

# GUERNSEY LAW JOURNAL

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GUERNSEY LAW JOURNAL

NINETEENTH ISSUE

Introduction

This edition covers the six month period from 1st January, 1995 to 30th June, 1995.

The original texts of legislation and judgments digested are available at the Greffe.

Whilst care has been taken in recording the material published herein no responsibility is accepted for the contents of this issue or its accuracy.

References to this issue in future issues will be cited using the figure and letters 19.GLJ. followed by the paragraph number.

Editorial Committee

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Compiled from sources including all Orders in Council, Ordinances, Projets de Loi and subordinate legislation and selected cases and other relevant material which became available during the months January to June 1995.

30th April, 1996

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GUERNSEY

AGENCY

Powers of attorney

1. Order in Council: The Powers of Attorney and Affidavits (Bailiwick of Guernsey) Law, 1994. - See 18.GLJ.1.

Approved by the Chief Pleas of Sark 18.1.95. Royal Sanction 20.4.95.  
Awaiting registration.

APPEALS

Appeal to Court of Appeal - civil proceedings - application for admission of further documentation not before the lower Court - exercise of Court's discretion

2. At an early stage of an appeal to the Court of Appeal in a civil case, A applied to the Court of Appeal for permission to introduce into the proceedings certain voluntary particulars of the Cause. HELD by the Court of Appeal, following the decision of that Court in Donaldson v. Upton (1982), when an appeal was brought the documents supplied to the Appeal Court must be limited to those which were before the lower Court and, if either party wished to introduce further material, a properly grounded application must be made. It appeared from correspondence between the parties that no objection was taken by R to the voluntary particulars. Further, those particulars did not raise any new cause of action and they appeared to be designed not so much by way of amendments as to give notice to R of the various matters referred to therein, a useful function of voluntary particulars provided that they are contained within the principles set out in the relevant section of the Supreme Court Practice. The application would be granted.

Note : See 17.GLJ.43. This appeal was not pursued.

[Fruit Export Co. Limited v. Guernsey Gas Co. Limited - Court of Appeal 28.3.95 (PTRF/JMW)].

BANKING, INSURANCE AND FINANCE INDUSTRIES

Royal Bank of Scotland

3. Projet de Loi: The Royal Bank of Scotland (Bailiwick of Guernsey) Law, 1995: Makes provision for the merger of the Bailiwick businesses of the Royal Bank of Scotland plc and the Royal Bank of Scotland (Jersey) Limited.

Approved by the States of Guernsey 26.4.95 and by the States of Alderney 7.6.95. Awaiting approval of Chief Pleas and Royal Sanction.

## COMPANIES

4. Order in Council: The Companies (Guernsey) Law, 1994. - See 17.GLJ.4 and 18.GLJ.8.

Registered 28.2.95. (No. VII of 1995). In force 31.5.95: see paragraph 5.

5. Ordinance: The Companies (Guernsey) Law, 1994 (Commencement & Miscellaneous Provisions) Ordinance, 1995. - Brings the Companies (Guernsey) Law, 1994 (see paragraph 4), other than section 63(6), into force on 31st March, 1995; adds another qualification for appointment as auditor for the purposes of section 63(1), namely membership of the Association of Authorised Public Accountants; prescribes H.M. Procureur's fee in relation to the restoration of a company to the Register under section 77(7) at £100; and prescribes H.M. Greffier's fee in relation to companies offering shares to the public under section 16(1)(c)(ii) at £30.

In force 29.3.95. (No. VII of 1995).

## CONSTITUTIONAL LAW

### Elections

6. Ordinance: The Electoral Roll Ordinance, 1995. - Extends the validity of the 1994/5 Electoral Roll for the electoral years 1995/6 and 1996/7.

In force 24.4.95 (No. XIII of 1995)

## CRIMINAL LAW AND PROCEDURE

### Firearms

7. Ordinance: The Firearms (Increase of Insurance) Ordinance, 1995. - Increases to £1 million pounds the minimum amount of third party insurance required to be maintained in respect of a firearm or shotgun.

In force 1st June, 1995. (No. V of 1995).

### Misuse of drugs

8. Projet de Loi: The Misuse of Drugs (Amendment) (Bailiwick of Guernsey) Law, 1994. - See 18.GLJ.11.

Approved by the States of Alderney 15.2.95 and by the Chief Pleas of Sark 18.1.95. Awaiting Royal Sanction.

### Money laundering

9. Order in Council: The Money Laundering (Disclosure of Information) (Guernsey) Law, 1995. - Provides in section 1 that no obligation of secrecy or confidence or other restriction on the disclosure of

information shall be regarded as being contravened by reason of the disclosure to a person described in section 2 of a reasonable suspicion or belief that any money or property represents the proceeds of criminal activity. The persons to whom disclosure may be made are HM Procurer or HM Comptroller, a police officer, an officer of customs and excise, an authorised officer of the Financial Services Commission, or any other persons specified by Ordinance.

Approved by the States 22.2.95. Royal Sanction 11.4.95. Awaiting registration.

**Sentence - burglary - disparity between sentences imposed on co-defendants**

10. A was jointly charged with P, aged 19, of six offences of burglary to which each pleaded guilty. A was sentenced to 18 months' imprisonment on each count concurrent and P was sentenced to 12 months' youth detention on each count concurrent, P's sentence to be served consecutively to a 4 year sentence imposed earlier the same day for aiding and abetting a post office robbery. The total value of the property stolen in the burglaries was £2,000. A had recently been sentenced for a total of six offences of burglary in the Magistrate's Court in two hearings when he was imprisoned for 6 and 9 months respectively and he had a very bad record in relation to other offences. It appeared that the present offences had been committed as part of a plan to cultivate cannabis. P also had an extremely bad record, worse than A's in terms of offences of burglary, but, on appeal by A to the Court of Appeal HELD, the disparity between the sentences could be explained by the disparity between the ages of the two men. There was no good reason for interfering with the sentence. The fact that A might have been dealt with in the Magistrate's Court were it not for P's involvement in the robbery was irrelevant. The appeal would be dismissed.

[Law Officers of the Crown v. Haines - Court of Appeal 28.3.95 (HMC/LLeRS)]. (For full report of judgment of Court of Appeal see paragraph 78).

**Sentence - causing grievous bodily harm - "glassing"**

11. A, aged 21 and with a very bad record of convictions including assaults on police officers, criminal damage and disorderly behaviour, smashed a broken bottle into the face of the complainant with great force, causing multiple lacerations and requiring 36 stitches. The complainant, who was a stranger to A, was fortunate to escape injury to his eye and scarring could be permanent. The attack appeared to be unprovoked. A, who had had a row with his girlfriend earlier in the day, was extremely drunk but the attack was not premeditated. A pleaded guilty in the Royal Court to wounding with intent to cause grievous bodily harm and was sentenced to 4 years' imprisonment. On his appeal against sentence, HELD by the Court of Appeal, the offence was undoubtedly in the upper bracket of serious harm. However, although having a long record of violence, A was aged only 21 years, he had had a traumatic experience earlier in the day, there was no background to what happened and it was not premeditated. The sentence would be reduced to 3 years' imprisonment. The Court also noted an

indication that there was a need to increase the general level of sentences for offences of violence committed in public places.

[Law Officers of the Crown v. Duncombe - Court of Appeal 4.1.95 (JRF/NLeP)]. (For full report of judgment of Court of Appeal see paragraph 76).

**Sentence - misuse of drugs - importation of Class B drug**

12. A pleaded guilty in the Royal Court to importing almost 500 grams of cannabis resin, strapped to her legs. She had assumed a false name and had flown to the island where she was searched. She did not have the benefit of legal advice prior to her trial and, although she had indicated, prior to her trial, that she wished to make a statement to police giving information which could lead to the apprehension of her associate, police had been unable to interview her. Subsequent to her trial she had named her supplier. On appeal against her sentence of 4 years' imprisonment, HELD by the Court of Appeal, as a result of further information which had not been before the Royal Court the proper sentence was 3 years' imprisonment and the appeal would be allowed to that extent.

[Law Officers of the Crown v. Wallace - Court of Appeal 28.3.95 (HMC/NLeP)]. (For full report of judgment of Court of Appeal see paragraph 77).

**Sentence - misuse of drugs - importation of Class B drug**

13. A, aged 18, pleaded guilty in the Royal Court to the improper importation (by swallowing) of approximately 4 oz. of amphetamine, a Class B drug, and was sentenced to 30 months' youth detention. It was held that he had not benefited from drug trafficking and A contended that the drug was for his own use and that of his friends. It was a first offence but had been carefully planned. On A's appeal against sentence, HELD by the Court of Appeal, although A was of previous good character, and following the statement of the Deputy Bailiff in Law Officers of the Crown v. Oren (see 18.GLJ.13), the sentence was not excessive. The appeal would be dismissed.

[Law Officers of the Crown v. Firth - Court of Appeal 27.3.95 (HMC/AMM)]. (For full report of judgment of Court of Appeal see paragraph 79).

**Sentence - plea of not guilty not to be treated as aggravating factor**

14. See Law Officers of the Crown v. Millman, paragraph 17.

**Sentence - suspended sentence supervision orders**

15. Order in Council: The Criminal Justice (Suspended Sentence Supervision Orders) (Amendment) (Bailiwick of Guernsey) Law, 1994. - See 17.GLJ.11 and 18.GLJ.14.

Registered and in force 31.1.94. (No. XXXII of 1994).

Social insurance offences - false declaration - whether necessary to prove remuneration received

16. A was convicted by the Magistrate's Court of two offences of making a false declaration and one of furnishing a false document in order to obtain sickness/invalidity benefits. He had declared that he had not worked while claiming benefit but the evidence was that he had undertaken work at a vinery, although there was no evidence of remuneration having been received. His appeal to the Royal Court was dismissed and he further appealed to the Court of Appeal, arguing that "work" meant remunerative work. HELD, following Clear v. Smith (1981) 1 WLR, at 399, it was not necessary in order to prove a false statement for the purpose of the 1978 Law to prove that the man was earning remuneration for it. The matter was essentially a question of degree and the Magistrate was entitled on the evidence to find that A was observed undertaking work at the vinery and that he had made false statements in that connection.

[Law Officers of the Crown v. Rault - Court of Appeal 27.3.95 (HMC/NJB)].  
(For full report of judgment of Court of Appeal see paragraph 75).

Trial - function of Jurats - function of trial judge - interruptions during evidence - whether miscarriage of justice - sentence - plea of not guilty not to be treated as aggravating factor

17. A was convicted by the Royal Court of eight counts of gross indecency and was sentenced to 30 months' imprisonment concurrent in respect of each. He appealed against conviction on the grounds, inter alia, that the Deputy Bailiff had erred in allowing the Jurats to ask questions of A which took the conduct of the defence out of the hands of his advocate and that there was a miscarriage of justice occasioned by the excessive number of interruptions by the Deputy Bailiff. He also appealed against sentence. HELD by the Court of Appeal, by reason of the experience of Jurats in finding matters of fact in trials it had always been the practice to allow them, with the permission of the presiding judge, to put questions to witnesses and this did not conflict with the fact that they were in the same position as English juries with regard to the summing-up. In relation to the question of the Deputy Bailiff's interruptions, interruptions by a judge, however numerous, could provide grounds for upsetting conviction only if they led to certain consequences defined in various English authorities. Having reviewed those authorities and considered the circumstances, the Court was satisfied that nothing had occurred at the trial which could be said to be objectionable. Many of the interjections were for the purpose of clarification. At no point had the Deputy Bailiff invited the Jurats to disbelieve the evidence for the defence or revealed any hostility to A, nor had he made it impossible for A's advocate to conduct the defence or prevent A from telling his story in his own way, nor had he ridiculed his evidence. However, the term of imprisonment imposed would be reduced to 21 months because the Royal Court, in passing sentence, had treated the decision of A to plead not guilty as an aggravating factor which was wrong.

[Law Officers of the Crown v. Millman - Court of Appeal 5.1.95 (JRF/NLeP)]. (For full report of judgment of Court of Appeal see paragraph 74).

