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The Jersey Law Review - February 2004 **ANY FRIDAY IN THE SATURDAY COURT**

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1 In 2003, as part of the in-house training programme at the Law Officers' Department, a series of discussions about Royal Court criminal procedure was held. During those sessions it became increasingly clear that a useful way of visualising the various paths and centres of the criminal process was to concentrate upon the contents of a Crown Advocate's briefcase on any given Friday morning in the *Samedi* division. In that way it was easy to see the criminal part of the public business list on a Friday morning as a gateway at which some cases are dealt with, and through which others pass in order to reach a different level of activity.

2 What follows is an abstract of the training observations which were offered at the in-house sessions. It is quite a good idea to keep a thumb in the page with the chart at the end of this article. At the bottom of the chart coming into the Law Officers' Department from the left and the right are case files. Those coming in from the left are from the uniformed services, generally the Police and Customs. Those coming in from the right are from, what it is convenient to call, civil service departments - characteristically Housing, Social Security, Health and Safety and Income Tax - although increasingly files are coming from the Jersey Financial Services Commission, which is not a civil service department.

3 It is important to understand that when these files come into the Law Officers' Department they are pretty much unrefined. A case file is essentially a lever-arch file containing a series of witness statements and key documentary and photographic exhibits. It is covered by a report of the investigating officer.

4 Those that come in from the uniformed services will have been through the Magistrate's Court and therefore come up after committal. That means no more than that they have passed the lowest available test in the criminal law, namely the establishment of a *prima facie* case. A magistrate has seen enough to convince him that the matter has the appearance of criminality and should be referred to the fuller process of the Royal Court. One should remember that in the case of a paper committal the magistrate has not even reached that low level conclusion - it has simply been accepted by defence counsel.

5 Files coming in from the civil service departments for the usual range of statutory offences have not even been through the committal stage. No person in legal authority has ever seen the case file before. It comes into the Law Officers' Department from the hands of a civil servant. This is not to say that it is anything other than professionally prepared.

6 In the box marked Law Officers' Department on chart (1) the Department is referred to as 'the gate keeper' because essentially the files are examined and worked on to see whether they are fit to proceed onward to the gateway of Royal Court process, in what form, and what needs to be done to get them fit. This work identifies any cases that are not fit to proceed and can never be made so. Represented at the bottom of the Law Officers' Department box is the work of a member of that department examining the file and, for example, making enquiries with those at Police Headquarters, commissioning extra information, identifying any need for extra statements to be taken or other work done, and doing the legal research necessary to see whether and if so, in what form, the case should be indicted.

7 Above that in the box will be seen the word 'Abandon'. It happens from time to time that the conclusion is reached that the case cannot proceed because a vital legal ingredient is missing or, to take another example, because a witness cannot be found. Above that in the same box is shown the crucial drawing-up of the indictment. This is where the rules start to have a crucial importance. An incorrectly drawn indictment can cause a case to fall to the ground from the outset, at the close of the prosecution case, at the close of the defence case, or on appeal. Adherence to the Indictments (Jersey) Rules 1972, as amended, is vital.

8 It is important to note that the Attorney General can indict for any offence which is disclosed by the evidence which has come to him in the case file. There is sometimes no resemblance between the charge on which the accused was committed by the magistrate and the indictment on which he is prosecuted by the Attorney General. Because the Attorney General reshapes the charge sheet - perhaps bringing entirely different charges - this is not an occasion for the defence to be granted costs.¹

9 In the case of the civil service files, e.g. Health and Safety, all of the stages which have just been described take place. There is, however, a slight difference in form. A company which is being prosecuted for a breach of the health and safety laws, for example, is not indicted. Instead, it is sent a summons which specifies the charges and it is required to answer that summons by appearing in court on the appointed day. For court purposes the summons is turned into a *billet* (not an indictment) and it is the *billet* which is read and to which the company pleads.

