ROYAL COURT
(Samedi Division) 217.

1st December 1997

Before: F. C. Hamon Esq. Deputy Bailiff

The Attorney General

v.

X

On 19th September 1997, the accused was arraigned before the Royal Court and indicted on the following counts:

3 Counts of indecent assault (Counts' 1, 2, 6,);

2 Counts of assault (Counts' 3, 7);

1 Count of procuring an act of gross indecency (Count 4); and

1 Count of sodomy (Count 5).

A guilty plea was entered on Count 2, and not guilty pleas on the remaining Counts

REPRESENTATION by the accused, seeking:

(1) a stay of counts 1 and/or 3 and/or 4 and/or 5 and/or 6 on the grounds of abuse of process by reason of delay;

(2) an amendment of the indictment on the basis of a misjoinder under Rule 3 of the Indictment (Jersey) Rules, 1972 and

(3) an Order, under Rule 6 (2) of the Indictments (Jersey) Rules, 1972 severing the indictment.

Advocate J. Clyde-Smith for the Attorney General
Advocate J. Martin for X

JUDGMENT

THE DEPUTY BAILIFF: This is an application by X before trial, first for a permanent stay on the basis of abuse of process; secondly that the indictment be amended on the basis that there is a misjoinder under Rule 3 of the Indictment (Jersey) Rules, 1972, and thirdly that because similar fact evidence does not exist in regard to the counts brought against him the Court should exercise its discretion under Rule 6(2) of the Indictment (Jersey) Rules, 1972, to sever the indictment. I have asked Counsel to address me on all the necessary law relevant to the three applications although a decision on one may of course be conclusive if I find for the representor.

The first question raised by Advocate Martin was the question of a permanent stay based on delay. In that regard the only relevant Jersey case is the Attorney General v. Rouillé (1995) JLR 315 where at 325 the learned Bailiff said:-

> ***"Furthermore in this jurisdiction, the responsibility for instituting criminal proceedings in this court rests not with an amorphous government department but with Her Majesty's Attorney General. The indictment laid against this defendant bears the signature of the Attorney General himself. We are confident that the Attorney would have considered the propriety of these charges before the indictment was signed. It would be a serious matter to overturn the decision of the Bailiwick's senior Law Officer of the Crown on a matter which constitutionally lies within his province. That is not to say that it would never be done, nor that the court does not have a duty to examine the matter on an application properly made. This was such an application and it has been well argued by counsel for the defendant. But the court must not forget that the discretion whether or not to institute criminal proceedings is vested in the Attorney General. In our judgment, only limited assistance can be drawn from the decisions in particular English cases."***

I must bear those words closely in mind at all times. It will, however, be necessary to examine the reasoning in some of the English cases although all the relevant cases have been exhaustively examined before me in this Court in order to enable me to exercise a discretion properly.

Advocate Martin's first application is for a permanent stay of counts 1 and/or 3 and/or 4 and/or 5 and/or 6 on the grounds of abuse of process by reason of delay.

I do not need in this judgment to deal with count 2 which is an indecent assault against a teenage female victim, Y, between 24th November, 1982, and 25th November, 1984, because he has pleaded guilty to that charge.

The relevant English principles on delay are set out in Attorney General's Reference (No. 1 of 1990) (1990)15 Cr AppR, C.A. where the court emphasized the exceptional nature of the jurisdiction to stay proceedings on the ground of delay. As is said in the headnote to that case ***"Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay."***

In the indictment there are early charges relating to the child Y when she was between 4 and 13 years old and in regard to the male child Z, early charges when he was then 10 years old.

Advocate Martin asks me to consider how a defence can properly be prepared. She asks me to decide the question of a fair trial on the balance of probabilities. She asks me to consider each disputed count separately and to take into account what she called *"the vague drafting"* which creates problems of establishing an alibi on counts 3, 4 and 5 which each cite a particular day within a time gap of several years.

