

JERSEY / JUDGMENT

AG -v- Sousa [2016] JRC 059 (10 March 2016)

[2016] JRC 059

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JUDGMENT

THE commissioner: 1. The defendant faces two charges, one of sodomy and one of indecent assault. On 18 th January the Court sat to consider whether the defendant was unfit to plead. At the conclusion of the hearing, the Court found that he was unfit and on 22 nd January, made an order pursuant to Article 1(3) of the Criminal Justice (Insane Persons)(Jersey) Law 1964 that he be detained during Her Majesty's pleasure. 2. The Court now gives it reasons for concluding that he was not fit to plead. The burden and standard of proof 3. The circumstances in which the Court has to consider this issue are somewhat unusual. The question of whether the defendant is fit to plead was first raised by the prosecution at a hearing on 4 th December, 2015, at which time the prosecution wished to instruct a psychiatrist to assess the defendant and prepare a report. The defendant's advocates were not instructed to make any submissions as the defendant did not wish to participate in the proceedings or in any such exercise. 4. The Court was concerned at the thought of there only being an expert instructed by the prosecution. Accordingly, the Court ordered that a second psychiatrist should be instructed on behalf of the Court to assess the defendant and prepare a report. 5. That has subsequently occurred. The prosecution has instructed Dr David Ho and the Court, through the Judicial Greffier, has instructed Dr Stefania Bruno. No expert has been instructed on behalf of the defence. 6. The complication is that the report of Dr Ho concludes that the defendant is fit to plead whereas the report of Dr Bruno concludes that he is not. The question then arises as to the applicable standard of proof and where the burden lies. 7. The test for determining fitness to plead was established in AG v O'Driscoll

[2003] JLR 390 where at paragraph 29 Bailhache, Bailiff articulated the test in the following terms:- "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; and (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." 8. He elaborated on this further at paragraph 32 as follows:- "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 recognized condition leading to incapacity would be required before a finding of unfitness could be made. ..." 9. We should note in passing that, as a result of the Criminal Justice (Insane Persons)(Amendment)(Jersey) Law 2015, issues of fitness to plead can now be heard before the Inferior Number rather than, as previously, before the Superior Number. 10. We should also add that the prosecution in this case asserted that the test in relation to fitness to plead is substantively different from that in England and Wales. That assertion is inconsistent with the views of the Court of Appeal in *Harding v AG*

[2010] JLR 239 where, having summarised the test laid down by the Bailiff in *O'Driscoll*, the Court said this at paragraph 5:- "Sir Philip considered that this test differed from the English law test, mainly it seems in requiring that the accused should have been capable of making rational decisions in relation to his participation in the proceedings. For our part, we are satisfied that the test which he stated in *O'Driscoll* is correct, but we do not regard it as any different in principle from that which has been held to apply in England. We make this point because issues may arise in future cases in Jersey on which it may be desirable to refer to the much more substantial body of English authority. This process serves the interests of legal certainty. We are reluctant to inhibit it by encouraging the notion that Jersey law on this question exists in a distinct juridical compartment from the corresponding law of England." The law of Jersey as to insanity at the time of the offence does of course differ from English law but that was not the issue in *Harding* or *O'Driscoll* and is not the issue here. 11. As to the burden and standard of proof, the Bailiff said this at para 30 of his judgment in *O'Driscoll* :- "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 at 1018-1019, per Otton, LJ)." 12. As to the burden and standard of proof under English law, Archbold (2015 edition) has this to say at para 4-236:- "If the contention [i.e. that the defendant is not fit to plead] that the defendant is under a disability is put forward by the defence, the onus of proof is upon the defence and is discharged if the court is satisfied on the balance of probabilities that the contention is right. If the Crown makes

