

IN THE ROYAL COURT OF GUERNSEY

Between: **THE LAW OFFICERS OF THE CROWN** (“P”)

-v-

NAOMI PRESTIDGE (First Defendant)
 (“D1”)

-and-

RORY CHRISTOPHER McDERMOTT (Second Defendant)
 (“D2”)

Ruling on Preliminary Issues

Submissions heard on: 26th July, 2019

Ruling handed down on: 2nd August, 2019

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

Counsel for the Prosecution/Law Officers: Crown Advocate C Dunford

Counsel for the First Defendant (“D1”): Advocate C A Tee

Counsel for the Second Defendant (“D2”): Advocate M G A Dunster

Cases and Materials referred to in Decision:

Andrews v Director of Public Prosecutions [1937] AC 576;

R v Adomako [1995] 1 AC 171;

R v Bateman (1927) 19 Cr App R 8;

R v Crow [2002] 2 Cr App R (S) 49;

R v Evans [2009] EWCA Crim 650;

R v Kuddus [2019] EWCA Crim 837;

R v Rose [2017] EWCA Crim 1168;

R v Zaman [2017] EWCA Crim 1783.

The Criminal Procedure (Advance Notice of Expert Evidence) Rules, 2003;

The Crown Court Compendium, December, 2018, paragraph 19-27;

The (English) Protocol issued by the Lord Chief Justice, 22nd March 2005.

Blackstone (2019) D11-25;

RULING ON PRELIMINARY ISSUES

Introduction

1. The First and Second Defendants (“D1” and “D2”) face a charge of gross negligence manslaughter in respect of Lauren Charlotte Ellis (“Lauren”). The Indictment is in simple form, alleging that both defendants “unlawfully killed Lauren ... by gross negligence”. Although jointly indicted, the Prosecution (“P”) point out that this is not an allegation of joint enterprise, as the alleged offence is of guilt by omission (paragraph 7 of the Prosecution Case Summary, or “PCS”). “The joint aspect to the allegation is that both parties shared a duty of care towards Lauren ...” On 26th July, 2019 oral argument was addressed to myself, as the trial judge, in relation to various points, principally the form of the Indictment. A four week plus slot, with numerous ‘live’ witnesses, has been fixed for September. This Decision or ruling is designed to deal with the points raised, which were also helpfully backed-up by written submissions and the presentation of authorities from the English courts. The essence of the case is that D1 and D2, qualified nurses, allegedly failed to carry out the requisite observations on Lauren, a known serious self-harmer, who committed suicide whilst in hospital under their care, and created false entries regarding checks not carried-out.

Preliminary Observations

2. I can recall no similar case in Guernsey since I arrived in 1988, nor can any be traced. Hence the English cases, which are of high persuasive authority, will be relied upon. Guernsey criminal law, according to the Victorian Royal Commission, relied on *Archbold*, so reference to the English cases is not inconsistent with Guernsey’s separate legal system. There is, unsurprisingly, no suggestion that gross negligence manslaughter is not part of Guernsey’s criminal law.
3. The thread of the cases starts with the well-known decision in R v Bateman (1927) 19 Cr App R8. The Appellant, who had a “slum” Panel Medical Practice in Deptford had been convicted of manslaughter after a woman had died in labour and sentenced to 6 months’ imprisonment in the Second Division (a rather less austere regime than normal imprisonment in those days). On appeal he was fortunate to be represented by Mr Norman Birkett, a new KC (Marshall Hall having failed below). The appeal succeeded and the case is chiefly memorable for laying-down that criminal liability on such a charge (as opposed to civil liability) could not be founded on the ordinary principles of negligence. The negligence must be such as to amount to a crime. This well-known formulation was delivered in the Court of Criminal Appeal:

“To establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the prisoner went beyond a mere matter of compensation between subjects, and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.”

That remains good law today. The House of Lords in R v Adomako [1995] 1 AC 171 said very much the same thing. Lord Mackay of Clashfern LC in his speech (which the Lords of Appeal agreed with) said (at 187-D):

“This is necessarily a question of degree and an attempt to specify that degree more closely is I think likely to achieve only a spurious precision. The essence of the

matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission.”

The House of Lords decision in Andrews v Director of Public Prosecutions [1937] AC 576 was followed.

