

JERSEY / JUDGMENT

E -v- AG [2017] JRC 034 (27 February 2017)

[2017] JRC 034

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JUDGMENT

THE BAILIFF: 1. On 13 th February, 2017, the applicant applied for leave to appeal against a sentence of a total of 2 years and 5 months' imprisonment imposed by the Royal Court on 29 th July, 2016 (AG-v-E

[2016] JRC 131), and against a recommendation for deportation made by the Royal Court on 11 th November, 2016, (AG-v-E

[2016] JRC 208). The sentencing remarks of the Court were made at the time of sentence on 29 th July, and the reasons for recommending deportation were handed down on 30 th November, 2016, (AG-v-E

[2016] JRC 222A . The applications, which were in time, were refused with reasons reserved. This judgment contains those reasons. The facts 2. At the time of sentence, the applicant faced three Indictments, the first charging a breach of the peace committed in the house of his former partner on 27 th October, 2014, in breach of the terms of an earlier Probation Order; the second for obstructing the police outside the Havana nightclub on 23 rd November, 2015, committed whilst on bail and in breach of a bail condition; and the third in respect of a charge of grave and criminal assault and malicious damage, also committed whilst on bail. As the Royal Court noted, the grave and criminal assault was the most serious of the offences, and on this appeal, as did the Court below, we focus our remarks on that offence. 3. The victim of the assault had been in the town area from approximately 2pm on 19 th December, celebrating his works Christmas lunch. He was drunk, but able to walk unaided and aware of his surroundings as he made his way home at approximately 10pm that day. CCTV footage shows the applicant and a friend walking along Burrard Street towards Minden Place. It also showed the victim walking along Don Street towards Burrard Street. The victim is seen on the footage to turn towards the applicant and his friend and he appeared to say something to them. According to the victim, he remembered passing the two males who he thought were arguing in Portuguese, and he said that he said words to the effect of "Cheer up guys, it's Christmas". He recalled hearing someone approach him from behind and next recollected waking up in hospital with a police officer present. CCTV footage is consistent with the victim's recollection. It showed the applicant to be the aggressor at all times, and indeed that another male stood in front of the applicant at one point and endeavoured to prevent him from getting at or pursuing

the victim. The victim was seen walking away up Don Street in the direction of Duhamel Place, but the applicant broke free from those who were restraining him and pursued the victim, out of view of the camera. Although the applicant claimed that it was the victim who initiated the violence by punching him to the face causing him a fractured jaw, the Court's summary of the facts was as follows:- "2. The grave and criminal assault is the most serious of the offences, being described by the prosecution as an unprovoked and vicious assault on the streets of St Helier, which was pursued with real purpose and vigour. The Defendant claims that the victim, who passed him in the street and was wholly unknown to him said something offensive but he cannot recall what was said. The victim denies having said anything offensive or provocative. As the prosecution say, even if the victim did say something provocative, it would not have justified the Defendant's subsequent conduct. Although the Defendant received a punch to his jaw in the early part of the incident, the evidence shows that at no time was the victim seen to act in an aggressive or violent manner 5. However, this was a very serious assault which we agree was unprovoked and which we agree was pursued with real purpose and vigour, causing the physical injuries set out in the doctor's report and the psychological impact upon the victim made clear by his statement." 4. Independent witnesses informed the police that the applicant had shouted at the victim, grabbed him and pushed him with both hands onto the bonnet of a parked vehicle. The applicant repeatedly punched, kicked and kneed the victim as he lay on the bonnet. He then grabbed the victim and threw him to the ground, thereafter kicking the victim to the body and then he bent over him and punched him to the face a couple of times. 5. The victim was seen to stumble across the road, leaning against a wall, blood covering one side of his face. He was then seen to walk into Vauxhall Street, but the applicant followed him, punching him from behind on the head and body. He jumped on the victim's back and pulled him to the ground, then sitting on the ground with his right arm around the victim's neck and his legs wrapped around him. A police vehicle approached and at that point the applicant got off the victim and walked into New Street. 6. When the applicant was examined by the Force Medical Examiner in the early hours of the following day, he told the doctor that he could not recollect what had happened. He denied being in pain but asserted he had drunk three bottles of whiskey during the course of the evening. On examination he was noted to be intoxicated, his speech was slurred and he was unable to sit up unsupported. He had a puncture wound to his lower lip, blood staining on his hands and a contracture of the fascia of the left hand affecting his ring and little fingers. 7. The victim was also examined by the Force Medical Examiner, and found to be suffering from multiple bruises and abrasions. The doctor concluded that the injuries were consistent with having been caused by blunt force trauma such as punches, kicks or hitting a blunt object such as the ground. The injuries which the victim had sustained were demonstrated in photographs which were available to the Court. In his victim personal statement, the victim told the police that, as of January 2016 "I am suffering anxiety when I leave my house and now I avoid Duhamel Place and the surrounding streets. I also try and avoid areas with large groups of people". 8. The Court below noted that there was little mitigation other than the guilty plea. The applicant

