was a member of a firm of solicitors who were to represent the plaintiff in civil proceedings pending as a result of a collision in connection with which the applicant was summoned for a motoring offence. The acting clerk retired with the bench but was not asked to advise the justices on their decision to convict the applicant. Held that, as the clerk's firm was connected with the case in the civil action, he ought not to advise the justices in the criminal matter and therefore could not, had he been required to do so, properly have discharged his duties as clerk. The conviction was accordingly quashed, despite the fact that the clerk had actually taken no part in the decision to convict.

On the other hand, in *The Queen v. Rand*, the Court of Queen's Bench refused to set aside a certificate given by justices in favour of the Bradford Corporation merely on the ground that two of the justices were trustees of societies which had invested funds in bonds of the Corporation.

To disqualify a person from acting in a judicial or quasi-judicial capacity a real likelihood of bias must appear, not only from the materials in fact ascertained but from such further facts as might readily be verified in the course of enquiries. But if on all the facts there are grounds for a reasonable suspicion of bias on the part of one or more members of an adjudicating body, its decision must be set aside.

- 2) *R. v. Rand* [1886] L.R. 1 QB 230, where the headnote reads -

Though any pecuniary interest, however small, in the subject-matter disqualifies a justice from acting in a judicial inquiry, the mere possibility of bias in favour of one of the parties does not ipso facto avoid the justice's decision; in order to have that effect the bias must be shewn at least to be real.

The corporation of B were the owners of waterworks, and were empowered by statute to take the water of certain streams, without permission of the mill-owners, on obtaining a certificate of justices that a certain reservoir was completed, of a given capacity, and filled with water. An application was made to justices accordingly, which was opposed by the mill-owners; but after due inquiry the justices granted the certificate. Two of the justices were trustees of a hospital and friendly society respectively; each of which had lent money to the corporation on bonds charging the corporate fund. Neither of the justices could by any possibility have any pecuniary interest in these bonds; but the security of their cestui qui trusts would be improved by anything improving the borough fund, and the granting of the certificate would indirectly produce that effect, as increasing the value of the waterworks. There was no ground to doubt that the justices had acted bona fide:-

Held, that the justices were not disqualified from acting in the granting of the certificate; and the Court refused a certiorari for the purpose of quashing it.

- 3) Metropolitan Properties Co. (F.G.C.) Limited v. Lennon and others [1968] where at pps 598 and 599 Lord Denning said -

A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a "direct pecuniary interest" in the subject matter. Second, "bias" in favour of one side or against the other.

.....

This is a matter on which the law is not altogether clear: but I start with the oft repeated saying of Lord Hewart C.J. in Rex v. Sussex Justices, Ex parte McCarthy: "It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

- 4) R. v. Altrincham Justices ex parte Pennington [1974]

1 QB 549. Again the headnote says -

Justices - Bias - Test to be applied - Short weight of goods delivered to local authority schools - Officer of local authority prosecutor - Presiding justice co-opted member of education committee and governor of other schools - Whether justice disqualified from hearing case

A weights and measures inspector of a county council was the prosecutor of two informations against each of the applicants that they had sold carrots and cabbages by weight and delivered a lesser weight to two of the county council's schools. The county council's education committee put itself forward as the buyers under the contract with the applicant sellers. The presiding justice at the trial was an alderman, who had been co-opted on to the education committee. She was a governor of two schools, but not of those referred to in the informations. The applicants were convicted.

On applications for orders of certiorari to quash the convictions on the grounds that the presiding justice had a pecuniary interest in the subject matter of the proceedings, that there was a likelihood of bias on the part of the court and that the presiding justice was acting as judge in her own cause:-

were said to illustrate the nature of the 'interest' required. In Marett v. Godfrey (1857) it was held, in a case involving a dispute to seigneurial rights, that two Jurats who were themselves seigneurs, could not be 'recusé'. In Hemery v. Guiton (1866) it was held that a Jurat who was a trustee and member of the executive Committee of a Bank which was seeking to confirm the arrest of goods belonging to the Bank could not be recusé. More recently, in Procureur General v. Houiellebecq (1945) 31 PC 174, where the defendant who was prosecuted for an offence under the Textile & Footwear (Rationing) Jersey Order 1941, made a récusation on the grounds that the Bailiff and certain other members of the Court had themselves been instrumental in promulgating that Order, it was held that no member of the Court had an intérêt personnel in the proceedings.