## DIVORCE AND MATRIMONIAL CAUSES

### Divorce - financial provision - vesting of matrimonial home in wife - exercise of judicial powers

18. Pursuant to divorce, the matrimonial home (which had originally belonged solely to H who had transferred it into joint names) was vested solely in W subject to her undertaking responsibility for two bonds encumbering the property, one being in respect of a loan by H's parents advanced for the purpose of funding an extension to the property and the other being a liability to a bank for a business loan advanced to H and his brother in respect of which W gave her personal guarantee. Further conditions of the vesting order were that, if H were to discharge the loan by the bank such discharge would be taken into account in considering any application by W for an increase in the £1 per annum maintenance which H was ordered to pay; and if W were to pay off the loan she would continue to enjoy her rights of indemnity as guarantor against H and his brother. H's arrears of maintenance were also to be remitted. H appealed to the Court of Appeal, asserting that the Deputy Bailiff was wrong in deciding that W should not be required to indemnify H in respect of the sums due to the bank and also that W should have a nominal order for maintenance in her favour notwithstanding that the matrimonial home had been vested in her. HELD, following the decision of the Court of Appeal in Traisnel v Traisnel (6.5.85), which had also been followed in Swaine v Swaine (20.9.90 - see 10.GLJ.33), the Court would not interfere with the decision of the Deputy Bailiff unless he had misdirected himself or erred in Law. Although H had lost his interest in a house which had originally been his alone he had received certain compensating benefits in that he was relieved of joint responsibility in respect of the loan to his parents, the arrears of maintenance had been remitted and the liability to the bank was unlikely to be enforced against him. W's financial circumstances, the fact that she had been treated badly financially by H since the separation and the fact that H had the prospect of an inheritance made the provision for a nominal maintenance order wholly appropriate. The appeal would be dismissed.

[D v D - Court of Appeal 28.3.95 (NJB/PTRF)].

### Legislation

19. Order in Council: The Domestic Proceedings and Magistrate's Court (Amendment) (Guernsey) Law, 1994. - See 17.GLJ.15 and 18.GLJ.15.

Registered and in force 16.1.95. (No. XXIV of 1994).

20. Order in Council: The Domestic Proceedings and Magistrate's Court (Amendment) (Guernsey) Law, 1995. - See 18.GLJ.16.

Registered and in force 24.4.95. (No. I of 1995).

## EMPLOYMENT

21. Order in Council: The Conditions of Employment (Amendment) (Guernsey) Law, 1994. - See 17.GLJ.17 and 18.GLJ.18.

Registered and in force 16.1.95. (No. XXIII of 1994).

## FOOD

### Food and Drugs Legislation

22. Projet de Loi: The Food and Drugs (Amendment) (Guernsey) Law, 1995. - Requires the registration by the Board of Health of premises used for any food business; confers additional powers on Environmental Health Officers, and on the courts, to issue notices and make orders in respect of food businesses; enhances available defences; and extends the Food and Drugs Law to bottled water, milk and shellfish.

The previous requirements as to registration are replaced by a broad requirement for all premises used for a food business, unless exempted by order of the Board, to be registered.

Where an order of the Board relating to food hygiene is not being complied with an Environmental Health Officer may require specified action to be taken by service of an improvement notice.

A court convicting of an offence in relation to food hygiene may prohibit the defendant from carrying on any food business, or the use of particular processes, equipment or premises. Upon cessation of the health risk the order will cease if the Board so certifies or the court so orders.

Where an imminent risk of injury to health is considered to exist an Environmental Health Officer may close down the business by serving an emergency prohibition notice; but such a notice will lapse unless confirmed on application to the court within three days, and there is provision for the payment of compensation if the court does not find that there was a health risk when the notice was served.

The Board is empowered to prohibit by Order the carrying out of commercial operations relating to food which appear to the Board to involve an imminent risk of injury to health.

Approved by the States 26.4.95. Awaiting Royal Sanction.

23. Statutory instrument: The Food and Drugs (Labelling of Food) Order, 1995. - Introduces "use by", "best before" and "best before end" dates in respect of foods other than those, such as fresh fruit and vegetables, food which is not prepacked and alcoholic drinks, sugar, salt and vinegar, which do not require a datemark.

In force 1.10.95. (S.I. No. 2 of 1995).

24. Statutory instrument: The Food and Drugs (Food Hygiene) Order, 1995. - Amends the 1976 Order so as, inter alia, to provide for the temperature at which certain foods must be kept.

In force 1.8.95. (S.I. No. 3 of 1995).

#### GAMBLING

25. Ordinance: The Gambling (Fees) (Amendment) Ordinance, 1994. - Increases various fees in relation to gambling.

In force 14.12.94. (No. XXXIV of 1994).

#### INCOME TAX

##### Computation of income

26. Order in Council: The Income Tax (Emoluments Amendments) (Guernsey) Law, 1995, - See 18.GLJ.27.

Royal Sanction 8.2.95. Registered and in force 24.4.95. (No. III of 1995).

##### Double taxation relief

27. United Kingdom Statutory Instrument : The Double Taxation Relief (Taxes on Income) (Guernsey) Order, 1994. - Excludes from relief under the Double Taxation Arrangement with the UK any income or profits of an exempt or international body which has not been assessed to Guernsey tax at the standard rate.

In force 3.1.95. (UK SI 1994 No. 3209).

##### Exempt bodies

28. Ordinance : The Income Tax (Exempt Bodies: Guernsey Limited Partnerships) Ordinance, 1995. - Permits limited partnerships registered in Guernsey which are investment companies to apply for exempt status.

Approved by the States 25.1.95. (No. I of 1995). In force on the same day as the Limited Partnerships (Guernsey) Law, 1995 (see paragraph 35).

##### Pensions

29. Order in Council: The Income Tax (Pension Amendments) (Guernsey) Law, 1994. - See 18.GLJ.28.

Registered and in force 16.1.95. (No. XXV of 1995).

## INTELLECTUAL PROPERTY

### Trade marks

30. Projet de Loi: The Patents, Designs and Trade Marks (Bailiwick of Guernsey) Law, 1995. - Includes service marks, certification marks and collective marks within the ambit of the term "trade mark"; provides for duties to be payable in respect of any "class" included in a trade mark registered in Guernsey; and validates any existing registration which would be valid under the amended provisions.

Approved by the States of Guernsey 25.1.95; by the States of Alderney 5.4.95; and by the Chief Pleas of Sark 19th April 1995. Awaiting Royal Sanction.

31. Ordinance : The Patents, Designs and Trade Marks (Amendment) Ordinance, 1995. - Increases the fees payable in respect of the registration of patents, designs and trade marks.

In force 1.2.95 (No. II of 1995)

## LAND LAW

### Rights of common - cession and relinquishment

32. Order in Council: Petition that the common rights of the inhabitants of St Martin's be ceded and relinquished in favour of the States for a term not exceeding 99 years. - Cedes and relinquishes rights of common of the inhabitants of St Martin's over certain parcels of land on Fief Blanchelande to enable the States Water Board and the States Electricity Board to install an electricity substation and a water pumping station at Saints Bay.

Approved by the States 25.1.95. Royal Sanction 17.5.95. Awaiting registration.

## LANDLORD AND TENANT

33. Eviction - occupier consenting to eviction by creditor in saisie proceedings - occupier returning to the court to seek a delay in the execution of the order - powers of the court

P, the holder of an interim vesting order, obtained an order for the eviction of D and his wife who were occupiers of the property. At the original hearing D consented to the making of an order delaying eviction to a specified date. Before that date D asked the Court to delay the eviction further. On the question of whether the Court had jurisdiction to consider D's application, HELD by the Deputy Bailiff:

(1) that Section 4 of the Law giving the Court increased power to stay Execution in actions for Eviction 1946 (as extended by the Law of 1954) expressly enabled the landlord or tenant or occupier to

apply for a variation of an eviction order on *showing a change in circumstances*, and,

(2) that the fact that a party had consented to the original order did not debar him from applying under section 4; to hold otherwise might discourage parties from reaching agreements in eviction cases, which was a practice to be commended as it saved the Court's time. However, as the Court would not have investigated the full circumstances at the time of making a consent order it might be more difficult for a party seeking to vary it to show a change in circumstances.

Application adjourned for hearing before Jurats. [In the event D did not pursue the matter].

[Savage v. Moulin Huet Holdings Ltd - Evictions 22.6.95. (NLeP/IHB)].

## **PAROCHIAL MATTERS**

### **Collection of refuse**

34. Ordinance: The Parochial Collection of Refuse (Saint Martin) Ordinance, 1995. - Modifies the Parochial Collection of Refuse (Guernsey) Law, 1958 in its application to the Parish of Saint Martin so as to permit the application required to be made to the Royal Court under section 4(1) of that Law (for permission to levy the rate) to be made, in the year 1995 only, in the month of April instead of the preceding December.

In force 29.3.95. (No. VIII of 1995).

## **PARTNERSHIP**

### **Limited partnership**

35. Projet de Loi: The Limited Partnerships (Guernsey) Law, 1995. - Provides for the registration in Guernsey of limited partnerships which may be formed for the carrying on within Guernsey or elsewhere of any lawful business. A limited partnership consists of one or more general partners who are jointly and severally liable for all debts of the partnership and one or more limited partners who contribute a specified sum to the capital and, subject to the provisions of the Law relating to personal liability, are not liable for any debts of the partnership beyond the amount contributed.

Part I of the Law is entitled "Formation of limited partnerships". Section 1 provides that a limited partnership is to have a continuous and successive existence in the persons of its partners until dissolution. Section 2 sets out the constitution of limited partnerships. Under section 3, every limited partnership must have a partnership agreement. Section 4 provides that the acts of a general partner in connection with the business of the limited partnership bind the partnership in all respects. Under section 5, the name of a limited partnership must contain

the words "Limited Partnership" or the abbreviation "L.P." or "LP". The name cannot be the same as one already appearing in the Register of Limited Partnerships or the Register of Companies. The Royal Court has power to order a change of name. Under section 6, every limited partnership must have a registered office in Guernsey. Section 7 establishes the Register of Limited Partnerships. Section 8 sets out the formalities required for the registration of limited partnerships. Among other things, the applicant must obtain written consent for the registration of the partnership from the Advisory and Finance Committee under section 7A of the Control of Borrowing Ordinance. Upon registration, the Greffier allocates a registration number to the partnership under section 9, issues a certificate of registration stating the partnership's name and registered office and the date of registration. Any change in registered particulars must be notified to the Greffier under section 10. In default of registration under section 8 the partnership is deemed not to be a limited partnership and every partner is deemed to be a general partner.

Part II of the Law is entitled "General provisions as to partners". Section 12 lays down what a limited partner may not do. For example, he may not participate in the conduct or management of the business. If he does, he loses his limited liability status. Section 13 sets out the powers of general partners. Generally, they have all powers of a partner in an ordinary partnership.

Part III of the Law is entitled "Conduct of limited partnerships". Section 14 deals with the institution of legal proceedings which, subject to exceptions, cannot be brought against limited partners. Section 15 requires the keeping by a limited partnership of certain books, documents and accounting records at its registered office. Under section 16, the general partners must appoint an auditor to act in relation to the affairs of the partnership. However, regulations under section 43 may provide for unaudited limited partnerships. Section 17 prescribes the qualifications for appointment as auditor. Under section 18 the auditors must, in relation to each financial year of the partnership, make an auditors' report. Section 19 lays down the auditors' powers and duties. Under section 20, any property of a limited partnership vested in or held on behalf of a general partner or in the name of the partnership is deemed to be held by the general partners jointly on trust as an asset of the partnership. Section 21 sets out the circumstances in which a limited partner may, and may not, require the return of his contribution. Section 22 permits a limited partner to undertake certain transactions with the partnership without prejudicing his limited status. Section 23 deals with the admission of additional limited partners. Section 24 lays down remedies available where there is a failure or refusal to execute documents, statements, etc. Sections 25 deals with the assignment of the interest of a limited partner. Sections 26 and 27 prescribe the cases where a person ceases to be a general or limited partner.

Part IV of the Law is entitled "Dissolution of limited partnerships". Section 28 prescribes the events upon the occurrence of which a limited partnership is dissolved (e.g. upon the expiration of its fixed term, or upon the written agreement of all partners, or upon the revocation by the Committee of consent for registration under COBO). Under section 29 the

Royal Court may order the dissolution of a limited partnership (e.g. where the partnership is insolvent or it is just and equitable to do so). Section 30 contains general provisions as to the dissolution of limited partnerships. Under section 31 cases are prescribed (e.g. where a limited partnership has been dissolved and is unable to pay its debts and a default of a general partner has contributed to the inability of the partnership to pay its debts) where the Court may declare that any officer of a general partner responsible for the default shall be personally liable. Section 32 deals with the order of distribution of limited partnership assets upon dissolution.

