

JERSEY / JUDGMENT

Warren & Ors -v- AG 29 Sep-2011

[2011] JCA 187 (29 September 2011)

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Court of Appeal September 2011 Before : The Hon Michael J. Beloff, Q. C., President; Dame Heather Steel, DBE, Michael Jones, Q. C. Curtis Warren John Welsh James O'Brien Paul Hunt Jason Woodward Oliver Lucas -v- Attorney General In the Matter of an Application by Curtis Warren & Others. HM Solicitor General - H. Sharp Q. C. Advocate S. M. Baker on behalf of Warren Welsh O'Brien Hunt Woodward and Lucas

JUDGMENT

THE president: This is the judgment of the Court . 1. This is an application made on behalf of Curtis Warren and Others including Mr John Welsh requesting the Court to make an order requiring the AG of Jersey to disclose the name of a juror in their trial so that a statement may be taken from him for the purposes of the investigation by Hampshire police into alleged police misconduct in connection with that same trial. For convenience we shall concentrate on Warren's case while noting that the same issues arise in the other cases. 2. The background to this application is as follows. Mr Warren, with the others was charged before the Royal Court with conspiracy to import 180kg of cannabis, a class B drug, into Jersey. On 7 th October, 2009, he was found guilty. He was later sentenced to 13 years imprisonment. On 5 th May, 2010, his appeal to the Court of Appeal was dismissed. On 28 th March, 2011, his further appeal to the Privy Council was also dismissed. The issue before the Privy Council was whether the prosecution should have been stayed on grounds of abuse of process by reason of the deliberate planting of surveillance devices in Mr Welsh's car when passing through Belgium, the Netherlands and France without the required consent of the relevant authorities in those jurisdictions. 3. The present application relates, however, to a distinct matter which was raised before the Court of Appeal but not before the Privy Council ("the new issue"). At the outset of the trial Sir Richard Tucker, Commissioner indicated to counsel that, on the material provided to him he was persuaded that attempts had been made to influence the jury and prophylactic steps were taken in consequence. However during the course of the trial, an ex parte application had to be made by the prosecution to discharge a juror. This was acceded to by the Commissioner who directed the jury as follows:- "You will recall that I ordered police surveillance in respect of this case. What I have to say to you is being said in the absence of the public or the press and will not be reported. As a result of information that I have received, I have discharged one of your number, Juror 125, and I shall continue, I hope, with a Jury of 11 Members. You must not hold these events against any of these

defendants. I must emphasise that you must not colour your approach to this case." 4. Advocate Baker submits that it has more recently come to the attention of Mr Warren that a member of the jury had been approached in September 2009, i.e. during the trial by a Jersey police officer at the Jersey Rugby Club who said words to the effect "you know they are guilty" apparently referring to Mr Warren and his co-accused.. An ability fully to investigate such incident may, Advocate Baker submits, open up an avenue to revisit the convictions. The hypothesis is that Juror 125 and the member of the jury allegedly approached by the police are one and the same person. 5. Correspondence ensued between Warren's lawyers on the one hand and the Hampshire Police and the Crown on the other between May and August of this year. . The upshot of that correspondence was that the Crown refused to disclose the name and the Hampshire Police said that in consequence they could take that particular matter no further (see their email of 30 th August, 2011). Hence this application. 6. The lynchpin of the application is a witness statement dated 7 th July, 2011, of a Mr Michel ("MWS"), who practised as a Jersey lawyer, and is currently serving a sentence of imprisonment for perverting the course of justice. It states:- "I am the above named person. I am making this statement in relation to a conversation I had with a male who stated that he had been on a jury and had been approached by a Police Officer about the case. He was then discharged. At some stage a few years ago, I went to an Indian restaurant called "New Raj", St Saviours Road, St Helier, Jersey for a meal with two friends, I think it was probably a Friday or Saturday evening. At that time I was a practising lawyer on Jersey, and I was also aware that around that time a highly publicised trial was either going on or had finished, in relation to Curtis WARREN with regards to drugs. I believe I was dropped off at the restaurant, and met my friends there. One of them had brought another male with him who joined us for dinner, this was the male who had been a jury member. I would describe him as being around 40 years old, white, around 6' tall who was fairly well built. He may have had an Irish accent, and he had dark hair with a slight "quiff". I may know his first name but I have been told not to mention this. I had never seen him before and I believe he was a friend or neighbour of one of my friends. I don't believe that he knew me at all. During the course of the evening we had a meal and one or two alcoholic drinks, but we were certainly not drunk or anywhere close to it. At some stage we were talking about the legal system, I think this came up because of me being a lawyer. He said that he had been a jury member in the Curtis WARREN trial, and I believe mentioned that in the evidence he had heard it was believed that the police had been 'up to no good'. He didn't elaborate on this though. He then stated that at some point, he had been at a rugby match when he had been approached by a police Officer who had said to him words to the effect of 'THEY'RE GUILTY'. The male said he didn't acknowledge him and didn't have any further conversation with him about it. He didn't say that the Police Officer said anything further to him. The male clearly felt disapproved as to what had happened. He then said he had been removed from the jury, he did not say how long after the incident he had been removed, but I got the impression that he was very vague about why he had been removed, and he was unsure why. This conversation only lasted around 4 or 5 minutes, I think some of us may have made light hearted comments about the Jersey legal system, but we did not discuss it much further at all. I seem to recall that he played rugby, possibly for Jersey Veterans or Seconds, but I'm unsure if was playing or watching rugby when he was approached, and I'm unsure where it happened, although I got the

