

JERSEY / JUDGMENT

Pritchard v AG [2021]

JRC 199 (29 July 2021)

[2021] JRC 199

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JUDGMENT

THE COMMISSIONER: 1. This appeal, brought under Articles 21 and 22 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 ("the 1949 Law") raises an issue of construction of the Costs in Criminal Cases (Jersey) Law ("the 1961 Law"). 2. By way of background, the Appellant was charged with three motoring offences under the Road Traffic (Jersey) Law 1956 ("the 1956 Law") as a result of a road traffic accident which occurred on 13 th November 2019. 3. The Appellant pleaded guilty to two of the charges against him, and not guilty to the third charge that he had driven whilst unfit through drugs, contrary to Article 27 of the 1956 Law. 4. The drugs found in his system were medication for pain and anxiety. The Appellant says that the prosecution belatedly sought a report from a toxicologist which was received on 3 rd February 2021, following a joint instruction with the Appellant, and on the basis of this report, the prosecution filed a notice of discontinuance under Article 80 of the Criminal Procedure (Jersey) 2018 ("the 2018 Law") on the same day. The notice was on the following terms: "This notice is provided in compliance with Article 80 of the Criminal Procedure (Jersey) Law 2018 to confirm that the proceedings against the above named for the offence listed below are to be discontinued. Driving whilst unfit through drugs, contrary to Article 27 of the Road Traffic Law 1956. The reason for discontinuing the proceedings is that there is insufficient evidence to support the prosecution in respect of the specified offence to continue. Please be aware that the proceedings for the following offences are to continue: Dangerous driving, contrary to Article 22(1) of the Road Traffic (Jersey) Law 1956. Using a dangerously defective vehicle, contrary to Article 106 of the Motor Vehicles (Construction and Use) (Jersey) Order 1998. The Defendant has pleaded guilty to these two offences and the Court can proceed to deal with them to sentence. Under Article 80(4) (b) Criminal Procedure (Jersey) Law 2018, the above named has the right to apply for the proceedings in respect of the offence to continue. Under Article 80(7) Criminal Procedure (Jersey) Law 2018, this discontinuance of proceedings shall not prevent the Attorney General from instituting fresh proceedings in respect of the same offence, at a later date." 5. In so far as it is relevant, Article 80 of the 2018 Law is as follows: "(1) In this Article - 'Preliminary stage' in relation to proceedings for an offence does not include any stage of the proceedings after the Magistrate's Court or Royal Court has begun to hear evidence for the prosecution; 'authorised prosecutor' means a prosecutor who is authorized in writing by the Attorney General to give a

notice under paragraph (2). (2) The Attorney General or an authorized prosecutor may, at any time during the preliminary stages of the proceedings, give notice that he or she does not want the proceedings to continue in relation to an offence specified in the notice ('specified offence'). (3) The proceedings in respect of the specified offence shall be discontinued with effect from the giving of that notice to the Magistrate's Court or Judicial Greffier, as the case may be, and a record shall be made to that effect. (4) The Attorney General or authorized prosecutor shall, in any notice given under paragraph (2) - (a) state whether the reason for discontinuing the proceedings - (i) is that it would not be in the public interest to proceed with the prosecution of the defendant for the specified offence, or (ii) is that there is insufficient evidence to support the prosecution of the defendant for the specified offence; and (b) inform the defendant of his or her right to apply for the proceedings in respect of the specified offence to continue. (5) A defendant who, under paragraph (4)(b) wants the proceedings to continue, must serve the Magistrate's Court or Royal Court (as the case may be) with a notice to that effect not more than 14 days after the notice given under paragraph (2). (6) If the defendant serves a notice under paragraph (5) - (a) the Magistrate or Judicial Greffier must notify the Attorney General or authorized prosecutor; and (b) the proceedings shall continue as if no notice had been given under paragraph (2). (7) ... (8) ..."

6. At the sentencing hearing in respect of the other two charges which took place on 5 th February 2021, Advocate Hall applied for the Appellant's costs in respect of the discontinued charge. She informed me that the possibility of the Appellant applying under Article 80(4)(b) for the case to be continued was discussed with the prosecuting officer, on the assumption that the prosecution would present no evidence and the Court would then have jurisdiction to award costs under Article 2(1)(c) of the 1961 Law. The prosecuting officer apparently said that there was authority to the effect that such a use of the continuance procedure would be considered an abuse of process under the equivalent legislation in England. No authority could be found in this respect and in the circumstances no application to continue was made by the Appellant.