Part V of the Law is entitled "Miscellaneous provisions". Under section 33 the rules of law applicable to partnerships apply to limited partnerships unless inconsistent with the provisions of the Law. Section 34 imposes criminal and civil liability for false statements. Under section 35 there is an exclusion of liability for certain public officers. Section 36 prescribes fees payable in relation to a limited partnership. Under section 37 only a limited partnership or partner therein can so describe themselves.

Sections 38 to 49 deal with penalties, offences by bodies corporate, etc, interpretation, service of documents, regulations of the Committee, amendments, power of Committee to delegate functions, repeals, citation and commencement.

Approved by the States 25.1.95. Awaiting Royal Sanction.

#### Partnership

36. **Projet de Loi: The Partnership (Guernsey) Law, 1995.** - Makes provision in Guernsey equivalent to the UK Partnerships Act 1890. Part I of the Law is called "Nature of partnership". By section 1, partnership means the relationship which subsists between persons carrying on a business in common with a view to profit. Section 2 lays down a number of rules for determining the existence of a partnership. For example, joint ownership of property does not of itself create a partnership as to that property; and the receipt by a person of a share of the profits of a business does not of itself make him a partner in the business. Under section 3, "postponement of rights of lender and vendor", where money is lent to a person engaged in business under an agreement by which the lender receives interest varying with the profits, then if the borrower becomes bankrupt the lender may not recover the loan other than the capital and interest at an ordinary commercial rate until the claims of all other creditors have been satisfied. Section 4 defines the expressions "firm" and "firm name".

Part II of the Law is entitled "Relations of partners to third persons". Under section 5, every partner is an agent of the firm and of his other partners for the purposes of the partnership business. Under section 6, an act or instrument relating to the business of a firm done or executed in the firm name by any person authorised is binding on the firm. Section 7 provides that where a partner pledges the firm's credit for a purpose apparently unconnected with the firm's ordinary course of business, the firm is not bound. Section 8 provides that if the partners agree to restrict the power of any of them to bind the firm, no act done in

contravention of the agreement binds the firm in relation to persons having notice of the agreement.

Part III of the Law is called "Liability". Under section 9, every partner in a firm is liable jointly and severally with the other partners for all debts of the firm incurred while he is a partner. Section 10 provides that where by any wrongful act of a partner acting in the ordinary course of the firm's business loss is caused to a third person, the firm is liable therefor. Under section 11, where a partner acting within the scope of his apparent authority receives the money of a third person and misapplies it, the firm is liable to make good the loss. Section 12 provides that if a partner who is a trustee improperly employs trust property in the business of the firm, no other partner is liable to the beneficiaries unless he had notice of the breach of trust. Section 13 provides that a person who represents himself as a partner in a firm is liable as a partner to any person who, on the faith of any such representation, gives credit to the firm. Under section 14, an admission made by a partner concerning the partnership affairs in the ordinary course of its business is evidence against the firm. Section 15 provides that notice to a partner who habitually acts in the partnership business of any partnership matter is deemed to be notice to the firm. Section 16 deals with the liability of incoming and outgoing partners and section 17 with the rights of persons dealing with the firm against apparent members (such as retired or deceased partners).

Part IV is called "Relations between partners & partnership property". Under section 18, the mutual rights and duties of partners as between themselves, whether ascertained by agreement or defined by this Law, may be varied by the consent of all the partners. Section 19 deals with the partnership property. All property originally brought into the partnership stock or acquired on account of the firm are called "partnership property." This is to be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement. There is specific provision as to real property. Under section 20, property bought with money belonging to the firm is deemed to be partnership property. Section 21 provides that no person may arrest or levy execution upon any partnership property except in respect of a debt of the firm. The Court may however order payment of a debt, interest thereon and costs from a partner's interest. Section 22 provides that the utmost good faith is due from every member of a firm towards his partners. Section 23 lays down certain rules for determining, as between themselves, the rights, duties and interests of partners in relation to the partnership and the partnership property. For example, subject to contrary agreement, all partners may share equally in the capital and profits of the firm, and all partners may take part in the management of the partnership business. Under section 24, no majority of partners may expel a partner unless there is express power to do so. Section 25 states that a partnership at will (i.e. one for which no fixed term has been agreed) may be determined by notice by any partner. Under section 26, where a partnership entered into for a fixed term is continued after the expiration date, the partnership continues as a partnership at will. Section 27 requires partners to render an account to his partners of anything affecting the partnership. Section 28 lays down the accountability of partners for private profits. Every partner must

account to the firm for any benefit derived by him without the consent of the other partners from any use by him of the partnership property, name or business connection. Section 29 prohibits a partner from competing with the firm. Section 30 lays down the limited rights of an assignee of a share in a partnership. In particular, there is no right to interfere in the management of the partnership business.

Part V of the Law is called "Dissolution". Section 31 prescribes the cases in which a partnership is dissolved (e.g. the expiration of the fixed term, where there is one). Under section 32, a partnership is also dissolved by the death or bankruptcy of any partner. Section 33 provides that a partnership is dissolved by the happening of any event which makes it unlawful for the firm's business to be carried on. Under section 34, the Court is empowered to order the dissolution of a partnership in specified cases (such as the permanent incapacity of a partner or when the business of the partnership can only be carried on at a loss). Section 35 empowers partners publicly to notify the fact of dissolution. Under section 36, upon the dissolution of a partnership, the authority of each partner to bind the firm ceases except so far as necessary to wind up the affairs of the partnership. Under section 37, upon dissolution, the partners are entitled, as against the others, to have the partnership property applied in payment of the firm's debts and to have any surplus paid to them. Section 38 deals with the repayment of any premium on the premature dissolution of a partnership. Section 39 regulates the position where the partnership is dissolved for fraud. Section 40 deals with certain cases where there is a right to profits after dissolution (e.g. where a member of a firm dies and the surviving partners carry on the business without any final settlement of accounts). Section 41 provides that a retiring or deceased partner's share is a debt due from the surviving or continuing partners. Section 42 lays down the order in which the firm's assets are to be applied on dissolution. Under section 43 the Royal Court is empowered to make orders in relation to dissolution.

Part VI of the Law is entitled "Supplementary provision". Sections 44 to 48 make provision respectively for interpretation, service of documents on partnerships, transitional provisions in relation to existing partnerships, citation and commencement.

Approved by the States 25.1.95. Awaiting Royal Sanction.

#### **POST OFFICE**

37. Ordinance: The Post Office Board (Chief Executive) Ordinance, 1995. - Provides that the title of the States Director of Postal Services shall henceforth be "Chief Executive of the States Post Office Board".

In force 25.1.95. (No. III of 1995).

**PRACTICE AND PROCEDURE**

**Appeals - appeal from the Court of the Seneschal to the Royal Court - desirability of the Seneschal giving reasons and being assisted in formulating questions for him to decide by Counsel**

38. See Drawmer v. Mountstephen, paragraph 71.

**Appeals - application to introduce documents to Appeal Court which were not before the lower court - exercise of Court's discretion**

39. See Fruit Export Co. Limited v. Guernsey Gas Light Co. Limited, paragraph 2.

**Companies - application for restoration of companies to the Register by creditors and other persons interested - Practice Direction**

40. Where applications are made for restoration of a company to the register by persons other than the company or the beneficial owner or directors thereof, it is clearly not possible for undertakings to be given to file outstanding annual returns. Neither will the applicant necessarily be able to ensure that the company is properly managed in the future.

In the interests of good order and also to prevent abuse the Court will require that in cases where applicants cannot undertake to file annual returns and pay outstanding fees counsel for the applicant gives an undertaking that the Company will be put into compulsory liquidation as soon as the necessary notice has been served at the registered office.

The Court will only be prepared to consider release from such an undertaking where it is satisfied that the directors of the revived company are prepared to accept responsibility for its good management and more particularly have filed outstanding annual returns and paid any necessary fees.

The suitability of any proposed liquidator to carry out the task will depend on the state of the company's affairs. The Court will not necessarily expect that a practising accountant will be presented to undertake this duty.

[Practice Direction No. 1 of 1995].

**Non-contentious applications - registration of wills and leases - procedure - Practice Direction**

41. To improve security, H.M. Greffier has directed that it will no longer be necessary to submit original documents to the Court when applying to the Non Contentious Court for permission to register Wills and Leases.

The original document is to be placed in the registration drawer in the Greffe strongroom in the normal way.

[Practice Direction No. 2 of 1995].

## PUBLIC HOLIDAYS

42. Ordinance: The Public Holidays (V. E. Day) Ordinance, 1995. - Provides that in May 1995 the 8th May (Victory in Europe Day) shall be a public holiday instead of the 1st May.

In force 25.1.95. (No. IV of 1995).

## RATING

43. Order in Council: The Tax on Rateable Values (Amendment) (Guernsey) Law, 1995. - See 18.GLJ.38.

Royal Sanction 8.2.95. Registered and in force 24.4.95. (No. II of 1995).

## ROAD TRAFFIC AND PUBLIC TRANSPORT

### Driving licences

44. Projet de Loi: The Motor Taxation and Licensing (Amendment) (Guernsey) Law, 1995. - Amends the Law of 1987 so as to enable a person becoming resident in the island who is the holder of a licence issued outside the island to drive vehicles of the same class without the necessity to obtain a Guernsey licence; to take account of the fact that, pursuant to the Driving Licences (Guernsey) Ordinance, 1995 (see paragraph 46), plastic licences will be issued with a paper counterpart; to empower the States Traffic Committee to maintain a register of licence holders and to make provision for driving tests and training courses for motor cyclists; and various other minor amendments.

Approved by the States 31.5.95. Awaiting Royal Sanction.

45. Ordinance: The Motor Taxation and Licensing (Guernsey) (Commencement) Ordinance, 1995. - Brings into force on 1st September, 1995 those sections of the Motor Taxation and Licensing (Guernsey) Law, 1987 which relate to driver licensing.

In force 31.5.95. (No. XI of 1995).

46. Ordinance: The Driving Licences (Guernsey) Ordinance, 1995. - Repeals and replaces existing legislation relating to driver licensing. Makes provision, inter alia, for application for, and grant of, licences; conditions attached to provisional licences; tests of competence and the grant of pass certificates; fees for and duration of licences; the surrender of licences and provision for lost or defaced licences; categories of licences; minimum age conditions; disqualification; physical fitness; revocation of licences; production of licences to police; and transitional provisions.

In force 1.9.95. (No. X of 1995).

### Public transport - omnibus services

47. Ordinance: The Public Transport (Amendment) Ordinance, 1995. - Redesigns the relevant sections of the Public Transport Ordinance, 1986 so as to facilitate the conclusion and enforcement of contracts between the Public Transport Licensing Authority and operators of bus services for the provision of guaranteed services.

The Ordinance also provides for the examination and certification of vehicles prior to the granting of public service vehicle licences and the payment of fees in that connection.

In force 26th April 1995. (No. IX of 1995).

### Road humps

48. Order in Council: The Road Traffic (Road Humps) (Amendment) (Guernsey) Law, 1994. - See 18.GLJ.44.

Registered 16.1.95. In force on a date to be appointed. (No. XXVI of 1994).

49. Ordinance: The Road Humps Ordinance, 1995. - Gives statutory approval to the retention of six road humps in the estate roads of Rue Jehannet, St Martin's and of four road humps at Chemin des Monts, Castel.

In force 29.6.95. (No. XIV of 1995).

### SHIPPING

#### Third party insurance

50. Order in Council: The Vessels and Speedboats (Compulsory Third party Insurance) (Amendment) (Guernsey) Law, 1994. - See 17.GLJ.38 and 18.GLJ.46.

Registered and in force 16.1.95. (No. XXVII of 1994).

### SOCIAL SECURITY

51. Order in Council: The Social Insurance (Amendment) (Guernsey) Law, 1995. - Makes provision for an income-related Class 3 social insurance contribution, at a percentage of income to be prescribed by Ordinance, to be payable by non-employed persons; and amends the section of the 1978 relating to the terms of office of the President of the Guernsey Social Security Authority and its members so as to bring them into line with other States Committees.

Approved by the States 25.1.95. Royal Sanction 11.4.95. Awaiting registration.

52. Ordinance: The Social Insurance (Reciprocal Agreement with New Zealand) Ordinance, 1995. - Gives effect in Guernsey for the purposes of the Social Insurance Law to the Agreement on Social Security between the United Kingdom and the Government of New Zealand, signed at London on the 3rd November, 1994.