the allegation and the defence disputes the issue, the burden rests upon the Crown: R v Podola ante. Where the burden falls upon the Crown the standard of proof is proof beyond reasonable doubt: R v Robertson, ante. Query as to the situation when the issue is raised by the judge." [emphasis added] 13. In his submission, Crown Advocate Pedley suggested that, as the issue of fitness to plead had been raised by the prosecution, it had to prove that matter beyond reasonable doubt. We do not think that can be right because, as the matter has turned out, the prosecution is not contending that the defendant is unfit to plead having regard to the report of Dr Ho; nor, on the other hand, is the defendant putting forward any positive case as he has no expert to rely upon and has hitherto not participated in the process. The position is that the prosecution is asserting that the defendant is fit to plead and it is only the Court appointed expert who is asserting that the defendant is unfit to plead. We are therefore in the territory envisaged by Archbold in the passage cited above where the issue is raised by the judge. 14. In our judgment, the only satisfactory way of approaching this situation is that the Court must determine on the balance of probabilities whether the defendant is fit to plead. If it considers it more probable than not that he is fit to plead, it should so rule and vice versa. We appreciate that this says nothing about the burden of proof, but where it is the Court appointed expert who is asserting unfitness to plead, we do not think that questions of the burden of proof are necessarily apposite. 15. With that introduction we turn to consider the facts of this case.

Background

16. The defendant is aged 26. Although he did not engage with either psychiatrist, various information has been obtained from medical and other reports and this is helpfully set out in both psychiatric reports. The following matters appear to us to be the most relevant events. 17. The defendant has refused to give details of his personal history but his GP records commence in August 2011. His GP, Dr Ellis, recorded on 21 st December, 2011, that 'this man is obviously unwell, he appears to be psychotic and possibly hearing voices but did not stay' . The next day Dr Ellis recorded that 'he appears to be experiencing auditory and visual hallucinations, he had bizarre behaviour, smiling and nodding in acknowledgement, standing on one leg and sat behind desk in my chair, appears floridly psychotic but no obvious physical signs of disease' . Dr Ellis further noted that the defendant complained of 'seeing teeth and hearing voices' . 18. That day he was admitted to the hospital for 14 days under Article 6 of the Mental Health (Jersey) Law 1969 ("the Mental Health Law"). He was prescribed anti-psychotic medication. During this admission he presented with chaotic behaviour. His friends had raised concerns following his consumption of 'magic mushrooms' and cannabis three weeks prior to the admission. He was discharged on 3 rd January, 2012, and was recorded as having had a probable presentation of 'drug induced psychosis that quickly resolved once the substance was removed' . 19. On 6 th June, 2013, Dr Ellis recorded that the defendant had tested positive for HIV and syphilis. He was referred to consultant microbiologist, Dr Muscat. 20. On 2 nd July, 2013, Ms Lorna Corfield, Blood Borne

Viral Sister, recorded that the defendant was seen in clinic and appeared calmer. He 'had difficulty getting his thoughts in place around his HIV diagnosis and how he had contracted the virus'. He was saying he was not going to be clinically managed but was calmer. 21. Dr Muscat recommended treatment in the form of anti-retroviral therapy but the defendant stated he did not wish to start treatment yet as he wanted to travel to America in October. This refusal was repeated on 27 th September, 2013. On 26 th November, 2013, he refused to discuss the results of his positive HIV testing and was aggressive. 22. On 4 th December, 2013, Dr Muscat recorded that the defendant had denied there was anything wrong with him to a nurse and had told her that he did not wish to be contacted again. He failed to attend an appointment with Dr Muscat on 6 th March, 2014, and was advised to attend appointments in the interest of his health. However he has at no stage agreed to treatment for his HIV. 23. In November 2013 the defendant sent a text message to Ms Caulfield containing 'I'm nasty when people put a knife to my back'. In December 2013 Dr Muscat recorded 'Mr Sousa's recent communications with the Blood Borne Virus Sister and the GU Sister have been most disconcerting. He denied that there is anything wrong with him and therefore he does not wish to be contacted again. He will be changing his telephone number.' In March 2014, the defendant sent a text to Ms Caulfield saying 'I don't need your drugs you liar'. 24. The alleged offences with which the defendant was charged took place on 6 th January, 2015. He appeared before the Magistrate's Court on 22 nd June and pleaded not guilty to the one count of sodomy which he faced at that time. Jurisdiction was declined and he was remanded on bail before being committed to the Royal Court on 3 rd August. 25. On 7 th August, 2015, Ms Caulfield recorded that the defendant had visited the hospital pathology reception 'using abusive and inappropriate language'. They were unable to engage with him due to his 'irrational conversation'. 26. On 11 th August, 2015, whilst on bail, the defendant attended the Viscount's Department to request his passport. The front desk staff were concerned about his bizarre and inappropriate behaviour and called the police, who escorted the defendant to the Magistrate's Court. There he continued to behave in a strange manner and eventually began violently to resist detention. He was taken to the Accident and Emergency Department at the General Hospital and was admitted for observation. The following day, 12 th August, he again attended the Accident and Emergency Department. CCTV footage and a statement from the receptionist shows that he displayed bizarre behaviour, pacing around the room before taking off his jacket leaving him bare chested. He then lay on the floor for approximately five minutes before standing up and taking off his trousers and underwear, thereby exposing himself to members of the public in the waiting area. He was then detained under Article 7 of the Mental Health Law and admitted to Bartlett Ward until 2 nd September, 2015. He was recorded as having presented in an acute delusional state and his psychosis initially escalated so that he required sedation and ventilation in intensive care, but in due course his psychotic episode subsided. On 13 th August, Dr Garcia noted rapid speech, flight of ideas and delusions and suggested a diagnosis of hyper-manic state of unknown aetiology. On 14 th August, Dr Hendricks' impression was that the behavioural disturbance had organic origin. 27. There were no illicit substances detected in his urine specimen analysis. He was discharged on 2 nd September, 2015. A discharge summary dated

