

JERSEY / JUDGMENT

AG v Carvalho [2007] JRC 011 (18 January 2007)

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ROYAL COURT
(Samedi Division)
th
January 2007
Before
:
Sir Philip Bailhache, Bailiff, sitting
alone.
The Attorney General
-v-
Joao Carlos Vieira Carvalho
Application regarding
jurisdiction.
N. Santos-Costa, Crown Advocate.
Advocate J. Grace for the Defendant.

RULING

THE BAILIFF: 1. The Defendant, Joao Carlos Vieira Carvalho, is to be sentenced for two indecent assaults. He was first presented before the Royal Court on Indictment on 14 th July, 2006, and pleaded guilty. He was remanded to the 15 th December, 2006, for sentence before the Inferior Number. Disagreement arose, however, as to the way in which the matter should be presented to the Court and it was agreed that these differences should be resolved at a Newton Hearing. 2. A Newton Hearing took place on the 20 th November, 2006. All the disputed matters were resolved by the Jurats in favour of the Crown. During the Newton Hearing the two victims of the indecent assaults were cross-examined extensively. The Crown Advocate takes the view that the conduct of the defence in relation to the victims during the Newton Hearing largely negates the value of the guilty plea as a mitigating factor. 3. When the matter came back before the Inferior Number on the 15 th December, the Crown Advocate moved that the defendant be remanded for sentence before the Superior Number. Counsel for the defendant submitted that it was not open to the Court to do so because the Newton Hearing had taken place before the lower Court and that was the Court which must sentence. In the event, the Court did remand the defendant to the Superior Number for sentence on the th February. The Court nonetheless gave leave to the defendant to apply to a single judge for the determination, as a matter of law, of the question whether a defendant can be remanded to the Superior Number for sentence in circumstances where a Newton Hearing has taken place before the Inferior Number. 4. Ordinarily, of course, it is for the

Attorney General to decide whether or not he wishes to move conclusions before the Superior Number. Although, theoretically, the Court might refuse to grant the Attorney General's conclusions, it would never, as a matter of practice, do so because the Attorney General must be free to make such recommendations to the Court as to sentence as he thinks fit. 5. Mrs Grace submits, however, that in circumstances where the Attorney General has not seen fit to move that a Newton Hearing should take place before the Superior Number he is, in effect, estopped from doing so at a later stage, when the factual dispute has been resolved by the Inferior Number. She submitted, first of all, that it was good practice for the sentencing Court to determine any disputed issues at the Newton Hearing. I agree, but that does not help to decide whether it is not open either to the Attorney General to move, or to the Court to order, that a defendant be remanded to the Superior Number in the aftermath of a Newton Hearing before the Inferior Number. Counsel conceded that there was no authority for the proposition which she was advancing, but she drew my attention to a passage from a work which is often regarded as authoritative in this Court, namely Advocate Whelan's essay on Newton and the Reverse in England and in Jersey, published as a supplement to the 1994/5 notes on Aspects of Sentencing in the Superior Courts of Jersey. The learned author stated, at paragraphs 90 and 91: "The Newton practice does, though, because of the division of the Royal Court structure, give rise to interesting questions. The present writer believes Wall (16.08.93) to have been the first Newton hearing to take place in Jersey and advised at the time that the application for the hearing should be made to the Superior Number because it was a drugs case which so far as conclusions were concerned would be sentenced in the Superior Number no matter whether the prosecution or the defence version prevailed. Thereafter, this principle has been followed in Skinner (03.04.95) and McKenzie (13.01.95). The guiding principle has been that the sentencing Number should conduct the Newton hearing. This seems axiomatic but is not entirely without its difficulties in principle. The selection of Court, as between Inferior and Superior Number depends upon the view taken by the Crown. This means that the Crown has to take an early view of its conclusions. If the Crown sees the case as one for the Superior Number even supposing that the defence version of the Newton issue is accepted after a contested hearing, then the hearing will be in the Superior Number. If the Crown sees the case as one within the Inferior Number sentencing jurisdiction even supposing that the prosecution version of the Newton issue is accepted after a contested hearing, then the hearing will be in the Inferior Number. However the Crown only moves conclusions; the Court is not in any sense bound by the Crown view. The implications of a departure by the Court from the Crown view are costly. If the hearing has taken place in the Superior Number, but the Court takes a more moderate view than the Crown and imposes a sentence which would have been within the sentencing jurisdiction of the Inferior Number, then there has been a waste of resources to a lesser or greater degree. Worse still, if the hearing has taken place in the Inferior Number but the Court takes a more severe view than the Crown and sees the case as one meriting a sentence beyond its jurisdiction i.e. requiring a remand to the Superior Number, then a case of serious waste of the Court's resources arises. The Inferior Number cannot sentence, and the whole of the Newton hearing has been wasted, because the Superior Number - it is suggested - cannot simply proceed to sentence on the remanded finding of the Inferior Number. The Newton principle requires the sentencer to determine factual

