

JERSEY / JUDGMENT

AG -v- Kinsella [2014] JRC 199 (17 October 2014)

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JUDGMENT

THE DEPUTY BAILIFF: 1. The Court sat on 17 th September, 2014, to hear an appeal against a sentence of 10 months' imprisonment imposed on the Appellant by the Relief Magistrate Advocate D E Le Cornu ("the Relief Magistrate") on 22 nd July, 2014, for various motoring offences detailed below. At the conclusion of the hearing, the Court allowed the appeal and substituted a total sentence of 8 months' imprisonment with reasons reserved. This judgment contains those reasons. The facts 2. The appellant arrived in Jersey from his previous home in Ireland some 48 hours prior to committing the offences for which he was sentenced. In the early hours of 21 st June, 2012, the defendant "hotwired" a blue Honda Civic and drove it away without the consent of the owner and without other lawful authority. As a result he was in breach of Article 53(1) of the Road Traffic (Jersey) Law 1956 ("the 1956 Law"). In doing so he was also in breach of Article 2(1) of the Motor Traffic (Third Party Insurance) (Jersey) Law 1948 ("the 1948 Law") because he was driving without a policy of insurance in respect of third party risks. The vehicle came to the notice of the police at 5am that day. An officer was dealing with a separate road collision when he heard the roar of this vehicle's engine, coming in his direction. He decided to ask the driver to stop so that he could issue words of advice and he took up a position in the middle of the road giving the appropriate signal. The car initially slowed almost to a stop just feet from the officer but then the car swerved and continued down the road past the officer at speed. Shortly thereafter a different police officer parked at the west end of Victoria Avenue observed the defendant driving the vehicle at speed past him, and using the blue lights and sirens fitted to the police car he indicated for the defendant's vehicle to stop. The defendant failed to stop and in fact increased his speed away from the officer. 3. The officer activated his body worn camera and the speed of his own vehicle travelling through the First Tower area in pursuit of the defendant was 80 mph, with the defendant's motor vehicle pulling away from the officer's car. In some of those areas, the speed restriction was 30 mph. The officer saw the defendant's vehicle travel at speed around various blind corners on the wrong side of the road. It was seen to drive the wrong way round the West Park roundabout and through a red traffic signal. As a result, the defendant was charged with driving dangerously contrary to Article 22(1) of the 1956 Law. 4. The officer had lost sight of the vehicle as it went through the underpass but he found it unattended with the engine still running in Hill Street, level with Church Street. The defendant was in the vicinity and he

fitted the description of the man who had been seen driving the car. The defendant was arrested and breathalysed and he failed the roadside breath test and was tested again at Police headquarters. The lowest breath sample was 52 mgs in 100 ml of breath. He was accordingly charged with a breach of Article 28(1)(a) of the 1956 Law as having driven a motor vehicle after consuming so much alcohol that the proportion in his breath exceeded the prescribed limit. 5. The defendant was also charged before the Relief Magistrate with driving without a licence authorising him to drive a motor vehicle contrary to Article 4(1) of the 1956 Law, and with two charges of failing to stop the vehicle on being so required by a police officer contrary to Article 51(1) of the 1956 Law. 6. Although the defendant initially denied being responsible for driving the vehicle, he subsequently entered a guilty plea and was represented at the sentencing hearing (though not by the amicus who appeared before us). The Relief Magistrate had the advantage of a social enquiry report which encouraged the Court to take an exceptional step of dealing with the defendant by way of a lengthy binding over order to leave the Island. The probation officer had taken into account that although the index offences would normally be considered too serious for such an order, the defendant had spent two weeks in custody which could be considered as an additional punitive sanction. In particular, the probation officer said this: "20. Offenders matching Mr Kinsella's profile would normally be considered for probation and community service orders. However, given the unknowns in his case and the risk concerns, I would not recommend a community based court order without first the completion of a court ordered psychiatric assessment. I would also question the appropriateness of community orders given his lack of ties with the Island and the short period of time he has been here." 7. Defence counsel urged the Relief Magistrate to impose a binding over order in accordance with the social enquiry report recommendation. When counsel was asked if he wished to address the Court on other ways of disposing with the matter if the Court considered a binding over was not appropriate, he responded that the social enquiry report noted that the alternative to custody, namely a community service order, would be unlikely to be appropriate and defence counsel considered that if no binding over order was made, custody would be the only alternative. 8. The Relief Magistrate retired to consider sentence and returned to say that he could not agree with the conclusions proposed by the Probation Service because the offences were very serious offences. He then imposed prison as follows:- (i) Article 28(1)(a) 1956 Law - one month; (ii) Article 22(1) 1956 Law - six months; (iii) Article 53(1) 1956 Law - one month; (iv) Article 2(1) 1948 Law - two months; with no separate penalty on charges 3, 4 and 5 relating to driving without a licence and failing to stop. He then said:- "All those sentences consecutive. Therefore, that makes a total of 10 months and, on charges 1 and 2 you will be disqualified from driving for 5 years." 9. Other than saying that the offences were very serious offences, the Relief Magistrate gave no reasons for his decision. 10. In his very helpful submissions, Advocate Jones as amicus put these points to the Court. He asserted that:- (i) The sentence was manifestly excessive; (ii) The Relief Magistrate failed to take into account a relevant issue, namely the mental health of the defendant; (iii) As a subset of the second point, fresh issues had arisen because there was now a psychiatric report from Dr Harrison; (iv) The sentences should not have been imposed consecutively because this was all one transaction. Although prima facie the sentences individually might be regarded as being reasonable, there was no reasoning for the exceptional course of making each sentence

