

JERSEY / JUDGMENT

Warren and Others v AG [2009]

JCA 175 (04 September 2009)

[2009] JCA 175

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COURT OF APPEAL 4th September 2009 Before : Jonathan Sumption Esq., Q. C., President; Michael S. Jones Esq., Q. C., and; Clare Montgomery, Q. C. Curtis Warren John Alan Welsh James O'Brien Jason Woodward Paul Hunt Oliver Lucas -v- The Attorney General Advocate S. M. Baker for Warren. Advocate S. E. Fitz for Welsh. Advocate J. W. R. Bell for O'Brien. Advocate D. Gilbert for Woodward. Advocate M. J. Haines for Hunt. Advocate M. L. Preston for Lucas. William Bailhache, Her Majesty's Attorney General assisted by H. Sharpe, Esq., Crown Advocate. Advocate R. Tremoceiro, as an amicus to the Court.

JUDGMENT

SUMPTION JA: 1. The defendants are charged on an Indictment alleging conspiracy fraudulently to evade the prohibition on the importation of a controlled drug contrary to Article 61(2)(b) of the Customs and Excise (Jersey) Law 1999, between 1 May and 23 July, 2007. The question at issue on this appeal is whether they are to be tried by jury or by a judge sitting with jurors. 2. The criminal jurisdiction of the Royal Court is exercisable either at an assize, with the facts being found by an enquête conducted by a jury of twelve persons (in effect, trial by jury), or by the Inferior Number of the Court (i.e. the judge sitting with not less than two jurors). 3. The customary law of Jersey distinguishes between offences under the customary law itself (known as 'crimes' or 'délits') and statutory offences (known as 'contraventions'). Minor offences in both categories are tried summarily, originally in the Police Court, now before the Magistrate. Where the defendant is brought before the Royal Court for trial charged with a statutory offence, he has from time immemorial been tried by the Inferior Number of the Royal Court. The original assumption was that statutory offences were comparatively minor or regulatory in nature. This assumption has become progressively more unrealistic as an ever wider range of criminal offences has been placed on a statutory basis, but the trial of statutory offences by the Inferior Number has remained the rule. 4. The mode of trial of customary law offences in the Royal Court has historically been a more complex matter. Before 1864, it appears to have depended on the Court's view of the gravity of the offence, the graver offences being assigned to the assize court and the others to the Inferior Number. This disorderly state of affairs was brought to an end by the Loi (1864) Reglant la Procedure Criminelle. Article 1 of the Law of 1864 provided:- "Toute personne traduite... devant la Cour Royale sous prévention de crime et délits sera jugée - soit, à une des Assizes ci-après établies, par la Cour, avec l'assistance d'une enquête composée de 12 personnes