We agree that although a member of the Société can clearly be said to have an interest in its affairs, that interest is not an interest of a financial nature; and is not an 'intérêt personnel' sufficient to found a récusation. The Société is incorporated for charitable purposes. Like any other body corporate it can be dissolved. In the event of a dissolution such of its assets as were received free of condition are to be offered to the States of the Island - unless a resolution to the contrary has been carried pursuant to Rule 22 of the rules of the Société. Assets which are not offered to, or accepted by, the States will fall to be applied, if necessary under a scheme, for some charitable purpose having the like objectives to those for which the Société was formed. There are no circumstances

in which the assets of the Société can be realised for the benefit of, or otherwise distributed to, the members of the Société as such.

There is a further ground upon which the appeal in its original form must fail. If we had been of the view that interest of those members of the court who were members of the Société was such as to found a récusation, it is clear that objection should have been raised before or during the trial. In Le Geyt, Code des Lois (cited above) it is stated, in Article 4.....'Il faut récuser avant que celui qu'on rēcuse opine, la Récusation doit par écrit.....'. The point has been illustrated recently in decision of the Court of Appeal of Guernsey, in De Bourgonnière (No. 14 of 1979). That Court accepted, on the facts which were before it, that an objection to the constitution of the trial court could have been taken at or before the trial. No objection had been taken. The Court of Appeal held,

.....'The consequence of (objection) not having been taken at the trial is, in our judgment, that the Appellant must now be treated as though he had consented to the composition of the Court before which he was tried. It is very important that any objections to the constitution of the Court be taken as soon as the facts, believed by the party concerned to give ground for objection, come to that party's knowledge. If such an objection is not taken at the proper time in that way, it cannot be subsequently made a ground for appeal.'

In the present case, this court was told by Mr. Thacker that the Appellant's instructions to him were that prior to the trial he had some doubts as to the composition of the Court but was advised by Mr. Yates, who appeared for the Appellant at the trial, that the Jurats would put any association with the Société Jersiaise out of their minds when considering sentence. Mr. Thacker had had the opportunity of reading Mr. Yates' notes which differed from the Appellant's instructions.

The Court invited Mr. Yates to appear before it to give us his version of events.

Mr. Yates informed the Court that prior to the trial the Appellant had said that some members of the Bench could be members of the Société to which Mr. Yates replied that, if there were members of the Société on the bench, their membership should not influence their decision. He, Mr. Yates, pointed out that there were many members of the Société within the island community, including himself. The matter was left as it was as the Appellant appeared to be satisfied.

It is clear that the Appellant knew before the trial that some Jurats were members of the Société. He should have made his challenge at that stage, and not left the matter until he was before this Court. We are satisfied that the Appellant did, in fact, acquiesce in the composition of the Court which sentenced him.

Before leaving this part of the appeal we should indicate that some degree of caution is required before applying, without qualification, the principles developed in the English Courts in relation to apparent bias to the

of 4 years' imprisonment are transferred to English prisons; and that the imposing of such a sentence was therefore "subject to the directions in R. v. Bibi," 71 Criminal Appeal Reports 360, where the Lord Chief Justice said:

".....this case opens up wider horizons because it is no secret that our prisons at the moment are dangerously overcrowded. So much so that sentencing courts must be particularly careful to examine each case to ensure, if an immediate custodial sentence is necessary, that the sentence is as short as possible consistent only with the duty to protect the interests of the public and to punish and deter the criminal."

The Lord Chief Justice gave illustrations of types of cases where short, medium or longer sentences would be appropriate. The case there under consideration involved an Appellant aged 49, a Kenyan Indian and a widow. She was charged with her brother-in-law who had played the dominant role in the importation of herbal cannabis by post from Kenya to England. His sentence of three and a half years imprisonment was not under review. The Lord Chief Justice emphasised that the Appellant had assumed the traditional and subservient role of her culture as a woman in a Muslim family, and was wholly dependent on her brother-in-law for support. She lacked the normal independence of mind and action which most women today enjoy. Any involvement in the offences was likely to be the result of being told what to do; while on any view of

the facts she was on the fringes of the whole enterprise. This was a typical case where a shorter term (of imprisonment) would have been appropriate.