10 At this point, then, the work has been done in the Law Officers' Department - decisions have been taken, cases have been studied, indictments or summonses have been drawn up and all of the matters now have to proceed. The gatekeeper has done his work and it is time for the cases to move forward to the gateway of the Royal Court. How are the cases brought to that gateway? Linking the box showing the Law Officers' Department and the box showing the Royal Court will be seen an arrow with the words 'custody, warning, summons (*saisie* and *signification*)'. All this means in practical terms is

¹ *Att.Gen. v Jones* November 19th, 1999 unreported

the following: that if the person to be indicted is in custody, the prison is notified that he or she must be brought down to court on a certain date at a certain time; if he is on a warning, *i.e.* bail with a warning to come to court when required to do so, then he is formally notified by the police that he must appear in the Royal Court on a certain date at a certain time. If it is one of those statutory offences, a Housing, Social Security, or Health and Safety infraction then, as already mentioned, the notification is done by way of summons. The summons is formally served and in the text of the summons which sets out the charges is a requirement notifying the company that it must be represented by a director in court on a certain date at a certain time. Included on the chart is the process known as 'saisie and signification'. It is not terribly important in practical terms. But the power does still exist and has been used on rare occasions, really as a method of last resort. It is the power of the Attorney General to direct a police officer to arrest someone immediately and to have him brought without any more formality before the Royal Court at the first opportunity.²

11 In the ways described, then, the cases are brought into the Royal Court. Friday morning court is a classic institution and is very much the gateway into the whole of Royal Court process. Cases may be dealt with at the gateway itself or may proceed from there on a longer journey.

12 If one looks at the Friday morning court box on the chart one sees that the Crown Advocate has brought seven cases files to Court; he or she therefore has just about one of everything that can happen. If one looks at the bottom line of the Royal Court box one sees that in the Law Officers' Department the gatekeeper decided that the case (case 1) did not make the grade for some reason and therefore it is abandoned. The accused has to be there, the abandonment has to be formally announced and as often as not the defence gets its costs without argument. The accused is free to go. The abandonment is usually announced either because there is insufficient evidence, or because a prosecution is not in the public interest.

13 In the second case the indictment is read to the accused and he pleads guilty to it. Because all the work has been done and the necessary background reports are available and because the prosecution is not moving conclusions of more than four years, sentencing can proceed immediately. It does not matter whether this is a common law or a statutory offence. The Crown is simply in the Inferior Number moving for a sentence within the jurisdiction of that court. The accused is therefore appearing before the Bailiff and two Jurats as a sentencing court for these purposes. Once the accused has pleaded guilty the Crown Advocate will read out a summary of the facts of the offence; the Crown Advocate will point out the accused's personal circumstances, including any criminal record; the Crown Advocate will refer to some previous sentencing decisions of the Jersey courts or - if appropriate - the English courts (usually guideline cases only, whether

² The power is described by the Royal Commissioners – see *First Report of the Commissioners appointed to inquire into [the Criminal Law] 1847*, at paras.586-589

Jersey or English) and the Crown Advocate will move the Attorney General's conclusions which, because the case is in the Inferior Number, must be for four years' imprisonment or less. The defence advocate will then speak in mitigation usually seeking to minimise the facts, accentuate the positive aspects of the accused's character and antecedents and usually seek to argue down the prosecution's conclusions either in kind (by moving for probation or a fine rather than a sentence of imprisonment) or in quantity (accepting that the offence really does merit prison but not as much as the prosecution has moved for). The Court then retires to deliberate. Sentence is a matter for the Jurats alone. The Bailiff has no voice in it. The only time that is not true is when the Jurats cannot agree between themselves.³ The Bailiff then gets the casting vote and is not obliged to cast it in any particular direction, *i.e.* he is not bound by any convention to move for the more apparently lenient of the options. The Bailiff and Jurats then come back into court and announce the sentence. These days it is incumbent upon the Bailiff to give a short reasoned judgment as to why this particular sentence is being imposed.⁴ If a court is dealing with a young offender then the additional formalities contained in the Criminal Justice (Young Offenders) (Jersey) Law, 1994 have to be observed.⁵

