The Law Officers of the Crown v. Jennifer Evelyn Guilbert
Royal Court
5th November 2015

JUDGMENT 58/2015

Decision of Preliminary Legal Questions in relation to charges under Section 25 of the Health and Safety at Work (General) (Guernsey) Ordinance, 1987

IN THE ROYAL COURT OF GUERNSEY

Between: **THE LAW OFFICERS OF THE CROWN** **Prosecution**

-v-

JENNIFER EVELYN GUILBERT **Defendant**

Decision on Preliminary Legal Questions

Submissions heard on: 27th October 2015
Decision handed down: 5th November 2015

Before: John Russell Finch, Esq., Judge of the Royal Court

Counsel for the Law Officers: Crown Advocate G S Perry
Counsel for the Respondent: Advocate A J Ayres

Materials referred to in Decision:

The Health and Safety at Work (General) (Guernsey) Ordinance, 1987;
The (English) Sentencing Council Guidelines, 2010, paragraph 4(c);
Archbold (2015 ed.), paragraph 4-343.
Austin Rover Group Ltd v HM Inspector of Factories [1990] 1AC 619;
R v Banks [1916] 2 KB 621;
R v F Howe and Sons (Engineers) Limited [1999] 2 Cr. App. R(S) 37;
Tangerine Confectionery Ltd and Veolia ES (UK) Ltd v R [2011] EWCA 2015.

Background

1. Mrs Guilbert ("D") has pleaded guilty to an offence under Section 25 of the Health and Safety at Work (General) (Guernsey) Ordinance, 1987, ("the Ordinance"). The charge relates to D's activities as registered manager and owner of a Residential Home and the death of an elderly resident there on 9th July, 2014. The person in question, Mrs Le Prevost, fell down a staircase at the Home and suffered injuries from which she died in the Princess Elizabeth Hospital. The offence admitted is failing to ensure, so far as was reasonably practicable, that persons

not in D's employment, including the deceased, were not exposed to risks to their health and safety.

2. Differences have arisen between the Prosecution ("P") and D on how the case can be put and approached. Written submissions were produced and oral argument heard on 27th October, 2015. It will be noted that the scope of this decision has been limited by the oral submissions made. There are various Health and Safety cases in Guernsey, but the authorities consider those emanating from England, where there are a large number of reported decisions on, for the purposes of this case, identical legislation. Such decisions are not binding, but of high persuasive authority. The English Sentencing Council Guidelines need also to be considered, and they are approached as guidelines which may be of assistance in this jurisdiction. Firstly the questions set out by the Defence will be looked at and then the points raised by the Crown and the questions they consider relevant, and finally any other matters.

Defence Questions

3. These are found in D's written submissions, firstly under the heading – "Questions of law for the Court to address". They are:

A Whether the duty owed to Mrs Le Prevost pursuant to section 2(1) of the Ordinance was an absolute duty or a qualified duty.

There is no dispute here. The person having control over the premises has an absolute duty to ensure they are safe. This is qualified by a "reasonableness" limitation. (See Austin Rover Group Ltd v HM Inspector of Factories [1990] 1AC 619.)

B Whether the death of Mrs Le Prevost is an element of the offence or an aggravating factor to be taken into account by the Court when sentencing D.

Reference was made to R v F Howe and Sons (Engineers) Limited [1999] 2Cr. App. R(s) 37, a leading English sentencing case, appended to D's written submissions. In this case Scott Baker J said:

> *"Next it is often a matter of chance whether death or serious injury results from even a serious breach. Generally where death is the consequence of a criminal act it is regarded as an aggravating feature. The penalty should reflect public disquiet at the unnecessary loss of life."*

It is common ground that causing death or serious injury is not an element of the offence. P's written submissions append the case of Tangerine Confectionery Ltd and Veolia ES (UK) Ltd v R [2011] EWCA Crim 2015. At paragraph 12, Hughes LJ (as he then was) states:

> *"These offences are not primarily concerned with ascribing responsibility for the cause of injury. Indeed, they are primarily concerned with avoiding injury. The offences can just as well be committed when there has been no injury as when there has."*

And:

> *"The offence lies in the failure to ensure safety as far as reasonably practicable, i.e. in exposure to risk of injury, not in the doing of actual injury. Causation of the injury is not an ingredient of either offence."*

4. The English Sentencing Council Guidelines of 2010 relate to offences where it is established that the offence was a significant cause of death not simply that death occurred. (See paragraph 4(c).) In oral argument it transpired that Advocate Ayres conceded that the failure to undertake a risk assessment did amount to a "*significant*" element. D also accepts readily that the death represents an aggravating feature. The plain dictionary meaning of the word "significant" is "important" or "noteworthy". It does not mean "sole" or "only". In passing it has to be observed that the 2010 Guidelines apply only to organizations and not individuals. However, D's operation could just as easily have been carried on by a corporate body, and the case concerns what took place in an institution, not an individual person acting on their own. Accordingly, after considering the present facts, the Guidelines remain relevant and helpful, though it is again stressed, not binding in Guernsey.