3 rd September listed as main diagnoses 'Drug induced psychosis, llulitis and aspiration pneumonia' . 28. The note of his reception at the prison on 4 th September records that he 'claims that he has recently come out of a two week coma after he was assaulted by his work colleagues' . On 7 th September Dr Muscat wrote that the defendant 'denied blood borne viral infection and claimed he was in a coma for two weeks because of an assault ... It was unclear if his chaotic behaviour leading to admission and sedation was drug related or a primary psychotic illness ...' . 29. The defendant was indicted on 4 th September and remanded in custody due to lack of a suitable bail address. On 16 th October he appeared before the Royal Court and made a bail application having obtained a suitable bail address. The prosecution did not oppose the application and bail was granted. However, on 21 st October he was returned to the Royal Court because he had breached his curfew and no longer had a suitable bail address. He has been on remand at the prison since then. 30. His records at the prison show continued strange behaviour. The following are some examples:- (i) On 13 th September he said 'My dad made the world, my dad is Jesus and this air is massively corrupted' . (ii) On 14 th September he complained of hearing voices at times and suggested the prison staff were 'polluting him' . (iii) On 17 th September he was said to have become hostile and accused staff of 'attempting to remove his thoughts and was evil' . He left the room but it was noted that immediately afterwards he 'appeared chatty and pleasant with other prison staff' . (iv) On 18 th September, the psychiatrist recorded him as denying the existence of HIV in the world and said 'my blood is good' . The psychiatrist recorded 'no clear evidence of psychotic symptoms or mood disorder. His presentation appeared to be under his own control' . (v) On 22 nd September, the psychiatric nurse recorded him as denying the existence of HIV, Hepatitis B or C and said that these diseases were 'creation to enable others to rape children' . (vi) On 12 th October, he was recorded as having said that he wanted to go home and that he was 'beaten up and raped at the Magistrate's Court' . He denied experiencing auditory hallucinations and the assessor recorded that he 'doesn't seem psychotic' . He continued to refuse medication. (vii) On 24 th October he was recorded to have engaged with health care officers and declined all health care interventions. He mentioned bizarre beliefs 'that blood tests would be injected into oranges' . It was however noted that he had 'no overt psychosis, his mood was reactive with spontaneous eye contact and he was in good spirits despite unusual beliefs'. (viii) On 6 th November Dr Harrison, consultant forensic psychiatrist, recorded 'no change in presentation, bizarre speech but does not give the impression of being (sic) fixed delusional beliefs. He refused to discuss HIV' . (ix) On 20 th November, Dr Harrison recorded that he had spoken to the defendant's lawyer who informed him that he had difficulty obtaining instructions from him. Dr Harrison recorded his impression that the defendant 'has capacity to understand charges against him, had described this and his view, and had pleaded not guilty' . 31. On 24 th November, 2015, the defendant was taken to the police station to be interviewed with regard to events at the Magistrate's Court on 11 th and 12 th August. Dr Rud examined him with the following summary:- "FME review prior to interview ... history of previous admissions to St Saviour's ... DP is very agitated, very busy and fidgety and suspicious of all police and me. Looking at the screen and what I am writing down all the time and interfering. He makes

