

JERSEY / JUDGMENT

AG v Porter [2023] JRC 247 (11 December 2023)

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JUDGMENT

deputy bailiff:

Introduction

1. The Defendant is charged with two offences, one a product of customary law and one a creation of statute. Accordingly, this is a mixed indictment and the Court's jurisdiction under Article 48 of the Criminal Procedure (Jersey) Law 2018 ("the Law") is engaged. Sub-paragraphs (3) and (4) of Article 48 provides: "(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." 2. The applicability of Article 48 was overlooked by counsel when the Defendant was indicted but drawn to the attention of counsel at the plea and directions hearing. Both have filed skeleton arguments for the purpose of the Court considering the same on the papers. 3. Count 1 is a charge of grave and criminal assault and Count 2 possession of an offensive weapon, namely a bat. The bat is not an offensive weapon per se and, accordingly, the Crown will need to prove that this was carried by the Defendant for the purpose of causing injury. 4. On the Crown's case, in briefest summary, is that the Defendant attacked the complainant in his home in St Clement with the bat on the evening of 27 August 2022. 5. The Defendant says that at all material times he was acting in self-defence / defence of another. 6. The effect of Article 48 has been considered by the Royal Court in two helpful recent cases. Firstly, in *Attorney General v Akhonya*

[2022] JRC 176 where Commissioner Sir William Bailhache said: "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. 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. 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. 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 2018 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. [my emphasis]

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 . [My emphasis]
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." 7. Recently in Attorney General v A T Mazurke

[2023] JRC 221 , Commissioner Olsen considered a case where the defendant faced an indictment alleging grave and criminal assault and domestic abuse. In that case, the Court referred to the decision of Commissioner Bailhache at Akhonya and said that, in its view, the domestic abuse allegations, taken cumulatively, were significantly more serious than the alleged assault. This factor was held to militate in favour of an Inferior Number trial. 8. Further, the Court noted that the case was not a complex one and said at paragraph 16: "Mr. Herold-Howes submitted that this was not a complex case and directed our attention to paragraph 18 of the Akhonya

judgment.

We agree that there will be some cases, for example of sophisticated fraudulent activity, or arcane forensic evidence, which might be more suitable for the expertise and/or experience of the Jurats than a jury. We accept the defence submission that this is not such a case. But complexity, or the lack of it, is but one of several factors that we have to weigh in the exercise of our discretion." 9. The Court also was significantly influenced by the likely trial date and said at paragraph 18: "Another important consideration is that the dates available for a trial before the Inferior Number, being 11 March 2024 for five days, are more proximate by almost six weeks than those that would be available for an Assize trial, namely 20 May next year (also for five days). In our judgment an Inferior Number trial would accordingly be significantly more compliant with the Overriding Objective, which requires at its core that criminal cases should be dealt with efficiently and expeditiously." 10. Both the allegations made against the Defendant in this case are serious ones. I accept that in circumstances where one of the charges (whether deriving from customary law or statute) added little to the overall case then it would not be appropriate for that charge to have a determinative effect on the mode of trial. This is not such a case. 11. I agree with Commissioner Bailhache that the Court needs to make a decision having regard to the offences charged as a whole. This is not a complex case and the case could equally be tried by the Jurats or a jury. Both tribunals are fair and human rights compliant. 12. Accordingly, one key consideration when considering the overriding objective and the interests of justice is when can this case be tried. It is a matter of note that the Royal Court is currently facing more requests for jury trial dates than at any time in its history. This risks delays in trying cases if matters are reserved to jury trials when they could perfectly properly be dealt with by the Inferior Number, although we are fortunate in the fact that the Royal Court does not suffer from a backlog of trials that many, if not most, other jurisdictions currently experience. 13. Nonetheless, it is in the interest of witnesses and defendants that cases come to trial quickly and the fact that there is currently competition for jury trial dates in that if one listing for a jury trial is vacated, then another case can be slotted into that date and tried sooner. The same does not apply to trial dates before the Inferior Number, and in this case the Inferior Number is available to try this case in February, whereas a jury would be convened in early April. Although both parties have filed skeleton arguments to the effect that the case should be tried by the jury, I have no doubt, having regard to the provisions of Article 48 and my duty to ensure that cases are managed in accordance with the overriding objective, that this case should be determined by the Inferior

Number in February. 14. The implementation of the overriding objective requires the Court to deal with cases justly, which includes respecting the interests of witnesses and victims and dealing with cases efficiently and expeditiously. In almost all cases, an earlier trial date will meet those concerns better than one that is further away. It is stated in Article 5 that the Court must ensure the implementation of the overriding objective when interpreting legislation, including provisions in the Law. The duty of the Court to actively manage cases includes a duty under Article 7 to discourage delay. 15. The case will be listed for 26 and 27 February 2024 and if any directions need to be varied in consequence then they should be and the case may be relisted by either party. Authorities Criminal Procedure (Jersey) Law 2018. AG v Akhonya

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