Warren v AG

Jurisdiction:	Jersey
Judge:	Beloff JA
Judgment Date:	18 October 2012
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Text

[2012] JCA 191

COURT OF APPEAL

Before:

The Hon. Michael Beloff, **Q.C., sitting as a single Judge**.

Curtis Francis Warren
and
The Attorney General

H. Sharp, **Q.C., Solicitor General for the Attorney-General**.

Advocate S. M. Baker **for the Applicant**.

Authorities

Court of Appeal (Jersey Law) 1961.

Loi (1864) Réglant La Procedure Criminelle.

Cotterill v Ozannes [2011–12] GLR 1 .

Glazebrook v Housing Committee [2002] JLR N 43 .

Re Billsons Settlement Trusts (1984) 1 Ch 409.

Magistrates Court (Miscellaneous Provisions) Jersey Law 1949.

European Convention on Human Rights.

R v Jones [2003] 1 AC 1 .

Ekbatani v Sweden [1988] 13 EHRR 504 .

Criminal Procedure (Scotland) Act 1995.

Human Rights (Jersey) Law 2000.

Gavin v Tunisie [2011] 1 Cr. App. R. (S) 126 .

Application for leave to appeal the rulings dated 14th May and 6th September, 2012.

Application for leave to appeal the rulings dated 14 th May and 6 th September, 2012.

Beloff JA

1 This is an application made by Curtis Francis Warren (“Warren”) to me as a Single Judge pursuant to the Court of Appeal (Jersey Law) 1961 Article 13 (“the Appeal Law”) for leave to appeal rulings made by Sir Christopher Pitchers (“the Commissioner”) dated 14th May 2012 (“the May Ruling”) and 6th September 2012 (“the September Ruling”).

2 In those rulings the Commissioner refused an application made by Warren (who, where appropriate, I use as a proxy for his lawyers), to be physically present at the hearing (“the hearing”) of an application made on 21st March 2012 by the Attorney General.

3 By that application the Attorney-General sought an order to preclude Warren from contacting a juror known as no.125, who was discharged during the trial in 2009 which resulted in Warren's conviction (which he unsuccessfully appealed up to the Privy Council).

4 Warren wishes to ascertain, if such contact be allowed and occurs, whether any witness statement obtained from Juror 125 provides evidence upon which Warren can apply to the

Lieutenant Governor to exercise his power of referral under Article 43 of the Appeal Law, so as to enable the Court of Appeal to consider the matter.

Procedural History

5 In the May ruling the Commissioner concluded on the basis of written submissions from both parties that Warren had no entitlement to be present at the hearing either under the *Loi (1864) Réglant La Procedure Criminelle* ("The 1864 Law") or natural justice, but could attend by video link.

6 In the course of his ruling the Commissioner expressed some doubt as to the nature of the dispute which he would be called upon to resolve. He said:-

> ***"6. The Acte of Court dated 7 October 2009 sets out in paragraphs 1; 2, 3 and 4 a series of measures designed, very properly; to protect the integrity of the jury during the trial. None on the face of the Acte seems capable of being construed as applying after those selected as jurors had ceased to act as such. Juror 125 ceased to act as a juror when he was discharged. I note also that the Attorney General does not set out the legal basis upon which he argues that a trial judge would have power to make an order restricting what would otherwise be lawful behaviour after the conclusion of the relevant proceedings. If it would be unlawful behaviour, no further order of the Court is needed. Not having heard full oral argument, I cannot express a concluded view on this point but because of its relevance to the matter I do have to determine I express a preliminary view.***
>
> ***7. If the basis of the present application is not the Acte of 7 October 2009, it must either be an application by the Crown for an order forbidding any approach to Juror 125 based on the Court's inherent jurisdiction to prevent an attempt to pervert the course of justice or an application by Mr Warren in the nature, though not in the form, of judicial review of the Attorney General's decision not to permit anyone including, and in particular, the Hampshire Police to approach Juror 125. Neither of those bases would even arguably trigger the application of the 1864 Law."***

