4th August, 1987

87/41.

In the Royal Court of the Island of Jersey.

Before V.A. Tomes, Deputy Bailiff, Jurats D.E. Le Boutillier and M.W. Bonn

Her Majesty's Attorney General

-v-

Roy Albert Sangan

Judgment

Deputy Bailiff: "The Court is here dealing only with the first and preliminary ground of appeal taken by Mr. Boxall on behalf of the appellant, that the Magistrate erred in permitting an amendment to the charge after the close of the prosecution case. The appellant was charged with having on the 5th July, 1986, at about 22.45 hours, in Bath Street, in the Parish of St. Helier, obstructed Police Constable Shaun Du Val, in the due execution of his duty by refusing to obey his orders. The appellant pleaded not guilty. At the conclusion of the case for the prosecution Mr. Boxall made a submission of no case to answer on behalf of the appellant. No evidence at all had been given by the prosecution that any orders had been given by P. C. Du Val to the appellant. It followed that there was no evidence that the appellant had refused to obey such orders. The Court has examined the transcript and has to agree that no evidence was given that any orders had been given by P. C. Du Val to the appellant and equally no evidence was given that the appellant refused to obey any order given by P.C. du Val. The principle that applies is clear: it is to be found in Archbold 42nd Edition Paragraph 4 - 385, and reads:-

> "A submission of 'no case' should be allowed when there is no evidence upon which, if it were accepted, a reasonable jury, properly directed, could convict."

The principle emanates from R. -v- Galbraith (1981) 73 C.A.R. 124 C. A. and the relevant part is: "Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty on a submission being made to stop the case". The submission made to the Magistrate was that there was no evidence on which he, the Magistrate, directing himself properly, could find the case proved.

The evidence given by P.C. Du Val was to the effect that the appellant pushed him on the left arm, with both his hands, causing P.C. Du Val to lose his grip on two persons, one David Hughes and one described by P.C. Du Val as "another male person with whom I was well acquainted", but who, for some mysterious reason he never named, and who were struggling, whilst he, P.C. Du Val, was separating them. P.C. Du Val testified that David Hughes was bleeding from a cut to his lip which would appear to suggest that he had been assaulted by the other male person. However, P.C. Du Val merely separated them and although they were abusive and in a drunken condition he thought it best to advise them to leave the area. However, because the appellant, attempting to say that David Hughes was not responsible, allegedly pushed P.C. Du Val on the arm, causing him to lose his grip on the two men, or causing him to lose his balance, he, the appellant, was arrested for obstructing the Police officer. The response of the Magistrate was that, whilst there might not have been any orders there might have been an assault. After an adjournment, the Magistrate said that refusal to obey orders is a matter of the particulars of the charge, rather that the substance of the charge itself. The particulars were plainly wrong; no orders as such were given to the appellant, but if the prosecution evidence was accepted the case of obstruction would be made out. The Magistrate had asked himself if the appellant would be prejudiced if he the Magistrate did not dismiss the case on the ground that the particulars were wrong and he found the answer to be in the negative. The Magistrate therefore amended the particulars and deleted the misleading words. The Court has to decide whether the Magistrate erred in making that amendment. The transcript shows, at page 81, that the Magistrate relied on Lewis -v- Cox (1984) 3 All.E.R. 672. The Magistrate purported to read from that case the following extract:

"The substance of the charge of obstructing the Police in Jersey, or in England for that matter, is an action which makes it more difficult for the police to perform their duty. To refuse to obey orders may be one such action, but it is a matter of the particulars of the charge, rather than the substance of the charge itself."

Clearly it is not an extract but a paraphrasing (see the reference to Jersey), but the Court has read Lewis -v- Cox most carefully and cannot find any reference to a refusal to obey orders. Lewis -v- Cox was concerned with the interpretation of section 51 (3) of the Police Act 1964 which provides so far as is material:

> "Any person who ..... wilfully obstructs a Constable in the execution of his duty ..... shall be guilty of an offence".

That case was concerned with the definition of 'wilfully' and the element or degree of mens rea required to constitute the offence and decided that a person wilfully obstructed a Police officer in the execution of his duty within section 51 (3) of the 1964 Act if his conduct actually prevented the police from carrying out their duty or made it more difficult for them to do so and if he intentionally did the act realizing that it would have an obstructive effect regardless of his underlining motive. That is physical obstruction. The evidence given by P.C. Du Val was evidence of physical obstruction; whereas the charge alleged a negative form of obstruction, the refusal to obey orders. The Magistrate relied on the difference between the particulars of the charge and the substance of the charge itself. Therefore, we must consider the situation as if the form of charge used in the Police Court charge sheet took the form of an indictment:

Statement of Offence

Obstructing a Police Officer in the execution of his duty

Particulars of Offence

Roy Albert Sangan on the 5th July, 1986, at about 22.45 hours, in Bath Street, in the Parish of St. Helier, obstructed Police Constable Shaun Du Val in the due execution of his duty by refusing to obey his orders.