7. The Magistrate declined to order costs on the ground that he lacked jurisdiction, saying this: "My reading of the Costs in Criminal Cases Law ("CICCL"), Article 2, which is the power to order costs. 2(1)(c) - the Court may order defence costs if the accused is discharged from the prosecution or acquitted. He clearly has not been acquitted. It all therefore falls on interpretation of the expression 'discharged from the prosecution'. Mr Crowder has 'on the hoof' indicted that how might be interpreted in England and, whilst our procedures are similar to England and Wales, they are not the same and therefore that would not be conclusive, and discharged is not interpreted in the Law [CICCL] in any way. Thus far, when I say thus far, since enactment of the Criminal Procedure Law 2018 ("CPL"), the position [in the Magistrate's Court] has been that discontinuance does not equate to discharge and therefore in the absence of anything to persuade me otherwise I think I must follow that, albeit limited and first instance, precedent. In which case your application for costs is refused."

8. In his Case Stated of 14 th May 2021, the Assistant Magistrate quoted from his extempore judgment and said this: "4. Article 80(2) CPL provides that the Attorney General may give notice of discontinuance in respect of a specified offence. Article 80(3) CPL provides that proceedings in respect of the specified offence are discontinued from the giving of notice. The Appellant says that such notice was given on 3 February 2021. 5. It was open to the Appellant, pursuant to article 80(5) CPL, to serve notice on the Magistrate's Court if he wanted the

proceedings to continue but he did not do so. 6. In these circumstances the specified offence was discontinued on 3 February 2021 and the Court had no further engagement. I was not aware of any inherent power under CICCL or any implied power for me to order defence costs in that scenario." 9. Crown Advocate Hallam agreed with the position taken by the Assistant Magistrate, submitting that from the point at which the discontinuance notice is received by the Magistrate's Court, that Court ceases to have jurisdiction to deal with the charge, as it no longer existed. There is no charge before the Court in relation to which orders may be made. In the absence of a specific power in statute to order costs after discontinuance, she said that the Magistrate was clearly right to conclude he had no jurisdiction to order costs. 10. Crown Advocate Hallam pointed out that a defendant may apply to the Court for the proceedings to be continued and the Court may then make orders in relation to the charge. The Magistrate will then have jurisdiction in relation to the revived charge and if the prosecution offers no evidence, then the defendant will be acquitted, and the Magistrate will have the power to make an order as to costs under Article 2(1)(c) of the 1961 Law. She said this should dispose of the appeal, save for the argument made by Advocate Hall that the Magistrate did have jurisdiction under Article 2(1)(c) of the 1961 Law. The relevant provisions of Article 2 of the 1961 Law are as follows: "2 (1) Subject to the provisions of this Article, where any person is prosecuted or tried before a court to which this Article applies, the court may - (a) if the accused is convicted, order the accused to pay the whole or any part of the costs incurred in or about the prosecution and conviction; (b) order the payment out of public funds of the costs of the prosecution; (c) if the accused is discharged from the prosecution or acquitted, order the payment out of public funds of the costs of the defence. (2) The costs which may be awarded by the Royal Court under paragraph (1) shall include the costs incurred in or about any proceedings before the Juge d'Instruction. (3) ... (4) the costs of the defence payable under paragraph (1)(c) shall be such sums as appear to the court reasonably sufficient to compensate the accused for the expenses properly incurred by the accused in carrying on the defence and to compensate any witness for the defence for the expense, trouble or loss of time properly incurred in or incidental to the witness's attendance and giving evidence. (5) ... (6) ... (7) the amount of costs ordered to be paid under this Article shall be ascertained as soon as practicable by the Judicial Greffier. (8) Where a person committed for trial is not ultimately tried, the court to which the person is committed shall have the same power to order payment of costs under this Article as if the accused had been tried and acquitted. (9) ... (10) ..."

