

JERSEY / JUDGMENT

Syvret v AG [2009] JCA 181 (04 September 2009)

[2009] JCA 181

COURT
COURT OF APPEALBEFORE
Miss Clare Montgomery, Q. C.
Stuart Syvret
-v-
The Attorney General
Senator Stuart Syvret acting on his own
behalf.
S. M. Baker, Esq., Crown Advocate.

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4 September 2009Before: Miss Clare Montgomery, Q. C.
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-v-
The Attorney General
Senator Stuart Syvret acting on his own
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S. M. Baker, Esq., Crown Advocate.

JUDGMENT

Montgomery JA:

Introduction

1. This application is made in connection with summary criminal proceedings brought before the Magistrates' Court in which the Applicant is the defendant (the summary proceedings). Various interlocutory issues have arisen in the summary proceedings, including an application that the Assistant Magistrate hearing the proceedings should recuse herself from hearing the case. The evidence on the criminal charges has not yet been heard and no verdicts have been recorded. 2. The Applicant sought to appeal to the Royal Court by way of case stated against the refusal of the Assistant Magistrate to recuse herself. The case came before a Commissioner, Sir Richard Tucker KBE. The Applicant applied to the Commissioner

to recuse himself from the case. The Commissioner declined to recuse himself and dismissed the appeal on the grounds that the summary proceedings before the Assistant Magistrate had not been finally determined and that, accordingly proceedings by way of case stated were inappropriate. The Attorney-General applied for and was granted an order for costs against the Applicant in respect of the application for the recusal of the Commissioner. The issues 3. The Applicant now seeks leave to appeal to the Court of Appeal against the refusal by the Commissioner to recuse himself and the order for costs. The Applicant's arguments and those of Crown Advocate Baker raise four issues: [1] The jurisdiction of the Court of Appeal to hear the appeals; [2] The merits of the decision of the Commissioner on the recusal application; [3] The jurisdiction of the courts to make orders for costs against defendants in criminal cases; and [4] The propriety of the order for costs made by the Royal Court in this case. The jurisdiction of the Court of Appeal 4. The Applicant accepts that this is an appeal in a criminal cause or matter. The Applicant contends that, as a matter of principle, there should be a right to an interlocutory appeal in a criminal case where the subject matter of the appeal may have a significant bearing on the outcome of the case. The Applicant argues that such a right of appeal is necessary in order to secure a defendant's right to a fair hearing at first instance, as well as to avoid the strain that might otherwise be endured by a defendant if he were to be required to wait for a conviction before he could enjoy a right of appeal. The Applicant accepts that his submissions are based upon what he regards as basic principles of natural justice rather than on a study of the laws of Jersey relating to the rights of appeal in criminal cases. 5. The law of Jersey does not provide for the extensive rights of appeal contended for by the Applicant. There is no right to appeal to the Court of Appeal against interlocutory or final decisions in summary criminal proceedings. The right of appeal in summary criminal proceedings is a right of appeal to the Royal Court either by way of appeal or case stated under Part V of Magistrate's Court (Miscellaneous Provisions)(Jersey) Law 1949 . 6. Article 26(2) of the Magistrate's Court (Miscellaneous Provisions)(Jersey) Law 1949 provides that:- "Any judgment or order of the Royal Court under this Part shall be final and conclusive, and shall not be subject to appeal to any other court." 7. There is a right to appeal to the Court of Appeal in relation to criminal proceedings on indictment before the Royal Court. However even in these cases, other than in the specific and limited circumstances covered by Article 90 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 , there is no pre-trial right of appeal in relation to interlocutory decisions. 8. The statutory policy that underlies the limitation on the right of interlocutory appeal in criminal cases is that criminal proceedings should not be subject to delay as the result of collateral and other interlocutory challenges. 9. Given the provisions of Part V of the Magistrate's Court (Miscellaneous Provisions)(Jersey) Law 1949 and the policy that underlies it, it is clear that there is no right to appeal to the Court of Appeal in this case. I would accordingly refuse any application for leave to appeal on this ground alone. The merits of the decision of the Commissioner 10. The Applicant does not contend that the Commissioner was actually biased. His submission is that, by reason of the acquaintance between the Commissioner and the former Bailiff, Sir Philip Bailhache KBE, as well as the Commissioner's knowledge of other members of the Jersey political and judicial

establishment with whom the Applicant is publicly at odds, there is an objectionable appearance of bias so that the Commissioner ought to recuse himself. 11. The Applicant referred me to the decision in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte* (No 2)

[2000] 1 AC 119 . However I consider that the Applicant is entitled to the benefit of the development of judicial thinking and expression evident in *In re Medicaments and Related Classes of Goods* (No 2)

