9 pages.

COURT OF APPEAL 125.

28th September, 1993.

Before: A.C. Hamilton, Esq.,Q.C., (President),
E.A. Machin, Esq.,Q.C., and
Sir Louis Blom-Cooper, Q.C.

Anthony Edward Croxton

-v-

Her Majesty's Attorney General

Appeal of **Anthony Edward Croxton** against conviction on 4th May, 1993, before the Royal Court (Inferior Number) "*en Police Correctionnelle*" on 1 count of possession with intent to supply a controlled drug (Cocaine), contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978.

C.E. Whelan, Esq., Crown Advocate.
Advocate M.C. St.J. O'Connell for the Appellant.

JUDGMENT

MACHIN, J.A.: There is before us the appeal of Anthony Edward Croxton who was convicted on indictment of a count charging him with possession with intent to supply a controlled drug, contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978, the particulars being that on 20th October, 1992, at named premises, he had in his possession with intent to supply it to another a controlled drug, namely cocaine.

He appeals to this Court against that conviction on the grounds which are set out in his Notice of Appeal, they being that the learned Court erred in accepting the evidence of Sergeant Molloy as that of an expert on the question of cocaine, its use, its supply, its purity, and the mode of payment for the same, and

also that the Court was plainly not prepared to accept the authority put forward by the defence in an attempt to challenge the evidence of Sergeant Molloy. He contended that this was in error and had or may have had a prejudicial effect on his defence.

We have read the transcript of the whole of the evidence in the proceedings. The case for the Crown was a formidable case. On the date in question police searched "Windsor House" at La Pouquelaye, where the appellant was the tenant of a room surrounding which was a loft space. In that space was found a plastic bag containing approximately 29 grams of a white powder. Also found were a number of plastic bank bags and a set of electric scales. On analysis the white powder was found to contain 33.6% by weight of cocaine hydrochloride. The officers found also a 1992 diary and some loose sheets of paper. On one page of the diary which formed one of the exhibits at the trial was a list of names with numbers against them. The Crown case was that these represented the price of cocaine sold or to be sold by the appellant to those named persons. The appellant's case on the contrary was that they recorded the results of a game of dice in which he and a number of friends had participated.

On arrest the appellant gave an account of his possession of the cocaine and of the diary entries, which he later acknowledged was false in a number of respects. Eventually he dictated a statement to a police officer and that statement was put in evidence and is in the following terms:

> *"First of all I'd like to apologise for wasting police time on the last question and answer. The truth of the whole matter is the stuff was for personal use. That's it. On the day I was arrested I panicked and got my story wrong. As for the story about Tommy and everything else it was just made up. Before I came to Jersey I had problems at home, all due to the fact that I was using quite a lot of cocaine. This was the main reason for coming to Jersey. It was a bit hard at first, but after a couple of weeks I was fine up until about 3 months ago when I was out with friends who were taking cocaine socially. One weekend led to another and I found myself in the same state again. We were paying £90 for each gram. Somebody offered me an ounce for £1,500. He said he just wanted to get rid of it so I borrowed £500, put £500 in myself and I still owe £500. Also in the question and answer I stated I was out of work for a period of time. I had actually been working regularly, that was paying for my habit. That's about it".*

So the appellant was saying that he admitted possession of the cocaine found in the loft space, and he could hardly have done otherwise, but that it was for his personal use and he did not intend to supply it to anyone else.

The issue therefore before the Court was whether the prosecution had proved that that admitted possession of cocaine was with intent to supply to another, or whether it was or might have been the case that the appellant possessed it for his own personal purposes.

In support of that case the Crown called a Sergeant Molloy, whose evidence is at the heart of this appeal. That evidence begins in the transcript at p.43. There is no doubt that Sergeant Molloy was a highly experienced drugs officer. In chief he said he had been a police officer for 14 years. He was Detective Sergeant in charge of the drugs unit between June, 1991, and April, 1993, and had been involved certainly in hundreds if not more drugs investigations.

