From: John Edmonds
Sent: 08 September 2008 09:24
To: William Bailhache
Subject: FW: AG of Jersey v Mr & Mrs Maguire
Attachments: Advice.doc; ATT437804.txt

Categories: Urgent

William

Herewith the advice from Mark Ellison. He has incorporated the proposed changes.

I will forward to Steve Baker and Simon Thomas.

John

-----Original Message-----
From: Adrian Chapman
Sent: 08 September 2008 09:18
To: John Edmonds
Subject: FW: AG of Jersey v Mr & Mrs Maguire

****
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Morning John

Please find enclosed a second draft with amendments. Can you confirm if it deals with what is required and I will get Mr Ellison to sign it off.

Kind Regards

Adrian

-----Original Message-----
From: Mark ELLISON
Sent: 05 September 2
To: Adrian Chapman
Subject: Re: AG of Jersey v Mr & Mrs Maguire

Adrian,

I have incorporated the substance of the amendments suggested, but the nature of one required that I made a few more amendments as well.

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I have therefore attached a second draft, which I would like you to forward to Jersey just to make sure that it does know deal with what is required before I print sign it off.

Mark Ellison.

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IN THE MATTER OF RE-INSTITUTING CRIMINAL PROCEEDINGS AGAINST ALAN AND JANE MAGUIRE RELATED TO CRIMINAL PROCEEDINGS INSTITUTED IN 1998 BUT LATER ABANDONED BY THE ATTORNEY-GENERAL.

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ADVICE

INTRODUCTION

1. I am asked to advise The Attorney General of the States of Jersey upon the following matters:

   (i) whether it would be proper for the Attorney General to seek to re-institute criminal proceedings against Alan and Jane Maguire;

   (ii) whether if proceedings were re-instituted, a plea of *autrefois acquit* would be likely to succeed;

   (iii) whether the Attorney General would be likely to be successful in countering the inevitable abuse of process argument if obstacles (i) and (ii) were successfully negotiated.

THE RELEVANT FACTS

2. Alan William Maguire (DOB [redacted]49) and Jane Marie Maguire (DOB [redacted]51) were both charged on 26th January 1998 with

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seven offences of wilful assault and ill-treatment in a manner likely to cause unnecessary suffering or injury to health, contrary to Article 9(1) of Children's (Jersey) Law 1969. The offences were alleged to have been committed between 1980 and 1990 at Blanche Pierre Group Children's Home upon children in the care of Jane Maguire, who was at the time House Mother; her husband Alan having an active but unofficial role as a carer.

3. In 1990 a number of complaints were made to the Children's Office by members of staff at the home about the manner in which Mr and Mrs Maguire were treating the children. The Children's Office removed the Maguires shortly thereafter but did not refer the matter to the police.

4. Several years later, in 1997, two alleged victims who had by then left the home made complaints to the Children's Service as to the manner in which they had been treated. Those allegations were disclosed to the Child Protection Team of the States Police, which led to other alleged victims making complaints.

5. The Maguires first appeared at the Magistrates Court on 21st April 1998. By then it had been realised by the prosecution that the age of the conduct was such that the offences they had charged were 'time-barred', and a charge of grave and criminal assault, and several charges of common assault, all contrary to common law, and focused upon specific incidents of alleged physical violence were laid in substitution. The defendants entered pleas of not guilty and arrangements were made for what was expected by both prosecution and defence to be a summary trial. The Magistrate designated to hear the case however indicated, after that hearing, that he felt the case was unsuitable for summary trial and that should he find a prima facie case he would commit the defendants for trial to the Royal Court. On 8th

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June 1998 the prosecution presented their case to the Magistrate, including calling the available complainants to give live evidence, and the Magistrate rejected a submission of no case to answer. One of the victims, [redacted] failed to attend and the charge related to her was dismissed. The Magistrate then adjourned the case until 7th July for further submissions, as there was a change of defence advocate, but those submissions were also rejected and he committed nine charges against Alan Maguire and four against Jane Maguire for trial.

6. The charges committed for trial were, in summary, as follows.

Alan Maguire and Jane Maguire.

Between 1.12.80 and 31.12.86 on [redacted] aged 4-10 years, thereby concussing him – relating to an incident when his head was banged on a bed by Jane Maguire and against another boy's head by Alan Maguire.

