

JERSEY / JUDGMENT

AG -v- T [2014] JRC 098 (24 April 2014)

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JUDGMENT

COMMISSIONER: 1. I now turn to the application for an adjournment. Immediately after giving my decision yesterday on the Crown's application for the joinder of the two Indictments, in which the defence submitted that it did not want a delay of the trial, the defence applied for an adjournment of the trial due to start this coming Tuesday. The trial was adjourned on the 13 th February, 2014, on the application of the defence after my decision not to exclude the evidence of Witness A, a prosecution witness who had come forward shortly before, and this so that the defendant could gather evidence to adduce in response, and to carry out other investigations. 2. At that time three witnesses in Portugal had been identified by the defence, and I was informed then that the defence were on notice that there may be practical difficulties in their attending a later trial in Jersey. Advocate Hall herself raised then the possibility of the defence applying to have the evidence of these Portuguese witnesses heard by way of video-link. Clearly if such an application were to be made it needed to be made in good time. 3. Advocate Hall puts forward three grounds for an adjournment, which are to some extent interlinked. Availability of defence witnesses 4. All of the witnesses concerned relate to the First Indictment. There are three witnesses in Portugal, not entirely the same persons who were originally indicated, who for different reasons it has become clear apparently in the last two weeks, are not able to attend voluntarily in Jersey to give evidence, namely, Witness C, Witness A and Witness D, but they are prepared apparently to give their evidence from Portugal. Advocate Hall gave the Crown notice yesterday that she applies for their evidence to be given by Skype. Advocate Hall was asked to give me alone a copy of their statements, so that I can, without the involvement of the Crown, assess the importance of their evidence. I will file her email to me with the Judicial Greffe, should it be necessary for my decision to be reviewed, but it is fair to say that information provided is essentially the same as provided to me on the 13 th of February, when considering the defendant's application for an adjournment then. 5. Whilst the information was I felt sufficient to justify a delay on the 13 th of February, together of course with a need for the defendant to make other investigations, little if any progress has been made as to what they will say, other than that they are not able to say it in Jersey. Witness A has not been contactable at all by the defence at all for some time. She was apparently going out with the defendant in Portugal at the same time as Witness A, will say she was in a relationship with the defendant but Advocate Hall does not appear to be in possession of any statement as to what, in detail, she will say, and I was certainly not given one. 6. The evidence of Witness C is described by Advocate Hall in two sentences. The

evidence of Witness D is described in one sentence, comprising a wholly unparticularised allegation against Witness A. To be fair to Advocate Hall it should be recorded that as she does not speak Portuguese she has had to conduct her communications with these witnesses through a Portuguese-speaking member of staff of the debt collecting business associated with her firm, who is neither a lawyer nor available after hours. 7. The evidence of these three Portuguese resident witnesses will only now be heard if it can be taken in Portugal or given through live video-link, and I will come to that in a moment. 8. Further witnesses have come to light in Jersey in the last two weeks. Another witness, apparently has evidence in relation to the complainant, but I have been given no statement as to what he might say. He has been out of the Island, in the United Kingdom, for three to four weeks, because his child is sick, and Advocate Hall has been unable to contact him. There are two further witnesses who have apparently approached the defendant. Advocate Hall has the name of one only, and that witness will apparently give what she describes as important evidence about the complainant on the day of the alleged grave and criminal assault. There is no statement or detail as to what he or she might say, so I cannot assess how important it is. The other un-named witness will apparently give evidence about Witness A, but again I know not what. Advocate Hall candidly acknowledged that the defence position in relation to these Jersey witnesses is not as compelling as she might wish it to be. 9. I asked to be referred to the case of Crown Prosecution Service v Alan Picton

[2006] EWHC 1108 (Admin) , which sets out the general principles to be applied when an application is made to adjourn a trial, quoting from the judgment of Keene, LJ at paragraph 9:- "In Essen this court considered the relevant law and it considered in particular the judgments of Lord Bingham in R v Aberdare Justices ex parte Director of Public Prosecutions

(1990) 155 JP 324 (then as Bingham LJ) and in R v Hereford Magistrates' Court ex parte Rowlands

[1998] QB 110 (then as Lord Bingham CJ). The following points emerge:

- (a) A decision whether to adjourn is a decision within the discretion of the trial court. An appellate court will interfere only if very clear grounds for doing so are shown.
- (b) Magistrates should pay great attention to the need for expedition in the prosecution of criminal proceedings; delays are scandalous; they bring the law into disrepute; summary justice should be speedy justice; an application for an adjournment should be rigorously scrutinised.
- (c) Where an adjournment is sought by the prosecution, magistrates must consider both the interest of the defendant in getting the matter dealt with, and the interest of the public that criminal charges should be adjudicated upon, and the guilty convicted as well as the innocent acquitted. With a more serious charge the public interest that there be a trial will carry greater weight.

