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9th January 2018

Deputy S Y Mézec
Chairman, Sub-Panel on the Draft Criminal Procedure (Jersey) Law
Scrutiny Office
Morier House
St Helier
JE1 1DD
[redacted]

Dear Deputy Mézec

Draft Criminal Procedure (Jersey) Law

Thank you for your letter of 18th December 2017 seeking the views of the Commissioners of the Royal Court on the above draft Law. Although it appears that there was a period of public consultation, neither Commissioner Clyde-Smith nor I were aware of this and we were not specifically consulted. Indeed, we were not aware that a draft Law had been finalised and lodged. We are therefore grateful to the Sub-Panel for the opportunity of considering the draft Law and offering our comments upon it.

Commissioner Clyde-Smith and I have taken the opportunity of discussing the draft Law and he has approved the contents of this letter. What follows may therefore be taken as our joint comments.

In general, we are supportive of the draft Law. The existing legislation governing criminal procedure is ancient and it would undoubtedly be helpful to have a modern law.

We do however have some comments which are as follows:-

1. **Article 36(3)**

   At present, on an appeal from the Magistrate's Court to the Royal Court, whilst the Royal Court may impose a heavier sentence than was actually imposed by the Magistrate, it may not impose a sentence which is greater than the maximum which the Magistrate could have imposed, i.e. 12 months imprisonment or a £10,000 fine – see Article 20(3) and (4) of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 ("the 1949 Law").

   In our view, this is as it should be. A person will have been dealt with by the Magistrate because it was felt that the sentencing powers of the Magistrate were sufficient. Such a person should not find that, just because he has appealed, he is at risk of having a sentence imposed which is greater than the Magistrate could have imposed.

   However, Article 36(3) changes the present position. It provides not only (as at present) that the Royal Court may impose a heavier sentence than that which was actually imposed by the Magistrate, but it also provides that the Royal Court may impose a sentence greater than the maximum which the Magistrate could have imposed.

In our view, that is wrong. The position should be maintained as provided by the 1949 Law i.e. whilst the Royal Court can on an appeal increase the sentence imposed by the Magistrate, it may only do so up to the level of the maximum which the Magistrate could have imposed.

2. **Article 50**

This is a useful new provision which will avoid difficulties in future. However we believe it is incomplete. It provides at paragraph (2) that the trial court may communicate its view of the facts to the sentencing court, but it does not say what the sentencing court is to do as a result. In our view there needs to be an additional paragraph which provides that the sentencing court may sentence on the basis of the facts as so communicated to it.

3. **Article 66**

This introduces the concept of a reserve juror i.e. a person who will sit through the trial and will be able to step in to become an actual juror if any of the actual jurors are discharged during the course of the trial. This should minimise the risk of a trial having to be aborted because the number of members of the jury falls below 10.

However we have two observations:-

(i) We think the five day period in Article 66(5) is too short. One has to bear in mind that the two reserve jurors will have to sit through the trial. In most cases they will not be called upon. It will therefore in practice have been a waste of their time and a cost either to them or to their employers when it was not necessary to incur such time and cost. A fair number of trials last more than five days and neither of us recalls ever having had to discharge a jury because the number has fallen below 10. In other words, in most trials, the chances of reserve jurors being called upon are fairly remote. Conversely, in a very long trial, the chances of jurors becoming indisposed etc. are higher and the costs incurred in having to start again are increasingly substantial. We therefore support the concept of reserve jurors for long trials. However, trying to balance the costs of wasting time and money on the one hand because reserve jurors are not required with the need to avoid substantial costs and inconvenience in the case of a long trial, we think that a more appropriate period for the expected length of the trial should be 10 days before reserve jurors are appointed.

(ii) We are not clear as to why reserve jurors are discharged under Article 66(8) at the commencement of the judge's summing up. In a long trial – which is where the importance of reserve jurors increases – the summing up may itself take several days. The risk of the jury falling below 10 is therefore as great during that period as during the rest of the trial. Aborting the trial at that late stage would be expensive. Furthermore, we do not understand the logic of discharging reserve jurors at this stage. They will have sat through all of the evidence and there is no reason why they should not equally sit through the summing up so that, upon retirement, they would be in exactly the same position as the other jurors. We agree that, once the jury retires to deliberate, one cannot parachute in a reserve juror as he/she will not have participated in the jury discussions. But we would recommend that the cut-off point under Article 66(8) be the retirement of the jury rather than the commencement of the Bailiff's summing up.

4. **Article 75**

This introduces a major change. At present, unless 10 members of the jury vote to convict, there will be an acquittal. Jurors are told this before they retire so they are aware of the consequences of not achieving a majority of 10. Article 75 will introduce the concept of a hung jury. There must be a majority of 10 to convict but also a majority of 10 to acquit. Anything in between will result in the jury being discharged without a verdict and the possibility of a re-trial.

