

JERSEY / JUDGMENT

# AG -v- Kean [2017] JRC 164 (09 October 2017)

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## JUDGMENT

THE commissioner: 1. On 22 nd May, 2017, the Court found the defendant unfit to plead and stand trial in relation to an Indictment comprising three counts of indecent assault and one count of rape, all alleged to have taken place on the same day involving the same complainant. 2. The hearing proceeded in the absence of the defendant pursuant to Article 1(2) of the Criminal Justice (Insane Persons)(Jersey) Law 1964 ("the 1964 Law"), who was then held at a secure unit in England, pursuant to Sections 48 and 49 of the Mental Health Act 1983 , the Court being satisfied on the evidence of the two experts appointed by the Court, namely Dr David Ho, a consultant forensic psychiatrist, and Dr Dale Harrison, a consultant general and forensic psychiatrist, that it was inappropriate to bring the defendant before Court. 3. On 9 th March, 2017, and as a consequence of the advocate appointed to represent the defendant becoming professionally embarrassed, the Court ordered the appointment of an amicus curiae . Advocate Evans was nominated to that role, and on 21 st March, 2017, he raised with the Court the issue of the defendant's fitness to plead. The Court referred that issue to be heard before the Inferior Number, appointing Dr Ho and Dr Harrison to provide expert reports and to give evidence. Burden and Standard of Proof 4. In AG v O'Driscoll

[2003] JLR 390 , the Court said this in relation to the burden and standard of proof where an issue as to fitness to plead arises under Article 1 of the 1964 Law:- "A number of points arise from that test. First, 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 [Inferior] 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 [Inferior] 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." 5. The issue of the defendant's fitness to plead in the case before us was not raised by the defence or by the prosecution, but was raised by the amicus curiae and it was the Court that appointed the two experts. In AG v Sousa

[2016] JRC 059 , the Court had to determine the issue of the burden and standard of proof in circumstances where the prosecution was asserting that the defendant was fit to plead and it was only the Court appointed expert who was asserting that the defendant was unfit to plead. Quoting from paragraphs 12 - 14 of the judgment:- "12 As to the burden and standard of proof under English law, Archbold (2015 edition ) has this to say at para 4-236:- 'If the contention [i.e. that the defendant is not fit to plead] that the defendant is under a disability is put forward by the defence, the onus of proof is upon the defence and is discharged if the court is satisfied on the balance of probabilities that the contention is right. If the Crown makes the allegation and the defence disputes the issue, the burden rests upon the Crown: R v Podola ante. Where the burden falls upon the Crown the standard of proof is proof beyond reasonable doubt: R v Robertson, ante. Query as to the situation when the issue is raised by the judge.' In his submission, Crown Advocate Pedley suggested that, as the issue of fitness to plead had been raised by the prosecution, it had to prove that matter beyond reasonable doubt. We do not think that can be right because, as the matter has turned out, the prosecution is not contending that the defendant is unfit to plead having regard to the report of Dr Ho; nor, on the other hand, is the defendant putting forward any positive case as he has no expert to rely upon and has hitherto not participated in the process. The position is that the prosecution is asserting that the defendant is fit to plead and it is only the Court appointed expert who is asserting that the defendant is unfit to plead. We are therefore in the territory envisaged by Archbold in the passage cited above where the issue is raised by the judge. In our judgment, the only satisfactory way of approaching this situation is that the Court must determine on the balance of probabilities whether the defendant is fit to plead. If it considers it more probable than not that he is fit to plead, it should so rule and vice versa. We appreciate that this says nothing about the burden of proof, but where it is the Court appointed expert who is asserting unfitness to plead, we do not think that questions of the burden of proof are necessarily apposite." 6. An amicus curiae is appointed to assist the Court, and in our view, we were similarly in the territory envisaged by Archbold Criminal Pleading, Evidence and Practice 2015 Edition , where the issue is raised by the judge, acting in this case on the advice of the amicus curiae . It was for the Court, therefore, to determine on the balance of probabilities whether the defendant was fit to plead. Legal test to be applied 7. Article 1(1) of the 1964 Law provides:- "[1] If on the accusation or trial before the Royal Court of any person charged with any act or omission punishable by 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 whether or not the accused is so insane as aforesaid." 8. The legal test is set out in O'Driscoll , where at paragraph 29 Sir Philip Bailhache, then Bailiff, held 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 [Inferior] 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." Expert evidence 9. The defendant sustained a brain injury at birth resulting in enduring brain damage. He has a history of epilepsy and developmental disturbances of personality and sexuality. He also has a history of substance misuse and has been in regular contact with Psychiatric Services, where he would present with heightened agitation, rapid speech, flight of ideas, thought disorder and marked hostility. He had been admitted to a secure unit in England in 2014 from HMP La Moye and had been admitted there again in April 2017 from HMP La Moye, because of a marked deterioration in his mental health with significant thought disorder and the emergence of paranoid delusions. 10. In his report of 10 th Maym 2017, Dr Ho gave the following advice, which was confirmed in evidence:- "(a) [The defendant] presents with features consistent with a diagnosis of a psychotic mental disorder, the most likely being Paranoid Schizophrenia... Paranoid Schizophrenia is a severe and enduring mental disorder. (b) [The defendant] presents with acute features of paranoid psychosis ... He has no insight into his mental health or his circumstances. His condition is of a nature and degree warranting compulsory detention in hospital. (c) [The defendant] is not fit to stand trial. He is unlikely to be able effectively to participate in the proceedings, to provide reliable evidence on his own behalf or be cross examined. He has not demonstrated adequate ability to provide instructions." 11. In his report of 30 th April, 2017, Dr Harrison gave this advice, again confirmed in evidence:- "(a) [The defendant's] presentation includes lability of mood, psychotic symptoms including paranoia, impulsive and violent behaviour, cognitive deficits resulting in problems with his use of language and communication with others. (b) [The defendant] meets the criteria for a diagnosis of mental disorder due to brain damage and dysfunction and to physical illness. (c) [The defendant] is not fit to stand trial. He is not able to understand the nature of the proceedings so as to instruct his lawyer to make a proper defence. He does not understand the substance of the evidence and he is not able to give evidence on his own behalf. He is unable to make rational decisions in relation to his participation in the proceedings which reflect true and informed choices on his part. (d) [The defendant] is not fit to understand the nature of the trial and the present proceedings. He cannot communicate adequately and cannot participate effectively. (e) [The defendant] may become fit to stand trial in the future with more sustained and regular anti-psychotic treatment." Decision 12. With both experts being in agreement as to the severity of the defendant's mental disorder and his resultant inability to participate effectively in the proceedings, there is no need to go further into the detail of their reports. 13. The Court was satisfied on the balance of probabilities and applying the test in O'Driscoll that the defendant was unfit to plead and stand trial. He was therefore detained during Her Majesty's pleasure, it being noted by the Court that he was currently detained at the secure unit in England. The Court also ordered that the prosecution of the defendant be stayed until further order. Authorities Criminal Justice (Insane Persons)(Jersey) Law 1964. Mental Health Act 1983. AG v O'Driscoll

[2003] JLR 390 . AG v Sousa

[2016] JRC 059 . Archbold Criminal Pleading, Evidence and Practice 2015 Edition. Page Last  
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