

68 of 1992.

Royal Court (Superior Number),
exercising appellate jurisdiction.
Appeal against conviction of
Thomas Anthony Bale and Christian Peter Fosse.

At the request of a Member of the Bar, the attached reserved Judgment which was delivered by Sir Frank Ereaut, Bailiff, on 2nd February, 1984, is being circulated to subscribers.

Royal Court (Superior Number)
(exercising the appellate jurisdiction conferred upon it
by Part III of the Court of Appeal (Jersey) Law, 1961).

Hearing Dates: 13th, 14th, 19th, 20th, 21st, 28th
and 29th July, 1983: Reasons reserved.

Reasoned Judgment: 2nd February, 1984.

Before: Sir Frank Ereaud, Bailiff
Jurat H. Perree
Jurat J.H. Vint
Jurat M.G. Lucas
Jurat P.G. Blampied
Jurat D.E. Le Boutillier

Thomas Anthony Bale
and
Christian Peter Fosse
- v -
H.M. Attorney General

Appeals against conviction before the Inferior
Number on 30th March, 1983, of:

Thomas Anthony Bale on 1 count of importation of
a controlled drug contrary to Article 23 of the
Customs and Excise (General Provisions) (Jersey)
Law, 1972; 1 count of possession of a controlled
drug, contrary to Article 6(1) of the Misuse of
Drugs (Jersey) Law, 1978; and 1 count of
supplying a controlled drug, contrary to Article
5 of the Misuse of Drugs (Jersey) Law, 1978; and

Christian Peter Fosse on 1 count of being
concerned in the importation of a controlled
drug, contrary to Article 23 of the Customs and
Excise (General Provisions) (Jersey) Law, 1972;
and 1 count of possession of a controlled drug,
contrary to Article 6(1) of the Misuse of Drugs
(Jersey) Law, 1978.

The Solicitor General.
Advocate A.J. Dessain for the appellant Bale.
Advocate C.M.B. Thacker for the appellant Fosse.

THE BAILIFF: On the 11th March, 1983, four defendants, Thomas Anthony Bale, Christian Peter Fosse, Mark Anthony Marchant and Gary Percy Vardon, were presented before the Inferior Number of the Royal Court on the same indictment. Bale was charged with three offences: importation of a controlled drug (cannabis resin) contrary to Article 23 of the Customs and Excise (General Provisions) (Jersey) Law, 1972, possession of the same controlled drug, contrary to Article 6(1) of the Misuse of Drugs (Jersey) Law, 1978, and supplying the same controlled drug, contrary to Article 5 of the same Law.

Fosse was charged with two offences: being concerned in the importation of a controlled drug (cannabis resin) and possession of the same controlled drug.

Marchant was charged with three offences: being concerned in the importation of a controlled drug (cannabis resin), possession of the same controlled drug, and supplying the same controlled drug.

Vardon was charged with two offences: possession of a controlled drug (cannabis resin) and supplying the same controlled drug.

All four defendants pleaded not guilty and were tried by the Inferior Number *en police correctionnelle*. On 30th March, 1983, they were found guilty on all counts.

Bale and Fosse subsequently appealed against their convictions. Their appeals were heard by the Superior Number sitting as a Court of Appeal. On 29th July, 1983, the Superior Number dismissed the appeal of Bale but allowed the appeal of Fosse and quashed his convictions, and stated that it would give its reasons later. The Court now gives its reasons for those decisions.

The police investigations which led to the arrest and charging of the four defendants began when Bale was stopped on 24th March, 1982, by a Customs and Excise Officer at Jersey Airport immediately after his arrival on a flight from London. He was taken to Police Headquarters where, because he was suspected of being under the influence of drugs, he was not interviewed at length but was examined by a police surgeon, Dr. Holmes. The doctor decided that he was not fit to be examined but was fit to be detained and, accordingly, he was detained until the following day. He was then again examined by the same doctor who decided that he was still not fit to be interviewed. On the Friday the same doctor again examined him and pronounced him fit to be questioned. Accordingly he was interviewed by the police and he made a cautioned written statement admitting that he had gone to London to buy cannabis with money given to him for the purpose by his co-accused Fosse and Marchant, he had

there bought a large quantity of cannabis and brought it back to Jersey, where he handed some of it to Fosse and to Marchant, and later some of it to his co-accused, Vardon.

We deal first with the appeal of Bale.

His first ground of appeal was that the written statement of 26th March should not have been admitted because it was not a voluntary statement, having been made as a result of inducements held out by or through the police, and by oppression.

