STATES OF JERSEY

Draft Criminal Procedure Law Sub-Panel

TUESDAY, 13th FEBRUARY 2018

Panel:
Deputy S.Y. Mézec of St. Helier (Chairman)
Deputy R.J. Renouf of St. Ouen

Witnesses:
Commissioner J. Clyde-Smith
Commissioner M. Birt

[13:01]

Deputy S.Y. Mézec of St. Helier (Chairman):
Thank you very much for joining us. Just the usual starting note just to make sure any phones or devices you have are on silent or set to not disturb. We are going to, just for the benefit of the tape, go round and introduce ourselves. So, I am Deputy Sam Mézec, chairman of the Criminal Procedure Review Panel.

Deputy R.J. Renouf of St. Ouen:
Deputy Richard Renouf, member of the panel.

Scrutiny Officer:
Andy Harris, scrutiny officer.

Commissioner Birt:
Michael Birt, Commissioner.

Commissioner Clyde-Smith:

Julian Clyde-Smith, Commissioner.

Deputy S.Y. Mézec:

Thank you. There is actually a notice in front of you if you could just take a moment to read it. It is just confirming you understand. It just explains the rules of privilege while we are here. Okay. Well, thank you very much for your submission on this, which we found very useful and it has helped form some of the basis of the questioning we have been having with others. We have met with the Bailiff and privately with the Law Society. I think it is fair to say that there appears to be a unanimous view that a new Criminal Procedure Law is necessary but there is not unanimity on some of the finer detail of the clauses that it should include. You have helpfully identified some of the areas in your submission that you have concerns over. So, I thought it might be an idea to go through some of those articles that you have suggested and just talk a bit about what you think the issues are and potentially how they could be resolved. So, the first one you have in your submissions, Article 36(3), is about cases between magistrates and Royal Court and also maximum penalties there. Could you just explain what has concerned you about this?

Commissioner Birt:

Yes. As you know, if you are taken before the Magistrate's Court and tried there, the magistrate has a maximum sentencing power, which at the moment is 12 months' imprisonment and a fine, I think, of £10,000. Now, at present under the Magistrate's Court Law, if you then appeal against a decision of the magistrate, appeal to the Royal Court, the Royal Court may vary the sentence but it may not impose a sentence greater than that which the magistrate could have imposed; in other words, £10,000 or 12 months. So you cannot suddenly go before the Royal Court protesting about a magistrate's decision and find you are locked away for 15 months. That, in my opinion, is the correct position. If everyone has agreed you should be tried before the magistrate, you should not suddenly be at risk of a bigger sentence. But Article 36(3) has changed that because it says: "The powers of the Royal Court under paragraph 1" - that is to vary the decision - "shall be construed as including power to impose any penalty whether more or less severe than that imposable by the magistrate under Article 16" and it is Article 16 which now contains the maximum. So, that is absolutely clear that the Royal Court could impose a sentence of 15 months or 18 months. In my opinion, that is wrong and we should revert to the current position.

Deputy S.Y. Mézec:

Do you think there would be a likelihood that if the law is enacted as is currently proposed that in practical terms it would ever happen that the Royal Court would seek to impose a greater sentence on appeal or do you think it is more likely the court may take into account what the magistrate's maximum sentence was and just work within those parameters voluntarily?

Commissioner Birt:

In most cases, no, because probably the sentence imposed would have been well below the maximum. But suppose you had a case where the magistrate had ummed and ahhed and in the end imposed a sentence of 12 months. It is not impossible that the Royal Court would say the magistrate underplayed this. Unlikely, but possible, and I just do not see why it has been changed. I do not know if arguments have been put forward for changing it, and as a matter of principle I do not think it is right.

The Deputy of St. Ouen:

Do you fear this might lead to defendants in the Magistrate's Court being deterred from taking an appeal to the Royal Court which might have merit?

Commissioner Birt:

I doubt it would have much practical effect because, after all, at present they can find their sentence being increased on appeal so they have to take that into account, but only increased within the magistrate's sentencing powers. I just do not understand the logic of this as a matter of principle.

The Deputy of St. Ouen:

Understood.

Commissioner Clyde-Smith:

Personally, I do not think they were intending to do that. I think they are trying to say here that a the Royal Court can impose a more or less severe penalty than that imposed by the magistrate, in other words if the magistrate imposes 6 months you can get 7 months or 8 months, but I do not think they were intending to say that the Royal Court can impose a sentence greater than the magistrate could ever have done. I think it is just a mistake.

Deputy S.Y. Mézec:

It is just an issue of clarity then, about fine tuning that?

Commissioner Clyde-Smith:

Yes. It should be made clear that it is subject to the overall limit.

Commissioner Birt:

Well, the wording could be changed very simply in paragraph 3 by saying: "whether more or less severe than that imposed by the magistrate", full stop.

Deputy S.Y. Mézec:

Yes.

The Deputy of St. Ouen:
We could put that to the Minister.

Deputy S.Y. Mézec:
The next article you have highlighted, Article 50, I do not know if there is too much to say on that, is there? Again, it is more an issue of clarity.

Commissioner Birt:
Yes. I think it is important it be done. Sir Christopher has written on this, I think, too, and I entirely agree with his comments. I think he suggested tweaking it if necessary for a slightly different purpose. I have seen his submissions and I agree with them. But what this says at the moment is that the judge can communicate views as to the facts, and I think Sir Christopher said: "or other matters" which would make it clear that it is not restricted to facts necessary for guilt. What it says at the moment is simply that you may communicate the facts, but what you actually need to say is that the sentencing court may - not must, may - sentence on the basis of those facts. That is the whole purpose of it happening. In other words, because you have an issue, shall we say, as to whether there was a punch or a kick and that was not resolved by the jury's verdict, because whichever it was it was a grave and criminal assault, but the sentencing court needs to know whether it was a punch or a kick, then the trial court can now communicate its view that having heard all the evidence at trial it says it was a kick. But you need to go on to say, I think: "and, therefore, the sentencing court can sentence properly on the basis that it was a kick." The article at the moment simply takes you halfway there.

