

JERSEY / JUDGMENT

A2 and A4 -v- AG [2016]

JRC 127A (21 July 2016)

[2016] JRC 127A

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JUDGMENT

THE commissioner: 1. Yesterday we announced our decision in relation to the appeal against conviction. I now give the brief reasons for that decision and also the decision in relation to the appeal against sentence. 2. There were five defendants in the youth court, all under eighteen years of age. All were convicted of doing an act tending and intended to pervert the course of justice. In reports of the case, the names of the defendants were concealed in the normal way by referring to them as D1 to D5 respectively. For clarity, they are referred to in this judgment as A1 to A5, following the same numbering. All five initially appealed against conviction. A1, A3 and A5 all abandoned their appeals. 3. Very briefly the facts of this offence arise out of the tragic death of a young man called Morgan, who had been at a party with the two appellants and also the other who defendants in the Youth Court. They had ended up at the home of one of them, not either of the appellants here, the young man, A1. Morgan had taken drugs of various kinds and was found by his friends in the garage of the house the following morning, clearly in a bad way and unconscious. There was no dispute that they picked him up, carried him down the road where they came across passers-by. The ambulance was called but sadly Morgan died. It is right to emphasise that there is no suggestion that the action of carrying him down the road contributed in any way to his death. It seems very likely that he was beyond saving when they found him in the morning. The issue in the case was the motive that the defendants, as they then were, appellants now, had for carrying him down the road. 4. The prosecution case accepted by the Panel below was that their purpose was to avoid the police coming to the house where A1 would have known he had drugs and, as it happens, also illegal pornography on his computer, but also he would have feared that he would be associated with the death because he and Morgan had taken drugs together in the past. The defence case was that the purpose was to avoid A1's parents learning of Morgan being in the house at the time that they found him in the morning. 5. There are two broad grounds of appeal. Firstly, it is argued that the Panel below found facts on a basis which was different from that put forward by the prosecution and that as a result there was such unfairness to the defendants that the conviction is unsafe. Secondly, it is argued that the decision on the facts was so unreasonable that the convictions cannot be sustained. We deal with those two different grounds separately. 6. Firstly the argument that the basis upon which the Panel found the defendants, the appellants as they now are, guilty was different from that put forward

by the prosecution. In summary the position was this. The prosecution put the case throughout on the basis that there must have been a conversation in the garage about moving Morgan and that the basis for moving him must have been to prevent the police connecting Morgan with A1's house, which he, A1, knew contained drugs and also contained evidence of him buying drugs as well as child pornography. The defence case, as we indicated, was that the purpose was to avoid A1's parents finding out that he, Morgan, had been there. 7. There was no direct independent evidence as to any conversation. There was obviously the clear inference that something must have been said. The defendants would not simply have picked Morgan up wordlessly and carried him down the road, there must have been a conversation. As to what was said it was a matter of the direct evidence from the witness box for those who gave evidence amongst the defendants, or from what they had said to the police at different times and also, of course, inference from the facts and the Panel's interpretation of those facts. The acts of the boys were not in dispute. All agreed that Morgan had been carried from the garage by all of them; he had been put down in the drive for a short period and then carried along the road for some distance until they encountered a passer-by who telephoned the ambulance. 8. The findings of the Panel came after a painstaking and detailed review of the evidence in which they analysed and assessed the evidence that each witness had given whether orally or in writing, and then stated their conclusions in respect of each of those witnesses. 9. The summary of their finding is conveniently found at paragraph 422 of their judgment where they say this:- "We concluded that the defendants had a plan; whether discussed verbally or simply overwhelmingly obvious to everyone. It was formulated at the latest on or near the driveway to A1's house. The plan was to move Morgan far enough away from A1's house to break any link between them and Morgan; they would leave him there and call an ambulance. If the ambulance had come to A1's house there was a clear link to all five defendants who knew what had happened the night before. The issue of drugs would be self-evident. A1 had much to hide in connection with drugs. Therefore the ambulance could not be called to his house. " 10. It follows that the Panel found that it was or might be true as A1 had said in his evidence to the Court that the first move out of the garage was in the hope that fresh air might revive Morgan. That, the appellants argue, is such a departure from the case presented by the prosecution as to lead to the quashing of the conviction. 11. It is trite to say that what matters is whether there is evidence upon which the Panel could find what they did. It has not been suggested that there was not. Nor in making findings of fact did the Panel, nor do any fact-finders, have to make a binary choice between the prosecution version and the defence version, provided the evidence justifies the different finding. Of course the principles established in the English jury cases can, as counsel have argued, be read across to the situation here, namely if the factual basis upon which a conviction may be reached is so different from that put forward by the prosecution it can become unfair for the defendant to be convicted upon it if he or she has not been forewarned of the different basis and it is so significant that he or she should have had an opportunity to deal with it. 12. The various cases were cited to the Court, the principles are set out conveniently enough in the English case of R-v-Ali

