

JERSEY / JUDGMENT

AG -v- B [2018] JRC 050 (05 March 2018)

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JUDGMENT

THE BAILIFF: 1. On Friday th January the Court sentenced the defendant, who was 18 at the date of sentence but 17 at the date the offence was committed, to 200 hours community service on one count of causing serious injury by dangerous driving contrary to Article 23A(1) of the Road Traffic (Jersey) Law 1956 ("the Law"). The Court indicated that if it had passed a custodial sentence, that sentence would have been one of 14 months' youth detention. In addition the defendant was disqualified for a period of four years. The Court indicated that full reasons for the sentencing decision would be delivered later, and this judgment contains those reasons. The circumstances of the offence 2. On 12 th May, 2017, the defendant collected four friends from a property in the Maufant area at around 11.30pm. He had not been drinking. He was driving a Ford Fiesta motor car. His route took him along La Grande Route de St Martin and Bagatelle Road, heading towards Mont Millais. One of the passengers was not wearing a safety belt - not because he made no effort to do so, but because he could not find the clip, and he accordingly held the belt across his shoulder. All four passengers described the defendant driving too fast on the road from Midland Stores towards Five Oaks, noting that the wheels spun when setting off and that the engine was revved excessively. One passenger felt the defendant was showing off. Two of them asked the defendant to slow down several times but he did not do so. 3. The defendant left the Five Oaks roundabout driving down Bagatelle Road at approximately 53 miles per hour. As the car approached the playing fields by St Saviour's School, it started to skid. The car hit the left hand pavement as the defendant failed to make the corner, and then, as he turned the steering wheel sharply right, it veered across the other side of the road before hitting the right hand pavement. One of the passengers describes the defendant as "fighting the steering wheel". 4. The Fiesta collided almost head on with an oncoming silver Mercedes travelling up Bagatelle Road in the opposite direction. The driver of that car had no time to brake before the collision but fortunately he escaped the crash with only minor abrasions. One witness described it as "a really really high speed collision" and the other, a taxi driver of several years' experience, said that he was "absolutely shocked at the speed" at which the defendant was driving and that it was "extremely dangerous and probably some of the worst I have ever seen". 5. Paramedics arrived, as well as technicians and members of the Police and Fire Service. We have seen copies of the photographs taken which show very significant damage to the front of the Ford Fiesta car driven by the defendant. The Fire Service had to remove the passenger door in order to gain access to one of the passengers. Injuries 6. The defendant was very fortunate. He was able to get out of his vehicle

after the collision. He had a bruise across his nose, but, perhaps surprisingly, he was otherwise unhurt. One of his passengers was able to exit the car by himself after the collision, being in shock and, according to him, "panicking like a headless chicken". He complained of pain to the left hip and both shoulders, had some muscular tenderness and was treated for whiplash. He was discharged from the hospital after a couple of hours. The other passengers had more serious injuries. The front seat passenger had fractures to his arm and fingers, for which he was treated at Accident and Emergency before being discharged some 7 hours later on 13 th May. The third passenger, sitting in the rear seat in the middle, suffered a broken leg and dislocated shoulder. His injuries may have been exacerbated by the fact that he was not wearing a seatbelt because he could not find the seatbelt clip. He was admitted to Accident and Emergency at 12.55am, given morphine for the pain he was suffering and he underwent surgery later that day. He underwent a blood transfusion a few days later and was discharged on 19 th May. The last of the passengers who was sitting in the rear seat on the right hand side, suffered a broken wrist and nose. He did not recall getting out of the car but he did remember sitting on the pavement after the collision. He was admitted to Accident and Emergency and discharged at 8.22am later that morning. 7. The defendant was interviewed in the presence of his mother and legal representative and answered "no comment". He was interviewed again approximately six weeks later and his representative then read out a statement on his behalf to the effect that he accepted he was the driver, accepted full responsibility for the accident, was sorry for it and sorry that people had been injured. He accepted his driving was careless within the meaning of the law. He went on to give a further no comment interview. Subsequently the defendant was charged with causing serious injury by dangerous driving, to which he entered a not guilty plea, although indicating that he would plead guilty to causing serious injury by careless driving. An expert report was commissioned by the prosecution, which was produced on 7 th November. It concluded that the defendant's vehicle was travelling at 53 miles per hour. When the defendant was indicted on that charge in the Royal Court on 24 th November, he entered a guilty plea. Aggravating circumstances 8. Weather conditions were poor and the road wet but the defendant nonetheless drove his Ford Fiesta car at an excessive speed. He was inexperienced and he disregarded warnings from his passengers to slow down. There was a suggestion that he might have been showing off. Mitigating factors 9. As indicated above, the defendant was 17 at the date of the accident and 18 at the date of sentence. As such, Articles 4 and 4A of the Criminal Justice (Young Offenders) (Jersey) Law 2014 ("the 2014 Law") apply. Furthermore, his youth is of itself a mitigating factor in so far as concerns sentence. 10. The defendant pleaded guilty on indictment in the Royal Court and had made earlier admissions before he was charged in the Magistrate's Court. His guilty plea to the more serious charge was entered as soon as the Crown provided evidence of his speed. 11. The defendant is of good character. In particular he has no previous driving convictions. In addition he has the support of his family. He produced some good references and wrote a letter of remorse to the Court as well. 12. As far as we are aware, this is the first occasion on which this Court has had to consider the appropriate sentence for an offence under Article 23A of the Law. We note that this offence of causing serious injury by dangerous driving, together with the offences of causing death by careless driving and causing serious injury by careless driving were introduced by the Road Traffic (No. 62) (Jersey) Regulations 2015 . The current offence carries a maximum sentence