The Deputy of St. Ouen:
Yes, that is a useful comment. Thank you.

Commissioner Clyde-Smith:
I have nothing to add to that.

Deputy S.Y. Mézec:
Thank you. Shall we move then on to Article 66, which is the concept of reserve jurors? This is something that we have had a substantial amount of comments on here. I think the main concern that we have had put to us was over whether it is necessary for this to be applied in the terms that the law suggests and that it would be better off for longer cases rather than what is suggested here. What are your views on this?

Commissioner Birt:

Well, I was interested to read Sir Christopher Pitchers' submissions on that because he queried the need for it at all. I must confess while this letter simply says maybe the period is too short, I am rather now of a mind of wondering whether it is worth it at all. What you have to bear in mind is the effect of having a reserve juror, 2 of them, is that these poor people have to sit through this trial for no purpose because 99 times out of 100 they will not be called upon. I myself have never known a trial aborted because we have fallen below the number of 10 ...

Commissioner Clyde-Smith:

No, neither have I.

Commissioner Birt:

... nor has Commissioner Clyde-Smith, I think, nor I think are the Bailiff or Deputy Bailiff aware of it. I see from the Law Society they think it happened in Holley. Well, I did the trial in Holley, on the retrial following the Court of Appeal, and it certainly I do not think happened there. So, I am not aware of any case where it has happened. So, certainly in the vast, vast majority of cases these poor, unfortunate reserve jurors will sit through an entire trial and do nothing. So they will go away, frankly, rather hacked off that they have had to do that. It would have been a waste of their time, a cost to their employers, and possibly structurally difficult because it is not clear from this whether they are kept with the jury or kept separate. If they are kept separate I think there are enormous administrative problems, too. You have to ask yourselves if it happens so rarely, is it worth doing it? I think I have rather come round to thinking the 10 days is too short as well because it is too mandatory. I would, if we are going to have it at all - and I think it is very questionable whether we should have it at all for the reasons Sir Christopher gave - if at all I would simply leave it that the Bailiff may, if he thinks the interests of justice require it, appoint reserve jurors so that it would really be covered for the very long case, the 6-month fraud case. I can see there that it might be a good idea.

Deputy S.Y. Mézec:

That would be for the discretion of the judge to decide?

Commissioner Birt:

The discretion of the judge, that he hear applications from prosecution and defence, and he would say: "Yes, this is so long and so complicated that the thought of having a retrial after 3 months is unbearable and I think it is worth the possible waste of their time to do it." But in the vast, vast majority of cases I think it would be a complete waste of time.

Deputy S.Y. Mézec:

How would you practically see that working?

Commissioner Birt:

Well, I think that it would be a matter for probably the prosecution to raise because they would be the one who would have the public interest at stake in saying we do not want to have a wasted trial, or the judge himself might raise it. So, the prosecution I can imagine saying: "We would like to have a reserve or 2 reserve jurors in this case because it is due to last for 4 months." You would have argument and the judge would have to decide. The alternative, as I say, is to scrub it altogether and just once in a blue moon suffer the cost of an aborted trial.

Commissioner Clyde-Smith:

Yes, I agree with that. The more I think about the whole issue of reserve jurors the more concerned I am about it, particularly having read Sir Christopher's letter where he says this has not been brought into force in England. I had assumed that it had. It has I think been brought into play or into force in a hodgepodge of jurisdictions around the world, but we are so closely connected with the U.K. (United Kingdom) that it seems to me strange that we should be going out on a limb here and bringing in something which has not been brought into force in the U.K. so we do not have the benefit of any case law on it. There also seems to be a lot of confusion as to how this is actually going to work because Sir Christopher seemed to think that the reserve jurors would be part of the jury and part of their discussions. They would be sitting with them. When they go out for meals and breaks they would go with them. The Law Society I think take the same view, but I do not think that can be right because if you look at Article 66(h) it says that the reserve juror will be called to serve on the jury if the number of jurors is reduced. So it seems to me that before the numbers are reduced they are not part of the jury. So that means you are going to have 2 people in court and you are going to have to keep them separate from the jury, somewhere else within the auditorium. When the jury go out as they do for breaks frequently, for arguments or for lunch and tea and that sort of stuff, they are going to have to be taken somewhere separate, the 2 of them. They are going to get to know each other very well, I think, in the course of a long trial.

[13:15]

The point that Sir Michael made; it is quite an imposition on members chosen to be reserve jurors. You see the imposition on them when you run these trials. To have somebody there who is simply playing a reserve role and probably will never be called upon is ... I worry about that. So, I entirely agree with Sir Michael. If we are going to have it at all, if we are going to blaze the trail, let us have a discretion where we can use it in very large, long trials where it is really worthwhile. At the moment it would be absurd. We would have to do it at every trial over 5 days.

Deputy S.Y. Mézec:

We did speak to a member of the public who had had an interest in a particularly difficult and emotional case for him. That trial was predicted to last for 3 weeks but ended up only lasting for one week, but he said that they came close to losing enough jurors to end up in that difficult position. He had felt strongly that this was important because with what was a very difficult case for him, for it to have had to be scrapped would have been earth shattering given the nature of what it was about. Do you think not necessarily looking at the length of case but in particular types of cases where there might be that difficult side of it, like a sexual offence case, for example, do you think there is any merit in looking at cases on that basis rather than just the potential length of the case?

