Application to exclude evidence under Section 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law 2003.

[2020]GRC089

(ANONYMISED – NOT TO BE REPORTED UNTIL CRIMINAL PROCEEDINGS HAVE BEEN DETERMINED)

IN THE GUERNSEY MAGISTRATE'S COURT

Between: **THE LAW OFFICERS OF THE CROWN** **("P")**

-and-

A DEFENDANT **("D")**

Application to exclude evidence under Section 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law 2003 ("PPACE")

Considered on written submissions

Before: John Russell Finch, Esq., OBE
Deputy Judge of the Magistrate's Court
Decision handed down on: 16th November, 2020

Counsel for "D": **Advocate T Crawfourd**
Counsel for "P": **Crown Advocate C Dunford;**
and Mr M Davies

Statutes referred to:
The Police and Criminal Evidence Act 1984, section 78
The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003 as amended, section 78
The Data Protection (Law Enforcement and Related Matters) (Bailiwick of Guernsey) Ordinance, 2018
The Telecommunications (Bailiwick of Guernsey) Law, 2001 section 16 (i)

Cases referred to:
Law Officers v de la Haye (Royal Court 6/2/12) ;
Law Officers v Veivars (Royal Court 52/18);
Mylward v Weldon [1595] EWHC Ch 1; 21 ER 136;
R v Chalkley [1998] QB 848;
R v P [2001] 2 WLR 463;
Sutherland v H M Advocate (DPP intervening) [2020] UKSC 32

Textbook referred to:
M Zander PACE (6th Ed) para 8-46
(ECHR Article 8 was also referred to)

J U D G M E N T

Background

1. The charges faced by D are set out in P's second set of written submissions ("P2") found at divider 8 of the first bundle. A "Defence Bundle" has also appeared consolidating D's written submissions ("D1" and "D2"), and at pages 212-216 an additional written submission ("D3") plus authorities. The original prosecution response to D's submissions is at divider 5 of the first bundle ("P1"). There are four charges against D, all under section 16(1) of the Telecommunications (Bailiwick of Guernsey) Law, 2001 as amended and all allege the sending of *"grossly offensive or of an obscene character videos".* As paragraph 11 (a) of P2 puts it *"the video clips are in essence "snuff" videos showing real graphic scenes of serious injury and death – including apparent ISIS beheadings. It is clear that they are not staged or false."*

2. At paragraph 3 of P2 there is a helpful chronology of the case. No trial date has been fixed until this legal argument is determined. It is set down for summary trial in the Magistrate's Court. The application by D is under section 78 of PPACE, the equivalent of the English provision in section 78 of PACE, on which there is a considerable body of Guernsey case-law that also cites and reflects relevant English decisions, and the very well-respected guidance given in Professor Zander's work on PACE.

3. P's case has a rather unusual background. It is alleged that the videos were sent by D in a WhatsApp chat to which he was a party and located not on D's phone, but on that of a Mr X who had been arrested in an unrelated matter. The Police were investigating a drugs offence when they (as is invariably the case) examined X's phone. X (as is now frequently not the case) provided his PIN number. The substance of D's response is found in the argument at D2, which runs to a meaty 209 paragraphs. The final observations are at D3. It is worthwhile, at this stage, to set out paragraph 16 of D3 as it encapsulates D's Advocate's approach in this case:

> *"In essence the prosecution seeks to have D convicted for offences under the Telecommunications Law which could see him lose his good reputation, his liberty and his livelihood whilst perversely, in order to do so, the prosecution proposes to rely solely on private social mobile phone communications between D and X that it would never have obtained in the first place had the Guernsey Police acted to the professional standards imposed on them and paid due regard to the fundamental rights afforded by Articles 8 and 9 of the Convention, had they exercised their powers of search and seizure lawfully and with propriety under PPACE Law and had they complied with their extensive obligations towards the handling of private and sensitive data under the Data Protection Law and the Law Enforcement Ordinance: circumstances which arguably amount to a state of affairs far worse than that for which D is being prosecuted i.e. a summary offence in the Magistrate's Court for an alleged and victimless misuse of a telecommunications network whilst engaging in a social exchange."*
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> The remainder of this written response is in the same rather over-wrought vein. This extensive quotation is set out because in my judgment it reveals two aspects which underpin almost all of D`s submissions in this case: using six words when one would do, and muddled thinking. It is unfortunate that this is unlikely to be well-received by D's Advocate, who has an indefatigable regard for what he perceives to be his client's best interests; but an examination of the merits, factually and legally, leads to this conclusion. It is also apposite to cite the preceding paragraph in D3, which unfortunately cements this opinion:
>
> > *"The defence does not question the quality or reliability of the evidence the subject of this application on which the prosecution seeks to rely. Instead it argues that the fairness of the proceedings will be compromised if the prosecution is permitted to rely on the evidence as it was obtained by unlawful and improprietous means and therefore its admission goes against the notion of fair play and proffers an unfair advantage making the proceedings as a whole unfair towards D i.e. one sided inequitable, unethical and wrong."*

This, (and the remainder of D3), make one question if the defence have read and sought to understand Crown Advocate Dunford`s argument at P2, or that of Mr Davies at P1.

