

JERSEY / JUDGMENT

AG -v- U [2011] JRC 053 (08 March 2011)

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JUDGMENT

THE DEPUTY BAILIFF: 1. On 10 th November, 2010, the accused was convicted on Counts 1 to 22 inclusive and Count 24 of the Indictment laid against him on 9 th July, 2010. The Court then remanded the accused in custody to 19 th November when a date would be fixed for the accused's trial on the statutory offences charged as Counts 25 to 40 inclusive on that Indictment. 2. The Act of 10 th November records that on that day, in accordance with the Crown Advocate's conclusions, the Court gave leave for the statutory offences (wrongly described as Counts 25 to 44) to be held on file, and the accused was remanded in custody for sentence before the Superior Number on 28 th February, 2011, in respect of Counts 1 to 22 inclusive and Count 24 on the Indictment, of which the accused had been convicted. 3. At the end of the trial before the jury, the Crown had indicated its intention to proceed with the statutory offences. It is clear that there had been a change of mind on the part of the Crown between that date and 19 th November. The Crown's view was apparently that the offending reflected by counts 1 to 22 and Count 24 indicated a serial child offender, and there would be little public interest in proceeding at that time with the statutory offences because there would be no impact upon the sentence which would ultimately be imposed. The Crown's view at that time was that in the round the administration of justice would be adequately achieved by proceeding in the way then proposed to the Court. 4. Subsequently, it has become clear that there is evidence in relation to the second group of convictions, namely on Counts 13 to 22, and Count 24, which indicates that the unidentified males referred to in these various customary law offences were in fact one male, who has been identified and who had in fact reached the age of 16 years at the time the photographs were taken, those photographs being the only evidence against the accused in relation to those charges. That new evidence suggests that the convictions may well be set aside by the Court of Appeal, and we understand that the appeal which is now being brought against those convictions will not be opposed by the Crown. 5. In a nutshell, the Crown's submissions are that if the Court does not give leave to proceed with the counts which were left on the file and which are the subject to this application, justice will not be done because the public will not be aware of the nature of the accused's overall offending and secondly the sentence will not adequately reflect the totality of that offending. 6. The Court therefore has been asked to exercise its discretion to grant leave to proceed with some of the counts which were left on file. 7. We use the expression "some of the counts" because the Crown does not intend to proceed with all the counts which were left on file. That is because some of those counts related to the particular offending which

was the subject of Counts 1 to 12 and, in one sense, duplicates that offending. Others of them related to the sexual activity with the now identified person who, it transpires, had attained the age of 16 at the time the photographs were taken, and therefore the accused would have been acquitted on those counts. The prospective Indictment which the Crown has put before us contains 12 counts. Six of them thus relate to counts which were left on the file and the other six are new charges which could have been brought earlier but which were not proceeded with at the earlier stage, for whatever reason. For the avoidance of doubt, this judgment concerns only the six charges which were left on file and were the subject in part therefore of the Court's order of 19th November, 2010. 8. In his well presented argument, Advocate Blakeley submitted that the Crown's approach was simply not fair. He submitted that until the 19th November, the Prosecution had always made it plain that it would proceed with the statutory offences. Accordingly, when convicted on the customary law offences on 10th November, 2010, the accused had known he was then facing a further trial on the statutory offences. At that time, he had also known that the Prosecution had other images which were not the subject of any charges. When the Crown changed its position on 19th November, the accused could reasonably have concluded that he simply faced sentence for the charges on which he had been convicted. 9. Advocate Blakeley also submitted that the Crown had taken a long time to decide on its next steps. A witness came forward on 18th November, 2010, a day before the statutory offences were left on file, to identify a "victim" of Counts 13 to 22 and Count 24. Nonetheless it was not until mid January 2011 that the Defence was informed of the new evidence. As a result the sentencing date on 28th February has been put off, and if there is to be a second trial, the sentence will not be passed until June. That will be an eight month wait since the time of conviction before the jury and he pointed out that the Bailiff had understandably expressed concern on 19th November, when the outstanding counts were left on the file, at the delay until February, which was only three months, before sentence would be passed. As Advocate Blakeley put it, lawyers may be used to changes of circumstances but laymen are not. The accused thought the other charges had gone by the wayside but suddenly it is now proposed that they be re-instated. 10. The Court heard argument upon 8th March and gave its decision that it exercised discretion to permit the Crown to bring the six counts which were in the draft Indictment and which had been left on the file on 19th November, 2010. The reasons for the decision were reserved and we now hand them down. 11. The practice of leaving counts on the file is not one which is frequently adopted. Understandably both the Crown and the defendant normally wish to resolve the outcome in relation to counts on an Indictment which have been laid. Sometimes however, it may suit both parties to do so. The Crown may consider that it is in the public interest not to proceed with a trial because the costs of doing so are not justified when set against the convictions which have already been obtained and the sentence which is likely to be imposed. The accused may consider that while he would not plead guilty to the counts which are left on the file, he does not want to face a further trial process, with the additional risks that such a process involves, including the risk that, despite the Crown's view of the impact on sentencing, there would in fact be a longer sentence imposed if he were to be convicted. At all events, it is open to the accused to submit to the Court that where the Crown seeks to leave counts on the file, the Court should not give such leave, but should require the Crown to elect either to abandon the counts on the Indictment by

having a not guilty plea formally accepted, or to proceed with the trial. 12. The practice of leaving counts on the file was considered in the Divisional Court in England and Wales in *R-v-Central Criminal Court ex parte Raymond*