Commissioner Birt:

I see that point because there is no doubt that if you have, for instance, a complainant in a sexual offence case the strain of giving evidence is even greater than giving it in another type of case, although the strain of giving evidence is invariably underestimated in any case. But I think I come back to the fact that we have not as yet had a case where it has happened. We have certainly had cases where it has gone down to 10, so in the case you mentioned I can well see everyone probably was on tenterhooks worrying that somebody else might fall ill. We have had cases where it has got down to 10, although not many. I can think of one or 2 like that. But I think you have to balance that, in other words the rare occurrence when it is going to happen, against the problem I outlined of people wasting their time and employers' money or their own firm's money, a self-employed plumber who loses out because he is serving on a jury. At least if he is serving on a jury he feels he has contributed to the administration of justice. If he is just a reserve juror it has been for no purpose. So, you have all these costs, all this wasted time, all this sense of frustration by reserve jurors, to be balanced against the possibility, which we have never had yet, that you might lose a trial and the complainant might have to give evidence again. It is a balancing operation, but at the moment, to my way of thinking, the balance comes down against having it even in the sort of sexual offence case you have described.

Commissioner Clyde-Smith:

Did Sir Christopher not say in his letter that in his long experience as a trial judge he had never come across a case where the juror ... I think he did somewhere in his letter.

The Deputy of St. Ouen:

It is.

Commissioner Birt:

Yes. So it can happen; of course it could happen, but it is rare.

The Deputy of St. Ouen:
How far back does your experience go, Sir Michael?

Commissioner Birt:
Mine goes back as a judge to 2000, so it is getting on for 18 years now. Actually, it is 18 years because it was the beginning of 2000. I was at the bar in England; I never saw it there. When I was Attorney General I never saw it there.

The Deputy of St. Ouen:
Attorney General. When were you ... when did you become a Law Officer?

Commissioner Birt:
In 1994.

The Deputy of St. Ouen:
That is 1994, so from ... you would have known of a trial ...

Commissioner Birt:
I would certainly have known if we had had to have a retrial because of loss of numbers.

The Deputy of St. Ouen:
So that is over 20 years, almost a quarter of a century, and it has not happened.

Commissioner Birt:
Yes.

Deputy S.Y. Mézec:
Almost as long as I have been alive.

The Deputy of St. Ouen:
Youngster. **[Laughter]**

Commissioner Clyde-Smith:
It would be quite difficult to assess it on an emotional basis, I think. Cases can, even though they are not involving sexual offences, still be very stressful.

Deputy S.Y. Mézec:
Anything else on this?

The Deputy of St. Ouen:

No, thank you.

Deputy S.Y. Mézec:

Shall we then move on to Article 75, which I think it is fair to say that you have a number of views on this regarding the changing of rules on reaching majority verdicts?

Commissioner Birt:

Yes.

Deputy S.Y. Mézec:

You are not in favour of this change. Could you just go through the basic reasons why and if there are any further points that have occurred to you since writing this?

Commissioner Birt:

Yes. The reasons are essentially as set out and I suppose they come down to 2 separate grounds. The first one is the risk of adverse publicity in a small jurisdiction. As I say here, you will be aware that the *Jersey Evening Post* quite properly gives headlines to some, indeed most, jury trials because we do not have that many of them, and particularly if it is of a rather sensational nature it is usually the front page with a summary of what the journalist happens to think are some of the important features. Very often you have the sensation of reading a newspaper report and wondering whether they were at the same trial as we were. I expect you probably have seen it in reports of the States sometimes.

Deputy S.Y. Mézec:

No comment.

Commissioner Birt:

So, that is not to say that they are incompetent. It is just that a person writes about a particular aspect which appears to that writer to be either of interest or of interest to their readers. So, undoubtedly when reading a newspaper report you get a very inaccurate picture of the overall evidence. Now, in a small jurisdiction I just wonder whether it is possible for jurors to put that out of their mind when they are called upon in a retrial probably only 3, 4, 5 weeks later. As I point out, we have very strict rules before the trial to prevent this sort of prejudice or damage occurring by our strict contempt of court rules so that the newspapers are not allowed to report the facts of the case at all. So, the circumstances of a retrial will be very different to the circumstances of the first trial. Now, that is not to say that a retrial is impossible but it is a concern and a reason for asking whether

it is the right course. I do think it is particularly relevant in a small jurisdiction. Sir Christopher points out they have them in England, and they do, but first of all there are so many trials in England the publicity tends to be less. It is just yet another trial. Secondly, in really fallacious cases they can move the trial to somewhere far away. Now, Guernsey does not have retrials. The Isle of Man I understand does - I did not mention this in the letter - so they manage it. I think there are differences there. They have juries of only 7 rather than 12. I spoke over the weekend to one of the judges and he said that really they hardly ever have retrials, perhaps because 7 can come to an accommodation more easily than 12, I do not know. That is speculation. Secondly, he says they have plenty of courtrooms so it does not lead to any delays. They do not have a difficulty in that way. So, on balance, I think that the risk of publicity is unhelpful to a retrial and, of course, we have the resource point. 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. Now, I gather there is a proposal that the Magistrate's Court may be converted so that we can have 2, in which case that would address that problem, although there are undoubtedly still resource implications for the Viscount's Department and so on. 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.

Commissioner Clyde-Smith:

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.