of imprisonment of 5 years and an unlimited fine. 13. " Serious injury " is defined in the Law but for present purposes, it is the fracture of bones (except simple fractures of fingers, toes or nose) which counts as a serious injury for the purposes of the Law. Guidelines 14. We were shown the Magistrate's Court guidelines for some of these offences which may have been formulated on the basis of English guidelines. We think they give rise to some difficulties. For example, when considering the instant offence of dangerous driving causing serious injury, one section which is descriptive of the nature of activity in question contains this language:- "Single incident where little or no damage or could be regarded as a serious example of careless driving". 15. It seems to us that if the description of driving is that of a serious example of careless driving, that description does not fit the offence which is being sentenced. 16. The Crown also put before us the definitive guideline in relation to causing death by driving, issued by the Sentencing Guidelines Council in the United Kingdom. In so far as the guidelines give proposed starting points, we find them unhelpful but to the extent that these guidelines provide a structure for assessing the seriousness of the driving, we think that they are useful. We were also shown a number of cases - R v Ellis (Johnathon James) 2014 WL 1219262, a case of causing serious injury by dangerous driving where the defendant was sentenced to two years' imprisonment; R v Dewdney

[2014] EWCA Crim 1722 where the defendant pleaded guilty to causing serious injury by dangerous driving and was sentenced to 32 months' imprisonment. He was also given a concurrent sentence of 4 months for driving with excess alcohol in his blood. We were also referred to R v Aziz

[2016] EWCA Crim 1945, where on a guilty plea to the offence of causing serious injury by dangerous driving a sentence of 2 years' imprisonment and a three year disqualification was upheld on appeal. Perhaps the closest case in factual terms to which we were referred was R v Passon

[2016] EXCA Crim 1992 where a 25 year old appellant was sentenced to 12 months' imprisonment for the offence of causing serious injury by dangerous driving and disqualified for 3 years, and again the appeal against sentence was dismissed. Finally we were referred to R v Jenkins

[2015] EWCA Crim 105 where two consecutive sentences of 3 years' imprisonment were imposed for separate offences of causing serious injury by dangerous driving and R v Rimmer

[2015] EWCA Crim 490 where on the same charge a sentence of 33 months with a 5 year disqualification was imposed and upheld on appeal; and R v Dicken