4. Since then there have been a significant number of appeals in such cases, with a good proportion of successful ones. It is something of a minefield for the trial judge (as is shown by the recent decision in R v Kuddus [2019] EWCA Crim 837, where after a most careful and detailed summing-up, the Court of Appeal still found it necessary to quash the conviction. The case will be referred to later). Navigating a minefield requires an accurate plan and a clear head. It is easy when dealing with concepts such as gross negligence to over-complicate the case, particularly where there is a medical element. There is already a considerable volume of paperwork in the present case and there is likely to be plenty more. However, on examination, the factual situation as alleged by the Prosecution is not notably over-complex, and (provided side-issues are kept under control) the task of the Jurats, demanding and responsible though it may be, can be kept within sensible bounds. A case strongly relied-upon on behalf of the Prosecution, R v Zaman [2017] EWCA Crim 1783, is of particular significance. With these general observations in mind, we now turn to the questions raised at the preliminary hearing.

The Indictment

5. Advocate Dunster, on behalf of D2, presented his oral submissions with characteristic clarity and was endorsed by Advocate Tee for D1. In summary (and the written points at ((i) and (ii) were developed in argument), it was suggested that the indictment as worded could give a “misleading impression” it was “a matter of joint enterprise”; next it was suggested that a one count Indictment would risk the two defendants’ duties being “conflated”, which is not permissible as the duties owed and allegedly breached need to be considered “individually”. It is wrong to suggest a “collective breach of duty”.
6. Crown Advocate Dunford referred to the PCS. This is a very detailed and comprehensive document which sets out P’s case very fully. In looking at it, the tendency of the legal mind to construe every document read in litigation as if it were a taxing statute must be avoided. It is not a pleading and may not be underwritten in the course of evidence – criminal cases are replete with unexpected replies to questioning. Nevertheless, it is a helpful and impressive document, which is of great assistance to the participants, including the judge. Paragraph 7 of the PCS is relevant. It states that “the joint aspect to the allegation is that both parties shared a duty of care towards Lauren ...”. In his written submissions, at paragraph 21, Crown Advocate Dunford also expressed a wish to avoid the question of joint enterprise (which, it has to be said, despite simplification from Lord Hughes in the Supreme Court, is still far from easy to deal with in practice). In any event, joint enterprise by omission is, as P submits, “not an offence known to law”.
7. Following on, there is the question regarding the alleged “conflation” of the duties of the defendants which, as Advocate Dunster put it, must be considered as “owed and breached ... individually”. The response on behalf of P was to the effect that an artificial picture would be created if this was broken down as suggested. There is no obligation to specify individual acts or omissions. The basis of P’s case is as set out in the PCS at paragraph 108, “the degree of omission establishes that [D1 and D2] collectively caused Lauren’s death”. The basis of P’s case is that there was a joint obligation during the relevant period to see the observations required were made and they did not do them. P placed considerable reliance on the case of Zaman (supra). Individual acts or omissions need not be specified and the jury’s task was to

consider the evidence as a whole (my emphasis); see especially paragraphs 47 and 48 of Hickinbottom LJ's judgment. The Prosecution case there was based on a single alleged breach of duty by the Appellant; it was not their case that the individual acts or omissions each constituted "a discrete breach of duty" (paragraph 46). In other words, the alleged failure here by D1 and D2 must be considered in the round.

8. There is also a submission regarding the particularity of the Indictment. A draft indictment from Winchester Crown Court was put forward on behalf of the defence which included specifications in its body. This was reminiscent of a count drawn up under the Health and Safety Act. If the count simply stood as drafted in the present case there might be some force in the submission, but that is not the situation. At paragraph 8 of the PCS, "Further and Better Particulars" have been provided; and this was served some four months ago. Paragraphs (a) to d, set out the following (which the Jurats will consider hand-in-hand with the Indictment):

- a. You owed to Lauren Ellis a duty, inter alia, to take all reasonable care to ensure her safety whilst in your care on Crevichon Ward, Oberlands Centre, Rue de La Corbiere, St Martins, Guernsey on the 11th and 12th October 2017.
- b. In breach of that duty of care you, inter alia, failure to ensure that at least 15 minute observation checks were carried out on Lauren Ellis on Crevichon Ward on the 11th and 12th October 2017.
- c. That breach of duty at (a) above, in all the circumstances, amounted to gross negligence.
- d. That gross negligence was a material cause of the death of Lauren Ellis."

P seeks the right to amend these details and "they should be considered non-binding".

