

JERSEY / JUDGMENT

AG v Capuano [2017] JRC 211 (13 December 2017)

[2017] JRC 211

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JUDGMENT

THE commissioner: 1. This is a case where the prosecution have decided not to proceed with the charge of grave and criminal assault against the defendant, but invite the Court to order that the single count in the Indictment lie on the file marked " not to be proceeded with without the leave of the Court ". 2. The defendant objects to this proposed course of action. He submits that the Court has no jurisdiction to order counts to lie on the file unless a defendant agrees; alternatively, if there is jurisdiction to that effect, it should not be exercised in the present case. 3. At the conclusion of the hearing, the Court reserved its decision on the jurisdiction point, but announced that, even if it had jurisdiction, it would not exercise it in the present case. The defendant was accordingly discharged and awarded his costs pursuant to Article 2(1)(c) of the Costs in Criminal Cases (Jersey) Law 1961 . 4. The Court said that it would give its decision on the jurisdiction point together with its reasons at a later date. This we now do.

Background

5. It is not necessary or appropriate to recount the alleged facts in any detail. Suffice it to say that the complainant and the defendant have had an on and off relationship for some time which is clearly quite volatile. The police have been called on three previous occasions, although no formal complaint was made by the complainant on those occasions and counter-allegations were made by the defendant. 6. In the early hours of Saturday 26 th February an incident took place at the defendant's flat. According to the complainant, the defendant assaulted her and she was seen afterwards in a distressed condition. She said that the assault had included the defendant striking her a number of times with a pole. She had injuries consistent with blunt trauma. 7. The defendant was arrested. He too had injuries, one of which was an abrasion on his left leg which had some features of a bite. A metal pole was seized from the defendant's flat. No identifiable fingerprints were found on the pole, nor was the complainant's DNA present. The only DNA present on the pole was that of a male, which the defendant later accepted was his. The defendant's case was that the complainant was the aggressor, that she had bitten his leg and that her injuries had been sustained in the scuffle between them. 8. The defendant was subsequently charged with grave and criminal assault. He pleaded not guilty and an assize trial was fixed for 11 th October. A hearing was due to

take place on 3 rd October at which the defence intended to submit that the proceedings should be stayed as an abuse of process on a number of grounds. 9. However, on 27 th September the prosecution announced that they would not be proceeding. This was because the complainant would not be giving evidence for two reasons. First, in a further statement dated 22 nd September she said that she did not want to go to court without her mother, who had died. Secondly, the prosecution had received a report from Dr Evans, a Force Medical Examiner to the police, which described her examination of the complainant and concluded that the complainant was physically and mentally unwell such that she was not fit to give evidence. 10. As a result, the prosecution informed the Court that it did not intend to pursue the prosecution and asked that the count in the indictment lie on the file, not to be proceeded with without the leave of the Court. This application was opposed by the defence. Accordingly the matter was adjourned and came before us on 11 th October. Jurisdiction 11. Advocate English submitted that the Court has no jurisdiction to order that an indictment, or one or more counts on an indictment, should lie on the file not to be proceeded with without leave, unless the defendant consents to such a course. He pointed to the fact that there is no decision at appellate level in England and Wales which holds that such a course is possible and it is inherently unfair that a person who has been charged is not entitled to a verdict of not guilty if the prosecution decide not to proceed. 12. We begin by considering the effect of such an order and how it is to be distinguished from a stay on the grounds of an abuse of process. The distinction was explained very clearly by Watkins LJ on two occasions, both of which were cited in *R v H*

[2006] NICC 5 , to which we shall refer shortly. 13. In *R v Central Criminal Court, ex p Randle*

[1992] 1 All ER 370 at 386 he said:- "...a stay on grounds of abuse of process contemplates that there never will be a trial whereas an order that the indictment lie on the file marked not to be proceeded with without leave contemplates that there may be. It matters not that there are circumstances in which a stay on grounds of abuse of process might be revoked or lifted, the crucial point is that such a stay, a direction that there should be no trial, is intended to be final." 14. In *R v Crown Court at Norwich, ex p Belsham*