very little sense today - railroading thoughts and pressure of speech constantly. Managed to get him to commit to a location - police station, but not to anything else. He states he is JFK and his parents are the Beckhams, that his father lives in New Jersey in the USA and that he wants to go and see him and that he wants me to get his American passport for him. He feels persecuted and that we are out to get him. On asking if he hears voices, he said 'You don't need to know'. I have found him firmly unfit for interview and recommend he be taken back to HMP La Moye where he is safe and can be seen by mental health professionals as required according to their further assessments." 32. The following day it was recorded that he had told prison staff that he had terminated the police interview intentionally by pressing the alarm. Staff recorded that there was 'no evidence of such issue today, he was clear and coherent however refused to engage in health assessments'. Evidence 33. The Court received reports from Dr Ho and Dr Bruno. Both are clearly experts. Dr Ho is a consultant forensic psychiatrist and Dr Bruno is a consultant neuro-psychiatrist. 34. Dr Ho gave evidence by video link. He was examined by Crown Advocate Pedley to draw out certain aspects of his report. He was not cross-examined because Advocate Hall had informed the Court at the outset that the defendant did not wish her to represent him and she had no instructions. In any event, it was apparently the defendant's position that he was fit to plead. The Court asked Dr Ho certain questions in the absence of cross-examination. 35. Dr Bruno gave evidence in person before the Court. She was subject to cross-examination by Crown Advocate Pedley and was also asked a few questions by Advocate Hall. Both psychiatrists were given the same material which included the medical records, hospital records, a case summary, relevant Jersey law cases and other information. 36. Dr Ho attended at the prison on 17 th December for the purposes of preparing his report. The defendant refused to present himself for this assessment. Dr Ho discussed his case with the health care manager and was taken to the CCU (segregation) unit to endeavour to engage with the defendant in his cell. He explained how the defendant was huddled beneath his blanket and refused to talk to Dr Ho for any length of time, telling him to 'go away' . He eventually was able to make some conversation but remained resolute regarding his unwillingness to divulge any information. The defendant did not present with gross observable features of severe mental disorder such as responding to unseen stimuli or severe psychomotor retardation. He appeared to be in control of his speech and did not present with features of acute mood disorder such as depression or mania. Nor did he present with features of thought disorder (psychotic process affecting thinking fluency) and he denied experiencing any features of paranoid delusions. Although he was known to have made bizarre utterances in the past, these did not appear to Dr Ho to be of an intensity or nature amounting to features of acute psychosis. They were more likely to be overvalued ideas or his personal beliefs. The defendant was not acutely confused and was orientated to time, place and person. Dr Ho felt that the defendant could respond to questions and he assessed him as being lucid although clearly angry at times. 37. In his report, Dr Ho noted that the December 2011 admission had resulted in a diagnosis of likely drug induced psychosis and this was also thought to be a possible diagnosis during the August 2015 stay in hospital. In his opinion, the defendant presented with features consistent with mental and behavioural disorders due to alcohol

