

101.

ROYAL COURT
(Superior Number)
exercising the appellate jurisdiction conferred upon it
by Article 22 of the Court of Appeal (Jersey) Law, 1961.

11th June, 1992

Before: The Bailiff, and Jurats
Vint, Bonn, Orchard, Gruchy, Le Ruez,
Herbert and Rumpfitt

Application of **Dean Gary Marie** for leave to appeal against a sentence of 18 months' imprisonment passed on him by the Royal Court (Inferior Number) on 24th April, 1992, in respect of one count of illegal entry with intent (count 1 of the indictment laid against him); and a sentence of 6 weeks' imprisonment passed on him in respect of one count of larceny (count 2); the said terms of imprisonment to run concurrently with one another.

Leave to appeal was refused by the Bailiff on 20th May, 1992.

C.E. Whelan, Esq., Crown Advocate.
Advocate J.C. Gollop for the appellant.

JUDGMENT

THE BAILIFF: This is an appeal by Dean Gary Marie from a sentence of 18 months' imprisonment passed on him by the Inferior Number on 24th April, 1992, for illegal entry with intent.

The premises into which he broke were part of the staff quarters of a hotel. He was seen in the course of his activities, reported to the police, and apprehended on the site.

In the course of his trial before the Inferior Number, stress was laid by the Crown on the fact that - according to the Crown - there were two young women (staff members of the hotel) asleep in the room into which the appellant entered and they were not disturbed.

As the Court below was in the course of retiring, the appellant addressed them. It is not entirely clear what he was saying, but his version was - it has now emerged - that he believed that no one was in that room at the time he entered.

Today in the course of the appeal, the Crown has adduced a number of statements to clarify that position. The Court expresses its doubt as to the propriety of doing so. It seems to the Court that this is an *ex post facto* attempt to deal with a point quite properly raised by the defence at the proper time and none of which was tested as it ought to have been, either by the hearing of evidence, or by the Court below making it clear that because there was a dispute as to part of the facts of the prosecution case, it was prepared to accept the version put forward by the accused.

In sentencing the appellant the Court was very short in its judgment. The Deputy Bailiff, speaking for the Court, said:

"Taking all factors into account and not wishing Marie to be under any sense of grievance, and taking into account that he has established a stable relationship and his intention to start a new life elsewhere, the Court has decided to reduce the conclusions to what we regard as the minimum tariff sentence for entering premises by night. Therefore, Marie, on Count 1 you are sentenced to 18 months' imprisonment, on Count 2 you are sentenced to 6 weeks' imprisonment concurrent, making a total of 18 months' imprisonment".

In the report of the Court's decision to this Court the learned Deputy Bailiff referred to the instance I have just mentioned of the applicant's interruption of the proceedings.

It is not, I agree, usual for a Court to refer to the Judge's notes, but these are circumstances where we think it appropriate to do so. The passage in the note relating to the interruption is as follows:

"Before the Court retired the applicant interrupted the proceedings categorically to deny that there was anybody in the room he entered. However, whether or not the room was occupied was not a factor which weighed heavily with the Court; these were staff quarters and, therefore, residential premises; thus there was a potential for causing fear and distress".

Nevertheless, although the Court reached that conclusion as expressed by the learned Deputy Bailiff, the note which we had of what Mr. Whelan said to the Sentencing Court made it clear that he was stressing the occupancy of the room itself and not the general staff quarters. Therefore, in this Court's view, it was not an immaterial difference, it was very material and this Court cannot say that, had the Sentencing Court either accepted the appellant's version, or heard evidence on the particular disputed point, it would not have reduced the conclusions even further.

However, before I deal with the appropriate sentence, I have to mention the question of the benchmark.

Mr. Gollop, who has pleaded very fully and carefully for his client, has suggested that a more appropriate benchmark for an offence of this nature would be 18 months' imprisonment and not 3 years' imprisonment as suggested by Mr. Whelan for the Crown.

Mr. Whelan quite rightly points out that the cases which have been referred to, with the exception of AG -v- Lynch (24th July, 1991) Jersey Unreported, where the circumstances were totally different, were in fact Inferior Number cases and it is for this Court, in appropriate circumstances such as these, to confirm the proper benchmark for illegal entry with intent by night.

Mr. Whelan has cited the case of AG -v- Aubin, (14th May, 1987) Jersey Unreported; (1987-88) JLR N.19, where the

circumstances were not entirely on all fours and the bench laid down a figure of 4 years which was later confirmed by the Court of Appeal, (6th July, 1987) Jersey Unreported, C.of.A.

We think that the Crown made a proper distinction between that case and the present one; and looking at the authorities such as we have had adduced before us today, we have come to the conclusion that the Crown was not wrong to say that, in circumstances similar to the instant ones, a benchmark of 3 years' imprisonment was the appropriate one to choose.

Having done that, the Crown then took into account a number of mitigating factors - all of which were very fully canvassed by Mr. Crane and repeated, quite properly, by Mr. Gollop before us today - and moved for a sentence of 2 years.

I have referred to the judgment of the Court where the words "**minimum tariff sentence**" were used. We find it difficult to understand those words. If it is a minimum tariff that is being referred to, then perhaps a further reduction might or should have been made, or if it is the minimum sentence in respect of a tariff which is an undecided figure, perhaps that itself makes it difficult to comprehend entirely what the Court had in mind.

We suspect that the Court meant to say that the benchmark was correct and therefore they had decided to reduce the conclusions to what they regarded as the minimum proper amount, but they did not exactly say that. It is somewhat equivocal and we ought to give the accused such benefit as he is entitled to from such an equivocal statement in the judgment.

Under all the circumstances we have come to the conclusion unanimously - that is to say the Jurats with myself directing them, as I told counsel, on matters of law - that the proper