In short it was a case far removed from the type of case with which this Court is now concerned. The Deputy Bailiff when passing sentence restated the policy of the Royal Court in breach of trust cases which is to impose more severe sentences than the current sentences imposed in England. He quoted a passage from Professor Thomas's "Principles of Sentencing" (second edition) at page 152. In our judgment the case of Bibi is not in point.

Secondly, Advocate Thacker again referred to the Deputy Bailiff's statement that:

"We believe that the change in England has been largely born out of expediency not unconnected with the overcrowding of Her Majesty's prisons....."

Advocate Thacker submitted that the guidelines in R. v. Barrick 1985, 81 C.A.R. 78 overtook or amended previous sentencing directions in breach of trust cases on the basis of which the Deputy Bailiff had directed the Jurats. We have considered the matters set out in that case by the Lord Chief Justice to be taken into account when determining sentence in breach of trust cases, together with the sentencing guidelines. We see no reason to reduce the sentences on that account. The observation of the Deputy Bailiff of which complaint is made was preceded by these words:

"Now insofar as counts 1 and 3 are concerned, they belong to the middle range, and therefore 3 years was the appropriate sentence as asked for by the

Solicitor General. In the case of the snuff bottles valued at £300,000 clearly that is above the middle range and therefore the 4 years asked for is not in any way excessive."

The Court agrees, while noting that in Barrick sums in excess of £100,000 were placed in the higher bracket. We agree with the Solicitor General that it is obvious that the offences committed by the Appellant were premeditated, carefully planned, and coolly and coldly executed, and that each one was a gross breach of trust. This view of a carefully planned crime and sophisticated operation involving a great deal of research was, rightly in our view, emphasised by the Deputy Bailiff when passing sentence. The offences took place over more than a year and the disposal of the property involved trips to England. This Court does not consider that there was undue emphasis on the unhealthy influence of the Appellant who was aged 28 upon his co-accused who was 16, and who was brought into the matter after the offence charged in count 1 had been committed by the Appellant on his own. It follows that we do not accept the arguments advanced by Advocate Thacker in paragraphs c) - e) of his letter to the Solicitor General.

Finally, in this connection we have considered the submission that the sentence on count 5 should have been concurrent. We are referred to the case of R. v. Harrity and the Judgment of Watkins L.J. briefly reported in the June 1986 Supplement to the Forty-Second edition of Archbold. This re-states the principle that where a number of counts are of equal seriousness and arise out of the same or similar circumstances the proper course is to pass the sentence which marks the whole seriousness of the matter in the

first count and to pass that sentence upon each one of the other counts and order the terms to run concurrently. In the present case the Court passed concurrent sentences on counts 1 - 4 inclusive for offences which were clearly distinguishable in their gravity. There are well established exceptions to the general rule that consecutive sentences should not be passed for offences arising out of the same offence. One example is where a man carries a firearm on a robbery. In the present case the Arson was essentially part of a cover-up after the theft of the snuff bottles. It involved setting fire to the museum building with two butane gas cylinders which, in the event of a serious fire, could have endangered the lives of the Fire Service Personnel. The Museum is of course an historical place with irreplaceable contents. A deliberately lenient sentence was properly passed to run consecutively and in conformity with the totality principle. The overall sentence arrived at, namely six years' imprisonment, was in our view just and appropriate.

Authorities

Barrick (Cr. App. R. 78) ('91).

R. -v- Rand (1886) L.R. 1 Q.B. 230

Metropolitan Properties Company (F.G.C.) Limited -v- Lannon & Ors. (1968)
1 Q.B. 577

R. -v- Altrincham Justices; ex parte Pennington (1974) 1 Q.B. 549

R. -v- Bibi (71 Cr. App. R. 360)

Marett -v- Godfrey (1857) Ex 158

Hemery -v- Guiton (1866)

Procureur Général -v- Houillebecq (1945) 31 P.C. 174

A.G. -v- de Bourgonnière (Guernsey Court of Appeal: No. 14 of 1979)

Code of Laws for the Island of Jersey, 1771

Wade & Phillips "Constitutional Law" (8th Edn) p.p. 647-8

Le Geyt: Code des Lois, Titre IV (de la Récusation des Jurés) Articles 1, 4

Le Geyt: Constitution, Lois, et Usages, Tome IV (de la Récusation des
Juges): Article XVI