STATES OF JERSEY

DRAFT CRIMINAL PROCEDURE (JERSEY) LAW 201- (P.118/2017): AMENDMENT

Lodged au Greffe on 6th March 2018
by the Education and Home Affairs Scrutiny Panel

STATES GREFFE

1 PAGES 83–84, ARTICLE 75 –

(1) For paragraphs (8) and (9) substitute the following paragraphs –

"(8) If, following such period of time for deliberation as the Bailiff thinks reasonable having regard to the nature and complexity of the case, the jury is unable to deliver a verdict upon which the majority of jurors are agreed, the Bailiff shall discharge –

(a) the jury from the proceedings and from the custody of the Viscount; and

(b) the defendant from the proceedings provided he or she is not convicted of another offence charged in the indictment.

(9) The Bailiff may, upon formally discharging the defendant from the proceedings, make such other orders or directions as may be required in relation to the discharged proceedings, or in relation to any other criminal proceedings pending before the Royal Court in respect of that defendant.".

(2) Delete paragraphs (10) and (11) and renumber paragraph (12) as paragraph (10).

2 PAGES 84–85, ARTICLE 76 –

Delete Article 76 and re-number the subsequent Articles and any cross-references to those Articles.

EDUCATION AND HOME AFFAIRS SCRUTINY PANEL

REPORT

Introduction

1. The Education and Home Affairs Scrutiny Panel established a Sub-Panel to review the Draft Criminal Procedure (Jersey) Law 201- [P.118/2017] ("the draft Law"), lodged by the Council of Ministers for debate on 16th January 2018. During that debate, the principles of the draft Law were adopted by the States. The draft Law was then called in for further scrutiny to take place prior to the second reading, which is to be considered at the Sitting on 20th March 2018. It is the intention of the Sub-Panel to report in full on its work prior to the debate resuming in second reading.

2. As such, this report is related solely to the Sub-Panel's amendment to the draft Law in respect of the issue of retrials.

Retrials

3. At present in Jersey law, unless 10 or more members of the jury reach a guilty verdict, there will be an acquittal. In the event that the jury falls below 12 members, it is a possibility that the number required to convict will fall to 9. Furthermore, the presiding judge will make the jury aware of the consequences of failing to reach a majority verdict. The introduction of hung juries in this draft Law would mean that a majority of 10 would be required to convict, and a majority of 10 would be required to acquit. Anything in between these 2 verdicts would be described as a 'hung jury'.

4. The draft Law creates a new provision in Article 75(9) to allow H.M. Attorney General to notify the defendant and the Bailiff as to whether a retrial is to take place in the event of a hung jury.[1] The Panel has received a number of submissions on this particular change in the draft Law, and has found that there are significant concerns about it.

5. The Panel has identified 3 arguments against the concept of re-trials which are as follows –

- Publicity of the first trial impacting on the re-trial process.
- The resource implications on the Royal Court and Viscount's Department.
- A shift in the balance of fairness to the prosecution which could be seen as unfair.

Publicity of cases

6. One of the main issues raised in the submission from Sir Michael Birt and Mr. Julian Clyde-Smith (Commissioners of the Royal Court), was in relation to the publicity surrounding high-profile cases, and the undue influence this could have on potential jurors within a retrial –

> *"All members of the Sub-Panel will be aware of the prominence given by local media to trials in the Royal Court, particularly if they are of a sensational nature. There is often a front page headline followed by a*

[1] Draft Criminal Procedure (Jersey) Law 201-, (p.84)

brief – and therefore partial – review of the evidence. If a re-trial takes place – particularly if the defendant is in custody – it will have to take place promptly. Thus the jury in the re-trial are likely to be aware of the earlier reports and that it is a re-trial.