[2017] EWCA Crim 530 where a driver who was 16 at the date of the offence was sentenced to 4½ years youth detention on a charge of causing death by dangerous driving and 2 years 4 months concurrent on a second count of causing serious injury by dangerous driving. For technical reasons the sentence on the second count in that case was quashed and no separate penalty imposed. 17. The Sentencing Council in England and Wales has published guidelines in relation to sentencing policy where dealing with the offence of

dangerous driving, and a definitive guideline in the case of the offence of causing death by dangerous driving. It is to be remembered at all times when looking at guidelines issued by the Sentencing Guidelines Council that the statutory regime for sentencing in England and Wales is not the same as that which exists in Jersey and accordingly no helpful guidance can be taken from the actual figures which are to be found in those guidelines even though the maximum sentence under the English statutory provision creating the offence may be the same as the maximum sentence under the equivalent Jersey statutory provision. Furthermore, one assumes that the Sentencing Guidelines Council must have regard to the figures which have been published as guidelines across a wide range of offending, thus keeping the sentences for comparable criminal behaviour in some sort of balance, even though it might be difficult to make any sensible comparison between the criminality of an indecent assault and of causing serious bodily injury by dangerous driving. Nonetheless, despite these reservations over the sentences recommended by the Sentencing Guidelines Council, the analysis of aggravating or mitigating factors is almost invariably helpful and the classification of the types of driving can also be useful. Thus, for example, in relation to the offence of causing death by dangerous driving, there are three levels of seriousness which the Sentencing Guidelines Council identifies and which we would respectfully adopt - level one, which are the most serious offences encompassing driving that involved a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger being caused to others; level two, which is described as driving that created a substantial risk of danger; and level three which is described as driving that created a significant risk of danger. Discussion 18. It seems to us that we must have in mind when approaching sentencing for the offence now under consideration the three comparable offences - dangerous driving for which the maximum sentence is two years imprisonment or an unlimited fine; dangerous driving causing serious injury, for which the maximum sentence is 5 years' imprisonment and a fine; and causing death by dangerous driving for which the maximum sentence is 14 years' imprisonment and a fine. We should also have regard to the offence of causing death by careless driving, for which the maximum sentence is 5 years' imprisonment and a fine, and causing serious injury by careless driving for which the maximum sentence is imprisonment for a term of 2 years and a fine, noting that if the careless driving causing serious injury occurs when under the influence of drink or drugs, the maximum sentence is increased to 4 years' imprisonment. Finally we note that the offence of careless driving carries a fine at level three. What is apparent from the statutory framework is that the legislature has identified two different forms of driving which are to be classed as criminal - dangerous driving and careless driving. It is also apparent from the different offences that the legislature classes the consequences of the driving as an important ingredient in determining the prospective penalty. We will consider both issues separately. 19. When the Law was first passed by the States, the offence of dangerous driving was framed in this way:- "If any person drives a vehicle ... on a road or other public place at a dangerous speed or in a dangerous manner, he shall be liable ..." 20. Interestingly, the penalty when first prescribed in 1956 for that offence was a fine not exceeding £25, or imprisonment for

a term not exceeding one month; and in the case of a second or subsequent conviction, a fine not exceeding £100 or imprisonment for a term not exceeding one year. 21. The offence of careless driving was framed in 1956 when first adopted in this way:- "If a person drives a vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence." 22. A first conviction for that offence rendered the offender liable to be disqualified for holding or obtaining a licence for up to one month but it appears there was no other penalty. 23. The offence of careless driving is defined in similar terms today, albeit the penalty has been increased. However, for some reason in 1999 the States amended the provisions for dangerous driving so that the statutory offence is simply committed where a person drives a vehicle (other than a wheelchair) dangerously on a road or other public place. At Article 24, the Law contains a definition of what it is to drive "dangerously" which is similar in effect to Section 2A of the English Act, albeit framed in slightly reshuffled language. 24. Under the Road Traffic Act 1988 in England and Wales, Section 2A provides a definition:- "(1) ... a person is to be regarded as driving dangerously if (and, subject to sub-section (2) below, only if) -