5. D then goes on to pose two "Questions of Law and Fact for the Court to address". The first, at C, is:

> "*How the Defendant should have conducted her undertaking in such a way as to ensure, so far as was reasonably practicable, that persons not in her employment, including Mrs Le Prevost, were not exposed to risks to their health and safety."*

D accepts that a specific risk assessment should have been carried out in relation to the deceased's use of the stair-lift. The protective measures identified should then have been implemented by D and her employees. This does not need further exegesis, as it ties in with the basis of D's guilty plea as a "significant*"* element.

The next question at D is a side of the same coin. It states:

> "*How the Defendant conducted her undertaking such that she failed to ensure, so far as was reasonably practicable, that persons not in her employment, including Mrs Le Prevost, were not exposed to risks to their health and safety."*

Again, the risk assessment point is made on behalf of D.

6. So far then the issues between P and D have narrowed. In oral argument D submitted that the death was not a direct result of the breach and therefore took issue with the wording used in P's draft Friskies Schedule, which is required in these cases to outline the facts, and aggravating, mitigating and other relevant factors. D has, as is expected, replied to the Schedule. In view of the fact that the lack of a formal risk assessment is accepted as a significant cause of this death it is not necessary to conduct a line by line exercise in analysing the differences between the versions put forward respectively by P and D. D will, by way of mitigation, be able to put forward the point that this is considered an isolated lapse and not a systemic failure. P refers to the risk of all residents due to lack of assessments.

The Crown's Points

7. Point A in P's skeleton is whether the plea is valid or equivocal. In view of the submissions, both written and oral, it is not an equivocal plea. On what has been set out, a guilty plea seems inevitable. Point B on "significant" cause has already been dealt with. That is no longer disputed. Point C and a Newton hearing therefore do not arise. This is, on the facts, not a case for the hearing of evidence in such a situation.

Avoidance of Emotion

8. In oral submissions Advocate Ayres suggested that P was presenting an emotional and overblown statement of the facts. The leading English authority on this goes back a long way and is very well-established. As Archbold, at 4-343 puts it:

> "*It is counsel's duty to outline the facts upon which the Crown intends to rely. It is highly undesirable for prosecuting counsel in so doing to use unnecessarily emotive*

> *language which on any view can only excite sympathy for the victim or prejudice against the accused ….”*

See R v Banks [1916] 2 KB 621 at 623. This must of necessity apply in statements of the facts presented in guilty pleas.

9. It is not necessary to repeat the words of Hughes LJ in the Tangerine case (supra). The gravamen of the offence is the exposure to the risk of injury, not the doing of the injury. Putting it simply, death or serious injury are not ingredients of this offence. The Prosecution Outline is commendably thorough, as one would expect, and it is only right that the Royal Court has sufficient details before it to enable it to arrive at sentence. Nevertheless, it is not necessary to have the full details of the deceased’s treatment and passing away set out extensively, and these should be cut down. The post-mortem findings are a part of the case and correctly referred to. There is nothing else discernible in the outline which appears inappropriate in the light of the test referred to earlier.

Conclusions

10. The hearing has clarified the situation and, having considered everything put forward by P and D, it seems that the position should be as follows:

    (i) death or injury are not ingredients of this offence. That is clear not only from the wording of the statute but persuasive English cases on the same provisions;
    (ii) however death, it is accepted, is an aggravating factor if the Health and Safety failing was a “significant” cause of death, which it is here;
    (iii) the differences between what P and D are putting forward do not justify a Newton hearing, where the matter would be resolved by hearing evidence - and still less is there an equivocal plea;
    (iv) given that the basis of the plea is viable then the remaining differences in the accounts to be adduced are properly left to the Outline given by P and the mitigation advanced by D. When looked at closely this case is not much different from a substantial number of criminal prosecutions where separate emphases are put by the parties on various aspects of the case, without impeaching the central issue. The matter can now proceed.

J R Finch
Judge of the Royal Court

