

JERSEY / JUDGMENT

AG v McLean [2018] JRC 200 (31 October 2018)

[2018] JRC 200

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

JUDGMENT

THE Commissioner: 1. On the 18 th May, 2018, the defendant was sentenced to a term of imprisonment of 5 months and 14 days which permitted his immediate release because of time served on remand. The offences for which he was sentenced were a common assault on the 16 year old son of his former partner together with conduct likely to cause a breach of the peace and obstructing a police officer. 2. On that date the Court imposed Retraining Orders on the defendant under the Crime (Disorderly Conduct And Harassment) (Jersey) Law 2008 . Amongst other things the Restraining Orders prohibited him from entering or loitering within 50 metres of the home address of the former partner and her son. 3. He has now been charged with 3 offences of breaching that Restraining Order. It is said that on 3 rd , 9 th and 11 th of June, 2018 he attended at the former partner's address and rang the buzzer on the door. He was not let in and he appears either to have then left of his own accord or to have on some occasions continued to loiter in the area. It appears that his reason for visiting the premises was to try and get hold of some clothing and other possessions which have been left there because he had, prior to the offences for which he was sentenced, been cohabiting with the former partner. 4. This is a matter which would normally have been dealt with by the Magistrate's Court but a question has arisen as to whether the defendant is fit to plead with the result that the matter has been committed to the Royal Court. That is why he appears before us this morning. 5. Two detailed Psychiatric Reports have been prepared for the Court, one by Dr Ho, instructed by the prosecution and one by Dr Engelbrecht, instructed by the defence. They have both applied the test established by this Court in AG v O'Driscoll

[2003] JRC 117 which lays down how the Court approaches the question of fitness to plead. 6.

Both psychiatrists are of the clear opinion that the defendant would not be able to participate properly in these proceedings, as is required by O'Driscoll . This is essentially because of his chronic and severe drink problem which has affected his memory, particularly short-term but also long-term and he becomes easily confused. He appears to be suffering from Korsakoff syndrome as described by the psychiatrists. 7. Until recently the position on fitness to plead was governed by the Criminal Justice (Insane Persons) (Jersey) Law 1964 . However that has been repealed and replaced by the Mental Health (Jersey) Law 2016 which has recently been brought into effect. Articles 55 to 59 of that Law

deal with what used to be called "fitness to plead" but is now called "incapacity". 8. The test in Article 55(1) of the Law is whether the person charged is incapable because of mental disorder of "participating effectively" in the proceedings. 9. Article 55(2)(c) elaborates what is meant by "participating effectively" and states that: (c) "participating effectively" includes, but is not limited to -

- (i) entering a plea, and (ii) understanding the nature and significance of the proceedings or any stage of the proceedings;..." 10. Neither party before us has suggested that Article 55 imposes a different test from that set out in O'Driscoll, and we agree that that appears to be the position, although we emphasize the point has not been argued. 11. Both the prosecution and the defence submit that the test of "incapacity" set out in Article 55 is satisfied in the present case. On the basis of the detailed medical evidence to which we have referred, we agree that that is so. 12. The question then arises as to the correct disposal. The combined effect of Articles 58, 59, 65 and 66 of the new Law is that the Court may do any one of the following:- (i) It may adjourn the case for up to six months for the defendant to receive treatment. This is set out in Article 58(2). (ii) It may release him unconditionally. This is set out in Article 58(3). (iii) If the Court is satisfied after hearing evidence that the defendant did the acts with which he is charged, the Court may make either a Treatment Order under Article 65 or a Guardianship Order under Article 66. This is set out in Article 59(2). 13. The psychiatrists are agreed in this case that there is no point in making either a Treatment Order or a Guardianship Order because of the nature of the defendant's condition. There also appears to be no suggestion that adjourning the case for 6 months for treatment would assist in the light of the very substantial number of previous attempts at detoxification which have been unsuccessful. 14. In the circumstances, there is no alternative but for the Court to make an order under Article 58(3) ordering the defendant's unconditional release, and we so order. We were informed in this respect that he should be able to be accommodated at the Shelter and the Grace Trust have helpfully been assisting in the process of getting back his belongings from the former partner's accommodation and will continue to help in securing any further items which may be there such as furniture, if that is thought to be appropriate. 15. We turn next to an application which Advocate Bell has brought this morning. He has applied on behalf of the defendant to discharge the Restraining Orders made by the Court on 18 th May, 2018 on the ground that, because of his lack of cognitive reasoning ability arising from his mental condition, the defendant will be unable to realise the consequences of breaching the Restraining Orders and one is in effect setting him up to fail, which Advocate Bell points out was a matter touched upon by the Court in May. 16. However, the Restraining Orders were made for the protection of the former partner and the son and their existence does at least enable the police to arrest the defendant if he breaks them. There is accordingly an element of protection for them by their existence. Because the application to discharge the Restraining Orders was only lodged yesterday - and we make no criticism of Advocate Bell for that, - it has not been possible for the prosecution to obtain the views of the former partner and her son. Whilst such views cannot of course be decisive, it seems to us they will nevertheless at least be a material

factor for the Court to consider when deciding whether to grant the application to discharge the Restraining Orders. 17. Accordingly, we are going to adjourn Advocate Bell's application until Friday 9th November, 2018 at 10am. This will enable Crown Advocate Pedley to obtain the views of the former partner and the son in the light of the psychiatric evidence which is now available. This is evidence which of course was not available when they were originally asked about whether they wished to have Restraining

Orders.

It is now available and we need to be clear what their present view is, although as I emphasize this will just be a factor and the Court will have to balance any views they express along with the points powerfully made by Advocate Bell. 18. Mr McLean you are free to go. I think, the Grace Trust are very kindly going to help you today to get accommodation at the Shelter Trust, and they will also help you with any belongings and other matters. 19. I am going to say this to you; I hope you can appreciate it. You must not go round to your former partner's accommodation. The Restraining Orders are still in place and therefore if you go round you are likely to be arrested and you will be back in prison and this whole process will start again; so please do not go there. If you want to find out about belongings and so forth, speak to the Grace Trust and they are very kindly going to speak for you and try and sort things out. Do you understand? Very well.

Authorities Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008. AG v O'Driscoll

[2003] JRC 117 Criminal Justice (Insane Persons) (Jersey) Law 1964 Criminal Justice (Insane Persons) (Jersey) Law 1964 Mental Health (Jersey) Law 2016 Page Last Updated: 05 Nov 2018 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2018/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/ag-v-mclean-2018-jrc-200-31-october-2018>

Prepared on 23 October 2026 · Esheria