In force 1st April, 1995. (No. VI of 1995).

### TORTS

#### Occupier's liability - plaintiff injured while visiting premises as licensee - standard of care required

53. P was intending to visit the flat of the tenant of premises when she injured herself while travelling through the common parts in the possession of the landlord. D, the landlord, applied to the court, as a preliminary point in the proceedings, for an order stating, for the purposes of determining the nature and extent of the duty owed by D to P, whether she was an invitee or licensee of D. In fact, it was common ground that under the pre-1957 definitions P was a licensee and not an invitee. However, P contended that, although the Occupier's Liability Act, 1957 did not have an equivalent in Guernsey, it could not be that the law relating to occupier's liability should have stood still since 1957 and that the Court should look at the position in other jurisdictions where the perceived difficulties with regard to the common law position of occupiers under English law had been dealt with by removing the distinction between occupiers and invitees, not by way of legislation but through caselaw. **HELD**, by the Deputy Bailiff, although the distinction between invitee and licensee was unsatisfactory, in the interests of consistency it was necessary to look at the common law of England for guidance as to the ingredients of a tort, and P must be treated in the same way as a licensee would have been in England before 1957.

[Paint v . Champion - Plaids de Meubles 22.5.95 (JMW/RJC)].

### WATER

#### Watercourses

54. Ordinance: The Watercourses Ordinance, 1995. - Applies the provisions of the Loi relative aux Douits, 1936 to La Claire Mare stream discharging at the outfall at La Croix Martin.

In force 31.5.95. (No. XII of 1995).

## WILLS AND SUCCESSION

### Real property - specific bequest by Will to person who would have inherited the property on intestacy - whether propre or acquêt

55. D, the deceased, died intestate as to Guernsey realty without issue. She had inherited the property in question from her mother. One half of the property had originally been devised to her father who had predeceased her mother and therefore, such devise having failed, D inherited it by operation of law as propre maternal. The other half of the property had specifically been devised to D by her mother but, had no will been made, it would have automatically vested in D, also as propre maternal. The question arose, for the purpose of determining who was entitled to inherit upon D's death, whether that half-share was an acquêt in her hands or propre maternal. HELD, following the decision of the Cour des Jugements et Records in the case of Rowswell v. Thoume, Plaids de Meubles 23 June 1874, property the subject of a specific bequest by will was an acquêt in the hands of the recipient. Upon D's death, therefore, the real property stood divided in equal undivided shares between those heirs entitled to inherit propres and those entitled to inherit acquêts.

[In re estate of Norris - Plaids de Meubles 7.4.95 (JMLeP/SRM)].

GUERNSEY STATUTORY INSTRUMENTS

56. The following Statutory Instruments were made during the period covered by this issue. Except where otherwise indicated they have not been digested in detail. A reference copy of each is held at the Greffe and copies may be obtained from the relevant Committee.

Title	Date Made	Coming into force	No.
The Parking Places (Amendment) Order, 1995	27.2.95	1.3.95	1
The Food and Drugs (Labelling of Food) Order, 1995 (see paragraph 23)	24.2.95	1.10.95	2
The Food and Drugs (Food Hygiene) (Amendment) Order, 1995 (see paragraph 24)	24.2.95	1.8.95	3
The Health Service (Pharmaceutical Benefit) (Amendment) Regulations, 1995	23.2.95	1.4.95	4
The Social Insurance (Residence and Persons Abroad) (Amendment) (Guernsey) Regulations, 1995	9.3.95	19.3.95	5
The Post Office (Inland Post) (Amendment) Order, 1995	13.3.95	3.4.95	6
The Post Office (Overseas Parcel Post) (Amendment) Order, 1995	13.3.95	3.4.95	7
The Health Service (Medical Benefit) (Amendment) Regulations, 1995	21.3.95	1.4.95	8
The Health and Safety at Work (Dangerous Substances) (Guernsey) Regulations, 1995	9.3.95	9.3.95	9
The Rent Control (Variation) Order, 1995	6.4.95	1.7.95	10
The Wireless Telegraphy (Cordless Telephone Apparatus) (Restriction) Order, 1995	25.4.95	1.6.95	11
The Wireless Telegraphy (Citizens' Band and Amateur Apparatus) (Various Provisions) Order, 1995	25.4.95	1.6.95	12
Code of Recommendations for the Welfare of Livestock	18.4.95	18.4.95	13

The Import and Export of Goods (Control) (Guernsey) (Amendment) Order, 1995	16.5.95	17.5.95	14
The Alderney Duty Free Order, 1995	13.6.95	13.6.95	15
The Milk (Retail Prices) (Guernsey) Order, 1995	30.6.95	2.7.95	16

**UNITED KINGDOM STATUTORY INSTRUMENTS**

57. The following is a list of Statutory Instruments made in the United Kingdom which are specifically applicable to Guernsey and which were registered here during the period covered by this issue. Unless otherwise indicated they are not digested in detail elsewhere in the Journal.

	<u>S.I. Number</u>
The Suppression of Terrorism Act 1978 (Designation of Countries) Order, 1994	2978
The Double Taxation Relief (Taxes on Income) (Guernsey) Order, 1994 (see paragraph 27)	3209
The Wireless Telegraphy (Television Licence Fees) (Amendment) Regulations, 1995	655
The Weights and Measures (Guernsey and Alderney) Order, 1995	1011
The Antarctic Act 1994 (Guernsey) Order, 1995	1033
The Summer Time Order, 1994	2798

## ALDERNEY

### COMPANIES

58. Order in Council: The Companies (Alderney) Law, 1994. - See 18.GLJ.61.

Registered 28.2.95. In force 3.5.95: The Companies (Alderney) Law (Commencement) Ordinance, 1995 (Ordinance of the States of Alderney of 3.5.95). (No. XXXIV of 1994).

59. Ordinance: The Companies (Alderney) Law (Fees) Ordinance, 1995. - Prescribes fees for the purposes of the Companies (Alderney) Law, 1994 (see paragraph 58). For an application for registration of a company's memorandum the fee is reduced from £50 to £25. The fee for delivery of an annual return (whether full or abbreviated form) is reduced to no fee. Other fees prescribed are:- delivery of return of allotments under section 40, £15; delivery of copy resolution under section 53 altering company's share capital, £15; giving notice under section 54(5) of redemption of redeemable preference shares, £15; lodging under section 150 of an inspectors' report, £15; delivery by directors under paragraph 9 of Schedule 7 ("shares of no par value") of a certificates under that Schedule, £15; application for entry in Register of copy of Court order, £15; delivery of copy of special resolution, £15; inspection of Register or records of struck off company, £10 per company; supply by Registrar of photocopies thereof, £1 per A4 side (first five sides) and 50 pence per A4 side thereafter.

In force 3.5.95. (Ordinance of the States of Alderney of 3.5.95).

60. Ordinance: The Companies (Alderney) Law (Applications) Ordinance, 1995. - Permits the Registrar, if satisfied in an exceptional case that the registration of a company under the Companies (Alderney) Law, 1994 must proceed as a matter of urgency and that there are good reasons for not submitting an original document, to accept an application for registration by facsimile. The original application or document must be lodged within 7 days.

In force 3.5.95. (Ordinance of the States of Alderney of 3.5.95).

61. Ordinance: The Companies (Alderney) Law (Guarantee Companies) Ordinance, 1995. - Re-enacts Schedule 6 to the Companies (Alderney) Law, 1994 ("companies limited by guarantee") by making provision for hybrid companies (companies limited by guarantee with a share capital).

In force 3.5.95. (Ordinance of the States of Alderney of 3.5.95).

### CONSTITUTIONAL LAW

#### Hawkers

62. Order in Council: The Hawkets (Amendment) (Alderney) Law, 1994. - See

17.GLJ.46 and 18.GLJ.62.

Registered and in force 16.1.95. (No. XXVIII of 1994).

#### CRIMINAL LAW AND PROCEDURE

##### Court of Alderney - jurisdiction

63. **Projet de Loi: The Government of Alderney (Amendment) (No. 1) Law, 1995.**  
- Amends the Government of Alderney Law, 1987 by increasing the criminal jurisdiction of the Court of Alderney. The maximum penalties are now level 5 for contempt of court (formerly level 4) and, in relation to other offences, level 5 for any one offence (formerly level 4) or an aggregate of six months' imprisonment (formerly three months') and twice level 5 (formerly level 5) for more than one offence.

Approved by the States of Alderney 7.6.95. Awaiting Royal Sanction.

##### Corruption

64. **Order in Council: The Corruption (Alderney) Law, 1994.** - See 18.GLJ.63.

Registered and in force 31.1.95. (No. XXXI of 1994).

#### EMPLOYMENT

65. **Order in Council: The Employers' Liability (Compulsory Insurance) (Alderney) Law, 1994.** - See 18.GLJ.65.

Registered 28.2.95. (No. XXXV of 1994). In force 1.6.95: The Employers' Liability (Compulsory Insurance) (Commencement) (Alderney) Ordinance, 1995 (Ordinance of the States of Alderney of 3.5.95).

66. **Ordinance: The Employers' Liability (Compulsory Insurance) (General Provisions) (Alderney) Ordinance, 1995.** - Prescribes, for the purposes of the Employers' Liability (Compulsory Insurance) (Alderney) Law, 1994 (see paragraph 65), a minimum amount for which an employer is required to insure of £2,000,000 in respect of claims relating to any one or more of his employees arising out of any one occurrence. The Ordinance also prohibits certain conditions in policies of insurance issued for the purposes of the Law which exclude cover under the policy in certain circumstances.

In force 3.5.95. (Ordinance of the States of Alderney of 3.5.95).

#### ROAD TRAFFIC

##### Speed trials

67. **Ordinance: The Speed Trials (Alderney) Ordinance, 1995.** - Closes the roads at Whitegates and Tourgis Hill on (respectively) 15th and 16th September 1995 for the purposes of speed trials. Disapplies the traffic

regulations as to speed limits and noise restrictions in respect of vehicles taking part in those trials.

In force 5.4.95. (Ordinance of the States of Alderney of 5.4.95).

#### Traffic regulations

68. Ordinance: The Alderney Road Traffic and Public Highways (Amendment) Ordinance, 1995. - Amends section 35 of the Alderney Road Traffic and Public Highways Ordinance, 1966 by providing a new procedure for the enactment of traffic regulations under the Ordinance. Regulations must henceforth be laid before the States (who may annul them). They must have an explanatory note which shall be published in the Alderney Official Gazette and displayed on the notice board outside the Court House for 7 days. They will then come into force on the seventh day after the date of publication or such later date (if any) as may be specified in the regulations.

In force 3.5.95. (Ordinance of the States of Alderney of 3.5.95).

### SARK

#### INTERNATIONAL LAW

##### International organisations

69. Order in Council: The European Bank for Reconstruction and Development (Sark) Law, 1994. - See 17.GLJ.58 and 18.GLJ.79.

Registered and in force 16.1.95. (No. XXIX of 1995).

70. Order in Council: The Organisation for Economic Co-operation and Development (Sark) Law, 1994. - See 17.GLJ.57 and 18.GLJ.78.

Registered and in force 16.1.95. (No. XXX of 1994).

#### PRACTICE AND PROCEDURE

##### Appeals - appeal from the Court of the Seneschal to the Royal Court - desirability of the Seneschal giving reasons and being assisted in formulating questions for him to decide by Counsel

71. In summing up to the Jurats [following a vue de justice] on a civil appeal from Sark involving the ownership of a well which was situate on the boundary of two tenements the Deputy Bailiff observed that it was desirable in a case involving lengthy evidence and legal argument that the Seneschal should, notwithstanding the fact that he is a lay judge sitting in a court of summary jurisdiction, endeavour to give reasons for his decision. The Deputy Bailiff drew attention to the decision of the Guernsey Court of Appeal in the case of Law Officers of the Crown v. Diment (see 16.GLJ.86) where that Court had expressed the view that it was

desirable for the Guernsey Magistrate to give reasons for his decisions. Further, in a case before the Seneschal where both parties were represented by Counsel it would no doubt assist the Seneschal if Counsel between them agreed an aide memoire for the Seneschal identifying the various questions upon which he was to rule.

[After further directions the Jurats upheld the decision of the Seneschal that the well in question belonged to the Respondent and dismissed the Appeal.]

[Drawmer v. Mountstephen - Cour Ordinaire 22.6.95 (NJB/JNVL)].

