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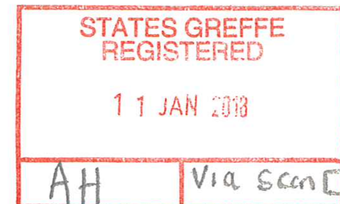

Deputy S Y Mézec
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Dear Deputy

Draft Criminal Procedure (Jersey) Law

I have seen a copy of a letter dated 9th January to you from Commissioner Sir Michael Birt, in which he sets out the joint views that he and Commissioner Clyde-Smith have reached in respect of the draft Law. I confirm that the two Commissioners, Deputy Bailiff and I sat down together to discuss the terms of the draft Law, and that we all agree with the points which have been made by Sir Michael in his letter.

If I may, I will add one or two further points. Sir Michael criticises the proposal to have re-trials where there has not been a finding of not guilty on at least a 10 votes of not guilty to two votes of guilty basis. I agree with that criticism for the reasons which he gives. However I would like to emphasise that in my experience of sitting as a judge on assize trials, a close result – 9-3 in favour of guilty for example, which on one analysis might be thought to justify a re-trial, comes up very infrequently. I think I have only had it once in seven years. Sir Michael tells me that he also regards it as very rare. It is far more frequent that a jury has only a relatively small number in favour of guilty or that the numbers are very broadly split – 7-5, 6 all or occasionally 8-4.

There is, as Sir Michael says, no way the prosecution will know how close the jury came to convicting. As a trial judge, I would like to confirm that these cases of 9-3 votes in favour of a guilty verdict are extremely rare.

I would also like to add this about the arrangements for selecting a foreman. In England and Wales it has been the position for a very long time that the jury select its own foreman. That has been the tradition in that jurisdiction. By contrast, it has been the tradition in Jersey, equally for a very long time, that the foreman of the jury is selected by the trial judge. The new law abandons that tradition and, at Article 72(6) provides that the jurors select from one of their number a juror who will chair the jury's deliberations. No reason for doing so is advanced. It perhaps is assumed that because this is done in England, it should

be done here. It is apparent that the jury will only do this at the time that the members of the jury retire to consider the verdict.

I feel quite strongly that this is undesirable. Before going on to say why the present system is better, let me just explain how it works in practice.

Prior to the first morning of the trial, the Viscount will have summoned a number of potential jurors drawn randomly in accordance with the 1864 Law, and supervised by the two Jurats. When those jurors are served, some of them indicate reasons why they should not be required to do jury service – they will be out of the Island at the time, they have a sick relative who they need to care for, they are best friends with the prosecutor or the defendant, or for whatever other good reason has been put forward. The Viscount in some cases makes a decision and grants exemption, and in other cases the request for exemption is put before the Court and the trial judge makes a decision. In the course of service of the different jury summonses, or on meeting jurors as they are arriving at court before the trial, or generally from any other knowledge there is within the Viscount's Department, the Viscount's officer is able to make an assessment of what the relevant prospective jurors do. In the 10 or 15 minutes prior to the opening of the trial, the Viscount's officer informs the trial judge of the results of his enquiries in that respect and it is not at all uncommon to be told that of the prospective jurors – one does not know necessarily whether there will be any other valid grounds for objection to their sitting so they are only prospective jurors at that stage – juror A is the managing director of local trust company, juror B is an accountant, juror C is a senior civil servant in the Health and Social Services Department, juror D is a headmaster, and so on. The trial judge will obviously look down the list of jurors himself to identify whether there are any known to him or whether he has any other information which might be relevant to whether or not they should be foreman of the jury. When the jury are called, he is also able to form a view – obviously only a superficial view, but sometimes nonetheless helpful – of their disposition: are they confident? Do they move swiftly? Do they look as though they would rather be somewhere else? Are they engaged?

All that information comes together and the trial judge makes his selection of the jury foreman. Although it is relatively rare that one knows the jurors well, there have certainly been three or four occasions over the last seven years while I have presided over criminal trials that I have known both individuals who would make a good foreman and individuals who I am sure would make a bad foreman – perhaps because from my knowledge of them they are inclined to ramble or be disorganised.

For my part I think this is a useful tool in the judge's armoury for the purposes of improving the chances of the trial delivering justice. Of course there is no guarantee that the foreman so selected will do a good job, but it seems to me that it improves the prospects of that occurring.

It may be worth just asking what damage will be done if the judge's choice of a foreman turns out to be not the best person equipped to chair the jury deliberations. If there is no one on the jury capable of running the jury discussion efficiently, the fact that the judge has chosen one of their number who is also not very capable is neither here nor there. On the other hand if there is one or more people who are capable of chairing the debates and the judge's choice is not, one would expect that in the course of the jury discussions it will become obvious that the capable juror is able to draw attention to the salient points and will probably exercise his or her influence anyway. In other words, while the appointment of the

foreman, if a good foreman, has advantages, the appointment of a less capable foreman is likely to do no more damage to the justice process than a jury electing its own.

What is the likely position if the jury selects its own foreman? On some occasions, no doubt the jury will select someone who has carried themselves appropriately during the course of the trial and seems to have a natural air of authority. One would hope the trial judge would have picked up such people anyway in the course of the enquiries I have described above. In other cases however, the jury may well find themselves with a foreman who has pushed himself or herself forward, and who has been the noisiest. There may be embarrassment within the jury room as to who should or should not be foreman.

I have given the impression earlier in this letter that there will always be someone on the jury who has had some experience of chairing meetings. That will not always be the case. Sometimes one may find a jury with 12 well meaning people who are slightly bemused to find themselves at the heart of the justice process – slightly unsure of what is the right course to adopt and certainly not very willing to put their names forward to act as foreman. In those circumstances, where the members of the jury are not executives in business of one kind or another, there is much to be said for removing further stress by simply nominating the foreman for them. All those potential problems are removed by the judge selecting the foreman.

