

JERSEY / JUDGMENT

AG v O'Driscoll [2003] JRC 212A (20 November 2003)

[2003] JRC 212A

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judgment

the DEPUTY bailiff: 1. The Superior Number has been convened in order to hold a hearing pursuant to Article 1(3) of the Criminal Justice (Insane Persons) (Jersey) Law 1964. The purpose of the hearing is to decide whether the defendant is, to use the wording of Article 1(3) "so insane as to be unfit to plead to the accusation or unable to understand the nature of the trial". I propose to refer to the issue simply as being one of fitness to plead. 2. The test for deciding whether an accused is fit to plead has recently been authoritatively determined in Jersey for the first time at an earlier hearing in relation to this defendant (see AG-v-O'Driscoll [2003]JRC117. The Bailiff established a test which took account of the jurisprudence under the European Convention of Human Rights and which is not the same as that which applies under English law. 3. In the course of his judgment the Bailiff said this at paragraph 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 bold 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 ." 4. The relevant English authorities establishing the position described in R-v- Friend

(1997) 2 All ER 1011 would appear to be R-v-Robertson

(1968) 1 WLR 1767 (which held that, where the prosecution raises the issue, the standard of proof is the ordinary criminal one of proving the issue beyond reasonable doubt; however it is clear from the judgment that this conclusion was reached without argument because prosecuting and defence counsel agreed on the matter) and R-v-Padola

(1960) 1QB 325 (which held that, where the defence raises the issue, it must prove that the defendant is unfit to plead on a balance of probabilities). 5. Miss Fogarty, who appears for the prosecution, has submitted detailed written contentions submitting that Jersey should not follow English law in relation to the standard of proof where the prosecution raises the issue of fitness to plead. She submits that, whether the matter is raised by the prosecution or the defence, the party raising the issue should have the burden of proving it but that the standard of proof should in each case simply be on the balance of probabilities. 6. She has raised a number of interesting arguments but it is necessary at this stage to mention only one on each side. On the one hand, because the consequences of a finding of unfitness to plead are potentially serious (possible detention during Her Majesty's pleasure) it may be said that, where the defendant is disputing that he is unfit to plead, he should not be so found unless the prosecution has proved his unfitness to a high standard, namely beyond reasonable doubt. As against that, the possible consequences of requiring the prosecution to prove the matter to such a standard could be very unsatisfactory. If, following the hearing, the Court were to be satisfied that it was more probable than not that the defendant was unfit to plead but were not satisfied to the high criminal standard, the prosecution would have failed in its assertion that the defendant was unfit to plead. The Court would therefore have to hold him fit to plead. The result would be that the defendant would then be tried notwithstanding that the Court believed that it was more probable than not that he was unfit to be tried and could not participate effectively in the proceedings. This would seem to be highly undesirable. 7. The facts of this particular case are unusual. The prosecution and the defence have each consulted psychiatrists and both psychiatrists are agreed that this defendant is fit to plead. Although the prosecution have raised the issue, it seems clear that, whether the test is on a balance of probabilities or beyond reasonable doubt, the prosecution will fail in its assertion. Indeed Mr James has quite naturally not taken any objection to the arguments put forward by Miss Fogarty as he considers the issue to be entirely academic so far as his client is concerned. 8. It is true that the Bailiff appears to have assumed in his judgment that the standard of proof should be the same in Jersey as it is in England and that the prosecution should therefore have to prove unfitness to plead beyond reasonable doubt; but it is clear that he heard no argument on the matter. For my own part I would agree that it is open to this Court to consider the matter afresh as it has never been the subject of any previous decision. However, despite Miss Fogarty's submissions, I do not think that this is the right case in which to rule upon the matter. For the reasons which I have given, there is no adversarial argument before me. There are clearly respectable arguments to be put on both sides and the Court would no doubt wish to consider the matter very carefully before deciding to depart from English law on this topic. I therefore do not propose to make a ruling. Because all the evidence on both sides suggests that this defendant is fit to plead, I propose for convenience to direct the Jurats to apply the lower threshold i.e. to consider whether the prosecution have succeeded on the balance of probabilities. The matter however remains open for consideration on any future occasion. Authorities. Criminal Justice (Insane Persons) (Jersey) Law 1964: Article 1(3). AG-v-O'Driscoll [2003]JRC117. R-v-

Robertson (1968) 1 WLR 1767. R-v-Padola (1960) 1QB 325. Page Last Updated: 22 Jun 2016
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