

IN THE ROYAL COURT OF GUERNSEY

Between:

THE LAW OFFICERS OF THE CROWN (“P”)

-AND-

NAOMI PRESTIDGE (First Defendant)
 (“D1”)

-and-

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

Decision on issues raised at second oral hearing
On 22nd August, 2019

Decision handed down on: 30th August, 2019

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

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

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

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

Materials referred to in Decision:

Looseley and Attorney-General’s Reference (No.3 of 2000) [2001] UKHL 53;

Pora v R [2015] UKPC 9;

R v Adomako [1995] 1 AC 171;

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

R v Gurpal Singh [1999] Crim LR 582;

R v Kuddus [2019] EWCA Crim 837;

R v Misra [2004] EWCA Crim 2375;

R v Momodou [2005] EWCA Crim. 177;

R v Sellu [2016] EWCA Crim 1716;

R v Walsh (1990) 90 Cr. App. R. 161;

R v Zaman [2017] EWCA Crim 1783.

The Criminal Evidence and Miscellaneous Provisions (Bailiwick of Guernsey) Law, 2007, Section 2.
The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, Section 78.

Introduction

1. Further legal argument was heard in this case on 22nd August, 2019. This judgment follows on from that and was produced dealing with the main issues which were examined, the trial being listed to start on 2nd September 2019.

Issue 1 – Phone Evidence

2. This concerns an exchange between D1 and D2 at 00:45 hrs on the 12th October, 2017. D1 messaged:

“He’s said she can have 2mg clonazepam.”

D2 responded:

“She needs a line of ket.” (I take this to mean ketamine)

D1 does not dispute the admissibility of this evidence. D2 does. It is the well-known section 78 of PPACE provision which has to be considered. The “minimal probative value” is, states Advocate Dunster, outweighed by its prejudicial effect. It is not crucial to the elements of the offence of gross negligence manslaughter. On behalf of the Prosecution, Crown Advocate Dunford submitted that D2’s message is “potentially clear evidence of a disregard” for the deceased’s life and safety. There is a lack of proper care and it is “important probative evidence to establish the grossness of the negligence”. The probative value outweighs the prejudice. Advocate Dunster’s written submissions concluded that this evidence “is so prejudicial that [it] risks create a lasting wrong impression in the mind of the Jurats irrespective of any evidence that the Defendants could give”.

3. The common-law rules have been broadened by the application of section 78, as is shown by the plethora of reported cases concerning the application of that section, see, e.g. Looseley and Attorney-General’s Reference (No.3 of 2000) [2001] UKHL 53. Each case, of course, has to be decided on its own facts. The defence have to persuade the Court there is a serious issue as to unfairness in regard to the admissibility of the evidence in question. The issue is summarized in R v Walsh (1990) 90 Cr. App. R. 161 at 163, where the Court of Appeal said:

“The task of the court is not merely to consider whether there would be an adverse effect on the fairness of the proceedings, but such an adverse effect that justice requires the evidence to be excluded.”

4. In dealing with the all-important concept of “gross negligence” Lord Mackay of Clashfern LC in the leading case of R v Adomako [1995] 1 AC 171 at 187 said that characterising conduct as gross negligence:

“... will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant’s conduct departed from the proper standard of care incumbent upon him, involving as it must

have done, a risk of death to the patient, was such that it should be judged as criminal.”

In other words, was the conduct of the defendant so bad in all the circumstances as to amount in the jury’s judgment to a criminal act or omission? (The “model direction” from R v Gurpal Singh [1999] Crim LR 582). Another helpful direction is found in R v Misra [2004] EWCA Crim 2375 at [25]. The jury had to concentrate on, in relation to the defendants conduct:

“... whether or not the prosecution has made you sure in all the circumstances you have heard about and as you find them to be, [it] fell so far below the standard to be expected of a reasonably competent and careful senior house officer that it was something, in your assessment, truly exceptionally bad ...”

(The cases are described in R v Kuddus [2019] EWCA Crim 837.)

5. Although the test for gross negligence is objective (here a reasonably competent and careful qualified nurse with the defendants’ experience) the actual assessment cannot, in the circumstances, be divorced from what D2 has apparently said. The remark can be treated on one hand as evidence of an uncaring, indeed callous, disregard for the deceased right down to the sort of humour professionals in testing jobs share, which may not be appreciated by outsiders. D2, if he gives evidence, will be able to deal with it. At the end of the day the Jurats need to decide how D1 and D2 measured up to the objective standard required and whether or not the facts they find proved amount to gross negligence punishable by a criminal court. The remark is therefore probative and relevant.