impression that it was at Jersey Rugby Club. He didn't go into any more detail about when it had happened, what the Police Officer looked like, or if he had told anyone else. After the meal I went home. At some stage after this I remember reading in either the Jersey Evening Post (JEP) or other media article that during the WARREN trial, jury members had been discharged. I remember thinking that people reading it may think it referred to the defendants 'getting to' jury members, but this certainly wasn't how the male I spoke to described it. I did not think much of what he said afterwards, and did not mention it to anyone else, until around late May/June 2011. On 5 th May, 2011, I was imprisoned at HMP La Moye, Jersey. After a few weeks I had a conversation with another inmate, John WELSH, who by that stage I had found out that he had also been convicted as part of the WARREN trial. I had never spoken to or met him before coming into prison, and it was only when I arrived at prison that people told me who he was and what he had been convicted of. I got to know and spoke to John a few times; however a few weeks after I had been inside, we were talking about our respective cases. He said that he felt hard done by during his trial, and mentioned that jury members had been discharged during his trial. I then told him what I had heard from the jury member in the restaurant. A few days later, John asked me if I would mind speaking to his lawyer about what had happened and I said I didn't. I spoke to Sarah Fitz, his lawyer which has led to me giving this statement. I want to stress that I have not been put under any pressure whatsoever to make this statement, and I do it of my own accord, as I feel that people should know what has allegedly happened. I do not want to name my friends who were at the restaurant at this stage, as I do not want them to become involved if necessary, I am willing to assist and am willing to attend court." 7. The Crown's reaction to the new issue so raised is exemplified in the letter of the Solicitor General dated 25 th July, 2011, to Advocate Baker. Juror 125 was discharged from the jury on 5 th October, 2009, shortly before the Commissioner commenced his summing up. The Commissioner stated "I have grounds to believe that one member of the Jury has been contacted by outside sources during the course of this trial" Plainly the phrase 'outside sources' was not a reference to the police. The Commissioner's decision was the result of a prosecution application made without notice. It followed the Commissioner's earlier ruling on the first day of trial: "I am persuaded by the material placed before me that there have been attempts to influence the Jury; to adopt a colloquialism, to 'nobble' the jury". Again, there was no suggestion that the police were responsible for these difficulties. Against that background, I turn now to consider the allegations of Mr Warren. On the day the Commissioner announced that he was discharging Juror 125, Advocate Baker appeared to suggest in Court that the police had interfered with the Juror; "We of course can't see any of the evidence which has been put before you but these are applications which are made in the context of a case where there has been very bad reprehensible behaviour by the police and we are concerned about that, but there we are. Commissioner: well are you suggesting that the police have attempted to nobble the Jury?... Advocate Baker: Sir, the defence... I simply don't know" Pausing there it was Mr Warren's assertion, without any evidence in support, that the police had interfered with Juror 125. At the time this allegation was not pursued by the defence perhaps because of the inherently unlikely coincidence of the same juror being inappropriately contacted by both the police and the outside sources in the course of the same trial. Mr Warren, following his unsuccessful appeal to the Privy Council this year, has chosen to revive this allegation. On 12

th May, 2011, Baker and Partners, by email addressed to the Hampshire Police alleged on behalf of Mr Warren that Juror 125 had been the subject of an approach by a police officer prior to his removal from the jury. It is alleged that the police officer said "you know they are guilty" or similar. I invited Baker and Partners to inform me as to the basis for these assertions. On 16 th June, 2011, Advocate Baker replied in these terms: "I have no instructions to provide the Law Officers Department with the information you request". More recently, Hampshire Police took a witness statement from Mr Justin Michel following his conviction for conspiring to pervert the course of justice which featured a jury rejecting his evidence given on oath. It is dated th July, 2011, and appears to relate to an allegation made by Baker and Partners in their email dated 12 th May, 2011. I enclose a copy of this statement with this letter. There are many striking features about the statement that include (1) the fact that, if the account which he gives in his statement is accurate Mr Michel's decided not to report such a matter at the time despite his status as a Advocate (2) again, if accurate, his conversation with WELSH occurred after the Baker and Partners email of 15 th May, 2011, had revived these allegations and (3) it seems that it is through WELSH that this statement has come to be provided. As prosecution counsel I have given very careful consideration to the contents of Mr Michel's witness statement, the seriousness of the allegations raised and to all of the relevant information available to me in this case. I am satisfied, by reference to all the facts that there is no basis for further scrutiny or action to be taken in respect of this allegation." 8. In our view Advocate Baker's application faces an insurmountable obstacle that is to say that, as both counsel now agree, the Court of Appeal lacks jurisdiction to deal with it. 9. Article 32 of the Court of Appeal (Jersey) Law 1961 states that an appeal against conviction should commence within 28 days of a conviction. Article 32(3) provides the Court of Appeal with the power to extend time at any stage. 10. However a defendant is ordinarily entitled to only one appeal. The Court of Appeal has no jurisdiction to entertain a second appeal of its own motion even where fresh evidence is said to have emerged since the first appeal: see R-v-Pinfold