11. Advocate Hall submitted that the word "discharged" in Article 2(1)(c) could be interpreted as including a discontinuance under the 2018 Law. However, Crown Advocate Hallam referred to the case of *AG v Picot*

[2000] JLR 232, where the Court considered the definition of "discharged from the prosecution" in the 1961 Law, holding as follows: "In my judgment the absence of the words 'discharged from the prosecution' in the English statute upon which the 1961 Law was clearly based is attributable to the different procedures which obtain in this jurisdiction. A defendant may be presented before the Royal Court by the Attorney General in two different ways: (a) He may, if committed by the magistrate, be indicted to stand his trial. Having been tried, he is convicted or acquitted; and (b) a defendant may be summoned to answer a charge that he

has committed a statutory infraction. In such event he is presented, not on indictment, but on a billet which sets out the statutory offences alleged against him. He is not invited to plead to such allegations but he is asked whether or not he admits the facts. If he does not admit the facts, the case is sent en preuve before the Inferior Number of this court. At trial he may be convicted, but if he is not convicted, he is discharged. A defendant presented on a billet is not acquitted. In my judgment the words 'discharged from the prosecution' in art. 2(1)(c) of the 1961 Law means that the prosecution has been unable to satisfy the court that a statutory infraction has been committed and the court as in consequence discharged the defendant. They have no wider meaning than that. ' (Her emphasis added). 12. Crown Advocate Hallam said that the decision in the Picot case were not specific to the facts in that case and that the meaning of the word " discharged " had no wider meaning than those held. 13. The word " discharged " is used in Article 75 of the 2018 Law and is specific to a situation in which a defendant is acquitted at a jury trial, either by the jury's decision or by their inability to return a verdict. The defendant is then discharged from proceedings unless he has been convicted of other offences on the indictment. 14. In this case, it was not the Magistrate's Court which has discharged the Appellant. The operation of law meant that the charge was discontinued from the notice being given to the Court - it simply ceased to exist, 15. Reference was made to Article 2(8) and it was accepted by the Appellant, rightly in my view, that the phrase " committed for trial " has a specific and established meaning in criminal law, namely that the Magistrate had declined jurisdiction in a matter and had committed the case to the Royal Court under Article 3 of the 1949 Law. " Committed for trial " in the 1961 Law must be read to be consistent with the 1949 Law. The rationale for this provision in the 1961 Law is that the Attorney General had complete discretion as to whether to continue with a case without having to return it to court. In those circumstances the Royal Court would never assume jurisdiction over the case and, absent express provisions, would have no power to make orders. It clearly applies only to cases that have been committed to the Royal Court and cannot be read to include cases before the Magistrate. The Magistrate does not commit a defendant to be tried before his or her own Court - the defendant is remanded (whether in custody or on conditions) to await trial. 16. Crown Advocate Hallam rightly pointed out that prior to the introduction of the 2018 Law, the only routes open to the prosecution where a not guilty plea had been entered into, were to take the charge to trial or to offer no evidence. Following the latter option, the Magistrate would dismiss the charge and the defendant would be acquitted. The 1961 Law, she said, had not been amended to reflect the new procedure available to the Attorney General. It was not possible to read the 1961 Law to grant the Magistrate powers he does not have. The solution is for a defendant in this situation to give notice of continuance following which it would be likely that the prosecution would offer no evidence, leading to an acquittal, thus giving the Magistrate jurisdiction to award costs. 17. Both parties accepted that the Magistrate's Court is a creature of statute in that it has no inherent jurisdiction. Therefore, it enjoys no greater jurisdiction than that conferred by the legislature and the Assistant Magistrate therefore had no inherent power, whether in general or specifically in relation to costs (see