14 In the third case which is in court, again the accused pleads guilty to the indictment which is read out to him. This time, however, the Probation Service and/or other background people, *e.g.* psychologists, have not completed their reports. The Crown Advocate knows that in any event the Crown will be moving for a term of imprisonment which does not exceed four years, so that sentencing will eventually take place in the Inferior Number *i.e.* when the reports are ready. It is therefore a case of putting the case off for, say, four weeks so that the background reports can be completed, with the accused being remanded until that date on the appropriate (usually the existing) terms. Alternatively, if the offence to which he has just pleaded guilty is a serious offence, the Crown Advocate is likely to move that the accused should be remanded in custody even though thus far he has been on bail. In four weeks' time this case will come back before this same court - the Inferior Number - and sentencing will take place according to exactly the same procedure as was described in paragraph 13 above.

15 In the fourth case the indictment charges the accused with a grave and criminal assault. He pleads guilty but says that he acted under severe provocation from the victim. Although that is not a defence, it may be very significant mitigation to keep the sentence down. However, it is the prosecution case that this was a completely unprovoked assault by a drunken accused on a victim who was a complete stranger to him. Because the issue goes so directly to the level of sentence likely to be imposed, it has to be resolved by a trial process. Therefore the Crown Advocate accepts the plea of guilty, but indicates to the judge that there is a dispute about the factual basis upon which the accused is to be

³ Article 13 of the Royal Court (Jersey) Law 1948

⁴ See *The Art of Sentencing* (2002) 6 JL Review 1

⁵ See in particular art. 4 of that Law.

sentenced. The accused is then remanded to a pre-arranged date so that the Newton trial of that issue can take place on that date.⁶

16 In the fifth case the indictment is read and the accused pleads guilty to a multi-count indictment of serial sexual abuse of children, including sodomy, over a course of years. It is perfectly apparent to all that the sentence for which the Attorney General will now move will be in excess of four years. That makes it the preserve of the Superior Number for sentencing. The Crown Advocate therefore moves that, having pleaded guilty, the accused be remanded to appear in the Superior Number (Bailiff and at least five Jurats) for sentencing on a date which has been pre-arranged and which is now announced to the court. Again, the question of the terms of the remand - custodial or on bail - will arise for consideration.

17 In the sixth case the indictment is read out to the accused. It charges a string of offences of breaking and entering and larceny. He pleads not guilty to each of the offences. There will have to be a trial and, because the offences charged are common law offences, that trial will take place before a jury at Assize.⁷ Again, the Crown Advocate knows that date by pre-arrangement with the Bailiff's Judicial Secretary and he announces it to the Court asking for the accused to be remanded until that date to stand trial before a jury. Again the question of a custodial remand or remand on bail/a warning arises.

18 In the seventh and final case that Friday morning a large firm of building contractors is charged with a serious breach of the Health and Safety laws which has caused one of its workmen to suffer a fractured spine and severe injuries to both feet. The company is represented by one of its directors; the *billet* (not the indictment - this is one of those 'civil service' cases that have come in from the Health and Safety section of the Employment and Social Security Department) - is read and through counsel the director on behalf of the company will indicate whether or not the infraction is admitted.⁸ Here the infraction is denied and, again, there has to be a trial. But this time, because it is a statutory offence, it will be a trial not before a jury at Assize but before the Inferior Number, sitting not as a sentencing court but as a court of trial (*i.e. en police correctionnelle*). That means that the company, on a future day, will re-appear before this very court (Bailiff and two Jurats - although it does not have to be the same individuals) and there will be a criminal trial in the fullest sense, the only true distinction being that the two Jurats will form the tribunal of fact and not a randomly selected jury of twelve members of the public. Again, by a pre-arrangement, the Crown Advocate knows the trial date and now announces it to the court. The court remands the matter until that date. Because the accused is a company, there is no question of there being a custodial remand.

⁶ As to that trial, a detailed discussion of principle and procedure is contained in *Newton and the Reverse in England and in Jersey* (Cambridge, 1995), issued as a supplement to Whelan, *Aspects of Sentencing in the Superior Courts of Jersey* (1st edn.).

