

JERSEY / JUDGMENT

Pearce v AG [2022] JRC 258 (24 November 2022)

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JUDGMENT

THE COMMISSIONER: 1. On 14 November, the Court heard the Applicant's application to review the refusal of the Assistant Magistrate to vary a condition which he had imposed when originally granting bail in respect of two offences with which the Applicant has been charged. 2. The Court gave an ex tempore judgment on the merits of the application at the conclusion of the hearing, but said that it would issue a separate judgment on a procedural issue which had arisen. What follows constitutes that separate

judgment.

The issue 3. Advocate Blakeley originally issued a Notice of Appeal pursuant to Article 16 of the Criminal Procedure (Bail) (Jersey) Law 2017 ("the 2017 Law") which provides as follows: "16. Right of defendant to appeal against Magistrate's decision to deny bail (1) If the Magistrate denies a defendant bail in criminal proceedings, the defendant may appeal to the Royal Court against that decision. (2) An appeal under this Article may only be made on the ground that the Magistrate's decision was unreasonable in all the circumstances of the case. (3) There shall be no right of appeal against a decision of the Royal Court under this Article." 4. An issue then arose as to whether an appeal against a decision of the Magistrate either to impose a condition on the grant of bail or to refuse to vary such a condition on a subsequent application fell within the terms of Article 16. We accept that neither of them does. 5. The wording in Article 16(1) could not be clearer; it applies where the Magistrate '... denies a defendant bail ..'. We do not see how a decision to grant bail but to impose conditions or to refuse subsequently to vary such a condition can be categorised as a denial of bail. 6. Furthermore, where the 2017 Law wishes to distinguish between the grant of bail and the imposition or variation of conditions attaching to bail, it does so; see for examples Articles 7(1) and 9(1), (2) and (3). 7. Accordingly, we accept that Article 16 does not confer a right of appeal against a decision of the Magistrate to impose a condition when granting bail or to refuse subsequently to vary such a condition. 8. The question then arises as to whether a defendant has any ability to apply to this Court to review such a decision by the Magistrate. The two alternative routes 9. In our judgment, there is such an ability on the part of a defendant and there are two possible routes by which he may do so. 10. The first is by way of an application for judicial review under Part 16 of the Royal Court Rules 2004 ("the 2004 Rules"). This

would involve an application to the Bailiff for leave to bring an application for judicial review and, if the Bailiff grants leave, the matter is subsequently brought before the Court. 11. The alternative is pursuant to what we shall call the 'longstanding procedure'. It is within the Commissioner's personal knowledge that, certainly for as long as he has been qualified as a Jersey advocate (1977) and no doubt for much longer before then, it has been the practice for defendants who wish to challenge a refusal of the Magistrate to grant bail to apply by Representation for a review of the Magistrate's decision. Such applications are routinely brought on the Friday morning sitting of the Samedi Court or on some other day if particularly urgent. The Attorney General is notified of the application in advance and the matter is heard and dealt with at the first hearing with both the prosecution and the defence having the opportunity of addressing the Court. We have no doubt that the longstanding procedure has been equally available in respect of reviews of the imposition of a bail condition or a refusal to vary a bail condition. 12. The longstanding procedure has survived the introduction of Part 16 of the 2004 Rules, which sets out the normal procedure for judicial review as we have described above. See for example, AG v Evans and Evans