Issue 2 – Admissions

6. D2 seeks admissions from P as set out in P’s written submissions at paragraph 8. No-one can force a party to make admissions and these points can be dealt with in oral evidence. Admission b) is regarded by P (and D1) as irrelevant to the case. In relation to b) the Pathologist relied upon by P concludes:

“... the presence of a pulse does not mean that cardiopulmonary resuscitation will be successful nor that there has not been any reversible brain injury.”

All this can be properly explored in the course of the trial. In relation to point a) the Pathologist stresses that this is not the case of a freely-suspended hanging, to which the timings on the draft admission seem to refer. Again this is left for oral evidence, should it be required.

Issue 3 – The Edgeworth Report

7. This is the report from D2’s nursing expert, Mr Richard Edgeworth. P takes very serious issue with it, and in oral submissions adhered to the points set out in his written argument, at length, in paragraphs 10-47. The question of experts and the so-called “ultimate issue” is also relevant here. The logical starting-point is the case of Pora v R (cited in R v Sellu [2016] EWCA Crim 1716) reported at [2015] UKPC 9, a Privy Council decision, deserving of special respect in Guernsey as the Privy Council is the highest appellate court for the Bailiwick. It is Pora which is the leading case on the duties of an expert in these matters. In Sellu at paragraph 135 Sir Brian Leveson P quoted two examples from that case with approval. The expert was the well-known forensic psychologist and specialist in confessions, Professor Gudjonsson. In his evidence he undertook a very wide-ranging review of everything the appellant said to the Police and some of his relatives and other material. He concluded that the appellant’s confessions were unreliable and advanced a theory as to why

he confessed. With this in mind as the background, paragraphs 24 and 27 of Lord Kerr's judgment can be cited in full:

“24. Professor Gudjonsson can certainly not be faulted for any lack of thoroughness in his approach to the preparation of his evidence. But the Board would wish to make three general observations about that approach before commenting on some particular aspects of his reports and appendix. It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasion that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case. Professor Gudjonsson trenchantly asserts that Pora's confessions *are* unreliable and he advances a theory as to why the appellant confessed. In the Board's view this goes beyond his role. It is for the court to decide if the confessions are reliable and to reach conclusions on any reasons for their possible falsity. It would be open to Professor Gudjonsson to give evidence of his opinion as to why, by reason of his psychological assessment of the appellant, Pora might be disposed to make an unreliable confession but, in the Board's view, it is not open to him to assert that the confession is in fact unreliable.”

And:

“27. The dangers inherent in an expert expressing an opinion as an unalterable truth are obvious. This is particularly so where the opinion is on a matter which is central to the decision to be taken by a jury. There may be cases where it is essential for the expert to give an opinion on such a matter but this is not one of them. It appears to the Board that, in general, an expert should only be called on to express an opinion on the “ultimate issue” where that is necessary in order that his evidence provide substantial help to the trier of fact. As observed above, Professor Gudjonsson could have expressed an opinion as to how the difficulties that Pora faced might have led him to make false confessions. This would have allowed the fact finder to make its own determination as to whether the admissions could be relied upon as a basis for a finding of guilt, unencumbered by a forthright assertion from the expert that the confessions were unreliable. In this way it would be possible to keep faith with the preserve the essential independence of the jury's role, which is to evaluate all the relevant evidence, including both expert evidence and other evidence which the expert may have no special qualification to evaluate.”

This convincing and clear exposition will be followed here.

8. In his written submissions, Crown Advocate Dunford cites the “offending parts of the report”. He is correct in stating that gross negligence “is not a medical term”. He is also, when the contents of the report are considered of the view that (paragraph 15ii):

“As the grossness of the negligence is an element of the offence, solely within the province of the [Jurats], it would have been wiser for the Report to be confined to assisting what a reasonable and competent Band 5 mental health nurse would have done, and how far the accused departed from that.”

He adds (at iii):

“...the Jurats will be asked in broad terms to consider if not carrying out observation checks for 1 hour 42 minutes was grossly negligent. This does not even require expert assistance.”

And (at paragraph 16):

“The principal submission is that ‘gross negligence’ and ‘breach of duty of care’ as legal terms and negligence as a legal concept are potentially complicated and legally loaded and should not be the subject of non-legally qualified expert opinion in the way expressed in the Report. The expert is only entitled to offer an opinion on nursing practice with a view to assisting the court on whether what the Ds did/did not do was grossly negligent. As the expert strays beyond this, P submits the whole report is inadmissible and cannot simply be excised to cover the points that are permissible.”