- (d) Where an adjournment is sought by the accused, the magistrates must consider whether, if it is not granted, he will be able fully to present his defence and, if he will not be able to do so, the degree to which his ability to do so is compromised.
- (e) In considering the competing interests of the parties the magistrates should examine the likely consequences of the proposed adjournment, in particular its likely length, and the need to decide the facts while recollections are fresh.
- (f) The reason that the adjournment is required should be examined and, if it arises through the fault of the party asking for the adjournment, that is a factor against granting the adjournment, carrying weight in accordance with the gravity of the fault. If that party was not at fault, that may favour an adjournment. Likewise if the party opposing the adjournment has been at fault, that will favour an adjournment.
- (g) The magistrates should take appropriate account of the history of the case, and whether there have been earlier adjournments and at whose request and why.
- (h) Lastly, of course the factors to be considered cannot be comprehensively stated but depend upon the particular circumstances of each case, and they will often overlap. The court's duty is to do justice between the parties in the circumstances as they have arisen." 10. This trial has already been delayed once and the defendant has been in custody now for some 8 months', as Advocate O'Donnell pointed out, he has had this period to prepare his defence in relation to the first indictment and he has been assisted by defence counsel. The information that I have been given in relation to the proposed Jersey witnesses is simply too vague to justify the further adjournment of this trial. I do not know all of their names, where they live, what they will say and whether they will actually give evidence. Transcript of telephone calls 11. The defendant spoke to a potential defence witness, Witness F, in January this year. She is or was, apparently a close friend of the complainant. She told the defendant on the phone, that she had been threatened and would no longer give evidence for him. Advocate Hall told me that she had earlier spoken to Witness F who had confirmed the evidence she would give, although I have not been given any statement. It would seem that the Police have since approached her, and she has refused to co-operate with them in any way. As the defendant is now accused of interfering with Crown witnesses, he says it is vital that he be able to show that his witnesses have also been interfered with. Accordingly Advocate Hall has given the Crown notice only yesterday, that the defence want access to the transcript of that telephone conversation he had with her from the prison, and this from the prison authorities who record all of those telephone calls. Advocate Hall had not applied to the Crown earlier for this transcript as she assumed that the Crown had the transcripts of all of the calls the Defendant had made. No real explanation has been given for this request being made so late. No application has been made by the defence directly to the prison governor for this transcript. 12. Advocate O'Donnell explained to me the procedures that have to be complied with for the Police to get access to the defendant's personal calls, aimed it seems to me at protecting his private life, none of which would presumably apply if the defence were to seek that information. But in any event Advocate O'Donnell says that the

transcript of the call would be inadmissible as hearsay. The defendant could not give evidence as to what she said, and could not adduce a transcript for the same purpose. Advocate Hall thought the transcript might be admissible under Article 64(3)(b) of Police Procedures and Criminal Evidence (Jersey) Law 2003 but on examining it with her it is clear that those provisions have no application. As Advocate O'Donnell says, the first step ordinarily would be to get a statement from her as to why she is no longer prepared to give evidence, but she will not apparently do even that. 13. At the moment I do not feel I can take this particular matter any further and as it stands it cannot justify an adjournment of the trial. Video Link 14. This application for the evidence of the three Portuguese resident witnesses to be heard by Skype or video-link was made at very short notice yesterday, giving counsel very little time to research and to assist me on the applicable law. Advocate Hall simply relied on Article 14(A)(1) of the Criminal Justice (Evidence and Procedures) (Jersey) Law 1998, which is in the following terms:- "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 in any proceedings on an appeal arising from such proceedings, if the witness is outside Jersey." She said that civil cases on the use of a video-link are of little relevance. Advocate O'Donnell cited authority from civil cases, which by analogy she felt were helpful and I agree that they are. In the case of the Federal Republic of Brazil & Ors-v-Durant International Corporation & Ors

- [2011] JRC 237, Page, Commissioner said this at paragraph 4:- "Jurisdiction: There appears to have been only one occasion on which the Royal Court has been required to deliver a reasoned judgment on a contested application for the admission of evidence by video-link, that of McCann v. Bateman
- [2005] JRC 027B, a personal injury claim in which I gave leave for one of the defendants to give evidence by such means from Australia. The material passages from the judgment relied on by Miss Jordan read as follows:- "Newman J., as it seems to me, rightly emphasised [in the English case of Polanski v. Conde Nast Publications Ltd
- [2003] EWCA Civ 1573] that "No defined limit or set of circumstances should be placed upon the discretionary exercise to permit video link evidence", the objective being to enable the court to do justice (para.9)..... As far as guiding principle is concerned, the approach to be followed in the Royal Court appears to me to be capable of being expressed very shortly. The normal practice and expectation of the court is that witnesses should be present in court to give evidence in person: giving evidence by video-link is not yet a mere optional alternative. The court does, however, have a discretion to permit the use of a video-link where there is good reason to do so and it is judged that the interests of justice - as between the immediate parties and in the wider sense of the expeditious and efficient management of litigation - would best be served. How that discretion is exercised in any particular case will depend on the circumstances of the case as a whole and the court's assessment of the justice of the matter" (paras.6 & 7)." In Dalemont Limited v Senatorov & Ors