9. It is P's case (see paragraph 26 of the written submissions) that citing *Blackstone (2019)* D.11.25: "The particulars of the offence needed to provide reasonable information as to the nature of the charge and as to the principal matters on which the prosecution relied", which this, it is submitted, sufficiently does. To an extent, this relates back to the case of Zaman, as referred to at paragraph 7 above. P's written submission, echoed at the hearing was: "The point is that it is not necessary for the Prosecution to identify each step and an overarching breach of duty as stated in the PCS is sufficient". P also referred to a case comment on Zaman in the *Journal of Criminal Law, 2018* (divider 6 of P's bundle). This states:

"... the court rejected the appellant's argument that the trial judge should have identified as many as three specific breaches by Z and directed the jury to consider each one separately. Rather, the court was satisfied with the Crown's argument that the question of breach should be dealt with "in the round". Such an approach makes sense when the Crown case involves a systemic failure to discharge an ongoing duty of care over a period of time (in this case months) rather than an isolated incident."

The case which supports this is R v Crow [2002] 2 Cr App R (s) 49. The significant cause of death there was reckless disregard for the deceased's safety demonstrated over a period of months. The present case is only over a relatively short period of time, but does not boil down to "an isolated incident". This reasoning supports P's submissions on the form of Indictment, both in not separating D1 and D2 and making the basis of their case an "overarching breach of duty". Crow, it should be noted, also referred to the appellant and his father breaching their duty over the relevant period.

10. There is some complaint, especially on behalf of D2, that it is not acceptable to put forward these particulars as "non-binding". This is at a late stage, only some 8 weeks "before the commencement of this very substantial trial". But litigation, especially criminal litigation, is

often productive of surprises. If the evidence is at variance with what has been set out, then the particulars (provided there is no injustice, especially any significant change in the basis of the case) can be properly amended. Anyone who has undertaken criminal cases in court knows how the ground can shift, even with the best planning and checking. The same reasoning applies to the “inter alia” phrase also criticised.

The “Legal Test”

11. This may simply be a dispute as to terminology. On behalf of D2 it is submitted that P seems to be basing its case on “a serious and obvious risk of self-harm”; see paragraphs 77 and 114h of the PCS. P responds by submitting (in paragraph 37 of the written argument), that the case is clearly stated, e.g. in paragraph 101. It is submitted that both D1 and D2 knew Lauren was a patient who presented an “obvious and serious risk of death”, due to her history of serious self-harming. In paragraph 113 of the PCS the words “reasonably foreseeable risk of death” are used, but this adds nothing to P’s case and “obvious and serious” risk of death requires no gloss. P’s other point, on the facts adduced, is that foreseeability is unlikely to be an issue as D1 and D2 had cared for Lauren before and, it is alleged, both knew of the risks she presented is understandable and rational in the context of the Prosecution case, as it stands on the papers. On a fair reading of the PCS, the case is put on the correct basis at this stage.

“Ensure”

12. D2 at Point 1(iv) takes issue with the use of this word. In oral submissions Advocate Dunster stressed that there is no duty in such cases at common law to “ensure”; there is no duty to make certain of anything. The appropriate phrase would be to “use reasonable care and skill”. The phrase used by P at paragraph 8a of the Further and Better Particulars reads “to take all reasonable care to ensure her safety ...”. However, the case of Zaman also comes into play here, e.g. at paragraph 40 of the judgment Hickinbottom LJ says:

“It was rightly common ground at the trial that the Appellant owed customers a duty of care to take reasonable steps to ensure their safety ...” (emphasis supplied)

The word “ensure” is also used in the next paragraph and in paragraph 52, where it is stated:

“The breach of duty alleged was singular: it was alleged that the Appellant failed to take reasonable steps to ensure the safety of his customers with food allergies.”

The word, of course, has to be taken in context. In his written submissions Crown Advocate Dunford mentions that his OED definition of ‘ensure’ includes to “make secure or safe”. The Collins Compact Dictionary definition includes “make safe or protect”, which is perhaps even more clear. As the written submission by P continues: “It is clear from the PCS that P does not put the case on the basis D1 and D2 had to achieve perfection in their care of Lauren”. Indeed so; and concentrating on one word without regard to context, but without fully taking into account its use on more than one occasion by the English Court of Appeal is, with respect, a rather sterile exercise. It is plain that P’s case is based upon the approach taken in the English courts and not put forward on any diluted basis, insofar as what has to be proved is concerned.