(1986) 83 Cr. App. R. 94, where Woolf, L J said this:- "I regard it as important, as Mr Laws submits on behalf of the Director of Public Prosecutions, to analyse the nature of the Order that an indictment should lie on the file. 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 succeed on an 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 (laid down by the House of Lords in *Connelly-v-DPP*

(1964) 48 Cr. App. R. 183; [1964] AC

1254) 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. " 13. The Divisional Court decided that it did not have jurisdiction to deal with that particular application by way of judicial review, and so it did not express any views as to the considerations which ought to govern the exercise of discretion by the Court considering an application for leave to proceed with counts on an Indictment which have been left on the file. However, in the argument before us both Counsel approached the matter on principles of fairness. In other words, the Court was asked to exercise its discretion as to whether it was fair to the accused and to the public to allow the Crown to proceed with what previously it had not sought to take forward. We consider that that approach is correct. We have to balance whether it would be fair and not oppressive to the accused to allow the outstanding counts to be taken forward. In making the assessment we have to have regard also to the fairness to any victims of the offending, and to the public which has an interest in ensuring that those who have committed criminal offences are dealt with fairly by the Courts and are given a proper sentence which reflects the offending of which they have been charged and convicted. 14. On 19 th November, 2010, the Crown Advocate (not Mr Baker) used language which could possibly be criticised as being loose. He said, having introduced the matter:- "It is proposed, given the likely sentence in relation to Counts 1 to 23 that Counts 25 to 40 be allowed to lie on the file marked in the usual way and not to be proceeded with. On that basis there will be no second trial and accordingly I invite the Court to remand U to 28th February at 10 o'clock for sentencing before the Superior Number." 15. We have considered whether that language could reasonably give the accused grounds for thinking he would never be tried on the remaining counts. It appears to us that we must assume that the accused was given proper advice for this

purpose. The advice would have been that, properly construed, all the Crown Advocate meant was that it was unlikely that there would be a second trial but if circumstances changed, perhaps because there had been a successful appeal, the file had been marked in the usual way, and the counts therefore might be resurrected. 16. We take note that there will be a longer than usual delay between the date of conviction on the customary law offences and the date of sentence. If the sentencing Court considers that that is a material matter to be taken into account, it can of course be then taken into account and reflected in the sentence which is then imposed. 17. We also take into account that the application to bring these offences back is brought quite swiftly after the application was made to have the counts left on the file. As is clear from R-v-Central Criminal Court ex parte Raymond , the longer the period between the time when the counts are left on the file and the time the Crown applies for leave to proceed with them, the less likely it will be that such leave will be given, because it would be more likely to be oppressive to the accused at that stage. 18. Mr Blakeley in effect asserts that the Crown have blown hot and cold over this matter and therefore should not be given leave to proceed. However that criticism is inevitable given the process which we are now asked to consider namely one where the Crown seek leave to leave the counts on the file and subsequently seek leave to proceed with them. The critical question is whether there has been a change of circumstances which mean that the interests of justice will be best served by allowing the counts to be revived. In our view, notwithstanding the submissions of Mr Blakeley, having regard to the relatively short period since it was ordered these counts be left on the file, the fairness to the victims of abuse in relation to the internet offending, who are entitled to expect those who view the images (not originally made by this accused) of the abuse committed upon them be dealt with, and also taking into account the fairness to the public in ensuring that this accused faces a proper sentence for the totality of his offending, whatever it may be, the right course is to allow the Crown to proceed with the six counts left on the file on 19th November, 2010, which it now seeks to revive. 19. We also take into account that there may be consequences under the Sex Offenders (Jersey) Law 2010 in relation to the decision to take forward prosecutions for offending of this kind. The internet offending might give rise to a different sort of restrictive obligation under the Sex Offenders (Jersey) Law 2010 than would be appropriate for the customary law offences. This is a matter which the Attorney General could reasonably take into account when deciding whether or not to indict this accused for the offending set out in the draft indictment, which has not previously been the subject of any previous charge, and the fact that the Sex Offenders (Jersey) Law 2010 has only recently come into force might be a relevant factor in the exercise of that prosecutorial decision. If such a prosecution were to be brought, and the draft indictment shows that it is the Attorney's provisional intention to bring it, then there would seem no obvious reason why the counts which are currently left on the file should not be dealt with at the same time. 20. For each and all of these reasons, we resolved to exercise our discretion in favour of allowing the Crown to proceed with the six counts ordered on 19th November to be left on the file, namely Counts 25, 27, 29, 35, 36 and 37. 21. The accused was accordingly remanded in custody until Friday 18th March in order that the Indictment

could be laid formally and he would then have an opportunity of entering a plea.

Authorities R-v-Central Criminal Court ex parte Raymond (1986) 83 Cr. App. R. 94. Sex Offenders (Jersey) Law 2010. Page Last Updated: 07 Feb 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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