

JERSEY / JUDGMENT

Carrel v AG [2017] JRC 067 (03 May 2017)

[2017] JRC 067

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Court of Appeal (Jersey) Law 1961, the Court can in its discretion order any witnesses who would have been compellable witnesses at trial to attend and be examined before the Court, whether or not they were called at the trial. If the Court admitted the evidence, when deciding what effect it should have, the Court would consider whether there might have been a reasonable doubt in the minds of the jury as to the appellant's guilt if that evidence had been given, or on an appeal against sentence, what impact the evidence might have had on the sentence passed. The Court of Appeal has established the principles upon which that discretion should be exercised. In *AG v Gorvel*

[1973] JJ 2503, applied by the Court of Appeal in *Norris v AG*

[2014] JCA 087, Le Quesne JA, who gave the judgment of the Court, cited the principles stated by the English Court of Appeal in the case of *R v Parks* 46 Cr. App. R.29 where Lord Parker, CJ, said at page 32:- "Those principles can be summarised in this way: first, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this Court to decide whether it is to be believed or not, but evidence which is capable of belief. Fourthly, the Court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial." 11. Le Quesne JA said at page 2505:- "... [we] consider that those principles are the principles which ought to be observed by this Court in exercising its discretion to admit further evidence under Article 32 [now renumbered] of the Court of Appeal (Jersey) Law ..." 12. In *Norris*, the Court of Appeal said at paragraph 50:- "Nonetheless, by parity of reasoning in appeals against sentence, if an appellate court decides to admit the evidence because the first three tests are satisfied, the Court must go on to consider what impact the evidence would have, if any, on the sentence passed on the offender." 13. Those then are the principles which we now apply. Decision on admissibility 14. The evidence of Advocate Macdonald, then acting for the applicant, was that he sent an email to the applicant on 19th January in which he said, in relation to medical records:- "You explained that you had seen your GP, Dr Gail Cochrane, regularly but that there was no condition which had prevented you from attending your appointments with the Probation Service. If, contrary to what you last told me, you think Dr Cochrane and/or your latest medical records could

contain anything to explain your failure to attend community service then please let me know." 15. Advocate Macdonald did not agree that the applicant had explained to him that he had not attended community service appointments because he was ill - rather he gave the explanation in relation to the failure on 23 rd November that it was because his shower was not working, and in relation to the failure to attend on 21 st December, that he simply could not remember. Advocate Macdonald said that the applicant never described himself as being seriously ill. 16. Advocate Macdonald also provided however, a copy of an email which the applicant's mother had sent to the Advocate on th January at 9.26pm, the day before the sentencing hearing. In that email, Mrs Carrel indicated that the applicant had not attended community service because he had been signed off sick by his doctor constantly since the last court date with depression, stress, anxiety and panic attacks. She said she would try to get the evidence of the sick notes from the Social Security Department if she had the chance to do so. The email set out other material relevant to the applicant's illness. Advocate Macdonald indicated that he made a copy of this email available to the Court on 27 th January, but that neither the applicant nor his mother nor anyone else had ever provided him with copies of the sick notes themselves. 17. After sentence Advocate Macdonald was informed by the applicant of the existence of the sick notes; he contacted Dr Cochrane as a result of which the various medical certificates were obtained. In the applicant's affidavit, he asserted that his advocate had told him that he would contact the applicant's GP to obtain copies of the relevant certificates. 18. We accept that neither the advocate nor the applicant should be regarded as being untruthful. In our view, there was a misunderstanding between the applicant and his advocate, the reasons for which lie not with the advocate but in the vulnerabilities of the applicant, which are set out in the psychiatric and probation reports available to us. In the circumstances, we consider that the evidence should not be regarded as having been "available" at the time of the trial. The medical evidence was clearly relevant to the issues, and clearly capable of belief. It was capable of being relevant not only to the question of any alternative sentence but also to the question of whether there was ever any breach of the community service order at all, because if the applicant had genuinely been medically unfit to do community service, he should not have been regarded as being in breach for not having done it. Nonetheless, the applicant ought to have provided medical certificates to the community service manager, in advance if that were possible, and if not then as soon as possible after the event. Accordingly, we have treated the applicant as being in breach of the community service order, and indeed Advocate Bell did not contend otherwise, but we are satisfied that the evidence that the applicant had been signed off by his doctor might have made a difference to the Royal Court's assessment of the appropriate sentence, and we therefore allowed that evidence in for the purposes of the application for leave to appeal. The application for leave 19. It is well established that an application for leave to appeal must in general terms be based on one of two grounds - either the sentence was wrong in principle, or it was manifestly excessive. Advocate Bell's submission was that the Royal Court did not fully explore the fact that the applicant had been signed off sick. That was, as he described it, the headline point. We were faced with an exceptional case. When it came