was not of good character, was aged 23 and had shown no remorse or regret. The Court noted, however, all the mitigation that was put forward by Advocate Landick on behalf of the applicant

- in summary the guilty pleas, albeit perhaps late in relation to the charge of grave and criminal assault; the stress of the proceedings, the applicant's relative youth including the fact that he was 21 and 22 when the first two offences were committed; his troubled early background and his intellectual impairment. 9. Noting that the Court had frequently said that those who commit violence in public places in St Helier will face substantial sentences where the violence is fuelled by drink, the Court reached the view that the starting point adopted by the Crown was too low. Accordingly, on the grave and criminal assault charge the Court took a starting point of 3 years and 6 months rather than the Crown's starting point of 3 years. Taking a more serious view of the obstruction of the police officer, and applying the totality principle, the Court sentenced the applicant to 1 month's imprisonment for conduct likely to cause a breach of the peace, 2 months' imprisonment, concurrent, for obstructing a police officer and 2 years and 3 months' imprisonment, consecutive, for the grave and criminal assault. There was in addition a sentence of 1 month's imprisonment, concurrent, on each of the counts of malicious damage, making a total of 2 years and 5 months' imprisonment. In handing down its judgment in relation to the recommendation for deportation, the Court applied the test in *Camacho v AG*

[2007] JLR 462 . Its reasoning in relation to the deportation recommendation went as follows:-

"Taking the first part of the test, the defendant has admitted to a drug dependency, and has a bad record generally relating to violent behaviour whilst under the influence of alcohol or drugs. His last conviction for grave and criminal assault was a serious offence. He has been assessed at a high risk of reoffending. The Court found that his continued presence in the Island was detrimental to the public good. Turning to the second part of the test, there was no evidence of any dependency between the defendant and his mother and siblings in Jersey, beyond emotional and blood ties. He had seldom lived with his mother and there was no offer to accommodation from her. The defendant's family life with his mother and siblings therefore carried little weight when balanced against the seriousness of the offending. Notwithstanding the comments of his mother, the defendant still has extensive family connections in Madeira where he lived until he was 16. The defendant's relationship with his son was a matter which would have carried much greater weight had he still been living in Jersey, but he was now living with the defendant's former partner in Portugal; indeed, the defendant's former partner was of the view that there would be more contact between the defendant and his son if he was deported. The Court concluded that the interests of the community outweighed those of the defendant and the Jersey based members of his family with whom there was no dependency. His deportation would not be disproportionate having regard to his Convention rights and those of his Jersey based family." 10. Advocate Landick brought his application for leave to appeal against sentence and the recommendation for deportation on these grounds. In so far as the sentence was concerned, he contended that it was manifestly excessive. He

