

JERSEY / JUDGMENT

Cornish v AG [2024] JRC 178 (10 September 2024)

[2024] JRC 178

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JUDGMENT

THE COMMISSIONER: 1. This judgment represents the reasons for our decision for allowing an appeal by Daniel Charles Cornish ("the Appellant") against the sentence imposed by Relief Magistrate Cadin on 1 August 2024 for an offence of common assault and an offence under Article 51(4)(b) of the Telecommunications (Jersey) Law 2002 ("the 2002 Law"). The Defendant was sentenced to two months imprisonment for the assault and a further two months for the offence under the 2002 Law making 4 months in total. 2. The appeal also challenged the imposition of notification requirements under Article 11 of the Domestic Abuse (Jersey) Law 2022 for a period of 2 years. The notification requirements are set out in Article 12 and in summary require a person subject to a notification order to notify the police of any name used by that person and their place of residence throughout the period governed by the order. A conviction under Article 51(4)(b) of the 2002 Law together with the assault conviction satisfies the definition of relevant offence under the Domestic Abuse (Jersey) Law 2022 and allows a notification order to be made. 3. Both offences took place on 28 April 2024. The common assault took place at People's Park when the Appellant assaulted the Complainant. The context of this was agreed as set out in the Appellant's contentions as follows: "a. the Appellant and the Complainant had been in an on/off relationship for 20 years;

- b. on 28 April 2024, the Appellant attended (uninvited) at the home of the Complainant;
- c. the Complainant then left to walk her dog at Peoples' Park and was followed by the Appellant;
- d. a verbal altercation ensued which was filmed by a member of the public;
- e. the Appellant pushed the Complainant in the chest, causing her to 'stumble back a few steps'." 4. Following the assault, the Appellant sent over twenty-two text messages to the Complainant between 4pm and 7pm. Article 51(4)(b) of the 2002 Law provides that: "A person who, for the purpose of causing annoyance, inconvenience or needless anxiety to another

- (b) persistently makes use of a telecommunications system, is guilty of an offence. The maximum sentence for such an offence is a term of imprisonment of two years and a fine (Article 51)(7))." 5. The right to appeal a sentence of the Magistrate is set out in Article 33 of the Criminal Procedure (Jersey) Law 2018 . On any appeal, the Royal Court has power (Article 36 (1)) to: (i) Confirm, reverse or vary the decision of the Magistrate's Court; (ii) Remit the matter to the Magistrate's Court with its opinion; or (iii) Make such other orders it thinks just and may by such order exercise any power which the Magistrate's Court might have exercised. 6. The test to be applied by the Royal Court on an appeal against a sentence imposed by the Magistrate's Court has been set out in a number of cases, including *Loureiro v AG*

[2015] JRC 154 , where at paragraph 9 the Court stated: "9. It is well established that the Court will not interfere with the sentence imposed by the Magistrate unless it is one which is not justified by law, or the sentence was passed on the wrong factual basis, or some matter has been improperly taken into account or left out of account, or there was some fresh matter which ought to be taken into account or whether the sentence was wrong in principle and manifestly excessive. In particular, it is not the function of the Royal Court to tinker with sentences which were within the range open to the sentencing court simply because it might itself have fixed a lower term of imprisonment." The Appellant's contentions 7. The appeal brought by the Appellant was brought on the basis that the sentence imposed by the Relief Magistrate was, in all the circumstances, manifestly excessive. While there was no definition of what was manifestly excessive, Advocate Nicholls suggested that a sentence that exceeded the proper range of guidance when all relevant factors were taken into account in relation to the offence or the offender met the requisite threshold. 8. In relation to the assault, the Appellant maintained that this was an assault with a low degree of force involving no injury. By reference to the Magistrate's Court Sentencing Guidelines [Part 2 Public Order Offences] the starting point for such an assault was a fine of £1,200 up to £2,000 for a first time offender pleaded guilty. Advocate Nicholls contended forcefully that the assault in this case was at the very lower end and did not warrant a custodial sentence even when taking into account the Appellant's previous record. It was a single push with no injury that took place on the spur of the moment. He invited us to view the phone recording of the assault (which had not been played to the Relief Magistrate) which illustrated why the threshold for custody had not been met. 9. While the Appellant accepted that he was not a first-time offender, Advocate Nicholls contended that the Relief Magistrate should have still had proper regard to the Appellant's early guilty plea but did not do so. He was particularly critical of the lack of any explanation about how any credit had been given for the guilty plea. This was due to the Relief Magistrate failing to identify what starting point he had used when sentencing the Appellant. This meant that it was not clear how credit had been given for the Appellant's guilty plea. This was important, as although the Appellant maintained there had been a prior altercation with the Complainant, he had accepted responsibility for his actions by pleading guilty at the earliest opportunity. 10. The Appellant also criticised the Magistrate for failing to consider