[2011] JRC 199 ; AG v Monks

[2015] JRC 028 ; AG v Caruso

[2015] JRC 066B . 13. This is not surprising. Rule 16/1(1) provides that any challenge to a decision of a public authority or body (which would include the Magistrate) must be brought by way of application for judicial review made in accordance with Part 16 '...unless the Court otherwise orders'. It must be assumed that the Court by necessary implication did 'otherwise order' in the cases referred to above and in the many other unreported cases where challenges to decisions about bail have continued (until the enactment of Article 16) to be brought by way of the longstanding procedure despite the introduction of Part 16. 14. Whether an application for review of a decision relating to bail by a Magistrate is brought under Part 16 or under the longstanding procedure makes no difference to the approach of the Court. The Court does not consider the matter de novo ; it is merely reviewing the Magistrate's decision. It may therefore only interfere on well-established grounds, namely if the Magistrate has misdirected himself in law or there is some procedural irregularity or the Magistrate has made an unreasonable decision in the sense of a decision which no reasonable Magistrate could properly have reached. Indeed, that is also the test for appeals under Article 16; see Article 16(2). 15. Although Article 16 of the 2017 Law has introduced a statutory right of appeal against a refusal by the Magistrate to grant bail (so that challenges to a refusal of bail should now be brought by way of appeal rather than judicial review under either of the two alternative routes described above), it has not affected the ability of a defendant to challenge the imposition of a bail condition or a refusal to vary a bail condition by judicial review. 16. The question then arises as to whether an applicant wishing to challenge a bail condition or a refusal to vary a condition should do so under the Part 16 procedure or under the longstanding procedure. In our judgment, the longstanding procedure is undoubtedly to be preferred for the following reasons: (i) The Part 16 procedure involves a two stage approach, namely an application

for leave made to the Bailiff followed by a hearing before the Court if leave is granted. This will lead to delay and also cause unnecessary extra work for the Bailiff (or his substitute). Delay is particularly undesirable in cases relating to bail. Conversely, the longstanding procedure enables the matter to come before the Court within a matter of days at most. (ii) If leave is granted by the Bailiff under Part 16, the Magistrate becomes a party to and has to be served with the proceedings. In our judgment, this is both unnecessary and undesirable. It is unnecessary because the matter can satisfactorily be dealt with - as it always has been, both under the longstanding procedure and now on appeals under Article 16 against a denial of bail - by the Attorney General on behalf of the prosecution coupled with a note of any reasons the Magistrate may have given for his decision. There is no need for the Magistrate to be made a party. It is undesirable because it is not appropriate for a judicial officer to be made a party to the proceedings simply because his decision has been challenged. Judicial officers are not made parties when their decisions are being appealed; the matter is left to the parties to argue. Any judicial officer who is made a party may feel compelled to swear an affidavit or to instruct an advocate, all of which would be highly undesirable and add complexity to what should be a simple and straightforward process. (iii) If leave is granted by the Bailiff, Part 16 sets out various requirements for the procedure to be followed. So, for example, service must be through the Viscount, any respondent (which would include both the Magistrate and the Attorney General) has 56 days in which to file an affidavit and there are provisions for other steps such as a summons for directions. It would of course be open to the Bailiff to make orders when granting leave to vary or do away with some of the procedural steps laid down by the Rules and he could shorten some of the time limits so as to achieve an early hearing. Nevertheless, proceeding under Part 16 would require both the applicant's lawyers and the Bailiff to give thought to this aspect and make orders so as to achieve an early hearing. (iv) Conversely, the longstanding procedure is simple and swift. It simply requires a Representation by the applicant setting out the nature of the matter and the relief sought, communication with the Court and the Attorney General to alert them to the application, and an appearance on Friday morning or such other date as the Court may fix. It is a well trodden route which enables an applicant to get before the Court in simple order and promptly. 17. We would therefore suggest that any applicant who wishes to challenge a decision by the Magistrate to impose a bail condition or to refuse to vary such a condition should proceed by way of the longstanding procedure. All that will be required is for the Court, at the hearing of the matter, to make an order under Rule 16/1(1) to the effect that the matter can proceed by way of the longstanding procedure rather than under Part 16. Recommendation 18. Notwithstanding the approach suggested in this judgment, we think that the best course would be for Article 16 to be amended so that it includes not only an appeal against a denial of bail but also an appeal against the imposition of a bail condition or a refusal to vary such a condition. We would also recommend that either the 2017 Law itself or Rules of Court should impose a fairly short time limit for any such appeal to be brought. The Attorney General might at the same time consider whether he wishes to have a right of appeal under Article 15 of the 2017 Law against a variation of a condition by the

Magistrate which he felt was unreasonable. Authorities Criminal Procedure (Bail) (Jersey) Law 2017. Royal Court Rules 2004. AG v Evans and Evans

[2011] JRC 199 . AG v Monks

[2015] JRC 028 . AG v Caruso

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