

JERSEY / JUDGMENT

AG -v- O'Connell [2017]

JRC 117 (26 July 2017)

[2017] JRC 117

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JUDGMENT

THE commissioner: 1. Earlier today we refused the defendant's application to change his plea and before dealing with his sentencing we now give our reasons. 2. The defendant was originally charged with two counts, firstly an assault on his victim by punching him outside the Café Pariso in New Street on 15 th March, 2017, and secondly being drunk and disorderly on the same occasion. On 17 th March, 2017, before the Magistrate's Court, the defendant pleaded not guilty to the assault but guilty to being drunk and disorderly. An issue as to fitness to plead was raised by defence counsel and so the matter was referred to the Royal Court. The defendant was remanded in custody. 3. The defendant appeared before the Royal Court on 4 th May, 2017, under an Indictment that now had three counts, the first as before, one of assault, the second a grave and criminal assault against the same person on the same occasion, and the third for using threatening or abusive words contrary to the Crime (Disorderly Conduct and Harassment)(Jersey) Law 2008 . The matter was adjourned whilst his counsel, Advocate Harrison, explored the fitness to plead issue but, having done so and clearly very thoroughly, no issue arose as to the defendant's fitness to plead. On 19 th May, 2017, the defendant appeared to plead to an Indictment in which the third count had been changed to one of being drunk and disorderly, again on the same occasion. 4. He pleaded guilty to Counts 1 and 3 and not guilty to Count 2, (that is the grave and criminal assault), pleas which were accepted by the prosecution on an agreed basis that was set out in writing and signed by the defendant. Following a bail application he was then remanded on bail to be sentenced on 23 rd June, 2017. On 23 rd June, 2017, the defendant advised the Court that he wished to change his pleas to Count 1 and 3. 5. His legal representation was changed from Advocate Harrison to Advocate Glynn of Carey Olsen. He then dispensed with her services and she and now Advocate Boothman was appointed Amicus curiae . The defendant has therefore represented himself at this hearing. The Court had before it his affidavit of th July, 2017, and two affidavits from Advocate Harrison dated 18 th July, 2017 and 21 st July, 2017, together with a very helpful skeleton argument filed by Advocate Glynn. The affidavit of Advocate Harrison shows that the defendant was carefully advised, with Advocate Harrison attending the prison on some three occasions as well as holding discussions with the prosecution. He kept careful notes from which there can be no doubt that the guilty pleas were unequivocal. In particular it is quite clear that he was advised that he should not plead guilty to the charges

unless he accepted the allegations. 6. The defendant agrees that the evidence of Advocate Harrison contained in his affidavits was true but said that Advocate Harrison had also advised that if he pleaded not guilty to all three counts there was a good chance that he would remain in custody until September or October, which were earliest trial dates then available. Bail might be harder to get if he pleaded not guilty; he therefore made the decision to plead guilty to Counts 1 and 3 on the agreed basis on 19 th may, 2017, in order to get bail, having given, as we have said, written confirmation of the basis of plea. 7. In his second affidavit Advocate Harrison says that regardless of the plea a bail application would have been made and he could not give the defendant any guarantees one way or the other in respect of the outcome of the application. Quoting from his affidavit: "It is clear from my file note that I told him that. It was Mr O'Connell's decision not to take the risk." 8. The defendant went on to say that by 21 st June, 2017, he had changed his mind about his pleas. He had been out of trouble for a long time and did not see why he should plead guilty for something he did not do. 9. In AG-v-Durkin

[2004] JRC 068 the Court said this in relation to unequivocal plea: "14 There is clear authority that the law of Jersey in this respect is similar to that in England, namely that, although there is a discretion to allow withdrawal of an unambiguous guilty plea and its substitution by a plea of not guilty, this is a discretion to be exercised very sparingly, particularly where the plea is entered with the benefit of legal advice (see AG -v- O'Brien (12 th May, 1985) Jersey Unreported, approving a number of English cases including R-v- Drew