[2014] EWCA Crim 948 . That was an unusual case on the facts. It was an allegation of assault occasioning actual bodily harm where the prosecution case was that one man had stabbed another. The unusual aspect of it was that there was real evidence, expert evidence in the case, that there was a possibility that the injuries were self-inflicted. The jury came back with a question indicating that they wanted to know whether they could only convict of assault occasioning actual bodily harm if the injury was inflicted with a knife. They were directed by the judge that they could convict if it was with some implement other than a knife and indeed they seemed to have convicted on that basis because they acquitted of possessing an offensive weapon but convicted of assault occasioning actual bodily harm. That different basis would obviously become apparent only at a time when it was impossible for counsel to deal with it whether by rebuttal evidence, cross-examining or arguing before the jury. 13. The Court in that case quashed conviction on the basis that it was a version which was so different that it was unfair and unsafe for the defence not to have had an opportunity to deal with it. The Court said this at paragraph 18:- "18 It is well established that the judge is not bound to confine the summing-up to the same basis as that relied upon by the prosecution - see R-v-Japes [1994] Crim LR 605. But as that case also demonstrates that is only permissible provided the accused is not disadvantaged or prejudiced by this course of action. If there is any uncertainty about that the jury should not be entitled to consider any fresh basis for conviction." 14. Then dealing with the unusual facts of the case at paragraph 20 the Court said:- "20 In most cases of this kind the precise implement which causes a particular injury will not matter. The strong assumption will be that a person does not injure himself. The alleged attacker will in all likelihood have inflicted the wound; the issue is likely to be not what implement was used but what defences are available to the attacker if it is thought that he did carry out the attack. This is an unusual case in the sense there was, as the expert indicated, a realistic possibility that the wound might have been self-inflicted and, as we have said, that was reinforced by the fact that the complainant did not initially tell the police about this injury. It seems to us that in those circumstances in particular, it was important for the prosecution to spell out precisely on what basis they were alleging that the appellant had committed this offence so that all these possible ways in which the injury may have been caused could be fully explored." 15. The cases cited in Ali and others of a similar nature that have been cited by counsel are all cases where the way in which it was suggested the offence had been committed radically changed from the prosecution's case to the basis upon which the jury, because these are all jury cases, had convicted. Here, in our case, nothing had changed as to the events themselves. The actions were clear and not in dispute: Morgan was taken from the garage by all five, put down on the drive, picked up again by all five and carried round the corner. Equally nothing had changed as to the motivation of the youths, the prosecution said it was to avoid the involvement of the police, whether or not mixed with other motives and the Panel so found. All that had changed was whether the Panel was sure that the plan had been formed in the garage or on the drive. It was a change but one of detail and not substance. 16. To test this, I pressed counsel to say in what way they argued they had been prejudiced by this change of the

