

**Judgment 18/2011**

**Bienvenu & Lynch - Royal Court  
14<sup>th</sup> June 2011**

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**Admissibility of evidence – application to exclude evidence – refused.**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

**Between:**

**LAW OFFICERS OF THE CROWN**

**-v-**

**SIMON THOMAS BIENVENU**

**and**

**EMMA JANE LYNCH**

**Ruling on Admissibility of Evidence**

**Submissions heard on: 13<sup>th</sup> June 2011**

**Judgment given orally on: 14<sup>th</sup> June 2011**

**Before: John Russell Finch, Esq., Judge of the Royal Court**

**Crown Advocate F J Russell for the Law Officers**

**Advocate M G A Dunster for Bienvenu**

**Advocate R B Eeles for Lynch**

**Statutes and Cases referred to:**

Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, Section 78(1)

DPP v Kilbourne [1973] AC 729

DPP v Sang [1984] AC 402

Noor Mohamed v R [1949] AC 182

R v Illumuanya [2005] EWCA Crim 58

R v Randall [2004] 1 WLR 56

R v Robb (1991) 93 Cr. App. R. 101

**Decision**

1. References to paragraphs and dividers in this decision are as they are set out in Advocate Eeles' skeleton and appended authorities. This is an application on behalf of the defendant Emma Jane Lynch (hereafter "D") to exclude the following evidence (see para 15(i) and (ii)):

- (i) Exhibit JLL/247/240210/1/Report1 (on page 26 of the Prosecution documents file). The first two text messages sent from Adriaan Peeters to D on 24<sup>th</sup> February 2010; and
  - (ii) Exhibit JLL/247/630910/1 (pages 423-424 of the Prosecution documents file), text messages between D, and her co-defendant Simon Thomas Bienvenu (set out as a text conversation at pages 305-308 of that bundle).
2. The two defendants face an Indictment comprising two counts. The first involves the illegal importation of the drug Mephedrone to the Island, both have pleaded guilty to that offence, which took place on 24<sup>th</sup> February 2010. They both pleaded not guilty to an identical offence the next day, 25<sup>th</sup> February 2010. The total quantity involved was 527.62 grams; the first importation was 29.5 grams, the second 498.12 grams. The contents of the messages sought to be excluded are summarized at paras 42-45.
3. In summary, it is suggested that exclusion is justified because these text messages are:
  - (i) Not relevant; or
  - (ii) If relevant the prejudicial effect outweighs the probative value; or
  - (iii) Alternatively, the evidence would have such an adverse effect on the fairness of the proceedings that it should be excluded under Section 78(1) of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003 (“PPACE”). (This provision is essentially identical to that in the original PACE in England).
4. The question of relevance may be summarized by stating that for the purpose of a criminal trial, evidence is relevant if its effect is to make more or less probably the existence of any fact which is in issue, i.e., upon which guilt or innocence depends. The question of relevance is typically a matter of degree to be determined, for the most part by common sense and experience – R v Randall [2004] 1 WLR 56 Per Lord Steyn.
5. The Court’s common-law discretion to exclude relevant evidence is set out by the House of Lords in DPP v Sang [1980] AC 402. The relevant aspect of that decision for the purposes of the present case is the discretion to exclude evidence if it would be likely to have a prejudicial effect outweighing its probative value. As I understand it, this was Advocate Eeles’ main submission. Finally, there was the power conferred under Section 78(1) of PPACE, having regard to all the circumstances ... the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. In other words, admissible evidence is excluded because it would be unfair to admit it.
6. It seems to be accepted that the alleged offences require proof of “*knowledge*”, i.e. are not strict liability offences. D’s principal admissions on the application are set out at paragraphs 47-53. Advocate Eeles deals with relevance first of all then prejudicial effect, and finally PPACE. It is not proposed to read out the messages in question, and they are in modern text jargon which does not lead sympathetically to oral rendering. They are better read. In summary, it is suggested that the messages between D and Bienvenu on 16<sup>th</sup> January, 2010 are irrelevant or insufficiently relevant to the facts. They pre-date the disputed second importation case by 37 days and, at that original time, the supply and possession (not importation) of Mephedrone was legal. The question of whether participation by the two accused in a lawful activity, 37 days before the second alleged offence makes D’s involvement more probably. At best it is suggested it is of marginal relevance. The text messages between D and Bienvenu on 17<sup>th</sup> January, 2010 do not specifically refer to Mephedrone, and there is also the considerable lapse of time between them and the second

importation. The two text messages sent to D by Peeters on 24<sup>th</sup> February, 2010 are also insufficiently relevant. They refer to the importation that day, which is admitted by D and not relevant to the second contested count.