agreed there was nothing he had to put forward which he did not put before the Royal Court, but he asserted that there was no real explanation of the reasons for the Court increasing the starting point from 3 years to 3 years 6 months. He also contended that the Court wrongly gave no warning that the Crown's conclusions might be increased. In doing so, he accepted it was not a requirement on the part of the Court to give such a warning but he said that it was a practice, and the absence of a warning that the sentence might be increased was a satisfactory reason to look at the Court's sentencing remarks in more detail. In particular, he contended that insufficient allowance was made for the applicant's youth at the time of the offending, and that the Court had placed insufficient weight on the fact that the applicant had been punched and was in pain. It was said that the applicant's jaw had been fractured but there was no medical evidence of that and indeed on examination by the Force medical adviser, the applicant had said he was not in pain. 11. In so far as the deportation recommendation was concerned, Advocate Landick pointed out that the applicant's mother and sister were in Court in support of the appeal. He contended that the applicant's former partner had not facilitated contact with their son and that the son's rights had indeed been interfered with. He submitted that the employment prospects for the applicant in Madeira, to which he would be deported if such an order were made by the Lieutenant Governor, were low. He went on to submit that as far as the applicant's son was concerned, the mother had seemed to be supporting contact and although that stopped for a period whilst the applicant was in custody, it was resumed on a two weekly basis until the end of August 2016. In Advocate Landick's submission, the mother's interests were contrary to those of the applicant, and her statement should not have been admitted or relied upon. For that contention he relied upon the case of *De Gouveia v AG*

[2009] JLR 169 , at paragraphs 38 - 41 where the Court of Appeal considered the comments of Birt, Deputy Bailiff, in *AG-v-Benyoucef* , noted at

[2008] JLR Note 35 .

Reasons

12. Advocate Landick has said everything that could possibly have been said on behalf of the applicant. We take first the application for leave to appeal against sentence. 13. It is contended that the Royal Court gave no real explanation of its reasons for the increase in starting point. We do not think there is anything in this complaint. We have set out the nature of the facts presented to the Court below at paragraphs 3 to 7 above and we are unsurprised by the Royal Court's conclusion at paragraph 5 of its judgment that "this was a very serious assault which we agree was unprovoked and which we agree was pursued with real purpose and vigour, causing the physical injuries set out in the doctor's report and the psychological impact upon the victim made clear by his statement." The Crown took a starting point of 3 years, having regard to the guidelines provided by *Harrison v AG*

- [2004] JLR 111 . At page 21 of the transcript, the Crown drew the attention of the various Harrison factors to the Court and correctly indicated that in considering the question of the starting point, it proceeded on the assumption that the defendant had been convicted following a trial. Quite apart from the Court's comments in relation to the seriousness of the assault, it is clear from paragraph 6 of the judgment that the Court had regard to the need to ensure that the Court would not tolerate violence fuelled by drink. The reference in the Court's judgment was to the case of *AG v Cummings*
- [2006] JRC 070 , but this Court is well aware that the lower court was correct in saying that the Royal Court has made the same point in many cases. As Harrison indicates, the Court of Appeal would not direct the Royal Court to identify starting points for sentences in all cases, but where the Royal Court does so, it makes that assessment having regard to its experience of cases of this kind which unfortunately trouble the courts of Jersey all too frequently. We find nothing inappropriate in the identification of a starting point at 3 years and 6 months for the offence of grave and criminal assault on the facts of this case. It certainly fell within the exercise of reasonable discretion by the Royal Court so to find, and indeed we agree with it. 14. Advocate Landick then contended that there was no warning given to the applicant or his counsel that the sentence might go up. He accepted that it was not a requirement for the Court to do so, but he contended it was a practice and the Crown had the duty to investigate and recommend an appropriate sentence. It was said that the presence of a warning from the Court gives a defendant an opportunity to look at the Crown's conclusions in more detail. 15. We also think there is nothing in this point but it is a good opportunity to reaffirm the fundamental principles underlying the sentencing process. The first is that the Crown's conclusions are in no sense binding upon the Court. They are an assessment by the prosecutor of all the relevant factors known to the Attorney General which would be relevant to the sentencing process - with the conclusions marking, as has previously been said, something akin to a preliminary judgment as to what the appropriate sentence might be. However, the responsibility for finding the appropriate sentence lies with the Court, and in meeting that responsibility, the Court has regard not only to the preliminary judgment of the Crown but also to the mitigation and submissions made on behalf of the defendant. There is no more an obligation to inform the defendant that the Crown's conclusions were considered potentially too low than there is an obligation to warn the Crown that the Court considered the conclusions were potentially too high. 16. It is correct that in practice the Court does sometimes inform defence counsel that it considers the conclusions of the Crown to be too low, but to find there is anything in the objections of Advocate Landick in this case in this respect would in effect be to find that there was a requirement on the Court to do so and that is contrary to authority and practice. In our judgment, the responsibility on the defence is to examine critically the conclusions of the Crown, making the defence assessment as to whether those conclusions are too high, too low or about right, and defence counsel should tailor the submissions in mitigation according to that assessment. 17. The next submission made by Advocate Landick was that the Court

below gave insufficient attention to the applicant's youth at the time of the offending. In that context it is right to recall the decisions of the Royal Court in the case of AG v Hilario

