

JERSEY / JUDGMENT

D v AG [2022] JRC 228 (24 October 2022)

[2022] JRC 228

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judgment

the deputy bailiff: 1. We heard this appeal by way of case stated pursuant to Article 37 of the Criminal Procedure (Jersey) Law 2018 ("the Law") last Monday, 17 th October 2022. Pursuant to Article 37 of the Law, a party aggrieved by, inter alia , an order made by the Magistrate may question it on the ground that it is wrong in law or in excess of jurisdiction by applying to the Magistrate to state a case for the opinion of the Royal Court. Pursuant to Article 38 of the Law on such an appeal, the powers of the Court are to: "(a) reverse, affirm or amend the determination in respect of which the case has been stated; (b) remit the matter to the Magistrate's Court, with its opinion thereon; or (c) make such other order in relation to the matter, including such order as to costs, as may seem fit." 2. The facts can be taken shortly. 3. The Defendant committed offences in respect of prohibited images of children contrary to the Protection of Children (Jersey) Law 1994 . The offences were committed on or before th September 2021 when the Appellant was aged 17. 4. He was interviewed by the police when he was 17 th in September 2021; in January 2022 and again in February 2022 when he was 18. Subsequently, he was charged at Court and at his first appearance at the Magistrate's Court when still aged 18, he pleaded guilty to the three offences and the Magistrate accepted jurisdiction. 5. The Appellant's plea of guilty attracted no publicity and an application was made for the Appellant's sentencing hearing to be held in private on grounds which we will consider in summary below. That application was refused by the Assistant Magistrate ("the Magistrate") on 31 st August 2022. 6. The Magistrate gave extempore reasons for refusing to hear the matter in private which he then supplemented when asked to state a case. He was asked to state a case on 6 th September 2022 and did so on 23 rd September 2022. 7. The Appellant's sentencing by the Magistrate has been adjourned pending the outcome of this appeal by way of case stated. 8. The Magistrate ruled that he had no power to grant that application. He held, inter alia , that there is no statutory basis for the granting of such an application; the Magistrate's Court as a creature of statute has no inherent jurisdiction and accordingly such a jurisdiction cannot be invoked. The Magistrate felt that the various statutes drawn to his attention did not give him the power to grant the application but, nonetheless, went on to consider the substance of the application if he was mistaken in his ruling on jurisdiction. He held that the principle of open justice was not displaced on the facts of this case by the evidence before him. He accepted that publicity may have an impact on the Defendant's family who are innocent parties, but that was insufficient for him to find that it was necessary in the interests of justice that the sentencing hearing take place in private. Accordingly, he held that even if he had the

power to grant the application, he would not have done so on the material available to him. 9. Further material has been filed by the Appellant relevant to this issue, particularly in the form of a statement from the Appellant's mother and a letter from a clinical nurse specialist at CAMHS (Child and Adolescent Mental Health Service). 10. The Respondent contended that the Magistrate was correct to reach the conclusions that he did. The Appellant, in the skeleton argument filed for the purpose of the appeal, argued that the Magistrate was wrong in law to find that he had no power to order that the sentencing hearing take place in private in this case, and that this is an exceptional case where the interests of justice outweigh the public interest in open justice so as to permit, indeed require, the Court to order that hearing take place in private. 11. We will deal with each argument and our decision as follows. Whether the Magistrate's Court has the power to hold sentencing hearings in private 12. It was accepted that there is no express statutory basis for such a finding and that the Magistrate's Court, unlike the Royal Court, has no inherent jurisdiction of its own. 13. However, we are satisfied that the Magistrate's Court does, in the exercise of its case management powers, have the power to order that a sentencing hearing takes place in private. We make this finding for the following

reasons.

14. First, under the Law, the Magistrate's Court has extremely wide case management powers. Pursuant to Article 2 of the Law, the 'overriding objective' is to ensure that criminal cases are dealt with 'justly'. 15. 'Justly' is considered in Article 3 of the Law under the title 'Implementation of the overriding objective'. Dealing with cases justly includes, inter alia, 'recognising the right of a defendant, particularly those granted under Article 6 of the European Convention on Human Rights...'. 16. Further, under Article 3(2)(c), dealing with a case justly also includes dealing with it in ways that take into account 'the severity of the consequences for the defendant and for others that are affected...'. 17. The obligation of the Court under Article 7 of the Law is to 'further the overriding objective by actively managing cases in criminal proceedings'. Pursuant to Article 9, the Court 'may give any direction and take any step actively to manage a case unless that direction or step would be inconsistent with any rule made under this Law or provision of this Law or any other enactment'. Article 9(2) goes on to provide a number of examples of case management powers including the power on the part of the Court to give directions at hearings 'in public or private'. Such a directions hearing would not on its face extend to a substantive hearing such as a sentencing hearing, but it is plain from the Rules made under the Law that hearings of application, for admission of bad character or hearsay evidence may take place in private. 18. Further, in respect of the Defendant's Article 6 rights under the Convention, we remind ourselves that under Article 4 of the Human Rights (Jersey) Law 2000, legislation must be read and given effect in a way which is compatible with Convention rights. Article 6 of the Convention provides, where relevant, as follows: "Article 6 Right to a fair trial 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be

excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." 19. So, it is clear from Article 6 that the press and public may be excluded from all or any part of a trial (which includes the sentencing hearing) in certain circumstances. 20. Accordingly, we are satisfied that the Magistrate's Court, when exercising its case management powers, has the right to order that a hearing, including a sentencing hearing, be heard in private. Whether the circumstances of this case are exceptional so that the interests of the Appellant and his family outweigh the public interest in open justice 21. In order to consider this matter, it is first necessary to consider the appropriate principles for the Court to have in mind when considering this question. 22. The principle of open justice has long been part of Jersey law. In the leading civil case on the principle of open justice, *Jersey Evening Post Limited v Al-Thani*

- [2002] JLR 542, Bailhache, Bailiff, giving the judgment of the Inferior Number said: "14. The principle of open justice has not yet found statutory expression in Jersey but we have no doubt that it forms part of our law. Indeed it has been given judicial expression in numerous judgments of the Court. Like most great principles however it is subject to qualifications. 15. The speeches of their Lordships in *Scott v Scott* were considered in a recent judgment of this Court in *G v A*
- (2000) JLR 56 where Page, Commissioner usefully summarized the general principles - "(a) The general principle, beyond doubt, is that all proceedings should take place in public in open court. (b) The constitutional, legal and practical importance of this principle is such that it should not be displaced except for compelling reasons. (c) Whether to order proceedings in camera is something that must be determined in accordance with principle, and not on the basis of what the judge happens to consider convenient or reasonable. Potential embarrassment on the part of those who have to give evidence is not a sufficient reason, of itself, to justify a hearing in camera. (d) The question (of principle) that has to be asked can be expressed in various ways but was put succinctly by the Lord Chancellor, Viscount Haldane, in *Scott (or Morgan) v Scott* (2) as follows ([1913] AC at 439). "I think that to justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made". There are several classes of case in which it is well established that in camera hearings are often necessary. But they are no more than illustrations of this wider principle. (e) The test is a strict one and I quote again from Viscount Haldane ([1913] A. C. at 438): "But the burden lies on those seeking to displace ... [the general rule as to openness] in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity". 16. The aim

therefore is to do justice to the parties before the Court. That aim must not be stultified by a rigid application of the principle that justice must be done in public. Yet the principle of open justice should not be displaced as a matter of convenience or expedience, or to avoid embarrassment to one or more of the parties, but only if it is necessary to do so in the interests of justice." 23. As to criminal cases, a similar approach applies as reinforced by the terms of Article 6 of the Convention cited above. However, the principle of open justice is quite properly excluded by statute in respect of young offenders who appear before the Youth Court pursuant to the provisions of the Criminal Justice (Young Offenders) (Jersey) Law 2014 . Generally, persons under the age of 18 have their cases dealt with by the Youth Court and, indeed, where a person is convicted whilst under the age of 18, they may still be sentenced by the Youth Court (Article 26(2) of the 2014 Law). 24. As to the procedure in the Youth Court, under Article 27 of the 2014 Law it, in effect, sits in private as pursuant to Article 27(2): "(2) No person shall be present at a sitting of the Youth Court except - (a) members and officers of the court; (b) parties to the case before the court, their advocates and solicitors, and witnesses and other persons directly concerned in that case; (c) bona fide representatives of newspapers, news agencies or sound or television broadcasting companies; (d) such other persons as the court may specially authorize to be present." 25. Accordingly, the Youth Court is, subject to these statutory exceptions, a closed Court. By virtue of Article 73 of the Children (Jersey) Law 2002 , children, whether defendants or other participants in Court proceedings, are not identified and it is an offence to publish material likely to lead to their identification. 26. Our attention was also drawn to various provisions of the United Nations Convention on the Rights of the Child which are, or may be, of relevance owing to the fact that the Appellant was a child when he committed these offences, and the Court is principally concerned with the effect on his siblings on any publication. Article 16(1) provides: "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence....." 27. Article 40, which deals with criminal proceedings involving children, emphasises at Article 40(2)(vii) that a child must have their privacy 'fully respected at all stages of the proceedings' and Article 40(1) provides: "1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." 28. We also note that the UN Committee on the Rights of the Child in its General Comment number 10 in respect of children's rights in juvenile justice under the title 'The Upper Age-Limit for Juvenile Justice' states the following: "36. The Committee also wishes to draw the attention of States parties to the upper age-limit for the application of the rules of juvenile justice. These special rules - in terms both of special procedural rules and of rules for diversion and special measures - should apply, starting at the MACR [minimum age of criminal responsibility] set in the country, for all children who, at the time of their alleged commission of an offence (or act punishable

under the criminal law), have not yet reached the age of 18 years.