#### **REGISTRATION OF BIRTHS, DEATHS AND MARRIAGE**

72. Order in Council: The Marriages (Amendment) (Guernsey and Sark) law, 1994. - See 18.GLJ.40.

#### **TAXATION**

73. Ordinance: The Financial Provisions (Amendment) (Sark) Ordinance, 1995. - Increases the following taxes under the Financial Provisions (Sark) Law, 1978:- harbour dues, horse tax, dog tax and cycle tax.

In force 1.1.96. (Ordinance of Chief Pleas of 19.4.95).

JUDGMENTS OF THE GUERNSEY COURT OF APPEAL

74.

[CRIMINAL DIVISION - APPEAL NO. 183]

1995 JANUARY 3, 4 & 5

THE LAW OFFICERS OF THE CROWN

v.

NORMAN JAMES MILLMAN

Before: DOREY, P., LE QUESNE, V.-P., and HARMAN, JJ.A.

Trial - function of Jurats - function of trial judge - interruptions during evidence - whether miscarriage of justice - sentence - plea of not guilty not to be treated as aggravating factor

See paragraph 17.

N. Le Poidevin, for the Appellant.  
J.R. Finch, for the Crown.

THE PRESIDENT: The Appellant appeared before the Deputy Bailiff on the 23rd June 1994, and pleaded not guilty to an amended Indictment containing eight counts alleging gross indecency with two young boys, contrary to Section 1(a) of the Protection of Children (Bailiwick of Guernsey) Law, 1985.

The first four counts related to four separate alleged incidents involving a boy ("X"). The date is widely drafted as being on a day unknown before the 30th September 1991; and in the case of count four before the 1st November 1991. The remaining counts related to another boy ("Y"), and the four separate incidents were alleged to have occurred between the 31st July 1992 and 31st December 1992, with the exception of count eight, where the offence was alleged to have been committed on a day unknown between the 31st January 1993 and the 1st April 1993.

The Appellant was thereafter tried at the Royal Court before the Deputy Bailiff and Jurats between the 4th to 7th July 1994, on which date he was convicted on each count by a majority of 8 to 2. On 23rd August 1994, after consideration of a Social Enquiry report and a psychiatric report, he was sentenced to 30 months imprisonment on each count concurrent, to be served with effect from 7th July 1994.

On 15th July 1994, the Appellant submitted preliminary grounds in support of his appeal against conviction, in which he maintained that there was insufficient evidence to support the convictions and that the Deputy Bailiff had shown bias against the Accused during his trial, while failing to remind Jurats of points relied upon by the defence, during his summing-up.

On 31st August 1994, he served notice of application for leave to appeal against sentence. In it he submitted that the Deputy Bailiff had erred in sentencing on the basis that the distress caused to the victims in having to come to Court to give evidence constituted aggravating features in the case,

A and also submitted that the sentence was excessive in all the circumstances. Leave to appeal against sentence was granted by the Bailiff on the 2nd December 1994. This Court is, therefore, considering an appeal against conviction together with, if necessary, appeal against sentence.

Amended grounds have been submitted in respect of the appeal against conviction. These have been fully argued before us. They can be summarised as follows:-

B 1. There was no evidence of any accompanying signs of sexual activity on the part of the Appellant, he was never seen to expose himself nor seen or heard to remove his necessary clothing.

The height of the sofa and other measurements taken of this in a kneeling position, make the acts described by the boys as impossible, particularly within the time scale alleged.

C 2. The Deputy Bailiff erred in law in allowing the Jurats to ask questions of the Appellant, which took the conduct of the defence out of the hands of his advocate. This was further submitted to be a miscarriage of justice, and in addition the Deputy Bailiff wrongly allowed the introduction in evidence of a question asked by X about which his mother gave evidence "Do fingers have hairs on them?". This, it was argued, was not a statement of recent complaint, was highly prejudicial, and had no probative value. This matter had, however, been carefully gone into during the trial, when it was suggested that the Appellant was a man with unusually hairy hands.

D 3. There was a miscarriage of justice occasioned by the excessive number of interruptions by the Deputy Bailiff during the trial, which went beyond mere clarification and impeded the conduct of the defence, which was thereby, undermined.

E It is not alleged that all the interruptions were harmful, many were neutral and some beneficial, however, there was a total of 66 interjections while X was giving evidence. There were 56 interruptions during the evidence of Y, 42 interruptions during the evidence of Mrs. X, and the Deputy Bailiff intervened to prevent Detective Constable Burnard being asked about suggestions of behaviour put not only to the Appellant but also to other potential witnesses, which might have had the effect of contamination.

F When the Appellant came to give evidence-in-chief, it is alleged that he was interrupted by the Deputy Bailiff's interjections 111 times. There was a further miscarriage of justice in that the Deputy Bailiff did not fairly present the Appellant's case during his summing-up and, in particular, did not invite the Jurats to consider fully the extent to which Y might have been influenced by what he had heard earlier about X.

G He failed to direct the Jurats that if they were satisfied there had been collusion or contamination to the point where it weakened the evidence of Y, then it could not corroborate the evidence of X.

It is further submitted that on a number of specified occasions the Deputy Bailiff showed bias towards the defence during summing-up, in particular

where it was a crucial part of the defence that this act complained of was physically impossible.

A

After some discussion with the Court, Dr. Le Poidevin decided not to pursue ground 1 and we make no further reference to it.

Ground 2 was that there were wrong decisions in law on the part of the Deputy Bailiff, in that he permitted Jurats to ask questions of witnesses, and, in particular, of the Appellant, thereby taking the conduct of the defence out of the hands of the advocate for the Appellant.

B

In England jurymen do ask questions of witnesses, invariably by passing a note with the question to the Judge, who will, if appropriate, pass them to counsel for comment. If there is no reason for any objection the Judge will put the question.

In Guernsey, the position of Jurats is different. By reason of their experience in finding matters of fact in all manner of trials, in particular, in criminal trials, it has always been the practice to allow them, with permission of the presiding judge, to put questions to the witnesses. It is understood by them that they are always under the control of the presiding judge. This does not conflict with the fact that they are in an identical position with English juries as respects the required contents of a judge's summing-up.

C

The Guernsey Court of Appeal has directed that there cannot be expected to be any legal experience in respect of the most recently elected Jurat, whatever experience the others may have. Clearly, there are limits on the nature of questions put by Jurats just as there are on the questions put by judges. This issue is considered below.

D

We turn now to the interjections, as Dr. Le Poidevin called them, of the Deputy Bailiff during the evidence. There were, as the Appellant contended, a large number of these. Dr. Le Poidevin's tally was about 66 during the evidence of X, about 42 during that of Mrs. X, about 56 during that of Y, and about 111 during the Appellant's evidence-in-chief.

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These figures alone, however, are of very little significance. Interruptions by the Judge, however numerous, can provide grounds for upsetting conviction only if they lead to certain consequences which have been defined in a number of cases in the English Court of Appeal. We refer briefly to a few of those decisions. The first is R. v. Hulusi & Purvis (1973) 58 Cr. App. R. 378. The head note there reads:-

F

"Interventions by the judge during a trial which lead to the quashing of a conviction occur (i) when they have invited the jury to disbelieve the evidence for the defence in such strong terms that the mischief cannot be cured by the common formula in the summing-up that the facts are for the jury, and that they may disregard anything said on the facts by the judge with which they do not agree; (ii) when they have made it impossible for defending counsel to do his duty;.. (iii) when they have effectively prevented the defendant or a witness for the defence from telling his story in his own way.

G

A Convictions quashed where there had been frequent interventions by the judge (i) during the cross-examination of the witnesses for the prosecution, suggesting that defending counsel was not doing his duty; (ii) during the evidence-in-chief or re-examination of the defendants and their witness (a) suggesting that defending counsel had not fully put his case to witnesses for the prosecution during their cross-examination and (b) in effect preventing the defendants and their witnesses from telling their story."

B We refer next to R. v. Mathews & Mathews (1983) 78 Cr. App. R. 23. Purchas, L.J., delivering the judgment of the Court, quoted the following passages from the judgment of Cumming-Bruce, L.J., in the earlier case of R. v. Gunning:-

C "This appeal is founded on the submission that thanks to the effect of the judge's persistent interventions while the Appellant was giving his evidence-in-chief (and to a lesser degree while he was being cross-examined by Mr. Everest) the trial ceased in a material way to be the kind of trial that the English and Welsh adversarial system is intended to be. Mr. Hopkins has presented the appeal with judgment and moderation. He does not submit- and it is important that this should be said- that the judge was at any stage consciously hostile to the Appellant, or consciously unfair to him. The submission is that the eagerness of the judge to elicit from the Appellant, while he was giving his evidence-in-chief, the exact details and implications of the story that he was telling had the effect of preventing Mr. Hopkins of counsel from taking his client through his evidence in a systematic and continuous way. The effect, it is submitted, was prejudicial to the Appellant without any intention on the part of the learned judge to injure the defence in any way. As Mr. Hopkins rightly submits, there are cases in which it is of the utmost importance to the defence that the examination-in-chief of the Accused in the witness box shall be conducted by counsel who has decided, having considered his instructions, how, by asking questions, to bring out before the jury the testimony of the Accused in its most persuasive and effective way. That often calls for very great judgment. It has been correctly stated that the judgment and skill with which the evidence-in-chief of a witness is conducted may be of crucial significance for the purpose of giving the jury a clear appreciation of the case for the Accused put at its strongest. Of course if there are weaknesses in it (As there were in the version of events given by this Appellant) those weaknesses can be explored when counsel for the prosecution cross-examines."

F Then going further down:-

G "If a judge, without any conscious intention to be unfair, descends into the forum and asks great numbers of pointed questions of the Accused when he is giving his evidence-in-chief, the jury may very well get the impression that the judge does not believe a word that the witness is saying and by putting these pointed questions, to which there is sometimes only a lame answer, blows the evidence out of the water during the stage that counsel ought to be having the opportunity to bring the evidence of the Accused to the attention of the jury in its most impressive pattern and shape. The importance of counsel having that opportunity is not diminished- indeed it is enhanced- if the evidence emerging in chief is a story that takes a bit of swallowing. If the judge, when the witness is

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skating over thin ice, asks pointed questions so that the ice seems to crack, the jury may well get the impression, however perfectly the judge may later sum up the case, that the judge has seen through the evidence-in-chief so that the jury do not take it very seriously either"

Purchas, L.J., himself went on to summarise the authorities in this way:-

B

"(1) Whilst a large number of interruptions must put this Court on notice of the possibility of the denial of justice, mere statistics are not of themselves decisive; (2) the critical aspect of the investigations is the quality of the interventions as they relate to the attitude of the judge as might be observed by the jury and the effect that the interventions have either upon the orderly, proper and lucid deployment of the case for the defendant by his advocate or upon the efficacy of the attack to be made on the defendant's behalf upon vital prosecution witnesses by cross-examination administered by his advocate on his behalf; (3) in analysing the overall effect of the interventions, quantity and quality cannot be considered in isolation, but will react the one upon the other; but the question which is posed ultimately for this court is 'Might the case for the defendant as presented to the jury over the trial as a whole, including the adducing and testing of evidence, the submissions of counsel and the summing-up of the judge, be such that the jury's verdict might be unsafe?' In the presence of conditions in which this Court has been alerted in the manner to which we have referred, it appears to us that if there is a possibility of a denial of justice then this Court ought to intervene."

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D

There are two more recent judgments, not yet reported, with which Dr. Le Poidevin provided us with transcripts. The first is R v. Marsh, given on the 1st of July 1993; Taylor, L.C.J., there quoted these words from Lawton, LJ in R v. Hulusi:-

E

"It is a fundamental principle of an English trial that if an accused gives evidence, he must be allowed to do so without being badgered and interrupted. Judges should remember that most people go into the witness box, whether they be witnesses for the Crown or the defence, in a state of nervousness. They are anxious to do their best. They expect to receive a courteous hearing, and when they find almost as soon as they get into the witness box and are starting to tell their story, that the judge of all people is intervening in a hostile way, then, human nature being what it is, they are liable to become confused and not to do as well as they would have done had they not been badgered and interrupted."

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The Lord Chief Justice added:-

"It is most undesirable that judges should interrupt a witness, and particularly a defendant, when he is giving his evidence-in-chief, or for that matter when he is in cross-examination. The whole purpose of the adversarial process, as opposed to an inquisitorial process, is that the judge sits and 'holds the ring' and it is for counsel on each side to conduct the examination and cross-examination and for the judge to see that they do it fairly. We think it is most undesirable that the judge should seek to anticipate cross-examination, which may properly be

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A appropriate when counsel for the Crown has his opportunity by himself interrupting the flow of the evidence-in-chief of the witness."