consecutive. 11. When the appellant addressed us, he said that he had been reconciled with his partner, who was due to produce a child in November, and that he wanted to make for his own child a different upbringing from the one he had. He needed to provide for his partner and her unborn child financially and emotionally and since being detained at La Moye he had been given different medications which made him a more stable personality. He told us that he recognised that he should not have drunk alcohol with the medication he was taking, and that it was time for him to start acting his age. He was only grateful that no-one had been hurt by his driving. 12. Advocate Byrne asserted that here we had an appellant with several previous convictions both for drunken driving and other driving offences. Individually the sentences were not excessive and he contended that in the round they were not excessive. He submitted that it was unfortunate that the Relief Magistrate did not give reasons for his sentences but he was an experienced Magistrate and we can assume that he applied the right principles. He submitted that the psychiatric report would have made no difference to the Relief Magistrate's sentence because the appellant was normal and was responsible for his actions. The test on appeal 13. It is well established that the Court will not interfere with a sentence imposed by the Magistrate unless it is one which is not justified by law, or the sentence was passed on the wrong factual basis, or some matter had been improperly taken into account or left out of account, or there was some fresh matter which ought to be taken into account or whether sentence was wrong in principle or manifestly excessive. In particular it is not the function of the Royal Court to tinker with sentences which were within the range open to the sentencing court simply because the appeal court might itself have fixed a lower term of imprisonment. 14. We apply those tests. Discussion 15. Advocate Jones made a vigorous submission that paragraph 20 of the social enquiry report, cited at paragraph 6 above, showed that the probation officer was in great difficulty in making any recommendation. Here was a case where the probation officer was recommending a psychiatric assessment, and the Relief Magistrate gave no reasons for his decision as to why he did not order that assessment to be carried out. The Relief Magistrate plainly knew what the probation officer thought in that respect and in effect had been told that a psychiatric report was necessary. The social enquiry report did not therefore serve the purpose for which it was designed and the Relief Magistrate had failed to take into account something which was relevant. The relevance in fact was established because whereas the probation officer had considered that the appellant showed a high risk of reconviction within 12 months, on the application of the LSI-R assessment tool, Dr Harrison in his psychiatric report concluded that the appellant was at low risk of reoffending. 16. In our view, the Relief Magistrate did not go wrong in failing to order a psychiatric report. A proper construction of the probation officer's report is that no recommendation would be made for a community service order because the appellant had not been in the Island for a sufficiently long period of time and had no real ties here. We do not take the probation officer to have been recommending the obtaining of a psychiatric report. Secondly, we think that the Relief Magistrate was perfectly entitled to reach the conclusion that the offending was so serious that a community disposal was inappropriate. Having reached that conclusion, there was no need for a psychiatric report to assist him. Thirdly, in our view the psychiatric report actually available to us would not have changed the decision in principle to impose a custodial sentence, because the defendant was not suffering from any mental illness. 17. We think however that Advocate Jones