- (a) The way he drives falls far below what would be expected of a competent and careful driver, and
 - (b) It would be obvious to a competent and careful driver that driving in that way would be dangerous.
- (2) A person is also to be regarded as driving dangerously ... if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.
- (3) ... "dangerous" refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those sub-sections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.
- (4) In determining for the purposes of sub-section (2) above the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried." 25. As in England, the test of what is dangerous driving concentrates on the nature of the driving albeit the defendant's state of mind can also be relevant, so that the defendant's driving is measured against that which would be expected of a competent and careful driver. It seems to us that that brings into play an assessment of the driving on the particular piece of road on which the driving took place, the road conditions at the time, the condition of the vehicle and possibly other circumstances of which the driver would be expected to be aware, such as the carrying of passengers or perhaps the special needs of particular passengers - for driving in a particular way might not be regarded as generally dangerous but might become dangerous if, for example, one of the passengers was heavily

pregnant. 26. Consideration of what is the focus of the offence informs the approach the Court should take to sentence. 27. What we can also say is that driving at a dangerous speed is unquestionably driving dangerously and that was the position in this case. 28. The different driving offences we have described make it plain that the sentence which can be imposed will vary according to the consequences of the driving. This is in some respects wholly a matter of chance. The dangerous driving may or may not result in an accident; the accident may or may not result in serious injury; or even death. The culpability of the defendant seems to us to be broadly the same whatever the consequences. When one has regard to what are generally considered to be the three classic purposes of sentencing

- to punish, to deter or to rehabilitate - it is not obvious that any of these objectives are achieved by the creation of statutory offences the commission of which is a matter of chance, or bad luck as far as a defendant (and probably the victim) are concerned. His dangerous driving, followed by a collision, caused a passenger in the other car to suffer a broken nose, and he is liable to two year's imprisonment. The same driving and the same collision caused the passenger in the other car to suffer a broken wrist and he is liable to five years' imprisonment. 29. This is uncomfortable territory for a sentencing court. It seems to us that the legislature has adopted these particular criminal offences with the different penalties which they carry only to reflect the consequences to the victim or victims of the offending which, in a sense, could be argued to transfer the gravamen of the offence from the driving to the consequences. 30. While it seems to us to be not entirely logical to suggest that, in every case, the worse the driving, the higher the risk of serious injury, there probably is a correlation between the two at least to some extent. Against that background, it is interesting to look at the injuries suffered in the English cases referred to us. Although the injuries suffered in the present case were not at all pleasant, it has to be recognised immediately that in the English cases, for the most part, the injuries were of a different scale altogether. In *Ellis*, the injured driver (not the defendant) sustained a fractured skull and an open compound fracture of her ankle. At the time of sentencing, ten months after the accident, she was still suffering from physical and neurological injuries and was in great pain. Her sight was affected. She had to wear a leg brace. Her ability to walk was affected and she could no longer drive. Her injuries meant she could no longer work or run the care home which she had run for 22 years, and her registration to do so had therefore been withdrawn. She told the judge that her life had been turned upside down. 31. In *Dewdney*, the consequences for the female rear seat passenger, who had to be freed from the vehicle by emergency services, were that she sustained a brain haemorrhage, bilateral contusions of the lungs, several fractures of the thoracic spine with bleeding around the spine and heart. There was a large wound to her scalp which required stitching. Following surgery to her back she had been left with rods permanently inserted. These were visible and resulted in scarring. In addition there were fractures of her clavicle and chest bones. Another passenger suffered one fractured and three crushed vertebrae and a fractured spine. 32. In *Aziz*, the injuries were less serious

