

# Desmond Keith Congdon v The Attorney General

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Deputy Bailiff
<b>Judgment Date:</b>	12 February 2002
<b>Neutral Citation:</b>	[2002] JRC 38
<b>Reported In:</b>	[2002] JRC 38
<b>Court:</b>	Royal Court
<b>Date:</b>	12 February 2002

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## Text

[2002] JRC 38

ROYAL COURT

(Superior Number)

(exercising the appellate jurisdiction conferred upon it by

Article 22 of the Court of Appeal (Jersey) Law, 1961.)

Before:

M.C. St.J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats Rumfitt, Bullen, Georgelin, Myles, **and** Herbert.

Desmond Keith Congdon  
and  
The Attorney General

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**Advocate R. Juste for the appellant**

**Advocate B.H. Lacey, Crown Advocate.**

**Authorities**

*AG v Hudson* (15th May, 1998) Jersey Unreported; [1998/98].

*AG v Ogilvie* (29th May, 1998) Jersey Unreported; [1998/110].

*AG v Cooper* (7th May, 1999) Jersey Unreported; [1999/78].

*AG v Buckley & Ors* (6th August, 2001) Jersey Unreported; [2001/175].

*Kirkland v AG* (24th September, 2001) Jersey Unreported C of A; [2001/200].

*Channing v AG* (26th October, 2001) Jersey Unreported C of A; [2001/213].

*Barrick* (1985) Cr. App. R. 142.

*Gorvel v AG* (1973) JJ 95 C of A.

*Fischer v AG* (27th September, 1994) Jersey Unreported C of A.

*AG v Hanley* (14th October, 1993) Jersey Unreported.

*Direction on Tariffs for Community Service Orders* (1990) JLR N. 19.

*AG v Strzelecki* (2nd February, 1996) Jersey Unreported.

*AG v Pipon* (16th August, 1999) Jersey Unreported.

*Gosselin v AG* (28th June, 2000) Jersey Unreported C of A; [2000/118].

*AG v Picot* (29th May, 1990) Jersey Unreported.

*Lloyd v AG* (23rd September, 1986) Jersey Unreported C of A.

*AG v Connor* (31st October, 1988) Jersey Unreported.

Applications for leave to adduce further evidence and for leave to appeal against a total sentence of 2 years' imprisonment, passed on 16th November, 2001, by the Inferior Number of the Royal Court, following a guilty plea to:

2 counts of: forgery (counts 1,3)

1 count of

fraudulent conversion (count 2)

1 count of

attempted fraudulent conversion (count 4)

The applications for leave to adduce further evidence and for leave to appeal placed directly before the plenary Court, without first being submitted to Single Judge for consideration and determination.

Deputy Bailiff

## THE

- 1 This is an application for leave to appeal against a sentence of 2 years' imprisonment imposed by the Inferior Number on 16<sup>th</sup> November, 2001. The facts can be shortly stated.
- 2 The applicant came to Jersey in April, 2000 and began employment in November, 2000 with Standard Bank Offshore Services Limited as an accounting technician in the company which dealt with unit trusts and investment funds. He had access to the cheque book of the relevant company and was authorised to prepare cheques, but not to sign them.
- 3 On 9<sup>th</sup> July, 2001 he drew up a cheque drawn on Standard Bank Unit Trusts (Jersey) Limited in the sum of £5,750.00, made payable to himself. He forged the signatures of two authorised signatories of the Bank, and paid the cheque into his account. This gives rise to Count 1: forgery, and Count 2: fraudulent conversion.
- 4 On 6<sup>th</sup> September he did the same thing again in respect of another cheque again for £5,750.00. On this occasion the Bank, when it received the cheque for clearing, was suspicious and refused to clear it. The cheque was therefore returned. The applicant faced two counts in respect of this cheque, namely a count of forgery, Count 3, and one of attempted fraudulent conversion of £5,750.00, Count 4.
- 5 On 12<sup>th</sup> September, 2001 the applicant was interviewed by his employers about this matter. He made full admissions immediately. He was dismissed and the police were informed. They arrived the same day, by which time the applicant had already written a statement making full admissions. He confirmed these admissions during an interview with the police later that day.
- 6 It transpired that he had been untruthful when obtaining his employment with the Standard Bank Offshore Services Limited. In answer to a question on the application form asking whether he had ever been convicted of any criminal offence, he ticked against the answer 'No'. In fact he had a number of previous convictions. He had been before the English courts on some five separate occasions for offences of dishonesty. A number of these were

thefts from his employers. In particular, in 1994 he altered cheques making them payable to himself and was sentenced to 4 months' imprisonment. In 1996 he again committed further offences relating to cheques for which he was placed on probation.

