Application regarding admissibility of Evidence.

[2019]GRC078

IN THE ROYAL COURT OF GUERNSEY

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

-v-

PETER DAWSON-BALL **(First Defendant) ("D1")**

-and-

SAMANTA BEATE MACPANE **(Second Defendant) ("D2")**

Application regarding admissibility of Evidence

Application heard on: 21st December, 2018

Decision handed down on: 14th January, 2019

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

Counsel for the Prosecution: Advocate W A Giles

Counsel for the First Defendant ("D1"): Advocate M G A Dunster

Counsel for the Second Defendant ("D2"): Advocate C M Fooks

Cases referred to in Decision:

Amann v Switzerland (2000) 30 EHRR 843;

Khan (Sultan) v United Kingdom [2000] Crim LR 684;

PG and JH v United Kingdom [2002] Crim LR 308;

R v Ahmed [2018] EWCA Crim 739;

R v Jelen and Katz (1990) 90 Cr. App. R. 456;

R v P [2002] 1 AC 46;

R v Ryan [1992] Crim LR 187;

R v Sultan Khan [1997] AC 558;

Schenk v Switzerland (1991) 30 EHRR 42;

Taylor v Law Officers 2011-12 GLR 81;

Warren v HM Attorney General of Jersey [2011] UKPC 10.

Textbooks referred to in Decision:

Archbold (2019), paragraph 11-3b;

Blackstone (2018), paragraphs F2.9, F2.14 and F2.34;

Zander on PACE (8th Edition), paragraphs 8-53 and 8-60.

Statutes referred to in Decision:

The Criminal Justice (International Co-operation) (Bailiwick of Guernsey) Law, 2001, Section 3;

The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, Section 78;

The Police and Criminal Evidence Act, 1984, Section 78;

The Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003.

Convention referred to in Decision:

The European Convention on Human Rights, Articles 6 and 8.

D E C I S I O N

Introduction

1. D1 and D2 face money-laundering charges connected with the manufacture of an unlicensed medicinal product, in respect of which the major protagonists have been sentenced in England (see exhibits 211 and 212 of P's bundle, showing the details of the offences admitted at Southwark Crown Court, and also exhibits 45 and 46 in the Court bundles). The two defendants represent the Guernsey part of the case. Unlike in the English case, both plead 'Not Guilty'. This application concerns evidence procured by the French authorities by way of intercept, after a Letter of Request issued by the Law Officers of the Crown in Guernsey. The details of the Guernsey case are set-out in summary in the skeleton put forward on behalf of D2, paragraph 2. It is alleged that D1 and D2 were involved in companies in Holland and Latvia, set-up to disguise the core business of the principal offender, a Mr Noakes, and allow payments and transfers relating to the sale of the unlicensed product ("GMAF"). The items sought to be excluded comprise exhibits 58, 59, 60, 61, 62 and 63, and, a series of texts set out at 28.

2. The application was founded under section 3(7) of the Criminal Justice (International Co-operation) (Bailiwick of Guernsey) Law 2001 ("the 2001 Law") and/or Section 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003 ("PPACE") and, in effect, common law. However, with great respect to the veteran and industrious Advocates for the Defence, it seems that the whole application can be dealt with under Section 78 (which mirrors Section 78 of the English Police and Criminal Evidence Act, 1984 ("PACE")). This is because the scope of Section 78, at least in the English cases, is wider than any inherent jurisdiction of the courts, for example *mala fides* is required at common law, not under Section 78 (see *Blackstone* at paragraph F2.9). In addition, consideration of Section 3 of the 2001 Law and the requirements of Articles 6 and 8 of the European Convention on Human Rights ("ECHR") can be subsumed into the Section 78 exercise that has to be undertaken. The reason for this joint application is very clear. If admitted, the evidence at first blush is

highly probative of the Prosecution case. If adduced at trial it may be explained or weakened, but at this stage of the process it needs to be taken at face value. Other considerations apply to exhibit 60, which cannot be specifically laid at the door of either D1 or D2, and is, therefore a form of hearsay.