basis for the conviction and the best that counsel could suggest was that they might have required the attendance of a witness whose statement was read. It is helpful to look at what the Panel said about the witness's evidence and I read from paragraph 115 of their judgment:- "Mr [witness A] drove along Rue..... at around 09.15 to 09.30 hours on 5 th July. He saw four males on the drive of a house and one male lying on the drive." That was his evidence. Then the following paragraph the Panel assessed that evidence:- "We find that this must have been the group of defendants pausing with Morgan on or near A1's drive. This was a distinctive group at around 09.15 hours on a Sunday morning; we do not believe it could have been anyone else. The witness recalls seeing four young men, not five. It is possible that he was mistaken as to the number or one of them had returned to the garage or house to fetch something such as Morgan's bag or A4's phone. We do not consider this discrepancy is significant. We are sure at this point that the defendants had moved Morgan from the garage and were standing on or near the driveway with Morgan on the ground when the witness passed by." 17. As to there being four or five youths on the drive the appellant, A2 in this case, agreed in evidence that he was there the other appellant, A4, did not give evidence but did not cross-examine A1 to suggest that he, A4, was not there. It was A1 who had introduced the two stage removal into evidence. He gave evidence first so each defence advocate made decisions as to cross-examination and decisions as to advising their client on giving evidence against the background of what A1 had said in his evidence. 18. In our judgment the Panel was fully entitled on the evidence to take the view that they did as to where the plan started. The appellants were not prejudiced by the modest difference in the point at which the Panel were sure that the decision to carry Morgan into the road had been taken. In our judgment this ground of appeal is without substance and it is rejected. 19. Secondly, we turn to deal with the decision on the facts and the argument that the decisions taken by the Panel were so unreasonable that the conviction ought to be quashed. It is as well to start with the test to be applied. This is well-known and is most clearly stated in the frequently cited case of *Rushton v AG*

[2000] JLR 363 :- "The court of course has on many occasions said that its duty in looking at an appeal on conviction from the Magistrate below is to examine the transcripts to see if there is evidence on which the Magistrate concerned could properly have come to the decision he did. If there was that evidence, than even though the court might not necessarily have come to the same decision, the court does not lightly interfere with it. The court has to be satisfied that there was insufficient evidence for the Magistrate to have come to the decision he did, or that he drew the wrong conclusions and inferences from the evidence before him." 20. It is also as well to restate why this test is appropriate in these appeals. An appeal against the Magistrate's Court decision or a Youth Court decision is not a re-hearing. The Court at first instance, in finding the facts, sees the witnesses on both sides; where there are disputes, sees that evidence tested in cross-examination; observes the demeanour of the witnesses and, based on that material, forms judgments about them. The inferences that they draw are based upon the assessment of the evidence they have heard and of the witnesses they have seen. The Appellate Court can do none of