In cross-examination at p.49 of the transcript Mr. O'Connell asked him:

> *"Now, Officer, I'd like to turn next to the question of your experience with cocaine. Will you please tell the Court in detail what your experience of cocaine is?"*
> *WITNESS: "In respect of seizures?"*
> *MR. O'CONNELL: "Generally, what's your training? What's your experience of seizures? How much do you know about cocaine?"*
> *ANSWER: "My training is no more than any other police officer goes through, Sir. It's the identification of substances which are then submitted for analysis. The seizures locally have been very minimal in my experience".*
> *QUESTION: "And how many cases involving the seizure of cocaine have you personally been involved in?"*
> *ANSWER: "This will be, where I've personally been involved in the seizure, will be my third case. However I have knowledge of all other previous cases where the seizure has occurred".*
> *MR. O'CONNELL: "So third case of personal involvement, but you have knowledge from other investigations. How many other investigations have you received that knowledge from?"*
> *ANSWER: "Off the top of my head, at least half a dozen.*
> *MR. O'CONNELL: "So, three direct cases and half a dozen peripheral involvements?"*
> *ANSWER: "Yes".*
> *MR. O'CONNELL: "And this is the first time you've been involved in an investigation of this quantity of cocaine, is that right?"*
> *WITNESS: "This is the first time anyone in Jersey has been involved in this quantity".*
> *MR. O'CONNELL: "Thank you, and your experience which we've just gone through tells you ...."* (And the Bailiff interjected) *"He was not involved in the investigation of the case, he's been called as a witness, as we're looking at the entries giving his opinion".*

MR. O'CONNELL: "Yes, Sir.
THE BAILIFF: "As a policeman for many years, how many years in the drug scene?"
MR. O'CONNELL: "Seven years, nine years?"
THE WITNESS: "Nine years, Sir".
THE BAILIFF: "Nine years?"
MR. O'CONNELL: "Nine years in the Drug Squad".
WITNESS: "No, not nine years in the Drug Squad, nine years investigating drug offences".
THE BAILIFF: "Nine years investigating drug offences and you were in the drug unit in charge of the unit, from June, '91 to April '93?"
ANSWER: "Correct, Sir".

As a matter of history of the way the trial proceeded, save in relation to a document found in the appellant's room, there was no objection to any part of Sergeant Molloy's evidence. Whether or not objection could have been taken without prejudicing the case for the appellant in the Court below, we do not pause to consider. We do not take it against the appellant that there was no such objection and we decide this appeal upon our reading of the transcript.

Sergeant Molloy's evidence below contained both statements of fact and statements of opinion in relation to cocaine. These have been analysed by Mr. Whelan very helpfully in the Crown outline, but there is of course sometimes a grey area where one cannot properly or definitely distinguish between fact and opinion. However it seems to us, if one looks at the transcript at p.44, that the evidence the officer there gives in relation to his own experience of seizures of cocaine is factual. For example he said: *"In my experience the seizures of cocaine have generally been recovered in the purity of 8% and 14%".* He was asked what the purity of the cocaine was in the present case. He said it was roughly 34%. He was asked in what individual quantity cocaine was characteristically administered to himself by an abuser of the substance, and he gave the answer that it's normally taken in what they refer to as a 'line' or a 'snort' of anything between half a gram to 2 grams maximum. He was asked in what quantities has the drug generally been seized in Jersey:
ANSWER: "Minute amounts, certainly previously no more than grams, more likely milligrams and micrograms".

He said that 29 grams were seized in the present case and that that was the largest seizure of cocaine in Jersey. Those seemed to be to us statements of fact and not statements of opinion in relation to which the question of Sergeant Molloy's qualification as an expert is entirely irrelevant. Then again another example of factual evidence occurs in our view on p.46 where the officer was shown the kitchen scales recovered from the premises and he said: *"They're a common or garden set of kitchen scales which are quite often seized not only in the form of*

digital display, but various other forms which have been purchased for illegal means".

And then, finally as to fact, on p.58 the officer was asked by the Bailiff: *"Have you ever come across, in the course of your experience, users as opposed to would be or suspected suppliers having as much cocaine in their own personal use?"*
ANSWER: "No, Sir".
MR. O'CONNELL: "That again to hammer the point home is based on three direct investigations and six peripheral ones?"
ANSWER: "That is correct".

