

JERSEY / JUDGMENT

Le Lay v HM Attorney General

[2022] JCA 195 (22 September 2022)

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Court of Appeal 22 September 2022 Before : Clare Montgomery KC, President; Jonathan Crow KC., and James Wolffe KC Between Shawn Le Lay Applicant And His Majesty's Attorney General Respondent The Applicant in person. Crown Advocate S. C. Thomas for the Respondent Advocate D. S. Steenson Amicus to the Court.

judgment

the president: 1. On 8 June 2022, before the Royal Court (Commissioner Clyde-Smith sitting with a jury), the Applicant was convicted of 2 counts of grave and criminal assault committed on 6 August 2021 on Victim 1 and Victim 2 at Property 1. The Applicant was also convicted of malicious damage of property at their apartment. He was also convicted of grave and criminal assault on PC Abreu at Police Headquarters following his arrest that same day. 2. The Applicant seeks leave to appeal on the basis of fresh evidence. He also contends that the procedure adopted at his trial, part of which took place in his absence, has caused a miscarriage of justice. In addition, the Applicant argues that the Commissioner should have recused himself from presiding over his trial and that the Commissioner's conduct of the proceedings was such that his trial was unfair and the judgment of the Royal Court should be set aside. Finally, the Applicant contends that he was not fit to be tried. 3. There are no questions of law raised by the Applicant. The test we must apply in considering this application for leave to appeal is whether there is an arguable case that there may have been a miscarriage of justice in his case. That is whether, by reason of a mistake, omission, or irregularity in the trial, the Applicant has lost a chance of acquittal which was fairly open to him. Fresh evidence 4. The Applicant has not addressed the test as to whether fresh evidence may be called in support of his appeal. This is not surprising since he is acting as a litigant in person. The test is that identified in *Motofelea -v-AG*

[2014] JCA 236 . The evidence must be (i) shown to be unavailable at the time of the criminal trial; (ii) relevant to the issues before the Court of Appeal; (iii) capable of belief; and (iv) raising a reasonable doubt that might have led to a materially different outcome at trial or on the fitness to plead hearing. 5. The evidence that the Applicant now seeks leave to call fails at least two of those tests. Much of the evidence was available before the relevant hearings (that is the fitness to plead hearing and the trial). The evidence was in large part irrelevant to the issues. To the extent the evidence was relevant it was called in the

hearings. More importantly there is no material before us that raise an arguable case that the evidence if called now would produce a different result in the trial or that it would have led the court to determine the case differently. 6. The witnesses sought to be called fall into 3 broad categories. These are; [1] witnesses in connection with procedures at Police Headquarters (including the Applicant's interview under caution and charge); [2] witnesses in connection with the conduct charged in the indictment; and [3] a witness in connection with the issue of fitness to plead.

- [1] Witnesses in connection with procedure at Police Headquarters, including the interview under caution and charge, namely Pearce, Pirouet, Thomas and Centenier Madden (the PHQ witnesses) 7. The only possible relevance at trial of the PHQ witnesses was in relation to the admissibility of the Applicant's interview under caution. An application was made to exclude the interview by the Applicant. No evidence was called by him in support of his application on a voir dire. There was therefore no evidence at that stage that anything said or done by the PHQ witnesses was relevant to the Applicant's conduct in his interview under caution. The application to exclude was rejected by the Commissioner. That decision is not challenged on appeal. This is not surprising since the contents of the interview under caution were favourable to the Applicant and there were no grounds for its exclusion. 8. At trial the Applicant had the opportunity to cross-examine PC Blasco on the circumstances surrounding his interview under caution and to give evidence in his own defence explaining the relevance of the PHQ witnesses. It did not appear from the evidence given by the Applicant that any of the PHQ witnesses had any relevant evidence to give, still less that their evidence was likely to impact on his trial. Insofar as the Applicant gave evidence about the role of the PHQ witnesses, his evidence was not challenged. His application to call the PHQ witnesses was therefore refused. In our judgment any evidence from the PHQ witnesses is not relevant to any issue on the application for leave to appeal and their absence from trial caused no unfairness in that process, since their presence would have made no difference to the verdict of the jury.
- [2] Witnesses in connection with the conduct complained of in the indictment (the complainants). 9. The Applicant wishes to call Victim 1 and Victim 2 and PC Abreu in support of his application for leave to appeal. Since each of those witnesses gave evidence that was adverse to the case for the Applicant at trial and there is no indication that their evidence would be in any sense more favourable to the Applicant now, there is no prospect that their evidence, if called, would provide any arguable grounds for appeal. 10. The Applicant also criticises the circumstances in which these witnesses gave evidence at the trial. The Applicant was prohibited from cross-examining Victim 1 and Victim 2 by an order made under the Criminal Procedure (Jersey) Law 2018 art 103(3) (f). There is no appeal against that ruling. Advocate Steenson was appointed to conduct the cross-examination on behalf of the Applicant. Advocate Steenson was able to cross-examine Victim 1 and Victim 2 effectively and there was no unfairness that resulted from the procedure adopted. 11. The Applicant was unable to cross-examine PC Abreu as he absented himself from the trial on the afternoon of Day 1 of the trial (31 May 2022). PC Abreu was only available to be cross-

