Application to stay proceedings for abuse of process relating to a failure to comply with RIPL Notices.

[2023]GRC076

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**

Abuse of Process Application

Application heard on: 12th and 13th December, 2022

Decision handed down on: 20th 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, Cases and Texts referred to in Decision:

The Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003, as amended ("RIPL") sections 46-49;

The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2004, as amended;

The Police and Criminal Evidence Act, 1984;

Article 8 of the European Convention on Human Rights;

The Home Office Revised Code of Practice, August, 2018;

Law Enforcement, Notices Requiring Disclosure Guidance (2017), as amended.

D Ltd v A [2017] EWCA Crim 1172;

R v Crawley [2014] EWCA 1028;

R v E [2012] EWCA Crim 791;

R v Latif [1996] 1 WLR 104;

R v Norman [2018] EWCA Crim 1564;

R (Rawlinson Trustees and Others) v Central Criminal Court (and Others) [2012] EWHC 2354 (Admin);

R v Telford Justices ex parte Badham [1991] 2 QB 78;

Warren v A/G for Jersey [2011] UKPC 10.
Blackstone (2022)

JUDGMENT

Introduction

1. This is the second judgment that has been issued in this case. The earlier one followed a hearing on 16th November, 2022, and dealt with the issue of disclosure of previous RIPL Notices over the past 5 years. The present matter is more wide-ranging. It is concerned with abuse of process and a *voir dire* took place, when the evidence of Chief Inspector Hockey and Acting Inspector Naftel was heard. There were already comprehensive written submissions as well as authorities and other documented material in the joint bundle. Both Advocates supplemented the oral evidence with further oral submissions. This is the decision, having assessed all the materials put forward. It was suggested by P that the issue is abuse of process, rather than the more familiar question of applying section 78 of PPACE (the equivalent to the English statute, i.e. the Police and Criminal Evidence Act, 1984) and this was accepted on behalf of D.

Abuse of Process

2. The English cases will be followed, they are of course of high persuasive authority and also the number of cases decided in England, with the number of different facts, plus high-level judicial decisions including statements of legal principle are indispensable in coming to a decision. Firstly, it is well-established that the burden of proof in these applications lies on a defendant, to the civil standard; see, e.g. R v Telford Justices ex parte Badham [1991] 2 QB 78 and R v E [2012] EWCA Crim 791, where it was confirmed that the "*burden of proof or persuasion"* lies on D. There are two categories where the court has the power to stay proceedings for abuse of process; we are concerned with the second one, expounded by Lord Dyson in the celebrated case of Warren v A/G for Jersey [2011] UKPC 10, a Privy Council decision from our sister island's courts. The words used are:

> "*Where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case."*

Lord Dyson went on to say:

> "*In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of justice and propriety ... or will undermine confidence in the criminal justice system and bring it into disrepute ..."*

This was reiterated by Sir Brian Leveson P in R v Crawley [2014] EWCA 1028, at [17] to [18], where he added:

> *"... [T]here is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort."*

Finally, in D Ltd v A [2017] EWCA Crim 1172, it was emphasized that the second limb, with which we are concerned, "*requires a balance of the competing interests"*.

(These cases are helpfully dealt with in *Blackstone (2022)* paragraph D3.67.)

3. In the Warren (supra), where the Police "*cut corners and acted unlawfully"*, Lord Kerr summarized some of the guiding principles. The "*balancing of interests*" was emphasized and "*the public interest in ensuring that those who are charged with grave crimes should be tried*" will always weigh in the balance. A stay should not be ordered to punish prosecutorial or Police misconduct, the integrity of the criminal justice system is the focus. The circumstances of each case govern the exercise of the judicial discretion. In R v Norman [2016] EWCA Crim 1564, the Court of Appeal observed that:

> *"How the discretion will be exercised will depend upon the particular circumstances of each case, including such factors as the violation of the accused's rights, whether the Police have acted in bad faith or maliciously … and the seriousness of the offence with which the accused is charged … Each case is fact specific."*

Nature of the Case

4. D has been committed for trial on an indictment comprising four counts. The present application does not relate to Count 1. The counts arise from the same set of facts and concern a complainant, who alleged rape by another person. Count 1, which it is necessary to consider as providing the backdrop to Counts 2-4, is an allegation of perverting the course of public justice. D is a serving officer with the Island Police. It is alleged that whilst investigating a complaint of rape, "*and with the intention of concealing the full details of [his] contact with her, he used 'unlawful means to pressure [her] to withdraw her complaint of rape'"*. Counts 2-4 relate to a failure to comply with RIPL Notices within 7-days in respect of an iPhone (Count 2); an iPad (Count 3); and an HP laptop (Count 4). Not guilty pleas have been entered at a Plea and Directions hearing.