Objection was taken by the defence at the trial to the admission of the statement and consequently evidence relating to the issue of the admissibility (of Bale's statement and of other alleged admissions of the co-accused) was heard on a "*voire dire*". For that purpose the Jurats remained in Court because the Deputy Bailiff ruled, after objections by Counsel, that in a trial "*en police correctionnelle*" the Court was properly constituted only if the Bailiff (or Deputy Bailiff) sat with two Jurats. At the appeal no objection was raised to that course.

It is not necessary to review the evidence in detail. There were three allegations of verbal inducements, two alleged to have been made by the police directly to Bale and one by them to his mother which it was intended or should have been realised would be conveyed by her to Bale. In each case the alleged inducement took the form of giving Bale the impression that if he helped the police they in turn would help him. The police denied that any such inducements were spoken.

The oppression alleged referred rather to Bale's mental and physical condition than to any act on the part of the police. The allegation was that he arrived in Jersey in a condition which caused the police to believe that he was under the influence of drugs, he then had very little sleep during the next two days whilst in custody and at some stage there was mention made to him of his possible involvement in some way in inquiries being conducted concerning a murder in England. As a result, on Friday he was in no fit state to make any statement, despite the opinion of Dr. Holmes that he was fit to do so, an opinion which was shared by the police and a Customs Officer.

Having heard the evidence on the "*voire dire*" the Court had to answer three questions in relation to these allegations, as follows:

First, what were the facts which gave rise to the statement? That was a matter of fact for the Jurats.

Second, upon those facts as found, were they such as to be capable of amounting to inducements or oppression? That was a matter of law for the Deputy Bailiff to decide.

Third, if they were, had the prosecution proved that they did not act upon the mind of the accused? That was a matter of fact for the Jurats.

At the end of the evidence and Counsel's submissions on the "*voire dire*" the Deputy Bailiff announced that Bale's statement was admissible. He did not at that time amplify that decision.

However, later and in the course of the trial he delivered a judgment which, it is clear from his opening words, was intended to be his reasons for the decision which he had reached earlier in the trial as to the proper composition of the Court when hearing evidence and submissions on the admissibility of the statements made by the defendants. Towards the end of that judgment, and logically arising from it, he set out the three questions posed above and the respective responsibilities of himself and the Jurats in the matter, with one exception to which we shall refer. Although, therefore, the Deputy Bailiff had not earlier stated the questions which the members of the Court had asked themselves, we are entitled to assume that the Court did ask themselves the correct questions at the time of deciding the issue of admissibility.

Counsel for Bale argued that the answer to each of the first and third questions should have been announced publicly. There was a reference, towards the end of the judgment mentioned in the previous paragraph of this judgment, to an acceptance by the Jurats of the evidence for the prosecution and we agree that it is not entirely clear to which of the two questions that reference was directed. Nevertheless, there was, in our view, adequate evidence upon which the Jurats could have answered either question in favour of the prosecution, and we are satisfied that the correct questions were put to them.

Counsel for Bale raised the further point that there was no evidence that the Court, in considering admissibility, had ever considered the allegation of oppression. He based this argument largely on the ground that in stating the second question which had to be answered, in the aforesaid judgment, the Deputy Bailiff specifically mentioned "inducement", but not "oppression". That is correct, but it does not mean that the Court did not consider oppression. The judgment referred to was, as already stated, delivered a few days later and was clearly intended to give reasons for the composition of the Court, and not primarily for the finding that the defendants' statements were admissible. We therefore do not find the omission of the word "oppression" of any significance. We are satisfied that the Court, when deciding the question of admissibility, had the allegation of oppression before it because Counsel referred to it in his address.

It has further to be borne in mind that the Jurats, who in the type of trial before us play a part in deciding whether a statement is admissible, that is to say, whether it was voluntary, must later, if it is found to be admissible, decide what weight to give to it, upon which they may hear further evidence and will certainly be addressed by Counsel. There may be actual merit, therefore, in such a case in announcing the decision to admit the statement without giving reasons.

We therefore reject this first ground of appeal.

The second ground of appeal was that the Deputy Bailiff's summing up of the case to the Jurats should have taken place in open Court in the presence of the defendant. That ground was also one of Fosse's main grounds of appeal and it is, therefore, convenient to deal with it now in relation to both appellants because the submissions of their Counsel were similar and complementary.

At the close of the evidence and of the addresses of Counsel, the Deputy Bailiff and the two Jurats withdrew from the Court. After withdrawing, the Deputy Bailiff gave to the Jurats the relevant directions on the law and the evidence which he considered to be necessary. After a fairly short period of time they returned to the Court and the Deputy Bailiff announced that the Jurats had found all the defendants guilty on all counts.