I must have regard to the basis of the prosecution's case. Of course this hearing is not a trial and nothing has been proved but Crown Advocate Clyde-Smith points out that the basis of the prosecution's case is of a continuing and terrible episode of abuse on two minor children. The learned Crown Advocate cites facts (which of course he will have to prove at trial). I set them out as he put them in his skeletal argument:-

[The learned Deputy Bailiff then set out the details of the sexual and physical abuse of the children as alleged by the Crown Advocate and continued:]

Advocate Martin makes much of the fact that when Y appeared with her mother and the accused before the Jehovahs' Witness Judicial committee, she did not mention earlier allegations. Advocate Clyde-Smith says that the prosecution will not rely on the many pages of detailed comment in the Jehovahs' Witness Judicial Committee report. It was Advocate Martin who insisted that it be shown to me. If the matter comes to trial it may be that the document will not be produced in evidence by either party. I merely mention it because in all matters of sexual assault by parents on their children, feelings of shame, fear, and confusion may make the victim reluctant to report the offender to the police. The reluctance in this case appears to me to be even stronger when a judicial committee of the Jehovahs' Witnesses has examined the stepdaughter and have in their words *"endeavoured to unite the family and have encouraged the qualities of love, mercy and kindness to be used to settle this unhappy situation"*. Even more so when the alleged rape in Germany, which is not on the indictment because of the jurisdictional problems, was outlined to this committee at the family home and *"comfort was given to* Y*"* by the three members. That may well have been an additional barrier to her telling the police.

I was referred to the transcript of the video questions and answers of Z which records this:-

[The learned Deputy Bailiff then set out the details of the evidence of Z from the transcript and his recall of the incidents at a later stage, and continued:]

In R v. Dutton (Crim L.R. (1994) 910 at 911 the Court of Appeal made it clear that although the imposition of a stay should be the exception rather than the rule, the prosecutor has as much right as a defendant to demand a verdict on an outstanding indictment. What the trial judge must do is not only to weigh in the balance the power to exclude evidence but where evidence of matters which occurred many years ago is properly admitted he must give the jury appropriate and careful direction.

There is nothing in the papers before me to suggest that the prosecution is at fault in any way. I can see difficulties at trial but I am unable to be so satisfied that an exception to the general rule is clear and obvious in this case. I reject the application on the grounds of delay.

The second ground of the application by Advocate Martin is one of misjoinder. She argues that counts 1 to 3 concern Y and counts 4 to 7 concern Z and that the sexual offences should be separate from the non-sexual.

She asks that the sexual offences against Y be tried separately to the non-sexual offences against Y; similarly that the sexual offences against Z should be tried separately to the non-sexual offences against Z. Alternatively she asks that, on the grounds of misjoinder, the offences against Y should be tried separately from the offences against Z.

The Indictments (Jersey) Rules, 1972, state under Rule 3 that ***"charges for any offences, whether 'crimes', 'délits' or 'infractions' may be joined in the same indictment if those charges are founded on the same facts or form or are part of a series of offences of the same or a similar character."***

This is precisely similar to Rule 9 of the English Indictment Rules 1971. Archbold at 1-166 says this:

> ***"In many of the older authorities no clear distinction is drawn between the topics of joinder and severance, but in view of the decision in R.- v -Newland (1988) QB 402, 87 Cr. App R. 118 C.A., it is now important to consider these two matters in separate stages."***

At 1-172 of Archbold, this passage appears:-

> ***"Misjoinder of offences in an indictment in contravention of the Indictment Rules 1971, r.9, cannot be cured by the judge directing under section 5(3) of the Indictments Act 1915 that the accused be tried separately for any one or more of the offences charged. Section 5(3) applies only to a valid indictment - an indictment containing misjoined offences is not a valid indictment. However, the indictment is not a nullity, because the defect can be cured by amendment pursuant to section 5(1) of the 1915 Act. The amendment simply involves the removal of such counts from the indictment as will result in the indictment being in accordance with the Rules. In order, in such circumstances, to proceed upon the count(s) removed from the indictment the prosecution would have to apply for a "voluntary bill". (Or, recommence proceedings on the charges contained in those counts.) If a court proceeds to try an accused upon an indictment containing misjoined charges, or purports to "cure" the misjoined by directing separate trials under section 5(3), the trial will be a nullity and any convictions upon that indictment, including those resulting from guilty pleas, will be quashed: R. V. Newland [1988] Q.B. 402, 87 Cr.App.R.118, C.A; R v. O'Reilly, 90 Cr. App. R.40, C.A. (defect cured after guilty pleas, but no re-arraignment; venire de novo ordered)."***

