

JERSEY / JUDGMENT

AG -v- C [2018] JRC 097 (01 June 2018)

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JUDGMENT

THE DEPUTY BAILIFF: 1. The defendant is charged with committing an indecent assault on the complainant, who was known to him, on Friday 14 th April, 2017. The nature of the allegation is that the defendant touched and digitally penetrated the complainant's vagina whilst they were together on a footpath in the Parish of St Saviour. On 24 th April, 2018, on an application by the defence, the Court determined that the defendant was not fit to plead. These are our

reasons.

2. The matter comes before the Court pursuant to the Criminal Justice (Insane Person) (Jersey) Law 1964 ("the Law") which, at Article 1(1), states:- "If on the accusation or trial before the Royal Court of any person charged with any act or admission punishable with imprisonment, it appears to the Court that the accused may be so insane as to be unfit to plead to the accusation or unable to understand the nature of the trial, the Court shall adjourn the case to try the question of whether or not the accused is so insane as aforesaid."

3. Article 1(2) of the Law provides that such a trial should be dealt with by the Inferior Number. 4. The test for fitness to plead is as set out in the case of AG -v- O'Driscoll

[2003] JLR 390 where Sir Philip Bailhache, Bailiff, in the context of determining the appropriate direction to the Jurats on the matter of fitness to plead says, at paragraph 29:- "An accused person is so insane as to be unfit to plead to the accusation, or unable to understand the nature of the trial if, as a result of unsoundness of mind or inability to communicate, he or she lacks the capacity to participate effectively in the proceedings. In determining this issue, the Superior Number shall have regard to the ability of the accused:-

- (a) to understand the nature of the proceedings so as to instruct his lawyer and to make a proper defence;
 - (b) to understand the substance of the evidence;
 - (c) to give evidence on his own behalf; and
 - (d) to make rational decisions in relation to his participation in the proceedings (including whether or not to plead guilty), which reflect true and informed choices on his part."
5. The Court went on to make a number of other observations. At paragraph 30 of the judgment the

Court said:- "... the presumption of sanity remains. If an issue as to unfitness to plead is raised by the defence, the burden is on the defence to satisfy the Superior Number on a balance of probabilities that the accused does not have the capacity to participate effectively in the proceedings. If the issue of unfitness to plead is raised by the Crown, the burden is on the Crown to satisfy the Superior Number beyond reasonable doubt." 6. At paragraph 32 the Court said:- "...it will not be sufficient in itself to justify a finding of unfitness to plead that an accused person is someone of limited intellect or someone who, for other reasons, might find the criminal process puzzling or difficult to follow. I envisage that some evidence of a clinically recognised condition leading to incapacity will be required before a finding of unfitness could be made. In this connection, it is worth underlining an important distinction between the process of adjudicating on a fitness to plead in Jersey and in other parts of the British Isles. In Jersey the duty of adjudication is placed not on a jury, but on the Jurats who are a mature and experienced body of judges on whom considerable reliance to arrive at a considered and reasonable conclusion can be placed." 7. We might perhaps at this point observe that the reference to the Superior Number in the above extracts should now be read as "Inferior Number" by reason of the amendment to the Law which gave the Inferior Number jurisdiction to determine questions of fitness to plead. 8. The question of the defendant's fitness to plead was raised before us by the defence and accordingly it is for the defence to establish on the balance of probabilities that the defendant is not fit to plead. We consider that against the tests set out in the extracts quoted above. The evidence 9. The Court had the benefit before it of a report from Dr Tanya Englebrecht, consultant psychiatrist ("Dr Englebrecht") of 6 th October, 2017 ("the First Report") and an addendum report dated 18 th March, 2018 ("the Addendum Report") together with a report by Dr Philip Joseph, consultant psychiatrist ("Dr Joseph") dated 27 th March, 2018. Dr Englebrecht was tendered by the defence as an expert witness and Dr Joseph by the Crown and both gave evidence before us. 10. We do not think it is necessary to go into the full detail of the evidence that has been placed before us by the experts. Dr Englebrecht's first report notes that the defendant suffers from a number of difficulties which are chronic. Of particular relevance to us is his response to anxiety and stress and the fact that he is diagnosed with epilepsy and is prescribed an anti-convulsant medication although his compliance with taking it is poor. He is resistant to taking it because he, so Dr Englebrecht reports, thinks "medication gives a false sense of security". 11. The defendant also suffers from severe anxiety with phobic symptoms and has received psychiatric treatment. 12. He also has a low IQ, some 73 on the normal scale which is "borderline low". 13. In her First Report, Dr Englebrecht expressed the view that the defendant was in her opinion fit to plead. At paragraph 10.52 she says:- "I performed a full mental state examination on [the defendant], which embraces cognitive function. Despite [the defendant's] diagnoses of social anxiety disorder, avoidant personality disorder, I did not find a significant impairment of his level of cognitive functioning to the extent that it causes loss of capacity." 14. And, at paragraph 10.53 of her First Report, Dr Englebrecht states:- "On the whole, I am of the opinion that [the defendant] does have capacity to understand court proceedings. I am of the opinion that [the defendant] has capacity to engage in the legal process and instruct a lawyer." 15. In her