Finally, in Whybrow v. Saunders, 21st January 1994, Lord Taylor said the Court was:-

"...satisfied that the learned judge's interventions during the evidence of the two Appellants went far beyond the bounds of legitimate judicial conduct."

B

He went on:-

"... In their evidence-in-chief, he interrupted the flow of their narrative not simply to clarify what they were saying but to pour scorn upon it. Whether or not their story was improbable they and their counsel were prevented from presenting it as they would have wished. The Appellants were cross-examined on their account as they were advancing it, and before it had been developed. Later, each Appellant was challenged in cross-examination not only by counsel but also and with greater hostility, by the judge who conveyed by his interventions his disbelief of their story. With regret, we have been driven to the conclusion that the Appellants were thereby deprived of their right to a fair trial, and there was a denial of justice."

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D After a paragraph which we omit, he continued:-

"We wish to make clear that there are, of course, circumstances in which, and purposes for which, it is entirely appropriate for a learned judge to intervene during the evidence. If a witness gives an ambiguous answer, the judge should have it clarified as briefly as possible. If the answer is long or the learned judge does not hear it clearly, he may certainly have it repeated for the purposes of his note.

E

Furthermore, the Royal Commission on Criminal Justice has recently recommended that judges should be more 'interventionist' so as to prevent trials becoming protracted.

We entirely support that recommendation. Judges should intervene to curb prolixity and repetition and to exclude irrelevance, discursiveness and oppression on witnesses. But all of this is a far cry from what occurred here..."

F

Dr. Le Poidevin took us through a considerable number of the Deputy Bailiff's interjections. We do not propose to consider those instances individually, it is enough to say that we are completely satisfied that nothing which occurred at the trial came anywhere near the sort of thing being held by those authorities to be objectionable, nor was there anything remotely comparable with the conduct of the judge in the Whybrow case. Dr. Le Poidevin accepted that many of the Deputy Bailiff's interjections were neutral and some beneficial to the defence. In many instances he was ensuring that he had heard the answer correctly or trying to elucidate something which the witness had left obscure. At no point does he appear to us to have invited the Jurats to

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disbelieve the evidence for the defence or to have revealed any hostility to the Appellant.

He did not make it impossible for Dr. Le Poidevin to conduct the defence, or prevent the Appellant from telling his story in his own way, nor did he ridicule his evidence. Once or twice Dr. Le Poidevin said, after an intervention by the Deputy Bailiff, that he would not pursue a point he had been preparing to make, but that was because of the exercise of his own judgment not because the Deputy Bailiff had made his line of questioning impossible. There were a few questions put by the Deputy Bailiff, which it would have been better to leave to counsel, but to say that is a very far cry from saying that his interjections led to a miscarriage of justice.

B

We turn now to the issue of recent complaint. In R v. Lilleyman (1896) 2 QB 167, it was held that a statement of recent complaint made shortly after the alleged occurrence may be led in evidence by the prosecution as evidence of the consistency of the complainant when giving evidence in the witness box. The admissibility of such a complaint is relevant solely to consistency and is in no sense corroborative of subsequent testimony. The statement of complaint must be spontaneous in that it is an unassisted and unvarnished account of what occurred. In this case the complaint was uttered in the form of a question by X to his parents, asked one day at teatime. He said "Do fingers have hairs on them?" In cross-examination, Mrs. X, the prosecution witness to this complaint, stated that this was a bomb shell dropped on them, which resulted in further discussion after tea.

C

At a pre-trial hearing it was agreed that this discussion which must presumably, have involved questions and answers, should not be treated at part of the complaint and the prosecution did not seek to lead any of it in evidence. The complaint, therefore, was restricted to the question.

D

During the hearing of this appeal, Advocate Le Poidevin conceded that the complaint might be made in the shape of a question and that this was capable of being construed as such. He argued, however, that it did not amount to recent complaint, and ultimately, its admissibility was a matter for the discretion of the Deputy Bailiff. In any event, he submitted, its prejudicial effect outweighed its probative value.

E

X stated in evidence that he posed the question to his parents, because he could feel the Appellant's hair on his legs when he was squeezing between his legs on what was supposed to be the Appellant's fingers or fist. This Complainant said that his father went with him the next session but afterwards he went on his own when he was asked to remove his clothes and the behaviour of the Appellant to him was repeated.

F

This Court concludes, therefore, that his submission that this was not a recent complaint in the first instance is ill-founded. It was made in the middle of the course of behaviour which, on the Appellant's own account, was always at least on the borderline of indecency, and which continued afterwards, following Mr. X's single appearance with his son at the Appellant's home when, understandably, nothing untoward occurred.

G

The Court has carefully considered the relevant passage in the summing-up, which has also been the subject of criticism, it is in the following terms:-

A "X said that he thought it was all a bit wrong, but he wasn't sure about it. It seems that his mind was troubled on the matter and at tea one night he said to his parents 'Do fingers have hairs on them?' ... Now, the prosecution are placing special significance on this remark of the boy, asking a question as to whether fingers have hair on them, on the basis that it is evidence of a recent complaint. It is important that you understand as a matter of law what the significance of recent complaint is in sexual cases."

B It is clear that the use of the word 'crotch' is directed only to the importance which the prosecution were inviting the Court to draw from X's evidence referred to in the preceding paragraph; this was that when he was squeezing on the Appellant's fingers he could feel the hairs on his legs. The Appellant had said in evidence that he had placed his fist or fingers halfway between X's knees and thighs and which he inserted from behind. In the judgment of the Court there is no fault to be found at this stage of the summing-up.

C Counsel for the Appellant urged upon the Court that where the circumstances were that a witness, and in particular a young and therefore impressionable witness appears, who is open to the possibility and risk of contamination by influence, the prosecution has a duty to ensure that any such likelihood is disproved. The facts are that the complainant, Y, was not interviewed for some three weeks after the arrest of the Appellant. He was, in the view of the Appellant, likely to have been contaminated by the police, by suggestion or perhaps by eagerness on his part to please.

D The Appellant established that he had been the subject of some talk in the school, at which both complainants attended, and on this foundation, Dr. Le Poidevin objected to the absence of disproof of undue influence. In England there is considerable mistrust of police in their methods of securing convictions of the guilty, and sometimes of the innocent. The mutual trust between police and public which still exists in rural communities in England still exists in Guernsey, and though it happens occasionally that in Guernsey a policeman is found to be dishonest, we have no knowledge of any police officer in Guernsey having been found to have exerted improper means to secure a statement, a confession, or indeed, a conviction.

E We can see no good reason for the Royal Court or for the Court of Appeal to require any special practice to ensure that a child's evidence is reliable. In this case the Royal Court had the benefit of standard and well tested police procedure, and in the absence of any representation by counsel, or of any element in the case giving rise to suspicion, no objection can be taken on this point. In our judgment there are no grounds for suspecting that there was anything calculated to affect the reliability of the complainant's statement.

In these circumstances therefore, the Court dismisses the appeal against conviction.

Now, Dr. Le Poidevin, you want to take the appeal against sentence?

G ADVOCATE LE POIDEVIN: Yes, sir. I will address the Court on one point and one point only. The-

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THE PRESIDENT: Well, can I say if it's on the point of R v. Scott, that is to say, that there was an aggravating factor referred to by the Deputy Bailiff in his summing-up, which was the fact that the Appellant pleaded 'not guilty.' If that is the point you want to take then we do not resist that as a point in law.

B

ADVOCATE LE POIDEVIN: I'm obliged, sir. That is the sole point I wish to take, and I really took that point not only on behalf of the Appellant as such sir, but on behalf of defence counsel in general; particularly the suggestion that it is an aggravating factor, and therefore, should by implication, increase sentence if a character is attacked, the character of a prosecution witness is attacked, because if that is an aggravating circumstance sir, which can result in a sentence being more heavy than otherwise then, sir, it puts the position of a defence counsel into an almost impossible one. He has to consider in the way in which he conducts the defence as to whether or not the way in which the defence is conducted is likely to have the effect of increasing the sentence, and that is the alarm with which the remark of the Deputy Bailiff was viewed.

C

So that is the sole point that I wish to raise sir, that if, as is submitted here, the sentence was increased as a result of the way in which I, as defence counsel, conducted the case or, indeed, increased because the defendant wished to have his guilt tested in this Court, which as one- in the Royal Court- which as one realises, was not unanimous in the matter, then again it is, in my submission, wrong, and I hear you to say that this is accepted, sir, and I am therefore sir, asking that there be some reduction in sentence to take this factor into account.

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THE PRESIDENT: Right, well we shall adjourn to consider the matter.

(11.51 a.m. Court adjourns)  
(12.10 p.m. Court reconvenes)

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THE PRESIDENT: This appeal against sentence has succeeded on the point raised by Dr. Le Poidevin, namely that the Royal Court in passing sentence, treated the decision of the Appellant to plead not guilty as an aggravating factor. Some adjustment must be made, and we substitute for the sentence passed the term of 21 months imprisonment.

We can assure Dr. Le Poidevin that no prejudice can be suffered by a guilty person in these circumstances. We record that Dr. Le Poidevin conducted the defence with notable discretion.

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ADVOCATE LE POIDEVIN: I'm obliged, sir.

Appeals against convictions dismissed; appeals against sentences allowed to the extent that the sentences on each of the eight counts were reduced to 18 months' imprisonment, concurrent and effective from 7th July, 1994.

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A<sup>75</sup>.

[CRIMINAL DIVISION - APPEAL NO. 185]

1995 MARCH 27

THE LAW OFFICERS OF THE CROWN

v.

JOHN FREDERICK RAULT

Before: DOREY, P., COLLINS and HARMAN, JJ.A.

B

Social insurance offences - false declaration - whether necessary to prove remuneration received

See paragraph 16.

N.J. Barnes, for the Appellant.

G.R. Rowland, Q.C. (H.M. Comptroller), for the Crown.

C

HARMAN, J.: On 27th May of last year, this Appellant appeared before the Acting Magistrate, facing three charges. The first alleged that on 19th November 1993 - and I summarise - for the purpose of obtaining benefit under the Social Insurance (Guernsey) Law 1978, he produced or furnished a medical certificate which was false in a material particular, that is to say, a signed declaration that:-

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"I declare that because of incapacity I have not worked since the date of the last medical certificate which I submitted."

The date of that last medical certificate was 20th October 1993. The second charge, and again I summarise, alleged that on 17th November 1993, for the purpose of providing information to the Administrator of the Guernsey Social Security Authority, he knowingly made a false statement which was in these terms:-

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"I don't work at all. I haven't performed any work since claiming sickness benefit."

The third charge, similarly for the purpose of providing information, alleged that on 26th November 1993, he made a false statement in these terms:-

F

"I have done no work at all, either paid or unpaid, whilst claiming sickness or invalidity benefit."

The Acting Magistrate found the Appellant guilty, and fined him £100 with an alternative of 10 days imprisonment on each charge, the fine to be paid at the rate of £5 per week from 10th June 1994.

On 3rd June a notice of appeal against conviction and sentence was lodged, grounds of the appeal against conviction being:-

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"I do not believe that the acts which I had carried out amounted to work within the meaning of the law, or that I was capable of working."

A

With regard to sentence the grounds were that no sufficient consideration had been given to his financial circumstances, the Appellant stating that he could not afford to pay the fines which were excessive in all the circumstances.

On 5th October, his appeal was heard in the Royal Court before the Deputy Bailiff and Jurats and was dismissed. On the same day a further notice of appeal was lodged with the same general grounds and it is in those circumstances that the appeal comes today to be heard by this court.

B

It is necessary to recite something of the history. On 12th December 1991, a medical certificate was received by the Social Security Authority, which bore the Appellant's signature and the same date. It declared that he was incapable of work for 2 weeks as from 9th December, and it was signed by a doctor.

Thereafter regular medical certificates were submitted purporting to show that the Appellant was incapable of work, and that because of incapacity he had not worked since the date when the last medical certificate was submitted; that the information given on the form was true and complete; that he claimed benefit; and that he agreed to his doctor giving information relevant to his claim to the Administrator. All those forms were signed by the Appellant.

C

The first certificate stated that he had a chest infection, requiring investigation as an in-patient at the Princess Elizabeth Hospital. Subsequent certificates gave a diagnosis as 'continuation' to indicate a continuing period of illness and of bronchitis. The last certificate, which is the subject of the first charge, was dated 19th November 1993.

