



In the Court of Appeal of Guernsey

No. 271

(**Criminal** Division)

The 19th day of September, 2002 before Jonathan Philip Chadwick Sumption, Q.C.,
presiding, Miss Elizabeth Gloster, Q. C., and The Hon. Michael Jacob Beloff,
Q.C.

THE LAW OFFICERS OF THE CROWN

v.

STUART RICHARD MARSH

Appellant

In the matter of the appeal by STUART
RICHARD MARSH from the conviction imposed on him by the Royal Court on 27th
November, 2001;

THE COURT, having heard Advocates
M.G.A. Dunster and G.D. McKerrill for the Appellant and the Crown respectively,
thereon, DISMISSED the appeal.

A handwritten signature in black ink, appearing to be 'J.P.S.' with a flourish.

Deputy Registrar of the Court of Appeal.

THURSDAY 19TH SEPTEMBER 2002

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COURT OF APPEAL

Before

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Jonathan Philip Chadwick Sumption, Esq., QC; presiding
Miss Elizabeth Gloster, QC
Michael Jacob Beloff Esq., QC

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STUART RICHARD MARSH
(Criminal Appeal No. 271)

Judgment delivered by Sumption, JA

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SUMPTION, JA: Stuart Richard Marsh was convicted by the Royal Court on 27th November 2001 on two counts of being knowingly concerned in the fraudulent evasion of the prohibition of the importation of goods. The first count related to Ecstasy tablets and the second to Heroin. He was sentenced to eight years' imprisonment. This is the judgment of the Court on his appeal against conviction. There is no appeal against his sentence if the conviction is upheld.

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Both counts relate to the same sequence of events. On the 13th June 2001 a parcel posted in Leeds and addressed to 'B Edwards' at Flat 3, Skyline Flats, Glatigny Esplanade, St Peter Port, was delivered to that address by the Post Office. The parcel contained a book closed with masking tape. The book was cut out in the middle, creating a cavity in which had been placed 443 Ecstasy tablets and (although there is some dispute about this), some powdered Heroin. The flat was occupied by a lady called Emeline Le Sauvage, but not by anyone of the name of B Edwards. Miss Le Sauvage's post was generally left by the postman on the stairs in the common part of the block, which are accessible to intruders. She picked up the parcel that evening when she returned from work and opened it, finding the book inside.

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On the following day, 14th June, she opened the book and discovered the pills and powder, which she took to the Police. The Police arranged for it to be redelivered by the Post Office to the stairs outside her flat on 15th June and waited to see who would pick it up. They set up a miniature video camera concealed in the staircase, whose image was transmitted to a remote monitor somewhere else in the building, at the back. Customs Officer Waters was stationed at the monitor. He passed a continuous narrative of what he could see by radio to Police and Customs Officers stationed around the building.

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For the purposes of dealing with the issues on this appeal, the critical witnesses for the Prosecution were Customs Officer Waters, DC Brogan and Customs Officer Richards. The substance of their evidence can be very shortly stated. Officer Waters gave evidence three times in the course of the Prosecution case, but it is convenient to summarise his evidence as a whole, in chronological order of the events. He said that the monitor view would usually have been taped, but that he was unfamiliar with the equipment and ran out of time before he could set up the tape. The result was that his recollection of what he saw, supported by some contemporaneous notes, was the only evidence of what happened in the stairwell of Skyline Flats.

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His evidence was that at about 11 am on the 15th June, some 15 minutes after the parcel had been left on the stairs with the rest of the post, a man was observed on the monitor entering the hall of the block of flats from the back. He was seen to approach the pile of mail, look at it, withdraw briefly and then return to pick up the packet, stuff it into his trousers under his shirt and leave by the back door of the block. At the back of Skyline flats, there is a small garden connected by an alleyway to the street. Officer Waters stood up from the monitor after the man had disappeared from the camera's view and, looking out the back window of the block, saw the same man crossing the back garden towards the alleyway.

