

JERSEY / JUDGMENT

AG v Baksa [2021] JRC 328 (24 December 2021)

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JUDGMENT

THE DEPUTY BAILIFF: 1. This case was listed for a trial by jury to commence on 14 th December 2021 with a time estimate of three days. 2. The day before the trial, it came to light that the officer in the case had made a mistake in not providing important material to the Crown Advocate in this case. 3. The Defendant faces three counts, two allegations of grave and criminal assault allegedly committed in June 2021 and one allegation of attempting to pervert the course of justice, the particulars being that the Defendant sought to persuade the complainant not to give evidence. 4. In relation to the latter count, the complainant made a witness statement on 9 th September 2021 subsequent to her statement made on 16 th August 2021 when she purported to retract her complaints made against the Defendant. 5. In her statement dated 9 th September 2021, the complainant said that prior to retracting her statement she was communicating with the Defendant by text, telephone and messenger. It was clear those messages were significant in the context of her retraction and at paragraph 7 of that statement she said that she was " willing to provide Police with my phone to evidence communication between [the Defendant] and myself ... ". 6. The officer in the case duly attended upon the complainant a few days later and provided her mobile telephone. He downloaded the contents via a " kiosk download ", determining that he should secure all relevant media messages and telephone logs from 1 st March 2021 to 13 th September 2021. This produced a 600 page report. He then returned the mobile telephone to the complainant. Although he then meant to send the material to the Law Officers' Department/ Crown Advocate using the "egress" confidential documentation system, he failed to do. He accepted he was at fault. He gave evidence on the Crown's application (which the defence supported) to adjourn the trial by reason of this non-disclosure. He accepted that the contents of this material may have been relevant for the purposes of disclosure to the defence but that this material could not be reviewed during the period between its disclosure to the Crown Advocate on the day before the trial and the day of the trial. He said he could only apologise for " wasting everybody's time ". He said that he thought he had referred the material to the LOD, but he had not. He said he only became aware of his error the day before the trial. 7. The Crown submitted that owing to the nature of the 600 pages of material in question, it was not possible for the material to be reviewed properly and disclosed in the space of a few hours owing to potentially relevant communications with third parties, extraneous material that could not be disclosed

without redacting the same, and the fact the defence would need to consider the material and its deployment prior to the trial commencing. I acceded to this application and vacated the trial date. 8. I observe that the Court is generally slow, even in these circumstances, to accede to such an application and earlier this year, in not dissimilar circumstances, it was possible for the Crown to download, review and disclose and for the defence to consider material exceeding 400 pages in short order during a jury trial without the necessity of discharging the jury as, in that case, the amount of material that was actually relevant was limited. 9. I ordered the Crown to review and disclose the relevant material by 5pm on what would have been the second day of the trial. The material that was disclosed to the defence by that deadline as relevant unused material amounted to 200 pages. 10. The parties were notified that the Court was considering making a wasted costs order against the Crown pursuant to Article 109 of the Criminal Procedure (Jersey) Law 2018 ("the Law"). The Court listed that matter two days later so as to allow the parties to prepare for the hearing, in particular for the prosecution to produce such authorities as may be relevant to such an application. On adjourning the matter, I ordered that an officer of not less a rank than Chief Inspector attend the hearing. 11. Article 109 of the Law provides: "Wasted costs against defence or prosecution (1) In criminal proceedings, the court may order the defence or prosecution to meet, the whole of any wasted costs or such part of them as the court may determine. (2) The States may, by Regulations, make further provision as to the court's determination of costs for the purposes of an order under paragraph (1), including in relation to cases of a particular description.

