Royal Court (Inferior Number)

2.

Before Mr. V. A. Tomes, Deputy Bailiff

3rd January, 1992.

BETWEEN: **Her Majesty's Attorney General**

AND: **Andrea McKINNEY**

Crown Advocate Miss S. C. Nicolle for Attorney General
Advocate Miss S. E. Fitz for Defendant

The prosecution against the defendant was abandoned following the Court's decision to exclude the admissions of the defendant.

The defendant now makes an application for her costs. Because Article 13(1) of the Royal Court (Jersey) Law, 1948, provides that in all causes and matters, civil, criminal and mixed, the Bailiff (or the Deputy Bailiff) shall be the sole judge of law and shall award the costs if any, I am sitting alone to decide the application.

It is common ground that it is normal practice that an order should normally be made for the costs of an acquitted or discharged defendant to be paid out of public funds unless there are positive reasons for making a different order.

Miss Fitz asks me to make an order in favour of the defendant; she argues that in this case there are positive reasons in favour of an award being made; she submits that the finding of the Court was that the statement or admissions had been obtained by oppression and, therefore, that it would be nonsensical to say that by making a statement, the defendant had brought the prosecution on herself; all that had happened provided compelling reasons for the making of an award.

Crown Advocate Miss Nicolle said that she did not oppose the making of an order, but wished to be heard as to the extent of the order which she submitted should be very limited.

She raised two issues, the first being the failure of the defence to raise the question of the admissibility of the statement or admissions during the committal proceedings in the Police Court. She referred me to the Judgment of the Court in Attorney General v. Le Cocq (12th June 1991) Jersey Unreported).

At page 38 the Court said this:-

"We must say, however, that the result of our decision is that there exists only one kind of proceedings before the Police Court, albeit the Magistrate starts a case with four potential decisions available to him. Unless, for some technical reason, he decides at an early stage that there is no case to answer, the Magistrate is under a duty to hear the whole of the evidence. So called "section one committals" are not part of the law of Jersey. The Magistrate must hear all the evidence both for the prosecution and for the defence. When he has heard all the evidence he will first decide whether or not there is a prima facie case against the accused, on the basis of admissible evidence of the accused's guilt. If he is not so satisfied then he will dismiss the charge (liberate the accused). If he declares that there is a prima facie case, he can then examine the accused's record of previous convictions (if any). If the Magistrate is then of the opinion that the gravity of the offence is such that there should be imposed a penalty or penalties in excess of those which he is empowered to impose, it is his duty to commit the accused for trial before the Royal Court. If the Magistrate is not of that opinion, then he can either convict and sentence the accused because he is satisfied beyond reasonable doubt on the basis of admissible evidence of the guilt of the accused, or acquit him if he is not so satisfied. In the opinion of this Court unless and until the

existing legislation is replaced, there can be no short cuts in that procedure."

Notwithstanding Attorney General v. Le Cocq the short-cuts in procedure in the Police Court have continued. Evidence was heard on the 19th July, 1991, from Detective Sergeant Graham Mark Meachen and Mr. Peter J. G. Holliday, Official States' Analyst, whereupon the Magistrate, Mr. Trott, found a prima facie case and ordered the preparation of transcripts and a Centenier's report for committal purposes. A further four witnesses, whose names appear on the Charge Sheet, were not heard.

Nevertheless, Detective Sergeant Meachen gave evidence of the admissions made by the defendant during the question and answer interview; indeed the officer read almost the entire record of that interview. He was cross-examined about the unrecorded interview or interviews which took place before the recorded question and answer interview.

Thus, one would expect pages 35 and 36 of Attorney General v. Le Cocq to apply. I read the relevant extract:-

"The defence did not object to leading questions being asked. Nor did the defence object to inadmissible evidence being adduced. Mr. O'Connell claimed that both leading questions and inadmissible evidence were permitted in committal proceedings. He submitted that the authorities in the United Kingdom were absolutely clear on this point, that committal proceedings are entirely different in their format from a trial; that the enquiring Judge on committal proceedings has a far wider discretion than a trial Judge would have to admit evidence; that defence counsel at committal proceedings is not entitled to raise objections to certain types of evidence which is admitted and that the Magistrate or enquiring Judge has virtually an unfettered discretion to admit evidence at committal proceedings which would be inadmissible at trial. (v transcript of proceedings in the Police Court p.45).

"Mr. O'Connell failed to produce any authority in support of his contentions. Bing's Criminal Procedure and Sentencing in the Magistrates' Court (1990) at p.83 says this:-

"Normally only legally admissible evidence should be adduced at a committal and the defence are entitled to object to the receipt of evidence which is plainly inadmissible, for example because it breaches the rule against hearsay."

And:-

"If representations are made that a confession by an accused should be excluded ..... the court should hear the arguments and make a ruling ...."

"Counsel can and should object to leading questions. Leading questions that can be asked at committal can be asked at trial, e.g. leading to elicit a statement which is not open to challenge, but if a question is open to challenge it is for counsel to do so.