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The story is then taken up by DC Brogan. He was stationed in plain clothes in an unmarked car, close to the street end of the alleyway. He heard over the radio from Officer Waters that a man had picked up the parcel and was leaving by the back of the block. So he got out of his car and entered the alleyway from the street end. Immediately afterwards he saw the Defendant, Marsh, whom he recognised, coming towards him through the alleyway. Marsh turned about, ran back through the alleyway and tried to escape across some gardens adjacent to the back garden of Skyline Flats. DC Brogan gave chase. His evidence was that as Marsh fled, he dropped the envelope in which the book had been packed and then the book itself. He then escaped over a high wall and disappeared. DC Brogan went back to pick up the envelope and the book. He found the envelope on the ground and picked it up. As for the book, he said that he pointed it out to Customs Officer Richards who had by now arrived on the scene, and that Customs Officer Richards picked it up. The involvement of Officer Richards was confirmed by his own evidence.

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Evidence was then given by other witnesses that Marsh was found shortly afterwards by a dog and handler hiding in an old tram shed, where he was arrested and taken to the Police Station. According to Officer Waters' evidence, he recognised Marsh in the custody suite by his appearance, and particularly by his clothing, as the man whom he had seen on the monitor through the back window of the block of flats.

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When Marsh gave evidence at the trial, it became apparent that not all of the Prosecution's evidence was disputed. He accepted that he was at the block of flats at about the time when Officer Waters said that the parcel was picked up. He accepted that he was walking through the alleyway at the back when he was confronted by DC Brogan. He accepted that DC Brogan chased him and that he hid in the tram shed and was arrested there. He denied that he had picked up the parcel on the stairwell. He said that when he was leaving by the back garden of the block, he saw another man there who, by inference, might have picked it up. He said that he ran away from

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DC Brogan because he did not recognise him, did not realise that he was a Policeman and thought that he was someone up to no good who had been following him for the past few days. He denied that he dropped the envelope or the book during the chase. This he said was a fabrication of DC Brogan.

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Marsh's challenge to his conviction can be summarised in four points, which we will take in what seems to us to be the logical order.

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1. The first related to the identification of Marsh as the man who picked up the parcel. It was submitted that the Deputy Bailiff should have given a Turnbull direction to the Jurats about the uncertainties of identification evidence, particularly that of Officer Waters, and particularly in the light of the absence of an identity parade.
2. Secondly, it was said that DC Brogan's evidence should have been excluded because he admitted to having discussed the case with another Police witness, DC Grant, one evening when they met socially while the trial was in progress.
3. Third, it was said that the trial was unfair because of the incompetent conduct of the defence by Marsh's Counsel.
4. Finally, it was said that the Deputy Bailiff was wrong in the way that he sought to protect from disclosure the location of the monitor on which Officer Waters saw the parcel being removed from the stairwell of the block of flats.

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We do not think that it was necessary in this case to conduct an identity parade or to give a Turnbull direction. An identity parade and/or a Turnbull direction may be required where the Prosecution's case depends on a witness who did not previously know the accused, being able to recall his appearance from some previous sighting. In that case the Jurats must be warned about the inherent difficulties of recollection in these cases, and they must have their attention drawn to any circumstances of the previous sighting which may affect the reliability of the later identification. The burden of the Prosecution's case against Marsh and the sole basis on which it was opened was that the man who was seen by Officer Waters on the monitor taking the parcel from the stairwell, and then through the back window walking across the back garden, was the same as the man who was chased by DC Brogan, whom Marsh admits was him. The evidence for this was:

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1. That there was only a very short interval, a matter of seconds, between the man disappearing from Officer Waters' view towards the alleyway, and DC Brogan confronting Marsh in the alleyway; and
2. That Marsh was seen to drop the envelope and the book as he ran and that they were found on the ground by DC Brogan and Officer Richards very shortly afterwards.

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Neither point depends on identification in the proper sense of the word. Point 1. depends on continuity of observation. It is not of course irrefutable, for it is theoretically possible that someone else was in the block of flats at the same time, perhaps the person whom Marsh claimed to have seen there, and that Marsh had the misfortune to appear in the alleyway a few seconds after the other person had taken the parcel and gone out into the back garden. The Jurats were entitled to accept that the sequence of observations showed that the man seen on the monitor and the man confronted and chased by DC Brogan were one and the same, and they were entitled to reject as irrelevant or untrue Marsh's evidence that there was another man in the garden.

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Point 2. is conclusive if the Jurats accepted the evidence of DC Brogan and Officer Richards, because on that footing Marsh must have had the parcel and its contents on him while he was being chased.