to it, we think Advocate Bell did accept that his submission in reality was that the sentence was wrong in principle and that a suspended sentence should have been imposed instead. In a nutshell, Advocate Bell relied upon the following:- (i) The defendant had been in custody since January and had served 11 weeks' imprisonment already. It was appropriate to have regard to this factor, he said, because as part of the appeal one should look at the impact of prison on the applicant. (ii) It is highly likely that the applicant is autistic. (iii) A community service order was setting the applicant up to fail. If one had regard to the social enquiry report in relation to the applicant's breach of probation, it was clear that the Probation Service regarded the cognitive inflexibility of the applicant, and his inability to accept responsibility for his offending as making intervention with him by the Probation Service extremely difficult. The probation officer, in her report in November 2016, noted that the psychiatrist had described the applicant as completely overwhelmed with anxiety due to the stresses and pressures of being under two court orders, and that he could not manage his anxieties. In a discussion between the probation officer and the psychiatrist on 2 nd November, 2016, it appears that the psychiatrist accepted that if the community service order were to be continued by the Court, the stress and anxiety which that would generate in the applicant would again become overwhelming and he might well opt out of the supervision and/or the community service scheme, such that he would be back in Court under breach proceedings again. The psychiatrist had indicated that a suspended sentence order was potentially the best solution. 20. Crown Advocate Pedley reminded the Court that there had been two failures to appear and three late attendances between March and June 2016 for which there was no medical explanation, and that despite the medical certificates, there had in fact been some attendances during the time when those certificates remained valid when community service had been performed in accordance with the order. He submitted that the suspended sentence would not meet the gravity of the offending and it would therefore be wrong to replace the community service order with a suspended sentence. Decision 21. This Court agrees with the Inferior Number of the Royal Court that the index offence of producing cannabis was serious. It also agrees with the general proposition that when an offender is given a warning, in as clear terms as this applicant was given that a further breach would lead to a custodial sentence being imposed, it will be in very rare circumstances indeed that the custodial sentence would not thereafter be imposed and, if imposed, would not be upheld on appeal. One Jurat was of the view that these features entirely justified the view expressed by the Royal Court that a suspended sentence would not be a sufficient sanction for the criminality of the behaviour of the applicant. 22. The majority of this Court, however took the view that there was ample evidence of misunderstanding, which might well be down to the vulnerability of the applicant and his place on the autistic spectrum. It is clear that the Probation Service have been concerned from the outset as to the viability of a community disposal. Furthermore the lower court does not seem to have taken into account at all the evidence before it that the applicant had received medical certificates from his doctor, as that possibility, apparent from his mother's email to Advocate Macdonald, does not appear anywhere in the sentencing remarks. That being so, the fact of those certificates appears

to have been disregarded and as a result no enquiry made as to what the true medical position was. 23. It is clear from reading the transcript of the proceedings before the lower court that the Court did have some information in relation to the medical certificates which had been issued, but not only did the Court not refer to it, but the applicant's counsel did not place any focus on the issue either. In the view of the majority of this Court, when one puts all the mitigation together, and adds to it the fact that the applicant has not reoffended, but has been breached twice for non-performance of the community service order, the right conclusion is that the sentence imposed below was wrong in principle, and therefore should be set aside. For these reasons, the Court granted the application for leave to appeal, allowed the appeal, and on the three counts of the indictment in respect of which the applicant was sentenced first on 21 st January, 2016, the community service orders were discharged and in lieu the applicant sentenced to 8 months imprisonment on each count, suspended in each case for a period of 2 years. 24. We record that in explaining to the applicant that he was liable to be sentenced to prison if he reoffended in any way in the next two years, we emphasised to him that the index offences, particularly the offence of production of cannabis, were serious and fully merited a custodial sentence. The applicant told us that he understood that, and would not be reoffending. We would merely like to add that we had contemplated the addition to the suspended sentence of a supervision order pursuant to Article 6 of the Criminal Justice (Suspension of Prison Sentences)(Jersey) Law 2003 . We have not followed that course because the original probation order was discharged by the Royal Court in November 2016; but we think that the applicant would gain from any assistance he feels able to seek voluntarily from Autism Jersey, assuming they are able to provide it. The Probation Service will be able to assist him in making that contact. Authorities AG-v-Carrel

[2017] JRC 021 . Misuse of Drugs (Jersey) Law 1978. AG-v-Carrel

[2016] JRC 199B . Court of Appeal (Jersey) Law 1961. AG v Gorvel

[1973] JJ 2503 . Norris v AG

[2014] JCA 087 . R v Parks 46 Cr. App. R.29. Criminal Justice (Suspension of Prison Sentences) (Jersey) Law 2003. Page Last Updated: 10 May 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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