

JERSEY / JUDGMENT

AG v Harding [2009] JRC 198 (16 October 2009)

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JUDGMENT

THE commissioner: 1. On 1 st September, 2009, the Superior Number of the Royal Court found that the defendant was unfit to plead to the accusation against her, pursuant to Article 1 of the Criminal Justice (Insane Persons)(Jersey) Law 1964 ("the 1964 Law") and we now set out our reasons. Personal and Psychiatric History 2. The defendant was born on 25 th January, 1990, in Jersey and was therefore nineteen years of age at the time of the hearing. She appears to have developed quite normally up to the age of nine when there was an abrupt change in her behaviour. She has a long history of psychiatric treatment from the age of thirteen and has spent most of her life since then in various psychiatric hospitals or in custody. She had been involved in physical assaults on patients and staff in the various institutions in which she had been placed and began to self-harm from the age of thirteen 3. She was released from St Saviour's Hospital in February 2008 and on the evening of Friday 9 th May, 2008, entered a shop called Newsfayre on Rouge Bouillon, St Helier. A female shopkeeper was working on the till behind the counter. This was not the first time that the defendant had entered the shop. The female shopkeeper had previously refused to sell her twelve packets of twenty-four paracetamol tablets, which was all the paracetamol in the shop on that occasion. The defendant had left angrily saying she would return to kill her. She explained to Dr J. D. Mumford, a consultant psychiatrist, that she was acting on the instructions of "Libby" a person she described as having no arms, legs or feet and who always wore a diving mask. Having entered the shop, the defendant approached the shopkeeper and demanded all the money from the till. The defendant told the shopkeeper that she had a knife and that she could kill her. The shopkeeper produced a metal pole or bar that she kept behind the counter and on seeing this, the defendant left the shop saying she would be back. 4. The police were called and approached the defendant with the intention of arresting her. She produced a five inch steel-bladed knife from her handbag and threatened the female officer by making stabbing movements towards her. The police had to use CS gas to disable the defendant who was then arrested. The defendant was charged with attempted robbery and violently resisting arrest and remanded in custody. She pleaded not guilty on Indictment and was remanded for an Assize trial on the 11 th and 12 th December, 2008. She was advised by Advocate S. A. Pearmain, but just before the trial dispensed with her services and represented herself. Advocate Pearmain remained in Court as amicus to assist. 5. Although it was clear from the facts of the case that

there were mental health issues, the defendant made it clear through Advocate Pearmain that she did not wish the Court or the Jury to consider the issue of sanity as a defence to the counts on the Indictment. 6. The Prosecution had commissioned a report from Dr Mumford on the issue of her fitness to plead and whether or not she was insane for the purposes of Jersey Law at the time of the alleged offences. In his report of 24 th November, 2008, he explained that over the four or five years that the defendant had been involved with psychiatric services it was clear that there had been a great deal of controversy regarding the nature and diagnosis of her mental health problems. Fundamentally all the psychiatrists who have been involved in her care had ended up coming to the same conclusion, namely that a major component of her mental disorder is based on her personality and referred to as an "emerging" personality disorder, as conventionally the diagnosis cannot formally be made until a young person is aged 18. 7. The difference of opinion within and between the clinical teams who have treated her over the years was whether, in addition to the Personality Disorder, she also had an additional psychotic component leading to the additional diagnosis of Schizoaffective Disorder. Ultimately the personality disorder diagnosis was favoured. Such a diagnosis would see her complaints of complex, bizarre, visual and auditory controlling hallucinatory experiences as not being produced by an additional psychotic illness, on the basis of their nature and quality being atypical of a true psychotic illness. They saw these as symptoms she had developed, having been in close contact with patients who have such schizophrenic symptoms, in order to justify her behavioural problems as not being her responsibility. 8. Dr Mumford's formal diagnosis was Borderline Personality Disorder with additional antisocial and histrionic traits. We will come back to this later. Dr Mumford expressed the view that she was able to understand the nature of the proceedings so as to instruct her lawyer and make a proper defence. He also considered that she could understand the substance of the evidence, give evidence on her behalf and make rational decisions in relation to her participation in the proceedings (including whether or not to plead guilty) which reflect true and informed choices on her part and that she was therefore, in his opinion, fit to plead. With regards to whether she was insane at the time of the alleged offences he expressed the opinion that he did not consider her unsoundness of mind affected her criminal behaviour to such a substantial degree that a Jury would consider that she ought not to be found criminally responsible. 9. There was no application by the prosecution or the defence for the issue of the defendant's fitness to plead to be referred to the Superior Number of the Royal Court pursuant to provisions of Article 1 of the 1964 Law and in the circumstances there was no such referral. 10. At the Assize trial the Jury was warned that although they might think the defendant had some difficulties which required professional help, whatever those difficulties may be, it was not the Jury's role to reach a view about them. The Jury was only to judge the evidence and the facts of the case. The defendant was unanimously acquitted of attempted robbery but convicted of attempted grave and criminal assault and of violently resisting arrest. She was remanded in custody pending preparation of reports for sentencing. 11. On 18 th December, 2008, whilst on remand at HMP La Moye the defendant attacked a female prison health worker by repeatedly slashing her neck in the region of her jugular vein with a glass weapon she had fashioned from the base of a nail varnish bottle. The medical opinion was that if the injury had been very slightly deeper it would have had fatal consequences. In her interview with the police conducted without an Appropriate