This will mean that a re-trial is held in very different circumstances to that which the courts have striven to achieve in relation to original trials. There are strong rules of court so that the media are not allowed to say anything about a case prior to its trial, other than the fact that a defendant has been charged. This is to protect the integrity of the trial process and ensure, as far as is practicable, that the members of the jury consider the matter solely on the basis of the evidence which they hear in court. That cannot be achieved in the case of a re-trial."[2]

7. Further to the Commissioners' submission, the Sub-Panel raised the issue at a public hearing with the Commissioners, where the concern was expanded –

Commissioner Birt:

"I think there are 2 things. First of all, it is highly unlikely that at the time of the investigation much will have been said other than that X is saying they have been raped, shall we say, and Y has been arrested and been interviewed by the police usually that much detail goes into it, and certainly once there is a charge, of course, the shutters come down and nothing is said. Now, by the time it gets to court this is several months later, so all you have is some possibly speculative reporting much earlier, much longer ago. I think the great difference with a retrial is that, first, there could be evidence given in court which is reported in much more detail – in other words: "He did this to me, he did that to me" – and it will have been reported recently. So, I think it is the quality of the matter which would be in the paper which is much greater than in a police investigation and the short time comparatively which would have elapsed since that report compared with a police investigation."[3]

8. The Sub-Panel also raised this issue with the Bailiff of Jersey and received a similar view –

Deputy S.Y. Mézec of St. Helier:

"Article 75 is referenced in the Commissioners' submission, and they have raised ... quite a few reasons why they would object to this. What do you think generally of the change that is proposed in Article 75, and do you agree that it is potentially not the way forward?"

Bailiff of Jersey:

"I absolutely agree with the Commissioners, and what they set out at paragraph 4 of their submissions, reflects the views of me and the Deputy Bailiff as well as their own views."[4]

[2] Written Submission – Sir Michael Birt and Julian Clyde-Smith – 9th January 2018
[3] Public Hearing with Sir Michael Birt and Julian Clyde-Smith – 13th February 2018 – p.12
[4] Public Hearing with the Bailiff of Jersey – 6th February 2018 – p.8

9. The Sub-Panel raised the concern in relation to publicity of re-trials with the Minister for Home Affairs at a public hearing on Friday 23rd February, and received the following answer –

> **Deputy of St. Ouen:**
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> *"Minister, I do not know if you have had the chance of looking at submissions made to the Sub-Panel by members of the judiciary. Even in the cases like the Attorney General has just put forward, if those merits were accepted, there is in Jersey the particular risk of a jury having heard media reports of the first case and being empanelled as a jury in a retrial and their view of the evidence perhaps being coloured or affected in any way by the media reporting of the first trial, which resulted in a hung jury. So is that a factor that has been considered in bringing forward these proposals?"*
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> **Minister for Home Affairs:**
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> *"Yes, I think it has. Myself, as a former journalist, had experience of reporting on a trial that was rather lengthy and very high-profile at the time, it was a murder trial back ... a long time ago now. So I reported on that extensively and towards the very end the process was halted and a retrial did occur at a later stage. The Attorney General probably recalls better than I do the details around that, but if the media are doing their job properly they should be at that point in the trial reporting the facts. So I do not really see that that would in any way taint anybody's perspective on a case that would make it so that they were not able to assist as members of a jury if there was a retrial."*[5]

10. The Sub-Panel understands this argument; however, it is of the opinion that the concerns raised by the Commissioners are in relation to the manner in which potential jurors hear the evidence that has been presented. Whilst it could be argued that the regulated media, if doing their job correctly, should be reporting the facts, other forms of media (such as social media) are not bound by the same codes of conduct, and can be more selective or partisan in their reporting. In a small jurisdiction such as Jersey, it is highly likely that persons selected to sit on the jury at a re-trial may have some prior knowledge of the case through one of these channels. It could therefore be argued that (depending on the factual accuracy of the reports) a distorted view of the evidence might have been formed.

11. On the basis of the evidence received, the Sub-Panel agrees that the issue of publicity is not without merit and should be considered seriously by the States Assembly in relation to this change.

Resource implications of re-trials

12. The Sub-Panel has heard that this provision could be seen to mirror that in England and Wales, where re-trials are able to be held in other locations (i.e. an initial trial in London may be moved to a northern city for a re-trial to prevent difficulties in terms of publicity). However, it is not possible to hold an assize

[5] Public Hearing with the Minister for Home Affairs – 23rd February 2018 – p.6

(or jury) trial in any building other than the Royal Court, which was a fact highlighted to the Sub-Panel by the Commissioners of the Royal Court –

Commissioner Birt:

"At the moment, we only have one court which can hear jury trials. Undoubtedly, if all cases where the jury were not 10:2 in one direction or another were retried, I should think we would have 2 or 3 a year, and that would impose pressures on the court. Sometimes at present, particularly if we have one or 2 longish assize trials, people have to wait longer than one would wish to have their assize case heard. This is going to make it even longer."[6]