choisies comme est ci-après réglé - soit par le Nombre Inférieur de la Cour sans enquête. Le prévenu aura la faculté en tout cas d'élire d'être jugé avec l'assistance de l'enquête. S'il ne fait pas election d'être ainsi jugé, la cour lors de sa présentation devant elle décidera, eu égard à la nature et la gravité du cas et oui les conclusions de la Partie Publique de quelle manière la poursuite aura lieu." In other words, the defendant charged before the Royal Court with a customary law offence was given a right to elect trial before an assize court with a jury. The Court had no discretion to determine the mode of trial unless the defendant failed to make an election. 5. Evading the prohibition on the importation of a controlled drug is a statutory offence triable before the Inferior Number of the Royal Court. However, conspiracy to commit that offence is an offence under the customary law. It follows that until the position was modified by statute in 2009, it was triable like any other customary offence as a 'crime' or 'délit'. The defendant was accordingly entitled under Article 1 of the Law of 1864 to elect whether to be tried before the Royal Court sitting as an Assize Court, with a jury of twelve persons, or by the Inferior Number, with a judge and jurors. 6. Under the Law of 1864, this election must be made after arraignment, which is the stage of the proceedings at which the defendant is 'brought' (traduite) before the Royal Court. Under Article 84 of the Police Procedures and Criminal Evidence (Jersey) Law, where criminal proceedings are instituted before the Royal Court, the Bailiff may order a preparatory hearing. Article 85 provides that if he does so, "the trial shall start with that hearing, and arraignment shall take place at the start of that hearing." In the present case a preparatory hearing was ordered, and opened on 10 March, 2008. The defendants were arraigned on that date. The defendants did not expressly elect trial by jury because, as we have been told, it is invariably assumed that a defendant elects trial by jury unless he says otherwise. That assumption is certainly consistent with the Court's subsequent conduct of the proceedings. On 3 October, 2008, the Court directed that the hearing of the evidence would take place before a judge and jury. Since it neither invited nor received any submissions about the mode of trial, the Court cannot have been exercising the discretion as to mode of trial conferred on it in cases where no election has been made. Given the terms of the Law of 1864, it must, as it seems to us, have made its direction for trial by jury on the footing that it reflected the defendants' assumed election. 7. After a number of adjournments, the hearing of the evidence is presently fixed to begin on 15 September, 2009. 8. The Criminal Offences (Jersey) Law 2009 came into force on 31 July, 2009, six weeks before that date. Its object was to deal with the anomaly by which statutory offences were tried before the Inferior Number whereas common law offences ancillary to them, such as conspiring or attempting to commit a statutory offence, or aiding and abetting some one else to commit it, were tried by jury. Article 1 provides (so far as relevant): "(1) A person who - ... (b) conspires... to commit a statutory offence, is guilty of an offence and is liable to the same penalty as a person would be for the statutory offence. (2) A person alleged to have committed an offence by virtue of paragraph (1) shall be triable in the same manner as a person would be tried for the statutory offence. (3) This Article does not affect proceedings for an alleged offence at customary law - ... (b) of conspiring... to commit a statutory offence, arising out of an act done by a person before the commencement of this Law. (4) However, the person is triable in the same manner as a person would be tried for the statutory offence." 9. The Attorney General contends that the effect of these provisions is to make a conspiracy to commit a statutory offence triable in the

same way as the principal offence, even if (as in this case) the relevant acts were done before the Law came into force and even if (as in this case) the defendants have already elected trial by jury in accordance with the law as it stood before the Law of 2009 came into force. The learned Commissioner accepted this submission. On 19 August, 2009, he directed trial before himself and the jurors. 10. We have, with respect, taken a different view. 11. The starting point is that an enactment is presumed, unless a different intention appears, to apply from the time when it comes into force. The strength of that presumption varies with the circumstances, and it is fair to say that it is not normally regarded as applicable to purely procedural provisions. In *Bennion on Statutory Interpretation*, 5th ed. (2008), at page 320, it is suggested in the commentary to Section 98 of the author's 'Code' that the reason for differentiating between substantive and procedural enactments in this way is that procedural changes are assumed to be for the benefit of all litigants. We note that those modern English authorities which have adopted Section 98 have generally refrained from adopting this particular explanation for it: see, for example, *Makanjuola*