9. It is not intended to reproduce all the excerpts selected by P. It suffices, having read the Report to mention what occur as the obvious main examples:
- (i) at paragraph 21 of the Report there is the observation that when D2 went off the ward to the high risk care area “his duty of care towards Ms Ellis effective stopped”;
 - (ii) in paragraph 19. “At the time of the breach of duty by the defendants it was not reasonably foreseeable that the breach would give rise to a serious and obvious risk of death”;
 - (iii) in paragraph 24, “The defendants would not have reasonably foreseen the tragic outcome”;
 - (iv) in paragraph 72, “Some but not all of the legal tests have been reached”;
 - (v) the use of the word “immediate” added to the risk of death. This, it is correctly suggested, is an unjustified addition and is expressly contrary to Kuddus; and
 - (vi) paragraph 24, a subjective analysis of reasonable foreseeability, where the authorities all show it is objective.

There are other examples, apparent from a reading of the Report.

10. The core of Advocate Dunster’s observations on this can be seen set out at paragraph B(iii) of his skeleton argument. The over-riding concern, however, is the Report’s constant and extensive straying into legal issues and getting them wrong. (Even an expert lawyer could not put in a similar report in this type of case, where the legal issues are solely for the trial judge, and the factual issues for the Jurats). The objections taken on behalf of P are well-founded. The Report as it stands, cannot be put in as it is presently constructed. In its present form it is, with respect, misleading and defective. Advocate Dunster made the point that he needs a nursing expert, unlike medical experts they are pretty thin on the ground and he will be obliged to seek an adjournment to obtain one. This will be dealt with later on. Meanwhile the question of “filleting” the Report to what is admissible and a result of nursing expertise should be considered, even if a new draft has to be prepared.

Issue 3 – HSC Reports

11. There was some space devoted to considering whether the internal Health and Social Care reports compiled by Dr McClean (a nursing expert employed by HSC) and Dr O’Sullivan (a psychiatrist from the UK) are admissible. It was sought to adduce them under Section 2 of

the Criminal Evidence and Miscellaneous Provisions (Bailiwick of Guernsey) Law, 2002 (“Business, etc. documents”). Put simply, Section 2 permits the admission of otherwise hearsay documents if they are business or trade documents and as “evidence of any facts of which direct oral evidence would be admissible”, subject to the conditions set-out. P’s submissions that these reports are not covered by this route are correct. They do not fall within the limited ambit of the legislation by their very nature and contents. It was, however, fairly accepted that the reports could go in the Jurats’ bundles and P could properly draw attention to the perceived limitations in them; also, if appropriate by cross-examination. These limitations are obvious and it is right to suggest that any failures by others do not go to the objective gross negligence test that has to be applied. It is the rôles of D1 and D2 that are the central issue. In other words, what is material perhaps in mitigation does not go to provide exoneration. That evidence will be assessed on its merits as it appears. This aspect is important and will be referred to further.

Issue 4 – Dr Pilgrim’s Report

12. This is a Report provided by D1’s legal representative, Advocate Tee, in respect of her client. P asks that it be disclosed to the Prosecution witnesses (and psychiatric experts), Dr Bhintade, Flambert and Bishop before trial. They are, of course, giving evidence as to fact in relation to their care of the deceased. Paragraph 51 of P’s written argument states that neither defence Advocate proposes to put Dr Pilgrim’s Report to any witness. It is submitted on behalf of P that each of the three witnesses will essentially be giving expert evidence in order to explain their approach to the psychiatric treatment of the deceased. Does this contravene the clear warning about “coaching” witnesses expressed in R v Momodou [2005] EWCA Crim. 177? The Prosecution evidence here falls between the two stools of evidence as to fact or psychiatric expert evidence. This is not a straightforward issue to decide. It seems to me, having given the matter full consideration that the answer is as follows: a witness as to fact would include that witness saying “I saw X steal money from the till”, “I saw Y smash a glass in the complainant’s face”, or “I heard Z say he was going to sell drugs in the bar”. However, the doctors called by P will not be giving evidence at that level, but referring to the exercise of their professional duties. It will be psychiatric practice not who did or saw what that is the essence of their testimony. In those circumstances, based on the individual facts (as they now appear), I consider disclosure is merited.