(1985) 2 All ER . For a recent decision confirming there is such a discretion and that it is a matter for the trial judge which will not be interfered with by the Court of Appeal unless the judge has misdirected himself or the decision is wholly unreasonable, See R-v-Sheikh (2004 EWCA Crim 492 ." 10. In the case of AG-v-Donachie

[2009] JRC 169A the court refused an application to change the defendant's plea because of fear of imprisonment. It was not dissimilar to the facts here in that this defendant says he pleaded guilty in order to get out of prison. The Court said this at paragraph 11 and again quoting: "11 In our view to allow the defendant's application would be to set at nought the clear policy of the Court that its discretion is to be used sparingly. There are good reasons for this as Mr Pedley points out. There are witnesses in all crimes who need to get on with their lives. A change of plea brings the matter back into uncertainty.... Furthermore it prolongs the court process. We have no doubt that this is not a case where our discretion should be exercised in favour of the defendant and the application is refused." 11. The defendant, as we have said, was clear why, despite the advice he had received, he pleaded guilty to Counts 1 and 3 on this agreed basis, namely so that he could get bail. It was an unequivocal plea on clear legal advice. This is not a ground on which our discretion should be exercised for the reason set out in the passage we have just quoted from AG-v-Donachie and for those reasons the application was refused. 12. The Court then must now turn to sentencing and the facts of the case. The defendant, who is 68, and who has a long history of alcoholism and who was drunk, was playing music loudly on his iPad, which had speakers, outside a café disturbing those outside the café and neighbours. A customer

approached him and told him to turn the music off. The defendant then directed verbal and racist abuse to the customer and to other customers outside the café. When the customer attempted to turn the music off the defendant became aggressive and swung at him, one swing making contact with the customer's eye socket but not causing any injury. The defendant then fell over due to his level of intoxication but getting back onto his feet he continued to shout at the customer and at the other customers. He then told the customer that he had a knife and put his hand into his pocket. The customer did not feel particularly threatened by this and when the defendant was shortly thereafter arrested no knife was found on him. 13. The defendant has a lengthy criminal record and these offences put him in breach of a three month binding-over order for public nuisance offences which also involved the playing of loud, on these occasions, IRA-themed music. 14. The social enquiry report is limited because the defendant failed to attend any meetings. His position seems bleak in that he has clearly battled with alcoholism all of his life and as a result of his recent behaviour he is, as we understand it, being evicted from his accommodation. 15. By reference to the Magistrate Court Guidelines and because the offences were seriously aggravated by racial abuse to members of the Portuguese community, the prosecution seek a sentence of 6 months' imprisonment in total. 16. In terms of mitigation the defendant has pleaded guilty. We understand that he lost his wife some two years ago and that has deeply affected his life. He has served the equivalent of a sentence of 3 months' imprisonment. Ordinarily this assault would be at the lower end of the scale and would not attract a custodial sentence but the racial element takes it across the custodial threshold. The Court will not tolerate racial abuse and we agree with the prosecution that a custodial sentence because of that racial element requires a sentence of imprisonment. 17. On Count 1 you are sentenced to 3 months' imprisonment and on Count 3; 2 months' imprisonment, concurrent. In terms of the breach of the binding-over order you are sentenced to 1 month's imprisonment, concurrent, and we discharge the binding-over order. That makes a total of 3 months' imprisonment. 18. Turning to the Exclusion Order which the prosecution seek in this case, we have given careful thought to that and it does seem clear to us that the defendant's life centres around going to public houses where he listens and plays music, which is his life interest. To exclude him from going to public houses would have a disproportionate effect on him. Therefore after some debate we have decided Mr O'Connell not to exclude you from public houses or licensed premises, but you must take some responsibility for your actions and if you abuse the hospitality of pub landlords and offend through drink again, you may well find yourself back before a court and being excluded from what is clearly your life and you will only have yourself to blame. 19. We order the payment of the costs of the Amicus on the usual basis. Authorities Crime (Disorderly Conduct and Harassment)(Jersey) Law 2008. AG-v-Durkin

[2004] JRC 068 . AG-v-Donachie

[2009] JRC 169A . Page Last Updated: 14 Sep 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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