13. The view was also reflected by the Bailiff of Jersey –

Bailiff of Jersey:

"We cannot run more than one jury trial at a time at the moment and that is a problem with resources mostly in the viscounts department. To understand that you need to know what happens when you have a jury trial. The jury, once they are in the care of the viscount, once they have been sworn in and panelled, they have got to be looked after so nobody can get at them. That requires a number of viscount officers, a number of a men and women obviously. It has an impact on ushers as well, as we only have, as you know, all four covering the State and the courts. So, it is not to say that it is not possible, but it would ... we would just need to have many more people employed in order to run more trials."[7]

14. Furthermore, it would also not be possible to hold a trial out of the Island –

Deputy of St. Ouen:

"Would it ever be possible to hold a Royal Court trial out of the Island to avoid that possible risk of prejudice?"

H.M. Attorney General:

"I do not think it would. Certainly I remember of my own experience having retrials when the jury were discharged and right at the end of the case in Truro, shortly after the first trial, and there was no difficulty at all. Truro is a city not much bigger than St. Helier, but, no, I do not think there is any way of having trials outside Jersey. Royal Court trials must be here."

15. The Bailiff of Jersey provided the Sub-Panel with statistics in relation to the number of trials over the past 5 years during a public hearing –

Bailiff of Jersey:

"The last 2 years the number of assize trials has gone up very considerably indeed. Just looking at some of these statistics …

[6] Public Hearing – Sir Michael Birt and Julian Clyde Smith – 13th February 2018 p.10
[7] Public Hearing – The Bailiff of Jersey – 6th February 2018 – pp.8+9

2012 = 13 assize trials;
2013 = 12;
2014 = 5;
2015 = 1;
2016 = 25.
Those are trial processes started, but you have the other statistics that go with it.
Trials that were abandoned:
2012 = 1;
2013 = 16;
2014 = 10;
2015 = 14;
2016 = 18.
Trials completed:
2012 = 7;
2013 = 4;
2014 = 9;
2015 = 9;
2016 = 10.
So, what we are seeing from those statistics, is generally more people have been pleading not guilty, and that has continued through 2017 as well. More people have been pleading not guilty. And, I think the verdicts in 2017 and probably in 2016, included quite a high number of not guilty verdicts. And, if the consequence of that had been a whole set of re-trials, then the whole of the system would have started creaking."[8]

16. The Sub-Panel broached this subject with the Minister for Home Affairs, who, whilst acknowledging there would be some resource implications, put forward the argument that the instances of re-trials happening would in fact be rare –

Minister for Home Affairs:

"In 2008 at a peak of recent years for retrials only 0.7% of cases in England and Wales required a retrial. So we are talking about a very small number of cases here."[9]

17. The Sub-Panel understands that the concept of re-trials is meant to sit alongside the changes that are put forward by the draft Law, and the inclusion of re-trials is in order to encourage juries to reach a majority verdict in the absence of a unanimous verdict.

H.M. Attorney General:

"The purpose of the retrial provision is not to encourage more retrials, it is to encourage more juries to reach the verdict upon which at least 10 of them are agreed. It is to encourage jurors to reach verdicts and a corollary of that is that very occasionally there will be a retrial."[10]

[8] Public Hearing – The Bailiff of Jersey – 6th February 2018
[9] Public Hearing with the Minister for Home Affairs – 23rd February 2018 – p.6
[10] Public Hearing with the Minister for Home Affairs – 23rd February 2018 – p.6

18. By implementing a Law that creates this provision, the resource implications that follow are unavoidable, and therefore the Sub-Panel believes this change could create further resource implications on the Courts and the Viscount's Department. The extent of additional resources required would depend on the number of retrials sought by the prosecution.

Fairness shift in favour of the prosecution

19. The Sub-Panel has received submissions that the introduction of re-trials would place more power into the hands of the prosecution and effectively allow it to have 'another bite of the cherry'. As discussed in the introduction, in the event that a jury cannot come to a majority verdict under the current Law, it is dismissed and the defendant is acquitted. Whilst some have argued that this could lead to miscarriages of justice, it could also be thought that the prosecution's case was not strong enough to prove, beyond reasonable doubt, the guilt of the defendant.

