[2024]GRC092

Indictment – Joinder and Severance, cross-admissibility of evidence.

Section 11 of The Criminal Justice (Children and Juvenile Court Reform) (Bailiwick of Guernsey) Law, 2008 applies to this case so there must be no publication of any report containing the name, address or school or any particulars likely to lead to the identification of the defendant, complainant or any witness who is a child (under 18) and there must be no publication of any picture of any such child. Any publication in any medium whether that is in writing or by broadcast or by means of the internet including social media is an offence.

Section 45 of The Criminal Justice Sex Offenders and Miscellaneous Provisions (Bailiwick of Guernsey) Law, 2013 also applies to this case so there must be no publication of any matter including (but not limited to) the name, address of work or school or any photograph likely to lead to the identification of the complainants in this matter, in the complainants' lifetime. Any publication in any medium whether that is in writing or by broadcast or by means of the internet including social media is an offence.

IN THE ROYAL COURT OF GUERNSEY
(CRIMINAL DIVISION)

Between:

THE LAW OFFICERS OF THE CROWN **Prosecution**

-v-

BEN FRANK SPRUCE **Defendant**

Hearing heard: 2nd October, 2024
Decision announced: 16th October, 2024
Judgment handed down: 24th October, 2024

Joinder/Severance Application

Before: Catherine Maureen Fooks, Judge of the Royal Court

Counsel for the Prosecution: Advocate P F Cobb
Counsel for the Defendant: Advocate C Green

Cases, legislation and texts referred to in Decision:
The Indictments (Guernsey) Law, 1950
The Telecoms Communications (Bailiwick of Guernsey) Law, 2001
The Sexual Offences (Bailiwick of Guernsey) Law, 2020
The Indictments Act, 1915

Dodd and Butler v Law Officers of the Crown 2015 Unreported Court of Appeal 23 July, Guernsey Judgment No.34/2015
Ludlow v Metropolitan Police Commissioner 1971 AC 29
The Law Officers of the Crown v Cusack 2023 GRC078
DPP v Boardman 1975 AC 421
R v Kray 1969 53 CR App R 412
Archbold Criminal Pleadings Evidence and Practice 2022 and 2024
Blackstone's Criminal Practice 2023

Introduction

1. This judgment is concerned with an application dated 13 August, 2024 by the Law Officers, represented by Advocate Cobb, to join four Indictments against the Defendant, who is represented by Advocate Green. The Application is made under Rule 3 of the Indictments (Guernsey) Law, 1950 ("the Law"). The Application is opposed.

Materials

2. Advocate Cobb has helpfully provided a consolidated bundle containing the necessary papers including her skeleton argument dated 13 August, 2024 and two skeleton arguments from the Defence dated 12 September, 2024 and 17 September, 2024 together with copies of the authorities to which counsel have referred as well as the report of Nigel Humphrey dated 16 September, 2024 and the addendum dated 26 September, 2024 submitted by the Defence.

3. The Application was listed for hearing on 19 September and there was a brief hearing but it was clear that further submissions were required on a number of points so the Application was heard instead on 2 October, 2024 and I reserved my judgment.

The Indictments

4. There are 4 Indictments, three of which have been through the committal process and are currently before the Royal Court and the fourth of which has not yet been through the committal process but will come through shortly. Not Guilty pleas are indicated in respect of all Counts on all four Indictments. Plea taking was deferred pending the progress of Indictment 4 and also pending this Judgment as that may create the need to reorganise the Counts.

5. There are 26 Counts (excluding the 4 alternatives in Indictment 2) across the four Indictments involving 14 complainants broken down as follows:

    1) 9 contact sexual offences, namely 6 counts of rape (with sexual touching as an alternative to 4 of them), 1 of sexual assault and 2 of sexual touching involving 4 different complainants;
    2) 10 offences of sending indecent messages, to 9 different complainants;
    3) 1 offence of causing a child (one of the 9) to watch sexual activity; and
    4) 6 offences of making indecent images of children.

6. There are case summaries in respect of each Indictment in the bundle, which I do not propose to set out in any detail in this judgment but I set out below the bare details of the four Indictments including the dates of the alleged offending:

	Indictment 1	**Dates**
1)	2 Counts of rape (Section 11 of the Sexual Offences (Bailiwick of	26 December, 2023

	Guernsey) Law, 2020 ("the 2020 Law")) against C1.	
2)	6 Counts of making indecent images of children (C3 and C7 included).	Various dates from February 2022 to December 2023
3)	Sexual assault (Section 13 of the Law) against C2.	1 – 31 January, 2023
	Indictment 2	**Dates**
1)	4 Counts of rape against C3 (with sexual touching (Section 21 of the Law) as an alternative).	Count 1 – 29 March, 2023 to 01 April, 2023 Count 3, 5 & 7 - 7 May to 9 May, 2023
	Indictment 3	
1)	6 Counts of sending indecent messages (Section 16(1)(a) of The Telecoms Communications (Bailiwick of Guernsey) Law, 2001 to 6 different complainants (C4 to C9).	1 March, 2023 to 31 December, 2023 11 May, 2023 to 31 December, 2023 14 April, 2023 to 31 December, 2023 23 April, 2023 to 29 May, 2023 19 October, 2020 to 15 August, 2023 1 August, 2020 to 15 November, 2020
	Indictment 4	
1)	Causing C10 to watch sexual activity.	27 August, 2022 to 28 April, 2023
2)	4 Counts of sending indecent messages to 4 different complainants (C10 to C13)	7 September, 2020 to 28 April, 2023 1 April, 2023 to 24 December, 2023 1 April, 2023 to 24 December, 2023 1 March, 2023 to 31 December, 2023
3)	2 Counts of Sexual touching against C14.	1 October, 2023 to 31 January, 2024

7. By reference to the helpful chronology document to be found at tab 4 of the bundle, which sets out the complainants in chronological order. It is possible to narrow down some of the dates further but it is clear that the vast majority of the offending occurred in 2023 with the first of the contact offences being the alleged sexual assault of C2 in January, 2023 with the next in time being the alleged rapes of C3 in March/April, 2023 and May, 2023 then the alleged sexual touching of C14 between October, 2023 and the end of January, 2024, and finally, the alleged rapes of C1 on 26 December, 2023. I have disregarded any entries relating to those who are not complainants.

