

JERSEY / JUDGMENT

AG -v- O Driscoll [2003]

JRC 117 (09 July 2003)

[2003] JRC 117

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judgment

the bailiff:

Introduction

1. This is an application seeking 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 Criminal Justice (Insane Persons) (Jersey) Law 1964 ('the 1964 Law'). 2. Article 1 of the 1964 Law is in the following terms - "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.
- (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 two 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 him before the court.
- (3) If the Superior Number of the Royal Court finds the accused to be so insane as aforesaid, it shall be lawful for the original court to order him to be detained during Her Majesty's pleasure; and until Her Majesty's pleasure is known, he shall be detained in such place and in such manner as the court shall order and any such order may be varied from time to time as the court thinks fit." 3. The question arises in the context of a charge of grave and criminal assault. The accused, Neil Liam O'Driscoll, is charged with having committed a grave and criminal assault upon his mother, who is aged sixty-three, at her home on 28th August 2002. The alleged assault took place at about 1.30 am. The accused is said to have punched his

mother to the ground and stamped on her head and thigh whilst wearing heavy boots or shoes. The victim started to bleed and the accused discontinued the attack. As a result, the victim is said to have fled in terror from the house, scaling a fence in order to make good her escape. She was subsequently admitted to hospital where she remained for several days for investigation of her head injuries. Fortunately it transpires that she suffered no serious injury. 4. The procedural history of this matter is set out in a judgment delivered by the Court on 2nd June 2003 in relation to an appeal by the Attorney General by case stated from a decision of the magistrate. It is unnecessary to repeat that history here. Suffice it to say that the Magistrate responded with commendable alacrity to the decision of 2nd June, and on 3rd June committed the accused for trial by this Court. The indictment was laid before the Court on 13th June and, the issue having been raised as to his fitness to plead, the case was adjourned for submissions as to the meaning in Jersey law of the phrase in article 1(1) of the 1964 Law referred to in paragraph 1 above. In due course the accused will be remanded to the Superior Number to try the question whether or not he is so insane as to be unfit to plead to the accusation or unable to understand the nature of the trial. He is at present receiving in-patient treatment at St Saviour's Hospital. 5. What then is the test that the Superior Number should apply? I am informed by counsel that their trawl of the authorities has unearthed no previous case where the phrase in question has been the subject of argument before the Court. The point therefore appears to be open and I have been asked by counsel for the Crown, with the support of counsel for the accused, to develop the law following the decision of the Court in *Attorney General v Prior*

[2001] JLR 146 . English Law 6. The test of insanity so as to found unfitness to plead in England was laid down as long ago as 1836. In *R v Prichard*

(1836) 7C & P303 , a case involving a deaf-mute Alderson B directed the jury: "There are three points to be inquired into:- first, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of the proceedings in the trial, so as to make a proper defence - to know that he might challenge any of you to whom he may object - and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation." 7. This test has been applied by English Courts in numerous subsequent cases. In *R v Robertson*

(1968) 52 Cr App. R , the appellant appealed to the English Court of Appeal against a finding by a jury that he was unfit to plead to a charge of murder. One of the questions was whether the jury's attention had been directed to matters which did not form the test of disability. Evidence had been given that the appellant suffered from delusions and had a persecution mania. Parker L C J stated - Counsel for the Crown in opening referred more than once not merely to the ability of the appellant to instruct counsel, but 'properly' to instruct counsel, putting before the jury the question whether the appellant was 'properly able' to defend himself and was of sufficient intellect to give evidence on his own behalf, and in their evidence the doctors - and one is not blaming them because they were put in the form of

