

COURT OF APPEAL

129.

11th July, 1997.

Before: Sir David Calcutt, Q.C., (President)
R.D. Harman, Esq., Q.C., and
R.C. Southwell, Esq., Q.C.

Francis Wilfred Joseph Dowse,
Philip Heys.

- v -

The Attorney General

Appeal of FRANCIS WILFRED JOSEPH DOWSE against conviction by the Inferior Number of the Royal Court, *en police correctionnelle*, on 27th December, 1996; and application for leave to appeal against a total sentence of 13 1/2 YEARS' IMPRISONMENT, passed by the Superior Number on 20th January, 1997, following a not guilty plea to:

1 count of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to Article 77(b) of the Customs and Excise (General Provisions) (Jersey) Law, 1972:

Count 1: diamorphine, on which count a sentence of 13 1/2 YEARS' IMPRISONMENT was imposed; and

1 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 3: diamorphine, on which count a sentence of 13 1/2 YEARS' IMPRISONMENT, CONCURRENT, was imposed. (*The Crown was given leave to add this supplementary count to the indictment on 16th December, 1996.*)

Leave to appeal against conviction was granted by the Bailiff on 15th April, 1997.
Leave to appeal against sentence was refused by the Bailiff on 15th April, 1997.

Appeal of PHILIP HEYS against conviction by the Inferior Number of the Royal Court, *en police correctionnelle*, on 27th December, 1996, following a not guilty plea to:

1 count of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to Article 77(b) of the Customs and Excise (General Provisions) (Jersey) Law, 1972:

Count 2: diamorphine, on which count a sentence of 12 1/2 YEARS' IMPRISONMENT was imposed;

and following a guilty plea to:

1 count of possession of a controlled drug contrary to Article 6(1) of the Misuse of Drugs (Jersey) Law, 1978:

Count 4: cannabis resin, on which count a sentence of 1 MONTH'S IMPRISONMENT, CONCURRENT, was imposed.

Leave to appeal against conviction was granted by the Bailiff on 15th April, 1997.

[Leave to appeal against sentence was refused by the Bailiff on 15th April, 1997; the application was renewed to the plenary court on 21st April, 1997, under Article 39 of the Court of Appeal (Jersey) Law, 1961, and was abandoned on 19th May, 1997].

Advocate R.G. Morris for F.W.J. Dowse.
Advocate P.C. Harris for P. Heys.
The Solicitor General.

JUDGMENT

(on conviction)

HARMAN JA: These two Appellants, Francis Wilfred Joseph Dowse and Philip Heys, appeared before the Inferior Number of the Royal Court, *en police correctionnelle*, (the Deputy Bailiff and two Jurats) between 16th and 27th December 1996, charged in an indictment containing four counts. Count one charged Dowse alone that on 23rd February 1996, in the island of Jersey, he was knowingly concerned in the fraudulent evasion of the prohibition imposed by Article 4 of the Misuse of Drugs (Jersey) Law, 1978, on the importation of a controlled drug, namely diamorphine (or heroin). In count two Heys was charged with a similar offence, which in his case was alleged to have been committed between the 9th and 23rd February 1996. In addition Dowse was charged in the third count with having in his possession on 23rd February 1996, the same diamorphine with intent to supply. Finally, Heys was also charged that on the same day he had in his possession a controlled drug, namely a small quantity of cannabis resin. He pleaded guilty to that count. After a contested trial both Appellants were convicted as charged on counts one to three. On 20th January 1997, Dowse was sentenced to 13½ years' imprisonment on counts one and three to be served concurrently and Heys to 12½ years' imprisonment on count two and six months' imprisonment concurrent on count four. Leave to appeal against the convictions was granted by the Bailiff on 15th April 1997, when he refused leave to appeal against sentence in the case of each Applicant. Heys has since abandoned a renewed application for leave to appeal against his sentence on count two. Dowse pursues his application for leave to appeal against his sentence before this Court. This appeal is therefore concerned first with counts one and two where the Appellants were separately charged. It is common ground that Article 77(b) is to all intents and purposes in identical terms to section 170 subsection (2) of the Customs and Excise Management Act, 1979.