examined on that day. In the morning of that day the Applicant had complained he was unwell. The Commissioner observed that the Applicant appeared physically well [AD46]. The Applicant was seen by a prison healthcare officer (not a doctor) over lunch. The officer considered the Applicant was fit to attend Court. The Applicant told the Commissioner that he did not accept the views of the healthcare officer and that until he saw a doctor he would not attend the court. 12. The Commissioner ruled that the proceedings should continue, if necessary, in the absence of the Applicant. The Applicant said he would not attend the continued hearing and the video link to the prison was closed. In our view the Commissioner was entitled to take the view that it was in the interests of justice for the case to continue and that any unfairness to the Applicant could be minimised by adjustments to the trial process including inviting Advocate Steenson to cross-examine PC Abreu. 13. The Commissioner was entitled to take into account the fact that any adjournment would have led to significant and damaging delays in completing the trial and was unlikely to resolve the problems caused by the Applicant's long term health issues. The Commissioner was also entitled to conclude that the unwillingness of the Applicant to appear until he had seen a doctor was not justified by any medical evidence. 14. Whilst it would clearly have been desirable for the Applicant to have been present to hear PC Abreu give his evidence, the Applicant had the advantage of having seen the CCTV recordings of his interactions with PC Abreu and having read PC Abreu's witness statement, so he can have had little doubt about the case being made against him. 15. In the absence of the Applicant, Advocate Steenson was able to cross-examine PC Abreu on the basis of the account given by the Applicant in his interview under caution. The cross-examination was limited, but searching. The limitation in cross-examination appears to us to reflect the limited account given by the Applicant on which Advocate Steenson based his cross-examination. The Applicant told the police that he had no clear memory of the incident in which PC Abreu claimed to have been bitten although the Applicant said it would have been impossible for him to have inflicted the wound given the circumstances, including the state of his teeth, the fact that he was wearing a mask and the thickness of the officer's trousers. This was the case that was put to PC Abreu and we do not consider that this any unfairness resulted. The evidence given in due course by the Applicant confirmed that his case (such as it was) had been put fully and fairly to the police officer.

- [3] a witness in connection with the issue of fitness to plead. 16. The background to the Applicant's application to call Dr Irala in support of his application for leave to appeal is that the Commissioner and Jurats considered evidence from Dr Irala on 17 May 2022 in connection with the question whether the Applicant was fit to plead. 17. The test for fitness to plead is set out in the Mental Health (Jersey) Law 2016 . Under Art 57 (1) the Court must have regard to the defendant's ability to understand the nature of the proceedings so as to instruct his lawyer and to make a proper defence; to understand the substance of the evidence; to give evidence on his own behalf; and to make rational decisions in relation to his participation in the proceedings (including whether or not to plead guilty), which reflect true and informed choices on his part. 18. The issue is to be determined on the balance of

