Judgment 8/2003

Heather Helena Guest
Court of Appeal
(Criminal Appeal 290)
9th January, 2003

Suffering smoking of Cannabis resin on licensed premises – appeal from conviction before Magistrate's Court – statutory test to be applied – section 25(1) of the Court of Appeal (Guernsey) Law, 1961

IN THE COURT OF APPEAL OF GUERNSEY

Criminal Division

The 9th day of January, 2003 before Richard Charles Southwell, Q.C., presiding, Christopher Simon Courtenay Stephenson Clarke, Q.C., and Kenneth Stuart Rokison, Q. C.

THE LAW OFFICERS OF THE CROWN

V

HEATHER HELENA GUEST

Appellant

In the matter of the appeal by the Appellant from her conviction by the Magistrate's Court on 5th April, 2002, her appeal to the Royal Court having been dismissed on 16th September, 2002;

THE COURT, having heard Advocates E. A. G. Prentice and G. D. McKerrell for the Appellant and the Crown respectively, thereon, GAVE JUDGMENT in the terms attached hereto and DISMISSED the appeal.

K. H. TOUGH
Registrar of the Court of Appeal

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THURSDAY 9TH JANUARY 2003

IN THE COURT OF APPEAL OF GUERNSEY

Before

Richard Charles Southwell, Esq., QC; presiding
Christopher Simon Courtenay Stephenson Clarke, Esq., QC
Kenneth Stuart Rokison, Esq., QC

HEATHER HELENA GUEST
(Criminal Appeal No. 290)

Judgment delivered by Clarke, JA.

CLARKE, JA: This is the judgement of the Court.

1. Mrs Guest has been for 18 years the licensee of a public house, The Helmsman, in Cornet Street, St Peter Port in succession to her parents who had been licensees for 8 ½ years. The Helmsman is a particular kind of public house, frequented by those working on building sites, bikers and similar persons. The premises are small– only about 30 feet long and very narrow. Many people smoke in it. There is usually a fire burning in the grate. The atmosphere in the bar is, therefore, heavy.

2. Mrs Guest faced two charges relating to the use of her premises. On the second charge relating to an alleged sale of two Ecstasy tablets in her premises she was acquitted. The first charge was that between 5th February and 1st April 2001, being concerned in the management of the Helmsman, she knowingly suffered the smoking of cannabis resin at The Helmsman contrary to section 7(d) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974 as amended. The matter came before the Magistrate on 4 and 5 April 2002. On 5 April 2002, following the hearing of much evidence, the Magistrate found Mrs Guest guilty on this first charge. On 26 April 2002 she was sentenced by the Magistrate to 6 weeks imprisonment.

3. Mrs Guest appealed to the Royal Court against conviction and sentence. The appeal against conviction was heard by the Deputy Bailiff on 4 September 2002. On 16 September 2002 he gave judgment dismissing that appeal. The appeal against sentence has not yet been heard. On 3 December 2002 Mrs Guest was given leave by a single Judge to appeal to the Court of Appeal against conviction. At the hearing of the appeal Mrs Guest was again represented by Advocate Prentice and the Law Officers by Advocate Robey. We are indebted to both Advocates for their clear and concise submissions.

4. The essential elements of the charge which the prosecution had to prove were that:

   (i) cannabis resin was smoked at The Helmsman between 5 February and 1 April 2001;

(ii) Mrs Guest was concerned in the management of the Helmsman (as she clearly was as licensee);

(iii) Mrs Guest knew that cannabis resin was being smoked there;

(iv) With that knowledge she "suffered", that is to say she permitted, such smoking of cannabis to take place.

5. To establish these elements of the charge the prosecution called two under-cover police officers from the British mainland, who were referred to as "Ted" and "Ed", and who had specific experience in drugs investigations, in the case of "Ted" over several years. They had visited The Helmsman on several occasions from 6 February to 31 March 2001. Their evidence can be summarised in this way. On each visit, so they said, they smelled the distinctive smell of cannabis in the bar, to a greater extent in the rear bar, and to an even greater extent in the toilets. They were on some occasions offered cannabis resin in the bar and in the toilets. They several times saw cannabis being smoked in the toilets and also on some occasions in the bar.