In the course of the trial, in giving reasons for his decision that the Jurats had an essential part to play in considering the issue of admissibility of the disputed statements, the Deputy Bailiff also announced that, anticipating a request that he should sum up to the Jurats in open Court, he had decided not to do so. In consequence of that decision, there were no submissions of Counsel on the matter during the trial and the Deputy Bailiff did not sum up in open Court.

Counsel's submissions on the matter were in two parts. The first contended that because of the provisions of Article 13 of the Royal Court (Jersey) Law, 1948, which makes the Bailiff the judge of law and the Jurats the judges of fact, the Bailiff (or Deputy Bailiff) is now required to give directions on law to the Jurats in criminal trials before the Inferior Number, and those directions which now form part of the trial should be given in the presence of the defendant, that is to say, in open Court.

This Court agrees that the first part of the above submission is correct. Article 13(1) and (2) of the 1948 Law is in the following terms:-

"Powers of the Bailiff and Jurats

- (1) *In all causes and matters, civil, criminal and mixed, the Bailiff shall be the sole judge of law and shall award the costs, if any.*
- (2) *In all causes and matters, civil, criminal and mixed, other than criminal causes tried before the Criminal Assizes, in which causes the jury shall, as heretofore, find the verdict, the Jurats shall be the sole Judges of fact and shall assess the damages, if any".*

We agree that it follows that in a trial before the Inferior Number the Bailiff or Deputy Bailiff is required to give the Jurats the necessary directions on the law involved in the case.

What is in issue, therefore, is the second part of Counsel's submission, namely, that those directions of law should be given by the Bailiff to the Jurats sitting *en police correctionnelle* in open Court. In argument before us, Counsel widened their arguments to include a full summing up as for a jury.

Counsel's arguments may be summarised as follows.

Article 24 of the Court of Appeal (Jersey) Law, 1961, gives a defendant who has been convicted a right of appeal on any ground which involves a question of law alone. In certain cases, as here, that appeal is to the Superior Number.

Article 40(1) provides:

- "(1) *A shorthand note shall be taken of the proceedings at the trial on indictment of any person who has pleaded not guilty and who, if convicted, is entitled or may be authorised to appeal under this Part of this Law, and, on any appeal or application for leave to appeal, a transcript of the note or any part thereof shall, if the Judicial Greffier so directs, be made and furnished to the Judicial Greffier for the use of the Court, of the Attorney-General and of the appellant".*

The phrase "proceedings at the trial on indictment" must be interpreted to include the directions on law which the Bailiff or Deputy Bailiff was required by Article 13 of the 1948 Law to give to the Jurats at the close of a trial before the Inferior Number, and because those directions could be transcribed only if they were given in open Court it followed that the combined effect of those provisions was to require the Bailiff to sum up the case to the Jurats in open Court. Counsel agreed that it had been the custom for very many years for such summing up to

take place in Chambers, but the 1948 and 1961 Laws had wrought a silent change in the trial process. Furthermore, if the summing up and directions were not made and given in open Court and so transcribed, the right of appeal was seriously affected and a convicted person could be deprived of a ground of appeal which would otherwise have been open to him.

In considering this ground of appeal it is necessary to consider why it has been the practice for very many years for the Bailiff's summing up not to be in open Court in trials before the Royal Court whether sitting "*sans enquête*" or "*en police correctionnelle*".

Formerly, and for centuries Jurats were judges of both law and fact. They could, but were not obliged to, consult the Bailiff on points of law.

The "Loi (1864) réglant la procédure criminelle" reformed the criminal procedure by providing an optional system of jury trial for defendants who had pleaded not guilty to a common law offence, a "*crime*" or "*délit*". Article 42 of that Law expressly provided that the Bailiff shall sum up the case to the jury, that is to say, in open Court. But there was no similar provision for those trials which continued to be heard by the Inferior Number, and the practice in those trials did not change.

As already stated, Article 13 of the 1948 Law enacted that thenceforth the Bailiff would be the sole judge of law and the Jurats the judges of fact. That Law, however, made no reference to any change in the summing up procedure in trials before the Inferior Number. We make that point because we were referred to the practice in Guernsey, where the Bailiff does sum up to the Jurats in open Court. That has apparently been the practice for many years, but it has to be borne in mind that there is an important distinction between the criminal procedures of the two Islands - in Guernsey there is no jury system. Furthermore, the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950, which parallels the Jersey 1948 Law by providing that the Bailiff shall be the sole judge of law, specifically refers to summing up in open Court in Section 6(4). As stated, the Jersey 1948 Law made no such reference, and although the Bailiff was thereafter required by law to direct the Jurats on questions of law those directions continued to be given in Chambers.