[1995] 3 All ER 730, 732 (Lord Taylor CJ) and *Bradley*

[2005] 1 Cr. App. R 24, at para. 28. In our judgment, that reticence is wise, for *Bennion's* explanation cannot be supported. Procedural changes may or may not benefit all litigants, and are most unlikely to benefit them all equally, particularly in the domain of criminal procedure. The real basis of the distinction is that the presumption against retroactive effect is designed to protect accrued rights or obligation from retrospective alteration, unless it is sufficiently clear as a matter of construction that such an alteration was intended. It is conceived to be unjust to derive substantive rights or obligations from a person's conduct or from some other state of affairs, by reference to a rule of statute law which did not exist at the time, because it is by then too late for him to act differently. By comparison, applying a new procedural provision to current proceedings will not normally involve any element of retrospectivity at all. A change in the procedural law of the court is not being applied retrospectively, simply because the proceedings are themselves concerned with things that happened long ago. The new procedural rule is being applied to what the court is doing now to discover the facts, and not to the facts themselves. To put the point another way, no accrued rights or obligations of a litigant are engaged by the Court's decision to apply its current procedure to current proceedings. When a person commits an offence, he does not thereupon become entitled to a trial in accordance with the procedural rules which then existed. His rights under the procedural law of the court arise only when he is in before the court, and they necessarily depend on how that law stands at that time. 12. This is in our judgment the real basis of the decisions of the English Court of Appeal in *Makanjuola* and *Bradley* which we have already cited. In *Makanjuola* it was held that an enactment abrogating the mandatory requirement that the trial judge should direct the jury about the danger of convicting on uncorroborated evidence in certain classes of case, applied to any proceedings after it came into force notwithstanding that they related to acts alleged to have been done before. In *Bradley* the same principle was applied to an enactment coming into force after the relevant acts which made evidence of bad character admissible on a wider basis than before. In each

case the underlying, albeit unexpressed, rationale is that the defendant has no right to have a particular procedure followed other than that which applies by virtue of the law in force at the time when he is before the Court. As Rose LJ made clear in *Bradley* (at para. 25), the question to what proceedings and to what stages of such proceedings the new statutory rule applies is always a question of construction of the enactment in question. 13. We turn therefore to the construction of Article 1 of the Law of 2009. 14. Paragraph (1) of Article 1 creates a new statutory offence of conspiracy with the same legal elements as the customary law offence. As a statutory offence, it is a 'contravention', which must as a matter of course be tried by the Inferior Number. Paragraph

- (2) merely makes this explicit. 15. Paragraph (3) of Article 1 provides that neither the creation of the new statutory offence in paragraph (1) nor the provision of paragraph (2) as to the mode of trial is to apply to proceedings for the customary law offence. The present proceedings are proceedings charging the customary law offence of conspiracy, which is the only offence of conspiracy for which these defendants could have been indicted or arraigned in 2008. Thus far, nothing in Article 1 of the Law of 2009 purports to modify or abrogate the defendant's right to elect the mode of trial under the Law of 1864. The whole burden of the Attorney-General's submission has to be carried by paragraph (4). 16. Paragraph (4) is a proviso to the proviso in paragraph (3). Its effect is that although the provisions about the mode of trial in paragraph (2) have no application to proceedings for the common law offence of conspiracy, nevertheless a corresponding rule about the mode of trial is to apply to such proceedings. 17. That is not, however, the end of the matter, for on that footing the critical question is: given that the Law of 2009 came into force on 31 July, 2009, what is it that has to happen after that date in order to engage the provisions of paragraph (4)? Four possibilities were canvassed before us: (i) the alleged criminal acts to which the proceedings relate; (ii) the beginning of the trial in the special sense meant by Article 85 of the Law of 2003, i.e. the opening of the preparatory hearing; (iii) the determination of the mode of trial; and (iv) the beginning of the evidential hearings, marked by the constitution of the fact-finding tribunal, i.e. of the jury or the jurats as the case may be. 18. In our judgment, the correct answer is (iii). The legislature did not intend to apply Article 1(4) to proceedings in which the mode of trial had already been conclusively determined under the pre-existing law before the Law of 2009 came into force. This is because paragraph (4) is concerned solely with the question how the relevant customary law offence is 'triable'. In other words, it is concerned with determining the mode of trial in the Royal Court in proceedings for that offence. 19. We say this for two related reasons:- (i) First, as a matter of construction the legislature is most unlikely to have intended to apply a rule about the determination of the mode of trial to proceedings already in progress when the Law came into force, and in which a valid determination of the mode of trial had already been made under mandatory provisions which were then in force. If it had been intended to reverse a determination already made in those circumstances, we think that the Law would have said so. There is certainly no need to read the Law that way in order to give sensible effect to it. (ii) Second, the application of Article 1(4) in these circumstances would involve a