disputes before passing sentence. In the instance under discussion the full Court, i.e. the Superior Number, because of the remand, becomes the sentencer but has not conducted a hearing of its own and cannot, surely, be bound simply to impose sentence on the earlier factual finding of a different, smaller and lesser tribunal. There is as yet no authority on that point, but it is suggested, that a contrary finding would mark a radical departure from the received principle of Newton, and to some extent a departure from the traditional functions of the respective Numbers of the Royal Court. That is not to say that there are no arguments the other way, but while the matter remains undecided it seems that the course of prudence will require Newton hearings to take place in the Superior Number, in all but those cases which upon any construction will patently attract a sentence within the sentencing jurisdiction of the inferior Number, i.e. now 4 years. As it happens, the writer is not aware of any Newton hearing having taken place in the Royal Court other than in the Superior Number." 6. Crown Advocate Santos-Costa, who appeared for the Attorney General, submitted that, in relation to the suggested lack of jurisdiction in the Court, to remand a defendant for sentence to the Superior Number where the Newton hearing had taken place before the Inferior Number, the learned author was wrong. Mr Costa drew attention to the fact that the Magistrate has the power to convict and to commit a defendant for sentence by the Royal Court. Equally, he pointed out that there are many instances of defendants being convicted by the Inferior Number of statutory offences, particularly offences in relation to drug trafficking, and subsequently remanded for sentence by the Superior Number. In both these instances a finding of fact is made by the inferior tribunal prior to sentence by a different and higher tribunal. 7. The Crown Advocate also drew my attention to the English case of *R v Warley Magistrate's Court ex parte DPP*

[1999] 1 ALL ER 251, where, at page 257, Kennedy LJ stated: "Even though an accused indicates a plea of guilty there may be dispute as to the facts which must be resolved before sentence can be passed, and which can only be resolved if evidence is called as envisaged in *R v Newton* (1982) Cr App R 13. If the magistrate's court comes to the conclusion that however that dispute is resolved it will have adequate powers of sentence then of course no problem will arise. The magistrates will simply proceed with the Newton hearing. Similarly if, whatever the outcome the magistrate's court is of the opinion that the case will have to be committed to the Crown Court for sentence it is clearly preferable to leave the Crown Court to conduct the Newton hearing. But if the decision as to whether or not to commit for sentence turns or may turn on the outcome of the Newton hearing then, despite Mr Carter-Manning's persuasive submissions to the contrary, I am satisfied that the magistrate's court should proceed to conduct the Newton hearing. As Mr Supperstone pointed out, it really has no option, because it can only commit for sentence if it is of the opinion that the offence was (not may have been) so serious that the greater punishment should be inflicted for it than the court has power to impose - see s 38(2). The Court cannot be of that opinion if the accused has put forward a version of the facts which may be accepted, and which if accepted would lead to a different conclusion in relation to the seriousness of the offence. Obviously if a magistrate's court does conduct a Newton hearing and then commits to the Crown Court it must in some way record its findings for