⁷ In fact the accused can choose to be tried by the Jurats. See art. 1 of the *Loi (1864) sur la procedure criminelle*. In these circumstances the trial court is said to be the *Nombre inférieur sans enquête*.

⁸ Strictly one does not plead 'guilty' or 'not guilty'. There is no indictment. The appropriate response from counsel is 'The infraction is admitted' (or denied) as the case may be.

19 If one looks to top left-hand corner of the box one will see firstly that there may be a bail application made by any individual who is remanded; and then at the double asterisk one sees that also on the list may be separate bail review applications from the Magistrate's Court in cases which have not yet been indicted and found their way to this gateway occasion in the Royal Court. There is a crucial distinction between the criteria which apply before the Royal Court is seized of the case on indictment (review) and those which apply after the Royal Court is so seized (consideration *de novo*).

20 That, then, is a brief account of the whole range of activity which is going on at this busy Royal Court gateway on any Friday morning so far as concerns criminal cases.

21 Taking things in sequence as they appear on the chart, it is time to consider what happens to those cases which pass through the gateway of the Friday Court and are remanded up into higher levels of the criminal process, rather than being dealt with at that gateway point.

22 If one thinks about it, that remand out of the Friday Court can only be for one or two purposes, either for sentencing or for trial. If one looks at the chart then, the movement up out of the Friday Court box, on the left is the sentencing remands to the Superior Number. In this case it is case 5 from the Friday morning. It will be recalled that on the Friday morning the accused pleaded guilty to a string of serious offences and was remanded to the Superior Number for sentencing. There it is on chart (2). His sentencing takes place in front of the Superior Number (Bailiff and at least five Jurats, *i.e.* any number of Jurats between five and twelve). He is being sentenced now in this Court because the prosecution is going to recommend by way of its conclusions that he should receive a term of imprisonment of more than four years. The sentencing process which has been described in respect of case 2 down in the Inferior Number on that Friday morning is exactly the process which now takes place in this Court, the Superior Number. The only difference is the number of Jurats. The rationale is probably no more than this: if the prosecution is asking for a seriously heavyweight sentence, then scrutiny by a wider selection of judicial opinion is desirable. The four year figure is more or less arbitrary as a watershed. Once it was three years, and before that it was two. The selection of the break point must be supposed as much as anything else to be based on logistics. There are many more practical difficulties in convening five and more Jurats, given their commitments, than there are in convening just two Jurats; thus the extension of the Inferior Number jurisdiction.

23 Looking to the other side of the diagram at this level there are the trials. These matters have been remanded up out of the Friday Court process because a quite different level of activity is required. In ascending order there is first the centrepiece of the criminal process, the jury trial (still referred to as an Assize trial in Jersey). That is case 6 from this Friday morning court. The accused has pleaded not guilty to the common law offences charged against him and it is the jury who must now decide whether he is guilty or not.

24 Then there is the other sort of trial which will take place is case 7 from the Friday morning Court. There, it will be recalled, the company has denied a serious offence and that issue has to be decided by a tribunal of fact. In this case, because the offence is statutory, the company has no option of being tried by a jury as the tribunal of fact. Instead it will be tried by the Bailiff and two Jurats, *i.e.* by the Inferior Number sitting *en police correctionnelle*. Just as in a jury trial, the Bailiff is the judge of law but the facts are for the tribunal of fact, in this case the two Jurats. If the two Jurats are split on the issue of guilt the Bailiff becomes a judge of fact and gets the casting vote.⁹ Again he is not bound by convention to cast it in one particular direction or another. He simply votes on the issue of fact according to his conscience and his view of the evidence. The internal procedure which governs this sort of trial is in large measure indistinguishable from the procedure which takes place in front of a jury.

