

Admissibility of evidence and consideration as to the classification of the evidence as hearsay.

[2020]GRC054

IN THE ROYAL COURT OF GUERNSEY

Between:

THE LAW OFFICERS OF THE CROWN

Prosecution

-v-

STEPHEN ROY JENKINS

Respondent

Decision on Admissibility of Evidence

Date of argument hearing: 7th July, 2020

Decision handed down on: 24th July, 2020

Before: John Russell Finch, Esq., O.B.E., Lieutenant Bailiff

Counsel for the Prosecution: Advocate R J Calderwood

Counsel for the Respondent: Advocate C A Tee

Statutes and Cases referred to in Decision:

The Criminal Justice Act, 2003, Sections 114(1) and 115

R v Chrysostomou [2010] EWCA Crim 1403;

R v Jones [1997] 2 Cr App R 119;

R v Lydon (1987) 85 Cr App R 221;

R v McIntosh [1992] Crim LR 651 (CA);

R v Twist [2011] EWCA Crim 1143;

Subramoniam v Public Prosecutor [1956] 1 WLR 965 (PC).

DECISION

Introduction

1. This is a decision on whether half a line of text is admissible in D's impending trial for unlawful importation of controlled drugs, to which a 'not guilty' plea has been entered. The disputed words are:

"Post office opens at 8.30 mate." ("Text 1")

D was neither, the Prosecution accept, a sender or recipient of this text. It was sent from DG's Facebook profile to DJ, who is D's son. One minute later DJ messaged his father D:

“Opens at 08.30 am Monday morning apparently xxx” (“Text 2”)

D responded to this by texting:

“OK mate no worries xxx”

2. DG and DJ (the sender and recipient of the disputed message respectively) faced counts on the Indictment, but have pleaded ‘guilty’. DJ entered a guilty plea to a joint enterprise importation count with D, who, as stated pleads ‘not guilty’. The Prosecution point out that in interview D did not deny receiving or sending Facebook messages. On Text 2 he said first of all that he did not know what that was referring to; and secondly it could have been “shops” or a “petrol station”. It is suggested by the Prosecution that DJ was told when the local post office opened and passed it on to his father, D. The Guernsey Customs had seized a postal packet containing cannabis resin the previous day before Texts 1 and 2 were sent. It is further submitted that this delay in transmission caused the intended guilty recipients to believe that they would have to wait until Monday 14th January. The two texts were sent on the afternoon of Saturday 12th January. It follows that the relevance of the two texts together is “plain to see” (para 7 of Prosecution skeleton) “bearing in mind the joint enterprise count”. D objects to the admission of Text 1; there is no dispute on the law, but on its application to the facts. D submits that (para 13 of D’s skeleton):

“Thus the truth of the statement encompassed by Message 1 goes to the issues in the proceedings and is hearsay; it is irrelevant for these purposes whether the opening time stated in Message 1 is actually correct or not.”

There is also a separate facet of the argument, on declarations by joint ventures in pursuance of a common enterprise, which will be considered later.

Legal Considerations

3. The common-law test, which has to be applied here, is a familiar one. A useful definition is found in the well-known case of Subramoniam v Public Prosecutor [1956] 1 WLR 965 (PC) at 970:

“[A statement] is hearsay and inadmissible when the object of the evidence is to establish the truth of what was contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made.”

This is also set-out in Archbold [2020] paragraph 11-8. The Prosecution rely on R v Lydon (1987) 85 Cr App R 221. In that case the appellant had been charged with robbery, and part of the case against him was two pieces of paper found with a gun along the route of the getaway car bearing the words “*Sean rules*” and “*Sean rules 85*”. It was submitted the references to Sean were hearsay and ought not to have been admitted. But it was held that the evidence was admissible and not unduly prejudicial. The reference to Lydon’s name “Sean” could be regarded as no more than a statement of fact, involving no assertion as to the truth of the contents of the documents. The later case of R v McIntosh [1992] Crim LR 651 (CA) also appears relevant. There a person was charged in relation to the importation of cocaine and evidence of a piece of paper concealed in his chimney, from an unknown hand, and with calculations on drugs weight and price was admitted. It had not been adduced for the purpose of proving the truth of the matters stated.

4. In the present case, the Prosecution explicitly say (para 14 of skeleton) that “the accuracy of the message is irrelevant”. The Prosecution “wish to admit this message to prove the fact that this communication took place”. It is also suggested that the fact asserted in Text 1 must not

be confused with the inference to be drawn from that statement. “It is only hearsay if the purpose of the admission is to prove the former” (para 17 of skeleton). In oral submissions it was stated that the truth of the communication is completely irrelevant. The purpose behind putting this evidence in is simply to prove the conversation took place; so D’s son DJ was told what time the post office opened and thereupon advised D of it. It is D’s submission that the Prosecution is seeking to adduce the evidence not merely to show that the message was sent, but relies on the descriptive quality of the words contained, i.e., the opening times “for specifically a post office” (D’s skeleton, para 12).

