Jersey & Guernsey Law Review – February 2012

VIVE LA DIFFERENCE (1)

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1 Sir Christopher Pitchers' *apercu* of grave and criminal assault,[1] following Cyril Whelan's *tour d'horizon* on the same subject,[2] reinforces the disparity between the respective approaches of Jersey and Guernsey to the development of the criminal law, illustrated in the exchange False Friends of Crown Advocates (1) and (2).[3] One purpose of Sir Christopher's review is to examine, in a comparative way, how Jersey customary law "plays out in one area of the criminal law". Others are invited by the author "to say where the balance of advantage lies",[4] both of which suggest some consideration of the development in Guernsey of the characterisation and prosecution of offences of assault – hence this note, which has encouraged some further identification of areas of difference between the jurisdictions.

2 So far as I can ascertain (and I have not checked, to any detailed extent, the *Crime* folios of the latter half of the 19th and early part of the 20th centuries), grave and criminal assault has never existed as a separate and distinct criminal offence in Guernsey. Such a formulation does not appear in the Commissioners' Second (Guernsey) Report of 1848, which nowadays must be the first port of call into the development of Guernsey's criminal law. Interestingly, Whelan points out that a search of Jersey's *Poursuites Criminelles* for the more serious offence described as such discloses its first instance in 1864, some 17 or so years after the Commissioners' First (Jersey) Report of 1847, which suggests to Whelan's mind the possibility (and he is obviously cautious here) of some local reflection of a perceived need, following enactment in England of the Offences against the Person Act 1861, somehow to categorise by the wording of the charge preferred the gravamen of the offence, which had been previously

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[1] Pitchers, *Grave and criminal assault – another view of the landscape* (2011) 15 J&GL Rev 52.
[2] Whelan, *Grave and criminal assault – the landscape past and present* (2006) 10 JL Rev 275.
[3] Miscellany (2010) 14 J&GL Rev 1 and 4.
[4] *Ibid*, at 66.

generically prosecuted as assault. But the 1861 Act reflected, at least in part, earlier codifications of assault offences by which their severity, both as to conduct and consequence, determined the charge. So there was little new in the 1861 formulations. In support of this view, the 1848 Guernsey Report particularly identifies, besides "ordinary" assault, the offence of grievous bodily harm, and from the exchange reported at para 6144 *et seq* it is clear that an indictment for assault with intent to do grievous bodily harm would then have been laid as such. The Bailiff, at para 6190, further observed that the offence of mayhem "would be in exactly the same position here as it was in England when Blackstone's Commentaries were written" (in the mid-18th century), which provides further evidence – as, indeed does much of the 1848 Guernsey Report – that English law, rather than Norman or French law, had by then become, if not the historic *origo* then the current *fons*, of Guernsey's criminal law.

3 Having been reminded in the 'False Friends' exchange that the development of Guernsey's and Jersey's criminal laws have proceeded by different means to different places, it is interesting to note that, in the area of assaults, Guernsey has not specifically legislated to reproduce in legislation the principal English statute – the 1861 Act. What seems to have happened is that the Law Officers developed the practice of drafting indictments by reference to the more serious of those various offences identified in the 1861 Act, and, where appropriate, laying as an alternative to the more serious charge (framed in terms of the 1861 Act offence) mere customary or "common law" assault, which would be apt to cover a wide range of conduct and consequence. In this approach, what would in England ordinarily be preferred as assault occasioning actual bodily harm is invariably encompassed by a charge of assault, whether or not as an alternative to a more serious charge. Interestingly Sir Christopher refers to the 1993 (English) Law Commission proposals by which offences of assault would be re-categorised according to their severity, not only of conduct but also consequence, which would broadly reproduce the subsisting 1861 Act hierarchy, set out (principally) in s 18 – wounding or causing grievous bodily harm with intent; s 20 – wounding or inflicting grievous bodily harm; and s 47 – assault occasioning actual bodily harm; besides customary (or common law) assault. Furthermore, the practice of Guernsey's prosecuting authorities to charge on the basis of the more serious 1861 Act offences carries advantages, as identified in the 'False Friends' exchange, including some simplification of the sentencing process if and so far as English sentencing principles and practices are relevant. But of this, more anon, with particular reference to the Law Officers' *conclusions*, long since statutorily abandoned in Guernsey but not in Jersey and, more latterly, the Guernsey Court of Appeal's recent judgment in *Law*

Officers v Gunter,[5] in which English sentencing practice in offences of internet child pornography was held to be more directly relevant in the Guernsey courts' determining of sentences, unlike, for example, sentencing for drug trafficking offences.

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[5] Guernsey Court of Appeal, No 24/2011, 12 July 2011.