[1992] 1 All ER 394 at 403, Watkins LJ described the purpose and effect of the two forms of order in somewhat greater detail:- "An order that an indictment or a count remains on the file generally is made at the conclusion of the trial when the accused has been convicted or acquitted on another indictment or other counts in the same indictment in such circumstances that it is unlikely that the prosecution will proceed further on these matters which are the subject of the order. It leaves open the possibility that in the light of further events it may be necessary to proceed, as for example where the Court of Appeal quashes the conviction recorded on the whole indictment on those counts which have been tried. Once again the order is one, like a motion to quash, which directly relates to the conduct of the trial. A stay on the other hand, while it may be applied for at any time, is not concerned with the conduct of the trial. Indeed its purpose is to stop the trial taking place or continuing." 15. The power to order a count to lie on the file is one which has been

exercised regularly by criminal courts in England and Wales for many years. Thus in *R v Chairman, County of London Court of Sessions ex p Downes*

- [1953] 2 All ER 750, Lord Goddard CJ said at 752:- "Again, if there is more than one indictment against a prisoner it is quite common practice, after the trial of one indictment, to direct that the other indictment or indictments are to remain on the file and not to be prosecuted without leave." 16. In *Connelly v DPP*
- [1964] 2 All ER 401, Lord Devlin said at 441:- "... I refer to the order of Roskill J in the present case that the second indictment was to remain on the file, not to be proceeded with without the leave of the court. This is a common form of order that is constantly being made. It is meaningless except on the hypothesis that the Court has power to order an indictment not to be proceeded with." 17. It is clear that on occasions judges at first instance have ordered a count to lie on the file against the objections of a defendant. Thus in *R v Preston Crown Court ex p Fraser* [1984] Lexis citation 480 ; [1984] Crim LR 624, the defendant had pleaded not guilty at the Crown Court to four counts on an indictment charging handling stolen goods. The chief witness for the prosecution relating to Count 5 was too ill to give evidence and consideration of disposal of that count was deferred until after the trial on the other counts. The defendant was convicted on the other counts. The trial judge refused the defendant's application for a direction to the jury to return a verdict of not guilty on Count 5 and, despite the defendant's objection, ordered that Count 5 lie on the file not to be proceeded with without leave of the court or the Court of Appeal. The defendant appealed against his conviction on the other three counts but this was dismissed. He also applied to the Divisional Court for judicial review of the order relating to Count 5 on the ground that he was entitled to have the matter determined one way or the other and not to be left in mid-air. 18. The Divisional Court held that it had no jurisdiction to grant judicial review because the order in question was a matter relating to a trial on indictment and judicial review was therefore prohibited by section 29(3) of the Supreme Court Act 1981 . However the Divisional Court did not express any criticism of what had occurred and said this in its concluding paragraph:- "What happened here clearly falls fairly and squarely within [a matter relating to trial on indictment]. The learned Assistant Recorder, using different phraseology, was doing no more and no less than adjourning the trial on count 5, but maintaining control over it to the extent that the prosecution would not be able to bring the matter back without the leave of the court. This does not leave Mr Fraser in mid-air. He can enquire of the prosecution whether in the light of the unsuccessful appeal they any longer have any interest in count 5. In the event of their saying no, he can then return to the Crown Court and ask for the order for which [his counsel] wishes and the merits of that order can then be considered. If the prosecution say: 'We do want the matter to be tried and the witness is fit to give evidence', then the Crown Court can consider the justification of bringing such a trial on now after all this time has elapsed and with the convictions upheld, and can make the appropriate order. This is not a matter over which this court has jurisdiction. ..." 19. In *R v Central Criminal Court ex p Raymond*

