Decision on Application regarding the hearing of Further Evidence

IN THE ROYAL COURT OF GUERNSEY

Appeal from the Magistrate's Court
(Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988)

Between: **LETITIA SINEAD GERMAIN** **Appellant ("A")**

-and-

THE LAW OFFICERS OF THE CROWN **Respondent ("R")**

Decision on Application regarding the hearing of Further Evidence

Application heard on: 29th March 2016
Decision handed down: 6th April 2016

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

Counsel for the Appellant: Advocate S E Steel
Counsel for the Respondent: Crown Advocate C G Dunford

Materials referred to in Judgment:

The Magistrate's Court (Criminal Appeals) Law, 1988, Section 6;
The Magistrate's Court (Criminal Appeals) Rules, 1989, Rule 6(1);
Collins v Law Officers (1988) 8 GLJ 16;
Presland v Law Officers 2007-9 GLR Note 11;
R v Parks (1961) 46 Cr. App. R. 29.

DECISION

Introduction

1. The Appellant ("A") was convicted (inter alia) on 8th December, 2015 of assaulting Helen Legg on 12th March, 2015. In respect of that charge a sentence of 3 months' imprisonment was imposed on 28th January, 2016, consecutive to 3 months for another offence, not subject to appeal. A now appeals to the Royal Court because of "*fresh evidence that has come to light since the conclusion of the trial"*. Both A and the Law Officers ("R") produced skeleton arguments, which they essentially relied upon at the oral hearing. References will be made to those skeletons in this decision.

2. A's skeleton, at paragraph 2, sets out the nature of the fresh evidence upon which it is intended to rely. Miss S Le Brun ["LB"] was a prospective Prosecution witness at the trial who failed to appear twice, the latter time having been specifically warned in writing and personally. The chronology is helpfully fleshed out by R in their reply, paragraph 2. LB was warned by the Police to attend, had asked for special measures, reminded to attend – signed the Police Officer's notebook to that effect, failed to come on 9th October, 2015, and then R successfully obtained an adjournment. LB signed a court warning slip for the new date, 8th December, 2015, but again failed to appear. The case went ahead in her absence. Interestingly enough, LB was asked by Advocate Steel to attend the Appeal Hearing but again failed. She is obviously very shy about coming to Court. A relies upon LB, after the verdict of guilty, informing her that she wanted to correct the lies given in her witness statement to the Police that she had seen the head-butt, which formed the basis of the assault charge. Her new witness statement given to the defence is found attached to A's skeleton, dated 17th March, 2016.

3. A asked the Royal Court to quash the conviction and LB is available, the Advocate says, to give evidence in the Royal Court under Rule 6(1) of the Magistrate's Court (Criminal Appeals) Rules, 1989, quoted in paragraph 4 of A's skeleton, and which refers to where "*Material evidence not available to one or other of the parties at the time of the Magistrate's Court proceedings is now available and that the interests of justice require that the said material evidence be heard"*. Plainly the task of the Royal Court is to decide if LB's evidence should be heard and only then would the appeal be determined in the way sought on behalf of A if the Royal Court considered that the guilty verdict could not be supported; see Section 6 of the Magistrate's Court (Criminal Appeals) Law, 1988.

Legal Test

4. Counsel agree that this is to be found set out in the Guernsey Court of Appeal case of Presland v Law Officers 2007-8 GLR Note 11, appended to A's skeleton:

> "*To be admissible on appeal, relevant evidence must not have been available at the trial, a reasonable explanation should be given for not having called it there, it should be credible and be capable of raising a reasonable doubt in the minds of the Jurats when taken with the existing evidence."*

This test was previously applied by the Court of Appeal in Collins v Law Officers (1989) 8 GLJ 16, following the English case of R v Parks (1961) 46 Cr. App R. 29. It is proposed to consider each aspect of the test separately.

5. One further element that should be mentioned is an alleged Facebook message from the complainant in the assault case to A. It is also attached to A's skeleton and refers to the complainant saying she is "*sorry for setting you up"* and "*I felt bad and made Shannon do a statement"*. This was provided by A's Advocate to R on 8th October, 2015 and the complainant denied sending it in her oral evidence (see transcript, page 18, as corrected). This will be referred to later on.

Elements of the Test

6. Elements of the test are considered as follows:

(i) The witness statement of LB is dated 17th March, 2016, so plainly it was not available for the Magistrate's Court to consider. R argues that it might have been available had A or her Advocate made further enquiries at the time.