- one victim suffered a shattered right wrist which had to be plated and pinned, a fracture of the bone in his left hand, a fractured nose and bruising to other parts of his body. Other passengers suffered serious bruising. 33. In *Passon*, notwithstanding that the driving was not dissimilar to the driving in the instant case, the injuries sustained by the victim were horrific. She suffered traumatic brain injury, cerebral swelling, sub-arachnoid haemorrhage and subdural haemorrhage, cognitive impairment including slurring of speech and mild to moderate right side weakness, mild memory recall difficulties, weakness and stiffness in the right arm, loss of balance and an inability to walk unaided for a time. She had bilateral lung contusions, a right pneumothorax, a right haemo-thorax, pubic rami-fractures and a soft tissue injury to the right shoulder. Nonetheless, it appeared that she had by the time of sentencing returned to work part time and she was expected to make a full recovery within a further twelve months. 34. In *Jenkins*, the injuries sustained by two of the victims were very significant. One had a broken arm, an open below the knee fracture to his leg, a fractured ankle which required pinning, two fractured ribs and a fractured hip. Part of his calf muscle had to be removed from his leg and he required skin grafts. He was confined to a wheelchair for a considerable time and at sentence was still only able to walk with a stick. 35. His wife had a broken arm which required plating. She had seven broken ribs, a punctured lung, internal bleeding, damage to her shoulder, nerve damage and a puncture wound around her knee. She was in intensive care for two days and in a high dependency unit for a further three days. 36. In *Rimmer*, the victim had to be cut out of the car by the emergency services. She had been impaled by a section of post and rail fencing. The medical evidence recorded that on admission to the hospital she had a "massive wooden post from the right proximal femoral area to the right, exists posterior aspect of the left buttock". In total her injuries included a serious injury to her pelvis; detached ovaries; muscle graft from her left thigh to her lower calf; a broken left ankle; broken left hand; nerve transplant from her right calf to her right thigh; and a severe bowel injury. A section of the bowel had to be removed and a colostomy bag was fitted for six months until the bowel could be reconnected. At the time of sentence, it was not known whether she would be able to have children in the future. 37. In *Dickin*, one victim suffered catastrophic injuries and died the following day. The other suffered serious injuries including deep gashes to his head, a broken jaw, a severed tongue, the loss of teeth, a fractured wrist and ligament damage. 38. Under Article 26C of the Law, there is a definition of "serious injury". It means an injury that:- (a) Requires hospitalisation for more than 48 hours, commencing within 7 days from the date the injury was received; (b) Results in the fracture of any bone, except simple fractures of fingers, toes or nose; (c) Involves lacerations which cause severe haemorrhage, nerve, muscle or tendon damage; (d) Involves injury to any internal organ; or (e) Involves second or third degree burns, or any burns affecting more than 5% of the body's surface. 39. That definition takes one, as it were, over the threshold for the offence to be committed, but even once passed, it is clear that there are different degrees of injury which nonetheless would fall within that definition - for example, a broken leg can be expected, in normal circumstances, to mend, but there will be other serious injuries that might leave the victim permanently incapacitated, and at worst in a permanent coma, or bedridden or in a wheelchair. 40. We

take from the analysis of this legislation that the Court is required to have regard to the principle that the degree of injury sustained by victim is a relevant component in the sentence which the Court should impose - that must be so because otherwise there is no difference for sentencing purposes, between dangerous driving and dangerous driving causing serious injury. 41. Nonetheless, fairness in sentencing requires that close consideration be given to the nature of the criminal conduct of the defendant and, for the reasons given in paragraph 28 above, not focussing predominantly upon the consequences suffered. The first task of the Court is to consider the nature of the driving because just as there are degrees of seriousness in "serious injury" there are also degrees of bad driving in dangerous driving. The most significant obligation of the Court in sentencing for the current offence is to make an assessment of the defendant's driving against the standard of driving of a competent and careful driver, for that is what essentially fixes his culpability. The Court then has regard to the consequences of his driving to ensure that the sentence which is imposed pays proper respect to the principle set out in paragraph 40 above. 42. We expressed earlier some reservations about the Magistrate's Court guidelines in relation to dangerous driving, whether this is concerned with dangerous driving simpliciter or dangerous driving causing serious injury. Under Category A, the description is "single instant where little or no damage, or could be regarded as a serious example of careless driving". We think that it is hard to justify a starting point of 9 months imprisonment for a single incident which could be regarded as a serious example of careless driving where, if careless driving had been charged without injury, the maximum sentence would be a fine. There is a qualitative difference between careless driving and dangerous driving, and this categorisation does not seem to recognise it. Similarly in Category B - "incident(s) involving excessive speed ..." does not seem to distinguish between driving at a dangerous speed which might fall into Category A, and driving at a dangerous speed which is firmly in the more serious category. In our view, the categorisation of driving by the Sentencing Guidelines Council when considering the offence of causing death by dangerous driving is perhaps a more helpful categorisation of the different kinds of dangerous driving. Application to this case 43. The defendant was driving at an excessive speed in a residential area at approximately midnight on wet roads. The speed limit was 30 miles per hour and he was driving at 53mph. The driving had taken place over a distance of approximately one mile, in the early part of which the speed limit had been 40pmh. One or more of the passengers had asked him to slow down several times, but he had not done so. As a result of the speed at which he was driving, the road conditions and no doubt in part his own inexperience, the defendant lost control of the car and an accident took place in which three passengers in this car suffered injuries which amount to serious injury for the purposes of Article 23A of the Law. Although serious injuries, they were for the most part injuries which fall at the bottom end of the serious injury spectrum - for the avoidance of doubt they remain serious, but one has to recognise that the injuries could have been much worse. Indeed the defendant is lucky that they were not worse, and lucky that none were fatal. The injuries sustained by the passengers came at a bad time for them - some were imminently to be taking examinations for AS level, and all were in the course of their A level studies. They