[2010] JRC 039 and AG v O'Shea

[2010] JRC 040 . In Hilario , the Court said this:- "You are aged 27 and in those circumstances I want to say just something about this concept of residual credit for youth. A person is generally entitled to treat his or her youth as a mitigating factor because by reason of that young age the inexperience of the accused reduces his or her culpability. The concept of residual youth is one with which the Court has some difficulty; no authority was put to us in support of the contention and it has not been one which has been argued, as far as we are aware in any detail and so the comments which this Court makes must be taken against that background; we have not had the benefit of detailed argument on it. Nonetheless the Criminal Justice (Young Offenders) (Jersey) Law 1994 distinguishes between those who are aged under and over 21 and the Court is very doubtful about the proposition that a person over the age of 21 is able to claim mitigation for youth. If there is some area of discretion around the edges it might, exceptionally, take into account a person up to the age of 23, if the facts justified a conclusion of particular immaturity in such a person ..." 18. In other cases, the Court has indicated that the rationale for giving credit for youth essentially lies in a recognition that young people sometimes do not appreciate fully the consequences of impulsive actions, and the Court makes allowance in sentencing for the lack of judgment which young people can sometimes display. The rationale extends to a consideration of the possibilities of rehabilitation in the case of young people, particularly when they are still in the course of education or seeking a first employment. 19. Nonetheless, the legislature has determined upon the age of 21 as the critical age for determining what sentences should not be available to the Court, and we are bound to have regard to the proposition that in selecting that age, the legislature has given guidance to the Court as to where it considers the hard lines should lie. That does not of course prevent the Court from making a more generous assessment in favour of a defendant on the facts of particular cases where it is thought appropriate to do so. Hilario makes it plain that immaturity on the part of the defendant may be one such example. 20. Advocate Landick submitted that there was no reason for an iron curtain to come down at the age of 21 in so far as the mitigation of youth is concerned. We agree that it is not an iron curtain, but nonetheless the Court does make an assessment of the importance of youth as a mitigating factor by having regard to all the circumstances of the case which is before it. Where a defendant over the age of 21 has had considerable previous experience of the courts by earlier offending, it is much more difficult to assert that the actions of the defendant in the case in question revealed the lack of judgment of a young person, because the experience of the previous offending weighs against such a

conclusion.

21. Advocate Landick contended further that the issue of the applicant's youth was relevant in the present case because the applicant was suffering the stress of pending proceedings at the time the grave and criminal assault was committed. He also submitted that the court below mistakenly believed that the applicant was at least 23 years old and possibly older when he committed the three offences of the Third Indictment, including the grave and criminal assault. This was not so, because he was in fact 21 at the date of the first offence and 22 at the date of the other offences. 22. The applicant was born on 9 th February, 1993, in Madeira. Count 3 of the First Indictment charged him with conduct likely to cause a breach of the peace on 27 th October, 2014, at which point he was 21 years and 8 months of age. The Second Indictment charged him with having on 23 rd November, 2015, obstructed a police officer. At that point, the applicant was 22 years and 9 months of age. The Third Indictment charged him with the grave and criminal assault and malicious damage on 19 th December, 2015, when the applicant was 22 years and 10 months of age. 23. In its sentencing remarks, the Royal Court referred to the prosecution assertion that the defendant was not of good character and was "now aged 23". The Court went on to say that it had listened carefully to the mitigation put forward which included "the stress of the proceedings, his relative youth, he was 21 and 22 when the first two offences were committed". It is apparent that the Royal Court not only made no mistake in relation to the age of the applicant, but also had that age in mind at the time of sentencing. In the circumstances we find nothing in this ground of appeal. 24. Finally, it was said on behalf of the applicant that although the Court's general practice is progressively to reduce any discount on a guilty plea the closer a matter comes to trial, this applicant had a particular intellectual impairment which ought to have been taken into account and the Court should therefore have exercised its discretion more leniently than would normally be the case. No authority for that proposition was submitted, but it seems to us to be a difficult one to accept. It is correct that the Court makes allowance for learning difficulties and intellectual impairment when deciding on the admissibility of statements made or answers given on interview - see for example AG v Coote

