

JERSEY / JUDGMENT

Arthur -v- AG [2016]

JCA 098A (26 May 2016)

[2016] JCA 098A

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Court of Appeal 26 May 2016 Before : Sir David Calvert-Smith., President; Robert Logan Martin., Q. C., and; David Anderson., Q. C. Richard David Arthur -v- The Attorney General D. J. Hopwood, Esq., Crown Advocate. Advocate D. S. Steenson for the Defendant.

JUDGMENT

THE president: This is the judgment of the Court 1. In May 2015, the Applicant, Mr Arthur was arrested and charged with offences of fraud, fraudulent conversion and false accounting. The case was expected to proceed by way of old-style committal and the week beginning 30th November 2015 was set for this since the defendant had requested the attendance of witnesses. 2. Before that date two things happened. First, the Assistant Magistrate ordered a hearing to consider the question of the defendant's right to request an old-style committal and second, after the defendant had submitted his Skeleton Argument in support of his request, but before the Attorney General had responded, the Solicitor General wrote to the defendant's advocate, Advocate Steenson, who appears today, informing him that the Attorney General had decided to indict the defendant directly to the Royal Court. This power is a customary law power unique, as far as the Court is aware, to Jersey. 3. On the 3rd November, that letter was followed by a letter giving reasons for the decision. Thus it was that the case was next listed at the Royal Court before Mr Clyde-Smith, Commissioner, on 24th March, 2016. At that hearing Advocate Steenson argued that the Attorney General's decision to indict direct was flawed and should be reversed. The Commissioner accepted that the Royal Court had jurisdiction to review and if, so minded, to reverse the Attorney General's decision. He based his review on principles expounded by the Royal Court in AG v X

[2014] (1), JLR 293. Although he criticised the grounds put forward by the Solicitor General in a number of respects, he concluded that the balance of justice came down in favour of a line of proceedings now under weigh to continue. 4. On the 1st April, 2016, the defendant issued a Notice of Appeal against the Commissioner's decision and submitted six grounds in support of it. The Attorney General contests the right of the defendant to amount an appeal against the decision. The trial, originally fixed or at least anticipated to be heard, in September of this year has now been fixed for the 6th February, 2017. The Appeal was originally listed for hearing at this sitting of the Court of Appeal this week but in the light

of the new timetable the court decided it should decide the question of the right to appeal at this sitting and if it found there was such a right, that the substantive hearing of the appeal would be dealt with at the next sitting of Court of Appeal in July 2016. Accordingly we have heard argument preceded by short written submissions from the parties. 5. Advocate Hopwood for the Attorney General submits that there is no right of appeal against a decision of the Royal Court. In short, he submits that the Court of Appeal's ordinary jurisdiction in criminal cases is limited to that set out in Part 3 of Court of Appeal (Jersey) Law, 1961 , which provides for appeals against conviction and sentence. He submits that that interpretation is supported by Rule 3 of Court of Appeal Criminal Rules, , which provides that any appeal is to be initiated by the filing of a notice in "whichever of Forms 1 or 2 is appropriate". Form 1 is entitled "Notice of appeal or application for leave to appeal against conviction or sentence" and Form 2 "Notice of application for extension of time in which to appeal". 6. The Court of Appeal has an additional jurisdiction to hear interlocutory appeals in criminal cases in which the Royal Court has made an order under Part 10 of the Police Procedures and Criminal Evidence (Jersey) Law, 2003 ("PPCE"), bringing the case within the preparatory hearings regime provided for in the Police Procedures and Criminal Evidence (Jersey) Law. No such order has been made in this case and so the decision of a learned Commissioner was not made in the Court of such a hearing. 7. In addition, he submits that a case cannot be brought within Part 10 ex post facto . Part 10 is drafted in very similar terms to similar provisions of the English Criminal Procedure and Criminal Evidence Act 1996 . In that jurisdiction, it has been held that once a relevant ruling has been given at a pre-trial hearing, that hearing cannot retrospectively be ordered to have been a preparatory hearing (R v C [2011], 3 All ER 509,CA at paragraph 35). 8. In any event, no such application was made at the hearing or has been made subsequently and the only other route to appeal - not to this court but to the Superior Number - in a criminal matter is by way of the customary law petition of doléance. In this context, Advocate Hopwood cited the summary report of Attorney General v Michel and Gallichan