Article 22 of the Court of Appeal (Jersey) Law, 1961, conferred upon the Superior Number an appellate jurisdiction in certain criminal and quasi-criminal matters, but, notwithstanding that the practice of not summing up in open Court in trials before the Inferior Number had endured for one hundred years, that Law did not enact any express change in that procedure, as it could have done.

We are being asked now to find that the combined effect of the 1948 and 1961 Laws was to enact, albeit silently, a mandatory change in the procedure which hitherto had been followed for one hundred years in trials before the Inferior Number. We are not prepared to accept that a material change of this nature can be made mandatory except by express provision to that effect. Article 40 of the 1961 Law does not, in our view, have the effect of expressly requiring a transcript of the summing up in a trial before the Inferior Number, because the word "proceedings" must be relevant to the mode of trial, and (unlike trials before a jury) there is no express provision that the summing up should be in open Court.

We therefore find that there is no statutory requirement that at the close of a trial before the Inferior Number *en police correctionnelle* or *sans enquête* the Bailiff or Deputy Bailiff should give directions of law or sum up the case to the Jurats in open Court.

Before continuing, we wish to refer to the case of the AG v. E.J.L. Paisnel (1972) JJ 2201, which was referred to in the submissions made to us. Paisnel was charged with several serious common law offences and, at his request, was tried before the Inferior Number *sans enquête* instead of by a jury. Because there were exceptional circumstances, the Bailiff, who presided, decided to sum up the case to the Jurats in open Court as he would have done if the trial had been before a jury.

At the hearing of the appeal, the members of the Court of Appeal were informed that that procedure was an innovation and not the normal custom.

The Court of Appeal stated in its judgment:

"It seems to us that the course adopted was perfectly consistent with the provisions of the Law" (a reference to Article 13 of the 1948 Law) **"and entirely appropriate in a serious case such as this"**.

The Court of Appeal was, of course, not asked to decide in that case whether the procedure adopted was, in any event, mandatory, as the present appellants would contend. We refer to the case only because it clearly appears from the second observation in the above extract that that case is not an authority for the submission that a summing up in open Court is mandatory.

The second part of the submission on behalf of both appellants concerning the failure of the Deputy Bailiff to sum up the case to the Jurats in open Court was to the effect that, having regard to the complexity of the issues of admissibility and weight of evidence in this case, as regards each individual

accused, which should have been put before the Jurats as they would have been before a jury, it was essential in the interests of justice that the summing up should have taken place in open Court.

In regard to Bale, for the reasons which appear in this judgment, we consider that the issues were not complex, but straightforward. The prosecution case against Bale relied mainly on his written confession. The issue of its admissibility was, as we have already said, correctly considered. Thereafter the issue was principally one as to whether the Jurats believed the apparent confession to be true. They had the advantage of seeing Bale give evidence, in addition to the other witnesses, and the issue was a simple and narrow one of deciding between two sets of witnesses. We therefore find no merit in the submission as regards Bale.

As regards Fosse, the submission is now irrelevant because, for reasons which appear later, we quashed his conviction.

Counsel for Bale advanced two further grounds of appeal. The first was that after the statements of Bale and his co-accused had been edited by agreement with the prosecution to avoid prejudice the Solicitor-General was allowed to cross-examine the accused as if the editing had not taken place. We find that the discretion exercised by the Deputy Bailiff in this respect was not exercised improperly, and further that no prejudice was in fact caused to Bale thereby.

The final ground of appeal was that the verdict was unsafe and unsatisfactory. The arguments advanced related mainly to the danger of relying upon Bale's statement. We have found that the Jurats were fully entitled to treat the statement as a genuine and true confession, and that Bale was properly convicted.

We therefore dismissed the appeal against conviction of Bale.

We next deal with the grounds of appeal advanced by Fosse.

We have already dealt with the first, which related to the failure of the Deputy Bailiff to sum up the case in open Court.

We now deal with the second ground of appeal, which was that two pieces of paper containing words, letters and figures in Fosse's handwriting and found in his possession, were wrongly admitted as evidence for the prosecution.

The background to this ground of appeal was as follows. In his written statement Bale stated that Fosse had given him £500 with which to buy cannabis in London, and Marchant had given him

£500 for the same purpose. However, when he gave evidence in the trial Bale stated that much of his statement, including that part implicating his co-accused, was untrue. Bale's written statement was not evidence against his co-accused, and therefore the prosecution had to seek adequate other evidence against them.

Fosse admitted having withdrawn £500 from a bank account shortly before Bale went to London, and Marchant also admitted drawing out a substantial sum at the same time, but obviously neither piece of evidence was by itself adequate to convict. The only other evidence potentially available to the prosecution against Fosse consisted of the two pieces of paper already mentioned.