"Even if the examination in chief can be shown to be improper in anyway, e.g. hearsay or leading questions, the fact that the defence thought that the proceedings were committal proceedings is not a proper reason for not objecting to improper evidence, or for not cross-examining properly."

The emphasis there, to meet the relevancies of the particular case, was on leading questions. The fact remains that the Court was of opinion that if the defence objects to inadmissible evidence it should raise that objection at committal stage. Only legally admissible evidence should be adduced at a committal and if representations are made that admissions by a defendant should be excluded, the Police Court should hear the arguments and make a ruling.

I hasten to say that Miss Fitz did not appear in the Court below and carries no responsibility for the failure of the defence to challenge the admissibility of the admissions in that Court.

I was much attracted by the submission of Miss Nicolle that the failure to challenge the admissibility of the admissions in the Police Court is a factor to be taken into account in considering the application for costs and that costs should be limited to the period from the commencement of the proceedings until the point at which Detective Sergeant Meachen gave evidence in the Police Court.

I was not persuaded by the argument of Miss Fitz that a distinction should be drawn between evidence that is inadmissible on the face of the transcripts, e.g. hearsay and leading questions, and evidence which is admissible on the face of the transcripts, e.g. a statement which, in order to be rendered inadmissible, has to be challenged as involuntary and evidence heard. That is not my understanding of the decision of the Court in Attorney General v. Le Cocq and is inconsistent with Bing's Criminal Procedure and Sentencing in the Magistrates' Court.

However, Miss Fitz informed me that she had communicated with the Magistrate in order to ascertain why, notwithstanding Attorney General v. Le Cocq, the Police Court had continued the practice of short cuts in its procedure. She informed me that there had been an exchange of correspondence between the Magistrate and the Bailiff, in his capacity of Chief Magistrate, on the subject. I felt bound to call for copies of that correspondence.

Mr. T. A. Dorey, Magistrate, wrote to the learned Bailiff on the 24th July, 1991, in the following terms:-

"I would like to draw your attention to a passage in (the Deputy Bailiff's) excellent judgment in A.G. v. Le Cocq (12th June, 1991). On page 37, sub-paragraph (iii) he says "if any questions are put during committal proceedings to which objection could be taken and

objection is not taken, an appellant who was legally represented at those proceedings cannot thereafter object to the evidence then elicited."

"If this rule is strictly applied, the committal proceedings will be infinitely prolonged, as time will be continually taken with such objections. I feel that the present method of allowing the defence advocate full right to reserve his objections until the assize trial, provided he gives due notice to the Attorney General beforehand, should continue."

The learned Bailiff replied on the 15th August, 1991, in the following terms:-

"I raised your query about the Le Cocq judgment with (the Attorney General) who says that he does not agree that evidence admitted before the Police Court during committal proceedings cannot thereafter be challenged at trial before the Royal Court. He adds, with justification, that that would be to purport to oblige the trial judge to allow irrelevant and/or prejudicial and/or inadmissible evidence to be led before the Jurat or Jurats (I think the learned Bailiff intended to say "before the Jury or Jurats").

"Like you, he finds the particular passage difficult to follow but it should not prevent defence counsel from keeping their powder dry until trial before the Royal Court and I am glad that you are going to continue the present arrangements".

Needless to say, as the writer of the judgment in Attorney General v. Le Cocq, I am much discomfited by this exchange of correspondence. Miss Nicolle submitted that the correspondence was not directly in point; it dealt with the question whether evidence admitted and not challenged could thereafter be challenged, i.e. the extract from page 37 of Attorney General v. Le Cocq. Again, whilst I find myself in sympathy with the submissions of Miss Nicolle I have to accept the submission of Miss Fitz that the correspondence goes

further. The learned Bailiff's statement that he is glad that the Magistrate is "going to continue the present arrangements" has been interpreted by the Police Court as authority not only to enable the defence to "keep its powder dry" until trial before the Royal court, i.e. not to disclose its line of defence and to ignore the authority of Bing, but also to overrule the clear statement in Attorney General v. Le Cocq that the Magistrate is under a duty to hear the whole of the evidence. By an unorthodox, if not irregular, exchange of correspondence, the judgment of the Inferior Number in Attorney General v. Le Cocq appears effectively to have been overruled.

Certainly, in a matter of costs, I do not now feel able to accept, as I should otherwise have done, the submission of Miss Nicolle that the order for payment out of public funds of the costs of the defence should be limited to a part only of the proceedings.

The second issue arises from the fact that the defendant was "on legal aid". This means that Attorney General v. Bouchard (6th April, 1983) (No 121 of 1991 Jersey Unreported) applies. I read the final paragraph:-

"Now, when I say his costs, I mean that contribution towards the legal aid assistance which he has been granted which he would normally expect to make".

Accordingly, Miss Nicolle submits that the defendant can have only that part of her costs, for whatever period, which represents her contribution towards legal aid which she would normally be expected to pay, based upon her means. The custom, which has the force of law, is that legal aid is given gratis to those who cannot afford it and it was not the intention of the legislature to alter that custom by indemnifying counsel for providing legal aid.