The Applicable Test

3. There is by now a very familiar and well-trodden path. There is a power to exclude evidence for the Prosecution if, having regard to all the circumstances, including those in which it was obtained, its admission would have such an adverse effect on the fairness of the proceedings the court ought not admit it. There are no general guidelines. In R v Jelen and Katz (1990) 90 Cr. App. R. 456 at 465 CA (a case where I conducted the committal proceedings and drafted the charges) Auld J said:

> "The circumstances of each case are almost always different and judges may well take different views of the proper exercise of their discretion even where the circumstances are similar."

In England, "by far the most common basis" for section 78 exclusion has been significant and substantial breaches of the PACE rules (*Zander* at paragraphs 8-53). Also, the critical test is whether any impropriety affects the fairness of the proceedings; evidence should not be excluded simply as a mark of disapproval of the way in which it was obtained (see *Blackstone* paragraph F2.14). The evidence can be excluded not because of the seriousness of any breach per se, but due to the extent of any unfairness caused thereby. Helpfully in the standard work on PACE, Professor Zander stresses that the court takes account of fairness to the Prosecution as well as the Defence and summarizes when the court will generally uphold a Defence submission under Section 78 (at paragraph 8-60). The court excludes evidence "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.

4. A breach of the ECHR does not necessarily mean that the trial is unfair (R v Sultan Khan [1997] AC 558). The fairness of the trial should be judged by the application of Section 78. The leading case which involved overseas telephone interceptions is R v P [2002] 1 AC 46 (Tab 3 of D's bundle). The main conclusions of the House of Lords there are set-out in *Blackstone* at paragraph F2.34 and can be summarized as:

(i) the criterion of fairness under Article 6 of ECHR is the same as applied under Section 78;

(ii) the fair use of the interception evidence at trial is not a breach of Article 6 even if it was unlawfully obtained;

(iii) it is a cogent factor in favour of admission that one of the parties to the conversation is to be a witness; and

(iv) there is no principle of exclusion of evidence independent of what (in Guernsey) is the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003.

Accordingly, the task in the present application is to consider Section 78 of PPACE in the light of the (highly persuasive) English authorities, which have been cited in Guernsey cases.

It should be noted that the French intercept evidence is considered by P to be key in assessing the "knowledge or suspicion" required to prove the case here.

The Intercept Evidence

5. This is helpfully summarized in D2's skeleton (and these submissions are adopted on behalf of D1), at paragraph 4. To set the scene it is to be noted that the illegal medication was manufactured on farm premises in Digosville in Normandy, subsequently raided by the relevant French authorities; furthermore the person named, David Halsall, was a coadjutor of Noakes and the person in charge of the operation in France. In relation, principally to D2, we have:

> Exhibit 28 - a series of text messages sent from a number said to be Halsall's and received on a number allegedly belonging to D2, including reference to "clean the farm".
>
> Exhibit 58 – a recorded call between a number said to belong to D2 and a number of Halsall's in which knowledge is demonstrated of the process of making and dispatching the illegal product.
>
> Exhibit 59 – a brief conversation between two males. M1 is "David" M2 apparently being D1.
>
> Exhibit 60 – a recorded call on a general office number of the French operation between a number of males and females, neither D1 nor D2 being shown to have participated. This is a discussion following Noakes' arrest, which took place in England on 8th February, 2017.
>
> In relation to D1 there are intercepts which seem to be confined to him and David Halsall. The same grounds are put forward for their exclusion as are used on behalf of D2.