probabilities and any assertion of unfitness to plead must be supported by 2 medical practitioners (Art 58 (2)) The evidence of Dr Irala was clear. He considered the Applicant to be a vulnerable defendant due to his mental disorder but with capacity to understand the proceedings and make rational decisions. Dr Hillier, the second medical practitioner called, concurred with this view and observed that the Applicant would benefit from specific adaptations but was fit to plead. 19. The Applicant has not provided us with any information that would suggest Dr Irala has changed his views. Accordingly, there is no basis on which we can conclude that there is any likelihood of Dr Irala giving any evidence that would be relevant to any ground of appeal. 20. In the result we decline the applications to call fresh evidence. Unfairness in procedure 21. The Applicant raises as one of his grounds for appeal the fact that certain significant parts of the trial process took place in his absence. 22. It is correct to record that there were a number of occasions when the Applicant did not attend the criminal proceedings in his case, whether by video link or by production in person, both before and during trial. There were also occasions when having attended, the Applicant left the court or the video link. 23. During the pre-trial phase, the Commissioner severed or muted the video link connection with the Applicant on 19 November 2021 and on 24 March 2022 under art 10(3) of Criminal Procedure (Jersey) Law citing the Applicant's refusal to co-operate with the court and its directions on how the hearings were to be conducted. 24. On 8 February 2022 the Applicant removed himself from the link for a time but without any order being made. On 18 March 2022 the Applicant returned to his cell when his application to recuse the prosecutor and the Presiding Lieutenant Bailiff was refused. On 24 March 2022 the Commissioner observed in the course of his judgment on a recusal application that the Applicant had a tendency to react to any perceived adverse event in court by disrupting the proceedings or absenting himself and that orders for the termination of the video link were only made where necessary to maintain order. 25. The Applicant had consented to appear by videolink at his trial. 31 May 2022 was the first day of that trial. As we have indicated above in connection with the evidence of PC Abreu the Applicant absented himself from the videolink with the court from 14:07 to the end of the court sitting that day (Day 1). On 1 June 2020 (Day 2) the Applicant was present at Court from 10:50 -12:00 and absent for the remainder of the day. On 6 June 2022 (Day 3) the Applicant was present by video link from 10:00-10:20 and 16:00 onwards but absent from 10:20 -16:00. On 7- 8 June 2022 (Days 4 and 5) the Applicant was present at Court and able to give his evidence and make a closing speech in person. 26. The absence of Applicant deprived him of the opportunity to hear any of the evidence of PC Abreu. He saw only part of the evidence in chief of Victim 1 and part of the cross-examination of Victim 2. 27. The Criminal Procedure (Jersey) Law 2018 provides for trial in the absence of a defendant in certain circumstances. Art 88 provides that unless the court excuses a defendant from attending his or her trial, a defendant is otherwise required to be present at court throughout his or her trial. It appears to us that the Applicant chose not to exercise his right to be present on Days 1-3 of his trial. 28. In those circumstances the law permitted the court to proceed to try the Applicant in his absence provided it had due regard to the interests of justice which included consideration of the following relevant factors: the conduct of the Applicant; the disadvantage to the Applicant of proceeding in his

absence; the public interest in favour of continuing the trial taking account of the inconvenience and to witnesses and especially to any complainant, of a delay to the trial; the effect of any delay; whether the attendance of the Applicant could be secured at a later hearing; and the likely outcome if the Applicant was found guilty. 29. In our judgment it was clearly in the interests of justice for the trial to proceed in the partial absence of the Applicant. Advocate Steenson was present to represent his interests and in the event the Applicant was able to give evidence in person and make a speech. The Commissioner directed the Jury that they were not to speculate as to the reasons for the Applicant's absence and that it could not provide any support for the prosecution case. In those circumstances, we do not consider that the procedure resulted in any unfairness to the Applicant and no possible miscarriage of justice arises. 30. Advocate Steenson has raised an issue as to whether the Applicant had a fair opportunity to make his closing speech as there was some confusion as to whether either Advocate Steenson or the Crown Advocate would be making a speech. In the result the Applicant made the only closing speech, which was a significant forensic advantage to him. His address appears to us to have picked up the salient forensic points that could have been made in his defence and we do not consider he at any disadvantage as a result of the procedure adopted and the confusion that had been present. The Applicant had time to consider his position overnight and was able to take time to compose himself after the evidence was complete before delivering his speech. Recusal 31. There remains the point that the Applicant considers that the Commissioner should have recused himself from trying the case since he considers that the Commissioner was biased against him. Amongst the matters identified by the Applicant is that the Commissioner did not listen to his side of the case and was in contempt of court for permitting certain Jurats to sit with him. The Commissioner declined to recuse himself on 24 March 2022 on the basis that there were no grounds for the Jurats' or his own recusal. The Commissioner observed that his conduct towards the Applicant was the product of the Applicant's disruptive behaviour and not an unwillingness to listen to what the Applicant had to say. 32. We should note that the Applicant also sought to recuse two of the prosecuting Advocates and at least one of the Advocates acting as Amicus to the court. 33. The approach of this Court to questions of bias has recently been considered in *AB v AG*