Furthermore, throughout the trial there are times when the jury will need someone to show authority, whether that is to prevent other jurors from talking out of turn or from making early judgments or from generally acting inappropriately on the jury. If there is no foreman until the jury retires, there is no one to carry out that task. For my part, I think it would be extremely helpful to know that the foreman is in place from the start of the trial and will have authority in the jury room by virtue of the judge's nomination of him. This does not mean the foreman will decide guilt or innocence – of course he will not, and the summary of each juror's individual obligations which the trial judge gives to the jury at the outset of a criminal trial make that clear. The nomination of the foreman however just gives the whole arrangement some structure from the outset. I very much hope that the Panel will be prepared to recommend an amendment which reinstates this position as at present.

You may no doubt wonder why this point has not been raised in Sir Michael's letter to you. The answer to that is that not all judges take the same view. My impression is that my three colleague Jersey judges do not feel as strongly about it as I do, and while one or maybe two of them would marginally prefer to keep the existing position, the fourth would marginally prefer not to. That is why the issue is raised by me in this letter and not by the letter which reflects our joint views.

Since the judges' meeting to which I have referred, I have also looked at the draft Law again and there are 3 points:

(i) In Article 89(1), a defendant is "*required to be present*" throughout his trial. In paragraph (2) of the same Article, the language is that the Court may try the defendant in his absence if he chooses "*not to exercise his ... right to be present*". These two things seem to me to be inconsistent. Paragraph (1) provides for a requirement to be present, and paragraph (2) refers to a "*right*" to be present. They are different and you may wish to ask the Attorney why the draft is framed as it is, because one would think at first glance that the language ought to be clarified.

(ii) In Article 90, the draft confers power on the Court to order a suspension of publication of the proceedings. I suspect that is probably something which the Court has exercised an inherent jurisdiction to do in the past, but the creation of the right of freedom of expression under the Human Rights (Jersey) Law 2000 means that there ought to be appropriate provision in a statute and I welcome it.

The point I wish to raise for further consideration is linked to this in one way, although not directly. In sexual cases, the identity of the complainant is never published, unless the Court considers it appropriate to do so. The purpose of that provision is to ensure that complainants are not put off making a complaint of a sexual offence committed against them by the publicity which might be attached to it, and that is a perfectly sound policy objective. There is, however, a policy question as to whether the identity of the defendant should also be similarly treated, at least until conviction. It does seem sometimes to be quite unfair that at the end of a criminal trial, where perhaps there has been a unanimous acquittal, or in any event insufficient jurors to find a verdict of guilty that the defendant has seen his name (because it is usually a male) and reputation very adversely affected by publicity, and yet is not guilty of a criminal offence. In a large jurisdiction such as England and Wales, that is perhaps not something about which to be overly worried, although that is not necessarily so even there – but in a small jurisdiction like Jersey, the adverse consequences for an acquitted defendant may be very substantial indeed. Everybody knows that the complaint has been made against him – including his actual or potential employers, his friends and actual or potential colleagues at work and so on. The police I know will probably advance the view that by giving publicity to the name of the defendant, other complainants who have suffered at his hands may come forward and complain as well, thus strengthening the case against him. I understand the force of that assertion, but it seems to me that balancing the rights of the defendant may require a different approach. There may be other practical ways in which police investigation can be improved. It is a subject which perhaps does not fall directly within the Criminal Procedure Law, but is nonetheless one which merits further investigation, and while your Panel is looking at this question more generally, it may be appropriate to focus on this particular issue as well.

(iii) I have referred already to the question of re-trials – and there is a parallel point which arises under Article 75(8) of the draft Law which requires the trial judge to discharge the jury from the proceedings and from the custody of the Viscount in a case where it is unable to deliver a verdict upon which the majority of jurors are agreed. The present arrangements are that the jury is advised by the judge in summing up that it is desirable that they should reach an unanimous verdict if they can, but if after an appropriate time of mature and careful consideration of the issues, unanimity is not possible, then the jury are invited to deliver their verdicts individually. In practice I have not known that arrangement caused particular difficulty. If there is to be an amendment on the issue of re-trials, then Article 75(8) will also need attention.

Apart from these points, I would like to re-emphasise my support for the new draft Law. The existing law, passed in 1864, is past its sell by date, and that has been so for many years. Successive Attornies General have not been successful in bringing forward a revised draft law, for whatever reason, and the current Attorney is to be congratulated on doing so, even if there are some points with which the judges may disagree. I am particularly pleased to see Part 2 included in the draft Law, and the emphasis given to it in Part 3 by the

requirement to see criminal proceedings being actively managed. In practice, the judges have been asserting their right to manage criminal trials more proactively for a few years, but there are some defence counsel who continue to take the line that they are not required to cooperate in any such management issues – they say it is for the Crown to prove its case, and that entitles the defendant to sit on his hands, through his counsel, and play no helpful part in the proceedings. This is not necessarily a complaint against defence counsel, because sometimes the defence advocates are forced into that position to ensure that they are not themselves later criticised by their client for making concessions that ought not to have bene made. The change of emphasis which Parts 2 and 3 of the draft Law bring to the handling of a criminal trial give statutory recognition of what the judges have been trying to do over the last 10 or 15 years, mostly with success. I absolutely welcome their presence in this draft legislation. The purpose of criminal proceedings is to ensure justice is done, and that requires that all appropriate evidence comes forward and that merit-less technical objections do not permit wrongdoers to escape their just deserts.

Yours sincerely

William Bailhache

Bailiff