Legislation

6. Section 3 of the 2001 Law is relevant, particularly Section 3(7); the section reads:

> **"Overseas evidence for use in the Bailiwick.**
>
> 3. (1) Where it appears to Her Majesty's Procureur –
>
> (a) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed; and
>
> (b) that proceedings in respect of the offence have been instituted or that the offence is being investigated,
>
> he may issue a letter ("a letter of request") requesting assistance in obtaining outside the Bailiwick such evidence as is specified in the letter for use in the proceedings or investigation.
>
> (2) Where it appears to the Bailiff that proceedings in respect of an offence have been instituted, he may, on the application of the person charged in the proceedings, issue a letter of request, requesting assistance in obtaining outside the Bailiwick such evidence as is specified in the letter for use in the proceedings.
>
> (3) Her Majesty's Procureur shall transmit a letter of request either –

(a) to a court or tribunal exercising jurisdiction in the place where the evidence is to be obtained; or

(b) to any authority recognised by the government of the country or territory in question as the appropriate authority for receiving requests for assistance of the kind to which this section applies.

(4) In this section "evidence" includes documents and other articles.

(5) Evidence obtained by virtue of a letter of request shall not without the consent of such a court, tribunal or authority as is mentioned in subsection (3) be used for any purpose other than that specified in the letter.

(6) If the court, tribunal or authority that supplied a document or other article pursuant to a letter of request so requests the document or other article shall be returned to that court, tribunal or authority when it is no longer required for the purpose stated in the letter of request or for any other purpose for which consent has been obtained in accordance with subsection (5).

(7) Evidence obtained by virtue of a letter of request shall, without being sworn to by a witness, be admissible in evidence and in exercising any discretion to exclude evidence otherwise admissible in relation to a statement contained in evidence taken pursuant to a letter of request the court before which it is sought to introduce that evidence shall have regard –

(a) to whether it was possible to challenge the statement by questioning the person who made it; and

(b) if proceedings have been instituted, to whether local law allowed the parties to the proceedings to be legally represented when the evidence was taken."

Submissions

7. The written and oral submissions mainly came from Advocate Fooks on behalf of D2, augmented orally by Advocate Dunster for D1. The intercepts were authorized and made in France before the letter of request was sent out. The two defendants were not being specifically investigated by the French authorities; whose focus was on fraud and public health. Care must be taken with the intercept evidence, as the identities of those participating are not always clear. So the purpose for which the evidence was gathered in France was different. D1 and D2 face money-laundering allegations, which were not the focus of the French investigation. The written opinion of a French Advocat, Me. Bernard (at Tab 7 of D2's bundle) was referred to. The evidence might not be admissible in a French court at all. Observations were made on the specific items of evidence. Exhibit 58 is a "long, rambling conversation", and we do not know for sure who the male is. Exhibit 60 "does not bear scrutiny" and is highly prejudicial anonymous hearsay; neither defendant can be shown to be a party. Both Defence Advocates also referred to the familiar Jersey case of Warren v HM Attorney-General of Jersey [2011] UKPC 10 (at end of D2's bundle). There, despite very bad and deceitful conduct during the course of the investigation (tracking and audio devices were illicitly employed and foreign authorities misled) the evidence obtained was allowed in. But that was in a much more serious matter; it was submitted, than this case. Advocate Dunster, in particular, drew attention to the sentence imposed on Noakes in England with "only" three months' for the money-laundering count. This was quite different to the organized crime

element in Warren and there are different considerations. The point is also made in paragraphs 31 and 32 of D2's skeleton. There is therefore a clear "gulf" between the Warren type of case and the present one. The balance "tilts much more heavily" towards protecting the Defendants' Article 8 ECHR rights.

8. That observation in R v P (Supra) that a cogent factor is that one of the parties to the conversation is going to be a trial witness was also referred to. The person(s) at the other end of the conversation will not be around to be questioned. It was also submitted noting Section 3(7) of the 2001 Law, that the decision to authorize the intercept was not made in circumstances where any party was legally-represented and D2 has been denied her request for disclosure of communications (other than the Letter of Request) between the Law Officers and the French authorities as well as the dossier placed before the French judge. Hence, she is "handicapped" in dealing with the context of the intercepted conversations. It was also suggested that the materials were obtained for one purpose and now intended to be used for another. It was said in R v P, at page 158 of Lord Hobhouse's speech that "In the present case the relevant information, having been lawfully obtained for the purpose of assisting the Prosecution of alleged smugglers of Class A drugs has not been used for any other purpose …". That is not the situation in this case. In relation to exhibit 60, it was strongly suggested that this falls into the category of "anonymous hearsay" and should be excluded; attention was drawn to paragraph 11-3b of *Archbold* (Tab 5) and the cases cited therein. Both defence Advocates spent some time on the question of the ECHR, principally the observance of Article 8, and referred to the Strasbourg court's jurisprudence on this: Schenk v Switzerland (1991) 13 EHRR 242 and Amann v Switzerland (2000) 30 EHRR 843 were mentioned, and are included in D2's bundle.