The Deputy of St. Ouen:

Are you aware of any sense within our prosecution authorities in Jersey that feels that the balance of fairness has shifted towards a defendant in that way and it needs to be readjusted?

Commissioner Clyde-Smith:

Well, nobody has put forward, as far as I can see, a rationale for this. It is just in the draft law, is it not? Nobody has put forward a case for its need.

The Deputy of St. Ouen:
No, it seems not.

Commissioner Clyde-Smith:
I was interested, I did ask at an earlier stage why it was brought in in England and nobody knew the answer to that. I think it has been there for some time. But it must be to redress the balance of fairness so that the state can have a second bite at the cherry. So if you are accused of a crime and you defend it and you are acquitted by the jury, or rather the jury is hung because they cannot reach a majority verdict, you have to go through it again. Is that fair?

The Deputy of St. Ouen:
Yes, indeed.

Commissioner Birt:
Certainly, in my experience ... because as a judge if it is not unanimous either way you do get to know the numbers. Nobody else does but the judge and the Greffier do, so there is a record of the numbers. Although I have once I think in my time seen 9:3 for a conviction, in other words they have just missed a conviction - and, of course, the jury are told this in advance so they know the consequences of 9:3 - far more common is something where the jury are fairly evenly split or even you have 3 for a conviction and 9 for an acquittal. So I can only remember one where, if you like, there was a feeling of: “Oh, only just missed a conviction.” More often it is that the jury is split so you have 6 people being not satisfied. So I think in those circumstances, as Commissioner Clyde-Smith says, to then insist that everyone has to go through the whole process again, including all witnesses, I am not sure.

Commissioner Clyde-Smith:
I agree with those figures. I think actually it is a matter of record. I think for every conviction the Greffier has a record of the vote, so I do not know whether it would be possible to, on an anonymous basis, ascertain how often it has come that close, but I would say very rarely.

The Deputy of St. Ouen:
We could ask.

Commissioner Birt:
I do not know whether they are allowed to say, are they?

Commissioner Clyde-Smith:
I do not know whether they are or not, but it is certainly a matter of record, as it has to be on the file what the votes of the jury were.

The Deputy of St. Ouen:
Coming back to the adverse publicity point, in a case where there has been a very high profile police investigation and a person is arrested and subsequently put on trial, and when a jury is empanelled it might still have a memory of reporting during the police investigation, do you as judges have to issue a warning to the jury in those sorts of circumstances and is that analogous to the situation that might occur if there were retrials?

Commissioner Birt:
I think there are 2 issues on that. First of all, we give a standard warning always, saying you must try this case solely on the evidence, so you must ignore anything you have read about it. So, that is just a standard warning. 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.

[13:30]

Not 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.

The Deputy of St. Ouen:
Thank you.

Deputy S.Y. Mézec:
Okay, anything else on this one?

The Deputy of St. Ouen:
No, that is all.

Deputy S.Y. Mézec:

Okay, thank you. Shall we move on to Article 81?

The Deputy of St. Ouen:

The one at the bottom of the previous page?

Deputy S.Y. Mézec:

Oh, sorry, I missed that one, yes, 75(4)(b), sure.

Commissioner Birt:

We think this must be a drafting mistake because it is completely nonsensical. Just to clarify what it says, it is ... that is right: "When the jury is ready to deliver its verdict, the jury must ask the juror: (a) whether he is guilty or not guilty of the offence charged." So the charge is grave and criminal assault: do you find the defendant guilty or not guilty of grave and criminal assault? Guilty. "(b) in the case of a guilty verdict, whether that verdict is in respect of a lesser offence than the one charged in the indictment." So, apparently, the jury having just said: "You are guilty of grave and criminal" you have to ask them: "Well, is he guilty of common assault?"

Commissioner Clyde-Smith:

Or some other offence.

Commissioner Birt:

Or some other offence, I do not know quite what it ... I mean, it is nonsensical, so something has gone wrong.

Deputy S.Y. Mézec:

Okay.

Commissioner Birt:

That has to come out. What clearly I think they are trying to say is probably it is in the case of a not guilty verdict it might be. So, perhaps if he is not guilty of grave and criminal, maybe you should go on and ask: "Well, is he guilty of common assault?" But I do not think that should be obligatory. It says at the moment the Judicial Greffier "must" ask the jury. Now, in some cases it will be relevant. Let us assume that the assault alleged involves the use of a fist but it happens to have fractured a jaw or something. While I think most jurors would say, because of the nature of the injury, that is grave and criminal, they might say: "Well, it is on the cusp" so it might be common assault. The defence might have raised that or the judge might raise that. Now, there it is quite right, so if they

come back and say not guilty of grave and criminal, I think the judge should ask: "Do you find him guilty of common assault or is it not guilty altogether?" We do that quite often, but it has always been addressed during the course of the trial and sometimes an additional count is added. But even if it is not, you can ask that question. But it is where he is not guilty of the grave offence and it certainly should not be mandatory so you have to ask it every time. So, let us assume on this wording, even if you read (b) as referring to where there is a not guilty verdict, so if somebody is alleged to have stabbed with a knife, it is obviously grave and criminal assault or nothing, and they come back and say: "Not guilty of grave and criminal assault," you have to ask them: "Oh, well, is he guilty of criminal assault?" So, I think it just needs a revisit and an amendment (a) to not make it mandatory and (b) I think must refer to not guilty verdict rather than guilty.

Commissioner Clyde-Smith:

I think personally it should come out because it is part of a judge's duty. If there is a lesser offence that the jury could convict for, it is your duty to put it before the jury and, of course, you then direct them what the ingredients are. Usually, we amend the indictment to include the alternative, so I do not think it is a problem.