Adult present the defendant made it clear that she had intended to kill the victim, although there appears to have been no personal motive. 12. On 16 th January, 2009, an Indictment was put to the defendant alleging attempted murder or in the alternative grave and criminal assault. Pleas were reserved and the matter adjourned whilst the Defence sought expert advice from Dr Clare Dillon, a psychiatrist, on the defendant's fitness to plead and her mental state at the time of the incident on the 18 th December, 2008. Dr Dillon's report of 8 th April, 2009 made it clear that she was sufficiently affected by her condition as to warrant the issue of her fitness to plead being referred to the Superior Number to try that question. She was formally remanded to the Superior Number for that purpose on 10 th July 2009. 13. The joint narrative submitted by counsel describes the defendant as extremely unpredictable. At a remand hearing in August 2008 she jumped out of the dock shrieking, lashing out, kicking and biting. She was only detained by the swift reactions of a police officer who grabbed her by the ankle as she went over the dock. It took all the Court Officers about half an hour to restrain her and get her out of the Court using multiple handcuffs and leg locks. Legal Test 14. The 1964 Law, lifted directly from English legislation, provides no test of insanity, whether in relation to unfitness to plead or the defence of insanity. The tests applied in England and Wales as set out in Pritchard

(1836) 7 C&P 303 (unfitness to plead) and M'Naghten

(1843) 10 C 1 & F 200 (insanity as a defence) focus on cognition and have come in practice to be applied only to major mental illnesses. The tests applied under Jersey Law are not so restricted. 15. In AG v Prior

[2001] JLR 146 the Court was concerned with the meaning of the word "insane" for the purposes of Article 2(1) of the 1964 Law which is in the following terms:- "2 Accused persons found insane at time of commission of offence

- (1) If on the trial before the Royal Court of any person charged with any act or omission punishable with death or imprisonment, the jury is satisfied that the accused did the act or made the omission charged against him or her but that the accused was insane at the time when the act was done or omission made so as not to be responsible according to law for his or her actions, the jury shall return a special verdict to the effect that the accused did the act or made the omission charged but is not guilty on the ground that he or she was insane so as not to be responsible according to law at the time." 16. Bailhache, Bailiff, found that the M'Naghten Rules were not part of Jersey Law. It was clear that Jersey Law required a volitional test of insanity, whereas the adoption in England of the M'Naghten Rules ruled out any such requirement. It was highly likely, although not necessary to decide, that adoption of the M'Naghten Rules would involve a breach of Article 5 of the European Convention of Human Rights . He drew attention to the opinions concerning the meaning of insanity in Jersey of two previous Bailiffs, Advocate Jean Hammond and Sir Robert Marett, and observed at paragraph 28:- "These statements of opinion are noteworthy for two reasons. First, in contrast to the M'Naghten Rules, they both appear to acknowledge a volitional as well as a cognitive test to establish unsoundness of mind. In other words, the "irresistible impulse" defence, against which English law has resolutely set its face ever since the

M'Naghten Rules were laid down, seems to have been part of the law of Jersey at that time. Secondly, although they do not refer specifically to medical opinion, they both underline the multiplicity of circumstances which destroy moral perception and which might lead to exemption from punishment for a crime committed under their influence." 17. He went on to hold that for the purpose of Article 2 under the 1964 Law a person was insane if, at the time of the commission of the offence, his unsoundness of mind affected his criminal behaviour to such a substantial degree that the Jury considered that he ought not to be found criminally responsible. The test would allow objective medical evidence of the accused's soundness of mind, in line with the provisions of the Convention, by retaining a clear causal link between the offence and the mental disorder. The presumption of sanity remained, with the burden of proving otherwise on the accused. 18. In *AG v O'Driscoll*