The Indictments (Jersey) Rules, 1972, are broadly in similar terms to the Indictments Act 1915. Rule 1 is identical to section 3 (1) and provides that every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence with which the accused person is charged, together with "such particulars as may be necessary for giving reasonable information as to the nature of the charge". The Court is of the opinion that a charge of obstruction by refusal to obey orders instead of a charge of obstruction by assault, however technical the assault, does not constitute "such particulars as may be necessary for giving reasonable information as to the nature of the charge". Rule 6(1) is identical in its terms to part of section 5 (1) of the Act and reads:-

> "Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such Order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice".

It follows that decisions of the Courts in England on the subject of the amendment of indictments will be of persuasive authority here. The leading case is that of R -v- Johal and Ram (1972) 56 C.A.R. 348 which is a considered judgment of the Court of Appeal and which reviews several of the earlier authorities. There it was held that no rule of law precludes the amendment of an indictment after arraignment, whether by adding a new count or otherwise, but an amendment during the course of the trial is likely to prejudice the accused person and the longer the interval between arraignment and amendment, the more likely is it that injustice will be caused. In every case in which amendment is sought the court must consider with great care whether the accused will be prejudiced thereby. The judgment of the Court was read by Ashworth J. At page 353, he said:

> "In the judgment of this Court, there is no rule of law which precludes amendment of an indictment after arraignment, either by addition of a new count or otherwise. The words in section 5(1) of the Indictments Act 1915 'at any stage of the trial' themselves suggest that there is no such rule; if the suggested rule had been intended as a limitation of the power to amend, it would have been a simple matter to include it in the sub-section.

> On the other hand this Court shares the view expressed in some of the earlier cases that amendment of an indictment during the course of a trial is likely to prejudice an accused person. The longer the interval between arraignment and amendment, the more likely is it that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby".

Of course cases subsequent to R -v- Johal and Ram are also authorities to be taken into account. Miss Nicolle asked us to attach importance to R -v- Bonner, (1974) C. L. R. 479, C. A. In that case, after beginning to sum up the judge directed an amendment of particulars from "on a day in November 1972" to "on a day between November 1, 1972, and January 31, 1973". It was held not withstanding (1) the judge's power to amend, (2) the possibility of an assault in January had been canvassed in evidence, amendment at such a stage was not to be encouraged. Amendments should only be made in such circumstances, providing the interests of justice required it, after particular care had been taken to ensure that the defence had had ample opportunity, by way of adjournment, to consider whether witnesses should be recalled, or further evidence called. The Court appeared to have overlooked the point that as the date was immaterial the amendment was unnecessary. It is true that in the instant case there was an adjournment after the amendment, when the defence could have (a) asked that prosecution witnesses already heard be recalled, (b) asked that prosecution witnesses not heard be called and be heard or, at least, submitted for cross examination. (Incidentally, the Court finds it strange that the prosecution witnesses Miss Mack and Mr Mortan were not called but merely, in the words of the Centenier, 'left out'). And (c) asked that additional defence witnesses be added to the list. Nevertheless, the change in Bonner was merely one of dates covering the offence and not a change of offence and even then amendment at such a stage was not to be encouraged and particular care had to be taken to ensure that the defence had had ample opportunity to consider whether witnesses should be recalled. In this case no offer was made to make prosecution witnesses available for recall and the initiative would have had to be taken by the defence. The Court is influenced by R -v- Thomas 1983 C. L. R. 619 C. A. and I read:-

"The defendant was committed for trial on an indictment containing a count of theft only, although the committal documents also disclosed a possible offence of receiving stolen property. At trial the prosecution alleged that the defendant had been in recent possession of the stolen property. After the close of the prosecution case, the trial judge amended the indictment under section 5 of the Indictments Act 1915 by adding an alternative count of receiving stolen property, contrary to section 22 of the Theft Act 1968. The jury later convicted the defendant on the additional count. The defendant appealed against conviction on the ground that the judge should not have amended the indictment.

Held, allowing the appeal, that an indictment which neglected to charge an offence disclosed in the committal documents was "defective" within the meaning of section 5 and under that section could be amended at any stage of the trial provided that no injustice was thereby caused to the defendant; that having regard to the very lateness of the amendment in the present case, it was not possible to say that the conduct of the defence up to the close of the prosecution case could not have been hampered in some way by the fact that the indictment did not include the additional count; and that, accordingly, the court could not be satisfied that no injustice had been caused.

Per curiam. The end of the prosecution case is probably as late a moment in a trial that so radical an amendment could conceivably be made."

In the Court's judgment (1) the Magistrate misdirected himself by relying exclusively on Lewis -v- Cox and did not therefore apply the proper test which is that in R v. Johal and Ram and later cases; (2) the amendment was itself defective because it merely deleted words and did not substitute other particulars (the words 'by assaulting him' should have been substituted if the amendment was to be made at all. As it was, the appellant remained charged only with passive obstruction and not obstruction by assault); (3) the alternative charge sought to be brought by the amendment, albeit unsuccessfully in the Court's view, was a more serious charge than the original one, it was positive obstruction, i.e. assault, as opposed to negative obstruction, i.e. refusal to obey, or passive obstruction, e.g. standing in the way. The Court does not find, on examining the cases cited, that amendments

have been allowed at so late a stage to substitute a more serious offence. In summary, therefore, the Court is not satisfied that no injustice was caused to the appellant and the appeal must succeed on this first ground because the case should, in the Court's judgment, have been dismissed at the 'no case' submission stage.