We are not in favour of this change for the following reasons:-

(i) We think it would cause difficulties in terms of publicity. All members of the Sub-Panel will be aware of the prominence given by the 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 very 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.

(ii) 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 about contempt of court so that the media are not allowed to say anything about a case prior to its trial, other than the fact that the defendant has been charged. This is to protect the integrity of the trial process and ensure, so far as 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.

(iii) It may be argued that this provision matches that in England and Wales, where re-trials occur. However, that is a much larger jurisdiction and there is always the possibility of moving a re-trial to a different location. In our view, there are particular problems in having a re-trial in a small community such as Jersey.

(iv) It may be said that the possibility of a re-trial already exists because the Court of Appeal, if it allows an appeal against conviction, can order a re-trial. However, that is a very rare occurrence and it will usually be many months after the original trial. Furthermore, the Court of Appeal can prohibit publicity about the appeal hearing. That would not be the position under Article 75, where there would have been full publicity during the original trial and the re-trial will take place soon after the original trial.

(v) A further reason for being concerned about introducing re-trials where there is a hung jury is the pressure on court resources. At present, there are occasionally delays in fixing dates for trials before a jury because of the limited court rooms and the demands upon the Viscount's Department in serving jurors etc. This tends to occur if a number of defendants plead not guilty within a short space of time. Our estimate is that, if this provision were introduced, there would be some re-trials each year and this would lead to delays in other jury trials.

(vi) Those who argue for a re-trial tend to point to the example of where a jury splits 9-3 in favour of a conviction. It is argued that in those circumstances it is wrong for the trial to result in an acquittal. However, Article 75 will be equally applicable where the vote is the other way i.e. 9-3 in favour of not guilty. No-one will know in future what the split is and therefore whether the jury was close to a conviction or close to an acquittal or more evenly split. Nevertheless, in all cases, the prosecution will be able to go for a re-trial.

(vii) Our experience as Commissioners is that, whilst we have come across cases where a conviction has only just been missed, much the more common situation is where the jury is split more evenly. It is the prosecution which has brought the case and in our view, there is nothing inherently unfair or wrong in as 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.

(viii) Balancing all these various factors, and particularly given the smallness of the jurisdiction in the context of publicity and the additional pressure on resources, we think the balance comes out firmly in favour of preserving the current system.

5. **Article 75(4)(b)**

We are concerned at the rigidity of this provision. It makes it mandatory ("*must*") to ask whether the guilty verdict is in respect of a lesser offence. In most cases, this will be a nonsensical

question. Let us suppose a charge of grave and criminal assault involving a knife attack. The only issue will be whether the defendant did it or whether he was acting in self-defence. On the facts, it will be a grave and criminal assault or nothing at all. It could not possibly be a common assault and no-one will have suggested during the trial that it might be. Yet this provision says that, after the jury has found the defendant guilty of grave and criminal assault, the Judicial Greffier must ask them whether in fact their verdict is for common assault.

In some cases, it is of course important but in those cases the judge will have directed the jury about the possibility of the alternative verdict. In most cases the indictment may have been amended to include it, but even if it has not, the judge will then take steps to ascertain whether the verdict is guilty of the greater or lesser offence.

In our view, the court can be left to extract the correct verdict as it has in the past and the appropriate course is simply to delete sub-paragraph (b). If left as it is, it will lead to some very strange and unexpected questions of the jury which will undoubtedly cause great puzzlement and, possibly confusion.

6. **Article 81(4) – (6)**

We are not sure that we follow these provisions. At present, if the prosecution discontinues because of insufficient evidence or because it is not in the public interest, that is the end of the matter. The defendant will be discharged and the proceedings will end. Indeed a not guilty verdict will often be entered. At present, the defendant has no right to insist that the proceedings should nevertheless continue.

The above provisions confer such a right although only in the Magistrate's Court. We are not clear as to why such a right is required. If the prosecution considers there is insufficient evidence to convict, what is the point of the trial continuing when both sides are presumably agreed on this point? If, for reasons which we have not appreciated, there is good reason to introduce such a provision, why is it only in the Magistrate's Court and not also in the Royal Court?

7. **Articles 81 and 82**

These provisions introduce a distinction between discontinuance (Article 81) and withdrawal (Article 82). This is a new distinction so far as we are aware and we are not sure that we understand the thinking behind it. We are not saying that we are opposed to the provisions as drafted, but we do not follow them at present. The key difference would appear to be that discontinuance can be effected without the court's leave whereas withdrawal requires the leave of the court. Conversely, withdrawn cases can be recommenced for any reason (with the leave of the court) whereas discontinued proceedings can only be recommenced if the requirements of Article 81(7) are met. It might be helpful for the Sub-Panel to be advised by the Attorney General as to the thinking behind these different provisions and how it is envisaged they will operate in practice. At present, we are not convinced that the new concept of 'withdrawal' is necessary or improves the present position.