The appeal is in addition concerned with the conviction of Dowse on count three in respect of which the Bailiff also gave leave to appeal on 15th April 1997. The situation here is unusual. We have been told that very shortly after leave to appeal was granted a decision was made by Dowse's lawyers in conjunction with the Appellant himself that the appeal on count three should be abandoned. We were told that this

5 decision was reached on pragmatic grounds. Thus four of Dowse's
original grounds of appeal were to be abandoned and when his outline of
appeal against conviction was submitted it proved to contain arguments
in support of his appeal on count one but with no reference to the
conviction on count three. However, no formal notice had been given, as
is required, but it appears that until a few days before the hearing of
this appeal it had been intended by Advocate Morris to notify the Court
on the day that the Appellant, Dowse, was indeed abandoning his appeal
on count three. This never happened because a few days before the
10 hearing other information came to light and was communicated to those
representing both Appellants. In those circumstances a new decision was
immediately taken, so we are informed, to revive the appeal on count
three and consequently, although we have been given a personal assurance
by Mr. Morris that as from an early stage a firm decision had been made
15 not to proceed, it is still now before the Court and is for us to
determine.

20 Thus, until recently, the sole grounds submitted on behalf of both
Appellants were that an importation was an intrinsic and essential
element of the offence charged; that the Crown had not called any, or
any sufficient, evidence that Dowse had imported heroin into Jersey on
23rd February 1996; that it was apparent from the subsequent report of
the Deputy Bailiff that the Jurats had been troubled by this aspect; and
that the Deputy Bailiff had failed to address that point with the Jurats
25 in the course of his summing-up in Chambers. The Deputy Bailiff stated
at p.29 of his report:

30 *"The only point that troubled the Jurats was that Dowse had not
been proved to have returned from England with the heroin on
his person but the learned Jurats considered that the alibis
that had been put forward by both accused were pure invention
of the most picturesque kind. With that decision I most
respectfully and heartily concur".*

35 For the summing up in Chambers the Deputy Bailiff had asked the
Greffier Substitute to write a note as it proceeded and the Deputy
Bailiff has confirmed that it appears to be, in his words, "entirely
accurate". It includes this passage:

40 *"The Deputy Bailiff sums up to Jurats - briefly sums up facts -
defines in law meaning of Article 77(b) of Customs and Excise
(General Provisions) (Jersey) Law 1972. Meaning of "knowingly
concerned in any way" case law states accused Dowse did not
45 actually have to have physically carried out importation -
involvement in any way sufficient. Words in Article have wide
effect".*

50 It is then apparent that the Deputy Bailiff referred to a number of
cases headed by R. -v- Neal & Others (1983) 77 Cr.App.R. 283. We will
return to that case in due course. Meanwhile it is necessary to refer
to the evidence.

55 At the material time Dowse was a self-employed sewing machine
salesman living in a flat in Seale Street, St. Helier. Heys acted as
caretaker at an address in James Road, St. Helier, where he lived. He
was also employed by a self-employed builder named De Ste. Croix who was
engaged on an eight week contract for the conversion of a public house

in Nantes. Heys was working on this project, living in Nantes during the week and returning to Jersey at weekends. However, Heys was not in France between the 4th and 17th February but remained in Jersey. There was evidence that Dowse telephoned Heys on the 13th and 15th February. On the 17th February Dowse obtained a ticket for a return flight to Gatwick. On the same day Heys returned to Nantes but came back at about 6.20 p.m. on the evening of Friday, 23rd February. At 6.45 a.m. on 23rd February, Dowse had flown from Jersey to Gatwick. He later stated that his purpose was to visit an exhibition at the Imperial War Museum in London. On arrival at Gatwick he took a train to Victoria. Later that day he returned to Gatwick from Victoria by train and flew back to Jersey during the early evening. He arrived at Jersey Airport at about 5.30 p.m. and went by taxi to his flat in Seale Street, arriving about ten minutes later. Heys shared his flat in James Road with a Mr. Sandor Gara who looked after it when he was absent. At about 5.45 p.m. Mr. Gara answered the telephone and the caller was Dowse. He asked for Heys and when it was explained to him that Heys was not yet back from France, Dowse left a message asking him to telephone on his return. Heys did return at about 7.00 p.m. and Mr. Gara gave him the message. Heys left his flat a few minutes later and at about the same time Dowse left his address in Seale Street. They both made their way separately to Colomberie where they met and they then walked along Old Don Road where they were arrested. Dowse was found to be in possession of two packages containing a total of 376.8 grams of heroin and it is said that this heroin would have been sufficient to make 3,768 score bags with a street value of approximately £113,000. This was, of course, on any view a very large amount of heroin to have been seized in Jersey. On Heys was found the sum of £1,900 in bank notes and a small quantity, about 5½ grams, of cannabis appropriate for personal use.