9. P's oral and written submissions were admirably concise. The cumulative effect of the evidence was mentioned and the context. Noakes was arrested in England on 8th February, 2017 and things escalated in France after that. It is correct that the French were concerned about the GcMAF product; they were environmental investigators, as is apparent from the documentation. Money-laundering is an off-shoot of almost any event where there is a gain, it is directly-related to what was going on. Lawful authority had been granted in France. The opinion of the French expert is hypothetical and he does not say that anything has been obtained illegally. Here the money-laundering tags on as a direct consequence of the original offending; it is often an adjunct to an offence. Proceedings have not concluded in France. It had been put forward by both Defence Advocates that the case was not an especially grave one, particularly in view of the sentence imposed on Noakes, in particular both D1 and D2 were less significant figures than him. However, Advocate Giles responded that it was a serious case for Guernsey, which is another jurisdiction and rightly jealous of its financial reputation. The wording of Section 3(7) was referred to. The evidence obtained "shall be admissible" and the words "shall have regard" before (a) and (b), mean that one looks at the circumstances in which the evidence was obtained. Section 3(7)(b) refers to "local law", which here means French law. There is no evidence of anything unlawful in the French procedure. Here either Defendant has the right to give evidence to explain the comments made and place them in context. It is hard to see how the actual content of the intercepts can be challenged. The picture revealed, it is suggested, is that shortly after Mr Noakes' arrest there was a panic, cleaning-up and "scurrying for cover" before the French authorities swooped. In summary, the correct procedural route was followed, there is no evidence of unlawful procedures and the material shows those involved were cognisant of this illegal operation. The intercepts are probative and indicative of guilt on the present indictment.

Application of the Relevant Legal Principles to the Facts

10. As indicated, it is hardly surprising that both D1 and D2 want this evidence out. In the absence of any explanation it is relevant and probative of guilt on the charges faced. It is repeated that the right approach in this case is to apply Section 78, and the pervasive concept of "fairness" which lies at its root. In making an assessment it should be remembered that

ECHR considerations have been fully dealt-with in the leading English cases, which it is intended to follow. It is useful to fix on a helpful summary of the situation in Zander at paragraph 8-60 at (10):

> "**Breach of the ECHR does not necessarily mean the trial is unfair.**
>
> As has been seen … in Khan (Sultan) v United Kingdom the European Court of Human Rights held that although there had been violations of arts. 8 and 13 of the Convention, the defendant had not been deprived of his right to a fair trial under art. 6(1) of the Convention. That case concerned reception of evidence from a listening device installed in his home by the Police. The European Court reached the same decision in PG and JH v United Kingdom which concerned covert listening devices both at the suspects' home and at the police station. The House of Lords adopted the same approach in Sultan Khan and in P. In both it held that the question of whether the trial was fair should be judged by application of s.78."

The Prosecution are on rather firmer ground here, as there is no cogent evidence of unlawful practice by the relevant authorities in France, or Guernsey. There can, on the facts available in this application, be no question either as to the reliability of this evidence. Hence, even if there were some impropriety, or indeed serious impropriety then, in all the circumstances, the evidence is not unfair to either accused person. The English case of R v Ryan [1992] Crim LR 187 shows that a major breach of the Code of Practice (on identification) did not result in the exclusion of the evidence, if it did not cause unjust prejudice to the accused. Nor, it should be noted, is there any trace of the bad conduct shown in Warren. The central question, as always, is whether the proceedings as a whole are fair. All the circumstances need to be considered. Without any "significant or substantial" breach of the rules or other impropriety there is no reason why the intercept evidence should not be admitted in the interests of "fairness" to the Prosecution, a relevant consideration in PACE, and therefore also under PPACE.