6. They gave a limited amount of evidence as to the potential knowledge of Mrs Guest in that they said that the smell and usage of cannabis in The Helmsman was so prevalent that Mrs Guest (who was in the bar on most of the occasions when they visited) must have been aware of what was going on, and in particular of the smell of cannabis and its usage in the bar as well as more frequently in the toilets. "Ed" gave evidence that on 6 February 2001, on the occasion of the first visit when they met Mrs Guest, she told Ed that she did not let anyone smoke cannabis in the bar but it was alright for people to smoke cannabis in the toilets.

7. Mrs Guest accepted in evidence that she knew the smell of cannabis and that at times this smell was to be found in The Helmsman, particularly in the men's toilets. But she gave strong evidence that whenever she saw cannabis in the bar, or suspected that it was being smoked in the toilets, she threw those responsible, and those she suspected of being responsible, out of The Helmsman. That was, she said, her policy and her practice. In this she was supported by a body of evidence from other witnesses, who said that Mrs Guest was well known for her practice of throwing trouble makers, including those using or appearing to use unlawful drugs, out of The Helmsman.

8. Mrs Guest strongly denied the alleged conversation with "Ed" on 6 February 2001. She said that it would be extraordinary that a long-standing licensee, with everything to lose if she was thought to tolerate drug-taking on her premises, should make such remarks on her first meeting with an unknown stranger.

9. The appeal to the Royal Court, and initially to this Court, was primarily based on the submission that "Ted" and "Ed", not being experts, were not competent to give evidence that what they smelt was cannabis, or of their identification of substances they saw as cannabis. The Deputy Bailiff saw nothing in this point and neither do we. It is not necessary in all cases for someone who gives evidence of the presence of a particular smell to have some formal or paper qualification in the detection of smells and the distinction of one smell from another. The critical question is whether the person giving the evidence has sufficient experience of, and familiarity with, the smell in question such that the Court can give credit to his evidence, if it accepts it. Whether a witness falls within that category must depend on circumstances such as the rarity or otherwise of the smell, how distinctive it is from other smells, what was said to be the strength of the smell on the occasion in question, and the length and quality of experience of the witness concerned. In the present case the Magistrate was, in our view, entitled to regard the

experience of the two undercover officers to be such that they were qualified to provide him with evidence from which he could conclude that cannabis was being smoked at the premises on the occasions in question.

10. In the course of the hearing of the appeal this Court raised the question whether, leaving aside the issue as to the expertise of the two officers, the conviction could stand in the light of a number of matters with which the Court was concerned, and the argument expanded to deal with that wider question. The matters with which this Court was troubled were the following:

(a) the apparent implausibility of the alleged admission being given on the first occasion when Mrs Guest first met Ed (even though he was posing as a filmmaker);

(b) the fact, put to Mrs Guest in cross examination that, since the start of 1998 the Guernsey Police, who must themselves be experienced in detecting the smell and usage of cannabis, had, for different reasons, entered the Helmsman on 45 occasions and had seen Mrs Guest on 34 of those visits without, so far as the evidence shows, any complaint being made about cannabis on any of these occasions;

(c) the strong evidence of Mrs Guest's policy and practice in dealing with those who used, or were suspected by her of using, drugs from a substantial number of witnesses;

(d) the unlikelihood of Mrs Guest, who has long experience as a licensee, putting her licence and livelihood at risk in the manner alleged.

The Court notes that no reference is made to these matters in the reasons given by the Magistrate.