8. Close reading of the chronology (which document was not challenged by Advocate Green) further illustrates the overlap into time between the alleged activities across the Indictments, for example, on 15 April, 2023 the Defendant is said to be in communication with c C6 from Indictment 3 and C3 from Indictment 2 (page 41), on 24 April, 2023 he is said to be in contact with C6, C3 and also C7, who is from Indictment 3 (page 43), on 1 May, 2023 he is in contact with C3 and C4, C6 and C7, on 8 May (as highlighted by Advocate Cobb), he is said to be messaging C6 and C3, filming C3 (resulting in IIOC (Indictment 1) and messaging about filming C7 and on 13 May he appears to be in communication with C3, C5 and C7 (Indictment 3) (page 46).

9. The maximum penalties for each offence are:

   2020 Law
   Section 11 - Rape – life imprisonment.
   Section 13 - Sexual assault – 10 years' imprisonment.
   Section 21 - Sexual touching – 14 years' imprisonment if over 18, 5 years' imprisonment if under 18.
   Section 24 - Causing a child to watch sexual activity – 10 years' imprisonment.
   Section 105(1)(a) IIOC – 10 years' imprisonment.

2021 Law
Section 16(1)(a) – Sending indecent messages – 2 years' imprisonment.

It can be seen, therefore, that the messaging offences, whilst serious, are not of the same level of gravity as the other almost exclusively contact offences.

Applicable Legal Principles

10. There was no substantial dispute between counsel as to the applicable legal principles. The relevant legislative provisions are Rule 3 of the Rules in the Schedule to The Indictments (Guernsey) Law, 1950 which permits joinder and reads as follows:

> *"charges for any offences, whether felonies or offences other than felonies, may be joined in the same Indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character."*

and Section 4(3) of the Law which gives the Court the discretionary power to sever an Indictment notwithstanding the fact that the charges on it may be properly joined which reads as follows:

> *"Where, before trial, or at any stage of a trial, the Court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same Indictment, or that for any other reason it is desirable that the person should be tried separately for any one or more offences charged in an Indictment, the Court may order as separate trial of any Counts or Counts of such Indictment".*

11. In Dodd and Butler v Law Officers of the Crown, 2015 Unreported Court of Appeal 23 July, Guernsey Judgment No.34/2015 the learned Judges of Appeal held that the above provisions were identical to those under Sections 4 and 5 of the English Indictments Act, 1915 such as to enable assistance to be derived from English and Welsh caselaw. The learned Judges then adopted the summary of the relevant principles from the 2014 edition of Archbold which is replicated in the 2022 edition which says (paragraph 1-269ff):

> *"The question whether particular charges 'form or are part of a series of offences of the same or a similar character', such as to justify joinder pursuant to what is now rule 14.2(3) of the 2013 rules, has also been considered in a number of authorities. The fact that evidence in relation to one count was not admissible in relation to another count under the old 'similar fact' principle did not necessarily mean that those counts could not properly be joined pursuant to this limb of the rule: see R v Kray 53CR.App.R.569,CA, and Ludlow v Metropolitan Police Comr [1971] AC 29 HL.*
> *In Kray it was held: (a) that two offences may constitute a "series" within the meaning of the rule, and (b) that although the relevant part of the rule does not require the offences to arise out of the same facts or be part of a system of conduct before joinder can be sanctioned, a sufficient nexus must nevertheless exist between the relevant offences; such a nexus is clearly established if evidence of one offence would be admissible on the trial of the other, but the rule is not confined to such cases; all that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together in the interests of justice, which include, in addition to the interests of the defendants, those of the Crown, witnesses and the public; a further relevant factor is the prejudice likely to arise in the second trial from extensive press reports of the first trial if the offences are tried separately. It was further held (at p.575) that it is not desirable that the rule should be given an unduly restricted meaning, since any risk of*

injustice can be avoided by the exercise of the judge's discretion to sever the indictment…..
In Ludlow v Metropolitan Police Comr, the House of Lords, having considered the previous law and practice, held, in respect of rule 3 of the Indictment Rules 1915 (now rule 14.2(3) of the 2013 rules), that (a) two offences can constitute a series and (b) both the law and the facts should be taken into account when deciding whether offences are similar or dissimilar in character. They concluded that, in respect of the limb of the rule then under consideration, there must be a series of offences of a similar character; for this purpose there must be some nexus between the offences; nexus is a feature of similarity which in all the circumstances of the case enables the offences to be described as a series. Applying these principles to the facts of the case before them (charge of attempted larceny from a public house in Acton and a charge of robbery at a different public house in Acton sixteen days later), it was held that the joinder had been proper; the offences charged were similar in both law and fact; they had the same essential ingredient of actual or attempted theft; they involved neighbouring public houses, and the time interval was only sixteen days. Their Lordships also cited, with implicit approval, the dictum in Kray ante, that the operation of the relevant part of the rule is not restricted to cases where the evidence on one charge is admissible on the other(s) and expressly approved of the dictum that the rule should not be given an unduly restricted meaning."

