

JERSEY / JUDGMENT

Fernandes v AG [2023]

JRC 098 (20 June 2023)

[2023] JRC 098

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JUDGMENT

THE DEPUTY BAILIFF: 1. The Appellant is 31 years old and committed an offence of making unwarranted demands for money with menaces, commonly known as blackmail, last August. The Appellant has previous convictions, mainly from approximately 10 years ago and principally for motoring offences with the exception of an offence of false pretences in 2015 for which he was sentenced to two months imprisonment. More recently, in 2018, 2019, 2020 and 2022 he has been cautioned and fined at Parish Hall for a number of relatively minor road traffic matters. 2. The circumstances of the offence can be taken shortly. The Appellant met the victim of this offence at her place of work in June of last year and thereafter contacted her through Facebook. A friendship developed. They met on a number of occasions. On those occasions, the Appellant made it clear that he wanted a sexual relationship with the victim. She was married and made it clear that she did not. Ultimately, in August last year the victim made it clear that she wished to end the friendship. The Appellant responded by becoming angry and threatened to notify the victim's husband of the "relationship" he had with her. He ultimately threatened to tell the victim's husband that she had been having an affair with him which of course she had not. He sent the victim draft messages which he threatened to send to the victim's husband and ultimately demanded £5,000 to be sent to his bank as the price of his silence. Ultimately, he reduced his price from £5,000 to £4,000 and at one stage the victim said that she would do her best to pay this sum. In fact, the victim told her husband what had happened, they contacted the police and the money was never paid. The probation officer in the Pre-Sentence Report described this as a planned offence designed to cause the termination of the marriage between the victim and her husband leaving, from the Appellant's perspective, the victim free to pursue a relationship with him. 3. The Pre-Sentence Report also says that the Appellant regretted what he had done but the opinion of the author is that the Appellant's demand for monies were a consequence of the plan he conceived and in her view this "demonstrates a paucity of insight despite his expressed remorsefulness" and her opinion is that the Appellant's understanding of the impact of this offending on his victim is "limited". 4. The Appellant pleaded guilty at the first opportunity in the Magistrate's Court and the Assistant Magistrate accepted jurisdiction when that plea was entered on 16 February 2023. It was submitted that, in view of the Appellant's early plea, the lower court could retain jurisdiction in this matter. Indeed, the Crown drew to the

attention of the Assistant Magistrate two previous decisions of the Royal Court indicating a sentence on a guilty plea of approximately 18 months on facts which, in some respects, bore some similarity to this case. The Crown observed that in view of the early guilty plea the Court "just" may have jurisdiction to deal with the Appellant. The Court in the process of considering jurisdiction had regard to Article 25 of the Criminal Procedure (Jersey) Law 2018 which is entitled "Magistrate's determination as to sentencing venue - guilty plea"; "(1) Where a defendant has entered a guilty plea, the Magistrate must, in accordance with this Article, decide whether the case should proceed for sentencing in the Magistrate's Court or the Royal Court.

(2) ... (3) Subject to paragraph (4), if it appears to the Magistrate that -

(a) ...

(b) the gravity of the offence would not require the imposition of a penalty in excess of any imposable under Article 16, the Magistrate shall determine that the case should proceed for sentencing in the Magistrate's court;

(c) ...

(4) Before making a decision under paragraph (3), the Magistrate must -

(a) hear any representations by or on behalf of the prosecutor and defendant; and

(b) have regard to all the circumstances of the case including any matters as may appear to be relevant and the defendant's previous convictions, if any." So plainly Article 25 considerations only arise once the Defendant has entered a guilty plea and the Court must consider those matters set out under subparagraph (4). It is said on behalf of the Appellant that that involves the Court taking the Prosecution's case at its highest. Well, that is not what subparagraph (4) says and it seems to us that the Magistrate's Court when considering Article 25 and its discretion to retain a case should look at the case in the round from a common sense perspective, having regard to the submissions made by both parties. 5. In any event, before the Court made a determination in relation to jurisdiction, Defence counsel made submissions in relation to the Appellant's business and antecedents. When accepting jurisdiction, the Assistant Magistrate said that in view of the guilty plea and the Appellant's criminal record, the Court would accept jurisdiction, but the Assistant Magistrate told the Appellant "you need to be aware that this is at the top end of this Court's jurisdiction which will be a 12 months prison sentence". When the Defendant fell to be sentenced on 30 March 2023 that was the sentence that the Court imposed. The Assistant Magistrate when delivering his remarks on sentence declined to make a recommendation for deportation and, having made reference to the facts of the case, noted the decision of the Royal Court in AG v Duchesne

