

JERSEY / JUDGMENT

AG v AB [2024] JRC 174 (21 August 2024)

[2024] JRC 174

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JUDGMENT

THE DEPUTY BAILIFF:

Introduction

1. The Defendant is charged with two offences, one a product of customary law and one a creation of statute. Accordingly, this is a mixed indictment and the Court's jurisdiction under Article 48 of the Criminal Procedure (Jersey) Law 2018 ("the Law") is engaged. Sub-paragraphs (3) and (4) of Article 48 provides: "(3) This paragraph applies where - (a) no election is made under paragraph (2); or (b) a defendant's indictment charges 2 or more offences at least one of which is an offence under customary law and the other an offence under an enactment. (4) Where paragraph (3) applies, the Royal Court shall decide, having regard to the nature and gravity of the offence and after hearing any submissions from the defence and the prosecution, the method by which the defendant shall be tried." 2. The Defendant entered not guilty pleas when she was arraigned on indictment. The issue of mode of trial was not resolved on that day, although the Bailiff indicated a provisional view that the case should be tried before the jury. However, there was no determination made, and on 20 February 2024 I directed that the question be considered after the parties had the opportunity to file written submissions on the issue. 3. The Bailiff has seen this judgment in draft and agrees with it. That is important as he is listed to be the trial judge when this case is heard on 13 May 2024. 4. The Defendant is seventeen years of age and will be seventeen at the date of trial. On Count 1 of the indictment, she is charged with grave and criminal assault, alleging that she attacked a former friend of hers who is nineteen years old and will be twenty when the case is tried. Grave and criminal assault is a customary law offence. Count 2 alleges possession of an offensive weapon, contrary to Article 43 of the Firearms (Jersey) Law 2000. 5. The Crown's case is, in briefest summary, that the Defendant attacked the complainant armed with a machete (the alleged offensive weapon) at the entrance to his home on 19 November 2023. All the injuries suffered by the complainant were inflicted by the machete. Although the Defendant made no comment in interview, her Defence Case Statement indicates that she denies assault, that the machete was the complainant's and not hers, and that it was not in her possession as alleged. In particular, she denies carrying it to the scene of the incident, as alleged by the Crown. 6. The effect of Article 48 has been considered by the Royal Court in three recent cases, namely AG v Akhonya

[2022] JRC 176 ; AG v Mazurke

[2023] JRC 221 ; and AG v Porter

[2023] JRC 247 . 7. The latter case bears some similarity to this in that it also involved a two count indictment where the first count was charged as grave and criminal assault and the second count alleged possession of an offensive weapon, namely a bat. 8. In AG v Porter , the Court referred to the following extract from the decision of Commissioner Sir William Bailhache in AG v Akhonya as follows: "9. The immediate conclusion to draw is that where Article 48(3) applies, it is the duty of the Crown and the defence to draw that to the attention of the Court at the earliest opportunity in order that the Court can give directions as to how the case should proceed. This follows from Article 4 of the 2018 Law which is in these terms: '4. Duties of the participants in criminal proceedings (1) A participant in criminal proceedings must - (a) prepare and conduct the case in accordance with the overriding objective; (b) comply with the relevant procedures; and (c) as soon as is reasonably practicable, inform the court and all parties to the proceedings if there is a significant failure (whether or not the participant's) to take a procedural step required by the relevant procedures. (2) For the purpose of paragraph (1) - (a) relevant procedures are the procedures prescribed by this Law, Criminal Procedure Rules or practice directions; and (b) a failure is significant if it might hinder the court in furthering the overriding objective. Threshold question

12. Where Article 48(3) applies, the Royal Court has to decide the mode of trial. In my judgment, this involves an exercise of discretion and the question which naturally arises is as to the factors which can properly be taken into account in that exercise. A threshold question is whether the Court can only have regard to the nature and gravity of the offence - and I will turn shortly to the meaning of that phrase - or whether it can have regard to other considerations. On the face of it, the legislative provision refers only to the nature and gravity of the offence; but in my judgment, it would be unnecessarily restrictive to construe that language as meaning that the Court has no discretion to consider other factors. 13. This view is confirmed by the terms of Articles 2,3 and 5 of the 2018 Law, which are in these terms: "2 The overriding objective of the Law The overriding objective of this Law is to ensure that cases in criminal proceedings are dealt with justly. Implementation of the overriding objective

(1) For the purposes of satisfying the overriding objective, dealing with cases in criminal proceedings "justly" includes- (a) acquitting the innocent and convicting the guilty; (b) dealing fairly with both the prosecution and the defence; (c) recognizing the rights of a defendant, particularly those rights granted under Article 6 of the European Convention on Human Rights (right to a fair trial); (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case; (e) dealing with the case efficiently and expeditiously; and (f) ensuring that appropriate information is available to the court when bail or sentence is being considered. (2) Dealing with a case justly also includes dealing with it in ways that take into account - (a) the gravity of the alleged offence;

(b) the complexity of what is in issue; (c) the severity of the consequences for the defendant and for others that are affected; (d) whether the costs of the proceedings are proportionate having regard to the seriousness of the offence; and (e) the needs of other cases. The application by the court of the overriding objective The court must act to ensure the implementation of the overriding objective when it - (a) exercises a power given to it by an enactment (including this Law); (b) applies Criminal Procedure Rules; (c) applies a practice direction; or (d) interprets legislation (including this Law), Criminal Procedure Rules or practice directions."