13. As to severance, the position was conveniently summarised by Lord Pearson in Ludlow (at 41) where he said:-

> *"The judge has no duty to direct separate trials under Section 5(3) unless in his opinion there is some special feature of the case which would make a joint trial of the several counts prejudicial or embarrassing to the accused and separate trials are required in the interests of justice. In some cases the offences charged may be too numerous and complicated….or too difficult to disentangle….so that a joint trial of all the counts is likely to cause confusion and the defence may be embarrassed or prejudiced. In other cases objection may be taken to the inclusion of a count on the ground that it is of a scandalous nature and likely to arouse in the minds of the jury hostile feelings against the accused…..".*

12. It is made clear in all the authorities that severance is a matter for the Judge's discretion and is to be applied having regard to the factors in Ludlow and the facts and nature of each individual case. Advocate Green produced the relevant section of Archbold 2024 1286ff which sets out the principles relating to severance of Indictments for similar sexual offences. He accepted that there is no principle that there should be severance of sexual offences as a separate category from the exercise of discretion to sever based on the factors contained in Ludlow.

13. Another passage from the Dodd and Butler judgment which is particularly relevant to the case before me is the observation of Lord Taylor CJ in Christou at 128E as follows:-

> *"…The essential criterion is the achievement of a fair resolution of the issues. That requires fairness to the accused but also to the prosecution and those involved in it. Some, but by no means an exhaustive list, of the factors which may need to be considered are:- how discrete or inter-related are the facts giving rise to the counts; the impact of ordering two or more trials on the defendant and his family, on the victims and their families, on press publicity; and importantly, whether directions the judge can give to the jury will suffice to secure a fair trial if the counts are tried together. In regard to that last factor, jury trials are conducted on the basis that the judge's directions of law are to be applied faithfully. Experience shows……. that juries, where counts are jointly tried, do follow the judge's directions and consider the counts separately."*

and the concurring speech of Lord Hope of Craighead in Christou, where, referring to the Scottish system, he said as follows at 130:-

> "*….But the practice of trying all outstanding charges against the accused on a single indictment has been established for a long time. It is seen to be in the public interest as well as that of the accused, in order that justice may be done expeditiously.*
> *It is inevitable, if a series of unconnected charges are allowed to go to trial at the same time, that evidence will be led in regard to one charge which is inadmissible in regard to another. A material risk of prejudice to the accused is not thought however to arise merely because the charges relate to different kinds of crime committed at different times in different places and under different circumstances. Experience has shown that under proper directions juries are well able to consider each charge in an indictment separately. In practice motions of separating of charges are granted only in very clear cases, where fairness to the accused makes this necessary."*

14. In that latter passage Lord Hope is considering unconnected charges. If the prejudice of hearing them together can be mitigated by directions to the jury, a defendant in Guernsey is arguably much better placed insofar as the value of directions to juries is greatly enhanced in Guernsey with our Jurats who are experienced in trials generally and can be trusted to follow directions and the nuances of a case to a greater extent than "lay" juries.

15. Cross-admissibility is an issue which is relevant to joinder, as, if there is cross-admissibility, this signals a nexus, but also severance, where an absence of cross-admissibility may, but does not necessarily, point to severance. Again, it depends on the facts. Advocate Green had produced the relevant section from Archbold (2022) on cross-admissibility. Both counsel accepted that care is required when considering the more recent editions of the practitioners' works as the law in England on admissibility of bad character evidence has been revised in ways not mirrored in Guernsey. It was agreed that it is important to remain focussed on the position in Guernsey which remains as set out in Dodd and Butler and is derived from DPP v P [1991] 2 AC 447 and to the decision of the Jersey Court of Appeal of U v Attorney General 2012 (1) JLR 349, from the latter of which the learned Judges of appeal quoted the following:

> *"The test for admitting similar fact evidence*
>
> *12. It is common ground that the relevant legal test for the introduction of similar fact evidence involves a two-stage analysis. The first is a hard-edged question of relevance, at which stage the question is whether the material has any probative value. The second stage involves a discretionary exercise to determine whether the evidence should, in all the circumstances of the case, be admitted.*
> *13. None of this is controversial or new. It is well established that similar fact evidence is admissible if it is relevant to an issue before the court, e.g. because it tends to prove one of the elements in the alleged offence, or to rebut a defence which would otherwise be open to the accused (Styles v Attorney General 2006 JLR 210, following O'Brien v Chief Constable (S Wales) [2005] 2 AC 534 at paragraph 67 (et seq) and ultimately Makin v Att-Gen for New South Wales [1894] AC 57. The question of coincidence lies at the heart of the analysis. Evidence is likely to be admissible if an attempt to explain it away by coincidence would be an affront to common sense, or would be against all probabilities, or would only be accepted as an explanation by "an ultra-cautious jury" (referred to in DPP v P [1991] 2 AC 447).*
> *14. It is worth emphasising that, in order to admit similar fact evidence, it is not necessary for the prosecution to wait until a specific defence has been set up. It is sufficient if the defence is reasonably available (Harris v DPP 36 Cr. App. R at 52 – 54). Nevertheless, the prosecution must not be allowed to adduce prejudicial evidence by imputing to the accused an intention to set up some improbable or fanciful defence*

(Thompson v R [1918] AC at 232). This qualification is illustrative of the more general principle mentioned above, which requires the court to balance the probative value of any admissible similar fact evidence against its prejudicial effect, and to exercise a discretion in deciding whether to allow it to be adduced – a discretion which is exercised by reference to the interests of justice (Noor Mohamed v R [1949] AC at 192)."