Deputy S.Y. Mézec:

Okay. Now shall we move on to Article 81 about the discontinuance of proceedings? One of the issues is the disparity between what can happen in the Magistrate's Court and the Royal Court here and defendants asking for a trial to continue even when the prosecution have given up, something they must often be desperate to do, I am sure. **[Laughter]**

Commissioner Birt:

Yes, I have not come across this before and I do not know what lies behind it. In my experience, if the prosecution say: "We are giving up because there is not enough evidence" the defence leap up and say: "Great." More seriously, what on earth would be the point of going on if the prosecution have said: "We give up"? As I said there, very often the judge will say: "Right, so we enter a verdict of not guilty, done." So, I do not understand the point, but if there is a point which I have failed to gather, why do we distinguish between the Magistrate's Court and the Royal Court? I am not, I emphasise, urging that the poor jury, having been told by the prosecution there is insufficient evidence to convict, should be invited to stay another 3 days before they agree, but nevertheless logically it is hard to see why one should distinguish, but my own view is that the whole thing should be taken out. If the prosecution discontinue, they discontinue.

Commissioner Clyde-Smith:

Has anybody put forward a rationale for this at all in your inquiries, an explanation?

The Deputy of St. Ouen:
No, not as yet but we have yet to ...

Deputy S.Y. Mézec:
We are going to dig down, though, and find out.

The Deputy of St. Ouen:
We will receive the Attorney General at some time and put all these questions to him and the Minister for Home Affairs.

Commissioner Birt:
We have Dr. Miles here but presumably she is going to respond to all these points on another occasion.

Dr. Miles:
Absolutely.

The Deputy of St. Ouen:
Yes. Thinking of the Attorney General in that position, how would an Attorney General feel if he was obliged to conduct a trial which he no longer felt to be in the public interest or to have a reasonable prospect of succeeding in?

Commissioner Birt:
You will have to ask the current Attorney, but when I have been Attorney in the past I would have said: "Why are we doing this?"

The Deputy of St. Ouen:
Yes, it is a strange provision.

Commissioner Clyde-Smith:
It also takes over the role of the Attorney General, does it not? The Attorney General has exclusive jurisdiction over whether prosecutions are brought, so here you are imposing upon the Attorney General a requirement to continue where the prosecution say ...

The Deputy of St. Ouen:
Of course, that is right.

Commissioner Clyde-Smith:

It is strange.

Deputy S.Y. Mézec:

Adding Article 82 into that, is there anything you want to add on that? That follows on.

Commissioner Birt:

No, that was just ... it may well be a lack of understanding on our part, but I think this is introducing into the law something which I do not think really exists at the moment, a distinction between discontinuance and withdrawal, which certainly I have not really been conscious of. It seems to proceed differently if you discontinue, which admittedly only applies before trial. Then you can do it ... the Attorney General can do it, but he can start again in certain defined circumstances. If there is a withdrawal, which can be at any time, then those criteria do not apply but you need the court's leave. It was really just I was not very sure of the thinking behind it.

Deputy S.Y. Mézec:

Okay, thank you for that. Shall we move ...

Commissioner Birt:

I suppose, sorry, one additional point, if I could, Deputy, which has occurred to me since, which is 81(7)(ii), which is ... this is where the Attorney General can start again after he has discontinued, and (ii) simply says that he is satisfied that the decision was incorrect. I think that is quite a low standard. It simply means the Attorney General says: "Oops, I think I made a mistake when I dropped it before so I want to start again." That is a very low threshold and I think it might be better to say something was unreasonable or plainly incorrect. Either way, my reading would certainly be that the court would still retain the power to say: "Look, if you start again that could be an abuse of process." At the moment, the law is clear that if the Attorney General has said one thing and he comes along later and wants to change it, the court may say: "Sorry, it is now an abuse of process to put everyone through this a second time having said you would not." I think that would be the protection, so I do not feel terribly strongly because I think the protection there is the key. The court could say this is an abuse of process.

Deputy S.Y. Mézec:

Okay. Moving on to Article 83 about the duty of the prosecution to disclose unused material, this raises a few issues. What is your immediate concern about the changes proposed?

Commissioner Birt:

Yes. Well, again, Sir Christopher really says ... disclosure is a really important part of the criminal process and we have all read the papers recently in relation to some sexual offence cases in

England where disclosure has not been done and as a result an injustice either has been done or might have been done if they had not discovered it at the last moment. So disclosure of unused material, meaning material that the prosecution do not intend to present in court because it is not necessary for them to do that to prove their case, is absolutely vital because very often it has something which might assist the defence. So, the normal rule is clear. The prosecution must disclose all unused material and by and large they do. However, there is an exception for that where the prosecution say that to do so would not be in the public interest. The classic example which I have given is that of informers. So, the prosecution have an informer. They know that if they disclose the informer then the defendant or one of his mates might do something very unpleasant to the informer. So there is a public interest in protecting the safety of informers. Now, at present what has to happen is that if they want to withhold anything, the prosecution have to go to the judge and show him the material, say: "Here it is, this is what we would normally have to give to the defence, but we say we should not have to because of the public interest; for example, the safety of the informer." The judge decides. He sees the material. He sees how important it might be to the defence. If it is not very important he might agree with the prosecution. If, on the other hand, he thinks it could really help them and might affect the verdict, he will probably say: "Sorry, you have to disclose it." Then the prosecution either give up or they disclose it, but the important thing is that the matter is not solely in the hands of the prosecution. It is in the hands of the judge. So it is absolutely vital that the prosecution may not withhold unused material unless the judge agrees. What has happened with this wording is it has it the other way round. It is probably not intended, but it says: "The duty to disclose unused prosecution material shall not apply where the prosecution is of the view it would not be in the public interest unless the court orders otherwise." So it is putting it the wrong way round. It is saying that the prosecution withhold it unless the court tells them they have to disclose it. It ought to be the other way round. The prosecution may withhold material in the public interest if the court agrees. So they cannot withhold it unless the court agrees. It is simply a drafting point, but it is a really, really important one.