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The only evidence which could be described as identification evidence in the sense which may require a Turnbull direction, was Officer Water's evidence that he recognised Marsh in the custody suite. This was a comparatively minor part of Officer Waters' evidence and had not been opened to the Jurats by the Prosecution. It was undoubtedly relied on, together with the other evidence, when the Prosecution came to make their closing speech, and the Deputy Bailiff reminded the Jurats about it in his summing up.

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The first point to be made about it is that since Officer Waters' evidence that he recognised Marsh in the custody suite was never intended to be the basis on which he was to be connected with the offence, it would have been absurd to put Officer Waters in front of an identity parade. Does the fact that he nevertheless gave that evidence undermine a case that continued to be based mainly on other compelling evidence connecting Marsh with the offence? In our judgment it does not. It is theoretically possible, but for practical purposes inconceivable that the Jurats could have convicted Marsh on the basis of his recognition of Marsh in the custody suite.

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They must, quite independently of Officer Waters' evidence on that point have accepted DC Brogan's evidence that Marsh dropped the envelope and the book as he ran away, and the evidence of DC Brogan and Officer Richards about the way in which both items were found on the route of the chase. As the Deputy Bailiff pointed out in his summing up, if that evidence was untrue there must have been a conspiracy between the Police and the Customs Officers involved to frame Marsh. That was indeed the substance of Marsh's defence, and the Jurats were told to consider it. They must have rejected it and accepted the evidence of DC Brogan and Officer Richards. If they did that, they must also have accepted that the man seen by Officer Waters on the monitor, picking up the parcel was the same man whom DC Brogan chased towards the tram shed.

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Marsh's second ground of appeal was that DC Brogan's evidence should have been excluded after he had admitted to discussing the case with another Police witness during the trial. This point can be shortly dealt with. All that the evidence established was that on the night before he gave evidence DC Brogan had spoken to DC Grant about the case, "Just in general terms about what was happening."

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Although it was never suggested to either of them that they had been concocting DC Brogan's evidence, Counsel for Marsh asked the Deputy Bailiff to direct the Jury that if they had set out to concoct the evidence this would have given them the chance to do so. The Deputy Bailiff duly gave that direction. It is now suggested that it was not enough to warn the Jurats in the terms suggested by Defence Counsel at the trial, but they should have been directed to disregard DC Brogan's evidence altogether. There is no basis whatever for that submission. The Deputy Bailiff had a discretion to exclude relevant evidence if there was reason to believe that it had actually been concocted, but a mere opportunity for concoction could not require more than an appropriate warning in the summing up that the Jurats should consider the evidence in question with special care. That warning was given and that is the end of the matter.

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Marsh's third point, the attack on the competence of his Counsel, is equally unmeritorious. In an extreme case a trial may be treated as unfair and a conviction as unsafe because of the incompetence of Defence Counsel. But the least that must be shown to make this point good is that the conduct of the defence as recorded on the transcript is alone enough to show that in some significant respect the accused was not being properly defended. It is not enough to say that there is some line of argument or cross-examination which might have been attempted but was not. All that Marsh could suggest in this case is that his Counsel did not put to witnesses or did not sufficiently follow up some allegation of incompetence in the handling of exhibits, and that he failed to challenge peripheral or background evidence given by Prosecution witnesses, which had in itself no bearing on the case against Marsh but was said to go to his general credibility. It has to be borne in mind that Defence Counsel owes a duty to the Court not to waste time on peripheral or speculative lines of enquiry that seem unlikely to be productive, and that his duty to his client will often require him to avoid antagonising jurors or blunting the impact of his own case by launching attacks on witnesses which are all too easy for the witness to rebut. There are many questions in cross-examination which just might produce helpful answers but which it is wiser to avoid in case they do not. These matters call for delicate exercises of judgment. There is no reason to suppose that Advocate Torode got them wrong, still less that his defence of Marsh's interests was incompetent or prejudiced the fairness of the trial.

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Marsh's final point has caused us more concern, not least because the Deputy Bailiff, in his note to us, has accepted that he probably erred. The background to this point is the well-established principle of public policy that certain categories of evidence may in appropriate cases be excluded if they would tend to identify an informer or a member of the public who had in some other way assisted the Police. If the evidence is relevant, and may assist the Defence, the prejudice to the Defence arising from its exclusion must be weighed against the public interest in protecting the informer or the assister, always bearing in mind that the fair conduct of the trial is the overriding consideration. The Prosecution in this case disclosed the exact location of the camera in the stairwell, but were anxious to ensure that the evidence did not identify the person in whose premises the Customs had been allowed to set up their monitor and watch it. To this end they made a number of applications to the Deputy Bailiff in the course of the trial from part or all of which Marsh and his Counsel were excluded.