16. Advocate Green sought to distinguish the case of Dodd which he said was simply not comparable factually, as it concerns drugs. He adopted the same line of attack against DPP v P. It must always be remembered that each case must be considered on its own facts whether looking for the nexus or considering whether the probative effect of admitting similar fact evidence is such as to outweigh the prejudicial effect of admitting such evidence or when considering the exercise of the discretion to sever. The trial of any two or more offences carries a risk of prejudice but the ability to join under Rule 3 removes prejudice as an obstacle in itself to joinder. The test is not whether there is any prejudice but whether the prejudice is so great that there should be separate trials. Prejudice is addressed by direction to consider each count separately or if felt to be too serious by severance.

17. Advocate Cobb also sought to rely on the principle contained in The Law Officers of the Crown v Cusack 2023 GRC078 which largely concerns background evidence and the importance of placing the full factual picture before the Jurats. I am not convinced that this line of authority is strictly relevant to issues of joinder and severance as it concerns evidence which is external to any of the counts on the indictment.

Long trials and Multiple Trials of the same Defendant in Guernsey

18. One of the factors identified in the caselaw as a reason in those cases for severance of properly joined matters is the convenience of the Court. Whilst not determinative of the issues I have to consider, I have to factor into my decision-making not only the convenience of the Court but the realities of trials in Guernsey. Royal Court criminal trials are held in Court 1 which has sufficient room for up to 12 Jurats and a secure dock. Realistically we can only run one Royal Court trial at a time so, if the Jurats are engaged in a trial or sentencing, that is the only Royal Court criminal case which can be ongoing at that point (except Judge alone matters where a secure Court is not required). In terms of sequential matters involving the same defendant, we have 16 Jurats plus a variable number of Suppléants but not sufficient to generate more than two independent benches of Jurats. We have had experience over recent years of needing two benches of Jurats to deal with different matters relating to the same persons and that has been managed. The role of the Jurats is not confined to criminal trials and they cannot be expected to be available constantly as they are volunteers.

19. I set out below more detailed calculations as to trial length but we had worked on a period of 10 weeks for a single trial leaving 1 day per week free for those participating in it and for others to carry on with other criminal business such as sentencing with a different or at least largely different bench on the rest days. This would be the longest criminal trial in anyone's memory. We had a 6 week trial listed 3 times over the last 2 years which in the end did not take place. There can be no denying that it had an impact on the listing of other cases especially when it was vacated and moved. Trials move and trials change in length. Focussing on one trial for as long as 10 weeks would have an impact on the rest of the calendar and be demanding for all concerned especially the Jurats. That said, I wish to be crystal clear that the Court will sit for as long as it needs to in order to conduct its business and the rest of the list will be managed. The practicalities are just one factor for me to consider. such that, if there were more than 2 trials, some Jurats who sat on the first 2 trials would have to sit on the later trials.

20. I asked Advocate Green what exactly he was proposing in terms of the trials if they were not joined. His submission was that ideally there should be 5, I relating to each of the contact

offences C1, C2, C3 and C14 and 1 for "the rest". That said, he was mindful that there can only be 2 different benches of Jurats such that having 5 separate trials would lead to the same Jurats sitting on more than one trial. I raised with counsel how the third or subsequent benches of Jurats would be selected. Both Advocates raised a concern (Advocate Cobb more than Advocate Green) that the necessary warning to those who had sat in a prior trial to disregard what they had heard would signal to any new Jurats that there had been a previous trial. It was submitted that it would be difficult in practical terms to avoid all Jurats coming to know over time that there were multiple trials. The Jurats would be directed not to discuss any of the cases. The special role of our Jurats does mean that they can be expected to follow any directions including to disregard any evidence or anything heard. It has to be acknowledged that 5 trials for the same Defendant would carry a risk of prejudice from disclosure of/from other trials absent were there 2 trials and there would be no such risk were there just one trial.

21. Advocate Cobb maintained her proposal for one trial and submitted that any severance would be "hard". I asked counsel to consider, as a third option, 2 trials, one of the contact offences and one of the remaining offences. If there were 2 trials, Advocate Green's submission was that Indictments 1 and 3 should be heard together and 2 and 4 heard together. This was based on chronological order and avoiding the worst issue which he identified as having Indictments 1 and 2 combined which would put the 2 rape cases together and cause the most prejudice to the Defendant though he also raised the combination of contact offences and messages as prejudicial which did not sit well with his proposed combining of Indictments 1 and 3 and 2 and 4. He was less concerned about having the same Jurats for some trials than about mixing the two rape complainants. He proposed that the IIOC offences be heard with the messages. Advocate Cobb submitted that trying to sever the trials would involve mixing the Complainants. If there were to be separate trials, her submission would be to hear the more serious complaints first which might then pave the way for the remainder.

22. I asked counsel to provide me with estimates of the length of the trials were there to be 1, 2 or 5 as alternatively proposed. The time estimated for a single trial had previously been worked out as approximately 10 weeks sitting 4 days per week (40 days) which, allowing for Easter and early May Public Holidays would last from 24 February to 8 May.