Addendum Report, however, Dr Englebrecht's views have changed. She had been requested to provide an up to date report because of concerns that had been raised by an intermediary appointed to assist the defendant and Dr Englebrecht reports that she had been informed that the intermediary had seen the defendant in such an acute state of anxiety:- "...that he had significant difficulty in following a singular thread of discussion and his ability to stay on topic was markedly impaired". 16. In her Addendum Report Dr Englebrecht also repeats the intermediary's assessment that seizures occur with greater frequency for the defendant than had previously been understood and that the intermediary thought it "likely that [the defendant] will experience a seizure at court ". If that were the case there were concerns that the defendant would be unaware that he was in Court and would not be able to understand the evidence being presented. We also heard through Dr Englebrecht of confirmation from the defendant's legal counsel that the defendant had fallen asleep during an important hearing before the Court and his inability to concentrate necessitated an adjournment. The defendant had also attended the emergency department on 8th March after his legal representative and court intermediary witnessed what they believed to be a seizure. 17. As a result of these concerns Dr Englebrecht had examined the defendant again and confirmed her diagnosis that he suffered from borderline intellectual functioning, avoidant personality disorder/social anxiety disorder and was prone to epileptic seizures. She notes the defendant as reporting that after a seizure he would " come round quickly " but then he would feel sleepy for a long time afterwards. It was apparent that he was experiencing seizures with greater frequency. 18. During the course of that interview the defendant explained to Dr Englebrecht that his anxiety became overwhelming when in court and when asked if he had been able to follow court proceedings thus far he said " I didn't fully understand what was going on ... I understand some of why they say it was wrong, but I don't understand all of it. " 19. At paragraph 8.11 of her Addendum Report Dr Englebrecht says this:- "[The defendant] will not be fit to participate in his trial to the required level if he has an attack of severe anxiety or a seizure either in court or at night-time. [The defendant] explained he currently experiences excessive tiredness. "I fall asleep ... I have seizures when I'm tired and the seizures make me feel tired... I will try to do my best in court even if I have seizure ...". 20. At para 8.13 of her Addendum Report Dr Englebrecht says:- "Whilst a seizure may theoretically be prevented (by encouraging [the defendant] to be concordant with his medication), I believe it to be inevitable that he will become extremely anxious. Given the intermediary's feedback, I am concerned [the defendant] may not then be able to understand his lawyer's questions, apply his mind to answer them and convey intelligibly to the lawyers the answers he wishes to give. He would struggle to follow the course of proceedings and give evidence on his own behalf. This brings into question whether he will be able to make rational decisions in relation to his participating in the proceedings, which reflect true and informed choices on his part." 21. And, finally, at para 8.13 Dr Englebrecht says:- "Given recent developments and reports obtained subsequent to my initial report dated 23 rd October 2017, I am of the present opinion that on the balance of probabilities [the defendant] is currently unfit to plead as he does not have the capacity to participate effectively in proceedings." 22. In her evidence before us, Dr Englebrecht confirmed the contents of her