[1988] 1 QB 462 at pp.465-7. This Court has been functus ever since it dismissed Mr Warren's appeal (whereafter the matter proceeded to the Privy Council). 11. In Jersey the Court of Appeal can only hear a second appeal in the event that the matter is referred by the Lieutenant Governor pursuant to Article 43 of the Court of Appeal (Jersey) Law 1961 . [Prior to 2008, it was the Secretary of State in the UK who exercised the Article 43 power.] Article 43 mirrors the equivalent provisions of Section 19 of Criminal Appeal Act 1907 and Section 17 of the Criminal Appeal Act 1968 (prior to the creation of the Criminal Cases Review Commission in England, Wales and Northern Ireland) by the Criminal Appeal Act 1995 . 12. Article 43 of the Law, somewhat opaquely entitled Prerogative of Mercy, provides:- "Nothing in this Part shall affect the prerogative of mercy, but, as respects the conviction of a person on indictment by the Royal Court or the sentence passed on a person so convicted, being a conviction or sentence against which an appeal lies under this Part to the Court of Appeal, the Lieutenant-Governor may, if he or she thinks fit, at any time either - (a) refer the whole case to the Court of Appeal, and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted; or

- (b) if the Lieutenant-Governor desires assistance on any point arising in the case, refer that point to the Court of Appeal for its opinion thereon, and the Court shall consider the point so referred and furnish the Lieutenant-Governor with its opinion thereon accordingly. 13. Article 43 is complemented by the Court of Appeal (Criminal) Rules 1964 . "Reference by Lieutenant-Governor When the Lieutenant-Governor exercises his or her powers under Article 43(a) of the Law and refers the whole case to the Court of Appeal, the petitioner whose case is so dealt with shall be deemed to be for all the purposes of the Law or these Rules a person who has obtained from the Court of Appeal leave to appeal, and the Court of Appeal may proceed to deal with his or her case accordingly." 14. Once the jurisdictional bar was drawn to his attention, Advocate Baker promptly, according to information from the Greffe, sought to invite the newly appointed Lieutenant Governor to exercise his power under Article 43 but, unsurprisingly, on his second day in office the Lieutenant Governor had not done so before the matter came before us. 15. Advocate Baker submitted that the Court of Appeal could, nonetheless if it so chose, informally advise the Lieutenant Governor that it was an appropriate case for him to refer to this Court. We would decline to do so for reasons which follow. 16. First, the Court of Appeal's jurisdiction is statutory. It has, like all Courts of record, inherent powers necessary for the proper performance of its functions. But on neither footing can the Court give the informal advice requested. There is no statutory provision enabling or entitling it to do so: and to give such advice falls far outside the exercise of any inherent power. Second, what Advocate Baker asks us to do is invert the procedure envisaged by Article 43 which places the initiative for a reference clearly and exclusively in the hands of the Lieutenant Governor. Third, Article 30 of the Court of Appeal (Jersey) Law 1961 , which endows the Court of Appeal with wide powers, only entitles it to exercise such powers when a case is before it. It assumes, but does not create jurisdiction. It provides:- "30 General powers of court The Court of Appeal shall, for the purposes of and subject to the provisions of this Part, have full power to determine, in accordance with this Part, any questions necessary to be determined for the purpose of doing justice in the case before it." 17. During the course of argument Advocate Baker said that he had considered the possibility of an application for leave to apply for judicial review to the Royal Court seeking to impugn the refusal of the Attorney-General to disclose the name of juror 125. No such application has in fact been made, and we therefore refrain from further comment on the suggested availability of this course of action. 18. Although Advocate Baker sought to pray in aid what he claimed to be exceptional circumstances nonetheless justifying us in expressing a view on the underlying merits (or lack thereof) of the matters exposed by Mr Michel's witness statement and their potential impact, if further pursued, on Curtis Warren's conviction, we must decline the invitation. Lacking any legal basis for so doing, it would be imprudent, if not indeed improper, for us to do so. Authorities Court of Appeal (Jersey) Law 1961. R-v-Pinfold [1988] 1 QB 462. Criminal Appeal Act 1907. Criminal Appeal Act 1968. Criminal Appeal Act 1995. Page Last Updated: 04 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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