23. Advocate Cobb prepared a more detailed trial timetable for a single trial which came out at 7 weeks (35 days) with no non-sitting days. Adding the non-sitting days would bring the total days to 42, so slightly longer than the first estimate. Advocate Green's estimate for a single trial was 30 to 35 days. Were there to be two trials, Advocate Cobb's estimate was 8 weeks (40 days) based on two trials of 20 days (4 weeks) divided into contact plus IIOC offences and the rest of the offences but that included no rest days. Adding 8 rest days would take the total to 48 days. The two trials might not be one after the other so the whole process could be spread over a longer period. Advocate Green's estimate was lower at 15 – 16 days per trial. Turning lastly to 5 trials, Advocate Cobb's estimate was that this would take the longest amount of time with:

C1	13 days
C3	8
C2	7
C14	5
Rest of the matters	20
Total	**53 days**

Advocate Green estimated 4 to 7 days for each of the 5 trials giving an average of 20 to 35 days per trial. There can be no doubt that having 5 trials would extend the overall duration of the case. Overall, I prefer Advocate Cobb's estimates as they have been created with trial

timetables listing witnesses and allowing for openings, closings etc. That said, they are estimates and little is yet known about the Defence case. Advocate Green did mention that an expert may be instructed on the issue of hacking. It is unclear whether this relates solely to the messaging offences. He also mentioned the Defendant being "set up" and an element of mistaken identity.

Submissions

24. Advocate Cobb's submission is that it is "*blatantly obvious*" that there is a clear series of offences between all four Indictments. All four involve young complainants and are of a sexual nature. She clarified that the offences charged in respect of the indecent messages are misuse of telecoms offences rather than sexual communications with a child due to the fact that the former can be tried either way, whereas sexual communications with a child is a summary offence only and it is settled law that summary offences cannot be tried in the Royal Court of Guernsey. In her submission there is a clear pattern of behaviour of the Defendant involving himself initially messaging both females and males over social media with a view to meeting up then in some the cases the behaviour has then turned into the contact offences. Although there are no messages offences in respect of C1, C2 and C3, there could have been but the decision was made to focus on the more serious contact offences. The allegation of sexual assault against C2 (Count 9, Indictment 1) is a little different from the other contact offences insofar as there was minimal previous contact between the Defendant and this complainant, prior to their physical encounter. I note that the causing a child to watch offence (C10) is linked with a messaging offence in respect of the same child.

25. Advocate Cobb highlighted the timeframes of the offences across the Indictments by reference to the chronology document and the activity by the defendant with more than one complainant across different indictments on the same day as set out above. She also made the point that C3 from Indictment 2 and C7 from Indictment 3 are the children who make up most of the indecent images in Counts 3 to 8 of Indictment 1. Further, in understanding the misuse of telecoms offence for C7 the Prosecution will need to draw on the evidence in respect of the indecent images on Indictment 1 and the evidence relied upon being used for both Indictment 1 and 3.

26. Advocate Cobb submitted that the Defendant uses a similar modus operandi with all complainants in terms of the use of messaging, the sending of nude photographs, the requesting of nude photographs and various lies which are told, for example to C6 that the Defendant was at that time in Jersey when he was not and to another complainant that he was moving to the Isle of Man. It is said that he seeks to exploit their vulnerabilities and, in some cases, to gain their sympathy by use of his cancer and reference to abusive parenting. It is accepted that the Defendant had cancer. It is said that he received the 'all clear' on 29 October, 2020. Cancer is mentioned in relation to C4, C6, C7 and C8 all of whom appear in Indictment 3 and C10 and C11 from Indictment 4. It is to be noted that the messaging with C8 and C10 appears to start just before the 'all clear' was given but that does not detract from the mention of the cancer and the point being made by the Prosecution. In Advocate Cobb's submission. the modus operandi and other links create a nexus sufficient to justify joinder

27. In his written submissions, Advocate Green disputed that the offences share a sufficient factual or legal similarity to justify joinder. Whilst the Counts involve broadly similar allegations each Indictment involves distinct incidents involving different complainants occurring at different times, different locations with different alleged acts and in different circumstances. The mere fact that alleged offences are of the same legal classification (sexual offences) does not justify joinder unless there is a clear and direct link between the incidents. He submitted that it is "*a stretch*" to say that the allegations under the misuse of telecoms offences are in essence "*the same or similar*" to allegations of rape, sexual touching, assault or sexual assault. They are different. He did accept that there are some links, for example, the clear and direct link between

the Indictments in terms of the IIOC in Indictment 1 and the Counts alleging the sending of messages relating to those images in Indictment 3. Advocate Green's position at the oral hearing was that he did not appear so forcefully to dispute that the offences across all four Indictments could properly be joined within Rule 3. Rather the focus of his submissions was that I should be exercising my discretion under Section 4(3) of the Law to sever the Indictments.

28. Advocate Green relied heavily on the passage cited above from Ludlow in which Lord Pearson set out the sort of factors which might lead a Judge to conclude that separate trials should be directed. Advocate Green argued that ,in this case the offences charged being are too numerous, the evidence quite complicated in terms of the number of complainants, messages and images such that it would be difficult for the Jurats to disentangle. A single trial would be likely to cause confusion and would be *"unwieldy"* for all, the Judge, Jurats, counsel and the Defendant. Advocate Cobb disagreed – these are not legally complex matters such as one might find in a fraud trial and many of the counts are the same. She set out how a single trial would work with an opening covering all matters followed by each Complainant's case heard in terms of oral and written evidence, including adducing any messages, with the HTCU evidence as to what was discovered and any technical issues heard in a block and the Jurats being carefully directed along the way as to cross-admissibility of evidence and considering each count separately. The Defence case would then follow with closings and summing up keeping the cases separate in presentation.