14. The threshold question requires a construction of Article 48(4). Article 5(d) of the 2018 Law applies. Thus Article 48(4) is to be construed widely having regard to the overriding objective.
17. In my view, the "offence" is to be construed as meaning all the offences in the Indictment. Article 48(4) applies to two types of indictment - a mixed indictment and an indictment containing only customary law charge(s) where the defendant has made no election for his mode of trial. It makes no sense to conclude that the legislature intended to give guidance to the Court as to what it should consider only in cases where there was just one customary law offence charged. Article 2(b) of the Interpretation (Jersey) Law 1954 supports this approach. The Court should make its decision having regard to the offence(s) charged as a whole.
18. As to the second question, the fact that the overriding objective also falls to be considered means that the Court must have regard to the whole case when considering the nature of the offence - who the witnesses are, where they live, how the evidence will be presented, how much is in genuine dispute, how long the trial is expected to take, how complex it is and other similar factors. The 'nature' of the offence may not be defined, but in my judgment this is intended to include a consideration not just of the seriousness of the offence but of the allegations in the round which are to be proved. It may be that the facts of the particular case are such that the Court decides that a trial by the Inferior Number would be more likely to provide justice - for the Crown and for the Defendant - than a trial by jury, perhaps by the reason of the complexity of the issues which are to be raised. This is absolutely not to say that juries are less capable of handling complex trials than the Inferior Number; it is only to say that there are some complex trials which are more suitable for the particular skills of the Jurats. In all these considerations it is vital to recall that the jury and Inferior Number trials are equally capable of providing justice. One is not intrinsically more just than the other. They provide different modalities for achieving justice and both are consistent with the Island's history and traditions. When considering the nature of the offence charged and the ambit of the allegations involved, a Court, in my judgment, would be right to consider the potential length of the trial - a heavily contested documentary trial liable to continue over a period of months may, in the circumstances applicable in Jersey, be at the relevant time a too onerous commitment for the Court sitting with a jury, and might well be more suited to the Court sitting as the Inferior Number.

20. The effect of an order under Article 48(4), that the defendant is to be tried by the Inferior Number on a mixed indictment, is that the defendant's choice, which existed previously under the 1864 Law and is restated under Article 48(2) in relation to customary law offences, has been removed. In my judgment, that is not a factor which falls to be taken into account of itself, but the reason does not lie in the fact that the removal of the right does not form part of the "nature and gravity of the offence". The reason lies in Part 2 of the 2018 Law. By Article 2, the overriding objective is to ensure that cases in criminal proceedings are dealt with justly, and that expression is defined by Article 3 which requires the Court to have regard to the interests of witnesses, victims and jurors, as well as the interests of the defendant, as well as requiring the Court to deal with the case efficiently and expeditiously, having regard to what is in issue and the consequences for the parties but also having regard to the needs of other cases. By Article 5, the Court is under an obligation to ensure the implementation of the overriding objective. The fact that that objective includes dealing with cases efficiently and expeditiously and having regard to the needs of other cases shows that the rights of the defendant to a jury trial under Article 48(2) are subordinated to the wider factors. The Court schedule and the availability of courts and jurors, as well as Jurats, are all factors that, in an appropriate case, fall to be taken into account. All that follows from a construction of Article 48(4) that, in its admonition to have regard to the nature and gravity of the offence, the Court is also to have regard to the overriding objective.
21. As to the third question, the facts alleged against a defendant will be relevant in determining the gravity of the offence which is charged against him. That is likely to be measured not just by the sentence to which the defendant in question is potentially liable - because all customary law offences carry a sentence at large, whereas with few exceptions notably in relation to trafficking in class A drugs, the statutory offences carry a lower sentence, a conclusion that a common assault was necessarily more serious than a conspiracy to import cannabis, a class B drug with a maximum sentence of fourteen years imprisonment, would not seem to be appropriate. It might be in some cases. I conclude, therefore, that the gravity of the offence is not to be measured by the potential sentence to which a defendant is theoretically liable by reason of the offence charged being a customary or statutory offence. By contrast, when considering the gravity of the offence, the Court must have regard to the facts alleged by the Crown and, if necessary, to the defences asserted by the defendant.
22. One has to question why the legislature has provided that the gravity of the offence is relevant to the mode of trial. That may have been apposite when statutory infractions did not carry heavy penalties but the creation of the more modern offences such as drug trafficking or money laundering offences demonstrates that both modes of trial may result in substantial terms of imprisonment for the convicted defendant. As has been said, both modes of trial are equally just, so it is not obvious why the gravity of the offence should be a relevant consideration. However, the statute provides as it does. In my judgment, the Court is required to take the gravity of the offence into account, but I leave open for argument in a contested case the significance of this factor having regard to the overriding objective.