the factors set out in Part B of the Guidelines which consider the seriousness of the offence and the effect of any aggravating or / and mitigating factors. The Appellant contended that that there were two factors identifying lower culpability, namely that the assault was a single push or shove and the assault took place on the spur of the moment. 11. The Appellant fairly accepted that the Court was entitled to treat previous offences of assault on the Complainant as an aggravating factor. He did not regard intoxication as a factor and submitted that that meant drunkenness. It did not apply to someone who had been drinking, which was the position that applied to the Appellant. Advocate Nicholls submitted however that the Relief Magistrate had given far too much weight to the Appellant's previous convictions. 12. The fact that the Appellant was in breach of a binding over order (involving an assault on another person, not the Complainant) was not relevant as the prosecution had not sought any sentence for any such breach. 13. While the Relief Magistrate faced limited options and a choice between a binding over order or imprisonment, this choice did not mean that the imprisonment had to be the default option, which is what the Appellant suggested had occurred. 14. In relation to the offence under the 2002 Law, the offence involved sending twenty-two messages during a period of just under four hours. The Appellant contended this did not warrant the imposition of a custodial sentence of two months, or at all. He contrasted the decision with that of AG v Bisson and Bisson

[2023] JRC 245 , where the defendant in that case was sentenced to eleven months imprisonment for making a total of five hundred and twenty-nine calls, often of a grossly offensive nature. The messages sent by the Appellant were annoying over a short period but had to be looked at in the context of the long history between the Appellant and the Complainant. On their own they did not justify a custodial sentence. Some of them were also not offensive. The nature of the assault did not alter that position. Advocate Nicholls also relied on his previous submission about the failure to identify a starting point and the failure to explain how credit had been given for the early guilty plea. 15. The Relief Magistrate's approach for sentencing was therefore flawed because the offences were relatively minor in nature, were not sufficiently serious to warrant a custodial sentence even when put in context of a history of prior offending and non-compliance with non-custodial sentences. The Respondent's contentions 16. Crown Advocate Taylor for the Attorney General contended the assault was made more serious by the Appellant's previous convictions which included: (i) Thirteen convictions for breaches of a restraining order where the Complainant was the protected party between 2012 and 2018; (ii) The Appellant had six convictions for offences against the person, the most recent being in December 2023 (which was not against the Complainant) where he was sentenced to a six month binding over order, which was in force when the Appellant committed the assault against the Complainant; and (iii) The following breaches of Court orders: "breach of community service order in 2003, breach of probation order in 2010, breach of binding over order and three breaches of a probation order in 2011, breach community service order and two breaches of a probation order in 2014, breach of community service order

in 2016, breach of probation order in 2018 and breach of binding over order in 2019." 17. In relation to the Guidelines, the Respondent accepted that two of the factors identifying lower culpability were present. However, there had been previous violence or threats to the Complainant which could properly have been taken into account by the Relief Magistrate. 18. The Relief Magistrate was also entitled to take in to account the breach of the binding over order in force at the time of the assault and the messages as an aggravating factor even though there was no separate sentence for that breach. 19. In addition, the Appellant himself blamed alcohol for the offending, as set out at paragraph 6 of the pre-sentence report prepared by the Jersey Probation and After-Care Service. 20. The Respondent also contended that the Appellant was conflating remorse with taking responsibility for the offending and victim blaming, which the Respondent submits that the Relief Magistrate could properly take into account. In the alternative, to the extent that there was limited remorse, this would be likely to have resulted in less credit being given for the mitigation. 21. In relation to the charge under Article 51(4)(b) of 2002 Law, given the nature of the telecommunications charge that each case is likely to be fact specific, there was no specific guidance in Bisson that would make it relevant for the Court to take it into account in considering sentence in this matter. The seriousness of these communications was that they very much followed on from the assault. 22. The Respondent therefore concluded that the sentences imposed were therefore within the discretion afforded to the Relief Magistrate and so the Appeal should be dismissed. The Relief Magistrate's decision 23. In relation to the assault, the Relief Magistrate described it in this way: "What occurred in April of this year was an unpleasant altercation in public, where you pushed the victim and caused her to stumble backwards. There were witnesses to this incident and they were sufficiently concerned that they videoed the incident on their mobile phone." 24. In relation to the telecommunications offence, the Relief Magistrate said this: "It is also aggravated by the fact that as the author of the Pre-Sentence Report notes and indeed as you say to this Court, notwithstanding your pleas you accept very little in the way of responsibility for them. It is also aggravated by the fact that despite recognising that the relationship is over, you keep on returning back. As to proportionality, you've got a number of previous convictions, as I've said for the same type of conduct against the same victim, in respect of which you've received a whole range of sentences including imprisonment, probation, community service orders and restraining orders and they don't appear to have done any good." 25. The Relief Magistrate also noted that the Appellant was assessed at a high risk of re-offending but was not prepared to undergo courses which left the Relief Magistrate with very few options. 26. This led to the Relief Magistrate to conclude that he had no alternative but to impose a custodial sentence. Discussion and Reasons for Decision 27. We start by reference to the phone recording of the assault referred to by Advocate Nicholls. In relation to this evidence, as noted above, it was not put before the Relief Magistrate by either the prosecution or the defence. We admitted this evidence on appeal because, in our view, it was in the interests of justice to do so in order to evaluate the submission being put forward by Advocate Nicholls on behalf of the Appellant that the assault did not warrant a custodial sentence.