Miss Fitz submitted that I should simply make an order for the payment of costs and that the question of the amount is for counsel, the bâtonnier and the Greffier. I do not agree - the question is one of law for me to decide.

Counsel further referred me to Archbold - 1992 p.999 para. 6 - 9 which cited R. v. Miller and Glennie (1983) 1 W.L.R. 1056 Q.B.D. She relied on the following extract:

"Once it was shown that the defendant was the client of the solicitor then a presumption arose that he was to be personally liable for the costs. That presumption could be rebutted if it were established that there was an express or implied agreement binding on the solicitors that the defendant would not have to pay those costs in any circumstances."

But that extract was part of a finding relating to the liability of a third party for costs. The court held that costs were incurred by a party if he was responsible or liable for those costs, even though they were in fact paid by a third party and even though the third party was also liable for the costs.

Miss Fitz argued that even in legal aid cases the client is liable for the costs of counsel, but that counsel has a discretion to waive or reduce those costs, with a reference to the bâtonnier in matters of dispute; the fact that counsel has a discretion does not alter the basic fact that the client is liable for all costs incurred; and that that position would only be altered if there was an express agreement that the individual would not be charged under any circumstances.

I have to say that that is not my understanding of our customary legal aid system. I prefer the submission of Miss Nicolle. Legal aid is granted gratis, subject to such contribution by the individual to whom it is granted by the bâtonnier, as he or she can reasonably make on a means test basis.

The decision in Attorney General v. Bouchard is that of a co-ordinate court. I refer, therefore, to Halsbury's Laws of England, 4th edition, volume 26, page 301, para. 580:-

"There is no statute or common law rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction. Where, however, a judge of first instance after

consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong."

I cannot say that the decision in Attorney General v. Bouchard arose out of a complicated and difficult enactment. However, I believe that I should follow the modern practice and, as a matter of judicial comity follow the decision of the learned Bailiff unless I am convinced that that judgment was wrong. Miss Fitz has failed to convince me that the judgment of the learned Bailiff was wrong. It has stood since 1983 and has been applied in other cases. If it is to be overruled now it is a matter for the court of Appeal.

Accordingly, I order the payment out of public funds of the costs of the defence, restricted to the contribution towards legal aid which the defendant would normally be expected to pay.

I might add that I did give serious consideration to the question whether the defendant should be entitled to any costs at all on the grounds that her own conduct had brought suspicion on herself and had misled the prosecution into thinking that the case against her was stronger than it was. I have no doubt that the defendant brought suspicion on herself. The very act of taking the bag into her custody without asking any questions is itself a highly suspicious act. Her previous record of drug taking (LSD on one occasion, 'speed' once, and cannabis twice) is another reason for suspicion that she knew what was contained in the bag. But I have to accept the decision of the Court in Attorney General v. Bouchard that the provision that the defendant's conduct had brought suspicion on herself and had misled the prosecution into thinking that the case against her was stronger than it was, must be construed as conjunctive. Here, it was the inadmissible admissions of the defendant that misled the prosecution. It is not, therefore, a factor which I can take into account and I say

this reluctantly, because it seems that the unfettered discretion of the court in the light of the circumstances of each particular case is, in reality, fettered by the subsequent guidelines.

There is another point which I wish to mention and it is Miss Fitz's claim that the Court found that the statement or admissions had been obtained by oppression. I invite her to re-read the Court's decision of the 12th December, 1991. The Court did not find that the interviews had been conducted oppressively.

The Court was not satisfied beyond reasonable doubt, that the admissions made were voluntary, having regard to the accumulation of surrounding circumstances, starting with the arrest at gun-point and the fact that the defendant was required to dress in the presence of male officers, with no woman police officer present, followed by a long period of detention and the circumstances of that detention, two strip-searches, all combined with a total lack of explanation and insufficient attention to her prisoner's rights. That is not the same thing at all as saying that the interviews themselves were conducted oppressively.

There is a further and final point which I wish to make. In its judgment of 12th December, 1991, the Court referred to possible breaches of Judges' Rules. Miss Nicolle in her address on costs said that if the Court could not commit itself, there was no reason why the prosecution should. The fact is that the Court was already satisfied that, having regard to the cumulative effect of the conduct of those in authority, it should exclude the admissions. Thus, it was unnecessary, in the interests of expedition, for the Court to go on and decide the question of breaches of the Judges' Rules.

AUTHORITIES.

Royal Court (Jersey) Law, 1948: Article 13(1).

A.G.-v-Le Cocq (12th June, 1991) Jersey Unreported.

Bing's Criminal Procedure and Sentencing in the Magistrates Court, (1990 Ed'n): p.83.

A.G.-v-Bouchard (6th April, 1983) (No. 121 of 1991 Jersey Unreported).

Archbold, (1992 Ed'n): p.999: paras. 6-9: R-v-Miller & Glennie (1983) 1 WLR 1056 QBD.

4 Halsbury 26: p.301: para. 580.