Deputy S.Y. Mézec:

So you are not suggesting that there may well be a logic in having it this way round rather than what it currently is?

Commissioner Birt:

Not that I can see and if there is a logic it is to give more power to the prosecution, which I think, even though I am an ex-Attorney General, would be wrong. The prosecution should only be able to withhold unused material if they can persuade a judge that it is right to do so.

Commissioner Clyde-Smith:

I have nothing to add to that.

The Deputy of St. Ouen:

No questions.

Deputy S.Y. Mézec:

Okay, yes, thank you. That is helpful. The next article you raised is Article 98 about the warning of witnesses to attend court. I think we spoke with the Bailiff about this one as well, who had agreed with your points.

[13:45]

Commissioner Birt:

Yes, it is a simple point, really. I have to say at present the Jersey system works incredibly well and is much better than the English system. Our system is that all people who are to be called as witnesses, whether for the prosecution or the defence - assuming the defence notify the prosecution - are summoned through the Viscount, told: "You must come." If they do not turn up, they can be arrested forthwith and brought to court, which means that trials are not delayed because by the time the case has been opened and the jury is sworn in and so on, somebody has been off to grab the chap, assuming that he or she is in Jersey, and brought him to court. So the cost and time and expense of a wasted trial is not incurred. In England, my understanding from speaking to a number of other judges is that trials are often having to be adjourned because witnesses do not turn up. Why? Because they have the system that is being introduced here of a witness summons, but most of the time the prosecution do not get a witness summons because in order to get a witness summons you have to have some reasonable grounds for believing a witness will not turn up. Clearly, if the witness said: "I am not going to come to court" then you can go and get your witness summons ahead of time, but if the witness says nothing but just does not turn up on the day, you have not been able to get a witness summons in advance. So, a witness does not turn up, the case has to be put off at vast time and expense to everybody. So I myself think we should stick with our current system, which is better than the system which is proposed.

Deputy S.Y. Mézec:

Are the rules under the current system used often?

Commissioner Birt:

No, because everyone is summoned by the Viscounts and people are very good about obeying it.

Commissioner Clyde-Smith:

Yes, the summons carries a warning, I think.

Commissioner Birt:

It carries a warning. The Viscount's officer says you must come. It is done personally. I suppose I must have had a case where a witness was not there, but I certainly cannot remember many. The system works terribly well and we do not lose time and money and waste everyone's time and the jury's time because a witness has not turned up.

The Deputy of St. Ouen:

Is the balancing exercise here that you must take account of the Viscount's time and the resources available to the Viscount in summoning witnesses? I do not know, but is that perhaps the reason for the provision that there should not be that need to involve the Viscount in each and every …?

Commissioner Birt:

I do not know. Dr. Miles and any others would know. Maybe there is pressure from the Viscount's Department, but it has never been communicated to me, while I was Bailiff, that the Viscounts were suffering under the pressure of serving notices. I have never had a notification of that. If that is the reason, then you have to balance the saving of cost to the Viscount with the enormous inconvenience and cost of an aborted trial.

The Deputy of St. Ouen:

Yes, or even delaying it for a day.

Commissioner Birt:

Even delaying it for a day, you might find that it is set down for 5 days and other cases are fixed to start the following Monday, a new trial perhaps, so chaos can be caused if a criminal trial overruns.

The Deputy of St. Ouen:

Yes.

Commissioner Birt:

Again, it is rather different from England where you have lots of courts, lots of judges, so if one trial overruns it does not matter, you move the next trial. They are all given very vague dates anyway. Our system is very much run, because we do not have very many courts, so that is the slot for that case and it has to finish within that slot.

The Deputy of St. Ouen:

Yes, thank you.

Deputy S.Y. Mézec:
The last aspect you have raised is on the changes to police procedures and criminal evidence law. The first point you have raised looks like a drafting issue.

Commissioner Birt:
It is a drafting point. It is a simple point.

Deputy S.Y. Mézec:
On evidence of a defendant's bad character being admissible, this is an interesting point of principle here and one that not everybody agrees on how far it should go. Do you think what the law is proposing is the right way to go?

Commissioner Birt:
I grew up practising law in England and practising law in Jersey where there were no bad character provisions. In other words, your bad character only goes in in very limited circumstances, where you attacked a prosecution witness or where you pretended you were of good character when you are not or where a similar fact evidence allows it. So, I have grown up with that system. On the other hand, I have a number of friends who are judges in England and I have asked them over the years: "What do you think of this bad character evidence? Has it helped or not?" Most of the ones I have spoken to say it works. It enables the jury to have a better picture. They think that it does not cause prejudice and they are in favour. I have no problem, I do not think, with it being brought in. There are the protections of the judge's discretion. Certainly, it should not be allowed to buttress a very weak case. I think if you have a very weak case and somebody who has done it before, I think, that is when it can be misused. But I am supportive of it.

Commissioner Clyde-Smith: We also have an extensive body of English case law to follow, which I think is very helpful. It is not as if we are bringing in something which has not been tried before.

