

JERSEY / JUDGMENT

AG -v- W [2014] JRC 066 (12 March 2014)

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JUDGMENT

THE commissioner: 1. The defendant stands indicted for seventeen counts of alleged sexual abuse involving three connected complainants, the earliest complaint going back some 53 years (1961) and the latest 40 years (1974). His trial was adjourned on 7 th November, 2013, and is now due to commence on the 7 th April, 2014. 2. On 12 th March, 2014, the court is sitting to hear an application by the defendant for the trial to be stayed as being an abuse of process. At the same time there will be further defence applications for the exclusion of the evidence of the witness C and for a stay in relation to six counts on the grounds of Autrefois Acquit. 3. The defendant applies for all of the applications to be heard on 12 th March, 2014, to be by way of preparatory hearing pursuant to Article 84 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("PPCE") which provides:- "84 (1) Where it appears to the Bailiff:

- (a) ...
 - (b) That a case is so complex or is a case the trial of which is likely to be so long that substantial benefits are likely to accrue from a hearing before the trial and for any of the purposes mentioned in paragraph (2), The Bailiff may order that a hearing (in this Part referred to as a "preparatory hearing") shall be held.
 - (2) The purposes are those of -
 - (a) identifying issues which are likely to be material to the verdict of the Royal Court or jury;
 - (b) assisting comprehension of those issues;
 - (c) expediting the proceedings before the Royal Court or jury;
 - (d) assisting the management of the trial."
4. Article 86(3) provides that at a preparatory hearing:- "The Bailiff may make a ruling as to any question as to the admissibility of evidence and any other question of law relating to the case." 5. There is a parallel and wider jurisdiction under Article 94(1) of PPCE for the Bailiff to make pre-trial rulings as to any question as to admissibility of evidence and any other question of law relating to the case concerned. The key difference in rulings under these two jurisdictions is that under Article 90 of PPCE an appeal lies to the Court of Appeal from any ruling of the Bailiff made in a preparatory hearing (with the leave of the Bailiff or the Court of Appeal). Under Article 90(2) of PPCE the trial shall not proceed until the appeal has been determined or abandoned.

There is always the possibility of a further appeal to the Privy Council. It follows therefore that in the case of rulings made at a preparatory hearing there is the potential for material delay in the case proceeding to trial. 6. Advocate Cadin referred me to the case of R-v-Z

- [2009] EWCA Crim. 2476 in which the judge had agreed with counsel on what was at most a three day trial to proceed by way of a preparatory hearing without any proper consideration of the requirements of the equivalent provision under English law (section 29 of the Criminal Procedure and Investigation Act 1996). The English Court of Appeal refused to hear the appeal. It held that the question for the judge was a straightforward one "was the case of such complexity, of such seriousness, or likely to be of such length, that substantial benefits are likely to accrue from a preparatory hearing?" 7. The Court of Appeal cited this extract from the judgment of Hughes LJ Vice President in R-v-CII
- [2009] EWCA Cri. 1793 at paragraph 24:- "i) Given the co-extensive powers of case management outside the preparatory hearing regime, courts ought to be very cautious about directing a preparatory hearing under section 29 CPIA or section 7 CJA 1987, in particular, the desire of one party to test a ruling by interlocutory appeal is not a good enough reason for doing so, unless the point is one of the few which is genuinely suitable for that procedure (see para 21 above) and there is a real prospect of such appeal being both capable of resolution in the absence of evidence and avoiding significant wastage of time at the trial." 8. A similar problem arose in the case of R-v-Ward
- [2003] EWCA Crim 814, to which Advocate Baker referred, where again a preparatory hearing had been ordered by the judge at the request of counsel without consideration of the requirements. Quoting from paragraph 23 of the judgment:- "23. Nothing said by the judge in any way enables one to conclude that he had addressed his mind to the relevant consideration of whether this was a long or complex case, whether by reference to the indictment or to the evidence in support of it. The judge clearly thought it desirable that a ruling was given in advance of the trial on the issue of law but there was power to give such a ruling under s.40 of the Criminal Procedure and Investigation Act 1996 without the need to resort to a preparatory hearing which was only permissible in the limited circumstances to which we have referred. Thus there was no benefit to be gained by ordering a preparatory hearing in the sense suggested in s.29." 9. In the case before me the defendant's trial is scheduled to last 8 days. Advocate Baker informed me that there will be four prosecution witnesses namely the three complainants and a police officer. No issue of law arises on the face of the indictment - the offences and their respective ingredients are all well established. 10. Advocate Cadin did not argue that this was a case that was likely to be so long that substantial benefits would accrue from a preparatory hearing. He relied on the first part of the test namely that the case was so complex that such benefits would accrue. That complexity he said arose out of the following (which I give by way of summary only):- (i) The defendant was 75 years old; (ii) There were 17 counts covering the period 1961 to 1974; (iii) There were three vulnerable complainants (as described by the Crown); (iv) The complainants would inevitably be cross-examined

