Application to adjourn trial and counter application for severance, supported by the beginning of an application for abuse of process.

[2023]GRC067

PERFECTED EX-TEMPORE JUDGMENT

IN THE ROYAL COURT OF GUERNSEY
(CRIMINAL DIVISION)

Between:

LAW OFFICERS OF THE CROWN	**Prosecution**
v	
HUREL LIMITED	**First Defendant**
-and-	
TREVOR WAINWRIGHT	**Second Defendant**

Ex-Tempore Judgment on adjournment, severance and abuse of process
handed down: 20th March 2023

Before: Catherine Maureen Fooks, Judge of Royal Court

Counsel for the Prosecution: Advocate M S Davies
Advocate R J Cowling for the First Defendant
Advocate M G Dunster for the Second Defendant

Cases, legislation and texts referred to in Decision

Indictments (Guernsey) Law, 1950

Indictments Act 1915

Warren v the A-G for Jersey, [2011] UKPC 10

Crawley 2014 EWCA Crim 1028

Blackstone's Criminal Practice 2023

Introduction

1. The circumstances leading to this judgment are that Advocate Ferbrache, who usually acts for D1 and who was visibly unwell when we had a review on Friday (17th March), is not well enough to start the trial which was due to start today(20th March). No-one disputes that.

2. On Friday, I was considering an application to adjourn the trial, as, on account of issues that have arisen between the Prosecution and Counsel for D1, or at least issues which have not be

resolved between them, the case was no longer going to fit into the three days slot allocated for it. Considerable effort was made with a view to extending the slot to at least four days but that relied on the issues being limited and the plan was that the Prosecution and Advocate Ferbrache would work together over the weekend to resolve and/or reduce the issues, such that the trial would fit into the time allocated. That has not happened; Advocate Ferbrache is unwell and there is therefore a problem with the time slot. In terms of the trial starting today, there is no other Advocate available from AFR to step into the breach and therefore the case against D1 at least could not proceed. I am grateful to Advocate Cowling for stepping in this morning and for making an oral application to adjourn. The Prosecution very reluctantly agrees to that application, D2 does not and has made an application for severance, supported by the beginnings of an application for abuse of process.

3. The law in relation to severance is that I have a discretion to sever a trial under Section 4(3) of the Indictments (Guernsey) Law, 1950 which is the same as Section 5 of the Indictments Act 1915. In Guernsey where we have similar statutory provisions it is not unusual for us to look to English Law and we therefore looked at Blackstone's this morning, D11.77 ff and D11.87 being particularly pertinent.

4. The Application is effectively made on the basis that it falls within the discretion I have to order a separate trial "*for any other reason*", which is the wording that appears in our Section 4(3) and Section 5 of the Indictments Act. The principles which apply in England are set out at D11.87 and it was agreed by Counsel there are two particular principles of relevance to this Application.

    (a) *where the accused is charged on a joint count, the arguments in favour of a joint trial are very strong. These arguments include:-*

    (i) that severance will necessitate much or all of the Prosecution evidence being given twice before different juries and increase the risk of inconsistent verdicts, (ii) even if the accused are expected to blame each other for the offence (i.e. run cut-throat defences), the interest of the Prosecution and the public in a single trial will generally outweigh the interests of the Defence in not having to call each accused before the same Jury to give evidence for him or herself which will incriminate the other…..

    The circumstances here are not identical. Although the two Defendants are joined on the same Indictment, there are no joint counts but the issues as to evidence being given twice and whether it would be necessary to convene two separate Courts are matters which I have to take into account.

    (d) *"there may be some distinction to be drawn between cases where the accused are jointly charged in a single count and those where they allegedly committed separate offences which were nonetheless sufficiently linked to be put in one Indictment"*. (That is the situation that we have here). "*In the latter situation the cases against the accused are unlikely to be as closely intertwined as when a joint offence is alleged, and the public interest argument in favour of a single trial is corresponding less strong. There should therefore be a greater willingness to order separate trials"*.

    At the end of the day, it is a matter for me to consider all the circumstances and, in particular, the facts and the way in which they are or are not intertwined and to make a decision exercising my discretion. There is no case law contained within Blackstones or to which Counsel could draw my attention where the argument of severance is raised other than in circumstances where there is an evidential or legal issue, such as cross-admissibility or some prejudice at trial i.e. some prejudice in the trial itself rather than outside it.

5. Advocate Dunster seeks severance his submissions can be summarised as follows:

1) although the Defendants are jointly indicted, the counts are separate;
2) there is no overlap between Counts 3 and Counts 1 and 2 which relate to D1, as what has gone on between D2 and his employees in Count 3 are nothing to do with D1;
3) regarding Count 4, the issues are, 1i) was anyone at risk? - D1 was not present, (2) is there evidence that others were at risk? - the question of training, instruction etc is purely a matter between Mr Wainwright and his staff and does not concern D1; and
4) there is an issue as to who was in charge of the site, D1 says that it was Mercury or Barker's and no-one is suggesting that it was D2 himself. The Court has only to determine if there was a duty owed by D2 in relation to Count 4. It is not necessary, in Advocate Dunster's submission, for the Court to determine whether that duty is owed by someone else.

6. Advocate Dunster said that there was prejudice to D2 in adjourning the case. He explained the delay in bringing this matter before the Court. It was committed to this Court in October 2022. Events occurred some five years ago. He made submissions as to the dire financial circumstances of D2, as outlined. He cannot even fund the travel to Court without significant financial hardship.