[1986] 2 All ER 379, the defendant had been convicted on a count of theft of a Rolls Royce motor car and given a prison sentence. That count had been severed from an indictment which contained an additional fourteen counts alleging theft and handling of motor cars. After being sentenced, the defendant was arraigned on the remaining counts on the indictment and pleaded not guilty. The judge ordered the remaining counts on the indictment to lie on the file on the grounds that no public benefit would be derived from continuing to try those counts because of the considerable expense of a trial and the pressure on court time and space, and because any additional sentence would be concurrent rather than consecutive. Subsequently, a further indictment containing two counts of assault was ordered to lie on the file notwithstanding the defendant's objection. The defendant applied for judicial review of the decision to order the counts to lie on the file, contending that the judge had no jurisdiction to make such an order where the defendant objected. Again, the Divisional Court held that it had no jurisdiction to rule on this issue and did not express a view one way or other on the course taken by the trial judge. In passing, Woolf LJ described the effect of an order that a count lie on the file in the following terms at 383:- "It starts off by having the same effect as an order for an adjournment but an adjournment which it is accepted may never result in a trial. Frequently the order is made to safeguard the position of the prosecution and the defence in case a defendant, who has been convicted should appeal, it being the intention of the court if there is no appeal or if the appeal is unsuccessful that the defendant should never stand trial. That the defendant can still stand trial is indicated by the limits on the discretion of the court ... to prevent the Crown proceeding with a prosecution if it wishes to do so. However, in the majority of cases where such an order is made, there will be no trial and there will certainly come a stage when either the prosecution would not seek a trial or, if it did seek a trial, the court would regard it as so oppressive to have a trial that leave to proceed would inevitably be refused." 20. In *R v H* (supra) a decision of Hart J sitting in the Crown Court in Northern Ireland, the issue of whether a count could be ordered to lie on the file against the objection of the defendant arose for decision. In that case the defendant was charged with various sexual offences against the complainant, who was his daughter. He was indicted in 2004 but the complainant then advised the police that she wished to withdraw her complaint because her mother had left her and she only had her father left and she wanted him to return to her. She did not indicate that her previous statement was false. Following an application by the Crown and against the objection of the defence, the trial judge, Judge McFarland, had made an order which Hart J held was an order that the counts lie on the file, not to be proceeded with without the leave of the Crown Court or the Court of Appeal. 21. Subsequently, in 2006, the complainant indicated that she wished to proceed with the charges and the prosecution applied to the court for leave to proceed with the indictment. Having considered various cases, including those to which we have referred above, Hart J concluded as follows at para 27:- "I agree with Judge McFarland that the court has power to order that charges lie on the file not to be proceeded with without the leave of the court even though the defendant objects, although it would be rare in practice that it would be done in the face of such objection as the defendant is entitled to seek a

verdict. However, the authorities to which I have referred suggest that the defendant's right to seek a verdict is not an absolute right." Hart J gave leave to the prosecution to proceed on the ground that the reasons for the complainant's change of mind were understandable and that the interests of justice would not be well served by holding a child of her age to a decision made two years ago in very understandable circumstances, even though this had the effect of placing the defendant on trial when he may well have thought that this would not occur. 22. Advocate English placed some reliance on the case of *R v Central Criminal Court ex p Spens* The Times, 31 December 1992 where the trial judge ordered a permanent stay of the indictment against Lord Spens rather than enter a verdict of not guilty. The Divisional Court subsequently quashed that decision on the ground that the judge had no power to order a permanent stay. However, as Hart J pointed out in *R v H*, that case was conducted on the basis that the order made by the trial judge was a permanent stay rather than an order to lie on the file not to be proceeded with without leave. It therefore does not assist in resolving the point at issue in this case. 23. Advocate English also referred to the published guidance issued by the Crown Prosecution Service where, at page 10 of 13 in the section headed 'Termination of Proceedings' the following is found:- "In the Crown Court the judge has the power to order that entire indictments or some counts on an indictment are ordered to 'lie on the file'. There is no verdict, so the proceedings are not formally terminated. There can be no further proceedings against the defendant on those matters, without the leave of the Crown Court or the Court of Appeal. The consent of the judge is required to leave an indictment or counts to lie on the file. In practice, the judge usually consents, provided that the defence agrees. The procedure is particularly useful when:- · the defendant has pleaded guilty or has been convicted of other counts in the same indictment; or · the defendant has pleaded guilty or has been convicted on counts on another indictment; and · convictions for the remaining offences would have no significant impact on the sentence; and · it is no longer in the public interest to proceed on the remaining matters." [emphasis added] 24. Finally we were referred to what Blackstone and Archbold have to say on this topic. Blackstone's Criminal Practice (2017 edition) says the following:- "D12.83 As an alternative to offering no evidence, the prosecution may ask the judge to order that an indictment (or counts thereof) shall lie on the file, marked not to be proceeded with without leave of the court or of the Court of Appeal. Such a course is particularly appropriate where the accused pleads guilty to the bulk of the charges against him (whether contained in one indictment or several) but not guilty to some subsidiary charges. Leaving the latter on the file avoids the necessity of a trial, but also avoids the accused actually being acquitted on the 'not guilty' counts which might seem inappropriate if the evidence against him is in fact strong. ... D12.85 Before the Crown Court or Court of Appeal is likely to give leave for a count or indictment ordered to lie on the file to be tried, a significant change of circumstances will be required. This would most commonly arise where the accused's convictions on the other matters (ie the charges on the same or separate indictments to which he pleaded guilty or of which he was found guilty at the same time as the order to lie on the file was made) are quashed on appeal and a retrial sought See, however, H