[2001] 1 WLR 700 , 726-727. A judge will be disqualified from adjudicating on a case where, even though no actual bias on his part is shown, the circumstances are such as to give rise to an appearance of bias, that is, to an impression that the judge may be influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case. 12. The court must judge this issue. It must do so having ascertained all the circumstances which bear on the suggestion that the judge was (or would be) biased. It must then ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was (or would be) a real possibility that the judge was (or would be) subject to bias. This is now the accepted test: *Porter v Magill*

[2001] UKHL 67 ,

[2002] 2 AC 357 , per Lord Hope at 494h: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." 13. In *Helow v. Secretary of State for the Home Department* and another

[2008] 1 WLR 2416 at 2418 Lord Hope described the characteristics of the fair-minded observer. He will always reserve judgment on every point until he has seen and fully understood both sides of the argument. He is not unduly sensitive or suspicious. His approach must not be confused with that of the person who has brought the complaint of bias. The "real possibility" test ensures that there is a measure of detachment. The assumptions that the complainer makes are not to be attributed to the fair-minded observer unless they can be justified objectively. But the fair-minded observer is not complacent either. He knows that fairness requires that a judge must be, and must be seen to be, unbiased. He knows that judges, like anybody else, have their weaknesses. He will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially. 14. According to Lord Hope, the requirement that the observer is "informed" means that, before taking a balanced approach to any information, the observer will take the trouble to inform himself on all matters that are relevant. He is the sort of person who takes the trouble to read the text of an article as well as the headlines. He is able to put whatever he has read or seen into its overall social, political or geographical context. He is fair-minded, so he will appreciate that the context forms an important part of the material which he must consider before passing judgment. 15. Approaching the complaints of bias

made by the Applicant in this case with this guidance in mind, in my view the fair-minded and informed observer would not consider that there was any possibility that the Commissioner was biased. The Commissioner's acquaintance with the judicial and political authorities in Jersey is not of such a nature or duration as to raise the possibility that the Commissioner would ignore his judicial oath so as to give rise to an appearance of bias. 16. The contact between Sir Philip Bailhache KBE and the Commissioner, that has been described to me by the Applicant as being of particular concern, appears to consist of relatively infrequent social meetings in the context of a professional acquaintance. I cannot regard the attendance of the Commissioner at the formal retirement dinner given to mark the end of Sir Philip Bailhache's term as Bailiff as evidencing the type of relationship that would give rise to a real possibility of bias. 17. The fair-minded and informed observer would also take into account the Commissioner's judicial career. After a distinguished career practising at the Bar of England and Wales, the Commissioner served as a Judge of the High Court of Justice, Queen's Bench Division, in England between 1985 and 2000. He has also served on the Parole Board between 1996 and 2003, for part of that time as its Vice Chairman. Since his retirement from the High Court Bench, the Commissioner has been appointed in 2008 to a Commission of Enquiry, in Grand Cayman. 18. The Commissioner was first appointed Commissioner of the Royal Court in February 2003 and he took the oath of office of Commissioner on 1 April 2003. He was initially appointed for a number of individual cases but in April 2004 was appointed for 12 months. This appointment has been renewed annually and the latest renewal was on 31 March 2009 at which time the appointment was extended until 9 July 2010 which is the occasion of, the Commissioner's 80th birthday. The Bailiff informed the Commissioner, at the time of the latest renewal of his appointment, that it would not be renewed thereafter 19. Adopting the language used by the Privy Council in *Bolkiah v State of Brunei*

[2007] UKPC 63, the fair-minded and informed observer may be taken to understand that the Commissioner is a judge of unblemished reputation, nearing the end of a long and distinguished judicial career in more than one jurisdiction, sworn to do justice without favour or partiality. Such an observer would dismiss as fanciful the notion that such a judge would break his judicial oath and jeopardise his reputation in order to curry favour with the Jersey authorities or on account of his acquaintance with them. The Commissioner may be seen as a man for whom all ambition was spent, save that of retiring with the highest judicial reputation. 20. The fact that the oath taken by the Commissioner included an obligation to "vigorously oppose whomsoever may seek to destroy [the laws and usages and the privileges and freedoms of Jersey]" does not give rise to any possibility that the Commissioner might construe this obligation, as the Applicant contends, as overriding his principal obligation under the oath to "administer justice to all manner of persons without favour or partiality". This is because, objectively, the oath does not require the Commissioner to give primacy to the interests of the individual members of the judicial and political authorities in any dispute they may have with the