7 On 18th May 2012 Warren applied for leave to appeal the May ruling.

8 On the 16th June 2012 the Commissioner refused the application for leave to appeal. He said:-

> ***"Leave refused. If the proceedings are properly regarded as being criminal in nature, the Applicant does not need leave. In my ruling on the procedural application, I expressly did not make a final finding as to the nature of the proceedings. That will be for the full hearing of this application. The application for leave to appeal at this stage is premature. If***

the proceedings are properly regarded as being criminal in nature, the applicant does not need leave. If they are not criminal, the decision is essentially a case management one".

9 On 20th May 2012 Warren invited the Commissioner to make a preliminary ruling as to whether the proceedings in respect of which the hearing was to take place were civil or criminal in nature.

10 In written submissions dated 2nd August 2012 Warren contended that the proceedings were civil (since the Attorney General's application was for an injunction – a civil remedy). In written submissions dated 24th August 2012 the Attorney General contended that they were criminal (since his application arose out of a criminal trial).

11 In his September ruling the Commissioner expressed concern that he was unable in the event to resolve the issue of classification without full argument (see para 5). He added, however, materially to the application before me:-

"6. I have already ruled that, whether these are criminal or civil proceedings, nothing in Jersey law nor the-rules of natural justice requires Mr Warren to be physically at court when I decide this issue. Any appeal should therefore now proceed and the matter be listed for hearing thereafter. Whether Mr Warren is physically present at the hearing or not will, of course, depend upon the outcome of the appeal."

12 There are several issues hitherto unresolved by the Commissioner:-

(i) Whether Warren's lawyers are entitled to take a statement from juror no.125 or the Attorney-General to obtain a court order to prevent them so doing (being two sides of the same coin) ("the first issue").

(ii) Whether the proceedings to resolve the first issue are properly to be classified as a civil or criminal ("the second issue").

(iii) Whether Warren is entitled to be physically present at the hearing to resolve the first issue ("the third issue").

13 Warren has been agile, even volatile, in his categorisation of the proceedings as civil. In his Application for Leave to the Commissioner he characterised them.as civil, and, as already noted, in his submission to the Commissioner on categorisation, he said "The Attorney General's application can only be civil in nature and thus the next hearing will be a civil matter following the rules of civil procedure" (para 8). In his submissions to me, however, dated 4th October 2012 he subtly altered direction and said "This is an appeal which is civil in nature but it concerns an underlying criminal case. It is submitted that the principles applicable to the attendance of a defendant in a criminal trial are apposite" (para

18).

14 It is therefore common ground that, it is the alleged criminal flavour of the first issue which will be necessary (according to Warren), but insufficient (according to the Attorney General) to trigger any right of Warren to be present at the hearing. Resolution of the second issue could therefore logically take place before that of the first issue. If the conclusion drawn is that the proceedings to resolve the first issue are civil in character, the third issue becomes moot; it is only if the conclusion is drawn that they are criminal in character, that the third issue itself could fall for resolution. Nonetheless in my judgment it is appropriate to see whether, even if they are criminal, the third issue would be resolved in Warren's favour because if it would not, the complex second issue can be avoided.

15 I have observed on another occasion in another jurisdiction (*Cotterill v Ozannes* [2011–12] GLR Part 1, 1 at para 11) that the test of grant for leave to appeal laid down by this Court in *Glazebrook v Housing Committee* [2002] JLR N 43 namely "there is a clear case of something having gone wrong may require review without it being necessary for the application to demonstrate a prima facie case that an error has been made" may require review since a ***"clear (sic) case of something having gone wrong"*** is,on one interpretation, a reason for allowing an appeal rather than merely granting leave to appeal. Moreover it could be interpreted as setting a higher hurdle than one of establishing only a prima facie case of error (although the antithesis shows that such was not intended). I shall approach this application on another interpretation of *Glazebrook* (more favourable to Warren) that he need show only a properly arguable case that something has gone wrong: but I must also, and do, have in mind the alternative *Glazebrook* triggers for grant of leave, namely that there is an issue of general principle which has been decided for the first time and there is an important question of law upon which further argument and a decision of the Court of Appeal would be to public advantage.