29. Advocate Green also submitted that, as set out by Lord Pearson, the allegations are of a scandalous nature and likely to arouse hostile feelings against the Defendant. He argued that this was particularly an issue if the contact offences were heard together. He particularly objected to Indictment 2 reference C3 being tried with the allegations by C1. In his submission all the contact offences should be tried separately otherwise the Jurats would not be able to separate out the facts of one count from another.

30. In his submission the issue of cross-admissibility was key here and he relied upon the passage from Simms cited in Ludlow above as to it being too much to ask the Jurats to disregard any evidence admissible on one count but not on others. If the evidence is not cross-admissible, the case for severance becomes more obvious. He relied on the case of Boardman 1975 AC 421 HL in which Lord Cross said "*if it is decided that the evidence is inadmissible, and the accused is being charged in the same Indictment with offences against the other men the charges relating to the different persons ought to be tried separately*." His submission was that joining the different rape offences would drive a coach and horses through the rule against bad character evidence still applicable in Guernsey. The evidence of C1 should not be admissible in relation to the allegations by C3 or C2 and joining those counts would be a recipe for unfairness and an *"unholy mess"*. Directions could not remedy such prejudice. Advocate Cobb's position was that the evidence on each count was admissible in relation to the others in view of the strong nexus between the counts as a whole but, were there any inadmissible evidence, the professional Jurats could be relied upon to follow any directions given. The presence of evidence which was not cross-admissible was not a bar to joinder in view of the provisions of the Law.

31. If the defence case is one of set-up, then it was submitted by Advocate Cobb that it is important that the Jurats hear all the counts together so that they can assess the validity of this defence by reference to all the evidence from all 14 complainants. It would be "*very unfortunate*", in her words, to be set up on so many devices. Hearing the evidence on the contact offences where there are physical meetings and use of devices during those meetings (the filming) would be important evidence for the Jurats to consider when looking at any hacking/set up defence.

32. In terms of the seized devices, each contains evidence relating to more than one count, often more than one indictment, for example, messages relating to Indictments 2,3 and 4 are all located on one of the iPhones.

33. Advocate Green submitted that there was a risk of impermissible propensity reasoning. He submitted that the Jurats, notwithstanding their qualities and significant experience as established finders of fact under Guernsey Law, might wrongly infer that, because the Defendant is accused of multiple alleged sexual offences, he is more likely to be guilty of each individual offence. He submitted that no amount of careful direction to the Jurats would be adequate to remove that risk even were the directions given at the start of the trial and before each new allegation. He also highlighted a risk of the credibility of the various complainants being artificially boosted or inflated by joinder in circumstances which would be prejudicial to the Defendant if evidence which is admissible on one Count only is heard together with evidence on the other Counts. Whilst there is no rule that mandates severance of sexual allegations, the nature of the allegations and the risk of prejudice or embarrassment should feed into the decision making.

34. Advocate Green submitted that the Defendant would be substantially prejudiced by the joinder of the Indictments, as this would suggest a pattern of behaviour that does not exist or cannot be substantiated by evidence which is admissible in relation to each separate charge. He cited the case of R v Kray 1969 53 CR App R 412 in which it was said that joinder should be resisted if it risked causing such prejudice that the Defendant cannot receive a fair trial. It was his submission that the prejudicial impact of combining multiple sexual offence allegations would outweigh any administrative convenience provided by a single trial and, as a separate point, outweigh any probative value.

35. Advocate Green submitted that the sheer number and/or complexity of the Counts and the aggregate across all the Indictments might result in difficulty for the Jurats and/or the Defendant in disentangling evidence on one Counts from that on the other Counts He raised concern that the messaging counts could create unjustified prejudice on the contact counts and vice versa.

36. Advocate Green also relied on the initial report of Nigel Humphrey, a Clinical Psychologist who indicated that the Defendant, with his autism, may well struggle to process the totality of the Counts against him if they all feature in a single trial process. Advocate Green emphasised the D's *"extremely low"* result in the cognitive assessment tests. He has a moderate learning disability. The report was received very shortly before the first hearing on 19 September, 2024 and Advocate Cobb raised various questions as to what had been the basis of the instruction and what information Mr Humphrey had been given about adjustments to the trial process which might make it more manageable for the Defendant. Advocate Green duly made contact with Mr Humphrey and Mr Humphrey provided a second report in which he indicated, in terms, that the Defendant might be able to cope with a single trial on all matters, subject to suitable adjustments. Advocate Green emphasised the qualified nature of Mr Humphrey's responses – *"a single trial could be feasible",...* and "*could be achievable*". Mr Humphrey did not go so far as to say that separate trials were warranted (Q3) but he did say "*having separate trials would work to his benefit*". He did suggest that were anxiety levels to become unmanageable, he might need a psychiatric assessment and medication to enable him to attend and give evidence. This caused me such concern that I asked Advocate Green immediately to start considering what measures might be required to ensure his client's proper participation, including the use of an intermediary. Advocate Cobb submitted that a long trial was *"much more possible"* based on the second report.

37. Advocate Green's supplemental submissions raised the issue of possible collusion between the complainants with a specific allegation that there are certain comments made by C1 and C2 which he set out in his submissions. He also filed a number of postings on Facebook which suggests that there has been widespread publication and details of the Defendant's identity during the investigation stage of the cases which might have led to further complainants coming forward but he did not identify which complainants that might be. He relied upon Section D 11.82 of Blackstone's Criminal Practice 2023 which indicated that the Judge should consider

whether there was evidence which suggested that the victims "*colluded together to tell full stories and if there is a real danger that has happened separate trials should be ordered but the Judge should not use his imagination to invent a conspiracy to make false allegations where there is no evidence in the statements that such a conspiracy existed"*.