leading questions - gave answers dealing with the fact that he might not be able "properly" to instruct counsel, "properly" to challenge jurors, to give "proper" evidence and so on. I take as an illustration Dr Terry, who was asked: ". . . . do you think he is in a position, or would have been in a position, to instruct solicitors and counsel properly in his defence? A. No. Q. Do you think he would be in a position to make up his mind properly as to whether or not he wished to be defended by a solicitor or counsel. A. No. Q. Would he be able properly to follow and apprehend the course of a criminal trial? A. Not properly, no." And finally: "Would he be of sufficient intellect to give proper evidence in the course of the trial? A. No." Dr Neustatter in answer to similar questions gave similar answers. He was asked whether the appellant could make proper decisions and so on during the course of his trial; was he in a position adequately to defend himself or give proper instructions, and so on. And finally, the learned judge in summing up to the jury said this: "A man is fit to plead only if he is in a sufficient state of mind to apprehend the course of the proceedings at his trial so as to make a proper defence." And on the next page: "[Dr Terry] told you that the accused's way of thinking was altered by his false beliefs about persecution and he added that in his view the accused was not able to give proper evidence at his trial." That this is a somewhat odd case becomes clear in this respect from later reports which have been received by this Court. Dr Neustatter in particular has had his mind directed to the sort of point with which we are concerned here and it is quite clear from answers which he gave to a questionnaire that was put to him that he was saying, for instance, that this appellant clearly is capable of understanding his right to challenge jurors but he, Dr Neustatter, fears that his delusional thinking might cause him to use his challenges wrongly or unwisely. Again, Dr Neustatter says that he is entirely capable of understanding the legal effect of pleas of Guilty and Not Guilty, etc. but he fears that his delusional thinking, from which he suffers, might cause him to act otherwise than in his best interests; in other words, unwisely, and so on. 8. The Court, applying *R v Prichard*, allowed the appeal holding that the mere fact that the accused was incapable of doing things which were in his best interests was insufficient to justify a finding of disability. 9. More recently, in *R v Friend*

[1997] 2 All ER 1011, Otton LJ summarised the requirements for a finding of unfitness to plead in the following terms - "The test of unfitness is whether the accused will be able to comprehend the course of the proceedings so as to make a proper defence. Whether he can understand and reply rationally to the indictment is obviously a relevant factor, but the jury must also consider whether he would be able to exercise his right to challenge jurors, understand the details of the evidence as it is given, instruct his legal advisers and give evidence himself if he so desires." It may be noted that, although the *Prichard* test has been applied in such a way as to focus upon the intellectual or cognitive capacities of the accused at the time of the trial, Otton LJ employed the adverb 'rationally' in the context of the accused's ability to reply to the indictment. 10. The Crown placed before me a report of Professor R D Mackay, upon which Miss Fogarty relied. Professor Mackay had been asked by counsel to advise (1) whether the test of unfitness to plead accepted by English law was

open to challenge under the Human Rights Act 1998 and (2) if so, how the test could be altered to comply with the European Convention on Human Rights. I have derived a great deal of assistance from the opinion of Professor Mackay, but it does not seem to me necessary or indeed appropriate to adjudicate upon either of those specific issues. It might be necessary if I were minded to adopt as part of the law of Jersey the English test set out in *Prichard*. But as I propose, for reasons that will appear below, to adopt a different test, such adjudication would be otiose and, I think, unseemly. It is for English Courts to determine whether the *Prichard* test is compatible with the Human Rights Act 1998.

Authorities in Jersey and Guernsey 11. There does appear to be no local authority directly in point as to the meaning of the word 'insane' in the context of article 1 of the 1964 Law or indeed generally. It is clear, of course, that this Court has, for a long time before the enactment of the 1964 Law, declined to try persons who were regarded as insane at the time of trial. When examined before the Royal Commissioners enquiring into the state of the criminal law in 1846, R P Marett (later Sir Robert Marett, Bailiff) stated that a plea of insanity would be tried by a jury. He referred the Commissioners to commentators on the *Ancien Coûtume* which suggested that a person found to be insane at trial would be remanded in prison or subjected to some other restraint. The practice at that time (1846) was that prisoner would generally be given into the custody of a curator who would have the duty to guard him and to care for him. Mr Marett expounded no test for unfitness to plead. 12. John Hammond (later to serve as Bailiff) agreed (at page 84) that - 'If [the prisoner's insanity were] brought to light by the evidence upon the trial, it would give rise to an acquittal; and precautionary measures for the future would be taken to protect society. As regards the test of unsoundness of mind, that would be received by the court, I conceive that the general principles of law would be the guide. The old *coûtume* on this subject is laid down by Terrien'

13. Significantly, in my judgment, no witness appearing before the Royal Commissioners testified that English law, or the test laid down in *Prichard*, would be applied. 14. The position was different in Guernsey. In their enquiry into the state of the criminal law in that Bailiwick in 1847-8, the Royal Commissioners received evidence from the Bailiff, Mr Peter Carey, who stated - 'With respect to the test of unsoundness, I have only to observe that no case of the kind has occurred since I have been Bailiff; but I apprehend that the authorities chiefly relied on would be those of the English law.' The Commissioners recorded that the Bailiff was 'an English lawyer of experience' to whom they were 'greatly indebted for his most valuable information and assistance in the progress of this inquiry'. He was clearly, therefore, a witness who spoke with authority. That difference of approach has continued down the years. As Sir de Vic Carey, Bailiff, stated in the Royal Court of Guernsey in an interlocutory judgment in *Law Officers of the Crown v Harvey* (3rd August 2001) Unreported Judgment of the Royal Court of Guernsey - '..... since 1848 one has witnessed the development of common law offences on parallel lines to those offences in England and also the development of local legislation dealing with the more common offences of dishonesty and other offences such as criminal damage that have been the creatures of statute mirroring English provisions. Jersey law, I accept, has not always developed in a similar direction.'