All those passages seem to us to consist of matters of fact which did not require the Sergeant to be qualified as an expert in the cocaine field. On the other hand he did undoubtedly give opinion evidence in relation to cocaine. For example, on p.44, immediately following the passage which I have previously quoted he said that *"the quantity seized in the present case would certainly be quantified as a commercial amount"*, the inference of course being that it would be an amount which was likely to be sold on.

He gave an estimate of his view of the value of that quantity saying *"taking into consideration the purity, it would be in excess of £6,000".* Again, that would seem to us to be clearly opinion evidence.

One turns to the following page at p.45; he was asked to look at the list of names and figures on a page of the diary to which I referred earlier and he said: *"There's various entries that appear on the list which relate to figures which indicate to me they are figures for quantity of drugs either sold or to be sold and names appear opposite these figures; some of the names which I recognise".* He later corrected the word "quantity" to "value", but allowing for that correction the first part of that answer appears to us to be a matter of opinion, but of course his evidence relating to names which he recognised is evidence as to fact.

Then, on the following page in relation to the scales, the Bailiff asked the witness: *"Would someone taking the drugs himself need scales?"*
ANSWER: "No, Sir".
THE BAILIFF: "As opposed to selling them?"
WITNESS: "They would need them to sell them because they'd need to know what quantity".
THE BAILIFF: "But for themselves?"
WITNESS: "For themselves, Sir, I couldn't think of any reason why they would require scales, Sir".

On the following page, Advocate O'Connell asked: *"Do you have any opinion as to why, for example, assuming, let's assume*

this was written by my client..." (and again that is a reference to the extract from the diary) *"why his name, or the words "me" at the foot of that column would be included if he was a trafficker". WITNESS: "Yes, it's quite obvious, Sir, that if he obtained the drugs, he'd need to obtain the drugs from someone else, he would need to pay for those. If he used any of those quantity of drugs then he would have to pay for the quantity he used".*

He was then asked various questions about the figures on that page and gave answers which are clearly matters of inference or opinion.

Finally, in relation to his evidence, Mr. O'Connell at p.48 asked if he had an opinion why there should be some round figures and why some figures that are not round. *"And your evidence* (Advocate O'Connell said) *"is that you're not sure about that, is that right?"*
SERGEANT MOLLOY: "No, that's not my evidence. If I'm to be pushed on the matter, my evidence is that the figures are consistent with various different substances having been sold at different prices". That is all I need read from the transcript to indicate the various passages of that officer's evidence which could be either categorised as passages relating to fact or as passages in relation to which, if they are admissible, he would have to qualify as an expert.

In the course of cross-examination, Mr. O'Connell put to Sergeant Molloy an extract from an English textbook, the title of which is "The Law on the Misuse of Drugs and Drug Trafficking Offences" (2nd Edn.) 1992, written by Mr. Fortson, an English barrister; a copy of the flyleaf of that work is to be found in the papers.

Although in the course of the evidence Mr. O'Connell described Mr. Fortson as an authority, of course he was not an authority. Insofar as his book dealt with matters of law he might have become an authority later, but he was certainly not an authority then. Insofar as his book dealt with matters of fact, it was simply an exposition of hearsay evidence. Insofar as it dealt with matters of opinion relating to these drugs it was in our view not *per se* admissible but might have become admissible in the sense that if a qualified witness agreed with what was in the book then the witness' evidence would be the admissible evidence supported by the passage from Mr. Fortson's work.

A long passage from the book was read to Sergeant Molloy at p.53 and p.54 of the transcript, but only the last few lines of the extract are relevant. They are these:

> *"At street level the average purity of the salt is between 35% and 39% and the cost per gram is between £50 and £90. A kilogram of cocaine 97% pure might cost up to £30,000".*

What was being said was that the officer's evidence differed from that and therefore less weight, or perhaps no weight, was to be attributed to that officer as an expert in the supply of cocaine. As to that, we have two observations to make. First, whatever was in that book had no application nor did it purport to have any to this jurisdiction but related simply to English experience, and in the second place Sergeant Molloy certainly did not agree with what was in that book when it was quoted to him. In those circumstances it is our view that what was put to Sergeant Molloy perfectly properly in an attempt to elicit from him some concord, having failed to do so, did not constitute evidence of anything.