was on much stronger ground in complaining that the Relief Magistrate did not set out his reasons for sentence. We recognise of course that the number of cases which come before the Magistrate's Court is such that Magistrates are not expected to issue judgments of the kind which are anticipated in this Court. On the other hand, to send a defendant to prison for 10 months without giving him any explanation as to why that sentence is being imposed, other than that the offences were serious, seems to us to be at risk of leaving the defendant with a legitimate sense of grievance, and indeed a lack of understanding as to the principles which had governed the sentences which were imposed. We ourselves have no understanding why the Relief Magistrate chose consecutive custodial sentences but an apparently concurrent disqualification. Furthermore, although we know that the Relief Magistrate considered the consecutive/concurrent issue, we do not know if he applied his mind to the totality principle. It is not enough in a case involving the deprivation of liberty for the Crown to assert that the sentencing court was extremely experienced and must have applied the right principles. Even recognising the undoubted experience of the Relief Magistrate, we do not think that it is a proper assumption to make, not because we are satisfied the sentencing court applied the wrong principles, but simply because we do not know whether it applied the right principles and if so how it applied them. 18. In our judgment, the most serious of these offences was the dangerous driving offence. Although it is true that at that hour of a morning it was unlikely that there would be many people about, the appellant drove in such a manner that one or more members of the public lawfully using the highway could have been seriously injured or killed. If the appellant did not expect anyone else to be about, it is equally the case that any others who were about might not have expected the appellant to be driving at speeds in excess of 80 mph, and driving around the roundabout in the wrong direction or on the wrong side of the road around a blind corner. 19. We think the sentence of 6 months' imprisonment on the dangerous driving charge was absolutely appropriate. 20. However we think that applying the totality principle, 10 months was too long in aggregate. We think that 8 months would have been an appropriate total in aggregate. Our difficulty when approaching this appeal is that the absence of reasons from the Relief Magistrate makes it impossible for us to know whether he considered this or not, and for that reason we feel able to allow the appeal and substitute alternative sentences. 21. This appeal also enables us to reaffirm what was set out by the Royal Court in *Skopans v AG*

[2011] JRC 210, where the Court said at paragraph 9:- "Where several offences arising out of the same circumstances occur, the Court has a choice as to whether to proceed by way of concurrent or consecutive sentences. In many cases it will impose concurrent sentences. However, when it does this, it is perfectly proper to take into account, as an aggravating factor, the existence of the other offences and therefore increase the sentence on, usually, the most serious offence beyond that which it would have been if that offence had stood alone; otherwise an offender receives no greater punishment for committing several offences than he would for committing only the most serious offence. Alternatively, the Court may impose consecutive sentences for each offence. In those circumstances the Court should not treat the other offences as an aggravating factor increasing the individual sentences, as otherwise the offender will be punished twice for the same conduct. In the

case of consecutive sentences, the court must look at its provisional decision and then apply the totality principle in order to see whether the total reflects the overall offending; and it may well end up reducing one or more the individual sentences so as to achieve the right total result." 22. When one has regard to the charges in this case, it seems to us to be clear that charges 6 and 7 for taking and driving away and driving without insurance do indeed arise out of the same transaction in the sense that the fact of driving without lawful authority will always mean, or almost always mean, that the driver was driving without a policy of insurance in respect of third party risks. Accordingly, we think that concurrent sentences on counts 6 and 7 would have been appropriate. In this case, having regard to our views about the totality of the offending and in particular to the fact that this is the first custodial sentence which this appellant will have served, we think that the drunken driving and dangerous driving charges could be reflected by a concurrent custodial sentence - as indeed the Relief Magistrate seems to have concluded by imposing concurrent disqualifications. 23. Accordingly, the sentence of 10 months' imprisonment in total was reduced on appeal to 8 months, and the sentences computed as follows. On Count 1 the sentence is one month's imprisonment and a 5 year disqualification from holding a licence. On Count 2 the sentence is 6 months' imprisonment and disqualification for 5 years, in each case concurrent with Count 1. On Counts 3, 4 and 5, no separate penalty. On Count 6; 1 month's imprisonment, consecutive to Counts 1 and 2, and on Count 7; 2 months' imprisonment, concurrent with Count 6 but consecutive to Counts 1 and 2, making a total of 8 months' imprisonment and disqualification for 5 years. Authorities Road Traffic (Jersey) Law 1956. Motor Traffic (Third Party Insurance) (Jersey) Law 1948. Skopans v AG

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