- [2013] (1) JLR Note 14, it was held:- "When considering whether it was necessary for a witness to appear in court in person or by video link, the court would consider a range of factors including: (i) the identity of the witness; (ii) the relevance of the evidence to the case; (iii) the reasons why the witness would find it difficult to appear in court personally; and (iv) how the case would proceed in his absence. It was a case management decision for the trial judge as to how he could best deliver justice in a particular case.... Whilst it was possible to do justice by hearing evidence by video link, it was preferable where the evidence was directly relevant to an important issue in the case to have the witness appear personally if possible." Advocate O'Donnell did also draw my attention to one criminal case *R v Diane*
- [2009] EWCA Crim 1494 , where the English Court of Appeal overturned a conviction where the evidence of a prosecution witness had been heard by way of telephone conference call, holding as follows:- "In a trial in the United Kingdom, the giving of evidence by a witness abroad by telephone conference is neither authorised by statute nor is there any precedent for evidence to be given in this way. Article 11(1) of the European Convention on Mutual Assistance in Criminal Matters 2000 does provide that where a person in one Member State has to be heard as a witness in another Member State, the latter may request the assistance of the former to enable to hearing to take place by telephone conference. However, this provision is subject to national law providing for evidence to be given in this way. The statute giving the force of law to the Convention in the United Kingdom is the Crime (International Co-operation) Act 2003. Sections 30 and 31 of the 2003 Act provide only for witnesses present in the United Kingdom to be heard in other countries by telephone link. No provision is made for hearing the evidence of witnesses abroad by telephone for trials in the United Kingdom. The intention of the legislature in so providing is entirely consistent with the long traditions of the common law that witnesses must appear in person to give their evidence, save where there are hearsay exceptions, and the modern elaborate and detailed provisions that permit evidence to be given by video link but not by telephone." My view is that the same position pertains in this jurisdiction. 15. We have no rules governing an application under Article 14A but the application by the defence was entirely devoid of what might be considered essential details, namely firstly, the full names and addresses of the witnesses, their dates of birth and passport numbers, so that the Crown can carry out the usual checks; secondly, where in Portugal they will give their evidence from and how it will be supervised and secured; and thirdly, how that evidence would be transmitted to Jersey and seen by all of the relevant parties involved in the trial. The suggestion of Skype was soon abandoned and I agree with Advocate O'Donnell that such an insecure process would be wholly unsuitable. In any event the 1998 Law permits only the use of live video-link. No discussion with the technical department, who advise the Royal Court on these matters, had been undertaken by the defence to see what was possible. Put simply the application was not in a state where it could be taken forward. 16. In my view and in the short time available it seems to me that when dealing with overseas evidence for use in criminal proceedings in Jersey, it

has to be undertaken within the proper frame work and that would involve an application by the defence to the Bailiff under Article 4 of the Criminal Justice (International Co-operation) (Jersey) Law 2001 for a letter of request to be issued to the appropriate body in Portugal requesting it's assistance in obtaining the evidence of these witnesses. That is not been done and I have no information at all as to how long that would now take, but if the trial is to be adjourned to enable this to happen, then it would be an open-ended adjournment for what could well be a considerable period of time. This assumes that the evidence of these witnesses, even if it were possible for it to be obtained through the proper channels, and with the appropriate safe-guards, would be admitted by the Court. I am conscious of the long traditions of the English Common Law and the Jersey Customary Law that witnesses must appear in person to give their evidence. That must particularly be the case when these witnesses from the little that I know as to what they may say, will be attacking the credibility and reliability of a key Crown witness. When I link that the paucity of information that I have been given as to what these witnesses would say, I conclude that an open-ended adjournment to enable their evidence, whatever it may be, to be heard, is not justifiable. 17. For all these reasons I reject the defence application for an adjournment of the trial. Authorities Crown Prosecution Service v Alan Picton

[2006] EWHC 1108 (Admin) . Police Procedures and Criminal Evidence (Jersey) Law 2003. Criminal Justice (Evidence and Procedures) (Jersey) Law 1998. Federal Republic of Brazil & Ors-v-Durant International Corporation & Ors

[2011] JRC 237 Dalemont Limited v Senatorov & Ors

[2013] (1) JLR Note 14 R v Diane

[2009] EWCA Crim 1494 Criminal Justice (International Co-operation) (Jersey) Law 2001. Page Last Updated: 18 Jan 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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