report confirming that the defendant had very poor coping strategies and illustrated his inability to deal with anxiety by saying that there was an example in the past where he did not leave his house for protracted periods and he had not cashed his social security cheques for one year or more which had put him in financial difficulties. 23. His epilepsy was the main condition that caused worry and he had presented with seizures very frequently over the last weeks. Some of those seizures had been witnessed by others. There is no doubt that stress contributed to the likelihood of him having seizures and immediately after the seizure, the post-ictal phase, which could last for a day or two after, he would feel exhausted and struggle to think clearly and would have issues with his memory. 24. His avoidant and anxious personality would also add enormously to his tension and whilst a low IQ is not by itself a reason to decide that someone is unfit to plead, nonetheless the defendant's IQ cannot be ignored in this case. He sometimes presents as more able than he actually is and is not particularly verbally impaired. 25. Because of the various reports that she had received relating to seizures she wished to re-assess the defendant and as a result now believed that he was unfit to plead. She did not think that the defendant was exaggerating or malingering. In her view, whilst it may be said his fitness to plead fluctuates, under the stress of the court proceedings, with the likelihood of a seizure and his response to stress generally, he was in his opinion not fit to plead. 26. Dr Joseph's report concluded that the defendant was fit to plead. At paragraph 22 he said this:- "The defendant is fit to plead and stand his trial. He understands the nature of the charge he is facing, he understands the significance of his plea, he understands the nature of the proceedings and is able to instruct his lawyer and make a proper defence. He understands the substance of the evidence and is able to give evidence on his own behalf. He has the capacity to make rational decisions in relation to his participation in the proceedings which reflect true and informed choices on his part. This was evident in his interaction with me when he preferred not to discuss further details about the allegation with me but consult with his advocate." 27. At paragraph 23 of his report Dr Joseph said:- "... it is unlikely that his socially avoidant personality disorder, if present, or his hoarding, would impair his ability to participate in his trial. The main health issue affecting the defendant's ability to stand his trial is his epilepsy. It follows that he should take his prescribed medication regularly to reduce the risk of suffering an epileptic fit during the trial." 28. It is undoubtedly the case, as indeed Dr Joseph and Dr Englebrecht confirmed, that were the defendant to take his medication the chances of him suffering an epileptic seizure during the course of the trial or at a time which would impact upon the trial would be reduced. That being said, however, it is equally clear that the defendant's failure to comply with his medication routine is nothing to do with the current proceedings and had been a chronic feature of his behaviour over the time he had been prescribed it. He does not take it as frequently as prescribed because he believes it has an adverse effect on him and he has been of this view and has not been compliant with his medication for a period significantly in excess of the period covered by the current charge. His non-compliance is itself a feature of his mental condition. 29. Interestingly, Dr Joseph in his evidence before us whilst maintaining his view about the Defendant's fitness to plead said that were he advising in the United Kingdom, as he had frequently done, his advice

would be that the individual was fit to plead but that there was "no public interest in continuing". We note that as a matter of interest although of course that is not a matter on which Dr Joseph can give an expert opinion and is a matter, at first instance at least, for determination by the Attorney General alone. 30. In evidence Dr Joseph confirmed that epilepsy was a significant issue but can simply be addressed by the defendant taking his medication. 31. He accepts that the defendant has the anxiety problems similar to those identified by Dr Englebrecht although perhaps not precisely the type that she identifies. The seizures reported could equate to epilepsy or anxiety. He accepted that the defendant was unlikely to be malingering or exaggerating. 32. We have not found this an entirely straightforward matter given the different conclusions reached by the experts. 33. There is no doubt, however, that the defendant is extremely anxious, perhaps to a significant extent as a result of the current proceedings, and that that anxiety makes it more likely that he will have seizures than otherwise. It seems to us to be highly likely that he will suffer one or more seizures during the course of any potential trial or in the surrounding time period and it is clear that the seizures that he is suffering, which are evidently becoming more and more frequent, have impacted upon his ability to give basic instructions to his legal adviser. 34. We are presented with a defendant with a low IQ, with acute social anxiety and who suffers from extreme stress. To this is added the epilepsy and the fact that he is historically non-compliant with taking his medication. 35. It may be that were the defendant to be compliant with his medication routine he would not suffer a seizure at trial but it is clear that so extreme is his anxiety that his ability to participate meaningfully during the course of the trial and in preparation for trial is in our view severely limited. We do not think it is helpful to look at the various problems that the defendant suffers in isolation and consider their effect. What is important is to take his mental state as a whole and to that we have to consider the complicating effect of the defendant's low IQ. 36. It is clear to us that the defendant's fitness to plead fluctuates but we must take a view in the round on the evidence before us and we are satisfied on the balance of probabilities, that he does not have the ability to understand the nature of the proceedings sufficiently to instruct his lawyer and make a proper defence; to understand the substance of the evidence, or if subject to a seizure or in the post-ictal phase to give evidence on his own behalf. We have serious doubts about his ability to make rational decisions if he is in a period following a seizure. 37. He has a number of clinically recognised conditions and clearly in the seizure or post-seizure phase he would not have the ability to participate effectively in proceedings. In our view it is highly likely that his stress levels themselves, during the course of a trial, would equally preclude his effective participation in proceedings. 38. Accordingly, on the balance of probabilities, in our view, he was unfit to plead. Authorities Criminal Justice (Insane Person) (Jersey) Law 1964. AG -v- O'Driscoll

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