7. If found relevant, these messages should be excluded on the grounds of their prejudicial effect. Largely the same considerations apply as set out in relation to the argument on relevance. Even a direction to the Jurats that it was legal to possess and supply Mephedrone in January and February, 2010 will not remove such prejudicial effect. The 17<sup>th</sup> January, 2010 text messages are highly speculative evidence. Any probative value is far outweighed by the prejudice. There was also the substantial time lapse until the importation. The final plank of the submission, as stated, is Section 78(1) of PPACE, set out by Advocate Eeles at her paras 22-24.
8. Reference was made in argument to R v Illumuanya [2005] EWCA Crim 58. In that case, evidence was relied upon to rebut the defence of a courier of unknowingly importing controlled drugs which neither suggested, nor tended to suggest a pattern of the accused being involved in previous importations. It is this type of alleged pattern, as I understand it, that the Prosecution say they are entitled to establish in the present case. In her oral submissions, Crown Advocate Russell stated that the issue in this trial is whether, or to what extent, D participated in the second importation. What better evidence could there be than texts? The motive is shown in them. Dealing with paragraph 47, the Prosecution submitted that the answer to the point raised there was obvious. The fact it was a legal activity there is not important. In para 49 the provision of D's address to Bienvenu is highly relevant, with a legitimate inference that can be drawn. Generally the messages did occur sometime before the importation, but not so far away. One must consider the context and a continuing course of conduct is demonstrated by these messages. Peeters' messages were on the date of the first importation and show motive. In summary, the messages are relevant and admissible and not so prejudicial that they should be excluded.
9. I have already alluded to the question of relevance at para 4 above. Each of the constituent elements of the offence must be proved. Evidence rendering any fact relating to them more probable is relevant to a fact in issue. So, in a theft case where the defence is that an appropriation is not dishonest, any evidence which makes dishonesty more probable is relevant to a fact in issue. As Lord Simon of Glaisdale said in DPP v Kilbourne [1973] AC 729 at 756:

*“It is sufficient to say .... That relevant evidence, i.e. logically probative or disprobative evidence is evidence which makes the matter which requires proof more or less probable”.*
10. As the quote from Lord Steyn indicated, it depends on the circumstances of the case. In the circumstances I consider the evidence in question is relevant, it goes right to the central issues in this case.
11. In relation to the common-law discretion on the admission of evidence, a classic formulation is given by Lord du Parc in Noor Mohamed v R [1949] AC 182, at 192. The judge ought to consider:

*“Whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interests of justice that it should be admitted”.*

12. It is all founded on the judge's duty to ensure a defendant has a fair trial, and to that extent is pretty closely linked conceptually to PPACE. In my judgment the messages in this case are likely to be highly probative. There will always be some prejudicial effect in adducing such

evidence, but it goes to the central issues in the case, and, as so the same considerations as to relevance apply. It seems all three aspects of the defence submission are very similar and fall to be decided in largely the same way. In other words, the evidence does not have a prejudicial effect out of proportion to its evidential value here; there are questions of motive and of a continuing course of alleged conduct to resolve.

13. Under Section 78(1) of PPACE the defence here do not have any submissions on the circumstances in which the evidence was obtained. The court has to consider only whether admitting the evidence would have an adverse effect on the fairness of the proceedings. It should be noted that the Section does not refer to “*fairness to the accused*”, so the court has to consider the interests of both the Prosecution and the defence and take them into account. Fairness is “*a two-way street: it was the fairness of the proceedings which mattered*” (Bingham LJ in R v Robb (1991) 93 Cr. App. R. 161 at 167). In dealing with cases circumstances vary infinitely. Taking the relevant circumstances into account, will the admission of the evidence have such an effect on the fairness of the proceedings that the court should not admit it? This is very akin to the common-law discretion, in the circumstances of this case. It boils down, it may be thought, to whether or not D would have fair play if this evidence is included in the trial. As indicated it is highly probative and was not obtained unfairly or by a trick. It goes straight to the point to be decided, namely the element of knowledge.
14. Accordingly, I will admit the evidence for the reasons given. I also sympathize with Advocate Dunster’s concern that excluding the evidence could well have an unfair effect on his client. Bienvenu should be able to challenge it fully, indeed in the fullest possible manner. I am obliged to Crown Advocate Russell and Advocate Dunster for their assistance at very short notice.
15. Application refused.