

JERSEY / JUDGMENT

AG -v- De Sousa Freitas [2009]

JRC 176 (08 September 2009)

[2009] JRC 176

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JUDGMENT

THE BAILIFF: 1. This is an appeal by way of case stated from a decision of Advocate P Harris sitting as a Relief Magistrate on 24th July, 2009. On that occasion, the Relief Magistrate refused an application under Article 98(1) of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("the 2003 Law") for leave to adduce the evidence of a witness who was resident in Northern Ireland by way of live television link. 2. He did so on the ground that, by virtue of Article 83 of the 2003 Law, Article 98 did not apply to the Magistrate's Court and he therefore had no jurisdiction to grant the order requested. At the request of the Attorney General, the Relief Magistrate stated a case and the issue raised is a narrow point of construction, namely whether he was right in his conclusion that there is no jurisdiction in the Magistrate's Court to grant leave for a witness's evidence to be given by way of live television link where the witness is outside Jersey. 3. The respondent faced four charges in the Magistrate's Court and the evidence of the witness in question related to one of those charges. Following the Relief Magistrate's ruling, the respondent pleaded guilty to one charge and the prosecution offered no evidence on the remaining charges, with the result that they were dismissed. Nothing turns on the facts of the case and it is not necessary to refer to them. The statutory provisions 4. Article 98 of the 2003 Law is in the following terms:- "98. Evidence through television links

- (1) A witness other than the accused may, with the leave of the court, give evidence through a live television link in any proceedings for an offence or any appeal arising from such proceedings if the witness is outside Jersey.
- (2) A statement made on oath by a witness outside Jersey and given in evidence through a link by virtue of this article shall be treated for the purposes of the law relating to perjury as having been made in the proceedings in which it is given in evidence.
- (3) Where, in the case of any proceedings before the Youth Court leave is given for evidence to be given through a television link and suitable facilities for receiving that evidence are not available at the court, the court may sit for the purposes of the whole or any part of those proceedings at any place at which those facilities are available and which has been appointed for the purposes of this paragraph by the Magistrate.

(4) Rules of Court may make any provision that appears to be necessary or expedient for the purposes of this Article." 5. On the face of it Article 98(1) is of general application and would therefore apply to proceedings for any criminal offence whether before the Royal Court, the Magistrate's Court or the Youth Court. However, Article 98 falls within Part 10 of the 2003 Law which also includes Article 83, which is in the following terms:- "83. Application and interpretation of Part 10. (1) This Part applies in relation to an offence if on or after the commencement of this Article the accused is committed for trial or proceedings are instituted before the Royal Court for the offence concerned. (2) References in this Part to the prosecutor are to the Attorney General or any advocate acting on the Attorney General's behalf." 6. The Relief Magistrate held that Article 83(1) is clear in its terms and limits the application of the whole of Part 10 to proceedings before the Royal Court. Article 98(1) falls within Part 10 and therefore has no application to proceedings before the Magistrate's Court. Discussion 7. Mr Pedley accepts that Article 83(1) appears to have the effect described by the Relief Magistrate. However, he submits that such an interpretation gives rise to an absurd result which cannot have been intended by the States. He argues therefore that the Court should give Article 83(1) a purposive construction by construing it as if the words "(with the exception of Article 98)" were inserted after the word "Part" on line one. He raises a number of arguments in support of this contention. 8. He reminds me first of certain observations which I made in *AG v Smith*

[2004] JLR 346 at paras 16-18:- "16 In *Carter v. Bradbeer* (3), Lord Diplock said ([1975] 1 W. L. R at 1206-1207): "If one looks back to the actual decisions of [the House of Lords] on questions of statutory construction over the past 30 years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions." That process has accelerated in the quarter of a century since Lord Diplock wrote those words. In my judgment, it is the modern approach. The objective is to ascertain the intention of the legislature. 17 Furthermore, it is a longstanding principle of statutory construction that the court will seek to avoid a construction which produces an absurd result. This principle is summarized in sect. 312 of Bennion, *Statutory Interpretation*, 4th ed., at 831 (2002) as follows: "(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of 'absurdity,' using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.