5. The Bailiff of Guernsey imposed the disclosure requirements following an Application to himself in Chambers on 28th October, 2021, sworn by Chief Inspector Hockey. The Information is a fully-detailed document, comprising 39 paragraphs. D failed to comply with the requirements ordered by the Bailiff. This Application is covered in Chief Inspector Hockey's evidence at the *voir dire* hearing, where what was put forward was examined closely.

Preliminary Observations

6. In considering the conclusions reached in relation to this Application, it may help if the following points are kept in mind. They are included at this stage to assist in understanding the reasoning set-out:

   (i) D faces a high hurdle. In light of the clear observations referred to in paragraph 2 above, there is a considerable public interest in trying serious criminal allegations. Stay, as Sir Brian Leveson stated, "*is a remedy of last resort"*. The burden of "*persuasion"* rests with D;

   (ii) The oral evidence of Chief Inspector Hockey and Acting Inspector Naftel, comprised their acceptance of their detailed witness statements as evidence-in-chief (with a few supplementary points) and then cross-examination delivered in D's Advocate's customary civil, but thorough manner. At the conclusion of this evidence, I had no hesitation in accepting their veracity (which was not an issue), nor their good faith. They were truthful and conscientious witnesses who showed a careful and cool-headed approach to what must have been an unpleasant task. There were only three points that required specific consideration, and these are mentioned in paragraph 11 below. These findings are significant, as the present case is on its own facts far removed from the Warren case, where considerable failings were admitted.

Main Issues

7. The provisions of sections 46-49 of the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003, as amended, i.e. "RIPL", are reproduced in D's skeleton argument. The first question for consideration relates to "*necessity"* in section 46(2)(b) and "*proportionality"* in section 46(2)(c). The evidence of the two investigating officers is of particular relevance here. D's arguments are to be found in paragraphs 15c, 17 and 18 of his skeleton and developed in the oral submissions. It is important to consider the situation at the time that the Application was made to the Bailiff, and to repeat, there is no element of 'bad faith' in the actions of the investigating officers. Also, the issuing of RIPL Notices is not unfamiliar to the judiciary of Guernsey, nor are the prosecutions of persons (principally drug suppliers) who fail to comply with them. Issues relating to necessity and proportionality need also be considered and evaluated in the light of the facts at the time the Application was made. These are summarized as follows:

(i) (Put briefly as this is the basis of Count 1, not a subject of the present hearing) D allegedly "leaned" unlawfully on a vulnerable woman, whom the evidence shows he knew to be vulnerable, to induce her to drop a rape complaint against a third party. This is all recorded on D's bodycam;

(ii) The complainant told the Professional Standards department, that she had previously been in an on-line relationship with D, starting off on a dating App. Over several months they had regularly exchanged messages on social media. When her phone was examined the same day, it was limited in what it disclosed as the complainant had recently applied a factory re-set. Some evidence of the two parties being linked on Snapchat was found;

(iii) Several images of the complainant topless were found during that examination. Other (solo) sexual images featuring both herself and also D were allegedly sent;

(iv) D's mobile phone, Apple iPad and HP laptop were seized from his home. At the time of arrest, D indicated that he would provide passcodes, but wished to obtain legal advice. In his initial interview, D stated he wanted the devices to be examined by another Force, to avoid embarrassment to himself and his current girlfriend, as they contained intimate images of them. D agreed he would provide passcodes if the States of Jersey Police examined the devices. The investigators agreed to that request;

(v) D was suspended on 25th October 2021 and given a deadline of the 26th, as he wanted to speak to his Advocate. This was agreed, and he was told a Notice would be sought if he still failed to provide the passcodes. The request was duly repeated on the 27th and it was indicated that D had not had the opportunity to seek legal advice, so there was a further extension to produce them. If not forthcoming, then an application would be made to a judge on the 28th. D was served with an advisory notice on the 27th of the intention to seek to obtain the passcodes. They were not forthcoming. Throughout the enquiry, the investigators had been guided and instructed by Crown Advocate Dunford, who also attended before the Bailiff;

The section 46 RIPL Notice was duly served on D, in the presence of Advocate Ayres, on 29th October 2021. D did not comply with it and the passcodes have never been provided;

(vi) The Jersey Police, hampered by the lack of the passcodes, were able to extract partial data only from the devices. P regards the findings as of evidential value, they are set out in P's Outline, which was given to myself before the hearings. They are well-described as "*partial"*, in comparison to what a full examination could have provided.; D exercised his right to make "*no comment"* answers when interviewed about the RIPL Notice on 19th November, 2021. Other matters from interviews relate largely to Count 1, the charge which is not the subject of the present hearing.