the benefit of the Crown Court, and it may be that the accused will seek to challenge those findings in the Crown Court. I would not expect him to be allowed to do so unless he could point first to some significant development - such as the discovery of important further evidence - having occurred since the magistrate's court reached its conclusion. Since we concluded the hearing of this case our attention has been drawn by counsel to *Bussey v Suffolk Constabulary* (5 May 1998, unreported), a case decided by another division of this court. In that case the magistrate's court proceeded to sentence without conducting any hearing to decide whether the prosecution version of the facts or the accused's version was correct. For the purpose of sentence to the Crown Court, which decided to reconsider the factual issue and resolve it in favour of the prosecution. This court held that the Crown Court was entitled to do as it did because it was not bound by any finding of fact in the magistrate's court which limited its powers of sentence. That we accept, but the principles which apply in relation to the appellate jurisdiction of the Crown Court do not assist in relation to how, when exercising its ordinary first instance, jurisdiction a magistrate's court should proceed. A point which was considered when submissions were made to us was the undesirability of requiring vulnerable witnesses, such as those sexually abused and children, to give evidence on more than one occasion, and the fact that video equipment is often available only in a Crown Court. That I recognise, but in the face of statutory wording which in my judgment is clear, a desire to protect vulnerable witnesses cannot justify a decision of a magistrate's court to send the Crown Court a case where if the defence version of the facts is accepted the magistrate's own powers of sentence will suffice." This decision was of course made, as counsel for the defendant pointed out, on the basis of a particular statutory formula which is not relevant in this jurisdiction, but it is interesting nonetheless that the English Court of Appeal found no objection, in principle, to a finding of fact being made in the context of a Newton Hearing by a different tribunal from that which ultimately imposed sentence. 8. As a matter of principle I see no difficulty, contrary to Mr Whelan's suggestion, in the imposition of sentence by a body different from that which has been the tribunal of fact. It happens on every occasion that a defendant is convicted before a Jury. The Jury determines guilt and the Inferior Number, or Superior Number as the case may be, proceeds to sentence on the fact of guilt determined by the Jury. Equally, as the Crown Advocate rightly pointed out, the same thing happens where a trial takes place before the Inferior Number sitting *sans enquête*. The two Jurats determine guilt or innocence, but if the matter is beyond the jurisdiction of the Inferior Number, the convicted defendant is committed to the Superior Number for sentence. It seems to me that there is no real difference between those scenarios, which regularly occur, and the unusual situation where the Attorney General takes a different view of the conclusions which should be moved following a Newton Hearing. 9. Furthermore it does seem to me unarguable that the Court should be able to impose whatever sentence it conceives to be just, and should not be constrained by the decision of the Attorney General to seek a Newton Hearing before the Inferior Number, a decision in which the Court itself has played no informed, or effective, part. Defence counsel conceded that the logic of her submissions would require a second Newton Hearing to

take place before the Superior Number, if, following the determination of facts by the Inferior Number, the Court considered that the sentence was beyond its powers. That seems to me to be a highly undesirable and indeed impractical outcome. As a matter of practice it is certainly desirable that the body which determines the facts at a Newton Hearing should be the same body which proceeds to impose sentence. The Attorney General should take all possible steps to ensure that such an outcome is achieved. It is desirable that that should happen but it is not, however, in my judgment a rule of law. 10. No prejudice is caused to the defendant by having the facts determined by the Inferior Number and sentenced by imposed by a higher Court. The Superior Number retains the complete discretion to impose whatever sentence it thinks appropriate, whether that be, in the context of this case, 5 years, 4 years, 3 years or any other penalty. The application is accordingly dismissed. Authorities Newton and the Reverse in England and in Jersey. Aspects of Sentencing in the Superior Courts of Jersey. Whelan. R v Warley Magistrate's Court ex parte DPP, 1999, 1 ALL ER 251. Page Last Updated: 27 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/je/cases/UR/2007/2007_011.html

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