

JERSEY / JUDGMENT

AG v Warren and Others [2009]

JRC 166 (19 August 2009)

[2009] JRC 166

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JUDGMENT

THE commissioner: 1. I have to rule on a short but important point of statutory interpretation arising out of the provisions of a new law, the Criminal Offences (Jersey) Law 2009 ("the 2009 Law"). Although adopted by the States on the 27 th February, 2007 this Law was only sanctioned by Order of Her Majesty in Council on the 8 th July of this year, and it came into force on the 31 st July. It has, or may have, a significant effect on the course of the proceedings in the forthcoming trial due to commence on the 16 th September and on other cases awaiting trial. 2. I am grateful to all parties for the speed with which they have reacted to requests to provide skeleton arguments in time for today's hearing and to Her Majesty's Attorney General for appearing to argue the case on behalf of the Crown. I am concerned only with Article 1 of the 2009 Law. The heading is inelegantly expressed and includes duplication of the word "conspire". The body of the Article provides as follows, so far as is material to the present application:- "1 (1) A person who -

- (b) conspires, ... to commit a statutory offence, is guilty of an offence and is liable to the same penalty as a person would be for the statutory offence.
- (2) A person alleged to have committed an offence by virtue of paragraph (1) shall be triable in the same manner as a person would be tried for the statutory offence.
- (3) This Article does not affect proceedings for an alleged offence at customary law -
- (b) of conspiring, ... to commit a statutory offence, arising out of an act done by a person before the commencement of this Law.
- (4) However, the person is triable in the same manner as a person would be tried for the statutory offence." 3. The Attorney General submits that paragraph (1) creates a new statutory offence, whereby inchoate crimes are to become themselves statutory offences, which are liable to the same penalty as the statutory offence which there was a conspiracy to commit. Paragraph (2) provides that a person who commits this new statutory offence shall be triable in the same manner as a person will be tried for the statutory offence, that is to say by a Judge sitting with Jurats rather than with a Jury. 4. So far so good. There is no ambiguity ; the intention of the legislatures is clear. The dispute in the present hearing is concerned with the meaning to be attached to the remaining paragraphs (3) and

(4) and their inter-relation. 5. Thus paragraph (3) provides that the Article does not affect proceedings for an alleged offence at customary law of conspiring to commit a statutory offence arising out of an act done by a person before the 31 st July, 2009. This of course covers the position of the defendants in the present case. What does it mean? The Attorney General submits that the effect of this paragraph is to retain the character of offences committed before the commencement of the Law in that they remain customary offences and are not converted into the new statutory offences created by paragraph (1). They are subject to the same penalty as before. That is the extent of the effect of the paragraph. 6. A further submission, made in particular by the Amicus appearing to assist the Court in view of the fact that the defendant Warren remains unrepresented, is that the use of the word "proceedings" in this paragraph is such as to preserve the legal effect of any proceedings held in relation to the relevant offences prior to the 2009 Law coming into effect. This, it is submitted, would include, for example, the charging of the defendants, any rulings made at preparatory hearings, and in particular any election by a defendant of mode of trial. 7. The nub of the debate before me related to the effect of paragraph (4) upon the mode of trial. The paragraph perhaps unusually starts with the word "However" . The Oxford Dictionary defines this word as one "used to introduce a statement contrasting to a previous one." It is synonymous with the words nevertheless or nonetheless. The paragraph clearly refers to mode of trial. The Attorney General and the Amicus, at least, agree that paragraph (4) must refer back to paragraph (3). The person referred to in paragraph (4) can only be the same person referred to in the last line of paragraph (3), immediately before it, that is to say someone such as these six defendants who, the 2009 Law provides, are still to be regarded as having committed offences at customary law. 8. That being so I conclude that paragraph (4) provides that these defendants are triable as if they had committed a statutory offence, that is to say by myself sitting with Jurats rather than by myself and a Jury. At the conclusion of her address to me, Advocate Fitz, on behalf of the defendant Welsh and the other represented defendants, felt obliged to concede that this paragraph gives me a discretion to direct trial by Jurats. 9. However, if I may borrow a word from the statutory draftsman, Advocate Fitz submits that I am not bound to take that course and that I should refrain from doing so for a number of reasons. In any event she quarrels with the Attorney General's submission that I am obliged to direct trial as if for a statutory offence, that is to say by myself and Jurats, and that I have no discretion to direct otherwise. Advocate Fitz submits that that would lead an illogical state of affairs. She cites the example of a trial which had already started with a Jury empanelled which would have to be aborted. She submits that in the present case the trial has already begun, I have already conducted preparatory hearings and I am reminded that by Article 85 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 it is provided that the trial shall start with that hearing. It is submitted that the defendants have elected for a trial by Jury, as is their fundamental right, that such a trial has been ordered and that it is shortly to commence. Therein lies the problem. 10. The Attorney General submits that the trial has not really started and will not get under way until, and unless, a Jury is empanelled. He submits that the purpose of Article 85 was to ensure uniformity of case management so that the preparatory hearings and the eventual