[2006] NICC 5 for other circumstances (relating to a complainant who had been unwilling to give evidence changing her stance) in which such an order was reversed ..." 25. Archbold (2017 edition) has this to say at 4-257:- "Where the plea (or pleas) of guilty entered by the defendant is regarded by the prosecution ... as an adequate plea to the indictment as a whole - for example, where a defendant pleads guilty to one or more serious offences alleged in an indictment and pleads not guilty to one or more relatively less serious offences - a direction [that a verdict of not guilty be entered] may be wholly inappropriate and it is the practice for the judge to order that the particular count or counts be left on the file marked 'not to be proceeded with without the leave of the court or the Court of Appeal.' The consent of the judge is required for this order, but as a matter of practice the judge usually does consent, provided that the defence agree." 26. At para 4-258 Archbold goes on to say this in connection with the topic of the defendant's consent:- "It is impossible to challenge such order in the Court of Appeal ... or by way of judicial review The court should, therefore, proceed with caution if the agreement of a defendant to such an order is not forthcoming. In *Ex p Raymond*, it was said that such an order is akin to an adjournment over which the trial judge has the final say. It should be confined to the circumstances contemplated, ante (ie sufficient pleas of guilty or findings of guilt taking the indictment(s) as a whole). It should never be made where the defendant pleads not guilty and the prosecution are disinclined to proceed, but are unwilling to offer no evidence; in such circumstances, the defendant's consent is insufficient reason for ordering a whole indictment to lie on the file... ." 27. This Court has on many occasions made an order that one or more counts should lie on the file not to be proceeded with without leave. It clearly has jurisdiction to do so. The question at issue is whether it can make such an order over the objection of a defendant. In our judgment, it can. We would summarise our reasons for so concluding as follows:- (i) The starting point is that if a court has power to make an order at all, it can usually make such an order whether or not the parties consent to the same. It is a power which the court has in order to achieve a just outcome. (ii) As stated by Woolf LJ in *Raymond*, the order is akin to an order for adjournment. The Court clearly has jurisdiction to grant an adjournment of a criminal prosecution over the objection of a defendant and it should therefore logically have a similar power when making an order that a count lie on the file. (iii) We accept that there is no authoritative decision at appellate level in England and Wales as to whether such an order can be made without the defendant's consent. That is because of the jurisdictional issue. Nevertheless, it is of note that experienced judges at first instance have clearly not seen any difficulty in making such an order against the objection of a defendant. (iv) It is clear that the order is usually made in circumstances where there are a number of counts or indictments and the defendant has pleaded guilty or been convicted of sufficient to give the court the necessary sentencing power, so that there is no public interest in incurring the time and expense of pursuing the remaining counts (or indictments). Yet, as Blackstone says, it would seem inappropriate to record a not guilty verdict on those counts if the evidence is in fact strong. (v) If, even in those circumstances, such an order can only be made with the consent of the defendant, it would often be impossible to achieve the