Between 1.12.80 and 31.12.86 on [redacted] aged 4-10 years, by forcing him to drink an excessive quantity of custard, after he ate custard with his finger and Jane and Alan Maguire made him drink the whole large jug full, making him sick.

Between 1.1.87 and 30.4.90 on [redacted] aged 7-10 years, by force feeding her fish pie.

Alan Maguire.

Between 1.1.87 and 30.4.90 on [redacted] aged 7-10 years, by forcing soap into her mouth as a routine punishment carried out by Alan Maguire that caused bleeding from contact by his fingernails to the back of her mouth.

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Between 18.5.88 and 1.1.93 on [redacted] aged 7-12 years, by forcing a block of soap into his mouth.

Between 18.5.88 and 1.1.93 on [redacted] aged 7-12 years, by hitting him with a racquet.

Between 18.5.88 and 1.1.93 on [redacted] aged 7-12 years, by lifting him off the ground by his ears.

Between 18.5.88 and 1.1.93 on [redacted] aged 7-12 years, by throwing him across the playroom.

Between 18.5.88 and 1.1.93 on [redacted] aged 7-12 years, by force feeding him.

Jean Maguire:

Between 1.12.80 and 31.12.86 on [redacted] by forcing him to swallow undiluted disinfectant.

7. The case was then referred to the Law Officer's Department: "to decide whether we have sufficient confidence in the evidence to pursue the case...and to consider the impact of reports that Alan Maguire had what was believed to be terminal cancer". The note prepared by the Law Officers' Department in October 1998, as part of the process leading to the Attorney General's decision, included the following passages:

> "The complainants are now all in their late teens, and all of the allegations took place many years ago...attached to this file is a blue folder of confidential reports prepared by members of the Children's Service into the background of

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the victims. Whether as a consequence of their treatment at Blanche Pierre, or for some other reason it is quite apparent that these young people, almost without exception, suffer from either behavioural or psychological problems…every effort was made to trace members of staff and other who might be able to provide corroborative evidence…

A reading of the file will demonstrate that many of the complaints could not be attributed to a particular time and were by their very nature aggravated forms of chastisement. Taken as a whole they paint a picture of sadism and cruelty towards the children, reminiscent of a Dickensian workhouse. Taken individually the punishments metered out by the Maguire's could be excused as excessive chastisement and since they were clearly 'in loco parentis' to these children I steered away from charges involving the use of corporal punishment with a wooden spoon or slippers etc. because I felt they would be all too easy to defend.

… despite the seriousness of what was alleged, I had grave reservations as to the prospect of conviction, firstly because of the quality of the victims as witnesses and their age at the time of the allegations, and secondly because of the vagueness of the evidence. It was the view of the Children's Service and the Police that having steeled themselves to make these complaints, these young victims needed to put these experiences behind them and to be given an opportunity to support a criminal conviction. The decision therefore to prosecute was made without any great optimism that the charges would succeed, but with every hope that the very process by which the allegations came to light and the fact that proceedings were investigated, would allow the victims to come to terms with their past and to

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have confidence that the Jersey authorities had not swept the complaints under the carpet.
… A reading of the transcripts (of the evidence given at the Magistrates Court) will reveal that the examination-in-chief neither allowed an opportunity for the witnesses to come up to proof, nor to explore the original evidence in more detail…I believe that of the thirteen charges altogether, the Magistrate heard evidence which might have entitled him to commit in respect of only eight."

8. A note to the Attorney General from the instructed Crown Advocate dated 5th November 1998 analysed the sufficiency of the evidence on all the committed charges and pointed to a number of specific weaknesses and inconsistencies.

9. At a conference held on 11th November 1998 between the Attorney General, the police, the Children's Service and the instructed Crown Advocate, the evidence available was further analysed against each of the committed charges. The notes of that conference include the following:

(i) That a witness, who many of the alleged victims had referred to as the one reasonable member of staff who would tell the truth, had denied the allegations made and had supported the Maguires in strong terms.

(ii) That the Attorney-General concluded, concurring with the instructed Crown Advocate and author of the Law Officers Department review Note, that there was simply insufficient evidence to have any realistic prospect of conviction, that in such circumstances it would not be right to proceed, and that the matter would be presented

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to the Samedi Division of the Royal Court for discontinuance on the grounds of insufficient evidence.