Dowse was interviewed on 24th February and made no comment to most, but not all, of the questions put to him. However, it was clearly suggested to him that he had travelled to London in order to collect the heroin which he then imported into Jersey when he returned to the island.

Heys was interviewed, first, on 24th February and again on the 25th. On the first occasion he said that he had been supplied with cannabis by Dowse in January and had gone to meet him on the present occasion in the hope that Dowse might have some more for him. During the second interview he said that the purpose of his meeting with Dowse was for him to give Dowse the £1,900 which he had received from a third party whom he did not identify. In return he was expecting to receive from Dowse a package or packages which he assumed would contain drugs of some description but about which he otherwise knew nothing. He was reluctant to have these packages in his own home and therefore agreed with the third party that he would leave them in a dustbin outside, where they would be collected in due course. He was expecting to be paid £500 for his part in the transaction. They were arrested before he parted with the money and also before he had received any package. It followed from this account that he was denying any knowledge of or participation in an importation of heroin.

At the trial Dowse gave evidence and stated that he was not involved in any way in the importation of heroin into Jersey on 23rd February. He had never imported heroin in this or any other way. However, he had had an association in the past with a Dr. Ambrose, now

deceased, who had been interested in South African politics. At the request of Dr. Ambrose he had on occasions taken over to England quantities of diamonds in "jiffy" bags and handed them to a man named Jan at Victoria Station. He had no diamonds with him on this occasion although unexpectedly he met Jan at the station and had to satisfy him that he was not in possession of any diamonds. They went together to a café near Victoria Station where he showed Jan his empty briefcase. He also said that he was aware of being followed by a man on the train. When he returned to his flat in Jersey he found in a cupboard and quite unexpectedly two packets which he took with him when he went for a social chat with Heys at the latter's request. He had no idea what was in the bags and both men were arrested before he had had an opportunity to investigate. It did occur to him, however, that they might possibly be diamonds belonging to Dr. Ambrose and he had intended to return them to him if he saw the doctor in a public house which he sometimes frequented.

Heys also gave evidence and he said that when he was interviewed on 24th February he was under the influence of cannabis which he had succeeded in swallowing shortly after his arrest. He said that he felt dizzy and that the interviewing officer suggested he was telling a pack of lies. It was further suggested to him that he should change his story. At the second interview he gave a fabricated and untruthful account in the hope of satisfying the interviewing officer who was threatening him with the prospect of a long sentence of imprisonment for telling lies. In reality the £1,900 found on him was made up mostly of savings during the year from money that he had earned. Some of it was from money earned in France and some of it was his thrift club money. He had in fact gone to meet Dowse for a social drink and because Dowse, when he spoke to him on the telephone beforehand, had appeared to be agitated about something. He knew nothing about the visit of Dowse to London earlier in the day.

On the basis of all this evidence it was submitted by the Solicitor General that the Jurats should infer that there had been an importation of heroin that day by Dowse. The arrangement then made for him to meet Heys so soon after his return to Jersey suggested a link between him and Heys in relation to that heroin. In the event when they were arrested Dowse still had the heroin in his possession and Heys had £1,900 which the prosecution suggested was to be paid to Dowse who was playing his part as a link in the smuggling chain. There was evidence from travel documents and bank statements to show that on previous occasions Dowse had received sums approaching £2,000 shortly after one-day trips to London. It was suggested for the Crown that Heys had remained in Jersey in the middle of the eight week contract in order to assist Dowse in making his arrangements. The telephone calls provided further circumstantial evidence of the relationship. The subsequent accounts by both men to explain what had happened were not to be believed. For the defence it was argued that there was before the Royal Court neither direct nor circumstantial evidence of any importation. That submission is now advanced before this Court as a basis of the appeals. For Dowse it is submitted that the failure of the Crown to lead evidence sufficient to show an importation and the fact that the learned Deputy Bailiff did not appear to address that point with the Jurats, were fundamental errors in the Appellant's trial.

5 However, the submissions do not end there. During the trial reference had been made to the case of R. -v- Neal & Ors to which we have already alluded. This was a case brought under section 170 sub-section (2) of the Customs and Excise Management Act, 1979. It enacts that:

10 *"... if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion ... (b) of any prohibition or restriction for the time being in force with respect of the goods under or by virtue of any enactment ... he shall be guilty of an offence ..."*

15 By section 3(1) of the Misuse of Drugs Act, 1971 the importation of a controlled drug is prohibited. In that case Customs Officers found 6 cwt. of cannabis resin at Neal's farmhouse in Wales. There was no evidence as to where or how it had been imported, although Neal admitted that he knew it had been imported. He and the other appellants were convicted of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of the drug. The Court of Appeal held that a person could be guilty of contravening section 170 sub-section (2) even if there was no evidence of his actual involvement in the initial illegal importation.