25 Finally, under this trial heading remanded out of the Inferior Number on the Friday morning, comes case 4. This was the case in which the accused has pleaded guilty to the grave and criminal assault but claims that he was provoked and, in the light of that provocation, that he should receive a much lighter sentence than would be the case had there been no provocation. The Crown's case is exactly that, *i.e.* there was no provocation so that the reductive effect that the accused is trying to establish is not in truth present on the facts. This is the so-called 'Newton' hearing (Newton did not in fact get a hearing). I have listed this under the trial heading very deliberately. A Newton hearing is a term of convenience and nothing more. It is absolutely vital to appreciate that this is a trial in the fullest and most absolute sense. That is why the expression 'Newton trial' is to be preferred to a 'Newton hearing' because it reminds one that this is nothing more and certainly nothing less than a trial. The burden of proof is always on the prosecution and the standard of proof is the criminal standard. Vitally, it can be said that the essential procedure should be indistinguishable from that which takes place at a jury trial.

26 That, then, is the trial level of activity within the Royal Court procedure. The broken arrow going upwards on the chart shows what happens after a trial. If the accused has been acquitted, then he walks away and the defence, in most circumstances, has its costs. But here on the diagram it is supposed that there has been a conviction. It follows that the accused has to be sentenced for the offence(s) of which he has been found guilty. When the verdict is announced, the prosecution simply moves that he be remanded to a pre-arranged date so that there can be a separate sentencing occasion. That sentencing occasion will be either in the Inferior Number (so that the accused may feed back into the Friday morning Court occasion for sentencing) or he will be remanded for sentencing by the Superior Number and will undergo exactly the same process in the Superior Number as case 5 underwent, which shows on the diagram and about which mention has already been made. Again, the choice of court will depend upon the level of sentence for which the prosecution proposes to move. And again, following conviction and before sentence the accused may make an application for bail. In a case which is likely to attract a prison

⁹ See art. 13 of the *Loi (1864) sur la procédure criminelle*

sentence the granting of bail is still to be regarded as somewhat exceptional at this point of the process.

27 Thereafter, *i.e.* once the accused has been convicted and then sentenced, the question of appeal arises. To which court he appeals is a difficult question depending upon which Court he was in and what sort of appeal he wants to make. On the diagram, opposite the arrow with 'APPEALS' on it, the question has been reduced to a single formula -

- (1) the appeal against conviction is always to the Court of Appeal;
- (2) the appeal against sentence is always to the Court of Appeal - except that if it is an appeal against sentence alone, and the sentence was imposed by the Inferior Number, the appeal is to the Superior Number. This remains true even if there was a plea of guilty, rather than a trial.

28 Upwards from that Court of Appeal stage is an arrow on the diagram showing the possibility of a further appeal to the Judicial Committee of Privy Council. That is something of a specialised rarity. It is probably sufficient for present purposes to say that the Privy Council option is open both to the prosecution and the defence. The key procedural point is that the jurisdiction of the Judicial Committee of the Privy Council is a prerogative jurisdiction. An applicant therefore needs the special leave of Her Majesty in Council under rule 2(b) of the Judicial Committee (General Appellate Jurisdiction) Rules 1982 to bring what is in essence a petition of appeal. Leave is likely to be granted only in those cases where there is a crucial point of public/legal importance to be considered. There is the broadest of analogies - although the test is likely to be far more stringent - with the process in England of asking the Court of Appeal to certify a point of public importance for the consideration of the House of Lords.

29 One gets a sense of the sort of issue with which the Privy Council will involve itself, and the mode of its approach, if one reads *Renouf v Attorney General for Jersey*.¹⁰

30 The most recent criminal case to go to the Privy Council from Jersey (and thence to Europe) was *Snooks v Att.Gen.*¹¹ The issues which fell for consideration in that case were fundamental, structural, and systemic - how should an Inferior Number trial, before Bailiff and two Jurats, be conducted? Was the existing time-hallowed procedure acceptable in the modern world? Did it accord with standards of fairness as they have become generally to be recognised? For Privy Council purposes the distinction one is trying to draw is between issues of this sort which go to the very foundation of our law and