- (3) Where an order is made by - (a) the Magistrate under paragraph (1), the defence or prosecution may appeal to the Royal Court; or (b) the Royal Court under paragraph (1), the defence or prosecution may appeal to the Court of Appeal.
- (4) In this Article "wasted costs" means any costs incurred by a party - (a) as a result of any improper, unreasonable or negligent act or omission on the part of the defence or prosecution; or (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay." 12. The Royal Court has, I think, not yet considered exercising its powers under Article 109 and, accordingly, counsel furnished the Court with various English case law which was of some assistance as the relevant statutory provisions are similar. 13. The correct approach for making a wasted costs order was set out in the case of *Re A Barrister (Wasted Costs Order)* No.1 of

[1993] QB 293 in which the Court of Appeal referred to a practice direction reported at 1 WLR 498 and said that it is appropriate for the party against whom such an order might be made to be present, to be represented and allowed to make representations. Further, on page 9 at paragraph 4 of the judgment the court said: "A three-stage test or approach is recommended when a wasted costs order is contemplated.

- (i) Has there been an improper, unreasonable or negligent act or omission? (ii) As a result have any costs been incurred by a party? (iii) If the answers to (i) and (ii) are "Yes", should the court exercise its discretion to disallow or order the representative to meet the whole or any part of the relevant costs, and if so what specific sum is involved?" 14. Such an approach is consistent with the terms of Article 109. As to the principles upon which the court acts, in Archbold at paragraph 6-57 there is reference to the case of R v Cornish

[2016] EWHC 779 where the court summarised the effect of the relevant authorities as follows:

"(a) simply because a prosecution fails, even if the defendant is found to have no case to answer, this does not of itself overcome the threshold criteria of s.19;

- (b) improper conduct means an act or omission that would not have occurred if the party concerned had conducted his case properly;
- (c) the test is one of impropriety, not merely unreasonableness; the conduct of the prosecution must be starkly improper, such that no great investigation into the facts or decision-making process is necessary to establish it;
- (d) where the case fails as a matter of law, the prosecutor may be more open to a claim that the decision to charge was improper, but even then, that does not necessarily follow because "no one has a monopoly of legal wisdom, and many legal points are properly arguable";
- (e) it is important that s.19 applications are not used to attack decisions to prosecute by way of a collateral challenge, and the courts must be ever vigilant to avoid any temptation to impose too high a burden or standard on a public prosecuting authority in respect of prosecution decisions;
- (f) accordingly, the granting of a s.19 application will be "very rare" and will be "restricted to those exceptional cases where the prosecution [have] made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him." 15. Accordingly, such applications will not be run of the mill. However, Archbold goes on to say; "A mere mistake without repetition can, however, be grounds for a costs order under this provision, there being no doctrine that every dog is entitled to one bite; and where it is clear that someone on the prosecution side was at fault, an order cannot be resisted on the basis that it is not possible to say whether it was the police or the CPS; the prosecution are indivisible for this purpose"
- see R (Maninder Singh) -v- Ealing Magistrates' Court and CPS 178 JP 253 DC page 1266 . 16. Detective Inspector Ryan and the Deputy Chief Officer of the States of Jersey Police Stewart Gull attended the adjourned hearing, and the Court was grateful for them doing so. DCO Gull wrote to the Court apologising for the " failing " and the " knock on consequence " of the trial being vacated until February 2022. The police accepted that their shortcoming was " unacceptable " and the DCO indicated that he had asked for a report as to the circumstances. The DCO characterised this oversight as a " genuine mistake " by the OIC with which the Court agreed. Detective Inspector Ryan said that steps had been taken to ensure that in