[2003] JLR 390, the Crown sought a ruling as to how the Jurats should be directed on the meaning of the phrase "so insane as to be unfit to plead to the accusation or unable to understand the nature of the trial" in Article 1(1) of the 1964 Law, which is in the following terms:- "1 Persons found insane on accusation or trial

- (1) If on the accusation or trial before the Royal Court of any person charged with any act or omission punishable with death or 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 enable the Superior Number of the Royal Court to try the question whether or not the accused is so insane as aforesaid." 19. Bailhache, Bailiff, declined to follow the test laid down in England under *Pritchard*. Quoting from his judgment at paragraph 27:- "I am reluctant to adopt a test laid down in England more than 160 years ago, when it is open to me to follow a new road which has been essentially engineered by the intellectual efforts of many specialists in this field. Social conditions have changed, and the importance of protecting the human rights and dignity of those afflicted by mental or physical incapacity is nowadays more widely appreciated. In my judgment I should adopt a test which is consonant with the European Convention on Human Rights, conscious of developments in medical science in the last century or more, and appropriate to the social needs of this jurisdiction in the 21st century. I propose to formulate a test which draws on elements of both suggested tests that have been placed before me. 20. The test he formulated (at paragraph 29) is as follows:- "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." 21. Bailhache went on to say, at paragraph 32:- "...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 recognized condition leading to incapacity would 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 unfitness 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 upon whom considerable reliance to arrive at a considered and reasonable conclusion can be placed." 22. It would appear that the current case is the first occasion in which the test formulated by Bailhache, Bailiff, in O'Driscoll stands to be applied. Burden of Proof 23. In O'Driscoll Bailhache, Bailiff, made a number of comments (at paragraph 30) arising from the test he had laid down as follows:- "...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. I am conscious that these rather bald statements do not address serious issues as to whether the burden is a legal or an evidential burden, nor the appropriate standard if the matter is initially raised by the court. However, I have heard no argument on these issues and they may be left over for another day. The above statements as to where the burden lies and what is the relevant standard appear to be in conformity with the position at English law; see *R. v. Friend* (7) ([1997] 2 All E. R. at 1018-1019, per Otton, L. J.)." 24. It was agreed by Counsel in this case that as the issue of the defendant's unfitness to plead had been raised by the defence, the burden was upon the defence to satisfy the Superior Number on a balance of probabilities that the Defendant did not have the capacity to participate effectively in the proceedings. The Hearing 25. At the hearing before the Superior Number on the 1 st September, 2009 the Court was much assisted by the joint narrative that had been agreed by Mrs Sharpe and Miss Fogarty and which was read to the Court by Miss Fogarty. The first potential issue to arise was the defendant's presence in Court, bearing in mind what both Counsel described as her unpredictable and precarious mental state. There was no application for the hearing to take place in her absence pursuant to Article 1(2) of the 1964 Law which is in the following terms:- "(2) Such trial shall be held by the Superior Number of the Royal Court as soon as may be at such time and place as the court may direct and may be held in the absence of the accused if it is proved to the satisfaction of the court by evidence (including the oral evidence of 2 medical practitioners who in the opinion of the court have had special experience in the diagnosis or treatment of mental disorders) that it is impracticable or inappropriate to bring the accused before the court." 26. The defendant was present at the outset of the proceedings but abruptly left the Court shortly thereafter. We were informed by the Court Officer that she refused to return