these and for these reasons the bar is set as high as it is when arguments on appeal relates solely at the findings of fact. 21. What the appellants in this case have done is to rehearse the arguments that they advanced in final submissions to the Youth Court. We do not list them and equally we do not suggest that those arguments were totally without merit. They were advanced to the Panel in the court below, which considered them in coming to the conclusions that they did. 22. Just to give two examples of arguments that were advanced below and have been rehearsed before us. The Panel made findings as to the extent to which the boys lied, first when they, in the road, came across Witness B and Witness C, who both gave oral evidence before the Youth Panel and then again to the paramedics. In our judgment the Panel were fully entitled to conclude that when the women B and C asked if everything was alright or if they needed help and the boys said that everything was fine, they were deliberately trying to minimise the seriousness of Morgan's condition and hide the true facts in the hope, clearly futile, that they would be left alone to continue their journey with Morgan. Similarly the Panel's findings that the paramedics were not told the truth was clearly open to the Panel on the evidence they had before them. 23. As far as A4 is concerned, Advocate Bell argues that no reasonable Panel could have concluded that what he said to the police at 10:45 that night was untrue. The Panel had to look at all the evidence so far as it concerned A4 and they did; the conclusion that they came to was expressly based on all the evidence and it was one they were entitled to come to on that evidence. As we say the arguments advanced to us were also advanced to the Panel, were considered by them and rejected for the reasons that they gave. 24. We have looked at those reasons carefully, they are, as we have noted, exceptionally detailed and painstaking, running to over 90 pages of typescript and over 660 paragraphs, each witnesses evidence is summarised, the panel then set out their assessment of that witness and their findings in relation to his or her evidence and the reasons for those findings. Inevitably it also involved drawing inferences from the facts as they found them to be. Our task is to examine those reasons and see whether there was evidence on which they could properly come to the decision they did. In our judgment there was and this ground of appeal is also rejected and for that reason, as I indicated yesterday, these appeals against conviction are dismissed. 25. Turning now to sentence, four of the five defendants were sentenced to Community Service Orders of differing lengths. One of them (A5), was made subject to a Bind-over for 12 months. The two appellants before us, who received Community Service Orders, one of 100 hours, and one of 50 hours, appeal not on the basis that their sentences viewed in isolation are wrong, but that there is an unwarranted disparity with A5. 26. Before turning to the merits of this argument there is a preliminary point that needs to be looked at: is there a right of appeal against sentence at all? This is arguable because there is a curious provision in Article 17 of the Magistrate's Court (Miscellaneous Provisions)(Jersey) Law 1949 which governs procedures in the Magistrate's Court and hence also in the Youth Court. Article 17(1) gives a right of appeal against sentence to the Royal Court. However Article 17(3) states: - " In this Article, "sentence" includes any order made on conviction by the Magistrate's Court, not being -.....(b) a community service order;" 27. Community service did not exist in 1949 so that provision

must have been inserted at some later stage. Before a community service order is passed the Court must be satisfied that the defendants conduct has passed the custody threshold and community service is imposed as a direct alternative to such an order. 28. In 2008 in the case of DB-v-AG

[2008] JRC 120 Sir Michael Birt, Deputy Bailiff, as he then was, said that the relevant Minister should consider amendment to that Law because there ought to be a right to appeal a community service order. I agree with that entirely. Justice requires the existence of a right of appeal against an order that is only imposed if it is a direct alternative to custody. 29. As it happens, all parties are satisfied that in this particular case there is a way in which that difficulty can be circumvented. It is contained in Article 20 of the 1949 Law: - "(3) On any appeal under Article 17, the Royal Court may by order confirm, reverse or vary the decision of the Magistrate's Court, or may remit the matter with its opinion thereon to the Magistrate's Court, or may make such other order in the matter as it thinks just, and may by such order exercise any power which the Magistrate's Court might have exercised, and any order so made shall have the like effect and may be enforced in like manner as if it had been made by the Magistrate's Court. (4) The powers of the Royal Court under paragraph (3) shall be construed as including power to award any punishment, whether more or less severe than that awarded by the Magistrate's Court, which that Court might have awarded." 30. In this case, there was a properly brought appeal against conviction under Article 17. Therefore under Article 20, this court can exercise any power which the Youth Court had including making the sentence less or more severe. Counsel have agreed that we have power to look at the community service orders. That is not a satisfactory way of dealing with this issue but it is a way of ensuring that justice is done and that is obviously more important. We can consider the merits of the sentences. 31. There was undoubtedly a very strong argument for distinguishing between A1 and the other four. His position was much more serious. He had organised the attempt to conceal the truth about Morgan: he had done so entirely for his own personal benefit; none of the others had anything to hide nor anything to gain in concealing what happened. None of them would have behaved as they did without his urging. We would not have been surprised nor have criticised the Panel if they had imposed a custodial sentence on A1. 32. Much less clear than the powerful argument for distinguishing between him and them was the argument for distinguishing between the other four. They all played broadly the same part in helping A1. In fact the Panel, as well as imposing different numbers of hours between three of the four, including the two appellants here, made A5 subject to a Bind-over. This is a much more lenient sentence involving no finding that the custody threshold has been passed and with the important practical difference that the conviction becomes spent after 12 months as opposed to 3 years. The express ground for this difference was that he, A5, answered questions to the police giving them helpful information. Had he pleaded guilty it would, of course, have been relevant to see when his honesty and straightforward cooperation with the police had started so then his answers to questions in interview might well have been relevant to the mitigation. However, he did not plead guilty so to