8. **Article 83(3)**

This is an important point. Disclosure by the prosecution of unused material (i.e. material which might undermine the prosecution case or assist the defence) is a vital part of the criminal justice process. There have been a number of cases in the UK in the past (and some recent ones) where a failure by the prosecution to disclose such material has led to a wrongful conviction.

Under the present system, it is the prosecution's duty to disclose all unused material. This will be continued under Article 83(1) and that is satisfactory.

However, in some cases the prosecution wish not to disclose unused material because there is a strong public interest in not disclosing it. An example would be information about informers, because disclosure of their names might lead to retribution against them. In such cases, under the

present system the prosecution have to disclose the material which they wish to withhold to the judge and seek his permission not to disclose it. The judge has to balance the degree of assistance which the material might give the defence against the degree of public interest in maintaining the confidentiality of the material. If the judge orders that the material be disclosed, the prosecution then have a choice as to whether to comply with that or whether to drop the whole case because they think it is so important not to disclose the information. The important point is that the final decision on disclosure rests with the judge, not with the prosecution.

It seems to us that Article 83(3) reverses the position. It provides that the prosecution does not need to disclose unused material where it is of the view that it would not be in the public interest to do so '*unless the court orders otherwise*'. But how will the court necessarily know? It will not do so unless there is a positive duty on the prosecution only to be able to refuse disclosure of unused material where the court agrees.

In our view the provision should be changed so as to preserve the current position and provide that the prosecution need not disclose unused prosecution material where it considers it would not be in the public interest to do so only if the court agrees. That would ensure that such matters have to go before a judge as at present, rather than the position under Article 83(3) which would enable the prosecution to withhold such material unless the court ordered otherwise. If the prosecution never tell the court about such material, the court will not 'order otherwise'.

9. **Article 98**

This too is an important provision. In England and Wales many trials have to be adjourned because witnesses do not attend in the absence of a witness summons. Conversely, in Jersey, this has never been a problem. That is because at the instance of the Attorney General, witnesses are warned to attend at trial and if they do not do so, they may be arrested as well as being fined. This normally means that trials do not have to be delayed because a witness has failed to turn up. The failure is identified at the beginning of the trial when all the witnesses are called and the defaulting witness's arrest is then ordered. This takes place whilst the trial proceeds with the prosecution opening etc. and more often than not, the witness has been found and brought to court by the time his allocated slot for giving evidence is reached.

We think that Article 98 should be amended so as to preserve the current power of arrest. Otherwise, the only remedy when a witness fails to appear would be to issue a witness summons under Article 99. Furthermore, Article 98 should be expanded so as to replicate the current position and enable witnesses for the defence whose names are given to the Attorney General also to be warned under Article 98.

Article 99 introduces the concept of a witness summons but this will not assist in dealing with the problem we have just identified. First, it requires that the person seeking a summons has to show that there is reason to believe the person will fail to attend. There is often no advance reason to believe that there will be a failure to attend. Secondly, the person seeking a witness summons has to give a written notice to the court and to the other parties. It is a procedure which may only be used in advance of the trial in limited circumstances.

We are therefore of the view that Article 98 should be strengthened so as to effectively replicate the current position. We would also suggest that the fine under Article 98(2) for failure to attend should remain at its current level of an unlimited fine and we note that this is the penalty under Article 100 for a failure to attend to comply with a witness summons. We see no reason to distinguish between a failure to comply with a witness summons and a failure to attend court when warned to do so pursuant to Article 98.

10. **Schedule 3 – New Article 82G(1) of the Police Procedures and Criminal Evidence (Jersey) Law 2003**

We think that the words "*it is evidence that*" are unnecessary and indeed do not make sense. They should simply be omitted. As drafted the provision says that evidence of bad character is

admissible if it (i.e. the evidence of bad character) is evidence that the defendant has made an attack on another person's character. That is nonsensical. The evidence of bad character is evidence of previous convictions etc. The making of an attack on another person's character is the ground upon which evidence of the defendant's bad character can be adduced. Paragraph (1) should therefore read:-

> ***"Evidence of a defendant's bad character is admissible if the defendant has made an attack on another person's character."***

I hope that these observations are of some assistance. Please do not hesitate to contact me if any of them are not clear or require further elaboration.

I am sending a copy of this letter to the Bailiff and to the Attorney General for their information.

Yours sincerely

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Sir Michael Birt
Commissioner of the Royal Court

c.c. Bailiff
Attorney General
Commissioner Clyde-Smith