(2) In rare cases there are overriding reasons for applying a construction that produces an absurd result, for example where it appears that Parliament really intended it or the literal meaning is too strong." 18 Maxwell on *Interpretation of Statutes*, 12th ed., at 201 (1969) states: "Where possible, a construction should be adopted which will facilitate the smooth working of the scheme of legislation established by the Act, which will avoid producing or prolonging artificiality in the law, and which will not produce anomalous results." 9. He also referred me to paragraphs 1442, 1450 and 1477 of Halsbury, *Laws of England* (4th edition) vol

44(1). 10. He submits that the interpretation favoured by the Relief Magistrate leads to an absurd result in the sense of one which is illogical, inconvenient and pointless. He points out that, apart from Article 98, Part 10 is concerned solely with preparatory hearings and pre trial rulings. It is entirely understandable that these matters are intended only to apply to proceedings in the Royal Court. However, Article 98 is nothing to do with preparatory hearings or pre-trial rulings; it deals solely with the mode of adducing evidence at a trial. There is no logical reason to restrict this to the Royal Court; on the contrary it would be just as appropriate for evidence to be capable of being given in this way before the Magistrate's Court and the Youth Court. Article 98 is, he says, the odd man out in Part 10. Indeed one would expect to find it in Part 9 which deals with various matters relating to the law of evidence. It is almost as if Article 98 had been included by mistake in Part 10 instead of Part 9. The Court should interpret Article 83(1) in such a way as not to lead to a result which is illogical, inconvenient and pointless. 11. Secondly, he argues that there is an inherent conflict between Article 83(1) and Article 98(3) because the latter assumes that leave under Article 98(1) could be given for evidence to be adduced through a television link in the Youth Court. It would be even more absurd if evidence could be given in this way in the Royal Court and the Youth Court but not in the Magistrate's Court. 12. Next he referred to certain English statutes upon which the relevant Jersey provisions appear to have been based. In so far as Part 10 of the 2003 Law deals with preparatory hearings and pre-trial rulings, these appear to be drawn from parts III and IV of the Criminal Procedure and Investigations Act 1996 . That Act does not touch upon the provision of evidence by television link. 13. That matter is dealt with by section 32 Criminal Justice Act 1988 ("the 1988 Act") the relevant parts of which read as follows:- "32(1) A person other than the accused may give evidence through a live television link in proceedings to which sub-section (1A) below applies if:-

- (a) the witness is outside the United Kingdom; or
- (b) the witness is a child, or is to be cross-examined following the admission under Section 32A below of a video recording of testimony from him, and the offence is one to which subsection (2) below applies, but evidence may not be so given without the leave of the court. (1A) This subsection applies:-
 - (a) to trials on indictment, appeals to the criminal decision of the Court of Appeal and hearings of references under section 9 of the Criminal Appeal Act 1995; and
 - (b) to proceedings in youth courts, appeals to the Crown Court arising out of such proceedings and hearings of references under Section 11 of the Criminal Appeal Act 1995 so arising.2.....
- (3) A statement made on oath by a witness outside the United Kingdom and given in evidence through a link by virtue of this section shall be treated for the purposes of section 1 of the Perjury Act 1911 as having been made in the proceedings in which it is given in evidence. (3A) Where, in the case of any proceedings before a youth court:-

- (a) leave is given by virtue of subsection (1)(b) above for evidence to be given through a television link; and
- (b) suitable facilities for receiving such evidence are not available at any petty-sessional court-house in which the court can (apart from this subsection) lawfully sit, the court may sit for the purposes of the whole or any part of those proceedings at any place at which such facilities are available and which has been appointed for the purposes of this subsection by the justices acting for the petty-sessions area for which the court acts. (3B) A place appointed under subsection (3A) above may be outside the petty sessions area for which it is appointed; but it shall be deemed to be in that area for the purposes of the jurisdiction of the justices acting for that area....." 14. Mr Pedley points to the similarity of the wording of subsection (3A) of section 32 of the 1988 Act to that of Article 98(3). Interestingly, it is clear that the effect of section 32 is that evidence by television link because the witness is outside the UK may be given in the Crown Court (trial on indictment) but not in the Magistrate's Court. The position is less clear in relation to the Youth Court. Subsection (1) and (1A) appear to suggest that a witness can be heard by television link either because he is outside the UK or because he is a child and the offence is one of those specified in subsection (2). However, subsection (3A) seems to imply that the ability to grant leave for evidence to be given through a television link in the youth court is confined to the latter case. 15. Be that as it may, the United Kingdom appears to have regarded the position in relation to the Magistrate's Court created by section 32 as unsatisfactory because it enacted section 51 of the Criminal Justice Act 2003 . This confers a general power upon a court to hear a witness by television link where it is thought to be in the interests of the efficient or effective administration of justice and it is specifically stated in the section that this can apply to a summary trial in the Magistrate's Court as well as a trial on indictment in the Crown Court. However, according to Mr Pedley, this section has not yet been brought into force and the position therefore remains governed by the provisions of the 1988 Act.