and likely multiple psycho-active substance misuse. Significant use of alcohol and substances in this manner was known to result in a pattern that was damaging to health, both physical and mental. He was of the opinion that, considering all the available evidence including his medical records in prison, the defendant was not suffering from a severe or enduring mental disorder. He did present with overvalued and somewhat bizarre ideas, but they did not at present amount to a diagnosis of a psychotic mental disorder. He appeared to have control over his thoughts and actions and could express his needs appropriately when making requests (e.g. for tobacco). His seemingly bizarre assertions (eg his father is Jesus) did not have the intensity and pervasive quality of delusional beliefs. Dr Ho was however concerned that the defendant had obdurately refused to comply with the necessary assessments and treatment for HIV and he would recommend that, given the clear and grave consequences of untreated HIV, the defendant be assessed specifically regarding his capacity to refuse treatment in this respect. 38. Turning to the criteria set out in O'Driscoll , as to the need to understand the nature of the proceedings so as to instruct his lawyer and make a proper defence, Dr Ho stated that, although the defendant was not willing to discuss the charges or court proceedings, it was abundantly clear that he knew he was charged with rape. He had expressed to different prison officers on various occasions that he believes he did not commit such an act. Dr Ho felt that it was likely that his difficulties with regard to instructing his lawyer were due to his reluctance to engage in general and to his denial of the charges. 39. As to the need to understand the substance of the evidence, Dr Ho considered that he was deliberately not wishing to cooperate as opposed to having a mental or physical disorder that would preclude him from such understanding. It was likely to be a voluntary and conscious decision as he was fully able to demonstrate control over his general behaviour and thinking. 40. As to giving evidence on his own behalf, the defendant was able to provide his version of events in a fairly coherent albeit slightly inconsistent manner. Although he had refused to completely disclose his reasons for saying that he was not guilty, it did not appear that he had arrived at this conclusion under any undue influence resulting from unsoundness of mind. 41. As to the need to make rational decisions in relation to his participation in the proceedings, Dr Ho noted that he had been able to demonstrate general rational behaviour in terms of his comprehension and communication whilst in prison. He had been able to comply with custodial structure and regimes albeit that he had demonstrated aggressive behaviour when his demands had not been met. In addition, he had clearly been able at interview with the police on 27 th January and 10 th February, 2015, to understand what was being alleged and to engage with the process. On balance therefore he considered that the defendant did possess the requisite understanding and ability to make rational decisions in relation to the charge which reflected his true and informed choice, albeit that it might be undertaken by the defendant with a degree of resentment and petulance. 42. In summary, Dr Ho concluded that in his opinion, although the defendant presented with some bizarre ideation and transient behavioural disturbances, this was not caused by a clinically recognised condition rendering him 'incapacitous' . The defendant might choose not to participate effectively in the proceedings, but that was unlikely to be due to a significant degree of unsoundness of mind. 43. In evidence, Dr Ho elaborated on his

report. He said that there was no 'recognised medical condition' which would render the defendant unfit to plead. He based this in particular on the fact that he participated effectively in the police interviews on 27 th January and 10 th February, that he clearly knew that he was in prison on a charge of rape and he therefore understood the nature of what was alleged against him, and that it appeared to be the view of the medical team at the prison that, although he displayed bizarre behaviour, he did have the capacity to understand the charge against him. 44. He accepted that during the acute incidents in December 2011 and August 2015, the defendant had displayed elements of psychosis but he was of the view that this was more consistent with psychosis induced by substance misuse. He was now free of such misuse whilst in prison and accordingly his condition had improved. Dr Ho accepted that the urine test in August 2015 had been negative but this was for known substances. One of the difficulties with new psychotropic substances was that one could not test for them all because they were often unknown. He acknowledged Dr Bruno's view that the defendant might be suffering psychosis as a result of his HIV. He acknowledged that this was possible but did not consider it to be correct in this case. He accepted that there was evidence of bizarre statements and behaviour but noted that it was inconsistent. If there was a psychosis with an organic cause, he would expect it to be more consistent. 45. Elaborating on his observation of the defendant during his visit to the prison, he said that his presentation did not suggest that he was plagued by mental disorder. He appeared to be able to listen to what Dr Ho said. He did not come across as someone so plagued by psychosis that he was in a world of his own. 46. When discussing the four specific criteria mentioned in O'Driscoll , he reiterated the views expressed in his report in relation to the first three. He remained of the same view in relation to the fourth criterion but accepted that this was a little more complex because of the presence of the word 'rational' . However, he had analysed this with regard to whether the defendant had a rational understanding of pleading guilty or not and concluded that he did because he had made statements such as 'You should let me go' and other similar remarks. He had understanding of the proceedings and why he was detained in prison. Dr Ho accepted that the position was slightly complicated by his HIV infection and the fact that he had refused treatment. Dr Ho reiterated the contents of his report, namely that he would recommend that the defendant had a capacity assessment to see whether he was able to refuse medical treatment and that would involve making rational decisions and informed choices. However, he went on to say that he thought the matter of his fitness to plead was perhaps less of a burden as compared to a decision in relation to HIV treatment. In relation to the former, the defendant needed to understand what he had been charged with, what the potential defences were and to be able to express that clearly to his legal team. Dr Ho thought that he did have the capacity to do that. There was ultimately no evidence of a clinically recognised condition leading to incapacity. This was so even though he had continued to behave in a strange manner despite being free of drugs and alcohol whilst in prison. Dr Ho noted in particular that the professionals looking after him at the prison had not felt the need to refer him for psychiatric treatment in hospital. He accepted that the defendant would require further monitoring in prison but he was not able at present to find any specific evidence of a consistent clinically recognised medical condition or psychiatric