Deputy S.Y. Mézec:
Do you think with it being made available in this way that it might encourage some prosecution lawyers to attempt to bring it forward … I have to be careful how I phrase this, but to bring it forward when it probably should not have been brought forward and might be, as you alluded to, an attempt to enhance what otherwise would have been a weak case? Is there a risk that it could just become routine now?

Commissioner Birt:

Well, you have to rely there on the protection of the judge, because it does require the judge's permission, as I understand it, to bring it in. You cannot just turn up and say: "Here we are" and produce all sorts of evidence of bad character. You have to get leave from the judge to do it. Defence are likely to say: "You should not do it, for these reasons" against whatever the prosecution are saying, and you have to then rely on the judge to be fair to say: "Yes, in this case I think it is okay" or: "No, in that case, I do not." As I say, I do not read or hear of any situation in England which says that it is leading to injustice.

Deputy S.Y. Mézec:

There have been some issues that have been raised by other people who have submitted to us that have not featured in your submission that I thought it might be an idea to ask you about. You may or may not have strong feelings on any of these. One that has been brought up is about the membership of juries, which will now include particular categories of lawyers. Some we have spoken to have said that it is absolutely right that a wider cross-section of society should be able to serve on a jury. But, of course, there have been concerns raised that lawyers, because of their experience, inevitably have a way of thinking or a way of looking at a trial and may influence the rest of the jury in a way that otherwise does not happen now. Whether that is a good thing or whether that is a bad thing, is that something you have particular feelings on?

Commissioner Birt:

I do think there is a risk of criminal lawyers influencing juries, although they should not if they are true to their oath, in effect. Let me explain. Take a case where if a defendant has no previous convictions, for example, the judge has to direct the jury: "He has no previous convictions and you may take this into account in his favour." If, of course, he has previous convictions the judge does not give that direction. At present, the jury simply, therefore, hear nothing. They do not hear he has any previous convictions, but nor do they receive a direction from the judge saying he has no previous convictions and you can take that into account. So, they just do not know. A criminal lawyer will know that if there is no direction from the judge saying he has no convictions then he must have them. Now, he should keep that to himself, but if he were wrongly to communicate that to the other members of the jury that would be grossly improper. So, clearly by letting lawyers on the jury you have that risk. Having said that, I think most commercial lawyers would not know that, it would only be criminal lawyers. Now, I see that there is a protection in that it is only lawyers who have been involved in criminal cases in the last 12 months. I suppose if it were me, I probably would delete the "12 months" and just say: "If you are a lawyer who practises in the criminal world, you probably should not sit on a jury."

The Deputy of St. Ouen:

It is possible that lawyers may have practised criminal law at some stage in their career or would have some knowledge of it or if not they might have partners or colleagues who are practising in criminal law. Does that create any risks?

Commissioner Birt:
I think the safer course probably would be to not have lawyers on the jury. That would avoid any problems that may arise. It is not something I feel strongly about because I think you can put in protections along the lines they have or they may need to be strengthened a bit.

Commissioner Clyde-Smith:
The only thing I would add to that is that advocates and solicitors, are, of course, officers of the court. I do not know whether that is something which is borne in mind. To be fair to the defendant, you need a jury that is entirely independent. So, you could have a foreman being elected who was an advocate and, therefore, an officer of the court.

Deputy S.Y. Mézec:
Yes, that is interesting.

Commissioner Clyde-Smith:
Whether that amounts to anything I do not know, because as I understand it in England, as Sir Michael was saying, judges can sit on juries. Basically, one has always thought that juries are completely independent of the court and anybody connected with it. So, you could have people who are actually part of the court system, officers of the court.

[14:00]

Deputy S.Y. Mézec:
You have raised that issue of the foreman who under this law would be elected rather than appointed. Putting that with the prospect of lawyers serving on juries, this is just my guess, but I would suspect that if you put a jury in a room together and they know one is a lawyer, I would guess that a lot of the jury would go: "Oh well, they must know what they are doing then," and want them to be the foreman automatically as a result of that. Do you think that is something that could be problematic?

Commissioner Clyde-Smith:
I think it would happen. Nobody knows what goes on inside juries' rooms; it is completely confidential. But I imagine.

Commissioner Birt:

They might not know he is a lawyer, but I can see that happening. I do not see the fact that a lawyer would be a foreman as being any more a problem than the lawyer being on there. I mean, either he is … he should be a reasonable chairman as a lawyer. If he is going to give the sort of secret information I just described earlier, he could do that whether he is the foreman or whether he is an ordinary member of the jury. So, I do not think the foreman point is necessarily an added worry. It is just the fact that he is likely to know and understand things about the process that the ordinary member does not.

Commissioner Clyde-Smith:

I think I would add to that from my much more limited experience in jury trials is that there is a lot of curiosity on the part of the jury when you adjourn because a legal point is raised. Counsel would get up and say an issue needs to be discussed in the absence of the jury. So, the jury then go out and, of course, they are very curious to know what has happened. I could see a temptation, if you are a lawyer with some criminal experience, to explain to the jury what you think is happening. I think there could be quite a temptation there.

The Deputy of St. Ouen:

It would be possible under this provision for the honorary police, including Centeniers, to serve on a jury. Does that cause you any concern?

Commissioner Birt:

Well, again, there is the protection maybe not if they have been involved in criminal things in the last 12 months, I think. I am not so concerned about Centeniers as lawyers, I think. A Centenier does not have a great knowledge about the technicalities of a criminal case in the Royal Court. Although he is a member of the honorary police, he is very much a sort of semi-judicial figure of parish wards. I think my concerns are greater in respect of lawyers than Centeniers.