Observations

13. The issue in this case is the conduct of D1 and D2, whom it is suggested, did not carry-out the requisite checks on the deceased for a period of 1 hour 42 minutes. There is the associated question of the records that were compiled. In paragraph 15iii of his written submissions it has been noted Crown Advocate Dunford suggests that this evidence “does not even require expert assistance”. It is a “limited (but important) issue”, he submits. It will have to be considered as the case develops and witnesses are heard what, if any, relevance alleged bad practices at the hospital, or poor psychiatric decisions have to this issue. At the risk of tedious repetition, the Jurats will have to evaluate the evidence in the light of the rigorous requirements needed to prove gross negligence manslaughter, with an objective test in relation to the actions of the accused nurses. It is what they did, compared with what reasonably competent nurses in their position would have done, which is relevant. Putting it in rather basic terms, the Jurats will need to blow the froth off before getting to the coffee, and I do not encourage distraction from the main issue. It seems to me, with respect, that as it presently appears (and it is accepted that oral evidence can put a different complexion on any trial) there is a limited period of time to concentrate on and a rather simple factual background. There may, or may not, be a need for further investigation of what took place by HSC, but this trial is not that forum. At present it seems that a central question will be

whether negligent conduct amounted to “gross” negligence as defined in the English authorities”. This is also dealt with in paragraph 15 below.

14. Reference was made at paragraph 10 to Advocate Dunster’s observation that if Mr Edgeworth’s Report went out he would consider applying for an adjournment as he needs a nursing expert’s report. If the present Report cannot be re-drafted (and it is suggested that counsel could get together to enable this) then, despite what Advocate Dunster perceives as his needs, he will face an uphill task in obtaining an adjournment. The main reason is that this (in Guernsey terms) long criminal trial has been fixed for a while, further delay would be unfair to everyone, and 4 week slots are extremely difficult to find. Furthermore, there are a number of witnesses whose needs had to be accommodated in getting dates, most of them health professionals. But there is another consideration, looking at the case as it is seen now. How relevant is any expert nursing evidence where it is accepted that the checks required by a doctor were not carried-out for over 1½ hours? And, in addition, how would such evidence assist in considering why allegedly false/misleading records of checks were produced? Going back to what was mentioned in the first judgment, what P has to prove is now well-established:

- (i) in accordance with the ordinary principles of negligence, D owed the deceased a duty of care. A person owes a duty of care to someone where it is reasonably foreseeable that their acts or omissions will cause harm to another.
- (ii) D was in breach of that duty of care. The question of breach of that duty should be dealt with “in the round” (R v Zaman [2017] EWCA Crim 1783 at paragraphs 46-48).
- (iii) A reasonably prudent person of D’s experience and position would have foreseen that their actions or omissions that made up the breach of duty exposed the deceased to an “obvious and serious” risk of death.
- (iv) The breach of duty either caused, or made a substantial contribution (or was one that was more than negligible) to the deceased’s death. “Significant contribution” is used in Zaman, paragraph 48.
- (v) The actions of D can correctly be characterized as “gross” negligence and therefore criminal. The cases start with R v Bateman (1927) 19 Cr. App. R. 8 (as mentioned in the earlier judgment) and the conduct must be proved to show “such disregard for the life or safety of others as to amount to a crime against the State, and conduct deserving punishment”. As Lord Mackay of Clashfern LC said in Adomako at 187:

“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 as in all the circumstances, as to amount in their judgment to a criminal act or omission.”

In other words, conduct that was truly exceptionally bad and amounting to such a departure from the proper care expected as to be truly reprehensible is therefore a crime. These formulations amount to very much the same (onerous) requirement.

15. It seems at this stage, taking into account the extensive and well-presented written statement of P’s case, together with the helpful and lucid defence case statements, that the most significant element may well be that referred to in paragraph 13 above – whether or not P can prove “gross” negligence. It follows that the pertinent area to be considered is, as stated, the period of time during which D1 and D2 were supposed to be making Level 2, 15 minute

checks, and how they recorded their actions. Particularly when there is an objective test, the alleged poor practices of others are relevant, as are the HSC reports mentioned, but as possible mitigation. The more I consider the already extensive body of paperwork in this case (which will increase) and try to fasten on what is important, the simpler the issues become. When all is evaluated it seems at this stage that the case is a straightforward one. The legal test is now very well-established, the facts are there for all to see and read; there remains the heavy onus on P in proving the case to the high level required. Side issues and legal blind alleys must be avoided to enable the Jurats to deal with the facts. This is not a “battle of experts” case.

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

30th August 2019