D

For completeness it should be added that at the end of the first year claimants are required to restate their circumstances, and forms were sent to Mr. Rault in December 1992 which included notes for guidance. These defined the meaning of the term "Incapable of Work" and required that any specified change should be reported to the Social Security Office including, and I quote, "If you do ANY work." And the word 'ANY' is emphasised. It further states a person is incapable of work only if there is no work or type of work which he can reasonably be expected to do. Meanwhile the Social Insurance Law provides that invalidity benefit should be paid instead of a sickness benefit after six months. In this case certificates from December 1991 to October 1993 show continuous illness.

E

On 26th November 1993, the Appellant made a written statement to an official of the Social Security Authority which is the subject of charge three. In it he said:-

F

"I hereby state that I have done no work at all, either paid or unpaid, whilst claiming sickness or invalidity benefit."

He said that he had been to a vinery, owned by Mr. Gordon Young, purely for a chat and company. At that time he said he could not provide the exact location because Mr. Young always drove him there. He could only say that it was in the north of the Island.

G

However, visits had been made early in November by officers of the Supplementary Benefits Department to Mr. Young's vinery at Les Landes in the Vale. On 9th November, they observed a large mound of chopped logs and bags

A with sacks and so on, and a tractor and another vehicle. On the 10th, the next day, they went back and they heard a chainsaw operating. Mr. Rault was seen on the site, but he wasn't actually seen to do anything. The next day, the 11th, again they heard sounds of work and voices although they saw nobody, but on the 12th, the fourth consecutive day of their visit, they saw Mr. Rault and Mr. Young both doing physical work. Mr. Rault was moving the logs, and Mr. Young was heard calling out to the Appellant at one stage about 'tomorrow morning.' On 16th November both men were seen apparently engaged in chores at the site. They appeared to be working independently. They both left the vinery in Mr. B Young's vehicle and on that day large sacks of potatoes were noted on the site.

On 17th November, the Inspectors arrived before 8 o'clock in the morning. At 8 a.m. the Appellant appeared alone, driving a Honda car, and he opened up the vinery. He emptied a barrel with a spade into a wheelbarrow. On that occasion a number of photographs were taken of the Appellant engaged in this activity. He was seen to collect sacks of potatoes which he emptied into a barrel C apparently for chicken food. He filled the barrel with water from a hosepipe. Later the same day both men were seen filling sacks with logs and stacking them. Eventually, on that day, the Inspectors returned to the site where the two men were drinking tea, and were invited by Mr. Young to look around. They saw amongst other things, onions growing in a greenhouse and about 250/300 chickens. During that visit on 17th November, Mr. Rault made a short written statement which is the subject of charge 2. In it he said:-

D "I do not work at all. I haven't performed any work since claiming sickness benefit. I was on the site at the Marais Vinery just for company. Mr. Young is my next door neighbour."

On 22nd December, Police Constable Domaille interviewed the Appellant in his home, under caution. He asked the question: "Have you been working at all this year?" The Appellant replied: "No." Question: "When was the last time you worked?" Answer: "Years ago."

E He said that he had visited Mr. Young's vinery to chat and drink tea, that he had never been there by himself, he had never carried bags of wood, delivered logs with Young, or fed the chickens. He was shown the photographs: he said that he had been picking up bits of bark to take home. He again denied having ever done any physical act at the vinery.

Mr. Rault gave evidence before the Magistrate. He said that he had moved some logs to get at some bark, otherwise he had just been walking around. Once in a F blue moon he had emptied the barrel. When it was pointed out that he had previously denied working at all, he said that he had been confused, but he also maintained: "Physical work I never done." He said that he had just been standing around. He was allowed to take logs home for his own benefit. He eventually agreed that he had put chicken food in a wheelbarrow and left it in a greenhouse, and that he had also emptied bags into a bin, but he insisted that: "I don't know what physical work is."

G Before the Deputy Magistrate, the Prosecution didn't seek to go beyond the Oxford Dictionary definitions of 'work.' They include 'application of physical effort to a purpose, task to be undertaken, employment or occupation etc., especially as a means of earning income.'

A

Advocate Barnes has referred us to decision number R(S)11/51 on a claim for sickness benefit under the National Insurance Acts, and in the course of that decision it was stated that a person is incapable of work within the meaning of the National Insurance Act 1946, Section 11(2)(a) provided if, having regard to his age, education, experience, state of health, and other personal factors, there is no work or type of work which he can reasonably be expected to do. The decision further stated: 'By 'work' in this connection, we mean remunerative work. That is to say, work whether part-time or whole time for which an employer would be willing to pay, or work as a self-employed person in some gainful occupation.' Advocate Barnes has further referred us to Section 103 (6) and Section 104 (2)(c) of the Social Insurance (Guernsey) Law, 1978. By Section 103 (6) a person shall not be required under this section to answer any question or to give any evidence tending to incriminate himself. The situation here is that, notwithstanding that, the Defendant made two false statements in addition to the statement which he made at the end of his application forms.

B

The Deputy Bailiff subsequently held that it was not necessary in order to prove a false statement for the purpose of the law, to prove that the man was earning remuneration for it, citing Clear v. Smith (1981) 1 WLR, at 399. We agree with the relevance of that judgment and with his finding that the matter is a question of degree and essentially for the good sense of the Magistrate's Court or, as in this case, the individual Magistrate. The Magistrate was clearly entitled on the evidence to find that the Appellant was observed undertaking work at Mr. Young's vinery, and that in the three instances charged, he made false statements in this connection. In the end the Appellant came close to admitting as much. He denied ever being alone at the site, when on one occasion, 17th November, he was the first person to arrive at 8 in the morning. It is apparent that throughout he was less than frank, and in our view was properly convicted on each charge. The appeals against convictions are, therefore, dismissed.

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Appeals against convictions dismissed.

E

76. [CRIMINAL DIVISION - APPEAL NO. 186]

1995 JANUARY 4

THE LAW OFFICERS OF THE CROWN  
v.  
SONNY ELTON DUNCOMBE

F

Before: DOREY, P., LE QUESNE, V.-P., and HARMAN, JJ.A.

Sentence - causing grievous bodily harm - "glassing"

See paragraph 11.

N. Le Poidevin, for the Applicant.  
J.R. Finch for the Crown.

G

**A** THE PRESIDENT: On 3rd October 1994, the Appellant appeared before the Deputy Bailiff in the Royal Court and pleaded guilty to Count 1 of an Indictment which charged him that on 26th June 1994, he wounded Timothy Falla with intent to cause him grievous bodily harm.

On 4th October 1994, he was sentenced to 4 years imprisonment to run consecutively to a current sentence of 7 months imprisonment then being served. He appeals to this Court against the sentence, with leave granted by myself on 2nd December 1994, the grounds being that it was excessive.

**B** The Deputy Bailiff, when passing sentence, described the offence as one of the worst cases of a totally unprovoked and deliberate glassing that the Court had seen before it for many years.

The Appellant, who is aged 21, has a bad record. Starting at the age of 11 he has appeared before the Juvenile and Magistrate's Courts on 17 occasions. Apart from offences of dishonesty and driving offences, he has been convicted

**C** of assaults, including three assaults on police officers, criminal damage and disorderly behaviour.

He has been employed mainly in the building trade. The Social Enquiry Report states that before his remand in custody, he had a steady average income of £150 per week. This money was mainly spent on alcohol. He has debts of £250 and no savings. The evidence is that the victim suffered financial loss in excess of £1,100.

**D** The facts of this case can be shortly summarised: The Appellant had a 4 year relationship with a girlfriend by whom he has a young daughter. On the evening of Saturday 20th June, they had a row and, according to the Appellant, his girlfriend threw him out. He later told the police:-

"I was out tonight and I said to my mates earlier on 'If someone gives me any trouble tonight, I'm going to fucking kill them' you know what I mean, so I probably did do it on purpose, there's nothing I can do about it."

**E** He subsequently told the probation officer that during the day he'd spent £90 on alcohol in various public houses and also took two LSD tablets. When the pubs closed he went to Scarlett's Nightclub, below the Old Government House Hotel. The nightclub is open to members of the public who pay an entrance fee. There are three bars.

**F** Earlier the same evening members of the Fermain Rugby Club had held their formal annual dinner upstairs in the hotel with women present. At about 11.30 p.m. various members decided to go down to the nightclub, and they included Mr. Falla. The Appellant arrived with a friend shortly afterwards and joined a group of young women near to the disc jockey's booth. Mr. Falla, who was a complete stranger to him, also went up to the disc jockey's booth and some kind of verbal exchange took place between them.

**G** The Comptroller, before the Royal Court, described what happened next as an episode of violence which was short, sharp, brutal and unprovoked. The Appellant picked up an empty lager bottle, smashed it on a metal barrier, and thrust it against Mr. Falla's right cheekbone with such force that the bottle neck shattered further, with glass fragments entering Mr. Falla's forehead and

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the area around his right eye. He suffered multiple lacerations and eight wounds required thirty-six stitches, and the painstaking removal of small fragments of glass.

B

The initial surgical procedures at the Princess Elizabeth Hospital lasted over two hours. The wounds were especially serious and Mr. Falla was fortunate to escape injury to his right eye. Mr. Allez, in the Royal Court, at once acknowledged that the scarring could well be permanent, and the doctor's report noted that it was virtually impossible to remove all the glass fragments.

The Appellant was detained on the spot and afterwards told the police that Mr. Falla had hit him first, he said:-

"He smacked me a couple of times and that was it, I just went off my head."

C

He described smashing the bottle "out of anger" and "... because I have a terrible temper." He also said "... and I hit him with it because he wouldn't fucking give up." In general terms he also claimed to be a victim of colour prejudice. In fact, it appears that Mr. Falla at no time touched the Appellant and that he did nothing beyond speak to him as a stranger when challenged. The Appellant was drunk and, to quote his own words, "steaming at the time."

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There is really little, if any, mitigation. The Deputy Bailiff was correct when he said that the Appellant had no alternative but to plead guilty in all the circumstances. He has since shown signs of contrition, but he indicated little regret on the night.

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This Court has been referred to a number of sentences for assault passed in Guernsey over a decade. It is apparent that their respective gravity varied enormously and, consequently, so did the penalties imposed. We also considered cases relating to totality of sentence set out by Professor Thomas in his textbook on sentencing.

It must be emphasised that the present offence was undoubtedly in the upper bracket of serious crime. However, although having a long record of offending in a violent fashion, the Appellant is still aged 21, he had had a traumatic experience in his domestic life earlier that day, there was no background to what happened, and it was not premeditated.

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While there was no conceivable justification or excuse for what was done to Mr. Falla, this Court considers that the sentence of 4 years imprisonment was too high, and that 3 years imprisonment would have been appropriate in this case. This appeal against sentence is, therefore, allowed, and a sentence of 3 years imprisonment substituted for that imposed in the court below. It will still be served consecutively to the existing sentence of 7 months.

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This Court has noted that there is an indication of the need to increase the general level of sentences for offences of violence committed in public places, and will not hesitate to support any appropriate increase in sentences passed by the Royal Court in these cases.

Appeal allowed to the extent that the sentence was reduced from four years' to three years' imprisonment.

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[CRIMINAL DIVISION - APPEAL NO. 187]

1995 MARCH 28

THE LAW OFFICERS OF THE CROWN

v.

CAROL WALLACE

Before: COLLINS, HARMAN and MACHIN, JJ.A.

B

Sentence - misuse of drugs - importation of Class B drug

See paragraph 12.

N. Le Poidevin, for the Applicant.

G.R. Rowland, Q.C. (H.M. Comptroller), for the Crown.

C HARMAN, J.:— On 28th October, 1994, the Appellant appeared before the Bailiff in the Royal Court and pleaded guilty to an Indictment charging her that on 24th September she was concerned in the importation of Cannabis Resin contrary to the prohibition imposed by Section 2 (1) of The Misuse of Drugs (Bailiwick of Guernsey) Law, 1974, as amended, with intent to evade such prohibition.

On 31st October the Court was reconvened, and on that occasion it was held that the Appellant had not benefited from drug trafficking. She was sentenced to 4

D years imprisonment with effect from 24th September.