16 I start by observing that it is obvious why if this were a matter of discretion and the test were one of convenience only, Warren's application would be doomed to failure and even if the test were, alternatively, one of justice, hard to sustain, for these reasons:-

(i) Warren is someone serving a lengthy sentence for a very serious crime.

(ii) Warren is serving his sentence in the North of England, not in Jersey.

(iii) As the Commissioner said in his May ruling "The securing of Mr Warren's attendance at the Royal Court is a complex and expensive exercise" (para 22)(I emphasise the two adjectives).

(iv) To ensure Warren's physical presence would therefore involve inevitable delay of the hearing.

(v) It is uncertain as to what, if anything, Warren, if physically present, could provide by way of relevant instructions to his Advocate. On the hypothesis that a juror at his

trial was indeed improperly approached by the States of Jersey Police, Warren could make no contribution as to what, if anything, passed between them on an occasion on which *ex hypothesi* he was not present.

(vi) In any event what is to be resolved at the hearing is whether his lawyers should be able to take a statement from the juror, and not as to the contents and consequences of any such statements if and when taken.

(vii) Even if contrary to (v) Warren could give his lawyers relevant instructions, it is unclear to how his ability to so would be substantially impaired if he had the facility of a video-link.

17 Nonetheless if Warren is entitled in law to be present for resolution of the first issue, such discretionary considerations, whether of convenience or justice or a balance between the two, are wholly immaterial.

18 The roots of the requirement ofJersey law for the physical presence of the accused during a criminal trial lies in customary law. As was put by Phillip Le Gallais, Jurat, in 1846 in his answer to the questions posed by Commissioners enquiring into the then state of Jersey law:-

> ***"The accused party is now during the whole proceedings to hear the evidence produced against him.*** No evidence may be taken in his absence."

19 The 1864 Law provides in Article 1:-

> ***"Toute personne traduite, en vertu d'un renvoi par le Juge du Tribunal pour la Répression des Moindres Délits, devant la Cour Royale, sous prévention de crime ou de délit, sera jugée – soit, à une des Assises ci-après établies, par la Court, avec l'assistance d'une enquête compose de vubgt-quatre homes choisis comme est ci-après réglé – soit par le Nombre Inférieur de la Cour, sans enquête.*** Le prévenu aura la faculté en tout cas d'élire d'être jugé avec l'assistance de l'enquête. S'il ne fait pas élection d'être ainsi jugé, la Cour lors de sa presentation devant elle decider, eu égard à la nature et la gravité du cas, et ouï les conclusions de la Partie Publique, de quelle manière la poursuite aura lieu."

(This key article remained unchanged in subsequent revisions)

20 Articles 42–71 were (and are) headed ***"PROCEDURE DEVANT L'ENQETE"***.

21 That is the context in which Article 72 must be construed.

22 Article 72 itself provides:-

> ***"L'accusé sera présent aux débats et à tous les jugements qui le concernent, et le Verdict de l'enquête sera rendu en sa présence:***
>
> ***Néanmoins, si par une conduite violente ou désordonnée l'accusé trouble l'ordre et empêche la Justice d'avoir son cours, la Cour pourra le faire sortir de l'audience, et en ce cas les débats pourront être continués en son absence, et l'Acte de la Cour en fera mention."***

23 The issue accordingly is whether resolution of the first issue (properly arguably) falls within the ambit of Article 72. In company with the Commissioner in his May ruling I am wholly unpersuaded that it does. It seems to me that looked at in the context of the 1864 Law as a whole, and in particular that section of it headed ***"PROCEDURE DEVANT L'ENQETE"***, Article 72 is limited to jury proceedings, and the words ***"debats"*** *and* ***jugement"*** must construed in that context.

