



Appeal No. 237

In the Court of Appeal of Guernsey

(Criminal Division)

The 17th day of January, 2000 before Richard Charles Southwell, Esquire, QC, presiding; Matthew Gerard Clarke, Esquire, QC and Jonathan Philip Chadwick Sumption, Esquire, QC

IN THE MATTER OF THE APPEAL by KRIS

HOLLIDAY from his conviction by the Royal Court on the 18th February, 1999;

THE COURT this day, having heard Advocates M.A. Torode for the Appellant, and P. Robey for the Crown, thereon, GAVE JUDGMENT in the terms attached hereto and DISMISSED the appeal.

A handwritten signature in black ink, appearing to be 'R. Southwell', written over a horizontal line.

Registrar of the Court of Appeal

EXTRACT

MONDAY 17TH JANUARY, 2000

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COURT OF APPEAL

Before

C

Richard Charles Southwell, Esq., QC; presiding
Matthew Gerard Clarke, Esq., QC
Jonathon Philip Chadwick Sumption, Esq., QC

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KRIS HOLLIDAY
(Criminal Appeal No. 237)

THE PRESIDENT: The judgment of this Court is the judgment of the whole Court. It has, however, been prepared by each of the three judges who will read that part which they have prepared and agreed with their colleagues.

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In this case Mr. Holliday was charged with being knowingly concerned between 1st and 12th July 1998 in the fraudulent evasion of the prohibition on the importation of cannabis resin, a controlled drug of Class B (such prohibition being imposed by Section 2(1)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended) contrary to the relevant provisions of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972, as amended.

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On 11th July 1998 Miss Nicola Cole was arrested as she left the Condor Ferry from Jersey, carrying a bag which contained, wrapped in a towel, a clear plastic bag containing pieces of cannabis resin, weighing in total 247 grams, and having the potential Guernsey street value of between about £1,725 and £2,218.

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Initially she claimed to have been acting alone. But in the course of her interviews with Customs Officers she soon implicated Mr. Holliday as having been the person who had given her the drugs in Jersey to bring to Guernsey and to return to him in Guernsey once clear of the ferry port. Mr. Holliday had been a passenger on the same ferry from Jersey as Miss Cole. He was also arrested in the Lower Vauvert in St. Peter Port, the same afternoon.

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The case against Mr. Holliday depended almost entirely on the evidence of Miss Cole. There were old style committal proceedings in the Magistrate's Court in which Miss Cole was extensively cross-examined by Advocate Peter Ferbrache, representing Mr. Holliday. Mr. Holliday

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was committed for trial in the Royal Court. The trial took place between 18th and 22nd January 1999 before the Deputy Bailiff sitting with a bench of Jurats, and the Jurats delivered a unanimous verdict of guilty. Mr. Holliday was sentenced to a term of imprisonment and his appeal against sentence has been withdrawn. He now appeals against his conviction.

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It is not necessary for this Court to set out fully the history of the relationship between Miss Cole and Mr. Holliday, as it appeared from her evidence. In brief, they had first met in Egypt in February 1996, and then again in Jersey in April 1996. There had been quite extensive correspondence from then on, principally letters from Miss Cole in which she appeared to indicate that there was a close relationship between them and almost certainly a sexual relationship. They met again in early June 1998 in Jersey. Mr. Holliday returned to Jersey in late June 1998, and was due to leave on about 12th July 1998. He stayed in Jersey at the Pine View Guesthouse run by Mrs. Colatoni.

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On Thursday 9th July 1998, Miss Cole found herself without accommodation. She appeared to have arranged to share Mr. Holliday's room in the guesthouse for that night and the night of Friday 10th July. She alleged that on the evening of Thursday 9th July 1998 Mr. Holliday asked her to take the cannabis to Guernsey for him on Saturday 11th July, and she agreed to do this, being at that time embarrassed by some debts.

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It seems that though they were together on the evening of Friday 10th July, the subject was either not discussed further or only briefly touched on. Miss Cole went to bed before Mr. Holliday returned and was asleep when he returned.

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On the morning of Saturday 11th July 1998 Mr. Holliday rose and breakfasted first. She claimed that he put the drugs in the bag for her to bring to Guernsey, and he told her that he would be on the same ferry but she was not to acknowledge him. She took the drugs with her on the ferry and was arrested when she left the ferry, as already described.

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At the close of the Prosecution's case, in the course of the trial, Mr. Ferbrache submitted that the Deputy Bailiff should hold that there was no case to answer, because Miss Cole's evidence was riddled with inconsistencies, she accepted that she had told lies, and her evidence was so intrinsically lacking in credibility that it ought not be put to the Jurats. This submission, which was put with care and skill, was rejected by the Deputy Bailiff. Mr. Holliday then elected not to give evidence as he was fully entitled to elect. He was convicted as already stated.