The Bailiff emphasised that in the recent case of Oren, 18 GLJ '13, the Court had stated that in cases involving larger quantities of drugs, the starting point for sentencing would be 2½ years for Class B drugs, and that the lower sentences would be reserved for cases where there were guilty pleas and the quantity found in the possession of the offender was at the lower end of the range in amount and value, that is to say, £1,000 or less. The Bailiff pointed out that this importation was about four times the amount stipulated by

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the Court as constituting the lower level of punishment.

At the hearing of this appeal it has been argued that the correct way to judge the position should be rather in terms of quantity than street value for reasons which have been given in a recent United Kingdom case.

On 9th November, 1994, the Appellant submitted a Notice of Application for leave to appeal against sentence which stated that there were fresh matters to be taken into account by the Court of Appeal which were not disclosed to the Royal Court at the time of sentence. The Appellant had indicated to the Police before her trial that she wished to give full assistance by giving information which could lead to the apprehension of her associate. The Police had been unable to interview her through lack of time. And, further, the sentence was manifestly excessive.

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The short facts of this case are that on 24th September, 1994, the Appellant arrived in Guernsey on an Air UK flight from Southampton where she had been living. She was travelling on a single journey ticket in the name of "Miss C. Fox". Her baggage tag and a cash card were in the name of "Wallace". She said that this was the name of her sister-in-law, but a cigarette case in her

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possession also had the initials "C.W.". Nevertheless, she completed a landing card in the name of "Carol Fox".

She was told that she would be searched, whereupon she removed her boots and revealed two blocks of Cannabis Resin wrapped in film, attached to the outside of her legs, above the ankle. She identified herself as Mrs. Wallace.

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The two blocks of Cannabis Resin amounted to almost 500 grams. The street sale price in Guernsey being £79 per gram, this quantity was said to be worth, potentially, £3,500-£4,500. It was also said that this could provide for approximately 3,500 reefers.

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The Appellant's version of events suggested to the Court of Trial that she was a courier. She said that she brought the Cannabis to Guernsey at the request of a friend in England, whom she refused to name. That was the position at the trial. She was to take the drugs to a public house, where she would be met by a man she did not know, to whom she would hand over the drugs. She refused to name the public house. Her male friend had arranged for a pre-booked air ticket in the name of "Fox", which she had collected and paid for and for which she was to be reimbursed. She was also offered £300 which she refused to accept, saying that she was doing it for a very good friend. She also said that she knew she was breaking the law but could not see any serious harm in it. She did it because she had nothing better to do.

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The Appellant had a number of previous convictions for dishonesty but none for drugs related offences. When her first marriage broke up in 1981 she was left alone to bring up four daughters. She has clearly had a difficult life and the Social Enquiry Report spoke of her taking an overdose in 1993.

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The matters urged upon this Court today come under two main grounds. The first ground is that the sentence of 4 years imprisonment was higher than recent guideline cases suggest should be the recognised tariff, where that is the main consideration to be followed. In addition we were asked to say that this is a case where an individualised sentence is appropriate.

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The second ground relates to the circumstances which led up to and included the trial itself. The Appellant was not granted legal aid at the earliest stage. She was, this Court is told, unaware of the likely sentence when she embarked upon this course of conduct and she was not advised by any lawyer prior to her trial. Because of that she did not make available information which she might otherwise have disclosed. Her Advocate, that is to say the Advocate who appeared before her at her trial, did not make personal contact with her until the last minute. She was seen at the hearing when she pleaded guilty by representatives of the same firm, but not by the person who was to speak for her when it came to mitigation. She received no assistance from anyone in the compilation of the Social Enquiry Report. We have been advised that that is common form in Guernsey, and that an Advocate might expect to be in touch with the relevant Probation Officer. Further on Friday 28th October, the date of the plea, she indicated that she wished to make a statement to the Police. At that time the Police were preoccupied over the weekend because of a heavy case which involved a number of different Police Officers.

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subsequent to her trial she made a statement naming her supplier. It remains the case, of course, that this statement was not otherwise particularly helpful

A to her case. However, as a result of further information which we have received and which was not before the Royal Court, this Court has concluded that the proper sentence was 3 years rather than 4 years imprisonment as imposed by the Court of Trial. This Court, therefore, allows the appeal to that extent, quashes the original sentence and substitutes a sentence of 3 years' imprisonment.

Appeal allowed to the extent that the sentence was reduced from four years' to three years' imprisonment.

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[CRIMINAL DIVISION - APPEAL NO. 189]

1995 MARCH 28

THE LAW OFFICERS OF THE CROWN

v.

RICHARD JOHN HAINES

C

Before: COLLINS, HARMAN and MACHIN, JJ.A.

Sentence - burglary - disparity between sentences imposed on co-defendants

See paragraph 10.

D L.LeR. Strappini, for the Appellant.  
G.R. Rowland, Q.C. (H.M. Comptroller), for the Crown.

HARMAN, J.:- On 17th January this year, the Appellant and a young man aged 19, named Stuart Page, appeared in the Royal Court before the Bailiff and Jurats, jointly charged with six offences of burglary. They both pleaded guilty, and were sentenced, Haines to 18 months imprisonment concurrent on each count and Page to 12 months Youth Detention on each count, concurrent. Page was also fined for possession of cannabis with which he was charged alone in a separate count in the same Indictment. This Appellant now appeals on the ground that the length of the sentence was excessive when his co-Accused received 12 months for the same crimes.

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Earlier on the same day, 17th January, Page had appeared before the Royal Court with two other men named Hotton and Doughty. Hotton pleaded guilty to robbery at the Cobo Post Office and Doughty and Page pleaded guilty to aiding and abetting. All three also pleaded guilty to burglary and taking a conveyance without authority. For these offences each was sentenced to a total of 4 years Youth Detention. The sentence of 12 months Youth Detention later imposed on Page for the six burglaries where he was charged with Mr. Haines was ordered to be served consecutively to the sentence of 4 years. Therefore, the totality of Youth Detention to which Page was sentenced on 17th January was 5 years.

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The six burglaries were committed between 8th and 17th October 1994, at various business premises where property and cash were stolen. The property included three generators and a television and the total cash amounted to about £560. The total value of the property stolen and the cash amounted to approximately £2,000. When both men were detained and interviewed, they separately admitted the offences while declining to name each other.

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The Appellant has a long history of persistent motoring offences since he was 17. He also has convictions for criminal damage and disorderly behaviour. More recently in February 1993, at Guernsey Magistrate's Court, he was sentenced to a total of 6 months' imprisonment for four cases of burglary. On that occasion a suspended sentence of 2 months' imprisonment was activated to run consecutively, and in August 1993 he was sentenced to a total of 9 months imprisonment for a further two cases of burglary.

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It is true that he has suffered serious misfortune. In 1991 Mr. Haines had a severe industrial accident, and this resulted in the loss of his left leg below the knee. For a time he was, obviously, unable to work. The Social Enquiry Report emphasises that his previous burglary convictions came subsequent to the accident when he was aged 23. Meanwhile, it appears that the present offences were committed as part of a wider plan involving others in the cultivation of cannabis. The three generators had been recovered from a bunker where it was suggested to him seeds had been planted. This Appellant denied any knowledge of seeds but agreed that there was a plan to cultivate or try to grow cannabis.

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The Royal Court imposed totality sentences of 18 months in this case against a recent background of two appearances at the Magistrates Court for a total of six offences of burglary, which had resulted in prison sentences of 6 and 9 months respectively at the separate hearings. It cannot be realistically argued that the sentences, the subject of this appeal, were excessive or otherwise wrong in principle. It is, of course, right to point out that Page also had an extremely bad record and a worse record than this Appellant when it comes to burglary. He is now serving 5 years Youth Detention. But the Court was entitled to take into account the disparity in ages between the two men and to have regard for this when assessing the appropriate sentences.

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This Court cannot say that the Royal Court was wrong in making the distinction which it did, and in our judgment there are no other good argument that, but for the position of Page, this Appellant might have been dealt with in the Magistrate's Court where the maximum sentence would have been a total of 12 months. The responsibility of selecting the Court of trial rests with the prosecution, and it is open to the Magistrate to commit a defendant for sentence by the Royal Court where he considers his own powers to be insufficient. We are, therefore, being asked to consider the likely reaction of a Magistrate's Court when dealing with a case of this gravity, that is to say, with a total of six burglaries, committed by a man with a very bad record. The Appellant has no reason, in our opinion, to labour under a sense of grievance. This appeal against sentence must be dismissed.

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Appeal dismissed.

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A 79.

[CRIMINAL DIVISION - APPEAL NO. 190]

1995 MARCH 27

THE LAW OFFICERS OF THE CROWN

v.

JAMES NATHAN ALLAIN FIRTH

Before: DOREY, P., COLLINS and HARMAN, JJ.A.

B

Sentence - misuse of drugs - importation of Class B drug

See paragraph 13.

A.M. Merrien, for the Applicant.

G.R. Rowland, Q.C. (H.M. Comptroller), for the Crown.

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HARMAN, J.: On 13th January of this year, this Applicant appeared before the Deputy Bailiff and Jurats charged with the improper importation of a controlled drug of Class B, namely amphetamine, contrary to the prohibition imposed by Section 2(1) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974, as amended, with intent to evade such prohibition. He pleaded guilty. It was held that he had not benefited from drug trafficking. The Court considered a Social Enquiry Report by Mr. Harvey, and references supplied by the defence which included one from the Headmaster of the Grammar School which

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the Applicant attended from 1987 to 1992. He was sentenced to 30 months Youth Detention.

The grounds of appeal are that the sentence was manifestly excessive; that the Court did not pay adequate regard to the Applicant's contention that he would have passed the drugs to friends and acquaintances only; that the Court did not have due regard to earlier cases cited as authorities; and having regard to the Applicant's previous good character, the sentence was out of proportion to the gravity of the offence. The Applicant had said in interview that he would have consumed 2½ to 3 ounces of the 4 ounces he had with him by the end of the year. He was 18 at the time of committing the offence, was unemployed, but previously employed as a barman.

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The facts can be shortly stated: On the morning of Saturday 26th November 1994, the Applicant flew to Heathrow, without luggage, returning on the evening of the same day. He was searched without result. He had nothing to declare and denied being in possession of drugs. He said he had been to London to watch a football match. This was an untruthful explanation which he had prepared in advance. He was wearing an Arsenal football t-shirt, and was in possession of two football magazines and the stub of a ticket for the Arsenal game with Manchester United, which had been played that day. He later told the police that he had bought the stub for £5 from somebody outside the ground. When first interviewed he recited some of the details of the match which he had not, of course, watched.

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Having been detained overnight, the next morning he began to vomit packages of amphetamine. Eventually either by vomiting or by bowel movement he produced 47 packages, all of which he had originally swallowed. By this time he had been admitted to the Princess Elizabeth Hospital. Customs Officers were involved in

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the distasteful duty of examining his excrement and vomit in order to retrieve the condoms and cling film that he had used. Not all the packages were intact. The total would seem to have been approximately 4 ounces or 113 grammes of amphetamine. He said he had paid £350 in cash to his supplier whom he refused to name, at a pre-arranged meeting. He denied that anyone else was involved. He had thought the quantity was 5 to 6 ounces. When asked what he would do with the drugs he said:-

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"I don't know whether I was going to give any to my friends, I assume I probably would have, but generally it was for my own consumption."

In further answers he made it clear that his friends would have to pay for it. He said it was the first time he had purchased drugs other than minute quantities for his own use.

On this occasion the street resale value was estimated as being between £1,800 and £2,250 if the total quantity was 4 ounces. It was described by the prosecution as an importation of a substantial quantity into a small island community, which would have increased the amount available locally. It was also a carefully planned operation. The Deputy Bailiff, when passing sentence, said that there was an inference that a sizeable part of the consignment would have been passed on to others. That was plainly right.

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The Appellant was aged 18. There is no evidence that this was other than a first offence. Although the case could not have been sensibly contested, some account must be taken of the fact that it was always to be a plea of guilty. He was a person of good character hitherto apart from a driving offence, but in our opinion the sentence was not, in this instance, excessive. This Court considers that the statement of sentencing policy made at the conclusion of the Oren trial on 24th August 1994, 18 GLJ 13, must be kept firmly in mind. On that occasion the Deputy Bailiff stated:-

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"The Court has come to the conclusion that sentences of the lengths that have hitherto been imposed are not acting as a sufficient deterrent to persons seeking to profit from the drugs trade in this Island. Therefore, in future cases substantially higher sentences must be imposed."

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In all the circumstances this Court does not regard the sentence passed here as being out of line, and this application must be dismissed.

Application dismissed.

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