[2013] (2) JLR 471. In our judgment however, that situation is materially different from the present one. In Coote , the Court was dealing with the admissibility of questions and answers given by an intellectually challenged defendant in circumstances where the interview took place without any appropriate adult and in the absence of a lawyer. The Court was there concerned with the fairness of admitting evidence of answers given to questions which the defendant might not have properly understood. In the present case, the defendant was represented, not under pressure in questions before the police, but able to receive advice from his advocate, which he could consider quietly before deciding for himself what plea was to be entered. There is in our judgment no reason to make enquiry of the kind suggested by Advocate Landick and indeed it would be most undesirable for the Court to be invited to go into the territory of privileged communications between advocate and client. It follows that the Court should make its assessment in the usual way as to the extent to which any discount for a guilty plea should be reduced by reason of the

fact that the guilty plea is entered later than it should have been. 25. In the circumstances, the Court's view is that there is nothing which suggests that the sentence imposed in this case was manifestly excessive - far from it. At the very least, it fell well within the band of reasonable sentences which the Royal Court could have imposed for the offences under consideration. Recommendation for deportation 26. At the time of sentencing the applicant on 29 th July, 2016, the Court concluded that it did not have sufficient information in particular to consider the effect of Article 8 of the European Convention on Human Rights in relation to the applicant's son, his former partner and his mother. Accordingly, the question of deportation was adjourned until later in the year. It was heard on 11 th November, when the Court recommended deportation with reasons to be provided later. Those reasons were handed down in a judgment (AG-v-E

[2016] JRC 222A) which was published on 4 th January, 2017. 27. The Court noted that it had received an affidavit from the applicant's mother who has lived in Jersey for 9 years. She has four children, three of whom, including the applicant, are over 21. She has separated from the applicant's father and she moved from Madeira to Jersey in October 2007. When she first came to the Island she had left the applicant with his grandparents in Madeira. He moved to Jersey in 2009 when he was 16 and he lived initially with his elder brother. The Court noted that the social enquiry report describes his relationship with his mother as tenuous. 28. The Royal Court noted that in his discussions with the Probation Department the applicant said that he wished ideally to remain in the Island both for the purposes of employment and also to be close to his son and family. He thought that if he were deported, we would reside initially with his father in Madeira but he added that employment would be very difficult to obtain. 29. The applicant's former partner left the Island in or about August 2016, obtaining employment in Portugal, where she has arranged to enrol her son, of whom the applicant is the father, in pre-school. She expressed the view that she would like her son to be schooled in Portugal and that she had accommodation with her extended family. It would not seem on the face of it to be likely that in the immediate term she will be returning with her son to Jersey, although she is Jersey born and of Portuguese parentage. 30. On the application for leave to appeal, Advocate Landick suggested that the former partner's move to Portugal might have been a ploy to avoid contact with the Children's Department. It was left hanging in the Royal Court that there was some welfare concerns in respect of the child, and that the move to Portugal was a temporary expedient. There is no evidence before us as to whether that is or is not true. However, we are obliged to take note of the fact that as of the date on which this is being considered, namely 13 th February, 2017, the Convention rights of the applicant's son do not seem to be much in issue in the sense that he does not live in Jersey and there is no obvious reason why it will be any more difficult for the applicant to see his son in Portugal or in Madeira, whether he is deported or not. 31. The Royal Court reached its view in relation to this matter without the benefit of a report from the Children's Service on the potential effects of deportation on the applicant's son. This was criticised by Advocate Landick, but it appears to us that no such criticism can be maintained because

