

**Judgment 33/2011**

**In the matter of an application by  
Aidan Richard Sherry – Royal Court  
- 10<sup>th</sup> November 2011**

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**Application for leave to appeal out of time – a decision of the Magistrates Court from 1980.  
Application refused.**

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

The 10<sup>th</sup> day of November, 2011 before John Russell Finch, Esquire, Judge of the Royal Court sitting alone.

2011 No.11

In the action of THE LAW OFFICERS OF THE CROWN against AIDAN RICHARD SHERRY (“the Appellant”) to pursue the appeal of which the said Sherry gave notice against the sentence imposed upon him by the Magistrate’s Court on the 29<sup>th</sup> day of February 1980 in the terms attached hereto;

WHEREAS on the 30<sup>th</sup> day of September, 2011 the Court heard Advocate S. Brehaut for the Appellant and Crown Advocate G.D. McKerrell and ADJOURNED the matter for Judgment to be handed down in due course;

THE COURT this day handed down Judgment in the attached terms and REFUSED the application.

S M SIMMONDS  
Her Majesty’s Deputy Greffier

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY  
(ORDINARY DIVISION)**

**IN THE MATTER OF  
AN APPLICATION BY  
AIDAN RICHARD SHERRY**

Applicant

**FOR:**

- 1. LEAVE TO APPEAL OUT OF TIME  
and**
- 2. A DECLARATION THAT THE ROYAL COURT ON 20<sup>TH</sup> MAY 1980 MADE AN  
OBVIOUS ERROR AND FOR RECTIFICATION OF THE SAME.**

**Application heard on: 30<sup>th</sup> September, 2011**

**Judgment issued on: 10<sup>th</sup> November, 2011**

**Before: John Russell FINCH Esquire, Judge of the Royal Court**

Counsel for the Applicant: S L Brehaut  
Counsel for the Crown: G D McKerrell

**Material referred to in Judgment:**

R v Ballinger [2005] 2 Cr App R 29  
R v Henderson [1997] 2 Cr App R (S) 206  
R v Jones (1972) 56 Cr App R 413  
R v McKerr [2004] UKHL 12  
Sherry v The Queen [1989] 1 WLR 341 PC

Loi Par Rapport aux Appels des Sentences rendues en Police Corectionnelle of 1939  
The European Convention on Human Rights, Articles 5 and 6  
Archbold (2011 ed.), para 7-192

**JUDGMENT**

**Introduction**

1. The factual background to this matter can seem unduly complex.

In summary:

19.02.80 Aidan Richard Sherry, the Applicant (hereafter “S”), was arrested for assault upon a woman. He was remanded in custody until his trial on 29.02.80.

- 29.02.80 Convicted of assault after a contested hearing. S was sentenced to 3 months' imprisonment to run from that day.
- 05.03.80 S lodged Notice of Appeal against Conviction. He remained in custody pending the determination of this appeal.
- 11.04.80 S was bailed pending the appeal.
- 20.05.80 The appeal was dismissed. S did not attend, but had been validly served with notification of the hearing. It was ordered that S serve 3 months (i.e. the original sentence), less the "*period of five days already served*". The "*five days*" refers to the 29.02.80 (conviction) to 05.03.80 (lodging of Notice of Appeal) dates.
- 21.05.80 S left Guernsey, in the words of his Advocate's written application (para 10) "*having been shocked at the prospect of having to reserve some 38 days of this sentence*".
- 19.08.83 S's Requête Civile to the Royal Court was presented.
- 19.06.84 Requête Civile dismissed.
- 20.02.89 S's application to the Privy Council asserting that he had not been properly notified of the appeal hearing on 20.05.80 was dismissed.

2. S has not returned to Guernsey since 1980. According to para 14 of the application he has "*discovered that he has a child living in the island of Guernsey and wishes to return*". According to the Prosecution response (para 3.5) S wrote to the Law Officers in 2007 on three occasions, but it was not until April 2011 that AO Hall began to act in this matter. The relief sought in this application is:

- (i) for leave to appeal against the sentence imposed by the Magistrate's Court on 29.02.80; for failing to take into account the 10 days served prior to conviction; and
- (ii) for a "declaration" that the Royal Court on 20.05.80 made an obvious error (in recording that he had spent 5 days in remand, whereas the amount was 43 days as a convicted person or 53 days in total since arrest); or
- (iii) relief under Section 7 of the Human Rights (Bailiwick of Guernsey) Law, 2000.

### **The Royal Court Appeal**

3. What was the nature of this hearing on 20.05.80? There is an 11 day gap in the recordings and other records of the Greffe over that period, which is very unfortunate. A diligent search has been made by the Court Reporters and I have personally enquired about the position; what we have is what is described in S's application. The Crown took the view at the oral hearing of this matter that the 1980 appeal was probably against conviction only. Accordingly, there was an outstanding appeal against sentence. Can this be properly pursued now we are in 2011? We therefore turn to the substantive issue of whether S should be permitted to appeal against his sentence in 2011. In passing I observe that the Crown's

concession on what took place in 1980 was a proper one, as it is not possible to reach a definitive judgment when trawling through the old papers. Hence any assessment of what took place should be weighted in favour of the Applicant here.