24 In any event *debats* for the purposes of the 1864 Law is elsewhere confined to matters relating to the jury trial itself e.g.:-

> ***"5. Si les débats d'un process sont commences durant une Assise et ne sont pas terminés au temps fixé pour sa cloture, l'Assise sera prolongée en ce qui a rapport à ce process jusqu'à ce qu'il soi jugé.***
>
> ***26. A la suite de l'accusation, les pieces de conviction produites par le Connétable seront loges au Greffe de la Cour, pour être reproduites lors des debts à l'Assise.***
>
> ***Le Rapport présenté par le Connétable sera également loge au Greffe, mais à titre de renseignement selument, et ne sera pas produit à l'enquête."***

25 Furthermore Article 70 introduced by way of amendment in 2002, which provides "L'accusé sera présent à toute déposition prise devant le Vicomte ou le Greffier Judiciaire; il lui sera donné un avertissement, ainsi qu'à son défenseur, de 24 heures pour le moins" would be superfluous if enquete in Article 70 extended to matters outside the trial. The States must have considered that it did not; and in the absence of clear words, Article 70 should be interpreted to accord with the States' apparent understanding of its effect, see *Re Billsons Settlement Trusts* (1984) 1 Ch 409 at p.418 D-E. I need not dwell on whether Article 72 requires physical presence of the person convicted at the handing down of sentence. In my view it may by necessary implication extend to that part of the proceedings, which itself takes place after the verdict (if adverse to the accused) and hence may be seen as indissolubly linked to the enquete itself. In any event it is elementary that as a matter of fairness the accused should be present at that time and would have no need of Article 72 however construed.

26 In 2002 by way of amendment Article 72A was inserted into the 1864 law in 2002, it

provides “Par exception aux dispositions antérieures de la présente Loi, la Cour pourra, dans tout procès criminel, avec le consentement de l'accusé, ordonner que l'accusé sera censé être présent au procès si, durant le procès, il est en prison ou autrement en détention et, soit par une méthode télévisée en direct, soit par un autre moyen, il peut voir et entendre la Cour et il peut également être vu et entendu par la Cour”. In short, for the accused's deemed presence during ***“tout proces criminelle”***.

27 Warren's submission that this amendment itself shows that Article 72 itself entitled an accused to present at all stages of the proceedings outside the trial but connected therewith must be rejected. Either *proces* is wider than *enquete* (“the first possibility”); or it is another way of describing it (“the second possibility”) Use of the word ***“proces”*** cannot retrospectively enlarge the meaning giving to the concept of *l'enquete* in Article 72 itself. However *proces* could itself be limited by that concept especially since Article 72A provides an exception-hence on well-established principle to be narrowly construed-to Article 72.

28 The Commissioner also opts for the second possibility, concluding that *proces* takes its colour from *enquete*, not vice versa. He notes too that at the same time as enacting the amendment of the 1862 Law the states inserted a new provision to the Magistrates Court (Miscellaneous Provisions) Jersey Law 1949 to add a new Article 6 “In any proceedings for an offence, the court may with a consent of the accused direct, that the accused should be treated as being present at the proceedings if, during the proceedings, he is in prison or otherwise in detention and, either by a way of a live television link or by another means, he is able to see and hear the court and he is able also be seen and heard by the court” and observes in his May ruling “That as can be seen is almost but not quite the same as Article 72A since it applies not to “all criminal proceedings” but to “all proceedings for an offence.”” Had “ ***Article 72A been intended to be wider in his application than Article 72 itself would not have beennecessary to enact this amendment”*** (para 19). I share his view on this point although it is not critical to my construction of Article 72.