8. The legislation (section 46) provides that if there are reasonable grounds to believe that a "*key"* to the protected information is in the possession of any person (here D), and that the imposition of a disclosure requirement is necessary on grounds falling within section 46(2)(b), then application for a Notice can be made. Section 46(2)(c) states:

> *"that the imposition of such a requirement is proportionate to what is sought to be achieved by its imposition."*
>
> (underlining provided)

Whilst other methods of investigating this aspect of the case need to be considered, and also the impact of Article 8 of ECHR, the facts invalidate the proposition that this should (somehow) have been an obstacle to the RIPL Application. The only, imperfect, method of accessing D's devices (see below, paragraph 11(ii) on the laptop) was forced extraction, which has produced a partial picture only of the data. We do not know what full-access would have provided. The best evidence is not available, for which D's actions are responsible. Indeed, at trial, it could even be submitted on behalf of D that what forced access produced is inferior and imperfect. The question of proportionality is, as P submits in paragraph 16 of the skeleton, "*clearly determined primarily by the seriousness of the offences under investigation and the likely value the information sought would have to the investigation"*. In his oral submissions, Advocate Ayres suggested that any contact between D and the complainant was a civil, not a criminal matter. Also, Count 1, if proved, was a relatively minor example of the offence of perverting the course of justice. These points, with respect, are misconceived. Contact is a relevant area of evidence to explain the actions of D, and of the complainant seeking to withdraw her complaint of rape. More starkly, a perverting the course of public justice charge is never a minor matter, especially when a person holding the office of Constable is the alleged perpetrator. The material that was sought to be obtained was, if not determinative, highly relevant to the main charge faced by D. (The question of section 46(2)(d) is dealt with in paragraph 10 below.)

9. Paragraph 19 of D's skeleton, as well as part of the oral submissions made on his behalf, focus on sections 46(2)(b) and 46(3)(b). Read together, they provide that the imposition of a requirement is necessary for the purpose of preventing or detecting crime. The local policy is to provide for the Application for a RIPL Notice to be made as soon as possible. This is set-out in a document relating to "*Law Enforcement Notices requiring Disclosure Evidence"* which applies in Guernsey and to which Acting Inspector Naftel's evidence refers. Paragraph 5.6 states:

> "*A section 46 Notice should be applied for as soon as possible as the more time that elapses before the Notice is served, the less effective the Notice becomes, and potentially gives the subject a line of defence in any subsequent court hearings in respect of not remembering what their access codes are, due to the amount of time that has elapsed."*

This refers to a line of defence found in section 49 of RIPL. In view of this policy, (which cannot be said to be inconsistent with the statute) it was reasonable to give priority to examining these devices as they are likely to produce substantial evidence (which could have been in D's favour), as the background to the case was the on-line contact between D and the complainant. The rigid approach urged on behalf of D would, as P submitted, "*place a stranglehold on investigations"*. It cannot be read into the statute that applying for a RIPL Notice is a last resort. There is one other relevant consideration. The complainant has in the past made a false allegation of rape, for which she received an official and recorded caution. It was therefore both entirely appropriate and necessary to examine D's devices to ascertain if her account in the present case was likely to be true. The Notice was obtained some six days having passed in the investigation, and the need to apply within good time was made out. The devices were,

on a fair understanding of the matter, the best evidence to obtain. The question of proportionality has already been mentioned and there is no conflict with it in seeking to timeously obtain what was the highest potential class of evidence.

10. Advocate Ayres also submitted, with reference to section 46(2)(d) (see paragraphs 21-23 of his skeleton), that less intrusive means or techniques could have been applied. This point is dealt with at paragraph 9 above and need not be looked at further, beyond stressing once more that the devices potentially contained the best evidence in the circumstances. Nor, on these facts, was the RIPL Notice obtained at 'breakneck speed'. It is obvious that no-one could be sure of the full contents of the devices, as D had failed to disclose the passcodes. It should also be taken into account that at the time the Application was made, the investigators could not say that the forced access, the imperfect weapon that had to be deployed, would be able to produce anything of use to either side of the case. Forced access was possible but distinctly a lesser resort.