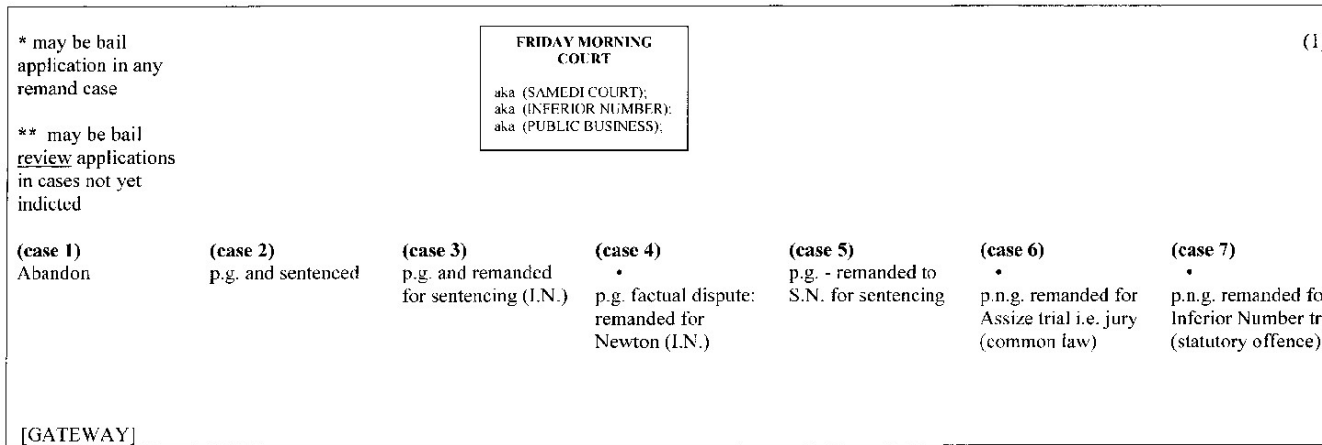
¹⁰ [1936] AC 445

¹¹ The proceedings in the Court of Appeal are reported at 1997 JLR 253.

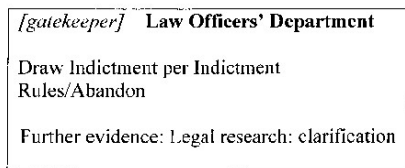
procedure - and on the other hand run-of-the-mill issues which although important in themselves arise in nine out of every ten appeals - was the sentence too high, was the identification evidence reliable, was there a breach of a PACE code and if so was it fatal, was a piece of key evidence inadmissible? All these important questions are the province of the Court of Appeal and there the matter is usually left to rest. It is only cases of the *Renouf* or *Snooks* sort which raise the most fundamental questions about the foundation of Jersey law or procedure that are likely to find their way through the filter and into the Privy Council.

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↑ custody
warning
summons
(saisie and signification)



P.H.Q. CUSTOMS CIVIL SERVICE DEPTS. (HOUSING, HEALTH & SAFETY ETC.)

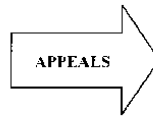
Judicial Committee of the Privy Council;
petition for special leave;
either side;

question of public/legal importance.

(cf. English law re certifying questions for
House of Lords)



• Supposing conviction, and after Newton
in any event, sentencing by the
appropriate number (I.N. or S.N.),
depending on sentence to be moved.
(4 years is the watershed)



The appeal against conviction is always to
the Court of Appeal.

The appeal against sentence is always to
the Court of Appeal -
EXCEPT IF IT IS AN APPEAL
AGAINST SENTENCE ALONE, AND
THE SENTENCE WAS IMPOSED BY
THE INFERIOR NUMBER. In this case,
the appeal is to the Superior Number.
[This is equally true if there has been a
plea of guilty rather than a trial]

SENTENCING

SUPERIOR NUMBER
(case 5)
(i.e. sentence of more than 4
yrs
being moved)



• TRIALS

INFERIOR NUMBER
(case 4) Newton;
(case 7) Statutory offences
Assize (jury)
(case 6) common law
offences