38. In response, Advocate Cobb questioned whether there was actually evidence of collusion and pointed to the general and unavoidable *"noise"* on social media in such cases which, she submitted, has no bearing on the Court's decisions. In the event, Advocate Green withdrew this limb of his objections to the joinder application. For avoidance of any doubt, I make it clear that I do not consider that there is any such evidence based on the content of Advocate Green's supplemental submissions and the accompanying paperwork.

39. Advocate Green urged me to refuse the Law Officers' application for joinder on the basis of prejudice to the Defendant. Advocate Cobb urged me not to lose sight of the need for fairness across the board, to the Defendant but also the Prosecution and the alleged victims.

Discussion

40. I considered very carefully all the materials filed and the submissions made, both written and oral. The first question for me to consider is whether the offences are founded on the same facts. The answer to that is clearly not as they involve different offences against different complainants at different times. The alternative question is whether they form part of a series of offences of the same or similar nature. All of the offences are sexual in nature, notwithstanding the fact that some of them arise under the telecommunications legislation rather than the 2020 Law for the reasons explained by Advocate Cobb. All of them involve young complainants. All the offences involve messaging, whether as the substantive offence or as part of the factual matrix of an offence, for example, the contact offences and the indecent images of children. Many of the offences are the same or share similar elements. There is also the limited time-span of the alleged offences occurring mostly in 2023. The alleged 2020 offence against C10 falls outside the 2023 timeframe but is brought within the series by virtue of the connection between the offence against C10 in 2020 and that in 2023. There is also, what is described by the Prosecution as the "*modus operandi"* with exploitation of vulnerabilities and gaining of sympathy through a mixture of true and untrue statements eg regarding the Defendant's cancer. I will not repeat the detailed submissions made by Advocate Cobb above, which I accept, as to the similar nature and series of offences or my own analysis above of the overlapping aspects of the Indictments. I acknowledge but cannot accept Advocate Green's opposing submissions in which he sought to draw distinctions between the offences in terms of locations and timeframes and to dispute that there was any nexus.

41. In Ludlow, it is said that, when regard is had to the requirement of a series of similar offences, it is right to look for a nexus. Nexus is a feature of similarity which in all the circumstances of the case, enables the case to be described as a 'series'. Lord Pearson goes on to consider the case of Kray wherein the issue of cross-admissibility is considered. Cross-admissibility can be an indicator of sufficient nexus, but it is clear that a nexus can be established without the need for cross-admissibility. In my judgment, it is difficult to see in this case how there could be any sustainable challenge to the assertion that there is a nexus, both in law and in fact, even without the need to consider cross-admissibility. Nonetheless that issue must be considered as it forms part of the consideration of the exercise of discretion to sever.

42. The test for cross-admissibility is set out clearly in paragraphs 24ff in Dodd, drawing on the English case law of D v P and also U v Attorney General (2012) (1) JLR 349 whereby there is a two-stage process. The first stage is consideration of whether the evidence on one allegation is relevant to another and probative, and the second stage is consideration of the effect of the admission of the evidence and specifically whether the prejudicial effect outweighs the probative. This second limb of the test dovetails in with the consideration of prejudice which

is required when a Judge is considering exercising the discretion under section 4 to sever the indictment.

43. We are at a very early stage in these proceedings and I can do no more than form a preliminary view as to the cross-admissibility but, in my judgment, bearing in mind the clear similarity between the offences and the series which I have already found to be established, the evidence should be, in general terms, cross-admissible. Specifically the evidence in the different contact offences is relevant and probative in the other contact offences. In so saying, I do not close down in any way further arguments as to cross-admissibility and indeed, there may well be further argument to be heard on both sides later in the proceedings as to the evidence to be adduced. Cross-admissible evidence brings with it an inevitable prejudice, as is the case with all probative evidence. Based on a broad view, at this stage, I do not consider that probative value is outweighed by the prejudicial effect such that cross-admissibility should not be permitted. Nor do I consider that the concerns raised by Advocate Green about impermissible propensity reasoning or artificial boosting of the complainants' credibility point away from joining the offences. When it comes to the evidence, the Jurats can be given appropriate directions which they can be trusted to follow.

44. As a consequence of my answers to the above questions, strengthened by my decision on cross-admissibility, I am satisfied that all of the offences on all four Indictments could properly be joined into one trial.

45. I must now move on to consider the exercise of the discretion that I have by virtue of section 4 to sever the indictment notwithstanding my decision that all offences can be properly joined. As is made clear in Ludlow and reiterated in Dodd, I am under no duty to direct separate trials unless I am of the opinion that there is some special feature of the case which would make a joint trial of the several counts prejudicial or embarrassing to the accused and that separate trials are required in the interests of justice, or put another way, that there is a special feature that would make a joint trial unfair. When assessing those issues, I am required to consider the extent to which any prejudice could be remedied by direction and my starting point is that the Jurats, even more than a Jury, can be expected to follow directions given.

46. Lord Pearson sets out a number of factors for consideration when considering the equivalent of our section 4 discretion. One factor is the convenience of the Court, and that naturally involves consideration of the practicalities of such a long trial. The convenience of the Court is going to depend on the particular set up of any given Court. I refer to what I have said above about long trials in Guernsey. A criminal trial of 10 weeks would represent the longest trial known to have occurred in living memory. I make it clear that there is no over-riding reason why there cannot be a trial of that duration but there is no doubt that it creates practical issues in a small court centre not least with the flow of other cases including other cases involving sexual allegations and young witnesses/defendants.