[2006] JLR N15 in support of his contention that the remedy will be available very rarely, not least because the accused must demonstrate that he has suffered a "grave injustice" and, importantly, that no other remedy is available. In this case, he submits as in that one, the remedy of an ordinary appeal under Part 3 of the 1961 Law would be available in the event of a conviction. 9. As a post-script on the issue of doléance , he referred the Court to Warren & Others v Attorney General

[2008] JCA 135 . In that case, the trial judge ordered that an application for a stay based on abuse of process be heard in a preparatory hearing and proceeded to refuse the stay application. This court had to decide whether it had jurisdiction to entertain an application for leave to appeal. In the event, the Court decided that the application fell within the definition of "question of law", within Article 86(3) of the PPCE and was therefore amenable to appeal under Article 90 of that Law. 10. He submits that it would be surprisingly if there were any other jurisdiction to appeal a refusal to stay, since no doubt one of the seven advocates

involved in that appeal, or the Court itself, would almost certainly have raised it. 11. In support of his contention that this Court has jurisdiction, Advocate Steenson submitted that, first, Article 30 of the Court of Appeal (Jersey) Law, 1961 "should cater for a situation like this one" and, second, that the alternative, namely, that the point could only be taken at this court following a conviction might create a situation in which a guilty person could overturn his conviction simply on the basis that the Attorney General had made an irrational decision to deny the accused the chance of an old-style committal and thus of hearing cross-examining and no doubt later, contrasting if he could, the evidence of witnesses who later gave evidence before the Royal Court. 12. Article 30 of the Law reads:- "General powers of court The Court of Appeal shall, for the purposes of and subject to the provisions of this Part, have full power to determine, in accordance with this Part, any questions necessary to be determined for the purpose of doing justice in the case before it." We are persuaded by the submissions of Advocate Hopwood. In short, the categories of case in which the accused can mount an appeal to the Court of Appeal are clearly defined and limited. It is impossible to bring this kind of decision within the parameters set by the Laws to which we have referred. Article 30 of the Law can only come into play if and when a case falling within the relevant provisions of that Law or the PPCE comes before the Court of Appeal. 13. The Court of Appeal has not therefore currently a "case before it", merely an application for leave to appeal. Accordingly, this application has to be refused, but as a post-script, a decision of the Attorney General is indeed capable of causing injustice to an individual, more so if he wishes, unlike this defendant, to submit the Magistrate's Court that he has no case to answer. However, it clear that the Jersey common law as set out by the then Deputy Bailiff in the Attorney General v X , to which we have already referred, and applied in this case by the Commissioner, allows the defendant to appeal such a decision to the Royal Court and that the standard set by that Court in determining such an appeal is lower for an affected defendant than that required, for instance, for an applicant for judicial review. 14. We would add that it is hard to believe that a failure to give the defendant the right to hear and cross-examine witnesses at committal would amount to much more than a make-weight ground in support of other grounds following trial and conviction before the Crown Court. 15. We would add further that the trial judge has ample powers to control the pre-trial and trial processes of any trial. That could in a suitable case possibly extend to acceding to an application for a witness' evidence in the first instance to be taken without being heard by Jurats or Jurors, depending on who were trying the case, in order to make up for a real difficulty caused to the defendant by his inability to cross-examine witnesses. Further, there is no property in a witness. 16. Finally, having read the papers which led to the hearing before the Commissioner, it does seem to us that the factors which may incline the Attorney General to adopt one course or another are far from clear. It may be that a short code or protocol would summarise the considerations which may provoke a decision to indict direct would help to guide individual advocates, and indeed the Royal Court, if such a decision were to be contested in the future. Authorities Attorney General v X

[2014] (1) JLR 293. Court of Appeal (Jersey) Law, 1961. Court of Appeal Criminal Rules, 1964. Police Procedures and Criminal Evidence (Jersey) Law, 2003. English Criminal Procedure and Criminal Evidence Act 1996. R v C [2011], 3 All ER 509 CA. Attorney General v Michel and Gallichan [2006] JLR N15. Warren & Others v Attorney General

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Prepared on 24 October 2026 · Esheria