

COURT OF APPEAL

25th October, 1988

Before: J.M. Chadwick, Esq., Q.C., (President)
R.D. Harman, Esq., Q.C., and
E.A. Machin, Esq., Q.C.

The Attorney General

- v -

Gary John Barnes

Application for leave to appeal (1) against conviction on Count 2 of Indictment (Rape); and (2) against sentence of 5 years' imprisonment on Count 1 (Grave and Criminal Assault) and of 12 years' imprisonment on Count 2 of Indictment. Sentences to run concurrently.

The Attorney General.

Advocate G.R. Boxall for the Applicant.

Decision of the Court on the preliminary application of the applicant for leave to adduce fresh evidence under Article 32(b) of the Court of Appeal (Jersey) Law, 1961. (Reasoned Judgment to follow).

THE PRESIDENT: We have before us an application by the appellant, Gary John Barnes, for leave to call further evidence in support of his appeal against a conviction of rape. It is clear that under Article 32 paragraph (b) of the Court of Appeal (Jersey) Law, 1961, this Court has power, if it thinks it necessary or expedient in the interests of justice, to order witnesses who would have been compellable witnesses at the trial, to attend and be examined before the Court, whether they were or were not called at the trial.

It is also clear from the authorities which have been cited to us that in cases where the evidence which is sought to be called could have been obtained at the time of the trial, that power will only be exercised in wholly exceptional circumstances.

We are satisfied in the present case that there are such wholly exceptional circumstances and that it is necessary in the interests of justice that the evidence of Dr. Kean be admitted on the hearing of the appeal against conviction.

Accordingly, we propose to make an Order under Article 32 paragraph (b) for the attendance of Dr. Kean and his examination before the Court of Appeal.

Out of courtesy to the arguments that have been submitted to us and in recognition that the point is an important one in the procedure in this Island, we will prepare and hand down a judgment giving our detailed reasons in due course.

The application for leave to call two other witnesses, Mrs. X
and Y, has, quite properly, not been pursued and we need not deal with it.

It seems to us, Mr. Attorney, that it must be right for you to have an opportunity to consider your position. To consider whether you wish to cross-examine Dr. Kean on the evidence that he will give. To consider

whether you wish to recall any prosecution witnesses, and I have in mind particularly Dr. Noel and Dr. Holmes, so that they can have the opportunity to deal with the points which should have been put to them, if Dr. Kean's evidence was going to be adduced at the trial. If you wish to recall witnesses you may need to make an application for that purpose. You may also wish to consider whether to make an application to call any further evidence in answer to Dr. Kean; if indeed that is permissible. I do not want to put you in the position of having to deal with those matters now. Are you able to give us any indication whether you require time; and if so, how long and how you see the most convenient course of proceeding?

ATTORNEY GENERAL: I think I would require time, Sir, because I think that it will undoubtedly be of benefit to the Court to hear the evidence of Dr. Noel and Dr. Holmes, certainly. But I should also like to give consideration to the making of an application to hear further evidence in the form of the evidence of Professor Cameron, with whom Dr. Holmes did confer before giving his evidence. In that respect it would be extremely helpful to me, and I don't know whether my learned Friend would be able to take instructions on this point, for Dr. Kean to put his statement - which was described to me by my learned Friend as a draft statement - into the form of a considered report, which could then be submitted to Professor Cameron. If I were able to do that, it would assist me and I think it would assist the Court because, clearly, if Professor Cameron takes the same kind of view as Dr. Kean, that is going to affect the way in which the Crown approaches the whole question of the appeal. On the other hand, if Professor Cameron takes a different view, then it may very well be that I should like to make an application to this Court for the evidence of Professor Cameron to be heard. Or, indeed, I say Professor Cameron, but in fact Dr. Paul was also consulted and Dr. Paul, indeed, is the author of the text upon which Dr. Kean relies in his statement. It may very well be that I would wish to consider whether the Court should have the benefit of Dr. Paul's evidence as well. All these matters, Sir, I think reinforce the view that I should ask for an adjournment to consider whether or not a further application should be made. Perhaps my learned Friend could assist me by saying whether the draft statement which Dr. Kean has prepared is in a sufficiently final and composite form for it to be submitted to these eminent medical men, or whether he would like to have the opportunity of recasting it.

PRESIDENT: Yes. If you were going to take advice from Professor Cameron and Dr. Paul, that would be likely to take some little time, I would imagine?