15. For my part, I do not find it in

the least surprising that in this area of the criminal law, the Royal Court of Guernsey has adopted a different approach from that of this Court. As one who has had the privilege of sitting as a judge of the Court of Appeal of Guernsey for many years, I have often noted that, notwithstanding their common roots in the customary law of Normandy, the Jersey and Guernsey plants have frequently surfaced in different parts of the garden of jurisprudence. One should be no more surprised that Jersey and Guernsey law have developed in different ways in relation to the insanity defence than that different approaches are evident on either side of the River Tweed. 16. I must therefore very respectfully differ from a passing observation of Vaughan J A in *Attorney General v Prior*

[2002] JLR 11 at 21 that it is 'highly undesirable that the effect of 'insanity' should be different in the two jurisdictions' if that observation were intended to imply that one of the two should be compelled to adopt the law of the other. Scots Law 17. In truth it is clear that, for better or for worse, the different jurisdictions of the British Isles have all beaten slightly different paths in the context of the insanity defence and unfitness to plead, except perhaps that Guernsey has chosen to adopt the law of England. The McNaghten rules are not part of the law of Scotland and the broad definition of the insanity defence in Scots law has avoided much of the controversy which has dogged the defence in England. The law on unfitness to plead, or on insanity as a plea in bar of trial, as the Scots would express it, is said to be defined in the two leading Scots cases of *HM Advocate v Brown*

(1907) 5 Adam 312 , and *HM Advocate v Wilson*

(1942) JC 75 and not in the English case of *R v Pritchard* . A study of the reports of the English Law Commission (Law com no. 231): *Mental Incapacity*

(1995) and the Scottish Law Commission (discussion paper No.122) *Insanity and Diminished Responsibility* (January 2003) does not leave me with the impression that a unified or co-ordinated British approach to these problems is in prospect. Proposals for reform in England and Scotland 18. The reports of the two Law Commissions and other academic writing do seem to me, however, unsurprisingly no doubt, to have common threads. One such thread is the notion that the test for incapacity should underline the requirement for rational decision-making. The report of the English Law Commission, referred to above, states at paragraph 3.14 - 'The definition of incapacity The functional approach means that the new definition of incapacity should emphasise its decision-specific nature. A diagnostic threshold of 'mental disability' should be included; except in cases of inability to communicate. We recommend that legislation should provide that a person is without capacity if at the material time he or she is:

- (1) unable by reason of mental disability to make a decision on the matter in question, or
- (2) unable to communicate a decision on that matter because he or she is unconscious or for any other reason.' The Commission explains this by stating that - 'Incapacity cannot in every case be ascribed to an inability to understand information. It may arise from an inability to use or negotiate information which has been understood. In most cases, an assessor of