11. Reference was made in the course of argument to the sentencing of the principal offender, Noakes. He received 15 months in all (after guilty pleas and the reception of evidence). However, Advocate Giles was right to mention that sentencing in Guernsey is a different matter and that Noakes' offences were serious, so that any proven laundering of the proceeds would adversely affect Guernsey's financial reputation. This is a relevant consideration, see e.g. the remarks of the Court of Appeal in Taylor v Law Officers 2011-12 GLR 81 (Nutting JA). There was criticism of the failure to disclose communications between the Law Officers and the French authorities. But with great respect to the Defence Advocates, this is not disclosable – also on the authority of the Taylor case. Even without such authority a request of this type resembles the wholesale fishing (or more accurately dredging) demands that used to be made in the 1980's in the hope that something that glistens might possibly turn up. The Letters of Request were disclosed and there was nothing in them that could raise any legal hackles.

12. Exhibit 60 needs to be separately considered, as it appears to be anonymous hearsay. Advocate Fooks produced paragraph 11-3b of *Archbold*, as mentioned, which states that there is no power to admit this either at common law or statute. However, the recent case of R v Ahmed [2018] EWCA Crim 739 is cited, where the anonymity of such evidence was held to be of little relevance and therefore it was admissible. The judgment in that case shows that hearsay assisted both sides and that the trial judge had correctly directed the jury on its limitations. There is a temptation to view this as a case very much on its own facts, especially as there was a complex gangland background. However, it is necessary to consider how the Prosecution in this matter propose to make use of exhibit 60, a rather crowded conference call in the wake of Mr Noakes' apprehension with a number of participants, none identifiable as one of the present Defendants. The gist of P's contentions here are set-out in paragraph 16 of the skeleton. In particular it is suggested:

> "What this transcript *does* demonstrate is that the staff at Immuno Biotech Ltd were all seemingly cognisant of the illegal nature of the French operation in particular and it adds great clarity to the earlier references to making 'sure the farm is clean' … a message sent by David Halsall to Samanta MacPane an hour and a half before – the day after David Noakes had been arrested …"

For the limited purpose set-out, i.e., to show the state of mind of the personnel in France it is admissible. It relates to that aspect of the case only and will need to be the subject of careful direction to the effect that it does not specifically implicate either Defendant. Nevertheless there is relevance, provided, as in Ahmed, the limitations are referred to.

13. One, in my view, rather peripheral point relates to the R v P case. It will be remembered (see paragraph 8 above) that a "cogent" reason, in favour of admitting intercept evidence was "that one of the parties to the relevant conversation is going to be a witness at the trial and give evidence of what was said during it". This was based on the Strasbourg case of Schenk, where the man Schenk had hired a hitman to kill his wife, and this person had taped the conversation, also giving evidence at the trial. Plainly the other party or parties to the alleged conversations with D1 and D2 were not recording themselves to assist the Prosecution and are most unlikely to turn up in the Guernsey trial. As Advocate Giles suggested, either or both Defendants have the right, if they so wish, to give evidence to explain the conversations. On the particular facts of this case, that opportunity is close to what Lord Hobhouse stated in R v P; after all, this was not a set of conversations between an informant or undercover officer and a Defendant.

Conclusion

14. Having carefully weighed the well-ordered submissions in this application, it is considered that:

    (i) the appropriate test is that set out in Section 78 of PPACE, with the need to show "fairness" (to both Prosecution and Defence);

    (ii) upon considering the relevant English and Strasbourg decisions, it is not unfair to have this evidence adduced. In particular the Prosecution have not been guilty of any impropriety or breach of the provisions protecting the rights of these Defendants; and

    (iii) the application fails and is dismissed. The evidence can be admitted.

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