Sergeant Molloy made his position perfectly clear on the same page when being asked by Mr. O'Connell: *"Now, Officer, you've seen from this extract that this author at least holds the view based presumably on experience, great experience at street level, the average purity of the sort which is what we're dealing with here is between 35% and 39%. Do you have any comment to make about that?"* In reply to that question, the Officer said *"Yes, the first comment I have, Sir, in respect of that is that I don't know what the author's definition of street level is. And certainly as far as the street level in Jersey is concerned, I would contend that the figures that are quoted here are out of context with the street level in Jersey"*. So not only was the Officer not agreeing with the passage cited, he contradicted it in relation to that jurisdiction of which he did have knowledge, that is to say the jurisdiction in Jersey.

We can now deal, I think, with the appellant's contentions which are set out in his outline and which have been very helpfully adumbrated and expanded before us by Mr. O'Connell.

The points made on behalf of the appellant can really be put into two related categories. First, it is said that Sergeant Molloy did not qualify to give expert opinion in this field. It is our view that that, of course, was initially a question for the Court of Trial; and since it is a matter of law, it fell within the province of the Bailiff to decide, rather than the province of the Bailiff and Jurats together and we further take the view that the proper way to approach the matter is to look at the evidence given to see whether, if that evidence had been given before us, we would have regarded Sergeant Molloy as qualifying as an expert. It is not enough that there was some evidence upon which a Court could reach that conclusion and we are heartened in that exposition by the fact that that was a submission made by Mr. O'Connell which was at first disputed by Mr. Whelan, but then very fairly Mr. Whelan conceded that that was the proper way to look at it and it is the way in which we do look at it.

So we have, therefore, looked at the evidence with regard to expertise and we have considered the authorities which have been put before us by counsel in their submissions and in particular the authority of the case of R. -v- Oakley (1980) 70 Cr.App.R.7 C.A., from which I do not think I need read, the case of Bryan (8th November, 1984) unreported: 3923B84, which dealt specifically with police officers who give expert evidence and the case of White -v- H.M. Advocate (1986) S.S.C.R. 224.

As to street value evidence, we have also considered R. -v- Patel (1977) Cr.L.R. 839, which is also to be found in the papers before us.

Having looked at those authorities we find no basis for the submission that Sergeant Molloy had not properly qualified as an expert in relation to any of the matters of opinion to which he gave voice and therefore no basis for any submission that that evidence was inadmissible or of no weight.

The other aspect of Mr. O'Connell's submissions was related to the first but was concerned with the extracts from the Fortson work. Those submissions we have to say rest, in our opinion, upon a misconception of the status of a textbook written by an expert in the field. As we have previously said such a work is not in itself evidence of anything. It may become evidence if it is accepted by a witness who gives evidence in the witness box and is himself an expert, but if it is put to such a witness and is disagreed with then it fails to become any evidence whatever.

In our opinion there is no ground whatever for criticising the Court below if it did not take into account, as we think it very probably did not take into account, statements of opinion in the Fortson book which were in the first place in our view inadmissible as evidence, and in the second place not relevant to Jersey, they being expressly concerned with the English position.

In these circumstances we do not accept the validity of the grounds of appeal argued before us on behalf of the appellant and the appeal is accordingly dismissed.

AUTHORITIES.

Rudi Fortson: "The Law on the Misuse of Drugs and Drug Trafficking Offences" (2nd Edn.): p.p.297-307: 14-07 - 14-32, 14-51, 15-12.

R. -v- Oakley (1980) 70 Cr.App.R. 7 C.A.

R. -v- Patel (1977) Cr.L.R. 839.

Bryan (8th November, 1984) unreported: 3923B84.

White -v- H.M. Advocate (1986) S.S.C.R. 224.