Application for disclosure.

[2023]GRC077

IN THE ROYAL COURT OF GUERNSEY

(Case Number 18 of 2022)

Between:

THE LAW OFFICERS OF THE CROWN ("P") **Prosecution**

-v-

AARON CUSACK ("D") **Defendant**

Application regarding Disclosure

Application heard on: 16th November, 2022

Decision handed down on: 31st January, 2023

Before: John Russell Finch, Esq., OBE, Lieutenant Bailiff

Counsel for the Prosecution ("P"): Crown Advocate C G Dunford

Counsel for the Defendant ("D"): Advocate A J Ayres

Materials and Cases referred to in Decision:

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

The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, as amended

Taylor v Law Officers 2011-12 GLR 81

R v H [2004] 2 AC 134

JUDGMENT

1. There has been a slight delay in handing this down due to my absence from Guernsey for several days. It is, however, in time for the next slot allocated to argument in this case. The matter under consideration is essentially one issue or aspect of the case, and a *voir dire* on the admission, or otherwise, of evidence is listed for 12th – 13th December, 2022. It has been helpful to hear in advance some of the issues which that much fuller hearing is asked to determine. The issue for this judgment has been covered by useful written submissions, concise in length and oral argument on 16th November, 2022.

2. Before examining the particular matter in dispute, it is useful to look at the broad outline of the case now before the Royal Court. D, a serving officer of the Island Police force, has pleaded

'not guilty' to an Indictment alleging (i) perverting the course of justice; (ii) failure to disclose information following the service of a Notice under the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003, as amended (a "RIPL Notice"); (iii) and (iv) are like offences relating to other devices. Very broadly, (as this is relevant when considering the present application, and, in due course, the *voir dire*), the alleged offences relate to D misusing his position of power as an officer of Police, by using unlawful means to pressure a female complainant to withdraw a complaint of rape against another person, and, in broad terms, failing to comply with RIPL Notices in respect of his iPhone, iPad and HP laptop. The Prosecution have provided a detailed and very full outline of the case for the Judge alone, which is on the case file. This assists in putting the preliminary issues in some sort of context.

3. D's Advocate seeks statistics for the last 5 years regarding the timing of RIPL applications. It is submitted that the procedure in the present case was followed at "breakneck speed" (paragraph 2 of D's written submissions). As paragraph 5 of the submission puts it: "There should be no difference in treatment between a 'civilian' and a police officer under investigation where applications for RIPL Notices are concerned". It is also to be noted that at paragraph 13 of P's written submissions, Crown Advocate Dunford helpfully lists six cases involving RIPL Notices that he recalls. D's submissions in respect of RIPL Notices are based, it should be noted, on "his experience" (and that of other officers); paragraph 10 of D's written submissions. P's response is that D is an inexperienced officer, and had only been attached to CID for around a week. When considering the witness statements in this case, it is relevant to look at what DC Simon mentions – D was paired with her, but was essentially learning and being instructed on his duties. DC Simon is also an experienced investigator of sexual offence allegations; her evidence amply illustrates D's lack of experience and the need to teach him how to proceed.

4. D's written submissions (and the nub of these need to be considered at the *voir dire*) allude to questions of "necessity and proportionality in RIPL, rather than a desire on the part of the Police to short-circuit these provisions" (paragraph 8); and follow-on in paragraph 9 by these questions being "short-circuited" by considerations of "public relations and media hype". Reference is made to pages 7 and 8 of Acting Inspector Naftel's witness statement in the committal bundle. One passage (page 7) reads (after referring to the Sarah Everard murder):

> "That a serving police officer in Guernsey stood accused of having an inappropriate relationship with a vulnerable female, one who comes to Police attention time and time again, usually as a result of sexual offences committed against her, meant that it was necessary and proportionate to pursue the very relevant line of enquiry that his electronic devices contained evidence to either prove or disprove the very serious allegations against him."

This is, of course, more relevant to the wider issues that will be considered at the *voir dire*, but is referred to because it correctly outlines why these allegations are so serious. Therefore, it would be arguable that relevant enquiries needed to be pursued expeditiously in such serious alleged circumstances.

5. In relation to the specific issue of the disclosure of RIPL Notices over the past 5 years, it appears that the following points apply:

   (i) comparisons with other cases are not helpful. Each case is different. Some applications will have been made with due expedition, others not so. The comparison which D postulates is not far removed from the normally unhelpful practice when mitigating before sentence of citing other cases, which are not guidelines;
   (ii) it is only to be expected, it can be argued, that in a case of this seriousness the RIPL application was submitted, without undue delay. The full merits fall to be decided in the *voir dire*. Paragraph 12 of P's written submissions states that:

> "Ultimately, P's stance is that the determination of whether the statutory criteria were met, to apply for and obtain a RIPL Notice, does not require any consideration of statistics from other cases, which may have a very different factual background …"

And:

> "The application made, … should be determined solely on the facts of the investigation as they were known at the time the application was made."

Furthermore, P asserts (paragraph 11 of the written submissions) that the Guernsey written policy (as advised on by the Law Officers), at paragraph 3: "Necessity and Proportionality", deals with these matters, unlike paragraph 5.6, cited in D's written submissions at paragraph 5, which is operational in content.

6. Counsel will no doubt be aware, when further considering the matter, that the test for disclosure in Guernsey is that set-out in the leading case of Taylor v Law Officers 2011-12 GLR 81 by Nutting JA at paragraph 131:

> "We hold, therefore, that the duty of the Prosecution in Guernsey is to disclose any material which might reasonably be considered capable of undermining or weakening the case for the Prosecution or of assisting the case for the accused."

(See also R v H [2004] 2 AC 134, at paragraph 35.)

Conclusion

7. In relation to the particular point regarding disclosure of previous RIPL applications, and leaving all other matters for future resolution, P's arguments are accepted, despite the well-crafted arguments put forward on behalf of D. Comparisons in this situation prove very little and the central question, e.g. under section 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, as amended remains, and arguments as to proportionality can be considered fully then, if adduced.

8. Application refused.

J R Finch, OBE
Lieutenant Bailiff

Dated this 31st, January 2023