Other Matters

13. It was rightly accepted by P at the oral hearing that the test for assessing foreseeability of risk or the grossness of the conduct in question was “objective and prospective”. As is stated in the headnote of the important case of R v Rose [2017] EWCA Crim 1168:

“The test of reasonable foreseeability was objective. It simply required the notional exercise of putting a reasonably prudent professional in the shoes of the person whose conduct was under scrutiny and asking, whether at the moment of the breach of the duty relied on, that person ought reasonably to have foreseen an obvious and serious risk of death.”

This is also set-out by Sir Brian Leveson P at paragraph 84 of the judgment (which is attached to D2’s written List of Issues, at divider a). It will be P’s case that if this question of reasonable foreseeability is touched upon, the “obvious and serious risk” of death arises from Lauren’s sad known history, the psychiatric involvement, and the fact of the Level 2 observation checks which were to be made.

14. The Defence may rely upon expert evidence. Under the Criminal Procedure (Advance Notice of Expert Evidence) Rules, 2003, this should be provided “as soon as practicable”. Both Defence Advocates are well-experienced in criminal (and civil) litigation and understand a criminal trial is not some kind of forensic jousting-match. This case, because of its overall importance, has been fixed for a long slot in September; other cases are therefore postponed. This is a long period for a criminal trial in Guernsey. It is not intended to postpone this matter unless a real and over-riding need surfaces. Hence, any expert evidence that is intended to be relied upon should be made available to Crown Advocate Dunford in time sufficient for him to consult the Prosecution’s experts. Counsel, of course, are aware of this, but it is inserted here due to its importance.

The Way Ahead

15. The nature of the case and the need to keep it within sensible bounds was touched upon in paragraph 4 above. Advocate Dunster kindly provided a concise and helpful over-view at the start of his oral submissions. Putting things at their most basic, it is alleged that D1 and D2 both completed false entries purporting to show regular checks of Lauren, as required. They are shown in red at paragraphs 73 and 75 of the PCS. This can be further understood if juxtaposed with the CCTV evidence summarized at paragraph 80. These items of evidence should also be placed with D1 and D2’s Police interviews, summarised at paragraphs 98 and 99 of the PCS. It will be seen that events (or non-events, as alleged) do not extend over a vast period of time and that the form of the allegations against D1 and D2 is pretty specific on facts. The sting in the Prosecution’s presentation is set out at paragraph 114, which culminates in the suggestion that (at i):

“The attempt to cover up the lack of checks by making false entries in the nursing notes is an aggravating factor of the gross negligence, and a good indicator both defendants were aware that the observations had not been done.”

16. The question of a “duty of care” is covered in various cases, notably in R v Evans [2009] EWCA Crim 650, annexed to P’s written submissions at tab 1. In the case of a nurse/patient relationship (as with a doctor/patient relationship), the existence of a duty of care here should not, it appears, be in dispute. If, for some reason there is a dispute then the judge will be able to direct the Jurats that it is open to them to find a duty of care; and if the facts specified were established, a duty would arise. This is a question that, in my judgment, ought not arise on the facts of the case as presently put forward, unless there is some compelling reason otherwise. The question of whether either D1 or D2 fulfilled that duty of care remains to be decided by the Jurats, of course.

17. The approved directions in such a case as this can be found in a number of authorities – such as the cases of Rose and Zaman, already mentioned. What they set-out is to the same effect, so in Zaman, the Court of Appeal said at [24]:

“The prosecution has to prove the following elements:

- (i) In accordance with the ordinary principles of negligence, the defendant owed the deceased a duty of care.
- (ii) The defendant was in breach of that duty of care.
- (iii) A reasonably prudent person would have foreseen that the defendant’s actions or omissions constituting the breach of duty had exposed the deceased to an “obvious and serious risk of death”. The court in [case citations omitted] confirmed that the relevant risk to be reasonably foreseen is nothing less than the risk of death. (And see paragraph 19 below).
- (iv) The breach of duty either caused, or made a significant contribution (i.e., a contribution that was more than negligible) to the deceased’s death.
- (v) The departure of the defendant’s conduct from the proper standard of care incumbent upon him, involving as it must have done, the risk of death was such that the breach of duty can properly be described as gross negligence and therefore criminal.”