ATTORNEY GENERAL: I would have thought, Sir, that it should be possible to do this before the end of the year, and I wondered whether the Court would be minded to deal with this when it sits at its ordinary sitting in January. The appellant has abandoned his appeal against grave and criminal assault, so there is no detriment as far as he is concerned.

PRESIDENT: Yes, we have that in mind. We had hoped that there might be a way by which we could deal with whatever other applications there were going to be before this present sitting finishes, so that when the matter does come back before the Court of Appeal, everybody knows what further evidence there is going to be. But I fully understand that that may well not be possible.

ATTORNEY GENERAL: Well, may I just say that I shall do my best, Sir. It's a question of whether I can persuade Professor Cameron and/or Dr. Paul to respond to the paper of Dr. Kean within the next two days.

PRESIDENT: Well, I appreciate that. I think two days is perhaps a little optimistic. I think it would be better if you were working on 24 hours. Mr. Boxall. First it might be right, must it not, that the Attorney should have the opportunity to consider the report, which as I understand it, he got for the first time, as we did, yesterday?

ADVOCATE BOXALL: Yes, it must be. I'm not sure about the latter part, Sir, but I'm sure it must be right that he has time to consider it. It would be very wrong for him to be put to a speedy decision in circumstances where care and attention is needed.

PRESIDENT: Are you able to tell us and him whether the draft which was handed up is in a final form, or whether there is further work to be done on it?

ADVOCATE BOXALL: I'm as certain as I can be that there are one or two minor amendments to be made. Dr. Kean approached me yesterday and pointed out at least one part that it would be a pity if I were not to change before it were approved, finally, by him. Nothing very significant, but because of that reason and the possibility that there may be two such reasons, then I would like the opportunity just to - if it is to go to Professor Cameron and Dr. Paul swiftly - to make sure that it is absolutely as Dr. Kean wants it to be. The difficulty has arisen really, I may say, because Dr. Kean is in England and it was prepared over here at his instructions of course. He hasn't been at my elbow all the time. So, if I may have, perhaps, 12 hours

just to go over it with him, then I can give a definite answer to my learned Friend.

PRESIDENT: Yes, well, I'm sure if you are going to have 12, you might as well have 18. If you could provide it to the Attorney first thing tomorrow morning, or even before close of business tonight, if that were possible.

ADVOCATE BOXALL: Subject to my instructions (indistinct) yes, I will attempt to ...

PRESIDENT: Is Dr. Kean on the Island?

ADVOCATE BOXALL: Yes, he is in Court.

DR. KEAN: They are very minor alterations; in general the statement I have made holds. It is just a remark or two at the end of the statement that ...

PRESIDENT: Thank you very much, Doctor. So, you would be able to get it into a final form in the course of the afternoon, perhaps?

DR. KEAN: With the help of Mr. Boxall's secretary, yes, Sir.

PRESIDENT: Yes, thank you very much. Mr. Boxall, I think then, your 12 hours has been truncated, you and Dr. Kean will try to get it into a form in which it can be delivered to the Attorney by close of business this afternoon. If the Attorney is then in a position to take a view as to what response you want to make, we will hear an application tomorrow morning. But if you are not in a position to do so, Mr. Attorney, then you are not shut out from making an application at any later stage.

ATTORNEY GENERAL: Yes, I'm much obliged, Sir.

Authorities: (referred to at the hearing).

Court of Appeal (Jersey) Law, 1961: Art. 32(b).

Criminal Appeal Act, 1907: (Ch. 23. 7 Edw. 7) (1907 Law Reports,
Vol 45, p.100).

A.G. -v- M.A. Gorvel (1973) J.J. 2503.

Archbold (42nd Edn.) paragraph 7-95 to 7-99.

Perry -v- Harvey (1909) Cr. App. R. 89, 92.

R. -v- Lattimore & Others (1975) 62 Cr. App. R. 53.

R. -v- Lee (1984) 1 W.L.R. 578, C.A.

R. -v- Lomas (1969) 53 Cr. App. R. 256.

R. -v- Merry (1970) 54 Cr. App. R. 274.

R. -v- Jordan (1956) C.C.A. 152.

Stafford & Luvaglio -v- D.P.P. (1973) 3 All E.R. 762.

R. -v- Harding (1963) Cr. App. R. 190.

A.G. -v- Brown and McLean (1978) J.J. 99 at p.p. 100 & 102.

A.G. -v- McNaught (1978) J.J. 103 at p. 104.

R. -v- Sparkes (1956) 40 Cr. App. 83 at p.p. 91 - 92.