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Advocate Torode appeared for Mr. Holliday on the appeal against conviction. He took four fundamental points which were set out clearly and succinctly in his written skeleton argument and briefly and cogently argued in his oral submissions.

The first point was in a sense a reiteration of the submission that

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there was no case to answer, although there was no formal appeal against the Deputy Bailiff's ruling that there was a case to answer. Mr. Torode submitted that the evidence of Miss Cole was not intrinsically credible, and drew attention to a large number of inconsistencies in her evidence, to lies which she admitted having told, and generally to many aspects on which her evidence was suspect.

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The Deputy Bailiff had directed the Jurats that the evidence of Miss Cole was that of an accomplice, and that as the evidence of an accomplice it should be most carefully assessed before being accepted (if it was accepted) by the Jurats. He gave directions as to corroboration in the form usual before the decision of the Privy Council in Attorney General of Hong Kong v. Wong Muk Ping [1987] 1 AC 501. This involved two stages. First, the Jurats were to consider whether Miss Cole's evidence was by itself capable of being credible, and secondly, only if the Jurats so decided, were they to go on to consider the matters said to amount to corroboration. The decision in the Hong Kong case was that there should be only one stage, involving an assessment of the accomplice's evidence in the light of the admissible corroborative matters for its credibility or otherwise.

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The Deputy Bailiff's direction was more favourable to Mr. Holliday than one in accordance with the Hong Kong case, and so it is unnecessary in the instant case to decide which of these two approaches should be adopted in Guernsey, not least because the choice of approach may depend on the facts of the particular case.

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We do not consider it necessary to go in detail through each of the 33 points on Miss Cole's evidence which Mr. Torode raised. Though on many peripheral matters Miss Cole's evidence was open to attack (as it was skilfully attacked by Mr. Peter Ferbrache), she never wavered on the matters at the core of her evidence, that Mr. Holliday had asked her to take the drugs into Guernsey, and had given her the drugs so that she could take them, as she did. The Deputy Bailiff was therefore clearly right to decide that there was a case to answer, and that it was for the Jurats, as the decision makers on the facts, to decide whether or not to accept her evidence.

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In his summing-up the Deputy Bailiff gave impeccable directions to the Jurats, and drew attention to most of the inconsistencies and lies in Miss Cole's evidence. Miss Cole's evidence was put to the Jurats very fairly, and indeed with some indication that the Jurats might conclude that her evidence was not to be accepted. The Jurats unanimously accepted the core of her evidence in convicting Mr. Holliday.

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In the judgment of this Court there is therefore nothing in this first point put forward on Mr. Holliday's behalf. The defects in Miss Cole's evidence were squarely put to the Jurats. Nevertheless the Jurats accepted what was the core of her evidence. It would not be for this Court to substitute its own assessment of her evidence, and in any event this Court is satisfied that the Jurats were entitled to reach the conclusion they did on her credibility.

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The second ground of appeal, as stated, was to the effect that the conviction should be set aside on the basis that defence counsel,

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Advocate P.T.R. Ferbrache, was either flagrantly incompetent, or alternatively conducted Mr. Holliday's defence in a manner which no reasonable counsel could have done. This ground of appeal was supported, in the event, by reference to only two specific matters in respect of which Advocate Ferbrache's conduct is criticised on behalf of the Appellant.

Before turning to consider those two matters we should deal, first of all, with the law in relation to such questions. This Court has very recently in the appeal of Rodney, 22nd September 1999, addressed the question- what is the correct approach in dealing with allegations of incompetence on the part of a defence Advocate as a ground of appeal. After reviewing certain of the English authorities on the subject, the Court said at page 6:-

"Once again, whilst recognising that the English law is not applicable in Guernsey, we have considered these statements of principle against the possibility of a miscarriage of justice. We have asked ourselves the question whether Mr. Torode's judgment was so far wrong as to have caused the trial to be unfair. We need only say that we do not regard this to be a tenable argument."

In his skeleton argument, Counsel for the Appellant referred to the earlier decision of this Court in The Law Officers of the Crown v. Collins 8 GLJ 16, where it was stressed that, although the conduct of Counsel is capable in some instances of giving rise to a ground for setting aside a conviction, such cases are indeed rare.

Counsel for the Appellant pointed out that until very recently the accepted test in England, which had to be met before such a ground of appeal might succeed, was that the conduct of Counsel conducting the trial was such as to involve "flagrant incompetence". In obiter remarks in the case of R. v. Naveed Ullah (Court of Appeal) 14th October 1999, Rose LJ had however stated:-

"It may be, although we express no final and considered view on this aspect of the case, that it is a proper and convenient approach to apply a Wednesbury test to the decision which is complained of, i.e. was it one which no reasonable Counsel or Solicitor could have reached?"