future such evidence would be immediately downloaded to the police master file. This did not occur in this case. Such download would ensure that the officer of the case would be frequently reminded of the need to classify the material as used, unused or irrelevant and, if in the former two categories it would automatically be transferred by the egress system to the Law Officers' Department, which should ensure that this sort of error is not repeated. 17. An error of this sort is always significant, but whether or not a wasted costs order needs to be made will depend in large part on the consequences. It is not unusual for errors to be made in prosecuting or defending cases and it would be inappropriate to consider making a wasted costs order in every case, not least because it would be difficult or impossible to identify what, if any, costs let alone significant costs flow from that error. However, this was an error which gave rise to consequences which were significant. In Jersey it is rare that a case listed for jury trial does not to proceed on the date that it is listed to begin. The vast of majority of trials proceed and it is important that they do so. Dozens of members of the public are warned to attend for the purpose of jury service and normally in excess of 20 people attend for that purpose. Witnesses in this case, including the complainant and two doctors, as well as police officers were required to attend Court. The Royal Court was set aside for three days. The Defendant is in custody awaiting trial. As a consequence of the error, the case needed to be vacated, the trial put back for two months, a fresh jury summoned and two doctors, who have other duties to perform, were again warned to attend. Mistakes like this, although a genuine mistake, are unacceptable and inexcusable when they give rise to consequences of this kind. 18. As the English High Court said in *Maninder Singh -v- Ealing Magistrates' Court* at paragraph 10: "We reject the submission that a mere mistake without repetition cannot be grounds for an order under section 19. There is no doctrine in this area that every dog is entitled to one bite. If the act or omission giving rise to the application consists of someone on the prosecution side (in Nolan LJ's words) not conducting the case properly, and it causes the defendant to incur additional costs, the discretion arises. Section 19(1) and regulation 3 say nothing about the act or omission having to be repeated. A single mistake, if it can be shown to have caused the defendant to incur costs, is enough to trigger the court's discretion to make an order. We emphasise, however, that section 19(1) creates a discretion, not a duty, and that the jurisdiction is highly fact-sensitive. The court is not bound to make an order in every case of a mistake causing costs to be incurred. If there is a satisfactory explanation for the mistake, the court may decide that it would not be just to make any order." 19. Applying the test to this case, I am satisfied: (i) There was an improper, unreasonable or negligent act or omission in this case. I would classify the act as "negligent" as the officer was careless in failing to carry out a standard investigative act which was important and had substantial consequences; (ii) Have costs been incurred as a result by a party? I will return to this question. (iii) If the answer is yes to question (ii), should the Court exercise its discretion to order that the party at fault meet the whole or any part of the relevant costs, and if so, what specific sum is involved? I should make clear that had costs been incurred as a result of the negligent act, then I would have exercised my discretion so as to order that a specific sum be paid to compensate the party, namely the defence, in this case. 20. However, I cannot and do not make such an

order as the Defendant is in receipt of legal aid with no contribution. Advocate Ingram, for the Defendant, confirmed that in his view the States of Jersey Police had been negligent in this case, but that even though he and his client had been inconvenienced he was not seeking a wasted costs order because the additional time spent on this matter arising from the negligence was caught under his legal aid obligation arising from his oath as an advocate. He said that the costs of carrying out legal aid work in the public interest can be onerous and demanding and although it might be possible to construct an argument to the effect that he should recover wasted costs, he did not propose to do so. He did go on to say that if the Defendant is ultimately acquitted then he would be seeking a Defendant's costs order and, in those circumstances, then it would be appropriate for him to make a wasted costs order in relation to a proportion of those costs incurred from the negligent act. Indeed, the Court would expect him to do so and would order costs against the prosecuting authorities in this case for the reasons I have set out. 21. I note that Archbold states that when considering the "amount to be awarded on a wasted costs order", the Court has a wide discretion, but the Court must satisfy itself that the amount claimed or awarded does not offend the indemnity principle. Similar principles have been established by Jersey case law. The Court is also required to give reasons for any decision that it makes. In relation to defendants who are on legal aid, it is said at paragraph 6-60 of Archbold that the costs "must be strictly limited to the amount falling to be paid to those representatives under those schemes; it is not permissible to include an amount by way of compensation for work reasonably done in the case which would not otherwise fall to be remunerated: Fitzgerald (2012) 3C Costs LR 437, Central Criminal Court (HHJ Gordon)". I have not heard full argument on this issue but I am provisionally of the view that although the Court has the jurisdiction to make a wasted costs order even when the receiving party is in receipt of legal aid, it may frequently be inappropriate to do so if their advocate is unremunerated. 22. However, if and when the new fixed fee regime is introduced pursuant to the Access of Justice (Jersey) Law 2019, it will be permissible and, on appropriate facts necessary, to make a wasted costs order in relation to the relevant scale fee to which defence counsel is entitled. Authorities Criminal Procedure (Jersey) Law 2018. Re A Barrister (Wasted Costs Order) No.1 of 1991 [1993] QB 293 Archbold Criminal Pleading Evidence and Practice. R v Cornish

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