O'Driscoll v AG

[2003] JRC 089). Crown Advocate Hallam accepted that requiring a defendant in this situation to apply for continuance was an awkward procedure, but that, she said, was a consequence of the laws that were in place. No public issue policies arose. This Court can only intervene where there is an error of law. Decision 18. I accept that prior to the 2018 Law, the position was as set out authoritatively in the case of Picot . If the prosecution wished to withdraw proceedings, its only option was to offer no evidence, from which there would be two possible outcomes, either a discharge, if it was a statutory offence, or an acquittal if it was a customary law offence, both covered by Article 2(1)(c) of the 1961 Law. Under the 2018 Law, there is now a further way in which the prosecution can withdraw proceedings and that is by the service of a notice of discontinuance under Article 80 of the 2018 Law either if it is not in the public interest to continue or if there is insufficient evidence, which notice takes effect immediately upon being given to the Magistrate's Court or to the Judicial Greffier. The charge therefore ceases to exist from that moment, and the Magistrate will only have power to award costs under Article 2(1)(c) of the 1961 Law if it can be interpreted widely enough to give that jurisdiction. 19. At the time the 1961 Law was enacted, discontinuance by notice served by the prosecution did not exist. It has now been introduced. What should be the approach to the interpretation of Article 2(1)(c) in these circumstances? 20. I have had recourse to Bennion on Statutory Interpretation th edition at Chapter 14 headed " Updating construction" which states that Acts are usually regarded as " always speaking " and it is presumed that the legislature intends the Court to apply a construction that allows for changes that have occurred since the Act was initially framed - " An updating construction ". Exceptionally an Act can be intended to be applied in the same way whatever changes might occur after its passing, but that is unusual and does not apply here. Quoting from the Commentary: "Comment Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. Although the language originally used endures as law, its current subjects may find that law more and more ill-fitting. Viewed like this, an Act resembles a vessel launched on some one-way voyage from the old world to the new. The vessel is not going to return; nor are its passengers. Having only what they set out with, they cope as best they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at. Parliament, in the wording of an enactment, is expected to anticipate developments over time and drafters will try to foresee the future, and allow for it in the wording. However, the court may apply an updating construction even if the drafter's efforts in this regard have not been successful. In construing an Act (other than one whose meaning and application are, exceptionally, fixed in time), the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention, making allowances for any relevant changes that have occurred since the Act's passing. The changes that may give rise to the question of whether an updating construction is appropriate include the creation of new institutions or other bodies, technological or

scientific developments, new natural phenomena or diseases, changes in social conditions or in the way that society views particular matters, and changes in the territory for which an Act is law (for example, the acquisition of a new territory). However, the categories of changes that might be relevant are not fixed." 21. The 1961 Law, in my view, is to be regarded as "always speaking" and an "updating construction" is required for the changes that have now occurred following the introduction of Article 80 of the 2018 Law. What was the true original intention of the legislature in enacting Article 2(1)(c) of the 1961 Law? In my view, it was to give the Royal and Magistrate's Courts jurisdiction to compensate a defendant against whom proceedings had been withdrawn in the only way then available to the prosecution. The defendant had been charged and subsequently no evidence had been offered, and fairness would dictate that the Courts should have the jurisdiction to award the defendant costs if that was appropriate. 22. We now have to update the construction of Article 2(1)(c) in the light of Article 80 of the 2018 Law, which allows for a further way in which the prosecution can withdraw proceedings, namely by the filing of a notice of discontinuance. It would surely be consistent with the original intention of the legislature that the words "discharged by the prosecution" should be interpreted as including the discontinuance of the prosecution under Article 80. 23. Such an interpretation does no violence to the wording of Article 2(1)(c), in that up to the point when a notice of discontinuance is served, the defendant is a person "charged" by the prosecution with a criminal offence whether statutory or customary law. From the moment the notice is served upon the Magistrate's Court or the Judicial Greffier, the defendant is no longer "charged"; he is accordingly "discharged from the prosecution". 24. Whilst not relevant to the issue of the Court's jurisdiction under Article 2(1)(c) of the 1961 Law, it seems to be counter intuitive to say to a defendant, who no doubt with some relief finds the case discontinued by the prosecution under Article 80 of the 2018 Law, that the Court has no jurisdiction to award costs unless he or she makes an application for the case to be continued, so that the prosecution can formally offer no evidence and the Court will have jurisdiction to award costs. It is not possible under Article 80 for a defendant to apply for the case to be continued on a limited basis, namely, to give the Court jurisdiction to award costs, and although it is most likely that the prosecution would offer no evidence, the continuance of the prosecution against the defendant must entail an element of risk to that defendant. The mere fact that the case continues is of itself prejudicial. 25. In any event, applying an updating construction, I conclude that the Royal and Magistrate's Courts do have jurisdiction to award costs under Article 2(1)(c) of the 1961 Law, where the defendant is "discharged from the prosecution" as a consequence of a notice of discontinuance being filed by the prosecution under Article 80 of the 2018 Law. 26. Whether on the facts of this particular case, the Appellant should be awarded his costs, is entirely within the discretion of the Assistant Magistrate and I make no comment upon it. Authorities Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949. Costs in Criminal Cases (Jersey) Law 1961. Road Traffic (Jersey) Law 1956. Criminal Procedure (Jersey) 2018. AG v Picot

[2000] JLR 232 . O'Driscoll v AG

[2003] JRC 089 . Bennion on Statutory Interpretation 7th edition Page Last Updated: 05 Aug 2021
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