### **Appeal out of time?**

4. The basic principle set out at Archbold 7-182 (Tab D in the Crown's submissions) is that "*substantial grounds must be given for the delay before the court will exercise its power to extend the time allowed for giving the appropriate notice and the longer the delay the more onerous will be this duty*". Later on in that paragraph it is stated: "*where an application for an extension is made by a defendant who absconded during the course of the trial, it will be subjected to rigorous scrutiny and the Court of Appeal will be reluctant to grant such an application as to do so might put a premium on absconding*". The relevant case is R v Jones (1972) 56 Cr App R 413, Tab E in the same bundle. Further on Archbold refers to the case of R v Ballinger [2005] 2 Cr App R 29, where it was held that "*there was nothing incompatible with the ECHR in the imposition of time-limits ..... provided that they were not too short or too rigorously enforced*". These principles arise from decisions which are highly persuasive in Guernsey and which it is proposed to follow.
5. The substance of the Crown's submissions on this point is that S chose to voluntarily absent himself from the jurisdiction and was able anyway to put his argument within a reasonable time. The event that would appear to have precipitated the present application is that S has discovered he has a child within the jurisdiction and wishes to return. The plain fact is that in the course of his long absence S has been able to present an appeal to the Judicial Committee of the Privy Council in 1989, after the failure of his Requête Civile in 1984 and also correspond with the Law Officers of the Crown in 2007. There is, on the papers, no satisfactory justification for this long delay before this present case was mounted.
6. S also departed from the jurisdiction to avoid serving his sentence. In the case of R v Jones (Supra) the applicant had jumped bail during a longish fraud trial which he thought was going badly for him. The Court of Appeal was not prepared to grant his application for extension of time as it would "*put a premium on prisoners jumping bail*". Roskill LJ concluded (at 422) by saying "*the applicant has brought this entirely on his own head and he must now take the consequences*". When the Royal Court dismissed S's appeal (see Tab C of the Applicant's bundle), it ordered that "*the said Sherry be apprehended on his return to the jurisdiction of the Court*" and thereupon serve the remainder of the sentence (three months less five days). No warrant was issued. However, S remains liable to serve that sentence should he return.
7. On the facts it seems curious to note that the details of the (now wholly adult) child in the jurisdiction are so vague. Nor is such a child under any inhibition from contacting S as he or she wishes, either in person or via one of the numerous modern means of communication and social media. It is also correct to observe, as has already been mentioned, that S has not, during his long exile, been under some sort of disability. He has run various applications over the years and has not, it would appear, been incommunicado. Finally, S has always had one child in Guernsey, whether that born to the victim of his assault or another. There is a total absence of any factual background in relation to S's circumstances and also no scintilla of prejudice demonstrated by S that stopped him exercising his legal rights.
8. The delay here is inordinate and largely unexplained. Nothing of any cogency has emerged that justifies the effluxion of 31 years and it would be wrong in the circumstances to take the exceptional step of granting leave to appeal out of time. That leave is therefore refused on this basic ground.

## Other Questions

9. Much attention has been devoted to the five day period (i.e. from 29.02.80 – conviction, to 05.03.80 – lodging of Notice of Appeal) “discounted” by the Royal Court when it dismissed the appeal on 20.05.80. The words of Lord Lowry in the Privy Council are clear (pp 2-3 Applicant’s Tab D):

*“On 21 May the defendant, having learnt that his appeal had been dismissed left the Island of Guernsey and did not return there. Consequently, except for the period of five days when he was undergoing sentence, he has not served the sentence imposed on him by the Magistrate’s Court. According to the law of Guernsey the time spent by the defendant awaiting trial (from 19<sup>th</sup> to 29<sup>th</sup> February) and the time spent on remand pending appeal (from 5 March to 11 April) does not count towards sentence.”*

This, with respect, accords with the clear and literal meaning of Section 5 of the Law of 1939 (Applicants, Tab B) which refers to “*the sentence .... shall be suspended until the disposal of the appeal*” and the appellant “*shall be set at liberty unless the Police Court directs that he is retained in custody*” (my emphasis).

10. Hence it would appear that there was no obvious or glaring error by the Royal Court. It is accepted that there must exist some sort of inherent jurisdiction to remedy previous errors, even over 30 years ago. But such matters must, in my judgment, have to be plainly established as such errors, which is not the situation in the present application. It is wholly consistent with the interests of justice that this jurisdiction is so limited in order to avoid re-visiting old cases without the clearest of grounds.
11. In relation to arguments under Article 5 of the ECHR, it has not been demonstrated that S’s rights under this part of the Convention were violated. In the final analysis it was S’s responsibility to be present at the hearing of his appeal. He either chose not to do so or failed to ensure he was available to receive the notice of the hearing, which was validly served. He has since absented himself from the jurisdiction and not presented any arguments within a reasonable time. The cases put forward on behalf of S are of no help in the circumstances.
12. There is no retrospective application of the convention, see R v McKerr [2004] UKHL 12 (Crown’s Tab H). This is made clear throughout the speeches in the House of Lords, see e.g. para 69 of Lord Hoffman’s speech and para 91 of Lord Brown of Eaton-under-Heywood’s speech. Looking at the facts of this case, the Guernsey courts cannot be criticised for their actions, the appeal was dismissed on grounds approved by the Privy Council. Again, none of the cases advanced on S’s behalf are of any help in resolving these matters.
13. Two other points had to be considered. In 2011 it is correct to say that Guernsey Courts take into account periods spent in remand when imposing custodial sentences, but we are not looking at decisions taken in 1980 with the hindsight of such wisdom. In any event it is a matter of judicial discretion, see R v Henderson [1997] 2 Cr App R (S) 266 – “..... *it was a matter for the exercise of judicial discretion, a view with which of course we agree*”. The other matter is to take a step back and look at all the circumstances, bearing in mind the considerable lapse of time and see, in general terms, if there is any broad injustice. We do have the transcript of the evidence at S’s trial, when he was ably represented by Advocate Day (as he then was). Looking at this it cannot be said that the final sentence for this

unpleasant assault on a woman was manifestly excessive; however it may have been finally calculated.

14. There is no merit in this very late application and despite Advocate Brehaut's careful arguments it fails and is refused.

**J R Finch**  
**Judge of the Royal Court**