real element of retrospectivity. We doubt whether the right to elect the mode of trial in the Royal Court can be described as a constitutional right, by analogy with the right to trial by jury in England. Its availability in Jersey is too limited and dependent on too many adventitious matters to justify that approach. (We observe that in Guernsey, there has never been a right to trial by jury). However, it is enough for present purposes that the right to elect the mode of trial is a statutory right conferred on the defendants by the Law of 1864 for their benefit. These defendants exercised it in accordance with the procedural law of Jersey as it then stood and thereupon acquired a right to trial by jury. The Commissioner's construction, unlike the arguments considered by the English Court of Appeal in *Makanjuola and Bradley*, involves retrospectively applying the current law to a stage of the proceedings which had already been completed before it came into force, so as to undo a lawful exercise of the defendants' rights and deprive it of the legal effect which it had at the time of its exercise. This involves the very injustice with which the presumption against retrospective effect is concerned. 20. We intend no disrespect for the other arguments canvassed before us by dealing with them only briefly. 21. The submission that the alleged criminal acts must have occurred after the Act has come into force was advanced before us by the amicus, Advocate Tremoceiro. We are most grateful to him for his helpful analysis of the problem, but we reject this particular submission for the reasons which we have given in paragraphs 12 and 13 of this Judgment. A procedural enactment applies to the current procedure of the court, unless a contrary intention appears. It does not apply to the underlying facts, nor does the presumption against retroactivity require that it should. 22. The primary case of the defendants is that Article 1(4) applies only in cases where the trial has begun after 31 July, 2009, according to the definition in Article 85 of the Police Procedures and Criminal Evidence (Jersey) Law 2003. This provision is in our view relevant only for the purposes of that Law: see R

v. Tonner

[1985] 1 WLR 344, a decision on Section 72(3)(a) of the Criminal Justice Act 1977, on which Article 85 of the Law of 2003 was based. However, we reject the submission for a more fundamental reason, namely that the beginning of the trial, however defined, has nothing to do with the issue. The expression used in paragraph (3), to which paragraph (4) is a proviso, is the 'proceedings', which is a wider concept than the trial. What matters is that step in 'the proceedings' which supplies the subject-matter of paragraph (4), namely the determination of the mode of trial. 23. That leaves the Attorney-General's submission that Article 1(4) applies to any proceedings in which the fact-finding tribunal is constituted and enters upon its functions after the Law of 2009 has come into force. The difficulty about this is that the determination of the mode of trial, which is what paragraph (4) is all about, necessarily happens before the fact-finding tribunal is constituted and enters upon its functions. Indeed, it determines how that tribunal is to be constituted. If (contrary to our view) Article 1(4) is mandatorily applicable notwithstanding that a determination of the mode of trial has already been validly made under the pre-existing law, it would follow that the mode of trial would have to be changed at whatever stage of the proceedings the

Law came into force: for example during the summing up or even during the jury's deliberations. The Attorney-General understandably shrinks from that outcome, but there is nothing in the terms of the Law which enables it to be avoided. 24. The appeal will accordingly be allowed, and we will direct that the trial should be conducted before a judge sitting with a jury. Authorities Customs and Excise (Jersey) Law 1999. Loi (1864) Reglant la Procedure Criminelle. Police Procedures and Criminal Evidence (Jersey) Law 2003. Criminal Offences (Jersey) Law 2009. Bennion on Statutory Interpretation, 5th ed. (2008), at page 320. Makanjuola [1995] 3 All ER 730, 732. Bradley [2005] 1 Cr. App. R 24. R v. Tonner [1985] 1 WLR 344. Criminal Justice Act 1977. Page Last Updated: 15 Oct 2015

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