20. Within the submissions received by the Sub-Panel, this issue was raised by Sir Michael Birt and Mr. Julian Clyde Smith –

> *"It is the prosecution that has brought the case and in our view, there is nothing inherently unfair or wrong in a system which says that, if the prosecution, having given it its best shot, fails to convince 10 out of 12 people that they can convict, it should be deemed to have lost and an acquittal recorded."* [11]

21. This issue of the balance of fairness was expanded upon by Sir Michael Birt and Julian Clyde-Smith when questioned at a public hearing –

> **Commissioner Birt:**
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> *"So, you have possible prejudice and further resources needed and both of those can ultimately be managed, although I think the prejudice one is difficult. On the other hand, what is the advantage of a retrial? The prosecution have brought the case. I am not sure there is anything inherently wrong in saying if you cannot convince 10 out of 12 of the defendant's guilt the first time around, well, so be it. Certainly, when balanced against the cost and the prejudice, to my way of thinking our present system is satisfactory."*
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> **Commissioner Clyde-Smith:**
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> *"I agree. All I would add is it seems to me it comes down to the balance of fairness. At the moment, I think the system is fair. You can see in trials the stress both upon the prosecution witnesses and on the defence witnesses. It seems to me fair that if the prosecution are unable to persuade 10 people to convict, then a person is acquitted. It comes down to deciding whether the balance of fairness should be shifted towards the prosecution to allow them to have 2 bites at the cherry and for everybody to have to go through the stress of a second trial."* [12]

[11] Written Submission – Sir Michael Birt and Julian Clyde-Smith – 9th January 2018
[12] Public Hearing – Sir Michael Birt and Julian Clyde-Smith – 13th February 2018 p.10

22. This Sub-Panel raised the issue of the power shift at a public hearing with the Minister for Home Affairs and received the following response from the Attorney General –

> **Deputy S.Y. Mézec of St. Helier:**
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> *"One of the points of principle that has been raised by some who are uncomfortable with this clause is the idea that because the standard of proof in a criminal case is for it to be beyond reasonable doubt, that if you cannot convince 10 out of 12 people why should you get the second go then anyway if the case was not strong enough to convince such a large proportion of the jury? Then you obviously did not have the correct amount of evidence there or a good enough argument, why should that be grounds for them having another go afterwards? That was one point that was made to us. How would you respond to that?"*
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> **H.M. Attorney General:**
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> *"That is obviously a valid argument. In response, one would say all these other jurisdictions in the first instance do require juries to come together and form a verdict upon which they are all agreed. I was looking at Archbold again today in relation to England and Wales. In England and Wales a jury must spend at least 2 hours, sometimes it can be days, trying to reach a verdict upon which they are all agreed and only after that time, when they are given a subsequent direction, can they return a verdict of guilty or not guilty upon which 10 of them are agreed."*[13]

23. On the balance of the evidence received on this particular matter, the Sub-Panel is of the opinion that the current system of acquittal in the absence of a majority guilty verdict is fair, and does provide opportunity for the prosecution to adequately prove its case. As the draft Law will seek to bring forward changes that require juries to attempt to reach unanimous decisions in the first instance (and will look to promote this through the overriding objective in Article 2), the Sub-Panel is minded to support the current system whereby if a jury is unable to reach a majority guilty verdict then the defendant is acquitted.

Conclusion

24. This report is principally concerned with the amendment that that the Sub-Panel has lodged. It will report in full on the review of the Draft Law prior to the debate on 20th March 2018. We hope that Members will read the full report in conjunction with this amendment. Members can access the submissions and transcripts from the Sub-Panel's review by following this link.

[13] Public Hearing – Minister for Home Affairs – 23rd February 2018 – p.5

25. It is clear to the Sub-Panel from the evidence it has received that the concept of re-trials, however well-intentioned, is not necessarily the correct change for Jersey at this time. When taking into account the issues relating to publicity and empanelling impartial jurors, resource implications for the Court and Viscount's Department and the issues relating to the balance of fairness through this Law, the Sub-Panel has come to a unanimous agreement that the concept of re-trials should not be taken forward. It therefore recommends that Members support this amendment.

Financial and manpower implications

26. There are no financial or manpower implications for the States arising from the adoption of this amendment.