disorder directly leading to his incapacity to be fit to plead. 47. Dr Bruno attended at the prison on 22 nd December, 2015, in order to assess the defendant but, despite numerous attempts by prison officers, he declined to be interviewed. She did not therefore see him at that time. 48. Nevertheless, based on the material before her, she concluded that there was an ongoing mental disorder in the spectrum of organic delusional/mood/personality disorder, probably related to his HIV infection. She pointed out that neuro-psychiatric complications of HIV infection are very common, both as a psychological reaction to the diagnosis and as a direct pathological effect of the infection on the central nervous system. The acute illness in August 2015 resulting in a hospital admission may have represented an HIV meningo-encephalitis followed by a sub-acute illness because of the presence of confusion and pyrexia at the onset, neurological signs, elevated CK (raising the possibility of an epileptic seizure) and high protein in the CSF. 49. She thought that a drug induced psychosis was less likely because of the negative urine test in August and the fact that the symptoms had continued during the defendant's detention at La Moye despite being free of illicit drugs. As against that, the continued symptoms were consistent with his refusal to accept treatment for his HIV condition which would explain the lack of significant improvement in his symptoms. Its causes were related to his HIV. 50. In her opinion, his current mental disorder would significantly impair the defendant's ability to give evidence on his own behalf and to make decisions in relation to his participation in the proceedings (including whether or not to plead guilty). As a consequence, she felt that he was unfit to plead. 51. She too elaborated on her report in oral evidence although she suffered from not having anyone other than the Court to extract her evidence in chief. She referred to the fact that the record showed some 40 separate incidents of bizarre behaviour, which included talking to an imaginary cell-mate, talking to himself and strange behaviour such as putting paper in a kettle. She referred also to the notes of his attendance at the Police Station on 24 th November when he said that he was JFK and the son of the Beckhams. She confirmed her opinion that the various physical symptoms in August 2015 were suggestive of some inflammation of the brain. She reiterated that she considered that the fact the defendant had continued to exhibit symptoms of mental disorder for the four months following the August incident indicated to her that the psychosis was not drug-induced. 52. She said that, although she had not been able to see the defendant at the prison, she had been to see him that morning in the cell at the Court and he had been speaking to himself before she entered the room. Turning to the criteria listed in O'Driscoll, she concluded that he was not in a state to fully understand the proceedings so as to instruct his lawyer and make a proper defence, she did not think he could give evidence on his own behalf as his speech was so disorganised, nor did she consider that he was in a position to make rational decisions in relation to his participation in the proceedings. In this latter context, she disagreed with Dr Ho over the significance of his decision to refuse all treatment for HIV. She considered that if there was a question mark (as Dr Ho seemed to accept) over his capacity to consent to such treatment, she thought there must even more so be a question over his capacity to participate rationally in the criminal proceedings. The decision to refuse treatment for HIV was in a way a simple one. If he refused treatment, the outcome would be fatal and he either

had to say yes or no to treatment in the light of that fact. This was a more simple matter than participating in a trial. 53. During the course of her evidence, it was apparent to the members of the Court that the defendant was behaving in a bizarre manner while sitting in the dock. He appeared to be conversing in an animated manner with an imaginary person to his left. This appeared to be the case for most of the time whilst Dr Bruno was giving evidence. The Court asked Dr Bruno whether she had observed the defendant whilst she was giving evidence and whether she had formed any opinion from the way he had been behaving. Dr Bruno confirmed that she had observed the behaviour and that it had been rather abnormal and that he seemed to be speaking to an imaginary person on his left. She considered that this behaviour was not normal and was suggestive of a psychiatric disorder.