The test to apply

4. It is considered that there are sufficient Guernsey cases that set out what is to be looked at. A very full decision was given by McMahon DB in Law Officers v Veivars (Royal Court 52/2018): to be found at divider 3 of the main bundle. Paragraph 40 of the judgment refers to Professor Zander's book on PACE (6th ed.) at para 8-46:

> *"In summary the Court generally will uphold the defence position under s.78 only where it is persuaded: (a) that there was a breach of the rules or other impropriety; (b) that it was significant and substantial; (c) that it affects the proceedings unfairly from the defence standpoint; and (d) that the unfairness is so great as to require that the evidence be excluded."*

The judgment cited then goes on to say:

> *"As a consequence, Professor Zander suggests that this shows that the burden is likely to be on the defence as opposed to the burden in respect of section 76(2), which is placed on the Prosecution."*

In my opinion that is all that needs to be said in relation to the present case on the approach the court must take. The essence of P's submission here is at paragraph 15(d) of P2:

> *"….. It is very clear evidence and it is very certain evidence, as it is captured on the phone and referred to in the report. In short it is fundamentally reliable and unchanging evidence. It is submitted that accordingly admitting it causes no unfairness to the accused. As it is underscored above concerns as to the investigatory process by which the evidence was obtained is not of itself a reason to exclude it."*

5. D2, as stated, comprises 209 paragraphs. There are lengthy observations on ECHR and the Data Protection legislation, notably the Data Protection (Law Enforcement and Related Matters) (Bailiwick of Guernsey) Ordinance, 2018. The simple answer to this mass of material is to be found in the legislation itself. The obtaining of personal data for a *"law enforcement purpose"* including the *"prevention, investigation, detection and prosecution of a criminal offence, within or outside the Bailiwick"* obviously is contemplated and therefore legitimate. At paragraph 17 of P2 the additional point is made that this legislation provides for *"civil proceedings for breaches and does not purport to regulate the criminal process or the admissibility or exclusion of evidence in a criminal trial.*" This paragraph concludes by reminding the Court that this case relates *"to data obtained by a third party who provided his passcode."*

6. ECHR considerations have only recently been addressed by the UK Supreme Court in Sutherland v H M Advocate (DPP intervening) [2020] UKSC 32. The facts were different from the present matter, but it is considered the principles set out by Lord Sales are applicable. It was a paedophile case involving private persons who *"hunt"* such offenders. The Appellant's article 8 rights were not violated, due to the fact that the contacts he made were criminal in nature and there was no reasonable expectation of privacy. The prosecution there, as a public authority, had a positive obligation to ensure the criminal law was applied effectively so as to deter that type of offence. It should also be pointed out once more that here the allegedly obscene material was on X's phone, for which he provided the PIN. Put in very basic terms, the right to privacy and its satellites do not exclude Police investigations of such material in these circumstances. No coercion was used here by

the Guernsey Police. In the case of Law Officers v de la Haye (Royal Court, 6/2/12) (divider 14), I stated that the House of Lords case of R v P [2001] 2 WLR 463 at 475-C, where Lord Hobhouse concluded that a breach of Article 8 *"lies outside the scope of a criminal trial"* was also relevant, and accepted the principle. The decision in de la Haye is supportive of the approach taken by P in the present matter.

Merits

7. It is important to bear in mind what the test for applying exclusion of material under section 78 actually is. It is as described in paragraph 8-46 of Professor Zander's authoritative book, cited at paragraph 4 above. More than one Guernsey case has accepted this. In addition reference has been made to English cases such as R v Chalkley [1998] QB 848, where at 874 Auld LJ observed that the critical test under section 78 is whether any impropriety affects the fairness of the proceedings: the Court cannot exclude evidence under the section simply as a mark of disapproval of the way in which it was obtained. Looking at the statements and considering the submissions it seems to me that there is no apparent impropriety by the Police and a proper line of investigation. Stripping away the waffle in D's written submissions is a far from easy task. They not only miss the point but do so in far too many paragraphs. The last submission (D3) is dated 4th November 2020. In parts (as some have already been quoted) they are almost poetic e.g. paragraph 10:

> *"It is important when considering this application to recall the significance of the modern day mobile phones. It is not just a phone but the digital window into the owner's soul containing a vast single-source inventory of personal data about him and others that typically contains far more intelligence than a search of his home or an interview would reveal."*

Paragraph 11 then lists what may be revealed. It is better left where it is and not quoted here. Paragraph 12 at least has the merit of brevity:

> *"Thus, the suspect's mobile phone in the hands of the Guernsey Police immediately raises significant privacy and data protection implications, and they do not have carte blanche upon seizing it to collect any of its contents let alone its entire contents on a whim."*

Part of paragraph 18, the concluding paragraph ends:

> *"The substantial unfairness to D, which results not from a one-off minor lapse by the Guernsey Police during the course of their investigations but multiple and significant breaches of law, which threw wind to the rights and protections afforded by law, to both D and X can only be addressed intrinsically within the criminal proceedings by excluding the evidence."*

8. The contents of these videos are summarized in the report TE/200/281019/1 at pages 41-56 of the main first bundle, especially (as they relate to D) pages 43-50. If correctly described they make the observation in D3 at paragraph 16 (already cited in full) that there are *"circumstances which arguably amount to a state of affairs far worse than that for which D is being prosecuted"* (emphasis supplied) wholly inappropriate. D`s submissions are misplaced. The allegation of bad faith is unfortunate on the material to hand and should not have been made. I regret appearing unkind, but in nearly 49 years now of specialist criminal work, I have never seen such an effort, other than from some litigants acting in person. Indeed, although time has moved on, I would be likely to have applied the remedy afforded in Mylward v Weldon [1595] EWHC Ch 1; 21 ER 136, which is appended to this decision (had it still been available).

Conclusion

9. Legal reasoning requires an analysis of a situation, stripping away extrinsic or irrelevant matter, and then seeing what legal principles are involved. In this case:

   (i) it is alleged the videos in question contravene the Telecommunications Law, as they are *"grossly offensive or of an obscene character".* That question has to be decided at a full hearing of the case;

   (ii) the material evidence against D was, from a reading of the papers, obtained by the Police lawfully examining the mobile phone of X (who had been arrested on other offences) with his consent;

   (iii) the Data Protection legislation is a code providing (eventually) for civil enforcement for breaches. It does not, on the facts so far, seem to have been broken by the Police, and, if so it seems to be in good faith (on considering what the papers show);

   (iv) D's ECHR rights are not affected. There is a substantial public interest in investigating and prosecuting this type of alleged offence; and

   (v) the test under section 78 of PPACE is familiar in Guernsey. Exclusion is not appropriate to punish the Police for improper behaviour. The question, to be considered, very broadly put, is the fairness or unfairness of the proceedings. The latter does not exist on the facts set-out and on the papers available for this case.

10. Prolixity in legal argument, whether written or oral, is a vice that should be suppressed. This is an extreme example of a multitude of words, most of which are redundant, that do not address the real issues, and which amount to a case study in obfuscation.

11. Accordingly, the arguments put forward on behalf of D fail, and the case will proceed to trial. If any further points of law need to be addressed, notice in advance should be given to the Court and the other party.

12. I direct that when the criminal proceedings in the Magistrate's Court are concluded, should D be legally-aided, H M Deputy Greffier forwards a copy of this decision to the Legal Aid Administrator.

J R Finch, OBE
Deputy Judge of the Magistrate's Court

APPENDIX

IN THE HIGH COURT OF JUSTICE
CHANCERY COURT OF ENGLAND

15 February 1595

MYLWARD V WELDON

FOR AS MUCH as it now appeared to this Court, by a report made by the now Lord Keeper, (being then Master of the Rolls), upon consideration had of the plaintiff's replication, according to an order of the 7th of May anno 37th Reginae, *that the said replication doth amount to six score sheets of paper*, and yet all the matter thereof which is pertinent might have been well contrived in sixteen sheets of paper, wherefore the plaintiff was appointed to be examined to find out who drew the same replication, and by whose advice it was done, to the end that the offender might, for example sake, not only be punished, but also be fined to Her Majesty for that offence; and that the defendant might have his charges sustained thereby; the execution of which order was, by a later order made by the late Lord Keeper the 26th of June, Anno 37th Reginae, suspended, without any express cause shewed thereof in that order, and was never since called upon until the matter came to be heard, on Tuesday last, before the now Lord Keeper; at which time some mention was again made of the same replication; and for that it now appeared to his Lordship, by the confession of Richard Mylward, alias Alexander, the plaintiff's son, that he the said Richard himself, did both draw, devise, and engross the same replication; and because his Lordship is of the opinion that such an abuse is not in any sort to be tolerated, proceeding of a malicious purpose to increase the defendant's charge, and being fraught with much impertinent matter not fit for this Court; it is therefore ordered, that the Warden of the Fleet shall take the said Richard Mylward, alias Alexander, into his custody, and shall bring him into Westminster Hall, on Saturday next, about ten of the clock in the forenoon, and then and there shall cut a hole in the *myddest* of the same engrossed replication (which is delivered unto him for that purpose), and put the said Richard's head through the same hole, and so let the same replication hang about his shoulders, with the written side outward; and then, the same so hanging, shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the Courts are sitting, and shall shew him at the bar of every of the three Courts within the Hall, and shall then take him back again to the Fleet, and keep him prisoner, until he shall have paid 10*l*. to Her Majesty for a fine, and 20 nobles to the defendant, for his costs in respect of the aforesaid abuse, which fine and costs are now adjudged and imposed upon him by this Court, for the above aforesaid.