10. It does not appear that Alan Maguire's medical condition played any part in the decision, which was made purely on the insufficiency of the evidence, but reference was made to a medical report having been provided indicating that his life expectancy was very limited. That report cannot now be found, but it is known that Alan Maguire is still alive and living with Jean Maguire in France.

11. The Attorney-General subsequently issued a formal notice declaring that he was abandoning the prosecution against William and Jane Maguire on the ground that there was insufficient evidence to support it, and on 28th November 1998, the Royal Court of Jersey Samedi Division discharged the defendants from the prosecution. No indictment was ever preferred.

12. As part of the Haut de la Garenne enquiry and concern about the way in which earlier cases had been investigated, this case has been revisited. Independent Crown Advocates have been instructed by the Attorney General to review the current state of the available evidence on the old charges, and allegations not charged, as well as being capable of supporting wholly new possible charges. That review includes the following conclusions:

(i) That the only new allegation concerns a new alleged victim, [redacted] who alleged that Jane Maguire washed her mouth out with soap. She is also capable of corroborating some the 1998 allegations made by her siblings [redacted]

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(ii) That a new witness [redacted] who did work experience in the home in the early 1980's when she was aged 15-17 years, had come forward recently and is capable of supporting the 1998 allegation that both Alan and Jane Maguire washed [redacted] mouth out with soap on frequent occasions.

(iii) That in the opinion of newly instructed Crown Advocates the new evidence was such that the evidential test was passed by a small margin but that the prospect of convictions was very far from certain and a high expectation of conviction was not justified.

THE LEGAL PRINCIPLES APPLICABLE AND QUESTIONS POSED

13. Although there are three questions posed in my instructions the principles applicable to each overlap to some extent, and clearly the prospect of either a plea of *autrefois acquit*, or of an application to stay the proceedings as an abuse of process succeeding will inevitably impact on the propriety of the Attorney General seeking to institute fresh criminal proceedings.

AUTREFOIS ACQUIT

14. In the leading case of *Connelly v Director of Public Prosecutions* [1964] A.C. 1254 the House of Lords reviewed at length a number of old authorities and set out nine propositions applicable to a plea of *autrefois acquit* [pp 1305-6]. Those can be further summarised for the purpose of this advice as: a person may not be tried for a crime for which, he has or could have, previously been acquitted, or is in effect the same or substantially the same as such a crime. The principle behind the rule is the general need

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for finality in the judicial process and the avoidance of oppression through repeated trials of what is substantially the same allegation.

15. A plea of *autrefois acquit,* if successful is, of course, an absolute bar to a trial proceeding. As *Connelly* establishes, it is only available where there has been an *acquittal* following a defendant having been in peril of legal sanction, and not when proceedings have been withdrawn prior to the point where he was at peril. It is often referred as a decision made by a competent tribunal on the merits.

16. In this case it appears that what occurred in 1998 was that following committal proceedings before the Magistrate, who determined there was a prima facie case sufficient to proceed to trial on all but one of the charges before the court, the proceedings were then abandoned by the Attorney General prior to any indictment being preferred to the Royal Court, the order of the court being that the defendants were discharged. The material presented to me therefore suggests that there may well not have been an acquittal by a competent court before whom the defendants were in peril, but this is a matter that may require some further examination. Whether a plea of *autrefois acquit* would be available is not however, in my view, the most determinative factor here, due the close relationship between abuse of process and the formal plea in bar principles, as is explored below.

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ABUSE OF PROCESS

17. Lord Devlin in *Connelly* [@p 1347 and 1353] identified that judges already had the separate inherent power to ensure that the court's process was fairly used by both sides and therefore to

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stay an indictment where the subject matter should have been included in an earlier one, even if the doctrine of *autrefois acquit* was unable to protect a defendant because he could have been put in peril but was not in fact put in peril in earlier proceedings. He said:

> "There is another factor to be considered, and that is the court's duty to conduct their proceedings so as to command the respect and confidence of the public. For this purpose it is absolutely necessary that issues of fact that are substantially the same should, whenever practicable, be tried by the same tribunal and at the same time. Human judgment is not infallible. Two judges or two juries may reach different conclusions on the same evidence, and it would not be possible to say that one is nearer that the other to the correct… that is why every system of justice is bound to insist upon the finality of the judgement arrived at by a due process of law. It is quite inconsistent with that principle that the Crown should be entitled to re-open again and again what is in effect the same matter."