the child was no longer in this jurisdiction and the difficulties of contact no more pressing whether the applicant was deported or not. The Royal Court's approach was also criticised in so far as it relied on the statement made by the mother, the applicant's former partner. That criticism was made because the statement was signed by her advocate rather than by her personally. In our judgment, although it is clear that in any event the Royal Court paid little attention to the content of the statement other than to note that the evidence appeared to be that the former partner and their son had left the Island to live in Portugal and there was no other evidence to the contrary, the criticism that the statement was signed by the advocate is inappropriate. If the facts had been contested, it might have been different but they were not. 32. It is said by the applicant that the effect of discharging the Children's Service from preparing a report was that the Court did not have the advantage of any other independent evidence from the Children's Service in relation to the applicant's family at large. It appears to us that the Children's Service had been asked to prepare a report on the potential effects of deportation on the applicant's son. Given that the child had left the Island, we do not think the Court went wrong in principle. 33. It appeared to us that much of the argument which Advocate Landick proposed in his application for leave to appeal against the deportation recommendation turned on the perceived lack of co-operation which the applicant had had from his former partner, the mother of his son. To the extent that that is so, we do not think it affords any grounds for the present application. The test which the Royal Court had to consider was that set out in *AG v Camacho*

[2007] JLR 462 , which formulated the two tests for the Court to apply:- (i) Was the continued presence of the offender on the Island detrimental to the public good; and (ii) Would deportation be disproportionate having regard to the relevant Convention rights of both the offender and others not before the Court? This consideration of the effect of deportation on Convention rights fell to be considered by the Court at the time of making a recommendation for deportation notwithstanding that the actual decision in relation to deportation would be made at a later date by the Lieutenant Governor. 34. Advocate Landick submitted that the Royal Court overlooked the very close relationship between the applicant and his now seven year old half-brother. The evidence for this is to be found in the applicant's mother's affidavit sworn on 7 th November where at paragraph 7 she expresses concern for the applicant's prospects were he to return to Madeira. At the end of that paragraph she added:- "His younger brother [x] loves him and already misses him so much, I cannot bear to think how upset he will be if his brother is sent away and cannot visit him" 35. In its judgment, the Court below noted the existence of the half-sibling and quoted the whole of paragraph 7 of the mother's affidavit. The Court noted that although the vast majority of cases involved applicants relying on the safeguards in Article 8 with reference to relationships between parents and children, or within a couple, the jurisprudence showed that "family life" could encompass relationships between children and members of their extended family including siblings (see paragraph 16 of the Royal Court's judgment). The Court concluded that the interests of the community outweighed

those of the applicant and the Jersey based members of his family with whom there was no dependency. The reference to "Jersey based members of his family" is clearly not a reference to his son and former partner, who have left the Island, but to his mother, his siblings and his half-sibling. 36. It is true that the Royal Court does not go into any further detail, but we are not convinced that it was really possible to do so. In essence, the Court was called upon to make a judgment call as to whether the interests of the community outweighed those of the applicant and the members of his family who might rely upon their Article 8 Convention rights. It exercised that judgment call and there is no basis put before us to suggest that its exercise was wrong in principle. Indeed we do not think it is and we agree with it. 37. It was said by Advocate Landick that the Court below was wrong to dismiss the difficulties which the applicant would face if deported, and forced to return to Madeira. The Court below noted the stronger links that the applicant had with Jersey, where he had lived all his adult life, and the progress already made in prison, than he had in Madeira. Nonetheless the Court reached the view that it did in relation to the balance of interests, and in particular indicated that notwithstanding the comments of the applicant's mother, the applicant still had extensive family connections in Madeira where he had lived until he was 16. 38. We do not find that the Royal Court reached an unfair conclusion in relation to the balance between the interests of the community and the rights of the applicant. It noted that he had a bad record generally relating to violent behaviour, that the last conviction was for a serious grave and criminal offence and that he was assessed at a high risk of re-offending. 39. In our judgment there are no appropriate grounds upon which to criticise the judgment of the Royal Court either in respect of sentence or deportation and accordingly the applications for leave to appeal are refused. Authorities AG-v-E

[2016] JRC 131 . AG-v-E

[2016] JRC 208 . AG-v-E

[2016] JRC 222A . Camacho v AG

[2007] JLR 462 . De Gouveia v AG

[2009] JLR 169 AG-v-Benyoucef

[2008] JLR Note 35 . Harrison v AG

[2004] JLR 111 . AG v Cummings

[2006] JRC 070 . AG v Hilario

[2010] JRC 039 . AG v O'Shea

[2010] JRC 040 . AG v Coote

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