29 There are other factors in play which fortify that construction. The importance of the right of a defendant to be present at his criminal trial under the common law of England and Wales is not to be doubted and the exceptions presumptively limited to those in which he had voluntarily chosen not to avail himself of that right or to have waived it. (See the full discussion in *R v Jones* [2003] 1 AC 1 but it does not go beyond it). Both, the common law of Scotland (and Section 92(1) of the Criminal Procedure (Scotland) Act 1995)) stipulate that no part of the trial or indictment may take place out with the presence of the accused. I see no reason to construe Article 72, when the language does not warrant it, as extending rights to an accused more generous than those accorded in these other legal systems with a well-established commitment to fair trial at the very time of its enactment. Such a construction is not supported by any precedent. Moreover it is noteworthy that under the European Convention on Human Rights it is presence at a criminal trial, and not elsewhere, that is mandated under Article 6 *Ekbatani v Sweden* [1988] 13 EHRR 504 para 25. *Hermi v Italy* [2008] 46 EHRR para 58. So the 1864 law does not have to be given an elastic construction to make it Convention compliant Human Rights (Jersey) Law 2000

Article 4(1) and(2)(a).

30 Nor indeed is there any good reason for such an extravagant construction. In *Gavin v Tunisie* [2011] 1 Cr. App. R. (S) 126 (" *Gavin*") the accused was absent from confiscation proceedings (which it was accepted were criminal proceedings) held in his absence because he had been deported following his conviction for the predicate offence and before the completion of the confiscation proceedings. Given the state's responsibility for his absence, the Court of Appeal held that the confiscation proceedings should not in those circumstances have continued. They said ***"(actual presence) is an important safeguard in securing a fair trial even in circumstances where (the defendants) presence is not on the facts essential to secure that fairness …""We recognise of course that this may create some inconvenient results.*** There will be cases and perhaps this is one where the scope of conflict over the evidence is very limited and where in truth the presence of the defendant is likely to make little difference to the outcome. But is a very strong matter to determine the defendants' rights in his absence at least in circumstances where he wishes to be present." The hearing, however, will not be a trial, and will involve no conflict of evidence (at any rate in which Warren is involved) and his presence could make no difference to its outcome.so none of the factors seen to require a person's presence thereat as listed in *Gavin* are present

31 Resolution of the first issue is in any event at most a preliminary to further involvement of Warren in the criminal process. In order for him to have such involvement:-

There may come a point in time when Warren may have a case, if not under Article 72, then in natural justice be physically present in Court. That point has certainly not been reached yet.

(i) The first issue would need to be resolved in his favour i.e. there would have to be a ruling by the Commissioner that his lawyers were free to approach Juror no.125.

(ii) Juror no.125 would need to agree to such contact.

(iii) Juror no.125 would have to supply material which would justify an approach by Warren to the Lieutenant Governor to refer the conviction back to the Court of Appeal

(iv) the Lieutenant Governor would have to agree to do so.

32 It was common ground before the Commissioner that, even if Article 72 did not give an accused serving a sentence outside Jersey a right to consent to presence by video-link in lieu of actual presence, the Royal Court had power so to order. The Commissioner so ordered. In my view it is indisputable that provision of such facility, if Warren chooses to make use of it, satisfies any conceivable principle of fairness for the reasons set out in the May ruling at para 22:-

"22. However, there will be hearings which can properly and fairly proceed without the physical presence of a party who is in custody at court. This, in

my judgment, is one such. The majority of the hearing will be legal argument. The only exception-to that will be my reading of the material in respect of which the. Attorney General claims PII. Whether Mr Warren is in the Royal Court or HMP Long Lartin, he will not see that part of the proceedings. The securing of Mr Warren's attendance at the-Royal Court is a complex and expensive exercise. Delay in hearing the case while arrangements are put in place is inevitable. If justice requires his presence, then that complexity, expense and delay must be borne. However, in my judgment, justice does not require him to be in the Royal Court for the hearing of the substantive application and I direct that it proceed with him attending by videolink from prison."

33 I do not discern in the unusual, even unprecedented circumstances of this case and the hearing(a matter of general principle raised for the first time, or indeed a question of genuine public importance such as would justify the grant of leave irrespective of the merit of the proposed appeal.

34 Given then that I do not consider Warren's contentions are properly arguable, I reject this application.