Applicant and also because, even if the oath was capable of being understood in that sense, there is no realistic basis on which it can be said to be likely to be construed in that fashion by the Commissioner. 21. Accordingly in my judgment the Commissioner was right not to recuse himself. There are no arguable grounds for any appeal against his decision. . The jurisdiction to award costs in criminal cases 22. The Applicant submits that the power of the court to award costs against defendants in criminal cases is liable to have a chilling effect on the willingness of a defendant to exercise his rights of defence in any criminal case. The Applicant submits that any power to award costs against defendants in criminal cases thus undermines the rights of access to the court guaranteed by Article 6 of the European Convention on Human Rights . 23. In my view this submission is unsustainable. The right to award costs in criminal cases in Jersey is strictly circumscribed and not such as to be liable to have a chilling effect on defendants. The power to award costs against a defendant in any criminal trial at first instance is restricted under Article 2 of the Costs in Criminal Cases (Jersey) Law 1961 to a power to award costs only in the event of conviction. 24. There is power to award costs on an appeal in criminal proceedings. In the case of an appeal, or application for leave to appeal, under Part 3 of the Court of Appeal (Jersey) Law 1961 and Part V of Magistrate's Court (Miscellaneous Provisions) (Jersey) Law , the Court may only award costs against the Applicant if his appeal is dismissed. In the case of an appeal by way of case stated under Part V of Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 , the court has power under Article 22(2) to make an order as to costs to the extent that may seem fit to the court. However for the reasons explained by the Commissioner in his judgment in this case (*Syvret v Attorney General*

[2009] JRC 165) the jurisdiction of a Magistrate to state a case should only be exercised after a final determination has been made in any criminal proceedings. 25. I do not consider that these powers to award costs are such as to hinder access to the courts in a manner that is unjustified or violates Article 6 of the Convention. The powers to award costs in criminal cases strike a reasonable balance between the interests of the prosecution and the defence and serve only to protect the right of the State to seek some payment from a defendant after conviction or in circumstances where he has chosen to appeal by way of case stated prematurely. The propriety of the order for costs made by the Royal Court in this case 26. Article 22(1) of the Magistrate's Court (Miscellaneous Provisions)(Jersey) Law provides that:- "On an appeal by case stated under Article 21, the Royal Court shall hear and determine the question or questions of law arising on the case and may reverse, affirm or amend the determination in respect of which the case has been stated, or remit the matter to the Magistrate's Court, with its opinion thereon, or may make such other order in relation to the matter, and may make such orders as to costs, as may seem fit." 27. In awarding costs against the Applicant the Commissioner said that he regarded the application for recusal "as being fanciful and entirely without merit." The Commissioner concluded that there was no public interest in the case and that the lack of means on the part of the Applicant was not a reason to refuse to order costs. 28. There are no properly

arguable grounds for attacking the exercise of the Commissioner's discretion to award costs. The application for recusal was without merit and the order for costs was limited to the costs of the recusal application (requiring the Applicant to pay no more than £2,512.07). 29. In the circumstances I do not consider there is any arguable basis on which leave to appeal against the order for costs could be sought. The costs of this application 30. The Attorney General seeks his costs of resisting this application on the grounds that it is specious and devoid of merit. Crown Advocate Baker argues that I have power to award costs under Article 3 of Costs in Criminal Cases (Jersey) Law 1961 since this is an application for leave to appeal under Part 3 of the Court of Appeal (Jersey) Law 1961 . However, the Applicant did not at any stage in the hearing before me claim a specific right to appeal under Part 3 and, for the reasons set out above, the Applicant has no right to make any application for leave to appeal under Part 3. 31. In any event, the lack of merit in the application as well as the limits on the jurisdiction of this Court give rise to an argument that the costs expended by the Attorney General should be limited to the costs associated with setting out his grounds for opposing leave to appeal rather than the costs associated with his attendance on the oral hearing, see by way of analogy the approach of the English Court in *R (on the application of Mount Cook Land Ltd) v Westminster City Council*

[2003] EWCA Civ 1346 . 32. In the circumstances I do not consider it appropriate to make an order for costs against the Applicant. Authorities Magistrate's Court (Miscellaneous Provisions)(Jersey) Law 1949. Police Procedures and Criminal Evidence (Jersey) Law 2003. *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte* (No 2)

[2000] 1 AC 119 . *In re Medicaments and Related Classes of Goods* (No 2)

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v. Secretary of State for the Home Department and another

[2008] 1 WLR 2416 . *Bolkiah v State of Brunei*

[2007] UKPC 63 . European Convention on Human Rights. Costs in Criminal Cases (Jersey) Law 1961. Court of Appeal (Jersey) Law 1961. *Syvret v Attorney General*

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