37. The Committee wishes to remind States parties that they have recognized the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in accordance with the provisions of article 40 of CRC. This means that every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice." 29. Plainly, the 2014 Law only applies to those under the age of 18 but, nonetheless, it is quite a proper exercise of the Court's case management powers to have cognisance of the fact that those who committed offences when they were under 18 but who, owing to the investigative procedure, are not sentenced until they are either 18 or 19, may, and in some circumstances should, benefit from the special procedural rules which the Court regards in the exercise of its discretion as appropriate in their particular cases. 30. We do not suggest that such an approach is appropriate in the circumstances of, to take an example, allegations of sexual abuse which come to light years, sometimes decades, later where the alleged offender is treated as an adult for the purposes of the trial process. 31. The Crown suggests that the correct approach in criminal proceedings when considering whether or not to disapply the principle of open justice is contained in the case of *R v Reigate Justices Ex Parte Argus Newspapers*

[1983] 5 Cr App R 181, where Ackner LJ gave the judgment of the Court of Appeal in a case where the magistrates excluded the public from part of a sentencing hearing at the request of the defence, where the defendant had a long record and assisted the police by giving information as a 'supergrass'. The defendant was living under an assumed name and was subject to threats to himself and his children. The decision of the magistrates was quashed on the footing that they had not been adequately advised as to the nature of their discretion. The Court of Appeal held that it would have been better for the prosecution and defence to have prepared an agreed statement setting out the defendant's assistance to the police which would not have been referred to in open court. Ackner LJ said: The law is most conveniently and succinctly set out in the following short passage in the speech of Lord Diplock in *ATTORNEY- GENERAL V. LEVELLER MAGAZINE LIMITED* [1979] . A. C. 440 at 449. "As a general rule the English system of administering justice does require that it be done in public: *SCOTT v. SCOTT*

[1913] AC 417 . If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this. However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the

particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be in order to serve the ends of justice. Our attention has inevitably been drawn to speeches in *SCOTT v. SCOTT*, to which I do not need to make detailed reference. There is, however, one passage in the speech of the Lord Chancellor, Viscount Haldane, at pages 437 to 438. which is particularly apposite to this case. He said: "As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning not on convenience but on necessity." 32. This approach is, in our view, a commendable one and we note that where there is to be a departure from the general rule of public justice, the departure must be justified and be limited to the extent that the Court reasonably believes to be necessary in order to serve the ends of justice. 33. However, it needs to be kept in mind that *ex parte in Argus* was decided before the implementation of the Human Rights Law in Jersey and the equivalent legislation in the United Kingdom. That provides not only for the rights of defendants as contained in Article 6, but Article 8 provides: "Article 8 Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." 34. It is these provisions in respect of the rights of the defendant and his family which are to the fore in respect of this application and such matters are to be taken into account when the Court exercises its discretion in accordance with Article 3(2)(c) of the Law as set out above. It is not necessary to set out in detail the matters of concern to the Appellant and his family. [Details redacted] . The author of the letter from CAMHS goes on to specifically consider the effect of exposure of the Appellant's offending and the attached publicity and how it might affect the children. [Details redacted] . 35. The mother of the [redacted] children is described as being 'already at breaking point' owing to the difficulties she has with managing her children. We have also read the moving statement of the mother which speaks of her home life being a constant struggle due to the children's complex mental health issues which she goes on to set out. In her statement, the mother describes the likely effect of publication of this case in relation to each child. She expresses the view that if her