The Duty of Candour and Associated Issues

11. A good deal was made of the duty of candour in both D's skeleton (paragraphs 28 to 33) and in oral submissions on behalf of both D and P. This is linked with other issues which have arisen. These are:

    (i) Some capital was made by Advocate Ayres arising from paragraph 34 of Chief Inspector Hockey's sworn Information, which the Bailiff considered before granting the Application. The last sentence reads: "*No examination can take place without the passcodes to unlock the devices"*. The officer was aware that limited "*forced access"* could take place. Having considered all the materials put before the Court, especially the oral evidence of Chief Inspector Hockey, who was thoroughly and properly cross-examined, I find that he was not deliberately misleading. Chief Inspector Hockey was aware that forced access came a poor second to a proper forensic examination (in Jersey, as arranged to accommodate D's earlier concerns). Crown Advocate Dunford submitted in oral argument, that as forced access was severely limited in what it could produce, a RIPL Notice would still have been appropriate. Chief Inspector Hockey and Crown Advocate Dunford conceded, in hindsight, the word "*forensic"* should have been inserted in the sentence in question, before "*examination"*;

    (ii) it will be recalled that there are three items of which each forms a separate charge: namely an iPhone (Count 2), an iPad (Count 3) and a HP laptop (Count 4). At the hearing it emerged that the laptop was not password-protected, so information could be obtained from it a lot more easily. This was not included in Chief Inspector Hockey's sworn Information before the Bailiff. (It was Chief Inspector Hockey's view at the time that the iPhone was the most likely primary source.) The laptop did produce some evidence with two Instagram devices present. However, at the end of the hearing, Crown Advocate Dunford drew attention to the Guernsey Police technical officer, PC Batiste's, witness statement. The laptop had two back-up files, one encrypted and the other not encrypted. Due to the lack of a passcode the encrypted back-up could not be processed. It was password-protected and completed during the time that the alleged contacts took place. Both back-ups were created on 12th August, 2020. Hence, no full forensic examination was possible of the material in the absence of compliance with a RIPL Notice;

    (iii) the Information very properly referred (paragraph 29) to the fact that D had made a report to (a now former) officer attached to Professional Standards in 2019. This was to the effect that the complainant had sent him an indecent image and a fake Snapchat account. D had phoned the officer immediately and

reported it. The former officer confirms this report, and that D told him he had deleted the image and 'blocked' her. As it was a 'one-off' incident, it was not recorded on any logs (it should have been). But, in addition to this, and not notified to Chief Inspector Hockey when he appeared before the Bailiff, Acting Inspector Naftel had received some information from two other officers. On the day of D's arrest (22nd October, 2021), PC Boughay approached her in the Police Station front yard and stated the complainant and her sister had approached D. Acting Inspector Naftel did not inform Chief Inspector Hockey as "*it wasn't really of huge significance to me"*. A similar disclosure was made to DC Simon, who was D's supervising colleague in the investigation of the complainant's rape claim. She was aware of the complainant's use of social media, and DC Simon did not find D's comments surprising "*and therefore it wasn't a matter that went much further"*. This information was that the complainant was contacting D, not contact instituted by D himself. This, too, was not passed to Chief Inspector Hockey. Chief Inspector Hockey would have included these conversations in the Information, had he been aware of them. These 'self-serving' statements, it is contended on behalf of P, would not have made any material difference to the Bailiff's decision. He already had details of the 2019 incident. P's submission here is realistic and well-founded.

12. In relation to these points there are a number of helpful English authorities. In R (Rawlinson & Hunter Trustees and Others) v Central Criminal Court (and Others) [2012] EWHC 2354 (Admin), at paragraph 173 it was stated:

> *"... the test being whether the errors and omissions would in fact have made a difference to the decision of the judge to grant the warrants."*

A number of other cases, to the same effect are cited. Putting it simply, I consider that the omission of the statements reported to Acting Inspector Naftel, does not amount to any form of irregularity. They were indeed self-serving and the more important 2019 incident was fully and fairly disclosed. The question of the laptop is put into perspective by the evidence about the encrypted back-up which could have contained relevant material. Chief Inspector Hockey's acceptance of the point that the word "*forensic*" should have been inserted in the last section of paragraph 34 of his Information is correct, but this was, I find, done in good faith with no intention to cut corners or, still less, to deceive. Accepting that the issue of a Notice is subject very much to the same principles as those governing the issue of a Warrant, I am firmly of the view that none of these matters would have caused the decision of the Bailiff to be different. A full reading of the Information shows not only considerable factual detail, but a desire to be fair to D.