Section 5(3) is in identical terms to Rule 6(2) of this jurisdiction. A clear example of misjoinder was shown to me on the facts of R -v-. Lockley and Sainsbury (1997) Crim. L.R. 455 C.A. where L & S were charged with conspiracy to commit burglary and S was also charged on the same indictment with dangerous driving. The defective vehicle was the car alleged to have been used in the burglary. It was held that "***The dangerous driving count on the indictment had been improperly joined. There had been a failure to meet the requirements of Rule 9 of the Indictments Rules 1971 in that the two charges had not been founded on the same facts and had not formed part of a series of offences of the same or a similar character. In this case, the defective nature of the vehicle could have been alleged without any reference to the facts giving rise to the charge of conspiracy to burgle and the dangerous driving charge was not part of a series of offences of the same or similar character to the burglary charge. Accordingly the dangerous driving count was a nullity and had to be quashed."***

Because on the facts of this case I can see no obvious evidence of misjoinder I refuse this application. The assaults be they sexual or non-sexual are on two children

of the family and in my view there is a nexus between the offences and no question in my mind that the indictment is not properly formed.

However Advocate Martin continues her argument on the separate grounds of severance.

Perhaps this is a more important question than misjoinder and is in effect whether I should order severance under Rule 6(2) of the Indictment Jersey Rules 1972. That Rule reads:-

> ***"Where, before trial, or at any stage of a trial, the Court is of opinion that an accused person 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 to direct that the person should be tried separately for any one or more offences charged in an indictment, the Court may order a separate trial of any count or counts of such indictment."***

The question will turn on whether there is similar fact evidence in this case sufficient to avoid the necessity of exercising my discretion to order separate trials. If Advocate Martin is right and there is no similar fact evidence then the exercise of that discretion would lead at the minimum to two Assize trials - one for Y and one for Z and could even lead to four separate Assize trials where the alleged sexual assaults on Y are separated from the common assault on Y and again separate trials where the alleged sexual offences on Z are separated from the common assault on Z.

Advocate Martin spoke of the highest level of prejudice and argued that there was no similarity between the allegations, no signature in that the offences against Z were dissimilar to those against Y, no relationship in time and where, if they are to be believed, Y took a passive rôle and Z took an active rôle in the sexual assaults.
In DPP v P. (1991) 2 AC 447 the questions for the House of Lords were:-

> ***"1. Where a father or stepfather is charged with sexually abusing a young daughter of the family is evidence that he also similarly abused other young children of the family admissible (assuming there to be no collusion) in support of such charge in the absence of any other 'striking similarities'***
>
> ***2. Where a defendant is charged with sexual offences against more than one child or young person, is it necessary in the absence of 'striking similarities' for the charges to be tried separately".***

In the conclusion to the leading judgment Lord Mackay of Clashfern said:

> ***"I would answer the first question posed by the Court of Appeal by saying that the evidence referred to is admissible if the similarity is sufficiently strong, or there is other sufficient relationship between the events described in the evidence of the***

other young children of the family, and the abuse charged that the evidence if accepted, would so strongly support the truth of that charge that it is fair to admit it notwithstanding its prejudicial effect. It follows that the answer to the second question is no, provided there is a relationship between the offences of the kind I have just described."

That part of the judgment answers some of the issues raised by Advocate Martin - as for example the criticism that there is no "signature". In Boardman v. DPP (1974) B All ER 887 the House of Lords moved away from technical tests and simplified the question of admissibility to the outcome of an exercise.