11. It may be that these matters were not canvassed before the Deputy Bailiff or, initially, before us in the light of the statutory test. That test was considered by this Court in Ogier and Le Noury (1989) No 27 (Criminal). As this Court then pointed out the statutory provision in Article 25(1) of the **Court of Appeal (Guernsey) Law 1961** is the same as that in force in England and Wales from 1907 to 1968. It reads:

> "The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice…"

The position in England and Wales is now different. It is governed by section 2(1) of the Criminal Appeal Act 1968 (as amended), under which (inter alia) the verdict of a jury may be set aside on the ground that under all the circumstance, of the case it is unsafe. As this Court indicated in Ogier and Le Noury the test in Guernsey is not as wide as is the current test in England and Wales. This Court is limited to the more confined terms of Article 25 (1) of the 1961 Law.

12. Usually this Court is considering the verdicts of the Jurats in the Royal Court. Such verdicts are not "speaking" verdicts, and it is not, therefore, possible to discern by what process of reasoning, or the lack of it, the Jurats have reached their conclusions. In those circumstances, if the summing up is sound, the Court may well not be able to interfere unless the verdict is obviously wrong. But where, as here, the verdict is one of a legally

qualified Magistrate it is a "speaking" verdict because the Magistrate has to state reasons for his verdict in his judgment. In such a case it is possible for this Court to review the Magistrate's process of reasoning, and to consider whether, by that process, the Magistrate has reached a verdict which is "unreasonable", or one which "cannot be supported having regard to the evidence" or whether "on any ground there was a miscarriage of justice".

13. The fact that the Magistrate's verdict is more easily reviewable because his process of reasoning is patent does not, however, alter the statutory test. If his judgment reveals a process of reasoning which is defective, or which cannot support the verdict he has reached, this Court can and should intervene. But we have no power to apply the wider test applicable in England and Wales under the Criminal Appeal Act 1968 but not yet adopted in this jurisdiction. We cannot, therefore, quash the verdict because we would ourselves have reached a different conclusion on the facts, or would have attached a different significance to some or all of the evidence by which the Magistrate was persuaded.

14. We have anxiously reviewed the reasoning of the Magistrate as set out in his judgment. In our view he correctly directed himself as to the law. He stated that he judged the case on the individual merits of the witnesses, whom we have not seen. He found the evidence of the undercover officers clear and convincing and, in the light of that evidence, he accepted the picture given by them of there being a strong, or very strong, smell of cannabis in these small premises on several occasions, including the example he gave of four consecutive days at the end of March 2001, and of nothing being done about it. He said that he took account of the defendant's evidence and the evidence given as to her strong character, but even so, he found it impossible to accept that she was unaware of what was patently obvious to Ed and Ted. He accepted Ed's evidence of the admission and regarded some of the explanations given to him as straining credulity to breaking point.

15. In our view there was evidence before the Magistrate on which he could convict the defendant. Having reviewed his process of reasoning we are not able to say that it is defective or that it cannot support the conclusion to which he came.

16. We do, however, think it right to say that, had our jurisdiction been the same as that of the Court of Appeal in England, our conclusion would have been different. In such circumstances the question would have been whether the conviction was unsafe. As Widgery L.J. said in R v Cooper (1969) 53 CAR 2:

> "That means that in cases of this kind the court must in the end ask itself a subjective question whether we are content to let the matter stand as it is, or whether there is not some further lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it".

17. In this case each of the members of this Court does entertain a lurking doubt as to whether the conviction is safe but, on the law which we are bound to apply, this does not entitle us to set aside the decision of the Magistrate.

18. The Appellant's appeal against sentence is not, and never will be, before us since there is no right of appeal to this Court from a decision of the Magistrate's Court on sentence. So nothing that we say can in any way bind the Royal Court. Nevertheless, since we have had fully to consider this case for the purposes of the appeal that is before us, we think it right to invite the Royal Court to consider whether the charge which the Magistrate

found proved merited a custodial sentence – a sentence which might put to an end Mrs Guest's livelihood and career - especially since her offence is, so far as we know, the only one in an 18 year career at The Helmsman. Whilst we would expect that the Royal Court would take into account the views of the members of the Court expressed in this judgement, the conclusion that the Royal Court reaches as to sentence is, of course, entirely a matter for that Court to decide.

19. Accordingly we dismiss the appeal.