Conclusion

16. I have considerable sympathy with Mr Pedley's submissions. It is very difficult to understand why Article 98 is included in Part 10 at all, let alone made subject to Article 83(1). One suspects that it may simply be a drafting error and that the Article should have been included in Part 9 which deals with matters of evidence. Furthermore, it is very hard to make sense of Article 98(3). Nevertheless, I am driven to the conclusion that the Relief Magistrate was correct in his decision. 17. I would summarise my reasons as follows:- (i) The principle of purposive construction enables the Court to choose between two possible interpretations. However it does not enable the Court to re-write the statute. Like the Relief Magistrate, I consider that the terms of Article 83(1) are clear, namely that Part 10 applies only to proceedings in the Royal Court. I do not think that it would be proper to read in words to the effect "(with the exception of Article 98)" unless the effect of applying Article 83(1) to Article 98 led to manifest absurdity, so that it could not possibly have been intended by the legislature. (ii) I do not consider that such interpretation leads to manifest absurdity. I

accept that it appears to lead to a somewhat unsatisfactory result but that is rather different. As mentioned above, the effect of the 1988 Act in England and Wales is that a witness who is out of the United Kingdom may only give evidence by live television link in the Crown Court (and possibly in the youth court). On any view, he may not do so in the Magistrate's Court. The UK has managed to get by with this position since 1988 and has not brought section 51 of the 2003 Act into force so as to correct the position. I do not think therefore that one can properly say that an interpretation of the 2003 Law which leads to a similar result in this jurisdiction is absurd. (iii) Mr Pedley placed great weight on the reference to the Youth Court in Article 98(3). He submitted that this meant that leave under Article 98(1) could be granted in the case of the Youth Court. If this was correct, then Article 83(1) could not possibly mean that Article 98(1) applied only to the Royal Court. The difficulty with that argument is that there is of course jurisdiction for the Youth Court to accept evidence by television link in the case of a child witness pursuant to the Criminal Justice (Evidence of Children) (Jersey) Law 2002 ("the 2002 Law"). Thus the reference to the Youth Court in Article 98(3) is consistent with leave for evidence to be given by television link being granted under the 2002 Law. (iv) I agree with Mr Pedley that Article 98(3) appears to be based on section 32(3A) of the 1988 Act. Interestingly, subsection (3A) states quite clearly that it relates only to cases where evidence by television link is admitted in the youth court because there is a child witness. Furthermore, the provision is concerned with the location of the Youth Court and where it may lawfully sit. It appears that there may be some provision in English law which states that a Youth Court may only sit in certain locations. Subsection (3A) is concerned to ensure that, if the Youth Court sits elsewhere to receive evidence by television link because of a lack of facilities in the Court's normal location, it will still be sitting lawfully. My attention has not been drawn to any provision in the Criminal Justice (Young Offenders) (Jersey) Law 1994 (which establishes the Youth Court) which requires the Youth Court in Jersey to sit in any particular location. If that is right, Article 98(3) would appear to be unnecessary. Nevertheless, whatever its purpose, I cannot construe Article 98(3) as overriding Article 83(1) in relation to the Youth Court, let alone in relation to the Magistrate's Court, which is not even mentioned in Article 98(3). 18. For these reasons I conclude that Article 83(1) must be given its natural meaning with the result that, like the rest of Part 10 of the 2003 Law, Article 98 only applies to proceedings in the Royal Court. I reach this conclusion without enthusiasm. Article 98 itself does not contain any such restriction and I see no reason why, subject to the leave of the court, a witness who is outside Jersey should not be able to give evidence by way of television link in the Magistrate's Court or the Youth Court as well as in the Royal Court. 19. Accordingly, I recommend that urgent consideration be given to a short amendment (perhaps by moving the Article to Part 9) making it clear that Article 98 applies to all courts in the Island. 20. I would add for the sake of completeness that I did consider whether, quite apart from Article 98, there might be an inherent jurisdiction on the part of the Magistrate's Court to receive evidence from a witness outside Jersey by way of television link. However, for the reason given in paragraphs 13-15 of *AG v Drea*n

- [2007] JRC 249 , I do not consider that it is open to me to so hold. 21. For these reasons I dismiss the appeal. I award Mr Freitas his costs. Authorities Police Procedures and Criminal Evidence (Jersey) Law 2003. AG v Smith
- [2004] JLR 346 . Criminal Procedure and Investigations Act 1996. Criminal Justice Act 1988. Criminal Justice Act 2003. Criminal Justice (Evidence of Children) (Jersey) Law 2002. Criminal Justice (Young Offenders) (Jersey) Law 1994. AG v Drear
- [2007] JRC 249 . Halsbury, Laws of England (4th edition). Page Last Updated: 29 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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