Firstly, there had to be an assessment of the probative contribution of the evidence in question when it was put against the other evidence in the case and then that probative contribution had to be balanced against the prejudice that it might cause in the circumstances of the case under consideration.

Lord Mackay stated the principle in this way at 462:-

"The Judge must first decide whether there is material upon which the jury would be entitled to conclude that the evidence of one victim about what occurred to that victim is so related to the evidence given by another victim to make it just to admit it notwithstanding the prejudicial effect of admitting the evidence."

Admissibility, therefore, turns on probative weight which is a matter of common sense and logical conclusion and not of legal doctrine.

There is also, of course, the question of prejudice to the accused and whether the evidence would cause undue prejudice to the defence case.

A case which is very much in point in this connection is R -v-. Christou (1996) 2 All ER 927 where the House of Lords clarified the relationship between the rules concerning severance of the counts on an indictment and the cross-admissibility of similar fact evidence in the context of sexual offences against multiple victims.

Earlier (and before DPP -v-. P) the Court said in R -v-. Brooks 92 Cr App R 36 C.A. 36 at 39:

"It seems to be that it would be flying in the face of common sense to suggest that those matters ought to be tried in isolation, the one from the other, when the underlying link of available daughters in the household being used for sexual gratification until her time had passed and the successor was able to take over is one which one could not possibly ask the jury to ignore. Equally I think it would be wrong that the jury should be asked to come to a consideration of the later ones without knowing of the earlier ones. That would be entirely artificial. I think that the jury would be

perfectly capable - despite remarks about mental gymnastics in other authorities - to look at this, to look at the witnesses who are called, make up their minds, as they will be directed to do so, first whether they think they accept the credibility of that witness. If they do, and if they are then looking for outside support, surely it would be absurd to suggest that that could not be found in looking at the conduct with another prosecution witness whom they may have accepted as credible. By the same token, if they find one of them incredible they will the more easily be led to the view, in fairness, that they must look at the other with special care, facing the danger that there may have been some kind of conspiracy between the girls to do a mischief, by way of telling lies in their evidence, to their father. It seems to me that justice really requires - both prosecution and defence - that the jury hear the whole of this matter."

In my view there is cross-corroboration. All of the offences involve trespass to the person for they are assaults. They are all assaults against vulnerable children in the special relationship of father and child. They all involve the abuse of that special care that parents have towards their children.

In my view, the common assaults may (and I put it no higher than that) explain the reluctance of the children to report the matter until long after the events have occurred. If there is collusion (and Advocate Martin when she took me through the transcripts spoke of *"innocent contamination"* then, in my view, that is a matter for the jury. In R. -v-. H (1995) 2 A.C.596, after referring to a speech by Lord Wilberforce in R. -v-. Boardman, Lord Mackay of Clashfern LC said this:-

"This passage states the basic principle on which similar fact evidence is admitted in these terms:

> ***'The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and commonsense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the other (s).***
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> ***'I use the words 'a cause common to the witnesses' to include not only (as in Rex v. Sims [1946] K.B. 531) the possibility that the witnesses may have invented a story in concert but also the possibility that a similar story may have arisen by a process of infection from media publicity or simply from fashion. In the sexual field, and in others, this may be a real***

> ***possibility: something much more than mere similarity and absence of proved conspiracy is needed if this evidence is to be allowed. This is well illustrated by Reg. V. Kilbourne [1973] A.C. 729 where the judge excluded 'intra group' evidence because of the possibility, as it appeared to him, of collaboration between boys who knew each other well. This is, in my respectful opinion, the right course rather than to admit the evidence unless a case of collaboration or concoction is made out.'***

In my view, in the first paragraph cited, Lord Wilberforce is saying that the matter is properly left to the jury when when the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true or have arisen from a cause common to the witnesses or from pure coincidence. Where such a relationship exists between the facts testified to by the several witnesses then that evidence is properly left to the jury in order for them to decide which of the options stated by Lord Wilberforce in the latter part of the paragraph is the correct judgment on the facts.