28. In our view, having reviewed its content, this recording should have been drawn to the Relief Magistrate's attention. We say that because, although there was a description of what is set out in the recording by Crown Advocate Taylor in her submissions, seeing the video gave us a very different impression. In particular, prior to the assault, the Complainant was leaning over the Appellant, who was seated on a park bench, and appeared to be remonstrating or arguing with him. The Appellant then stood up and pushed the Complainant, who stumbled backwards for a few steps and then regained her balance. After pushing the Complainant away, the Appellant then remained stationary while the Complainant moved towards him to recover an object she had left on the wall behind the seat where the Appellant had been sitting. The recording then ended. 29. What we saw on the phone evidence led us to conclude that the threshold for a custody sentence was not met in respect of the assault. In reaching this conclusion we were fully aware that the Appellant had followed the Complainant to the park uninvited and that he had committed a number of offences and breaches of restraining orders against the Complainant. These are matters that were aggravating factors, as the Relief Magistrate correctly noted; such factors can lead to a low level assault crossing the custody threshold whereas a first offence would not do so. Nevertheless in this case the assault was at as low a level as it could be. It was a single push with limited force with an open hand not a closed fist directed towards the Complainant's shoulder and appeared to us to take place on the spur of the moment. There was no injury and no other conduct by the Appellant which formed part of the offence. 30. While therefore we agreed with the Relief Magistrate that this was an unpleasant altercation in public, and the Appellant was right to admit that he had committed an assault, the altercation involved both parties, with the Appellant appearing to have responded to how he was being addressed by the Complainant in an unacceptable but limited way. 31. In reaching our decision, we also took into account that intoxication had a role to play in this offence. We disagree with Advocate Nicholls that intoxication has to mean drunkenness. Rather, we considered that intoxication covers a situation where a person has drunk sufficient alcohol for their ability to make judgments to be impaired. It will be a question of fact for each case as to how the degree of impairment and how far the fact that an individual has been drinking is an aggravating factor. In this case, as the Appellant himself recognised at paragraph 6 of the pre-sentencing report, alcohol played a part in this offence. 32. However, in our view, the aggravating factors we have referred to, looking at the facts of this case, and with reference to the recording, were not sufficient to cause the offence of assault to cross the threshold of the imposition of a custodial sentence. We therefore allowed the appeal. 33. We also allowed the appeal in relation to the telecommunications offence because the seriousness of this offence was linked to the seriousness of the assault. Once we had concluded that the assault did not justify a custodial sentence, then the basis for imposing a custodial sentence in respect of the messages also fell away and the order for imprisonment had to be set aside. We wish to emphasise however that this Court takes a dim view of any breach of Article 51(4) of the 2002 Law. While each case is fact specific, imposition of a custodial sentence is always a possibility for such offences. The sending of

messages that cause annoyance, inconvenience or needless anxiety is upsetting and is not acceptable in any form. 34. In relation to the notification requirements imposed by Relief Magistrate Cadin, the Appellant, in oral submission, did not challenge this part of the decision and so the order remains in place. 35. We did however impose a binding over order for twelve months in lieu of the sentence of imprisonment, having regard to the period of time already served. We stressed to the Appellant that it was important that he did not commit any further criminal acts and, in particular, stayed away from the Complainant and did not attempt to communicate with her in any way as otherwise he ran a serious risk of finding himself back in prison. We imposed a period of twelve months because the period of six months for the previous binding over order imposed in December 2023 had proved insufficient, and we therefore considered that a longer period of time was justified. Given the history between the Appellant and the Complainant we did not consider that the Appellant should be left to walk free from prison without having to account for his future behaviour. 36. In relation to the other grounds relied on by Advocate Nicholls, we did not decide the Appeal on the basis of these other grounds. However, in this case, it was not clear to us what starting point the Relief Magistrate had applied and how he had given credit for the guilty plea. Where a person is being sentenced in the Magistrate's Court is not a first time offender, the Magistrate's Court is entitled to consider previous relevant offences as an aggravating factor. In future cases, it would be helpful for the Court delivering sentence to explain the effect of any aggravating factors on how it has arrived at its sentence and then to explain what credit has been given for any guilty plea or other mitigation. In another case, if the reasoning is not clear, that might lead to an unnecessary appeal where the sentence is not manifestly excessive but a defendant does not understand how a sentence has been arrived at. 37. For all these reasons, the Appellant's appeal was allowed in respect of the sentences for assault and the breach of Article 51(4)(b) of the 2022 Law, which we replaced with a binding over order of twelve months from today's date. Authorities Telecommunications (Jersey) Law 2002. Domestic Abuse (Jersey) Law 2022. Criminal Procedure (Jersey) Law 2018. Loureiro v AG

[2015] JRC 154 . Magistrate's Court Sentencing Guidelines [Part 2 Public Order Offences]. AG v Bisson and Bisson

[2023] JRC 245 Page Last Updated: 23 Sep 2024 Back to top About JLJB Accessibility Contacts Copyright Disclaimer Feedback Privacy policy Site map BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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