

JERSEY / JUDGMENT

AG v Akhonya [2022]

JRC 176 (24 August 2022)

[2022] JRC 176

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JUDGMENT

THE commissioner:

Introduction

1. The Defendant is charged with two offences, namely knowingly providing false information for the purposes of intended marriage, contrary to Article 76(1) of the Marriage and Civil Status (Jersey) Law 2001 ("the 2001 Law") and bigamy, a customary law offence. The Defendant entered not guilty pleas and he is listed for trial on 12 th December 2022. On arraignment, the Royal Court ordered an Assize trial, but did not hear any argument as to whether the Defendant should be tried before a single judge sitting with a jury or before the Inferior Number. The issue was not raised and it is not apparent that it was considered. 2. At a directions hearing before the Deputy Bailiff on 7 th July, the order was made that the Crown and the Defendant should file written submissions regarding the mode of trial. I have received these submissions and am determining the matter on the papers. 3. The offence under Article 76(1) of the 2001 Law (Count 1) is alleged to have been committed by the Defendant knowingly providing false information on 20 th July 2015 in the Parish of St Helier that his marital status was single, for the purposes of giving notice of intended marriage. The charge (Count 2) of committing bigamy contrary to customary law is alleged to have been committed by the Defendant contracting a marriage with Ewa Przyborowska in the Office of the Superintendent Registrar during the life of his wife, Agatha Nabwire Ongamo , whom he had married in 2008 in Nairobi, Kenya. 4. Under Article 76(9) of the 2001 Law, the penalty for committing an offence under that Article is imprisonment for a term not exceeding five years, or a fine or both. The penalty for bigamy, as with other customary law offences, is at large. 5. Both the Crown and the Defendant have submitted that the charges should be heard before a jury. It is only because the Royal Court has not previously been called upon to determine the issue of mode of trial since the passage of the Criminal Procedure (Jersey) Law 2018 ("the 2018 Law"), and there is therefore no case law on the subject, that I have resolved to issue this short judgment, notwithstanding there has been no contested argument before me. 6. Article 48 of the 2018 Law contains new provision for the mode of trial. The previous position under the Loi (1864) réglant la procédure criminelle

(the "1864 Law") was that where a defendant was charged with a customary law offence, he had the right to claim a trial by the Inferior Number if he did not wish to be tried by a jury. Neither the Crown nor the Court had any jurisdiction to deny a defendant that right to select his mode of trial, where a customary law offence was charged. By contrast, the position where a defendant was charged with a statutory law offence (or in the old terminology, a 'contravention'), the mode of trial was always before the Inferior Number of the Royal Court, sitting without a jury. The fact that there were cases where alleged statutory infractions were tried before a jury is not to the point - these must have been so tried *per incuriam*, or because the statutory offence reflected a customary law offence - see *AG v Weston*

[1979] JJ 141, affirming the decision of this Court in *AG v Pennington*

[1970] 1 JJ 1349. It is noteworthy that in *Weston*, the indictment contained both customary law and statutory offences, but the Court determined that they had to be heard separately notwithstanding that in fact some of the evidence which would be adduced might be germane to both prosecutions. The question of exercising a discretion did not arise under the terms of the statute then in force. 7. Article 48 of the 2018 Law provides as follows: "48. Mode of trial (1) Subject to the provisions of this Article, a defendant may be tried either by the Royal Court sitting with a jury, or by the Inferior Number of the Royal Court sitting without a jury. (2) A defendant whose indictment only charges an offence which is an offence under customary law, may elect to be tried - (a) by the Royal Court sitting with a jury; or (b) by the Inferior Number of the Royal Court sitting without a jury. (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. (5) Unless an enactment expressly provides otherwise, a defendant whose indictment only charges an offence which is an offence under an enactment shall be tried by the Inferior Number of the Royal Court sitting without a jury. (6) For the purposes of this Article, an "offence under an enactment" includes an offence under an enactment of the United Kingdom which extends or applies to Jersey." 8. Thus, the structure of this Article is as follows. Paragraph (1) provides for the alternative methods of trial - the Royal Court sitting with a jury, or the Inferior Number of the Royal Court sitting without a jury. Paragraph