and that physical force would have to be used to bring her back into the Courtroom. The Court was concerned over the use of force on a young girl suffering from a serious personality disorder and in all the circumstances and applying Article 72 of the Loi (1864) *Régulant la Procédure Criminelle* the Court decided to continue in her absence. She remained within the precincts of the Court and did return to hear the Court's ruling. 27. In addition to the material contained within the joint narrative, the Court had before it reports by and heard evidence from Dr Dillon (called by the Defence) and Dr Mumford (called by the Prosecution). 28. In a draft article "On Being Insane in Jersey: Again" by Professor R D Mackay and Miss Fogarty, shortly to be published in the *Jersey and Guernsey Law Review*, the authors say this:- "There is something distinctly odd about the fact that the 1964 Law has been in force for 45 years but that no case has ever, as far as we have been able to ascertain, been heard under it. It is also strange that the Bailiff's tests as set out in *Prior and O'Driscoll* have been in existence since 2001 and 2003 respectively, but have remained unutilised. However, in England, where the tests for unfitness and insanity might be viewed as distinctly questionable on Convention grounds, there exists a plethora of case law to which the criminal practitioner may refer. In Jersey, any mental health related criminal case appears to have sunk with little or no trace at the point where a psychiatric report has been obtained. This article examines some of the reasons why this might be the case. Psychiatrists receive training in connection with the legal aspect of psychiatry largely in the law of England and Wales, and lawyers in Jersey, by and large, are reliant on the psychiatric opinion of those so trained. The potential for misunderstanding and misapplication of the law as it stands in Jersey is evident in this situation where the relevant parties have little or no common ground." 29. It was clear that both experts had been properly briefed as to the test to be applied under Jersey Law and both were careful to acknowledge that the decision as to whether the defendant was unfit to plead was a matter of law not medicine, which was for the Jurats alone to decide. Their own opinion on the issue, whilst important, was not decisive. Evidence of the Experts 30. Both psychiatrists were in agreement that the defendant suffers from a clinically recognised mental condition, namely Borderline Personality Disorder as defined in the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorder DSM - VI*, one of the two widely accepted major classifications used by clinicians. This does not mean that it is "borderline" i.e. whether she has a disorder or not. It is clear that the main impact of the disorder is on the sufferer's mood and volition. Referring to *DSM - VI* the essential feature of Borderline Personality Disorder is a pervasive pattern of instability of interpersonal relationships, self image and affect, and marked impulsivity that begins by early adulthood and is present in a variety of contexts. Quoting from paragraph 301.83:- "Individuals with Borderline Personality Disorder make frantic efforts to avoid real or imagined abandonment (Criterion 1). The perception of impending separation or rejection, or the loss of external structure, can lead to profound changes in self-image, affect, cognition, and behaviour. These individuals are very sensitive to environmental circumstances. They experience intense abandonment fears and inappropriate anger even when faced with a realistic time-limited separation or when there are unavoidable changes in plans (e.g., sudden despair in reaction to a clinician's

announcing the end of the hour, panic or fury when someone important to them is just a few minutes late or must cancel an appointment). They may believe that this "abandonment" implies they are "bad". These abandonment fears are related to an intolerance of being alone and a need to have other people with them. Their frantic efforts to avoid abandonment may include impulsive actions such as self-mutilating or suicidal behaviours, which are described separately in Criterion 5." 31. Other criteria include a pattern of unstable and intense relationships, sudden and dramatic shifts in self-image (usually based on being bad or evil) and opinions and rapidly fluctuating mood. Some individuals develop psychotic-like symptoms during times of stress. 32. By reference to the test laid down in O'Driscoll, Dr Dillon addressed the defendant's ability to make rational decisions, true and informed choices and to participate effectively in the trial as follows:- "I am of the opinion that Miss Harding has the necessary cognitive ability to understand the nature of the proceedings, to form a proper defence and to give evidence. She has demonstrated an understanding of the case brought against her and has read and understood the witness statements. Miss Harding understands what it means to enter a plea and the possible outcomes of entering a guilty or not guilty plea, including the role of the Judge and Jurats. Miss Harding has stated that she is disinterested in her case and will not play an active role in it, including giving her counsel instructions or participating in giving evidence. With regard to her ability to make rational decisions, I believe that in any given moment she may be capable of making such rational decisions, however, they may fluctuate rapidly by virtue of her disorder. Albeit a matter for the Jurats to decide, there are a number of aspects of her disorder that may influence her ability to make 'rational decisions'. The first relates to her rapidly fluctuating mood where she can move between an elevated mood, with feelings of optimism to feelings of despair and irritability with suicidal thoughts and negative thinking patterns, within a few minutes. This may not only influence her ability to 'hear' and take on board information presented but may also significantly influence the way she processes this information and the manner in which she acts on this information. I am not aware of any case law that defines 'rational decisions'. However, it is notable that Miss Harding fluctuates in the answers in relation to the case. She suggests that she will not participate in her court case, however, previously, in relation to prior charges, suddenly chose to represent herself. Whether this is considered a 'rational decision' could of course be based on the individual and the circumstances, however, I believe this is highly representative of her disorder and therefore may be of some relevance. As I have previously stated, in my earlier report, Miss Harding is likely to act in a manner that is going to lead to her feeling 'contained', that is, safe and cared for by others. The evidence of her assaults on herself and on others, previously, notwithstanding the current charges, may be seen as attempts to convey how distressed she is feeling internally and also serve to ensure that she is kept within a safe environment, with care givers in close proximity. It is highly probable that her future decision making, with regard to the case, will be driven by an on going desire to feel safe and whether this would constitute a 'rational decision' is again something for consideration. Turning to consider whether she can make true and informed choices I feel there are similar considerations, in that Miss Harding has the necessary cognitive ability to understand information presented to her and to weigh the