Conclusion

54. Having had the benefit of seeing and hearing both psychiatrists give evidence (Dr Ho by video link and Dr Bruno in person), the Court has concluded that, on the balance of probabilities and applying the test set out in O'Driscoll, the defendant is not fit to plead. The Court has had regard to all the evidence before it but we would summarise the main reasons for that conclusion as follows:- (i) Whilst it seems clear that the psychotic incident in December 2011 was probably drug induced, the Court finds on balance that the bizarre behaviour since August 2015 is more likely to have an organic cause such as his HIV infection. That is because the urine test in August was negative - although it is accepted that not all drugs can be tested for - and more particularly the symptoms and behaviour have continued until the present day despite the defendant having been remanded in custody since then (apart from a few days). (ii) The level and frequency of his bizarre behaviour is significant. Thus Dr Bruno referred to some 40 separate incidents and these range from talking to an imaginary cell mate to believing that he is JFK and the Beckhams are his parents. Dr Bruno records the prison records as describing a clinical picture characterised by intermittently bizarre, inappropriate and at times aggressive behaviour, frequent insomnia, thought disorder, paranoid and grandiose delusions and probable auditory hallucinations. (iii) The Force Medical Examiner found him to be 'firmly unfit' to be interviewed by the police on 24 th November, 2015, for the reasons set out at para 31 above. There is no suggestion that his condition has improved since then. If a person is not fit to be interviewed by reason of his delusional behaviour and inability to make sense, he is unlikely to be fit to participate effectively and rationally in a criminal trial. (iv) Both psychiatrists accepted that the record of the interviews with the police on 27 th January and 10 th February, 2015, showed that at that stage the defendant was fit to plead. He engaged rationally with the process and understood what was being put to him. However, it is clear that his condition altered in August 2015 and he has remained in that condition since then. We cannot therefore derive any assistance from how he dealt with the interview process on 27 th January and 10 th February, 2015. (v) The Court notes that even Dr Ho considered that there was a question mark over the defendant's capacity to consent to (or refuse) medical treatment in connection with his HIV condition. Dr Ho felt that this did not indicate a

similar concern over his ability to participate effectively and rationally in a criminal trial, but we prefer the opinion of Dr Bruno that a concern over his fitness to consent to medical treatment raises a similar concern in relation to fitness to plead. In the Court's view, the complexity of participating effectively in a criminal trial by giving instructions, reacting to evidence that is given, giving evidence and all the other matters that are involved in a trial is more complex and demanding than a yes or no decision as to whether to consent to the taking of drugs which are essential to save your life. (vi) The Court was able to observe the defendant during the hearing. When Dr Bruno was giving her evidence, he engaged in an animated conversation with an imaginary figure to his left for most of the time. Dr Bruno was able to observe that behaviour and concluded that it was not normal and would suggest psychiatric disorder. In this respect Dr Bruno had the advantage over Dr Ho in that she was able to observe the defendant during the Court proceedings whereas he was not able to do so because he gave his evidence by video link. (vii) It is of course possible for a defendant to fake conduct of the type described in the preceding sub-paragraph. However, this seems very unlikely in the present case given that Advocate Hall informed the Court that the defendant considered that he was fit to plead and did not wish to be found unfit. (viii) Putting all the evidence together, the Court accepted that the defendant was suffering from unsoundness of mind which meant that he lacked the capacity to participate effectively in the prosecution against him as required by O'Driscoll . In particular the Court accepted the evidence of Dr Bruno that, given his disorganised thought process, he was unlikely to be able to give evidence on his own behalf and that, given his condition, he was not able to make rational decisions which reflected true and informed choices on his part. 55. For these reasons the Court found that the defendant was not fit to plead. Authorities Criminal Justice (Insane Persons)(Jersey) Law 1964. AG v O'Driscoll

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