[redacted] son's offending is to become common knowledge, his fragile siblings would become 'victims' of his offending which may lead the family to feel compelled to leave the Island. 36. We also have regard, although use of the utility of the same is somewhat limited as the statutory background is so different, to HM Courts and Tribunals ("HMCT") publication Reporting Restrictions in the Criminal Courts updated on 30 September 2022. Under the title 'Discretionary Reporting Restrictions', the guidance notes that the Court should scrutinise closely any application for discretionary reporting restrictions, even where restrictions are agreed by the parties. It is not open to the parties to waive the rights of the public by consent. Further, generally the Court should not impose reporting restrictions without first giving the media an opportunity to attend to make representations or, as soon as practicable, after they have been made. It will be a matter for the Magistrate, in this case, as to whether or not it is in the interest of the Appellant for sentencing to be adjourned for the purpose of the media making representations but, in the future, it will be appropriate particularly where the Court is making a statement of general principle for the first time (as in this case) for the media to be represented. We should have adjourned this application for the media representations but for the fact that we were dealing with a young defendant whose sentencing has already been delayed because of this issue. Further, there may be merit in convening the Law Society to canvas their views. 37. The HMCT guidance says that a defendant at a criminal trial must be named 'save in rare circumstances' and exercise of the equivalent English power to withhold matters for the benefit of a defendant's feelings, comfort or to prevent financial damage or damage to his reputation, would not be appropriate. However, it is noted: "In rare circumstances, it may be argued that the right to private and family life under Article 8 ECHR requires normal media reporting to be curtailed. Any such argument calls for a fact-sensitive investigation which starts with recognition that communication to the public of information about what happened in a criminal court ranks high on the scale of values and the onus lies on the person seeking to restrain publication to justify the restriction by clear and cogent evidence." Our decision 38. As we indicated in the course of argument, any exercise of the Court's discretion in this area will be heavily fact dependent. For example, if the appellant was being sentenced for an offence of violence against a person it would generally be in the interests of the public, including having regard to the interests of the victim/complainant, for the defendant to be named; and in the event of an offence such as rape, customary or indecent assault or its statutory equivalents, it will generally be in the public interest that the defendant be identified so that (inter alia) other victims/complainants have the opportunity to come forward. 39. We remit the case to the Magistrate for consideration as to whether or not, having regard to all the material now available in this case (which was greater than was available when the decision was made in August) and having regard to the principles that we have set out in this judgment, it is appropriate for the sentencing hearing to take place in circumstances equivalent to those that would be applicable in a Youth Court hearing, with the hearing taking place in private but representatives of the media, family and other approved interested persons present on the footing that the starting point is, and must be, that the case be heard in public save if

this is an exceptional case. When considering whether this case warrants such measures being taken the Magistrate will be entitled, indeed obliged, to take into account the provisions of Article 6, the fact that the Appellant was 17 when he committed these offences and therefore a child, the Article 8 rights of his siblings and mother and any other circumstances which the Magistrate regards as relevant. 40. It will be for the Magistrate to decide whether or not to convene representatives of the media prior to making the order in this case. Fresh evidence on appeal 41. Finally, we were asked to consider whether or not it was appropriate for us to receive, which we did, the further evidence filed on behalf of the Appellant since the decision under appeal was made. 42. Our attention was drawn to the decision of the Court of Appeal in *McKeown v AG*

- [2018] JRC 227A , where the Court noted, on an appeal against sentence in respect of new evidence which the appellant wished to adduce, the following: "6. The test for adducing new evidence was well summarised in the case of *Motofelea -v-AG*
- [2014] JCA 236 and it is noteworthy that there are several principles which need to be considered in relation to any such application to advance new evidence: (i) Whether the new evidence was not available at the time of the sentencing hearing; (ii) Whether the fresh evidence is relevant; (iii) Whether the fresh evidence is capable of belief; and (iv) Whether the fresh evidence might have raised a reasonable doubt that might have led to a materially different sentence. 7. In this case this court is not satisfied that there was essentially any new evidence advanced by Advocate Bell. But if it was new it was certainly available at the time of the original sentencing hearing. We say that it was not necessarily new in any event because the Probation Officer, and this is the only direct evidence, says that the information requested of her in Chambers was whether there was support available in the prison and she said that there was. And indeed, there is because the information which Advocate Bell puts before the Court from the Prison Service shows that the applicant has seen the substance misuse worker and has seen him on two occasions. There is also some evidence which I have not mentioned yet that the applicant has seen a psychologist at the prison as well." 43. The Law is silent as to the admission of new evidence on an appeal by way of case stated. Generally, we think that the principles set out at paragraph 6 in the case of *McKeown v AG* ought to apply to such an appeal but, as this was an appeal against a case management decision in the context of a criminal sentencing, we think it was appropriate for us to receive the material filed by the Appellant after that hearing took place. Authorities Criminal Procedure (Jersey) Law 2018. Protection of Children (Jersey) Law 1994. Human Rights (Jersey) Law 2000. *Jersey Evening Post Limited v Al-Thani*
- [2002] JLR 542 . Criminal Justice (Young Offenders) (Jersey) Law 2014. Children (Jersey) Law 2002. United Nations Convention on the Rights of the Child. *R v Reigate Justices Ex Parte Argus Newspapers* [1983] 5 Cr App R 181. Human Rights Law. *McKeown v AG*

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