5. D also cited the case of R v Twist [2011] EWCA Crim 1143. This is concerned with the hearsay provisions of the English Statute – the Criminal Justice Act, 2003, sections 114(1) and 115. This legislation is not in force in Guernsey; however Section 114(1)(b) preserves most of the common-law exceptions to hearsay. For the purposes of the present application, it is only necessary to summarize one of the main points of the judgments (which was in relation to telecommunications). When applying the provisions of the Act, it is important to distinguish between (i) the speaker wishing the hearer to act on his message; and (ii) the speaker wishing the hearer to act on the basis that a matter stated in the message is true (emphasis supplied). It is only in the latter case that the hearsay rules operate.
6. Twist (at [24]) referred to R v Chrysostomou [2010] EWCA Crim 1403, with approval. Here there were texts found on D’s mobile phone which appeared to be orders for drugs. It was held that these were not hearsay. What was being sought to prove was not the contents of the messages, but the state of affairs they revealed. As Hughes LJ put it: “The sender did not have the purpose of getting the defendant to believe or act upon the matter; it was simply the common knowledge revealed by the message.”
7. It will be recalled that in the present case the Prosecution suggests that the accuracy of the message is “irrelevant”. The purpose of adducing the evidence is not to prove what time the post office opens. It is put forward to prove the fact that this messaging took place. As the Prosecution skeleton at para 14 states “i.e., that DJ was told what time the post office opened and then passed on the same information to his father”. There would be no point (even leaving aside practical considerations) in calling DJ to give evidence.
8. On considering the submissions here, it is plain that there is a limited purpose put forward to justify the reception of this evidence. Even if the contents of Text 1 were to the effect that the post office would open at noon, or was closed for redecoration, it is the fact that it was sent and very shortly thereafter imparted to D, which is relevant. Accordingly, it is considered that in view of the limited purpose relied on by the Prosecution the hearsay rule is not violated. Also, R v Twist is consistent with this reasoning. It is something of a comfort to note that this ruling appears consistent with not only the English cases, but common-sense. Sometimes in the past evidential rulings have been made on artificial grounds, or upon very fine distinctions.

Common Purpose

9. As an alternative the Prosecution seek to make use of an exception to the hearsay rule whereby a statement by one party to a common enterprise (a conspiracy or joint enterprise) is admissible against any other party to the enterprise as evidence of the truth of the matters stated. So in R v Jones [1997] 2 Cr App R 119, the English Court of Appeal held that a recording of telephone conversations between parties to a common enterprise to import illegal drugs and third parties, during which the involvement of a co-accused had been mentioned was admissible evidence of that person’s guilt. Here the Prosecution submit that Text 1 and Text 2 together show DJ (D’s son), furthering a joint enterprise by passing-on the information to his father, D. The excision of Text 1 from the evidence would make Text 2 appear as having no context and potentially misleading. The submission put forward on behalf of D is

that Text 1 was sent to DJ by DG, a third party, who is not a co-defendant of DJ or D and there is no evidence of DG's participation in DJ and D's alleged common enterprise. Indeed in oral submissions, it was suggested that the Prosecution's argument here was "superficial".

10. At the hearing, the Prosecution emphasized that it was DJ receiving the message and passing it on to his father which showed the element of joint enterprise. As paragraph 20 of the skeleton put it:

"So it is the act of joint venturer (DJ) receiving that information and the act of that same joint venturer (DJ) passing on that information to the Defendant that the Prosecution wish to admit in evidence." (Emphasises supplied.)

It is only by being able to look at both Text 1 and Text 2 that the Jurats can understand what Text 2 is referring to. In other words, it is DJ furthering a common enterprise by passing on the information just received one minute later which is relevant.

11. On the basis put forward by the Prosecution, it is also considered that Text 1 can be received in evidence. Again, with great respect to the cogent submissions made on behalf of D, this seems to accord with common sense and does not rely on artificial or strained analyses. It is emphasized again that without receiving Text 1, what Text 2 means would be problematic. Leaving Text 2 on its own would not assist the Jurats in their task.

Conclusion

12. Accordingly, for the reasons set out, Text 1 is noted admissible, having regard to all the circumstances of the case. Both Advocates are thanked for their helpful and economical oral submissions.

J R Finch, Esq., O.B.E.
Lieutenant Bailiff

24th July, 2020