The Court wishes to add that it finds some rather disquieting features in this case, particularly in the evidence of Police Constable Du Val. The conduct of the appellant was at the most one push. Prior to this, two persons had been fighting. When Hughes came out of the Public house he had a cut and bleeding lip. So he had been assaulted. They continued to fight outside. They were merely given words of advice. At Page 3 of the transcript, P.C. Du Val says of David Hughes (at Letter E) -

> "he was struggling with another male person with whom I was well acquainted."

That person was never named and it is very probable that he had caused the cut lip that was bleeding. If the appellant was to be charged with obstruction by assault, then both Hughes and the un-named well acquainted mystery man should have been called to give evidence. At Page 20 and I read- Police Constable Du Val had been asked about the exercising of his discretion and he said -

> "And I exercised that in relation; if you wish me to explain my attitude, Sir, I'm explaining. I exercised that apparent discretion in relation to David Hughes, when I was pushed by Mr. Sangan I did not exercise my apparent discretion. I cannot say exactly what my attitude was, but I did not exercise my discretion. I did not think that was a matter I should be ... should exercise my discretion about".

The Court finds that to be a strange exercise of discretion. There is another point at Page 20 - Police Constable Du Val says -

> "I've never dealt with Mr Sangan before; having said that, I probably have spoken to him... in relation to appearances I may have had at his pub when I've been on uniform duty in the past, but I'm not aware of any incident that I've dealt with regarding Mr Sangan".

And then a little bit further down the same page:
"I know Mr Sangan is the licensee of the Soleil Levant, I don't know him for any personal reasons".
And at Page 22 he says -
"No personal grudge towards Mr Sangan whatsoever Sir. I don't know the man".
And yet at Page 21 he says-
"It's his attitude I'm familiar with, Sir".

That evidence provides an unexplained inconsistency.

So, for those and other reasons the Court is left with a feeling of unease, unease that here there was possible discrimination - deliberately the Court does not use emotive words - but there is an uneasy feeling or disquiet.

Licensees have a difficult job, they need to feel that they have the support of the police, and the Court hopes that there will be a careful examination of police methods, because there must be nothing approaching harrassment to licensees.

So the Court's decision is - the appeal is allowed; the conviction is quashed; the appellant will have the costs of his appeal.

ADVOCATE BOXALL: Would it perhaps be impertinent to mention the Costs of the Police Court hearing as well?
DEPUTY BAILIFF: I would need to be advised. Do you have the law with you?
ADVOCATE NICOLLE: There is no power to so order Sir.
DEPUTY BAILIFF: There is no power ...
ADVOCATE NICOLLE: I am happy to pass up the law....
DEPUTY BAILIFF: In my experience I have only ever granted the costs of the appeal but if you have...
ADVOCATE NICOLLE: (indistinct) I think I should refer to the law rather than to ask the Court to take it upon my ...(indistinct). The Police Court (Miscellaneous Provisions)(Jersey) Law, 1949, says that "on any appeal under Article 14 of this law" - it is at page 552

DEPUTY BAILIFF: Yes.

ADVOCATE NICOLLE: "On any appeal under Article 14 of this Law - (a) if the appeal is successful, the Royal Court may order the prosecution to pay to the appellant such costs as may appear reasonably sufficient to cover the out-of-pocket expenses of the appellant in relation to such appeal".

DEPUTY BAILIFF: I think that the Court is bound by the statute.

ADVOCATE BOXALL: Yes, I am sure that is right, nevertheless there are types of costs that can be awarded, there is - the Court may be aware that there is quite a distinction nowadays between the costs allowable on a taxation basis and those actually charged by the profession and I would ask the Court to note that this situation is in fact indemnity costs.

DEPUTY BAILIFF: Well again we are bound by the statute it is out-of-pocket expenses of the appellant in relation to the appeal. You must persuade the Greffier, as to what your out-of-pocket expenses are.

ADVOCATE BOXALL: (indistinct)... the amount that he will pay my firm towards his representation in relation to the appeal.

DEPUTY BAILIFF: If necessary, that must be argued before the Greffier and if necessary come on appeal to us. I am not going to make an order different to the usual order. I would have thought that you were flushed with success already.

Authorities cited

Archbold (42nd Edition) Section 4
Sections 1 - 63 to 69 inclusive
Section 20 -136

Lewis -v- Cox (1984) 3 All E.R. 672

R -v- Johal and Ram (1972) 56 C.A.R 348

R -v- Thomas (John Joseph) (1983) C.L.R. 619 C.A.

R -v- Galbraith (1981) 73 C.A.R. 124 C.A.

R -v- Bonner (1974) C.L.R. 479 C.A.

Indictments (Jersey) Rules 1972 - Rule 6(1)