desired outcome. A defendant would be able to call the prosecution's bluff by insisting that the matter proceed to trial and not consenting to an order that the counts lie on the file. In those circumstances, the prosecution would either have to proceed or the court would have to enter a not guilty verdict. (vi) Even Archbold, which is clearly strongly in support of a defendant's rights on this issue, accepts that, although the Court should proceed with caution if the defendant does not agree, it may nevertheless make such an order in the sort of circumstances described in the preceding two sub-paragraphs. If there is jurisdiction to make an order against the defendant's objection in those cases, it would be illogical to say that there is no jurisdiction (as opposed to how it should be exercised) merely because the charges to be left on the file represent the whole of the criminal conduct alleged against the defendant. (vii) In the one case where the issue has been ruled on (namely *R v H*), the court concluded that there was power to order charges to lie on the file even where a defendant objects and we see no reason to differ from the reasoning in that case. 28. Although, for the reasons just given, we find that the Court has jurisdiction to order counts (or an indictment) to lie on the file in any case even if the defendant objects, we entirely agree with the cautionary words to be found in Archbold and indeed in *R v H* itself as set out in para 21 above. The power should normally only be used in the circumstances described in the various authorities and text books to which we have referred (ie where a defendant has pleaded guilty or been convicted of various counts such that it is not in the public interest to proceed with the remaining counts). It should not normally be used without the consent of the defendant where the count or counts which the prosecution are asking to lie on the file represent the substance or essence of what is alleged against the defendant. It is after all the prosecution which has invoked the power of the state to bring a defendant before the court on a charge and he is entitled in general to seek a verdict with a view to establishing his innocence. Nevertheless, in our judgment, even in such circumstances, the court may order a count(s) to lie on the file if there is good reason to do so on the special facts of the case. *R v H* is perhaps an example of such good reason. Discretion 29. Crown Advocate Yates argues that, as in *R v H* where there was a young complainant who might foreseeably change her mind about giving evidence, this was a case where the complainant might in due course be fit to give evidence and might change her mind. There was a public interest in pursuing cases of domestic violence. This was a vulnerable witness with alcohol and mental health issues where, given the history, it was conceivable that there would be further incidents of violence involving the defendant and the complainant. The interests of justice would be served by allowing the prosecution to proceed with the charge at that stage or to adduce the relevant evidence by way of similar fact evidence if other charges were brought. The Court could prevent oppressive conduct by the prosecution by refusing leave should the prosecution seek to resuscitate the charge after too long a delay. 30. We understand the above points but in our judgment, they are insufficient to order that the count of grave and criminal assault lie on the file. There is no evidence before us as to the likelihood of the complainant changing her mind or becoming fit to give evidence. The prosecution has brought the charge and the defendant has been remanded in custody for

some seven months pending trial as a result. Whilst the charge was properly brought, there are clearly a number of points which can be made on the defendant's behalf in relation to the evidence. It is not an open and shut case. Although the defendant might have been convicted, he might also have been acquitted. 31. In our judgment, in accordance with the general principle we have described above, the defendant is entitled to seek a verdict and to have the opportunity of establishing his innocence. If the prosecution are not willing to proceed, he is entitled to a verdict of not guilty. 32. It was in those circumstances that we refused the application of the prosecution that the count should lie on the file. Authorities Costs in Criminal Cases (Jersey) Law 1961. R v H

[2006] NICC 5 . R v Central Criminal Court, ex p Randle [1992] 1 All ER 370. R v Crown Court at Norwich, ex p Belsham

[1992] 1 All ER 394. R v Chairman, County of London Court of Sessions ex p Downes

[1953] 2 All ER 750. Connelly v DPP [1964] 2 All ER 401. R v Preston Crown Court ex p Fraser

[1984] Lexis citation 480; [1984] Crim LR 624. Supreme Court Act 1981. R v Central Criminal Court ex p Raymond [1986] 2 All ER 379. R v Central Criminal Court ex p Spens The Times, 31 December 1992. Blackstone's Criminal Practice 2017 Edition. Archbold Criminal Pleading, Evidence and Practice 2017 Edition. Page Last Updated: 18 Dec 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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