The first piece of paper contained the figure of 500, which Fosse admitted was a note of the amount he had withdrawn from his bank account on 2nd October, 1982. It also contained the figure 70, which the prosecution claimed to be the price of an ounce of cannabis, the figure 11 (crossed out), which it was claimed was the number of ounces imported, and the figure 10 which it was claimed represented the number of ounces which Fosse had left in his possession after the sale of one ounce for £70.

The second piece of paper contained capital letters, words and figures which the prosecution claimed to be a record kept by Fosse of his transactions in relation to his share of the cannabis imported by Bale. The capital letter 'M' appeared, which the prosecution claimed stood for Fosse's co-accused Marchant, and the verbs "gave", "owed" and "got" also appeared, but there was no reference to the subject-matter of the transaction.

At the trial Counsel for Fosse objected to the two documents being put in evidence on the ground (*inter alia*) that the letters, words and figures were open to several interpretations, and their prejudicial effect would outweigh their probative value. The Solicitor General urged that the documents be allowed in evidence on the basis that Detective Constable O'Brien was an expert on drugs and on the interpretation of documents which related to drugs, and could give an informed interpretation of the letters, words and figures, and he went on to explain to the Court how the police officer would interpret them if he was allowed to give evidence. The Deputy Bailiff ruled that the documents could be put in evidence, and the police officer was then called to give evidence of interpretation. He began to give such evidence, but was almost immediately stopped by the Deputy Bailiff who ruled that the officer was not competent to do so, and that the interpretation of the two documents was a matter for the Jurats.

In the course of the appeal hearing, the Solicitor General agreed that when he asked the Deputy Bailiff to allow the documents to be put in evidence he did so at least partly in reliance upon his intention to seek permission to call Detective Constable O'Brien to interpret them. The Solicitor General also told us, however, that on reflection he agreed that the Deputy Bailiff was correct to stop the officer from giving such evidence, because the interpretation of the documents was a matter of commonsense and general experience and not a matter of scientific knowledge. We also agree that the Deputy Bailiff was correct to refuse to allow the police officer to interpret the contents of the documents.

Advocate Thacker argued on two grounds that the two documents should not have been admitted in evidence. Firstly, he suggested that the Deputy Bailiff had allowed the documents in only because he was told of the interpretation which the police officer would give in evidence, and that probably decided him that their probative value outweighed their prejudicial effect. Having decided, however, that the police officer should not be allowed to interpret them, then he should have excluded the documents, because their prejudicial effect then outweighed their probative value.

Secondly, Counsel argued that the letters, words and symbols were too imprecise to be capable of safely supporting the interpretation which the prosecution sought to place upon them. They might have been capable of corroborating other evidence which implicated Fosse, but Bale's statement was not evidence against Fosse and in his evidence at the trial he did not implicate Fosse.

It is not clear from the evidence that the Deputy Bailiff admitted the documents in reliance upon the intention to call Detective Constable O'Brien to interpret them. At an early stage the Deputy Bailiff expressed, correctly, serious doubts about allowing such evidence of interpretation.

However that may be, we have to come to the conclusion, with the benefit of having been able to consider carefully the whole of the evidence, that the documents should not have been admitted in evidence. Their contents were too imprecise to make it safe for the Jurats to interpret them in the way that the prosecution argued. Their prejudicial effect was very considerable, because the Jurats heard the Solicitor General explain how the police officer would interpret them, but in the event he was not allowed to, and they also heard the Solicitor General repeat that interpretation in his closing address, although no evidence to that effect had been allowed.

On the other hand, their probative value was not great, in the absence of any other substantial evidence which they could

corroborate. The Solicitor General pointed to the fact that Fosse had given two different and contradictory explanations as to what the contents of the documents meant. That is true, but it is not sufficient to place upon them the interpretation for which the prosecution argued.

Having decided that the two documents should not have been admitted, we did not consider that this was a proper case for the application of the proviso to Article 25(1) of the 1961 Law, because such admissible evidence as remained was insufficient to support a finding of guilty. We therefore allowed the appeal by Fosse and quashed his convictions.

Authorities

Royal Court (Jersey) Law, 1948: Article 13.

Court of Appeal (Jersey) Law, 1961: Articles 22, 24, 40(1).

Loi (1864) réglant la procédure criminelle.

The Royal Court of Guernsey (Miscellaneous Reform Provisions)
Law, 1950.

AG -v- Bale & ors. (1983) JJ 7.

AG -v- Paisnel (1972) JJ 2201 CA.