In the second paragraph he is saying that the test of his first paragraph is not satisfied when only mere similarity and absence of proof of conspiracy is demonstrated. The illustration related not to the question of whether the evidence being considered should be admitted as similar fact evidence but whether it could be relied upon as corroboration and the relevance of the illustration was that it proceeded not in the proved absence of collaboration but on the possibility of collaboration, where the absence of collaboration was an essential ingredient."

A passage from Archbold 1-185 is of importance in this regard:

> ***Again, in R. V. Smith [1992] Crim.L.R.445, C.A. a refusal to direct separate trials of charges of sexual misconduct was upheld without any apparent consideration of the implications of the answer to the second certified question in DPP v. P. However, in R. V. Christou [1996] 2 W.L.R. 620, H.L., the answer to that second certified question was prayed in aid in support of a contention that in cases of sexual abuse of children where the evidence of one child is not admissible in support of allegations by another child, the judge's discretion should always be exercised in favour of severing the counts relating to those children. In a speech with which the rest of their Lordships agreed, Lord Taylor C.J., having reviewed the authorities, concluded that the relevant principles had been correctly explained in R. V. Cannan, ante. The appropriateness of separate trials will depend on the particular facts of each case. Judges will often consider it right to order separate trials but to hold that either generally or in respect of any particular class of***

> ***case the judge must so order would be to fetter the discretion given by statute. The relevant factors will vary from case to case, but 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 interrelated are the factors 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 and to 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 relation to that last factor, his Lordship stated that jury trials are conducted on the basis that the judge's directions of law are to be applied faithfully and experience shows that juries, where counts are jointly tried, do follow the judge's directions and consider the counts separately."***

The trial judge (and I have to bear in mind that I may well be conducting the trial, which starts on 9th February) will no doubt have to give a very careful direction to the jury, particularly as the accused has pleaded guilty to count 2 and where Advocate Martin is prepared in this Court to say that the defence arguments against each child are quite different although she is not of course bound under Jersey law to disclose what that defence is and has not disclosed it.

A close reading of the last fifty or so pages of the committal papers gives something of an indication but it cannot be more than that and Advocate Martin, as I have said, declines to elaborate. She is perfectly in her rights to do that.

Any challenge to the admissibility of any of the evidence will be a matter for the presiding judge but I am convinced in my own mind that I am able to exercise a discretion because I take the view that in view of all that I have heard a joint trial of all the counts would be appropriate and accordingly I reject the representation and order the trial to proceed on the indictment as drafted.

Authorities

Indictment Rules 1971

Indictment (Jersey) Rules, 1972

A.G. -v- Rouillé (1995) JLR 315

Attorney General's Reference (No.1 of 1990) 95 Cr. App.R.

R -v- Dutton (1994) Crim L.R. 910 @ 911

Archbold (1997 Ed'n): Paragraph 1-166, 1-172, 1-185

R -v- Lockley & Anor (1997) Crim. L.R.455 C.A.

DPP -v- P (1991) 2 AC 447

Boardman -v- DPP (1974) 3 All ER 887, HL

R -v- Christou (1996) 2 All ER 927, HL

R -v- Brooks (1990) 92 Cr. App.R 36

R-v- H (1995) 2 A.C. 596

R -v- Sheffield Stipendiary Magistrate ex.p. Stephens (1992) Crim L.R. 873

R -v- J.A.K. (1992) Crim L.R. 30.

R -v- Wilkinson (1996) 1Cr . App.R. 81

R -v- Telford JJ, ex P. Badhan (1990) 93 Cr. App.R. 171.

R -v- Canaan (1990) 92 Cr. App.R.16 Ludlow -v- Metropolitan Police Commissioner (1971) A.C.29

R -v- Wilmot (1988) 89 Cr. App. R. 341.

R -v- Wells (1988) 92 Cr App. R. 24

R -v- Sims (1946) K.B. 531.