23. Similarly, I do not think it is appropriate in a case where there is no contest as to the outcome to attempt to lay down firm guidelines as to what the other relevant factors are for consideration but it would seem to be essential for the Court to consider the nature of the evidence which is to be adduced in respect of the different charges. Where there is a similarity of evidence relevant to both statutory and customary law charges, it may well be that a defendant's right under Article 48(2) will have more relevance: but this is subject to the qualification that the overriding objective, including the availability of courts, is a relevant - perhaps the most relevant - consideration.
24. In this case, both the prosecution and the defence contend that a jury trial is the appropriate method of trial. That is a factor to be taken into account but it is not conclusive because the Court's obligation under Article 5 is a wider one. However, I accept the defence submission that the offence charged under the 2001 Law can be regarded as a 'paperwork' version of the customary law offence of bigamy and was a step on the way to the customary law offence being committed, if it was. I also accept that there would be a potential argument that to remove the Defendant's right to elect a jury trial under Article 48(2) because the Crown have preferred an additional and statutory charge which does not add much to the overall case would be unjust." 9. In *AG v Porter*, the Court held: "10. Both the allegations made against the Defendant in this case are serious ones. I accept that in circumstances where one of the charges (whether deriving from customary law or statute) added little to the overall case then it would not be appropriate for that charge to have a determinative effect on the mode of trial. This is not such a case. 11. I agree with Commissioner Bailhache that the Court needs to make a decision having regard to the offences charged as a whole. This is not a complex case and the case could equally be tried by the Jurats or a jury. Both tribunals are fair and human rights compliant." 10. In the case of *Porter*, the Court was resolved that it was appropriate to have the case tried by the Inferior Number as that would allow for an earlier trial. In fact, in this case the trial date is the same whether the case is determined by a jury or the Inferior Number. 11. I have had regard to a number of discretionary factors in accordance with the approach set out in *AG v Akhonya*. I endorse the approach set out in paragraph 10 and 11 of *AG v Porter*; both the allegations against the Defendant are serious ones. 12. A significant consideration in this case is the Defendant's age. Since the cases referred to above were decided, the Court has implemented Royal Court Practice Direction RC24/02 which makes special provision in relation to child defendants such as this Defendant. Paragraph 6 of the Practice Direction provides that "If practicable, the case involving a child as a witness or a defendant will be listed in Court 2 which is a less formal environment than the Royal Court". Other provisions also encourage an approach desired to put child defendants at their ease
- for example, the contents of paragraph 10 to the effect that a child defendant should not be required to sit in the dock - unless the case is being heard in the Royal Court - but immediately behind their counsel. 13. The tenor of the Practice Direction as a whole is to ensure that child defendants in the Royal Court are treated by and large as if they were facing trial in the Youth Court by the Youth Panel. The Youth Panel resembles the Inferior

Number consisting, as it does, of a legally qualified Chair and two experienced lay assessors. It is axiomatic that a child witness or defendant is likely to be most comfortable giving evidence in front of such a Panel and not a jury of twelve in a much larger court room. 14. The Crown in its written submission notes that Court 2 is a small court room and one possible disadvantage of trying the case in that court is that the complainant and Defendant would be sitting in close proximity to each other. There is no application for special measures on the part of the complainant so perhaps that is a concern that could be addressed. One alternative is for the case to be tried by the Inferior Number in the Magistrate's Court. The Crown accepts that an Inferior Number trial may " facilitate the case being dealt with more efficiently and expeditiously. In addition, hearing cases in which there is a child defendant in a less formal environment is desirable" . I accept those submissions. 15. I have had regard to the defence submission seeking a jury trial in this case. I reject the defence argument that Count 2 " adds little if anything to the substantive charge ". This is not a case where the Crown has preferred an additional statutory charge which does not add to the case overall. 16. We have been told that the case can be tried by the Inferior Number in the Magistrate's Court. We have been notified by the Magistrate's Court that Court Room 3, which is the least formal court room in that building and which benefits from being set aside from the other court rooms, can accommodate this trial. The Youth Court frequently sits in Court 3. 17. I have also taken into account the fact that, all things being equal, a trial before the Inferior Number is likely to be swifter than a trial by jury as the Inferior Number is constituted of a judge and two professional lay assessors, the Jurats. 18. In the circumstances, I am of the view that it is in the interests of justice and consistent with the statutory test in Article 48 for this case to be tried by the Inferior Number in the Magistrate's Court on 15 May 2024 and so direct. Authorities Criminal Procedure (Jersey) Law 2018. Firearms (Jersey) Law 2000. AG v Akhonya

[2022] JRC 176 . AG v Mazurke

[2023] JRC 221 . AG v Porter

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