In citing and approving this formulation in the case of Kuddus, Sir Brian Leveson P, made it clear that two phrases that pop up in recent reported cases in relation to element (iii), namely “It was reasonably foreseeable that the breach of the duty gave rise to an obvious and serious risk of death” and “A reasonably prudent person would have foreseen that the defendant’s actions or omissions constituting the breach of duty had exposed the deceased to an “obvious and serious” risk of death were not materially different (paragraph 35 of judgment). As Sir Brian Leveson P also said, “Each formulation was, in fact, considering what a reasonable person would reasonably have foreseen”. These matters will, in due course, be discussed with Counsel and their input will be considered before written directions are given to the Jurats.

18. These points are made to assist Counsel in how they approach the case. Subject to the important proviso referred to in paragraph 10 above, the period of time in question and the actions of the defendants are relatively short. There is then the evidence of their Police interviews and the CCTV, together with the deceased’s unfortunate background, and what was allegedly known to them. The Jurats, with their knowledge and experience will be keen to concentrate on the issues and not approach the trial with the wide-eyed wonder of 12 people summoned for Jury Service. The evidence must bear on the relevant requirements of the law in relation to the alleged offence, as listed in paragraph 17 above. In his written submissions, at paragraph 5, Crown Advocate Dunford mentions two reports, requested by HSC from Drs O’Sullivan and McClean. They have been disclosed. If evidence is sought to be led from these persons then it has, of course, to bear on the issues in the trial. They were prepared, it would seem, to deal with procedures at the Princess Elizabeth Hospital, which is a built-in limitation. It may well be that they are material to the cases of D1 and D2, but this will have to be established – Occam’s Razor. Putting it bluntly, the present trial is held to decide if the charge against D1 and D2 has been proved beyond a reasonable doubt, or not. It is not an enquiry on or critique of hospital practices generally. So long as the established

formulation set-out in paragraph 17 above is uppermost in everyone's minds, then the task at hand can be completed without irrelevancies.

19. It follows that admissions ought to be made, allowing non-essential witness evidence to be reduced to writing, and that care has to be taken to avoid calling evidence that does not relate to the test the Jurats have to apply. It is again emphasized that this is an objective test, so that the risk must be obvious to the reasonable professional in the two defendants' shoes, who demonstrate the same level of alleged negligence as they did. The risk must be assessed with reference to D1 and D2's alleged negligent standard (see the Crown Court Compendium, December 2018, at 19-27). The evidence adduced should be relevant to this point as well as the other legal elements required. Crown Advocate Dunford in his note of 17th July, 2019 referred to the English Protocol, which applies in that jurisdiction to lengthy cases. It does not apply, of course, nor has an equivalent been introduced, in Guernsey. In a case such as this it would be appropriate for the defence to indicate what their case is. They have had a very comprehensive exposition from the Prosecution (and very properly too). The English Protocol (2005) contains the following wise words:

“The judge will try to generate a spirit of co-operation between the court and the advocates on all sides.

The expeditious conduct of the trial and a focussing on the real issues must be in the interests of **all** parties. It cannot be in the interests of any defendant for his good points to become lost in a welter of uncontroversial or irrelevant evidence.”

Defence statements, it goes on to say, should enable the court to identify: (a) what is common ground and (b) the real issues. It is repeated that this Protocol does not apply here, but the sentiments expressed are, with respect, wholly understandable. The English Protocol applies to cases taking 8 weeks or longer, but should also be followed in all cases estimated to last more than 4 weeks. In my experience, criminal trials on indictment in Guernsey generally last less than half the time they take in England. As it would help the court, it is requested by way of sensible and fair case-management that the defence set-out the basis of their case(s) in advance, to assist in the efficient running of the trial; this should be achieved, please, within (a realistic) 14 days from the date of the final version of this Decision.

Conclusion

20. The main submission put forward on behalf of D2, and supported by D1 is rejected. The situation is covered by the case of Zaman, which will be followed. The other submissions are dealt with in the body of this Decision. Upon examination of the case papers, the trial should be kept within reasonable bounds and the issues narrowed to those set out in the leading English cases of Rose and Zaman. All the Advocates are asked to assist in the expeditious and fair resolution of this trial. The criminal case is not (as I am confident all parties will have understood) an opportunity for a Public Enquiry into the Princess Elizabeth Hospital or the Oberlands Centre.

**J R Finch, O.B.E.,
Judge of the Royal Court**

2nd August 2019