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This was in itself unsatisfactory, since it would have been perfectly possible to discuss the problem with the Deputy Bailiff without revealing the location of the monitor. In the event it did not matter, since the Deputy Bailiff considered that the location of the monitor was irrelevant and he was plainly right about that. Provided that the location of the camera was disclosed, it did not matter where the remote location was in which Officer Waters was sitting when he watched the view from the camera through the monitor.

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It was faintly suggested to us that the location of the monitor assumed greater importance when Officer Waters was recalled for a second time in order to correct evidence which he had previously given that he had not seen Marsh between his disappearance off the monitor screen and the incident in the custody suite. It emerged at this stage that he had in fact seen Marsh through a back window of the block of flats going through the garden. This evidence might have made it relevant to investigate where Officer Waters was standing when he made this observation if, for example, Marsh's Counsel had wished to suggest that he could not in fact have seen Marsh from where he was or that he could have seen the other man whom Marsh claimed to have been in the back garden. But not only were no such lines of enquiry attempted, but Marsh's Counsel expressly disclaimed any desire to know where Officer Waters was standing. His only point was that Officer Waters had previously denied a sighting, which he now admitted had occurred. This was said to undermine the Officer's credibility. It was of course a point which could be made without knowing where Officer Waters was at the time of the sighting.

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A more serious complaint against the Deputy Bailiff is that he would not allow Marsh's Advocate to make even that point. When Counsel asked Officer Waters to explain the inconsistency in his evidence the Judge stopped him, it seems upon the ground that Officer Waters had been entitled to deny the sighting in his earlier evidence lest he disclose his location. He made this point in terms in his summing up to the Jurats, when he told them that that was the explanation for the inconsistency and that Officer Waters had, "if you like, judicial backing," for what was apparently an untruth. This was quite wrong. A witness must always give his evidence truthfully. If that is likely to involve disclosing matters which should not be disclosed it is for Counsel to object to the question or to the drift of the answer, not for the witness to suppress the facts. The judge moreover had no warrant for assuming in his summing up that was in fact the reason for the inconsistency, given that he did not allow the reason to be investigated in the evidence.

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The real question is whether any of this matters. By Section 25 of the Court of Appeal (Guernsey) Law 1961, we are required to dismiss the appeal notwithstanding an irregularity in the conduct of the trial if we consider that "no substantial miscarriage of justice has actually occurred." We consider that it is right, in the light of the Crown's international obligations under the European Convention on human rights, to apply this proviso by asking ourselves whether by reason of the irregularity the Defendant's right to a fair trial was infringed. If there were any real risk that the way in which the Judge dealt with the inconsistency in Officer Waters' evidence might have affected the outcome, we would conclude that the trial had not been fair and would set aside the conviction. But in our judgment it is entirely clear that the

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incident, although unfortunate, cannot have affected the outcome in this particular case. Even on the worst construction of Officer Waters' reasons for failing to refer earlier to the sighting of Marsh through the back window, the point had no direct bearing on any of the issues of fact and only a marginal bearing on the credibility of Officer Waters' more pertinent evidence. Moreover, as we have pointed out in dealing with other grounds of appeal, the Jurats must have accepted evidence from DC Brogan and Officer Richards which if accepted was conclusive. The reality is that the evidence against Marsh was overwhelming, unless there was a deliberate conspiracy to frame him, centrally involving DC Brogan. The Jurats were invited to consider that possibility and must have rejected it.

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The result is that Marsh's appeal against conviction will be dismissed.

Court Adjourned at 10.25 am

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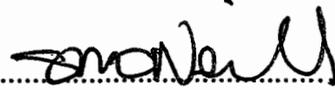
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I, Emma White, hereby certify the foregoing to be a correct and complete extract, prepared to the best of my skill and ability from the tape-recording of the proceeding in this case.

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 Sue O'Neill
p.p. Emma White
Wednesday 6th November 2002

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