capacity will have to consider both the ability to understand information and the ability to use it in exercising choice.....' 19. This notion is developed in an interesting and helpful passage in the report of the Scottish Law Commission - '4.14 We believe that the general rationale of the plea in bar in the existing law is that because of a person's mental or physical condition a criminal trial is an inappropriate process for that person. The fundamental ideas are that an accused person should understand and participate in the trial in some meaningful way. In the USA the Supreme Court has formulated the test in terms not simply of the accused's mere cognitive skills (for example in instructing his legal advisers) but also by reference to a full understanding and appreciation of the process in which he is involved. In *Dusky v United States*, the Court stated that - 'the test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as a factual understanding of the proceedings against him.' 4.15 Professor Richard Bonnie has developed this test in terms of the 'adjudicative competence' of the accused. At the seminar which we held as part of this project, Professor Bonnie reformulated this test as follows: "A defendant is competent to proceed to [adjudication] [trial] if he has a rational understanding of the charge against him, the nature and purpose of the proceedings and the adversary process, is able to assist counsel in his defense, and has the capacity for rational decision-making in relation to the defense and disposition of the case." 4.16 Other legal systems have also sought to make more explicit the general context of the accused's cognitive skills which are at the basis of the plea. In English law one of the criteria is expressed in terms of the accused's ability to "understand and reply rationally to the indictment", and in New Zealand, a Bill has been introduced to amend the test by adding the criterion "to make an informed decision whether or not to give evidence." However in our view these provisions do not bring out with sufficient clarity that the factors of rational response or informed decision-making are descriptions of the general nature of the plea rather than merely constituent elements of it. 4.17 We have considered how best to formulate the general rationale of the plea in bar of trial. Case law under the European Convention on Human Rights suggests a general principle in terms of the accused's 'effective participation' in the criminal process, and we favour using this idea as the core of the reformulated test in Scots law. The idea of effective participation captures the notion of full or 'rational' appreciation by the accused of the proceedings, which the phrase 'adjudicative competence' expresses. We consider that it is preferable to use the formulation derived from ECHR cases, as it will allow Scots law more easily to adapt to developments in the Convention jurisprudence.' 20. The European Convention on Human Rights applies to Jersey, although the Human Rights (Jersey) Law 2000 is not yet in force. The first convention issue concerns article 5. In *Attorney General v Prior* the Court, in considering the insanity defence as opposed to the question of fitness to plead, considered the implications of article 5(1) of the Convention which provides, so far as material, '(1) Everyone has the right to liberty and security of person. No-one shall be deprived of his liberty, save in the following cases and in accordance with a procedure required by law -

- (e) the lawful detention of persons of unsound mind'. The Court concluded, at paragraph 30 of its judgment - '(b) It is not necessary for me to decide whether the McNaghten Rules are in compliance with the requirements of the European Convention on Human Rights. It is, however, strongly arguable that their adoption in this jurisdiction, particularly in the absence of legislation equivalent to the [Criminal Procedure (Insanity and Unfitness to Plead) Act 1991], would involve a breach of article 5 of the Convention.' 21. The disposal consequences of a finding of insanity, as of a finding of unfitness to plead, are a matter of concern in the light of the Convention and of the terms of the 1964 Law. Article 1(3) of the 1964 Law provides, as noted above, that if a finding of insanity under Article 1(1) is made, 'it shall be lawful..... to order [the accused] to be detained during Her Majesty's pleasure'. 22. While the provision is not mandatory (even where the charge is murder) it remains possible that a person might find himself detained in a secure mental hospital where there are no medical grounds for such detention. I revert to this below. 23. The second convention issue concerns the implications of article 6 which requires a fair hearing in respect of a criminal charge and which prescribes certain minimum rights for an accused person. It is unnecessary for me to delve too deeply into this issue. I find myself in agreement with the conclusion of the Scottish Law Commission, set out above, that - 'case law under the European Convention on Human Rights suggests a general principle in terms of the accused's 'effective participation' in the criminal process'. In my view the test which I formulate below will conform with the requirements of article 6 of the Convention. 24. The Scottish Law Commission proposes a test for unfitness to plead, or 'disability in bar of trial' as they would express it, in the following terms - '(1) A person has a disability in bar of trial where as a result of a mental or physical condition at the time of the trial he or she lacks the capacity to participate effectively in the proceedings.
- (2) In determining whether a person has a disability referred to in (1) above the court shall have regard to:
- (a) the ability of the accused to understand the nature of the charge;
 - (b) the ability of the accused to understand the requirement to tender a plea to the charge or to understand the effect of a plea;
 - (c) the ability of the accused to understand the purpose of trial;
 - (d) the ability of the accused to follow the course of a trial;
 - (e) the ability of the accused to understand the substantial effect of evidence that may be given against him or her;
 - (f) the ability of the accused to communicate adequately with his or her legal representative;
 - (g) the ability of the accused to give adequate instructions to his or her legal representative;

- (h) any other relevant factor.' 25. Professor R D Mackay, upon whose opinion counsel for the Crown has relied, has recommended the following test - "A defendant will be found so insane as to be unfit to plead to the accusation or unable to understand the nature of the trial in accordance with article 1(1) of the Criminal Justice (Insane Persons) (Jersey) Law 1964, if the Superior Number of the Royal Court is not satisfied that the accused (1) has the capacity to assist his lawyer and (2) has decisional competence. In determining this issue the Superior Court shall have regard to whether as a result of unsoundness of mind or inability to communicate the defendant lacks the capacity to: (a) understand the course of the proceedings so as to make a proper defence; understand the substance of the evidence; (b) give rational instructions to his lawyers; (c) give evidence on his own behalf; (d) make rational decisions in relation to his participation in the trial process, including whether or not to plead guilty, which reflect true and informed choices on his part."