25 As we have already observed it is apparent that this case was cited to the Jurats by the Deputy Bailiff in his summing up to show that it was not necessary to prove that Dowse had actually carried out the importation. Involvement in any way was sufficient for a conviction under Article 77(b). But there was in fact no evidence of any importation of this heroin at any time other than that which could be inferred from the events of 23rd February. This position was fully accepted by the prosecution and the Solicitor General conducted the case for the Crown throughout on the basis that Dowse had been the importer on that day. She did not challenge his evidence of meeting the man, Jan, at Victoria Station, but nor did she accept in the course of her questions in cross-examination that he had met anybody there. She asked him in particular about his evidence that he had bought £80 of Lottery tickets at the station and asked him whether he would expect to find those mentioned in the police search log. Again, she did not challenge his evidence that he had been to the Imperial War Museum but the general tone of cross-examination was challenging and even dismissive. The Solicitor General concluded by suggesting in terms in a number of questions that Dowse went to Gatwick on this day to collect drugs, that he had collected drugs, and that he had brought them back to Jersey. No other suggestion was ever put to him. It was further suggested that he was going to give those drugs to Heys and that Heys was going to give him the £1,900 cash which he had on him.

50 A few days before the date set for the hearing of this appeal the Solicitor General disclosed to the appellants the existence of witness statements by seven English police officers who had been concerned in keeping Dowse under observation on 23rd February. The statements of these officers provided confirmation of Dowse's own evidence in a number of respects, namely: (1) he had in fact been followed from Gatwick to Victoria Station although not by an officer in the same carriage as Dowse himself had stated; (2) he had been observed at the National Lottery stand at Victoria Station where he joined the queue; (3) he was seen to be approached on the station concourse by another man with whom

he was shortly afterwards observed sitting at a table in a café nearby with his briefcase open on the table; (4) he was photographed at the time in Victoria Station; and (5) he himself took photographs at the Imperial War Museum. The film had been later developed. It should be pointed out that while at the café he and the other man were watched by a police officer from a table close to where they were sitting and nothing was seen to pass between them and nothing was placed in the open briefcase or seen to be in it.

In consequence of these disclosures further supplementary grounds of appeal have been submitted to this Court. It has been submitted that the Crown is under a strict duty to disclose to the appellant any matter which is material to the defence and is in the possession of the Crown, and upon which the Crown does not intend to rely at trial, at least unless such a matter is covered by Public Interest Immunity. If the Crown considers that the matter may be covered by Public Interest Immunity then the Crown is under a duty to make application to the Court so that the Court can decide whether or not such a matter should be disclosed to the defence. On the question of whether the English Law of Public Interest Immunity is applicable to Jersey we have been referred to the case of A.G. -v- Lagadec (1995) JLR 328 as being the only relevant authority. In that case it was held that as a matter of public policy, to ensure the continued supply of information to the authorities by informants the identity of an informant did not need to be disclosed unless that information were essential to the defence in proving its case, in which event it should be disclosed regardless of any promise of confidentiality made by the authorities to the informant in question. In the United Kingdom the law relating to disclosure has been a mixture of common law and statute; Mr. Morris has submitted to us that the same principles nevertheless apply in Jersey with the general recognition of a need for a fair trial. In the event, and in part because of the position taken by the Crown at this appeal in accepting that there is here no right for the prosecution to keep material evidence from the defence, it is not necessary for us to consider further the possible application of United Kingdom Law.

Mr. Morris has contended for Dowse that these statements and the photographs should have been disclosed together with the police observation log book to the defence as being material to the defence case. Failure to disclose necessarily resulted in an irregularity at the trial. The appellant, Dowse, was prevented from having a fair trial on the issue of importation. Consequently there had been a miscarriage of justice. The conscious decision by the Crown not to disclose was wrong, but even if the Crown was right before trial the materiality of the available evidence became apparent during the trial, and the duty to disclose is continuous. Mr. Morris submitted to us that it is not for this Court to speculate as to what might have happened at the trial if the available evidence had been released. He submits that the statements were necessarily material and from that flowed the miscarriage. It went directly to the defence submissions that there was no evidence of importation and in particular to that point because it was known to have troubled the Jurats. If the Jurats had had the advantage of seeing or hearing the witnesses and taking into account the other evidence, Dowse's credibility would have been enhanced. In the context of the possible application of the proviso the miscarriage of justice must be regarded necessarily as having been substantial. Mr. Morris finally submitted that this evidence and its possible affect upon