Commissioner Clyde-Smith:

I do have an element of concern. Again, it goes back to this point of the jury being completely independent. People who are prosecutors or Centeniers, okay, there is a 12-month period, but I would be concerned about that, I think, if I was facing a jury trial. I would want people who are completely independent, not somebody who has prosecuted cases up to the last 12 months or Centeniers who are there, of course, to enforce the law. They are prosecutors as well. I do not think they should sit on juries.

The Deputy of St. Ouen:

There is provision in the law for the defence being required to produce, say, a defence statement of case and, therefore, give advance knowledge of the nature of the defence the defendant might wish to run. Does that cause you any concerns as judges, in the sense of might it infringe the fundamental right to silence?

Commissioner Birt:

I am in favour of it. Yes, of course, the right to silence is important, but you have to ask: what is the court there to do? The answer is it is to convict the guilty and acquit the innocent. That is what justice is, in a perfect world. Now, it is, of course, perfectly open to a defendant to say nothing and to not give evidence, in which case he would presumably not file a defendant case. But it cannot be used against him because he will not have given evidence. But what I think is wrong is where a defendant says nothing at any stage and then lo and behold goes into the witness box and gives a very detailed account, which he has been able to think out, which comes to everyone for the first time. The prosecution cannot check it because they have not been given any notice of it. The only exception to that, which already exists, is alibi notices. In other words, if you as a defendant, your defence is: "I was not there, I was somewhere else" you do already have to give notice of that. Also you have to serve notice of who your witnesses will be, so the police can go along and ask these witnesses: "Well, was he there?" Otherwise, you can imagine on the day in court he says: "Oh, yes, I was in London. My mates X and Y will confirm that." X and Y come along to court and say: "Yes, yes, he was with us in London." There is no way the prosecution can challenge that when it is sprung upon them. Now, I think the same principle as applies for alibis, it is correct, it should apply generally. So, I think it is right that if there is a defence other than silence some notice of that should be given so that it can be checked out. Sometimes it might help even the trial end, because it is checked out and it is found to be correct. Other times it simply enables the prosecution to say: "There is some evidence against them." I think it is a fair solution. The prosecution have to put all their cards on the table. I think if the defence have a case, other than saying: "Prove your case," they should have to say so. I do not think it has worked unfairly in England where it exists. We are not here imposing an obligation that you have to say something at interview, so you only have to put forward your case much, much later when you have seen everything the prosecution have to say, got your lawyer, the whole process has started and so you have plenty of time before you have to say: "Well, what is your defence? What are you saying?" To take a simple case: "Are you saying it was not you who assaulted him at all? Or are you saying you were acting in self-defence."

Commissioner Clyde-Smith:

I agree. I see no fairness in defence by ambush, which is basically what defendants can try and do. I see nothing fair in that.

The Deputy of St. Ouen:
I was just going to say - I must check the law - but is it the case, in your understanding, that if a defendant does not give a defence case that an adverse inference can be drawn from it?

Commissioner Clyde-Smith:
Is that Article 84?

The Deputy of St. Ouen:
Article 84, yes. It is Article 84(4), is that right? If the defendant fails to comply and there is a possibility of comment being made or inferences drawn, you shall give a warning to the defendant. Is that right that a judge could comment on the failure to give a defence case?

Commissioner Clyde-Smith:
There is a further provision, I see, which does allow that. Article 87 I think it is.

The Deputy of St. Ouen:
I see. Oh, yes.

Commissioner Clyde-Smith:
Yes, it is. It is Article 87(2): "Where this Article applies a Court of any other party may make such comment as it feels appropriate".

Commissioner Birt:
What comment would you make where if he was simply not … it is not allowed to comment adversely on his failure to give evidence. So, all you would be reduced to saying is: "Well, the defence does not give evidence and nor did they file a case statement." If you like, the non-filing of a case statement disappears under the not giving evidence. The defence in that case is simply the prosecution has to prove its case.

Commissioner Clyde-Smith:
Yes.

Commissioner Birt:
Clearly, this law does impose a pressure to make a defence statement, because if you do not have some sort of pressure nobody will do so. I do not see injustice in the way they have structured it, which follows the English structure.

Commissioner Clyde-Smith:

Yes, it has to have teeth, does it not, otherwise it just would not be complied with. I do not see why it is unfair that if you do not assist the process of a fair trial by indicating what your defence is, comment can be made to that effect to the jury and they can draw whatever inferences that appear proper.

The Deputy of St. Ouen:
Thank you, that is helpful.

Deputy S.Y. Mézec:
Just finally then, are there any issues that you think arise from the law that we have not covered this afternoon and that did not occur to you at the time that you wrote your initial submission but you do think is important to add at this point or perhaps an observation based on some of the other submissions that you have seen?

Commissioner Birt:
I do not think so, no. A lot of those points seem to be addressed by the current draft. In general, I am in support of the law and I do think that those who have prepared it have done a good job, pretty much. It is long overdue. It has been a mammoth task to try and bring it all together, so I think they are to be congratulated. The fact that we have a few comments and criticisms does not detract from that.

Deputy S.Y. Mézec:
Okay. Can I thank you very much for your time this afternoon? That has been really helpful. We have work to do. There will be a hearing at some point with the Minister for Home Affairs and the Attorney General and some of the points that you have raised will give us food for thought. We will question those and see what we can do to make sure that if any amendments are required to improve things or comments to support the law and various provisions or constructive criticism, then that is what we will be doing. So, thank you very much for your help. I call the hearing to a close. Could I ask those in the public gallery to exit the room first, please?

[14:10]