47. The main thrust of Advocate Green's submissions was that, in this case, the offences charged are simply too numerous and too complicated and there are too many complainants, messages and images to enable an effective and fair single trial. He submitted that there would be confusion and that the trial would be "unwieldy" for all involved.

48. Although it is clear that there is no special rule about sexual cases, Advocate Green urged me to take the nature of the cases into consideration and I agree that it is a factor to be considered. It is reasonable to observe that the dicta from various cases relating to the feelings of hostility arising out of scandalous sexual allegations are borne of their era, particularly those in relation to homosexual acts which were, of course, illegal and very much frowned on by society in the early to mid part of the twentieth century. We are now in 2024 and attitudes are different. Of the trials which have gone the full distance in the last couple of years, my assessment is that the vast majority of them are sexual offence trials so it cannot be said that sexual offence cases

present any form of surprise or scandal to the Jurats. The Jurats are always warned to keep a cool head when hearing cases involving sexual allegations as they remain difficult cases capable of arousing strong emotional reactions. That issue is managed by directions.

49. The Defendant and the Complainants in this matter are young and this is another factor which I have taken into consideration in terms of ensuring that the process is the best it can be for those young persons who need a speedy conclusion to all matters. Fairness and meeting the interests of justice apply not only to the Defendant, but also to the Prosecution and to the Complainants. The impact of joinder/severance on complainants (victims) is specifically a factor for my consideration.

50. In considering these matters, I must also consider the potential defences being raised by the Defendant and Advocate Cobb's submission that it is important that all the offences are heard together so that those defences can be properly assessed in the light of all the evidence. I have given particularly anxious consideration as to whether severance would interfere with the assessment of defences or deprive the Prosecution in some way of the ability to put its case properly. I am satisfied that there are no such difficulties. It is not necessary to assess any defence by reference to 14 different complainants. As long as there are several complainants' cases heard together, Advocate Cobb will be able to run her argument about the unlikely nature of coincidental similar allegations. The only allegation of collusion related to the two complainants in Indictment 1, both of which are contact offences and that could be pursued if the contact offences are all linked together. As to the admissibility of other evidence by the Prosecution, were the trials to be severed, that does not preclude the Prosecution from seeking to introduce evidence from other sources which could fall to be considered as background evidence and there could be a preliminary hearing were there any disagreement.

51. I must also consider the Defendant's own issues. Whilst Mr Humphrey is much more optimistic in his second report, there is no escaping the Defendant's extremely low IQ and the likely need for Special Measures, which may include an Intermediary, but will certainly include more frequent breaks and adjustments to ensure that he is able, fully, to access the proceedings. In my judgment, this will elongate the trials and I consider that that is a factor which points away from having one long trial. I consider that it is a lot to ask of a person with that IQ to follow a trial involving 26 different allegations, 14 complaints plus other witnesses, potentially expert evidence and the likely volume of messages and images.

52. I do consider there is some force in Advocate Green's submissions about the very long trial being unwieldy not just for the Defendant but for everyone. I also harbour a concern that, in one single trial, there is a greater risk that the trial will be interrupted or possibly even de-railed by difficulties such as illness or unforeseen evidential or other issues, possibly those of the Defendant. Interruption or having to start again would be the very worst outcome for the Defendant and the Complainants and very much contrary to the interests of justice. Those inherent risks in a long trial might be unavoidable in another scenario but I am struck by what I consider to be a natural distinction between the contact offences and the messaging offences. They can be properly joined but are not interdependent. The contact offences are by far and away the most serious offences, particularly the rapes, although I have not lost sight of the fact that causing a child to watch sexual activity carries a much higher sentence than the messaging offences. It seems to me that natural difference between the two sets of offences opens the consideration of severance in a way which is particular to this case. I also consider that the very serious nature of the rape and other contact offences merits consideration in terms of ensuring that those offences are heard and determined as soon as possible and with the minimum risk of disruption by including the other offences which, whilst serious, of course, do not carry the same penalties.

53. On balance, I am satisfied that I should exercise my discretion to sever the Indictment. I am persuaded that there is a risk of prejudice to the Defendant arising from the sheer number of

offences, participants and material added to which there are the practical issues and the Defendant's own special needs. Many of those issues cannot be addressed by directions to the Jurats.

54. I did consider, carefully, Advocate Green's submission that there should be five separate trials. I do not consider that to be practical or appropriate. It would be impossible to have different benches of Jurats so there would be an overlap of Jurats, but much more importantly, there is a clear similarity between the contact offences and they fall to be joined together properly. I also considered carefully his proposal to join Indictments 1 and 3 and 2 and 4 but I cannot see that those pairs work logically together. I consider that the most appropriate way of splitting the offences is to separate the contact offences from the messaging and other offences though I can see some merit in having the IIOC offences which involve C3 heard with the contact offences (which includes the causing the child to watch offence). When I issued my decision to counsel ahead of the draft judgment I invited them to consider the issue.

Decision

55. My decision is that there should be 2 trials, one for the contact offences and one for the remaining offences. In technical terms, I granted the application for joinder but then severed the trial into two parts. Ultimately I left Advocate Cobb to consider in which part the IIOC offences should fall.

Catherine Maureen Fooks
Judge of the Royal Court

24th October, 2024