have been adversely affected, as is plain from the victim personal statements which have been filed with us, and which we have read carefully. 44. The Crown submitted that the offending fell between the most serious and the middle category of offending on the Magistrate's Court sentencing guidelines for dangerous driving. We do not agree with that. In our view, the driving as described to us, was dangerous driving, but fell in the least serious category. The defendant was driving too fast. If one were looking at the Sentencing Council guidelines in England and Wales, the offence seriousness would fall in the middle category - an incident involving excessive speed in a built-up area. If one were looking at the guidelines for causing death by dangerous driving in England and Wales, it was driving that fell into level 3, namely the least serious category, as driving that created a significant risk of danger, characterised by driving above the speed limit/at a speed that was inappropriate for the prevailing conditions. 45. Given the maximum sentence of five years imprisonment, had we been dealing with an adult offender, we would have considered that a sentence of one year's imprisonment would have been the initial point to take in this case. 46. One then has regard to aggravating and mitigating circumstances. The offending was aggravated by the fact that more than one person was injured, and by the disregard of warnings from the passengers that he should slow down. It is also aggravated by the suggestion that there was an element of bravado to the defendant's driving because he was revving the engine. In terms of mitigation, there is the guilty plea, his remorse and his previous good character, the fact that one of the victims was a close friend of his, and that he was an inexperienced driver, unable to handle the loss of control when the car started to skid. 47. At the time of handing down the sentence, the Court indicated that serious injury had been caused and it could have been much worse. The effect on the passengers was very much taken into account. Nothing said in this judgment detracts from that. This was bad driving at an excessive speed in a residential area with an element of bravado to it. We consider that had we been dealing with an adult offender, we would have imposed a sentence of fourteen months imprisonment. 48. However, this offender is one to whom the 2014 Law applies. The Court should not pass a sentence of youth detention unless there has been a history of failure to respond to non-custodial penalties or an inability or unwillingness to do so; or that only a custodial sentence will be adequate to protect the public from serious harm; or that the totality of offending or the offence is so serious that a non-custodial sentence cannot be justified. None of those features apply, and accordingly the Court imposed a sentence of 200 hours community service. 49. The Crown moved for a disqualification period of three years in respect of the defendant's holding or obtaining a driving licence. After consideration, we resolved to increase that to four years. This reflects our assessment of the relative immaturity of the defendant and the need for him to understand that while driving a car is a great convenience, it also leaves the driver in a position of great responsibility towards other members of the community. This defendant needs to gain maturity in order to appreciate that fully. He may do so in less than four years, and there is power in this Court to lift the period of disqualification on an application by the defendant. Whilst not encouraging him to do so, we indicate that he should certainly not attempt to do so until three years have gone by and at that time one would still want to be satisfied that he then demonstrated the

maturity which has been lacking on this occasion. Authorities Road Traffic (Jersey) Law 1956. Criminal Justice (Young Offenders) (Jersey) Law 2014. Road Traffic (No. 62) (Jersey) Regulations 2015. R v Ellis (Johnathon James) 2014 WL 1219262. R v Dewdney

[2014] EWCA Crim 1722 . R v Aziz [2016] EWCA Crim 1945. R v Passon [2016] EXCA Crim 1992. R v Jenkins

[2015] EWCA Crim 105 . R v Rimmer

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