General Observations and Conclusions

13. Some reference was made on behalf of D to the Home Office Revised Code of Practice of August, 2018 (folio 6 of the bundle). The extreme observation that the powers under RIPL have been used "*in an unregulated and unfettered fashion"*, was rightly criticized on behalf of P (see especially paragraph 23 of P's skeleton). Not only is there no obligation to issue such a Code of Practice document, but, in practical terms, questions of necessity and proportionality are dealt with in the Law itself. D's skeleton at paragraphs 17-18 is way off-target when it suggests that the absence of such a Code is in itself grounds for exclusion of the "*evidence of the service of the Notice in this case"*. A reading of two, it is considered, relevant paragraphs of this Code of Practice, i.e., 3.39 and 3.41, merely underscores what requirements are set-out in RIPL, especially in sections 46(2) and (3). Similarly, in oral argument, Advocate Ayres characterized the RIPL Notice as the "*nuclear option"*. Some measure of hyperbole may be expected from time to time from those defending criminal cases, but this, too, is misplaced. If

the rough analogy is pursued, it is considered more of a 'tank-busting' weapon. It should be noted that (as stated in paragraph 8 above), Guernsey Law Enforcement do have a document created internally in RIPL matters. It only covers Part III of the Law and at folio 10 of the bundle, there are answers prepared for Advocate Ayres on it. Paragraphs 3.1 to 3.3 headed "*Necessity and Proportionality"* were reproduced. They refer to "*Human Rights legislation*" and the question of using other means to obtain information other than RIPL, and the balancing of a person's rights against "*the benefit to the investigation or operation"*. Paragraph 3.3 concludes with the observation that a judicial officer is only likely to approve a Notice "*where the subjected offences are serious"* and national security, or the economic well-being of the Bailiwick are involved. There is nothing wrong or misleading here.

14. D is seeking, in the words of the old saying to 'have his cake and eat it'. He is accused of a serious criminal offence (Count 1), on which there is a case to answer. When spoken to regarding the three devices which are the subject of Counts 2-4 (see paragraph 7(v) above), it will be recalled that D, in his first interview on 22nd October 2021, confirmed that he would provide his passcodes if another Police Force examined them. He had earlier, on arrest, stated that he was happy to provide them, but wished to seek legal advice. So far so good. Then, shortly afterwards on 25th October, 2021, when D was suspended, he was again asked for the passcodes and said he was shortly to meet with his Advocate and would provide them after the meeting. D was advised, and it was agreed, that the Jersey Police would examine the devices. The reason advanced by D about requiring the examination to be done elsewhere was that there were intimate photographs of himself and his girlfriend that would be disclosed. D was advised on the 25th October, 2021, that a RIPL Notice would be served if he failed to disclose the passcodes. On 27th October, 2021, D was served with an Advisory Notice and a further, unsuccessful, request was made by Chief Inspector Hockey, (via D's Police Association representative), for the codes, that that they could be provided to the Jersey Police. On 29th October, 2021, the RIPL Notice was served on D, in the presence of Advocate Ayres. The Bailiff had granted the Application on the previous day. The investigating officers had acted very reasonably in accepting D's wish not to be embarrassed in his place of work by an examination that would throw up intimate personal images. It cannot be said that D did not have his chances to co-operate. The investigating officers did not act with undue haste and were placed in a difficult position. They now find themselves under attack on a number of fronts, despite acting sensitively.

15. Accordingly, going back to the applicable legal principles, the position is as follows:

    (i) the burden of "*persuasion*" rests with D, on the balance of probabilities (Telford Justices case). That burden has not been discharged and the "high hurdle" not surmounted;
    (ii) the Court is concerned to protect the integrity of the criminal justice system;
    (iii) the particular circumstances of each case need to be considered and have been;
    (iv) "*the public interest in ensuring that those that are charged with grave crimes should be tried*" will always weigh in the balance (per Lord Steyn in R v Latif [1996] 1 WLR 104);
    (v) in this case the Police investigators have not acted improperly, there was no misconduct, and the RIPL provisions were properly invoked. Nothing has emerged that would have affected the issue of the Notice.

16. Hence, the stay Application, despite Advocate Ayres' well-ordered submissions, does not – on a fair view of all the relevant circumstances – get off the ground.

17. Application dismissed.

J R Finch, OBE

Lieutenant Bailiff

Dated this 20th January 2023