For our part, we are content simply to follow the approach of this Court in the case of Rodney by asking ourselves the question whether the conduct by Counsel complained of was such as to have caused the trial to be unfair.

The first of the two matters complained of was as follows:-

In his speech to the Jurats, Advocate Ferbrache said of his client that:-

"To describe him as an international businessman, I think is slightly over egging the pudding. Mr. Holliday (and even

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though he hasn't given evidence, and I will come to that in a moment or two) clearly from the tenor of the interviews you have read is, and I don't mean in this disparagement to him, is something of a 44 year old 1960s hippie. The duffle coat, sleeping on someone's bedsit when they've been to a party, he's that type of individual. That, I am sure from considering the interviews, and hearing Miss Cole, and reading all the bits of paper that you have read, will be the impression that probably will be the one that sticks with you."

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Counsel for the Appellant accepted that the role of counsel for the defence was not simply to act as a mouthpiece for his client. In course of his submissions he furthermore conceded that the remarks just quoted were no doubt made by Advocate Ferbrache as a tactic to assist his client. His complaint was that these remarks should not have been made without first having obtained the agreement of the Appellant. They were remarks that could have created an unfavourable impression of the Appellant in the minds of the Jurats. The fact that they were seized upon by Press reporters in their reporting of the trial demonstrated this.

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We are of the clear view that there is nothing in this point. It is plain that in making these remarks in the course of his closing speech, Advocate Ferbrache was seeking to distance his client from an image of him being a calculating and experienced drug trafficker. That, in our view, was a legitimate exercise in the circumstances of his advocacy role, taken with the interests of his client fully in mind. It was not a matter which he required the prior consent of his client to say, but was a matter for his professional judgment. In no way can we see how these remarks rendered the trial unfair.

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The second matter complained of was a failure by Advocate Ferbrache to put two exhibits to the witness, Miss Cole, in cross-examination. These exhibits were two notes written by the Appellant to Miss Cole and found in her wallet. The relevance of these notes, it was contended, was that their content pointed to the existence of a sexual relationship between the Appellant and Miss Cole. In interview Miss Cole, when shown these notes, had denied the existence of a sexual relationship between herself and the Appellant, notwithstanding the terms of the notes. The existence of a sexual relationship between the Appellant and Miss Cole was, however, the subject matter of detailed cross-examination by Advocate Ferbrache, under reference to a large number of items of correspondence, which were in the possession of the Appellant, and which were written by Miss Cole. The terms of that correspondence could, in our view, have enabled the Jurats to reach the view that there had been a relationship which went beyond the platonic, between the Appellant and Miss Cole. Miss Cole, however, maintained throughout her evidence that the relationship was never of a sexual character. Counsel for the Appellant contended that if the two items of correspondence, found in her possession, had been put to her in cross-examination and she had maintained her denial of a sexual relationship, this would have put her credibility in even greater doubt in the minds of the Jurats. On the other hand had she been forced to admit that the relationship was a sexual one, which was

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now over because the Appellant had terminated it, the Jurats might have come to the view that she was seeking to incriminate the Appellant because of a grudge she had against him for ending the relationship.

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In our view it was for the professional judgment of Advocate Ferbrache to decide to what extent, and in what way, he should deal with these matters in cross-examination. He clearly spent a considerable amount of time putting before the witness Cole a large amount of material which was suggestive of more than a platonic relationship between herself and the Appellant. That he decided, in his professional judgment, that it was inappropriate or unnecessary for him to put the other items of correspondence, found in her possession, to her in cross-examination cannot, in our view, be said demonstrably to amount to misconduct on his part, which rendered the trial unfair. It follows that the second ground of appeal fails.

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What is more, in our view, the allegations of flagrant incompetence or unreasonable conduct, which were made against Advocate Peter Ferbrache should not have been made.

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Advocate Torode's third and fourth points, both concern the evidence that was relied upon as amounting to corroboration of Miss Cole's evidence.

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The Deputy Bailiff directed the Jurats that there were seven matters which were capable of amounting to corroboration. They were (1) the association between Miss Cole and Mr. Holliday at the Pine View Guesthouse in Jersey, (2) the fact that Miss Cole and Mr. Holliday were on the same ferry to Guernsey, (3) the fact that six clear sachets containing traces of cannabis were found after his arrest in the room which he had used at the guesthouse, (4) the fact that a knife was found with them which was shown by scientific evidence to have been used to cut the block of cannabis resin found on Miss Cole,

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(5) the fact that £2,625 in English bank notes was also found with the sachets and the knife, (6) various lies which Mr. Holliday told Customs Officers at the time of his arrest, and (7) the fact that when arrested he was found in possession of a small set of electronic scales, which he admitted having carried in his jacket pocket. Having identified these as matters capable of amounting to corroboration, the Deputy Bailiff briefly summarised the evidence about them and made some remarks concerning their weight. Advocate Torode's third point is that three of the seven matters, the association at the guesthouse, the sachets and the money, were incapable in law of amounting to corroboration. His fourth point is that assuming that they were admissible, the Deputy Bailiff's directions as to their materiality were inadequate in relation to all seven.