trial will be dealt with by the same Judge. The Attorney General relies on the decision of the English Court of Appeal (Criminal Division) in *R v H*

[2006] 1 Cr App R 4, where preparatory hearings had been held before new provisions as to the introduction of hearsay evidence came into force. It was held that those provisions were applicable to the trial before the Jury because the proceedings in question did not begin until the Jury was empanelled or the Judge embarked on his task. 11. Both main parties to the application referred me to passages in *Bennion on Statutory Interpretation* referring to the retrospective effect of Acts. Advocate Fitz referred to passages on page 316 to the effect that it is a fundamental rule of English Law that no statute shall be construed to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. The Attorney General on the other hand referred me to a passage on the following page to the effect that there is no room for presumption where the enactment is expressly stated to be retrospective. 12. I was also asked to consider the questions of benefit to one person as opposed to detriment to another. Advocate Fitz's submission was that the defendants would suffer detriment if they were to be deprived of their right to trial by Jury. The Attorney General responds that whether the case is tried by Jury or Jurats the defendants will get a fair trial. I agree with that. In any trial over which I preside I shall ensure it. 13. Having regard to Advocate Fitz's ultimate concession that I am given at least a discretion in the matter it is not clear what relevance all this has. As to the question of discretion, I note that in paragraph (2) the expression used is "triable in the same manner" in a context where there can be no question of the exercise of a discretion. The same expression occurs in paragraph (4). In my view I do not have a discretion. The natural meaning of the language used in paragraph (4) is that these defendants are triable, and I interpret that as meaning to be tried, as if they had committed statutory offences. Incidentally, though I do not need to look at it in order to reach that conclusion, the *Projet de Loi* makes it clear that it was the intention of paragraph

- (4) to require the trial to take place in that way. Accordingly I conclude that the 2009 Law implicitly amends Article 1 of the *Loi (1864) Régplant la Procédure Criminelle* to that extent. 14. I make it plain that I have read the helpful submissions made in writing on behalf of Mr Warren, but I regret that I cannot accede to them. In particular I do not agree that my decision will give rise to the difficulties referred to in paragraph 6 of the document placed before me. Thus I direct that the forthcoming trial of these defendants is to take place before me sitting with Jurats. I do not regard myself, as I have made it plain, as having a discretion in the matter, but if I did I would exercise it in the same way. (Leave for appeal is sought on behalf of all defendants). 15. Leave is granted on condition that notices of appeal are filed with the Royal Court by close of business on Friday 21 st August. *Authorities Criminal Offences (Jersey) Law 2009. Police Procedures and Criminal Evidence (Jersey) Law 2003. R v H [2006] 1 Cr App R 4. Bennnion on Statutory Interpretation. Loi (1864) Régplant la Procédure Criminelle.* Page Last Updated: 15 Jun 2015 [BAILII: Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

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Prepared on 28 October 2026 · Esheria