18. A more recent case, *R v Murphy* [2002] EWCA Crim 3067, and the commentary upon it by Professor Ormerod as to the factors relevant to abuse of process where the prosecution have changed their minds in the course of proceedings in a way that involves going back on decisions not to proceed on charges against a defendant, also serves to highlight factors relevant to the situation on which I am asked to advise. The Appellant was charged with two offences of indecent assault, but by the time the case came on for hearing in the Magistrates Court the prosecution had decided not to proceed with one of them because the evidence of the young complainant was not satisfactory. The charge was withdrawn and the case was sent for trial to the

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Crown Court on the other charge. At the plea and directions hearing the prosecution sought to add the withdrawn charge to the indictment, the evidential assessment of counsel being different to the prosecutor at the Magistrates Court, and the evidence forming part of the transferred case. The Court of Appeal decided that in this particular case the administration of justice was not brought into disrepute by prosecuting counsel's revised view as to the second charge being resurrected, and attached some importance to the fact that no objection was raised at the Crown Court or until after there was a conviction, and that this was not a case where it was proposed to offer no evidence. Professor Ormerod's commentary on the decision in [2003] CLR 471 included:

> "What is certain is that there is no requirement that the defendant has suffered any prejudice over and above that of facing a trial/charges that he did not anticipate. Beyond that each case turns on its merits. It is submitted that the following factors may be relevant: how firm a commitment not to prosecute is made and in what form – whether it is to offer no evidence or to withdraw the charge; whether it is an unequivocal commitment not to prosecute or something less (e.g. to accept a plea to lesser charges); whether it is an express undertaking or a failure to disabuse D of a belief that proceedings have terminated; whether it is delivered in open court; by whom the undertaking is given and at what point in the pre-trial process; whether D relies to his detriment on the undertaking; whether the prosecution's decision to renege on the promise is made in good faith, promptly, and for good reason; and, whether it is immediately challenged by the defence. The distinction in this case between offering no evidence and withdrawing charges really serves only as an illustration of the

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> importance of the strength and nature of the representation. The strongest cases will presumably those in which the prosecution accept in open court that the prosecution *ought not* to proceed (not just that it will not)."

19. In this case the charges against the Maguires were withdrawn by the Attorney General in court, after there had been a committal for trial by a Magistrate who had heard live evidence. It was clearly an important and strong indication from the highest level that following a careful examination of the reliability of the evidence it was insufficient to merit the continuance of the prosecution and that accordingly the case ought not to proceed despite there having been a committal for trial.

20. Assuming that no plea of *autrefois acquit* could succeed as there had been no acquittal, then there would have to exist the most exceptional circumstances to justify seeking to re-institute criminal proceedings which would to any extent prosecute the defendants again for substantially the same conduct, or on the same evidence, as was concerned in the 1998 case.

21. While most compelling new evidence that could not have reasonably been obtained in 1998 *might* be sufficient to merit the re-charging, but the best that can be said of the position now (ten years later) is that there are two new witnesses, who in reality add little to the weight of the evidence as whole, and that the available evidential case is still no more than very borderline, albeit that new Independent Crown Advocates place it by a small margin over the threshold of the evidential test.

22. In my assessment the evidence now available in 2008, the vast bulk of which is the same as that on which the decision was originally made, is certainly not of a weight or exceptional and

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compelling character, as compared to what was available in 1998, as to merit the Attorney General contemplating re-instituting criminal proceedings for offences considered and not charged, or charged in 1998.

23. Potential new offences falling outside the ambit of the 1998 investigation may be a different matter, but in terms of evidential sufficiency a problem immediately arises from the fact that the new offences would concern conduct and potential witnesses inexorably mixed up in the overall assessment of evidential insufficiency at the time of the original prosecution in 1998. There would again therefore need to be the very clearest of evidential cases, such as could withstand the impact of the problems and inconsistencies prevailing in 1998, before charges for new offences based on entirely new evidence could have a realistic prospect of succeeding.