(ii) A reasonable explanation has to be given for not calling the evidence at trial. R submits that there was ample opportunity for A to contact this person. In particular, at the resumed hearing on 8th December, 2015, LB again failed to turn up. A was content to proceed and not seek an adjournment herself. The disputed Facebook entry is also noted in this context. It purportedly came from the complainant, stating she "*made"* LB do a statement, which implicated A. In view of this presumably important alleged revelation, which was in the hands of A from 8th October, 2015, there was more than enough time for LB to be approached, it is suggested. A claims this message was genuine, the complainant denied it. The Magistrate's Court believed the complainant (page 33 of the transcript). As Presland makes clear, submits R, A should use reasonable diligence; the alibi material produced in Presland "*had been available and should have been called at the trial"*.

(iii) Credibility. There is nothing in the account given by LB to the Police to suggest, R submits, about the complainant bullying LB, rather it was A. It was that which caused the Special Measures application. In addition, it is submitted by R that even taking LB's new statement at face value she seems only to have seen the final 5-10 seconds of the argument. She had moved away from it to behind a kiosk with the argument taking 5 minutes and her looking at what went on, on "*two or three occasions"*. She therefore, on this, missed a large part of what went on and her account is of little value.

7. A's submissions advance the explanation that the complainant made LB "*bullied and intimidated"*. She also advanced an explanation for not coming to court as this brought back childhood memories of cases involving her parents when in Care. A adds that LB "*would be the only independent eye-witness to the crucial moments of the argument ...."* (paragraph 10.1 of A's skeleton). At paragraph 7, A's submission is that when the Prosecution decided to proceed without LB at the trial, "*the defence did not call her as she had demonstrated a clear unwillingness to attend court on two occasions despite being served with a witness summons for the later date"*. As mentioned, she failed to attend the present hearing, despite Advocate Steel's efforts. In passing it should be added that LB did not receive a witness summons, but was officially warned by the Police to attend and signed the paper confirming this (page 8 of transcript).

Conclusion

8. This Court has to follow the binding guidance in Presland. How this guidance is applied will always depend on the individual facts of the particular case under consideration. But the principles will be applied firmly, if not strictly. Presland was a rape case, with a 6½ year sentence and the proposed fresh evidence was an alibi. The rationale for this is not hard to pick out. Ex post facto examinations of concluded trials would bring a host of problems in their wake – intimidated witnesses, changed stories, newly-thought-up defences, etc. There has to be an element of control to avoid wide fishing-expeditions after the event. The present case can, it seems, be looked at quite simply. At the resumed hearing on 8th December, 2015, the Prosecution said they were not calling LB. The Facebook entry from the complainant (if A is right and this was rejected by the Magistrate's Court) had been in the hands of the defence since 8th October, 2015. If LB's account was important then the Defence should have, despite their submissions at this hearing, sought an adjournment and obtained a witness statement. Nor was there any particular kerfuffle at the hearing about LB's absence. There were then two possibilities; the adjournment would have been granted, after all the Prosecution had already had one; or refused – in which case A's position at this hearing would have been enhanced.

9. R is right to draw attention to LB's perceived lack of credibility. There are two different accounts: one to the Police saying she saw the head-butt, the next one (not until 17th March, 2016) saying she did not. The former says:

> "*As I looked I suddenly saw Tish, who was standing right in front of Helen bring back her head, and then throw it forward quickly. She basically head butted Helen without any warning or provocation. Her head hit Helen right in her face and Helen's head moved backwards because of that."*

The latter says:

> *"This is untrue. In fact, I saw on the final occasion that I looked at them, Tish and Helen finished their verbal argument for around 5 to 10 seconds then leave in separate directions …. I did not see any physical contact between them."*

She adds that she felt intimidated by the complainant into making up her original false statement.

10. This belated afterthought seems just to be the type of mischief the cases such as Presland is designed to stop. As indicated it took a long time to make the second statement and LB again did not come to court, though asked by the Defence Advocate. The only species of "*intimidation"* on the papers is LBs statement asking for special measures on the basis that she finds A "*quite intimidating"*. A review of the papers shows that even if the evidence could be adduced it is so manifestly unreliable, in view of the history of the witness's involvement, that it would not be right to give effect to it. That, added to the considerable length of time between her recent contradictory statement and the incident, strongly militates against allowing the evidence in. It would not have been capable of raising a reasonable doubt. It is not possible to put forward LB's latest statement with any confidence at all. The evidence was discoverable earlier on, an application for an adjournment could have been made, and its poor quality is apparent from a review of all the relevant factors. On the authority of Presland it fails the tests.

11. Accordingly, the application fails and is dismissed. Advocate Steel should please notify the Greffe if the substantive appeal is to proceed.

J R Finch
Judge of the Royal Court