extensively about previous alleged lies and collaboration; (v) There was an argument as to Autre Fois Acquit in respect of six counts; (vi) The application to exclude the evidence of C raised novel and important matters of law of such complexity that expert testimony may be necessary with the outcome of any decision having a consequential impact on the case as a whole and the safety of any convictions; (vii) There were issues concerning one of the complainants which had been rendered insurmountably complex as a result of the Crown's decision not to pursue a complaint in relation to her daughter; and (viii) There were arguments as to prosecutorial misconduct as to the disclosure obligations and investigation. 11. The case is undoubtedly serious and I accept that some of the issues will be difficult to decide. In the simplest of criminal cases difficult issues can arise for determination, for example on the admissibility of evidence, but difficult issues do not render a case complex. Reference was made to the case of AG-v-Bhojwani

[2008] JRC 172A . That was unquestionably a complex case (the trial lasting six weeks) in which issues arose on the face of the indictment as to the ingredients of the offences charged and even whether such offences existed under Jersey law. 12. Advocate Cadin argued that by allowing all of these issues to be dealt with by the Court of Appeal, we would get the house in order so to speak ready for the trial, but it seems to me that this argument could be applied to every criminal case. It was clearly not the intention of the legislature that the Court of Appeal should be used routinely in this way. Preparatory hearings are to be restricted to cases which come within the requirements set out above. 13. Advocate Cadin further argued that whilst the benefit of an ability to appeal against a decision on a point of law may often be outweighed by considerations of delay and witness care, in cases such as the current one, there are important issues that can only be fairly determined before the tribunal of fact is seized with the matter and in respect of which the ability to appeal is crucial to the interests of justice. By way of example he said that if a decision was made (wrongly) to admit the testimony of C and the trial were to continue to a conviction (in respect of any of the complainants) and an appeal court later determined that C's evidence ought not to have been admitted, then he said the only remedy available to the Court of Appeal would be a retrial which would be far from satisfactory both for the remaining complaints and the defendant. Similar issues would arise where counts should have been stayed on the basis of Autrefois Acquit. 14. A retrial is not the only remedy available to the Court of Appeal. Under Article 26(1) of the Court of Appeal (Jersey) Law 1961 the consequence of a successful appeal in an ordinary case is that the verdicts or some of them are set aside. It is under Article 28(1) that the Court of Appeal can order a retrial but only if the interests of justice so require. The desirability of avoiding the possibility of a successful appeal and potential retrial is an argument that can be made in every criminal case and cannot be a justification for ordering a preparatory hearing. 15. It comes down to whether the requirements of Article 84(1)(b) of PPCE are met namely that this case is so complex that substantial benefits would accrue from a preparatory hearing. I conclude that although there are a number of difficult decisions that will have to be made, this is not such a case. The hearing on 12 th March, 2014, will therefore proceed by way of a pre-

trial hearing. Authorities Police Procedures and Criminal Evidence (Jersey) Law 2003. R-v-Z [2009] EWCA Crim. 2476. Criminal Procedure and Investigation Act 1996. R-v-I-I and Others

[2009] EWCA Crim 1793 . R-v-Ward [2003] EWCA Crim. 814. Attorney General-v-Bhojwani

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Prepared on 26 October 2026 · Esheria