5 the Jurats had they been aware of it could have affected their attitude
towards the issues in count three where Dowse was charged with
possessing the heroin with intent to supply. It is submitted that his
enhanced credibility as to the account he had given about supplying
10 diamonds to the man, Jan, at Victoria on behalf of Dr. Ambrose would
have influenced the Jurats in considering his evidence about finding the
packages of heroin at his flat without knowing what was in them on his
return to Jersey later that day. This Court is not impressed by that
argument. It seems to us that any credibility which could have been
15 achieved through the undisclosed evidence being before the Jurats must
have been limited to the question whether or not Dowse was proved to
have been concerned in the importation of heroin on 23rd February. It
could not go to substantiate either directly or indirectly his claim to
have an entirely separate relationship with Dr. Ambrose as a diamond
courier. Nor could it explain his behaviour in relation to the two
20 packages on the evening of that day after they had been left in his flat
according to Dowse by some unidentified person and without any
explanation.

25 On behalf of Heys Mr. Harris has submitted that if this available
evidence was material to the defence of Dowse on count one, it
necessarily follows that it was also equally relevant on the issue of
importation in the case of Heys, charged as he was in count two with the
same offence. The Solicitor General informed the Court that the
30 decision not to disclose had been taken on grounds of materiality. It
had been decided that the statements and other evidence available did
not support the defendant, Dowse, in any issue to be decided by the
Jurats. If that decision was wrong this was a case which called for the
application of the proviso.

35 We have given very careful consideration to all the matters raised
at this appeal and we are satisfied that, whatever may have been the
position before the start of the trial, this available evidence had
become material during the trial and should have been disclosed. We are
also satisfied that the consequent irregularity was the cause of a
substantial miscarriage of justice. We have therefore concluded that
the appeals must be allowed on counts one and two and the convictions on
those counts quashed. This does not affect the position of Dowse on
40 count three where we judge his account to have compounded the inherent
unlikelihood of any honest explanation. The appeal against conviction
on count three is dismissed. We now turn to the application for leave
to appeal against sentence.

45 JUDGMENT

(on application for leave to appeal against sentence)

50 We have to consider the application for leave to appeal by Dowse
against his sentence of 13½ years on count three. We have been
referred, as might be expected, to the case of A.G. -v- Le Tarouilly
(2nd December, 1996) Jersey Unreported. Its only relevance at this
stage is the fact that it was concerned with a perhaps comparable
55 quantity of heroin, namely 471.28 grams with a street value of £141,000
if sold in score bags at £300 per gram. As in that case this Court has
to take into account the judgment in Campbell, Molloy, MacKenzie -v- AG
(1995) JLR 316 CofA. We do not need to recite again the passage from

that judgment in Campbell quoted in the appeal of Le Tarouilly and in the context of the need for condign punishment. Nevertheless in order to honour the decisions in relation to counts one and two, we treat this application as the hearing of the appeal. We reduce the sentence from 13½ years to 12 years' imprisonment and allow the appeal to this extent.

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Authorities
(conviction appeal)

R. -v- Neal & Ors. (1983) 77 Cr.App.R. 283.
Archbold (36 Ed'n): paras. 911, 936-940.
Woolmington -v- DPP [1935] AC 463.
R. -v- Haddy [1944] 1 KB 443 CA.
R. -v- Turner [1944] 1 KB 463 CA.
Farid [1945] CCA 168.
Oster-Ritter [1948] CCA 191.
Whybrow [1951] CCA 141.
Vibert -v- AG (1991) JLR 247 CofA.
Smith -v- AG (1986) Jersey Unreported CofA.
Paisnel -v- AG (1972) JJ 2201 at pp.2202-3 CofA.
Lagadec (1995) JLR 328.
Keane [1994] 1 WLR 746.
Phillipson (1990) 91 Cr.App.R. 226.
Court of Appeal (Jersey) Law, 1961, Article 25.
Archbold (1997 Ed'n) Chapter 12: Public Interest Immunity.
Dallison -v- Caffery [1964] 2 All ER.
Bryant -v- Dickson [1946] CCA 146.
R -v- Ward [1993] 2 All ER 557 CA.
Brown [1995] 1 Cr.App.R. 191.

Authorities
(sentence appeal)

AG -v- Le Tarouilly (2nd December, 1996) Jersey Unreported.
Campbell, Molloy, Mackenzie -v- A.G. (1995) JLR 316. CofA.