(2) confers on a defendant charged with an offence under the customary law a right to choose whether to be tried by jury or by the Inferior Number. Paragraphs (3) and (4) make it plain that where paragraph (3) applies, namely where the defendant fails to make his choice or alternatively where the indictment charges both customary and statutory offences, the Royal Court has to decide the mode of trial. In reaching that decision the Court is to have regard to the nature and gravity of the offence and is required to hear submissions from the defence

and the prosecution. Paragraph (5) provides that where a defendant is charged on indictment only with statutory offences, the mode of trial is by the Inferior Number sitting without a jury. 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. " The parties' written submissions 10. The Crown submit that all decisions must be made in accordance with the overriding objective to ensure that cases in criminal proceedings are dealt with justly, that being the requirement of Article 2 of the 2018 Law. The Crown also submit that the statutory offence which is charged by this indictment is in effect a preparatory offence to the offence of bigamy - in reality, the bigamy could not have been committed unless the offence of providing false information to the authorities to allow the marriage to go ahead was also committed. Thus it is said that the statutory offence was committed as a means to the commission of the bigamy offence and not for its own purposes and the Crown concludes that the overriding objective, including fairness to both prosecution and the defence is such that the matter "should be heard by a jury in order to ensure that it is dealt with justly, and in particular with regard to the Defendant's right to a fair trial". 11. The Defendant contends that bigamy is the more serious of the two offences charged because providing false information for the purposes of intended marriage was a step taken in order to commit the bigamy offence. If convicted, it is said that the offence of bigamy is likely to attract a more substantial sentence. 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. The nature and gravity of the offence 15. The expression 'nature and gravity of the offence' prompts a number of questions. Which offence is being referred to? Does the nature of the offence import consideration of the nature of the case? Is the gravity of the offence determined by the available sentence? It appears it may have been an expression derived from Article 1 of the 1864 Law which was in these terms: "TOUTE personne traduite , en vertu d'un renvoi par le Juge du Tribunal pour la Répression des Moindres Délits , devant la Cour Royale, sous prévention de crime ou de délit , sera jugée - soit , à une des Assises ci-après établies , par la Cour , avec l'assistance d'une enquête composée de vingt -quatre hommes choisis comme est ci-après réglé - soit par le Nombre Inférieur de la Cour , sans enquête . Le prévenu aura la faculté en tout cas d'élire d'être jugé avec l'assistance de l'enquête . S'il ne fait pas élection d'être ainsi jugé , la Cour lors de sa présentation devant elle décidera , eu égard à la nature et la gravité du cas , et oui les conclusions de la Partie Publique , de quelle manière la poursuite aura lieu. " 16. If that is so, it must be recalled that in 1864 when that law was passed, the contravention did not attract custodial penalties with the length of sentence which the States have now enacted in a number of pieces of legislation. The provisions of that Article are of no help in my judgment in the construction of Article 48(4) of the 2018 Law, and I have not been directed to any case law directly in point as to the meaning of the phrase. 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. 19. Equally, the nature of the evidence which is to be provided - which can be very much linked to the nature of the offence charged - may involve receiving evidence by video link from foreign jurisdictions where the time differences are such that the burdens of a jury trial would be too onerous in the interests of justice, both to the prosecution and to the defence. 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 2008 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. The exercise of discretion in this case 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. It is not said that there is any reason why on the application of the overriding objective a jury trial is not appropriate. The dates for trial have been fixed. For these reasons, I consider that it is appropriate that the Defendant be tried by the Court sitting with a jury and I so order. *Authorities Marriage and Civil Status (Jersey) Law 2001. AG v Weston*

[1979] JJ 141. AG v Pennington

[1970] 1 JJ 1349. Interpretation (Jersey) Law 1954. Page Last Updated: 28 Dec 2022 Back to top
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