24. Whether for offences charged, or that could have been charged in 1998, or for new offences that only came to light as a result of new witnesses coming forward recently, any prosecution instituted in 2008 would clearly also face an abuse of process attack based on the contended impossibility of the defendant having a fair trial due to the impact of the delay since the offences were alleged to have taken place. It is not possible to make a detailed assessment of the merits of the arguments that may be advanced on the material provided to me and there have been successful prosecutions in some very old cases, particularly related to familial sexual offending where the complainants have only come forward many years after the event. The fact that in this case, after thorough investigation in 1998, the evidence thought sufficient to justify prosecution was later assessed to be insufficient leading to the proceedings being abandoned by the Crown after committal, is not likely to assist the Crown, and it

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can be foreseen that the prosecution will be likely to face an uphill struggle in meeting such an abuse application.

CONCLUSIONS

25. Assuming that the circumstances cannot be brought within the availability of a formal plea of *autrefois acquit*, the strength and nature of the representation made by the prosecution in 1998, that there was insufficient evidence to justify the case proceeding despite the Magistrate having committed the defendants for trial, was such that an abuse of process application on the basis that it would not be fair or a proper use of the court's process to allow the prosecution to re-institute proceedings ten years later is highly likely to succeed unless there were the most exceptional circumstances, such as very compelling and completely new evidence capable of removing the reasons for the 1998 decision and having a good reason for not having been available before.

26. The material provided to me clearly falls far short of providing any such exceptional justification.

27. In my assessment the material provided indicates that it would not be proper for the Attorney General to seek to re-institute criminal proceedings against Alan or Jane Maguire.

28. Even if such compelling new evidence were to exist and proceedings might therefore be properly re-instituted, or if there was new evidence capable of supporting a fresh charge or charges, there is still a significant risk that the prosecution would be unable to counter the inevitable abuse of process application based more generally upon the impact of delay on possibility of holding a fair trial, resulting in proceedings being stayed.

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Mark Ellison QC

First Senior Treasury Counsel at the Central Criminal Court.

5th September 2008

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On 5 Sep 2008, at 16:48, Adrian Chapman wrote:

>
>
> -----Original Message-----
> From: John Edmonds
> Sent: 05 September 2008 16:49
> To: Adrian Chapman
> Cc: William Bailhache
> Subject: AG of Jersey v Mr & Mrs Maguire
>
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>
>
>
> Adrian
>
> Please would you ask Mr Ellison to consider the following
> amendments to
> his draft advice. The following are points of accuracy:
>
> Paragraph 5:
>
> After "time-barred" - "and a charge of grave and criminal assault and
> several charges of common assault all contrary to common law."
>
> Paragraph 6:
>
> "The charges of grave and criminal and common assault..."
>
> (Note
>
> There was one charge of grave and criminal assault faced by Mr
> Maguire.
> The remaining charges were of common assault.)
>
> For reasons which I will explain we would invite Mr Ellison to replace
> the entirety of 12(iii) with the following:
>
> Paragraph 12(iii)
>
> "That in the opinion of the newly instructed Crown Advocates the new
> evidence was such that the evidential test was passed by a small
> margin
> but that a high expectation that the case would now result in a
> conviction would not be justified."

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>
> The instructions which were sent to counsel contained an assertion
> that
> Baker Platt, the advocates instructed to deal with the case had
> indicated that, with the new evidence, it was a borderline case which
> just met the test for evidential sufficiency. The instructions
> included
> an analysis prepared by me for the Attorney General in which (at
> paragraph 13), I indicated my own assessment of the evidential
> strength
> of the case. It was this assessment which found its way into the
> draft
> opinion.
>
> The precise words used by Baker Platt were:
>
> "...the conclusion is that there is a realistic prospect of conviction
> so that the evidential test is passed. The margin by which the
> test is
> passed cannot be regarded as great and the prospect of convictions is
> very far from certain. Nevertheless, it is impossible to conclude
> that
> there is no realistic prospect of conviction."
>
> Later in their advice, they aver:
>
> "By a small margin, the evidential test is passed -there is a
> reasonable
> prospect of conviction (that is of course something quite different
> from
> saying that a high expectation of conviction is justified. In this
> case
> it is not.)"
>
> I have suggested that the proposed amendment to paragraph 12(iii)
> would
> more accurately reflect the views expressed by Baker Platt.
>
> Please would you ask Mr Ellison if he is prepared to review the
> wording
> before issuing his signed advice.
>
> Kind Regards
>
> John Edmonds
> Principal Legal Adviser
> Law Officers Department
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