give him such a clear benefit for not exercising his right to silence must, as a necessary corollary, mean that others who did exercise the right that the law gives them, were to be penalised for it. That cannot be right, certainly when the benefit is so great. Those who remained silent were absolutely entitled to do so, no doubt acting on legal advice, and it would manifestly be wrong to penalise them for that. 33. Equally, in our judgment, there were not real grounds for distinguishing between those defendants where the same sentence was passed - that is to say by ordering a different number of hours of community service. That seems to have been done on the basis of precisely what each of them said to the police and how helpful or otherwise that might have been. In reality there was little to choose between what each of them said. It may have depended on such chances as to whether they chose to remain at the scene which must have been the more difficult thing to do or whether they left. 34. There is a further point relevant to all defendants. One of the matters we considered in mitigation was the stress that must have been caused to the boys through having a charge of murder hanging over them for so long. It must have been apparent well before they were informed of it that no murder charge could possibly have been sustained but the continued existence of the charge must have been an added stress for the boys and their families and that was something we took into account in mitigation when considering their cases. 35. In our judgment the reality was that these four were equally culpable and there is no real distinction to be drawn between them. We of course can only deal with the two appellants who are here not those who are not and so we are faced with the difficult task of seeking to arrive at a just result in circumstances where what is, in our judgment, the correct outcome, that is to say that all four were treated identically, cannot be achieved. 36. The choices before us are these:- first, to reduce the sentences of those subject to a community service order to the same as that imposed on A5, namely a Bind-over. In our judgment a Bind-over was not an appropriate sentence for an offence of this seriousness. As the Court found, it crossed the custody threshold while there was obviously powerful mitigation in the young men's good character, which the court found justified not imposing the relevant custodial sentence. However, one aspect of sentencing is the message the court is giving about the seriousness of an offence. To impose the most lenient sentence possible, namely a Bind-over for an offence of this gravity, in our judgment simply would not give the correct message about the Court's view of this offence. 37. A second possibility is to leave all the sentences as they are because the difference in hours is not in real terms a serious difference, though of course it involves a greater restriction on the liberty of the defendant who has the longer hours. This would have the advantage that it would leave the sentence at 100 hours community service which, had we been left to our own devices, is probably the sentence we would have regarded as appropriate for all of them but it would also mean that between those defendants who are before the Court, we are saying that they should have been treated the same and were not. 38. The third possibility, and this was the one that ultimately we decided was the closest we can get to a just outcome of the case, is to make the same sentence to be imposed upon these two appellants whose culpability in our judgment was identical. We have the power to increase the sentence on A4 from 50 to 100 hours. The

alternative obviously is to reduce that on his co-appellant from 100 to 50. In the end we have decided that it is that lesser course which gives the closest approximation to a just outcome in this case that we can achieve and simply because of the desire to ensure that they are treated as alike as possible we are prepared to reduce the number of hours in the case of the appellant, A2, from 100 hours to 50 hours. It is not suggested that the 100 hours was in any way wrong but simply, as I have said, to try and ensure that we make their sentences as comparable as we can. There is of course nothing we can do so far as the other three appellants, who of course, aren't before us. 39. So to that limited extent and for those rather special reasons, this appeal against sentence is allowed. 40. There will be an order for costs of £1,000 against each, the same as for the other appellants. Authorities R-v-Ali

[2014] EWCA Crim 948 . Rushton-v-AG

[2000] JLR 363 . Magistrate's Court (Miscellaneous provisions)(Jersey Law 1949. DB-v-AG

[2008] JRC 120 . Page Last Updated: 11 Aug 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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