6 pages.

69 of 1992

Royal Court (Superior Number),
exercising appellate jurisdiction.
Appeal against conviction and sentence of
Muhammer Isik.

At the request of a Member of the Bar, the attached Judgment which was delivered by the Deputy Bailiff, as he then was, on 23rd July, 1984, is being circulated to subscribers.

ROYAL COURT
(Superior Number, exercising the appellate Jurisdiction conferred upon it by Part III of the Court of Appeal (Jersey) Law, 1961).

23rd July, 1984

Before: P.L. Crill, C.B.E. Deputy Bailiff
and Jurat H. Perree
Jurat The Hon. J.A.G. Coutanche
Jurat J.H. Vint
Jurat M.G. Lucas
Jurat C.S. Dupre, M.C.
Jurat P.G. Baker

Muhammer Isik
- v -
The Attorney General

Appeal against conviction by the Royal Court (Inferior Number), 'en police correctionnelle', on 17th February, 1984 on a charge of an infraction of S.25 of the Immigration Act 1971, as extended to Jersey by the Immigration (Jersey) Order, 1972 and against a sentence of 6 months' imprisonment passed on 5th April, 1984.

The Solicitor General.
Advocate D.F. Le Quesne for the appellant.

JUDGMENT

THE DEPUTY BAILIFF: On the 17th February, 1984, the appellant was convicted by the Inferior Number of the Royal Court sitting *en police correctionnelle* of an infraction of Section 25 of the Immigration Act 1971 as extended to this Bailiwick by the Immigration (Jersey) Order, 1972. Sub-section (i) reads as follows:-

> ***"25(i) Any person knowingly concerned in making or carrying out arrangements for securing or facilitating the entry into the Bailiwick of Jersey of anyone whom he knows***

or has reasonable cause for believing to be an illegal entrant shall be guilty of an offence ..."

Sub-section (v) of Section 25 reads as follows:-

"(v) Sub-section (i) shall apply to things done outside as well as things done in the Bailiwick of Jersey where they are done (a) by a citizen of the United Kingdom and Colonies ..."

It was not disputed that the appellant fell within that definition. The indictment was set down within the terms of the sub-section but qualified by the words *"in the Island of Jersey"*.

Before the trial, the learned Bailiff saw the Solicitor General and Advocate Le Quesne, counsel for the appellant, in Chambers. The learned Bailiff queried whether the inclusion of the qualifying words was necessary. The Solicitor General demurred and they remained in. At the conclusion of the evidence for the prosecution the defendant made a submission of no case. But for an application which was then made for leave to amend by omitting the words *"in the Island of Jersey"* from the indictment, the learned Bailiff would have allowed the submission. The learned Bailiff rejected a further submission of no case on the amended indictment. The appellant was convicted and has appealed against conviction (and sentence). The Superior Number concerned itself with the two principal grounds of appeal, which were as follows:-

(c) The learned Bailiff erred in amending the charge.

(d) The learned Bailiff erred in rejecting the submission of no case to answer and in amending the charge at that stage.

It was agreed that if the Superior Number considered that the charge ought not to have been amended, then the appeal should be allowed without it having to pronounce itself on the first part of ground (d).

The Court was referred to Archbold (41st Ed.) paragraph 1/63-68, to which the Inferior Number had been directed, and also to the following cases:-

R -v- Johal and Ram (1972) 56 Cr. App. R.348;
R -v- Gregory 56 Cr. App. R.441;
R -v- Radley (1974) 58 Cr. App. R.354;
R -v- Collison (1980) 71 Cr. App. R.249; and
R -v- Thomas (1983) Criminal Law Review at p.619.

The Court felt it was entitled to take into account these English Authorities because our indictment rule concerning the amendment of indictments is identical to sub-section 5(i) of the Indictment Act 1915 upon which the English cases were based. The rule, or the sub-section, reads as follows:-

> ***"Where before trial or at any stage of a trial it appears to the Court that the indictment is defective the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case unless having regard to the merits of the case the required amendments cannot be made without injustice and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the Court thinks fit".***

For the appellant, Mr. Le Quesne submitted that the injustice was that, but for the amendment being allowed, his client might not have been convicted. It was this, he said, which constituted an injustice. He accepted that he had not been prevented from asking all the questions he wished on the amended indictment, nor from conducting his case as fully as he had wished, and he did not feel it necessary to ask for any of the prosecution witnesses to be recalled after the amendment had been allowed. There was, he said, some doubt whether the Court in Radley's case, *(supra)* in saying that Section 5 should be interpreted liberally, meant to apply such an interpretation to the question of the defectiveness of an indictment or to the concept of injustice. He did not argue that he had been placed in a position where he was not able to deal with all the allegations in the indictment as amended. But if the charge were changed half-way through a trial, that was, in his view, an incurable defect and therefore an injustice. In preparing for the trial he had restricted his view of the case, and therefore the appellant likewise, to what had been done in Jersey. He had not objected to evidence of events outside Jersey because that was a matter for the prosecution and he allowed them to go down the wrong road. The appellant knew only that he had to arrange his defence so as to meet allegations of what he had done in Jersey. The proper standpoint for the Superior Number should be to interpret the rule (or sub-section 5) in a way that was most beneficial to the appellant.

For the Crown, the Solicitor General submitted that the question of justice should be looked at not only from the point of view of an accused but from the point of view of the public. Was it in the interests of the public, as he submitted it was not in this case, for a guilty person to go free on a technical defect? Was the appellant prejudiced by the amendment being made? That could only be so if his defence would have been conducted in a different way. The cases showed that an appeal would lie only where the defence would have been conducted on

different lines. The appellant in this case had not been taken by surprise. He had known all along what the substantive allegations were. Taking a liberal interpretation of our rule, it could not be said that any injustice had been caused to the appellant by the learned Bailiff allowing the amendment.

The Court drew the following conclusions from the authorities cited to it:-

1. A defective indictment may be amended at any time.

2. The later such amendment is made the greater the risk of injustice being done to an accused.

3. The interests of justice comprehend those of the public as well as the accused and require the Court to balance these interests.

4. Where the interests of the public and an accused are evenly drawn, the balance should come down in favour of the accused.

Applying these principles, three of the Jurats would have dismissed the appeal and three would have allowed it. Those who would have dismissed the appeal felt that the appellant had not been prevented from developing his case in the fullest possible way and, on the merits of the case, he knew what he had to meet. Those who would have allowed it were not satisfied that an injustice had not been done, particularly as the prosecution need not have been specific in framing the indictment and had declined the opportunity to amend it before the trial. Although I might have concurred with the learned Bailiff's decision, particularly having regard to the merits of the case and bearing in mind that the Inferior Number was in the position of hearing the parties, I felt that the case was not so exceptional as to enable me to depart from the usual practice and to decide other than in conformity with that practice, that is to say in favour of the appellant. Accordingly, the appeal is allowed by a majority with costs.

Authorities

Immigration Act 1971: S.25.

Immigration (Jersey) Order, 1972.

Indictment Act 1915: s.5(1).

Indictments (Jersey) Rules, 1972: Rule 6(1).

Archbold (41st Ed.) para. 1/63-68.

R -v- Johal and Ram (1972) 56 Cr. App. R.348.

R -v- Gregory (1972) 56 Cr. App. R.441.

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