

2. The factual background is set out helpfully at para 1 of D’s skeleton argument. D has pleaded guilty to four offences under the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 (as amended); the Indictment is at tab 1 of D’s skeleton bundle. The basis of the proposed Newton hearing is in counts 2 (possession with intent to supply) and 4 (possession). The factual issues are set out in the Prosecution’s communication of 25th October 2012, also located at tab 1 of D’s bundle. These differences, in summary, amount to the following: in respect of counts 2 and 4, 14 bags containing a total of 13.5 grams of JWH-018 and 1.2 grams in the jeans of D it is alleged that D intended to supply these quantities. The defence case is that the only amount to be supplied was 1.0 grams in his sock and that all the rest was personal use only. The Prosecution case is based on the telephone calls and texts set out in the draft admissions at tab 1 of the Prosecution’s skeleton bundle, they are not further reproduced in full here. These messages are both prior and subsequent to D’s arrest on 26th September 2011. The defence argue that this material is inadmissible and/or irrelevant and grounds these submissions on the English case of R v Kearley [1992] 2 AC 228 (set out at Tab 2 of D’s bundle); in essence it is suggested that they are hearsay. In addition their probative value is outweighed by their prejudicial effect, so exclusion is merited under Section 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003. The Prosecution submissions seek, in effect, to distinguish the case on the facts and suggest if (as is denied) the material is hearsay, then an exception applies.

Legal Principles

3. It is as well to start with R v Kearley, a decision of the House of Lords, overturning the dismissal of an appeal in the Court of Appeal, and by a 3-2 majority. The case has been abrogated in England by statute – The Criminal Justice Act, 2003, especially Sections 114 and 118 – this legislation has not been enacted in Guernsey and therefore the common law position remains. The decision caused some surprise in criminal law circles in England when it appeared, but it is of the greatest persuasive authority in Guernsey. Although not formally binding, a decision of the House of Lords will be followed in Guernsey courts where English and Guernsey Law coincide. This is a consistent approach in Guernsey and dates back to Archbold being regarded as a work of authority for criminal law purposes in the 19th century. On a personal note, I had the advantage of discussing the decision with leading Counsel for the Crown in some detail when it was announced. Although I have an individual preference for the dissenting speeches, I propose to follow the majority here. In that case the evidence of 10 telephone callers asking for the Appellant by nickname and 7 personal callers wishing to buy drugs, given by police-officers at the house was given at trial. It was held by the majority in the House of Lords that the state of mind of callers was not in itself relevant to any issue. The implied assertion that the Appellant was a supplier was inadmissible hearsay. The multiplicity of calls went as to weight, not admissibility, the opinions of the callers were unsworn, untested by cross-examination and prejudicial (Lord Oliver). The principles expounded actually operated in favour of the Prosecution in another drug case, R v Harry (1986) 86 Cr App R.105, where the accused sought to use this type of “evidence” to demonstrate his flat-mate was the dealer, not him.
4. The Prosecution cited R v O’Connell [2003] EWCA Crim 502. Kearley was applied here on similar but not identical facts, and it made no difference that D was present at the time of the telephone calls if he could not hear them - but his reaction in shouting warnings, was admissible. However, at paragraph 8 of Mantell LJ’s judgment (tab 10 of Prosecution’s bundle) it is said:

“Here it was not a case of a two-way conversation being intercepted as sometimes happens where both parties or sides to the conversation are recorded and where it has been accepted in the course of argument that the whole conversation would be admissible to put the responses of the defendant or suspect into context, provided always of course that what was said by him was relevant to an issue in the trial.”

And part of paragraph 10 reads:

“In Kearley what the caller had to say was pure hearsay. That would not be so if, of course, it is directly communicated to the hearer and he responds to it.”

A little later in that paragraph we find:

“What the caller says, however, is irrelevant unless the person to whom he thinks he is addressing his remarks actually hears it”.

On this basis it is submitted by the Prosecution (para 22 of the skeleton) that the evidence in the present case has developed beyond merely trying to assert that D is a dealer because people are seeking drugs from him, rather it is advanced to show an actual state of affairs that existed (a concluded agreement). Hence, it is suggested that this is not an implied assertion, but direct evidence.

5. The Prosecution place special importance to the messages texted on 25th September 2011 at 22:57 to 23:03, reproduced at para 4 of the skeleton. An individual going under the designation “*Lez Rach*” texted to D:

“Ricky it’s Robbie can we make it 300 Thursday mate?”

And 4 minutes later:

“That’s 100 each mate.”

D responds a minute afterwards:

“Ya that’s kl I got I now down bridge at moment shouldn’t be too long.”

And *Lez Rach* responds:

“Sound cheers mate nice one.”

The abbreviation “*kl*” apparently alludes to the word “*cool*”.

6. Looking at this material in a common-sense way, and, in particular in the light of what appear to be clear dicta in O’Connell, I cannot see how, applying Kearley religiously, this is inadmissible. The question of weight and any explanations which may be offered will, obviously be for the Jurats to consider. The other dialogue also seems to fall into the same category. However, the last two messages from “*Julie*” after the execution of the warrant are, under Kearley inadmissible and cannot be relied upon.
7. D has admitted by his plea to count 1 that he is a drug-dealer. He also accepts possessing the amount located in his sock with intent to supply. He accepts he was contacted by telephone by persons seeking to purchase “*stuff*”. The question for determination in the Newton hearing is whether D possessed the additional amounts referred to at paragraph 1 above with intent to supply. The texts appear to be highly relevant to the issue and D will have the ability, should he choose to do so, of explaining them. It follows, in my judgment, that the probative value exceeds the prejudicial effect. All probative evidence indicative of guilt is by nature prejudicial, but when a balancing exercise is carried out here this prejudice is considerably outweighed in the scales. The Section 78 PPACE argument therefore fails.
8. It was rather faintly argued on behalf of the Prosecution that the statements ascribed to D could be regarded as *Res Gestae*. This was not, as Advocate Dunford admitted, his strongest point. I concur. It was also suggested (para 24 of skeleton) that the exchanges are admissible as a confession. Under Section 91 of PPACE the word “confession” includes any statement which is wholly or partly adverse to the person who made it. In this Advocate Dunford is on stronger ground and, upon considering the plain words of the statute, I accept his submission.

Conclusion

9. For the reasons given the messages up to the execution of the warrant, i.e., with the exception of the two from “Julie”, are relevant and admissible as the factual circumstances differ markedly from those in Kearley.

J R Finch
Judge of the Royal Court

16th November 2012