7. Advocate Cowling on behalf of D1 said that there was no objection to the Application to sever.

8. The submissions of Advocate Davies for the Prosecution can be summarised as follows:

1) he acknowledges the financial pressure on D2, the inconvenience of an adjournment and acknowledges fully that there has been delay in bringing this matter before the Court;
2) the Defendants are properly joined on the Indictment as the events are all part of a single factual presentation, it is best that they are heard in one trial so that the Court hears all the allegations in relation to role, responsibility and duties and the explanations which are given by the different participants;
3) it is possible that there would be a need for two separate benches of Jurats. In Advocate Davies' submission, there is a risk, in that case, of inconsistent verdicts;
4) the Prosecution would be producing the same evidence in both cases, namely that from Mr Coggins and the expert Mr Davis; and
5) there is no prejudice to D2 so unusually great as to militate the starting point that the cases are properly joined and should remain so joined.

9. Advocate Dunster prayed in aid the principles applicable to abuse of process. He advances four points:

1) The case against D2 is weak. As a consequence of the admissions, the issues at trial are likely to be confined to Section 28 in relation to Count 3, which is sometimes called the statutory defence, whether D2 has done everything reasonably practicable. In relation to Count 4, in addition to the Section 28 issue, it has previously been said by Advocate Dunster that there is also the issue of whether anyone was at risk;
2) Advocate Dunster raised again the delay which the Prosecution accepts;
3) the prejudice to D2 in terms of the stress and especially the financial pressure as set out above; and
4) the prejudice to D2 as he is an individual not a corporate, so the case continues against him in circumstances where it likely would not against a corporate, where that corporate had ceased trading or possibly even ceased to exist altogether.

10. Advocate Dunster questions the overall benefits of the Prosecution in this case, as the likely result, even if findings of guilt were made against D2 would be a small or possibly no fine at all based on the second Defendant's financial circumstances.

11. I record that the submissions made by Advocate Dunster in relation to abuse of process were not full and it is possible that a fuller application supported by full submissions will be made, in due course and if so, based on what Advocate Cowling has said, that might be supported by D1.

12. The Prosecution resists any argument based on abuse of process and cited the principles applicable. At that stage in the Hearing it was not clear that D2 was relying not on the first limb, namely that it was impossible for him to have full trial but actually in relation to the second limb. Again for ease, bearing in mind the speed at which were dealing with this matter, we looked at Blackstone's D3 67 for ease of reference but there have been local cases in which the principles applicable to abuse of process in Guernsey have been set out and it is my recollection were similar to those in Blackstone's and applicable in England.

13. The second limb of the test for abuse of process is this:

    Warren v the A-G for Jersey, [2011] UKPC 10.

    > "*it is well established that…..The Court has the power to stay proceedings 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…..in [this] 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 circumstances a trial will offend the Court's sense of justice and propriety or will undermine public confidence in the criminal justice system and bring it into disrepute.*

    It is said at the foot of the page quoting from Crawley 2014 EWCA Crim 1028

    > "*there is a strong public interest in the prosecution of crime and 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".*

    Over the page, there is a further passage cited from Crawley

    > *"His Lordship,* (Sir Brian Leverson) *observed that cases in which it may be unfair to try the accused will include, but are not confined to those cases where there has been bad faith, unlawfulness or executive misconduct".* That is not the allegation made in this case.

14. What is clear from those passages is that an argument based on an abuse of process is a high hurdle indeed. I am not asked to determine that today. Advocate Dunster wished to pray in aid the principles applicable only.

15. In my judgment there is some force in Advocate Davies' submission that, until the point where there was a possibility of the trial being adjourned, there was no abuse of process raised by any party. In relation to the submission that the case is weak and the fact that there may be no significant penalty, Advocate Davies said that was very much a matter for the Court and not for the Prosecution in terms of the test as to whether or not a prosecution should continue and I agree with him.

16. Is the case weak? Advocate Dunster submitted that the case is weak; I cannot agree with him. In Count 3 it is accepted that the Prosecution case is effectively made out and the Defendant is

relying on what is called the statutory defence in Section 28, so it is hard to see how the case can be categorised as weak. It is very much a case for the Jurats to consider and that is how I see it at this stage based on the submissions made to me.

17. I note also the points made in relation to financial pressure and delay. I am not persuaded that any of the submissions in relation to abuse of process add anything to the submissions previously made in support of the Application for severance. Abuse of process is for another day if the Defendants wish to raise it.

18. Turning back to the severance application, in my judgment there are overlapping issues in this case, Counts 1 and 3 both allege that Mr Challon was the employee, in Count 1 of D1 and in Count 3 of D2. This is an issue which is going to need resolution. Added to that there are overlapping issues of the control of the site and the duties owed. In this matter, the cases are properly joined and the Court should determine the basis of the factual allegations in one go and hear from both Defendant, as to their counter allegations of fact and in respect of the existence of duties and risks. Were the two matters to be heard separately there is a risk that the Jurats hearing the case in relation to D2 would form a view in relation to D1 without having heard from D1 and that would cause prejudice if it were the same bench. Having two benches, in my judgment, runs the risk of having inconsistent verdicts.

19. Whilst I have a discretion to order separate trials *"for any other reason"*, no such reason exists in terms of prejudice to the trial itself in this case and, in conclusion, I reject the application to sever the two cases. The inconvenience and financial pressures which I acknowledge and the delay which I also acknowledge are not sufficient to justify an exercise of that discretion.

20. Mr Wainwright once again I am sorry for you particularly in this matter. It is unfortunate that you have come here expecting to have your trial today. It is unfortunate that the experts have come here and expense has been incurred. At the end of the day, this has arisen primarily because Advocate Ferbrache is unwell which is a circumstance beyond the control of everybody. What matters is that when we get the trial back on track, you and the other Defendant will have a fair trial and that the interests of justice overall are met.

Catherine Maureen Fooks
Judge of the Royal Court

27th April 2023