information. It is, however, the internal factors I have alluded to, which are influenced by her disorder, that affect how she makes her choices. Similarly, her choices if taken as a 'snap shot' at one point in time may appear to be true and informed, however, if taken in the context of multiple 'snap shots' or even 'a film' may appear incongruous and are likely to vary according to her mental state, at the given time. Drawing inferences from the discussion above, with regard to Miss Harding's ability to participate effectively in her trial, I believe this may similarly be influenced by her disorder. Moreover, Miss Harding might ultimately find the emotional process of attending court in itself overwhelming and ultimately disrupt proceedings." 33. In her evidence Dr Dillon assessed the severity of the defendant's impairment as a result of this disorder on a scale of one to ten, at eight or nine, illustrated by the need for her to be kept in solitary confinement. In his evidence Dr Mumford did not substantially disagree with Dr Dillon's diagnosis or assessment. In his view the defendant was profoundly affected by the condition which affects all areas of thinking, feeling and behaving. He scored the severity of her impairment at seven to eight. 34. Both experts had some difficulty with the meaning of "rational decision" for the purposes of the O'Driscoll test. Dr Mumford referred, by analogy, to the UK Mental Capacity Act 2005 which as a principle states that a person is not to be treated as unable to make a decision merely because he or she makes an unwise decision and outlines the meaning of being unable to make a decision within that Act namely if they cannot understand information about the decision, retain that information, weigh that information up and then communicate their decision. In his view the defendant would satisfy all those cognitive tests. 35. He saw irrational decisions as those that are being influenced by a major mental illness such as a psychotic illness with delusions (mistaken beliefs held fixedly against rational argument) or hallucinations which can certainly lead to an individual being unable to make rational decisions in the proceedings which reflect true and informed choices. The defendant's decision, for example, to represent herself at the trial in December might objectively be viewed as unwise but in his view it could not be extrapolated from that decision that she did not know internally that to be represented might be the wisest thing to do. He considered that she had that internal ability. 36. However he accepted that whilst overall the defendant was not cognitively impaired, the features of the disorder may lead to her being cognitively impaired at any given moment. It was a question of degree. The features of her condition were such that it was open to the Jurats in his view to consider them sufficient to affect her ability to make rational decisions which reflect true and informed choices. If asked to give a personal opinion he would not on balance consider them to be sufficient. Dr Dillon's personal opinion was that on balance the features were sufficient. 37. Thus the experts were agreed on the diagnosis and very substantially agreed on the severity of the defendant's impairment. Both agreed that the features were sufficient to ground a finding that the defendant lacked the necessary capacity. They differed in their personal views as to whether she lacked that capacity but accepted that this was a matter for the Jurats to decide 38. For the purposes of the O'Driscoll test the court has to have regard to the ability of the defendant to make rational decisions in relation to her participation in the proceedings which reflect true and informed choices on her part; "rational" in this context to be given its ordinary

meaning namely based on or in accordance with reason or logic. In this case it was clear from the evidence of both experts that, at any given moment, the defendant had that ability but that, as Dr Dillon said, in the context of multiple snap shots or even a film, her condition, and in particular her changes in emotional state, would impact on her thought processes and ability to make rational decisions. 39. We are concerned not with a snap shot in time but with the capacity of the defendant to participate effectively in her trial i.e. in the whole course of the trial likely to span a number of days. Taking into account the evidence of the experts and all the circumstances of the case as outlined in the joint narrative, the Jurats concluded, on a balance of probabilities, that her impairment by reason of this condition, by which she was severely affected, was sufficiently substantial to render her incapable of participating effectively over the course of her trial. 40. Finally in O'Driscoll , Bailhache, Bailiff, referred at paragraph 33 to the desirability of a number of reforms to the 1964 Law. One aspect he referred to was the references to "insane persons" which he said might be thought to carry a stigma which was inappropriate in the context of those suffering from mental illness. As the first Court (apparently) to make a finding under Article 1(1) of the 1964 Law, we were deeply uncomfortable over the use of such language, which we did our best to avoid in the presence of the defendant but which we regarded as wholly inappropriate. The Court therefore expresses the hope that the reforms suggested by Bailhache, Bailiff, will once again be drawn to the attention of the appropriate Minister. Authorities Criminal Justice (Insane Persons)(Jersey) Law 1964. Pritchard (1836) 7 C&P 303. M'Naghten (1843) 10 C 1 & F 200. AG v Prior

[2001] JLR 146 . European Convention on Human Rights. AG v O'Driscoll

[2003] JLR 390 . Loi (1864) Réglant la Procédure Criminelle. Mental Capacity Act 2005. Page Last Updated: 29 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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