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There is no dispute about the relevant principles. In Baskerville [1916] 2KB 658, Lord Reading formulated the classic definition of corroborative evidence as "independent evidence which affects the accused by connecting or tending to connect him with the crime." In our judgment all seven matters relied on as amounting to corroboration

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were capable of doing so in law. It is, we think, important to bear in mind two general points about the corroborative evidence in this case. The first is that the offence was not a "single act" offence; it consisted of the fact of being "concerned in" a fraudulent evasion of the prohibition on the import of drugs. The concern of Mr. Holliday in the offence is said by the prosecution, on the basis of Miss Cole's evidence, to have extended over a period of two days, from his agreement with Miss Cole in Jersey on the evening of 9th July 1998 until his arrest in Guernsey on the afternoon of 11th July. The corroborative evidence must tend to support Miss Cole's evidence connecting him with her conception and execution of the plan to import the cannabis into Guernsey over those two days. Secondly, although it is convenient for the purpose of presentation to divide the corroboration up into seven matters, we must not lose sight of the fact that it is their cumulative impact on the case which counts, not necessarily the impact of any one factor alone. Ultimately this is a matter of common sense which does not admit of excessively elaborate analysis. In our judgment, the seven items of corroborative evidence, taken together, did tend to support Miss Cole's evidence connecting Mr. Holliday with the conception and execution of the plan to import the cannabis. It was capable of being regarded by the Jurats as evidence tending to show that Mr. Holliday was engaged in drug dealing, that the two of them had been together for much of the period when Miss Cole claimed that the plan had been conceived, and that Mr. Holliday had something to hide.

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Turning to the three particular items of corroborative evidence of which the Appellant complains, Miss Cole's evidence was that Mr. Holliday handed the cannabis to her at the guesthouse. As a matter of common sense, the fact that there is independent evidence that the two of them shared a room at the guesthouse at the time, in which room a locked suitcase belonging to Mr. Holliday was later found with the cash, the knife and the sachets inside it, must tend to confirm that evidence. Of course, it is not conclusive, as Advocate Torode points out. Mr. Holliday and Miss Cole might have been together at the guesthouse for entirely innocent purposes unconnected with their subsequent journey on the same ferry to Guernsey, and Miss Cole's importation of the drugs into the Island. As to the sachets, there was no evidence that the cannabis, traces of which were found in the sachets, was the same as the cannabis that Miss Cole carried into Guernsey, and Mr. Holliday told Customs Officers that he had used the sachets to hold cannabis which he had legally consumed in Amsterdam. As for the cash, it could have been lawfully come by, and even if it represented the proceeds of drug dealing, it was clearly not the proceeds of the cannabis which Miss Cole imported since Miss Cole was arrested before the cannabis could be sold and the money remained in Jersey when the two of them took the ferry. All of these points affect the weight which can be placed on these particular matters of corroboration. But the fact that individually or even cumulatively, evidence is capable of an innocent as well as a sinister explanation, does not make it incapable of amounting to corroboration at all. It only makes it desirable that the Jurats should be cautious before concluding that material which is capable of amounting to corroboration actually does so. It is the duty of the judge to tell

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them this in his summing-up, as the Deputy Bailiff did in this case. It was then a matter for the Jurats what they made of it.

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Once Advocate Torode's third point falls, as it must do, his fourth point cannot survive for reasons which can be shortly stated. The trial judge is not bound to remind the Jurats of every detail of the evidence nor to describe for them every possible alternative explanation of the evidence relied on by the prosecution. In this case, the Deputy Bailiff accurately summarised the corroborative material, and invited them in terms to consider alternative, innocent explanations given by Mr. Holliday to the Customs Officers who interviewed him. He told them that the material was capable of amounting to corroboration, but that it was for them, approaching the matter with appropriate caution, to decide whether it actually did provide independent support for Miss Cole's evidence. His directions on the point cannot be faulted. The Jurats were evidently satisfied.

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Mr. Holliday's appeal must therefore be dismissed.

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I, Suzanne Margaret O'Neill, 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 proceedings in this case.

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.....*smO'Neill*..... Suzanne M. O'Neill
3rd February, 2000

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