[2020] JCA 094 [10-16]. 34. If there are facts from which a fair minded and informed observer would conclude that there was a real possibility that the Commissioner was biased in this case we would allow an appeal on that ground alone. 35. However, it is important to note that there are two elements to the test for bias. Firstly, an allegation of bias must be backed by facts, not mere apprehension. Secondly, the person to whom the 'real possibility' of bias should be apparent from those facts is a hypothetical, dispassionate, fair minded and informed observer. This person was described by Sumption, Commissioner, in *Syvret v Chief Minister*

[2011] JLR 343 as someone who views the matter with some detachment, and reserves judgment until they have seen and fully understood both sides of the argument. They are not unduly sensitive or suspicious, but nor will they shrink from the conclusion that there is a real possibility of bias, if this can be justified objectively by "things that [the impugned judge or judges] have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially". They will form their judgment on this matter only after considering all relevant matters, and putting them in a fair and complete overall context. 36. We make two observations on this test in the light of the Applicant's submissions. Firstly, the test is whether there are facts from which the hypothetical fair minded and informed observer would conclude that there was a real possibility of bias, not merely facts from which such a person might reach such a conclusion. Whether or not a reasonable person would apprehend such a genuine risk is the issue for this court, and the burden of proving the facts and the conclusions a fair minded and informed observer would draw from them rests on the Applicant. Secondly, the test is not whether it is 'necessary' for the impugned judge to sit, but whether the person making a recusal application has established facts from which an external onlooker, acting in a fair and well-informed way, would conclude that there was a real possibility of bias. 37. On this basis we are unable to conclude that there was any real possibility that the Commissioner was biased. True it is that his rulings might have been regarded by the Applicant as unfavourable and unfair. However, in each case the Commissioner's decisions were well within the range of rational judicial reactions to the applications before him. A fair minded and informed observer would not regard the rulings as evidence of bias. The ruling in relation to the application to recuse the Jurats illustrates the point. The Applicant's objection to the Jurats was on the basis that he recognised them. This was a wholly inadequate basis for concluding that they might be biased against him even if the contact had been with them when they were acting as members of the Board of Prison Visitors. 38. In addition, we recognise that there were occasions when the Commissioner was obliged to remind the Applicant of the need to behave properly in Court and not to make threats or cast aspersions. When the Applicant did not behave, his video link was muted or cut. The Applicant might well have regarded this as the Commissioner refusing to listen to him. We recognise that the Applicant may well have resented the behaviour of the Commissioner, however we cannot conclude that an informed and fair minded observer would have regarded the Commissioner's behaviour and demeanour as being evidence of bias. On the contrary we consider that the Commissioner did his best in difficult circumstances to strike a balance between the desire of the Applicant to participate in the proceedings only on his own terms and the need to progress the trial in the interests of justice. Fitness to be tried 39. As we have indicated the question of fitness to be tried is an issue to be determined by reference to the evidence of 2 medical practitioners (Art 58 (2)). There is no evidence from any medical practitioner that the Applicant was unfit. Accordingly, despite the Applicant's belief that he is indeed unfit, there is no basis upon which we could reach that decision and therefore no arguable ground of appeal.

Conclusion

40. There are no arguable grounds in this case to grant leave to appeal. There was no mistake, omission, or irregularity in the trial that has caused the Applicant to lose a chance of acquittal which was fairly open to him. There has been no miscarriage of justice. The application for leave to appeal is refused. Authorities Motofelea -v-AG

[2014] JCA 236 . Criminal Procedure (Jersey) Law 2018. Mental Health (Jersey) Law 2016. AB v AG

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