Conclusion

26. In determining how the Jurats should be directed, I am conscious that I am, in a sense, making new law. Judges have a duty, however, to fill in the interstices of legal rules and should not shirk that duty when the interests of justice so require. The law will not tolerate a vacuum. Notwithstanding this ruling, however, the 1964 Law cries out for reform. I make certain recommendations below and it will, of course, be open to the legislature to re-formulate the test for unfitness to plead should it be thought that it is for any reason inappropriate. 27. It is true that in many respects the criminal law of Jersey tends to follow the law of England rather than the law of any other jurisdiction. The criminal law has, however, been expounded and developed independently by judicial decision in numerous different ways; see eg AG v Thwaites

(1978) JJ 179 (where the offence of committing a public mischief was given its quietus) and AG v Foster

[1989] JLR 70 (RC) and

[1992] JLR 6 (CA) (where the law of fraud was re-formulated). I am reluctant to adopt a test laid down in England more than one hundred and sixty 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 one hundred years or more, and appropriate to the social needs of this jurisdiction in the twenty-first century. I propose to formulate a test which draws on elements of both suggested tests that have been placed before me. 28. It seems to me desirable to pay particular regard to the jurisprudence of the European Court of Human Rights. The States have adopted the Human Rights (Jersey) Law 2000 which will, when in force, incorporate certain Convention rights into domestic law. The capacity to participate

effectively in the criminal process has been seen to be the key factor in that European jurisprudence. I propose to adopt that factor as the central theme of the test to be applied. 29. I propose therefore to direct the Jurats that - '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; (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.' 30. 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 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*

[1997] 2 All ER 1011 at 1018-9 per Otton LJ . 31. Secondly, I have included the words 'inability to communicate' to cater for situations where, for example, an accused is in a coma, or has had a stroke, and there may be some doubt as to whether he cannot participate effectively in the proceedings on account of unsoundness of mind, but no doubt that he cannot participate because he is unable to communicate. *R v Pritchard* was of course itself a case involving a deaf-mute. 32. Thirdly, 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-recognised 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. 33. I turn finally to the desirability of reforming the 1964 Law. The submissions by both counsel have left me in no doubt that the 1964 Law is in urgent need of reform. First and foremost, the limited powers of disposal available to the Royal Court should be expanded in order to enable justice to be done to those who might be able, on the basis of the above test, to establish unfitness to plead. Legislation on the lines of the Criminal

Procedure (Insanity and Unfitness to Plead) Act 1991 would empower the Court to make orders currently available to English Courts. Secondly, it is for consideration whether it is any longer appropriate to vest responsibility for the treatment of mentally disordered persons in Jersey in the Secretary of State. Thirdly, the title of the 1964 Law and the references therein to 'insane persons' might be thought to carry a stigma which is inappropriate in the context of those suffering from mental illness. I express the hope that the Attorney General might bring this judgment to the attention of the appropriate committee of the States of Jersey so that consideration might be given to the reform of the 1964 Law. Authorities AG -v- Prior [2001] JLR146. R -v- Prichard (1836) 7 CP 303. R -v- Robertson (1968) 52 Cr. App. R. 690 R -v- Friend (1977) 2 All ER 1011. Report of the Commissioners into the state of the Criminal Law in the Channel Islands

- Jersey (London, 1847): p84 - Guernsey (London, 1847). Human Rights Act 1988. Law Officers of the Crown -v- Harvey (3 rd August 2001) Unreported Judgment of the Royal Court of Guernsey. AG -v- Prior [2002] JLR11. HM Advocate -v- Adam (1907) 5 Adam 312. HM Advocate -v- Wilson (1942) JC 75. Report of the English Law Commission (Law Com no.231) : Mental Incapacity (1995). The Report of the Scottish Law Commission (discussion paper no.122): Insanity and Diminished Responsibility (January, 2003.) European Convention on Human Rights: Article 5. Criminal Justice (Insane Persons) (Jersey) Law 1964. AG -v- Thwaites

(1978) JJ 179. AG -v- Foster

[1989] JLR 70 ;

[1992] JLR 6 (C. A.). Mental Health (Jersey) Law 1969. R -v- Dickie

(1984) 3 All ER 173. Dusky -v- US 32 US402 (1960) R (Grant) -v- DPP

(2002) 1 CrAppR 38 . R -v- H

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