- 7 As we have already stated, he appeared before the Inferior Number on 16<sup>th</sup> November, and was sentenced to 2 years imprisonment concurrent on each count. Miss Juste, who appears on his behalf, submits that there are exceptional circumstances in this case, as a result of which a non-custodial sentence could properly be imposed. Failing that she submits that the period of imprisonment was too long.
- 8 She relies upon a number of matters. First, she points to his remorse, and refers us to the Social Enquiry Report, and to a letter which he wrote to the Inferior Number, although unfortunately that is no longer available. We accept that the applicant is remorseful for this offence.
- 9 Secondly, she refers to his co-operation. He made immediate admissions, he signed a confession before the police arrived, he admitted his offences to the police, and he pleaded guilty at the earliest opportunity. These are matters which go considerably to his credit.
- 10 Thirdly, she refers to matters set out in the Social Enquiry Report, and the Psychiatric and Physiological Reports, which were before the Inferior Number, and which we have also had the opportunity of reading. In particular she points to the opinion that there is a low risk of re-offending provided he is not employed in the finance sector; that he has a stable relationship with his partner; and that this was an opportunistic and impulsive offence, rather than one which was calculated or systematic.
- 11 Fourthly, she refers to the efforts to re-pay. He has repaid £750.00. Before the Inferior Number it was said that he would be making arrangements for his pension to be realised so that further re-payments could be made, but this has not progressed because he lost the form. However, he assures us, through counsel, that he intends to proceed with that re-payment.
- 12 Fifthly, she refers to the fact that, whilst on bail, he rapidly found employment, and we saw a reference from his employer. Sixthly, she refers to the fact that although he was not from Jersey and had comparatively few connections with the Island, he was allowed bail to go to England. He abided by the bail conditions and returned to face sentence.
- 13 Seventhly, she referred us to a number of references, including a letter from his partner setting out her belief in him and the hardship which prison would cause for her and we have carefully considered those.
- 14 All of these matters were put to the Royal Court. In addition Miss Juste referred us to some

other cases, namely *Hudson*, *Ogilvie*, *Cooper*, and *Buckley*. She suggested that these pointed to a lesser sentence as being appropriate bearing in mind the amount of money involved.

- 15 There is, however, one new factor which was not available to the Inferior Number. In the court below no real explanation was forthcoming as to why the applicant had taken these funds; he and his partner had a reasonably adequate income. But now it is said that he is subject to a gambling addiction, and he asserts that he had considerable debts as a result of this addiction.
- 16 No independent evidence to support this is available, although Miss Juste has made considerable efforts to obtain such evidence, and she explained to us why that evidence was not capable of being obtained. She says that the applicant did not admit to his gambling addiction at the time of his appearance before the Royal Court because he wished to protect his partner who was unaware of his debts, and was worried that in fact it might make things worse.
- 17 In support, he relies on a Psychological Report prepared by Mr Berry, who, having carried out various tests, concludes that there is a high probability that the applicant's claim that he has a gambling addiction is true, and if true, his behaviour merits a diagnosis of pathological gambling which he defines as follows:

*“Pathological gambling is frequent and repeated episodes of gambling, which dominate an individual's life to the detriment of social, occupational, material, and family values and commitments. Those who suffer from this disorder may put their jobs at risk, acquire large debts, and lie, and break the law to obtain money or evade payment of debts.”*

- 18 The Courts in Jersey have had to consider on other occasions whether a gambling addiction is a mitigating factor. The leading authority is the case of *Lloyd v Attorney General* (23rd September, 1986) Jersey Unreported, where the Court of Appeal said this

***“We have listened with great care to what was said on the applicant's behalf, but we think that there were no mitigating features.*** We do not believe that an obsession for gambling is a mitigating feature at all. If there had been proper medical evidence the Court might have been able to look at the matter in a different way, but we see no reason to distinguish between a man who is a compulsive gambler and someone, who, for example, buys a substantial yacht or spends a fortune on lady-friends. We repeat we do not believe that there was any mitigation here.”

- 19 That approach has been followed in a number of cases, namely, *Connor* in October 1988, *Hanley*, and *Strzelecki*. In none of those cases did the Court find that a gambling addiction was a mitigating factor. But Miss Juste argues that this case is different, because there is

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medical evidence to support the claim of a gambling addiction.

- 20 In our judgment, the Court of Appeal in *Lloyd* was not saying that a gambling addiction was a mitigating factor if supported by medical evidence. The Court was merely contemplating that there might be circumstances where the gambling addiction arose as a result of a medical condition, or where it should otherwise be taken into account. In our judgement, the principle is that, in normal circumstances, a gambling addiction is not a mitigating factor. This has been established by the cases to which we have referred, and we think that it is correct. Nevertheless, that is not to rule out the possibility in exceptional cases of a gambling addiction being a mitigating circumstance, particularly if arising from a medical condition.
- 21 We consider that there is nothing exceptional in this case about the nature of the applicant's gambling addiction, and accordingly we do not think that that addiction materially adds to the mitigation available in the case. We are therefore left with the matters which were put before the Inferior Number, and which Miss Juste has very ably re-presented to us today.
- 22 The Crown on the other hand, as did the Court below, points to the fact that this involved a breach of trust. It was furthermore a breach of trust committed by an employee in the financial services sector, where as the Court below said "Integrity is of vital importance to the community." Most significantly, in our judgment, this is not the normal case in this type of offence of a person of hitherto good character. This applicant has committed offences like this before and he lied in order to obtain employment, and put himself in the position of trust.
- 23 We have carefully considered the points which Miss Juste has made, but we remind ourselves that we are not sitting as a court of first instance to determine the sentence we would have passed ourselves. We are sitting as a Court of Appeal to consider whether the sentence passed by the Inferior Number was manifestly excessive or wrong in principle.
- 24 We are quite satisfied that there are no exceptional circumstances which would justify a non-custodial sentence. We are further satisfied that it cannot be said that this sentence was manifestly excessive, and we therefore refuse leave to appeal.