[2004] JRC 044 where Birt, Deputy Bailiff had observed "Blackmail is a serious offence. Your counsel has suggested the possibility of community service. An offence of blackmail is too serious for that". The Assistant Magistrate, having referred to those remarks said, "I do not interpret that as an absolute rule that there cannot be community service, because

that would not be appropriate, but rather an expression that only in truly exceptional circumstances would a prison sentence be avoided. " We agreed with those observations.

6. The Assistant Magistrate went on to find that there were no exceptional circumstances in this case, that an immediate custodial sentence was called for and, after allowing for the mitigation available to the Appellant, the sentence which he imposed was one of 12 months' imprisonment.

7. The Appellant appealed by notice dated 6 April 2023. That notice set out four general grounds of appeal. The first was that the learned Assistant Magistrate erred in failing to impose a sentence of Community Service as a direct alternative to custody. That ground of appeal has quite properly been abandoned today. The Court is always free if, it finds the custody threshold has been passed, certainly in respect of an adult, to pass such a sentence and is not obliged to impose a Community Service Order as an alternative. The second ground of appeal that has been abandoned is that the learned Assistant Magistrate erred in taking into account matters which he ought not to have taken into account. The third ground, which is pursued, is that the learned Assistant Magistrate erred in failing to take into account matters which he ought to have taken into account which we will come to in a moment and the fourth ground, which is pursued, is that the learned Assistant Magistrate failed to give an early indication that he proposed to impose an immediate custodial sentence despite recommendation in the Pre-Sentencing Report for a non-custodial sentence.

8. We can deal with that fourth ground of appeal briefly and we do so now. Although in fact in this case the Magistrate did give an indication to Defence counsel towards the end of Defence counsel's speech in mitigation that he was considering, in any event, imposing a non-custodial sentence, notwithstanding the recommendation for Community Service in the Pre-Sentence Report he was not, in our judgment, obliged to as a matter of law. Although it may be courteous and helpful to Defence counsel to give such an indication, it is not necessary that such an indication be given in this or indeed any case, certainly any case involving an adult offender.

9. It was said on behalf of the Appellant that the Assistant Magistrate accepted jurisdiction when he was aware of the Appellant's plea, but not fully aware of the full circumstances of the offence and had not heard the mitigation to be advanced on behalf of the Appellant and accordingly cannot have given weight to those matters when he accepted jurisdiction. Accordingly, it is said that the Assistant Magistrate made an error when he imposed a sentence of 12 months' imprisonment and that the Royal Court should intervene on appeal.

10. It is contended on behalf of the Appellant that this sentence was manifestly excessive. Both parties agree that that is the correct test on appeal. This Court will not interfere unless the sentence imposed by the Magistrate was wrong in principle or manifestly excessive and will not substitute its own view of what was the appropriate sentence unless that high threshold has been passed.

11. The Crown say that the Magistrate's Court when accepting jurisdiction knew that this offence had been committed six months prior to that date - so was aware of any delay and while it is true that the Assistant Magistrate was not aware of the details of the offence save in broadest terms, including knowing that no money passed hands, that cuts both ways as the full facts encompassed circumstances of both greater and lesser seriousness.

12. It is of

course correct that the Assistant Magistrate was not aware of the contents of the Pre-Sentence Report nor the many references submitted on behalf of the Appellant when he accepted jurisdiction. 13. As regards the Pre-Sentence Report, although there was reference to expressions of remorse by the Appellant, that needs to be put in context, as we have done in the course of this judgment. The Pre-Sentence Report was a balanced document and contained material which both helped and hindered the Appellant in his mitigation. There were a number of references, but the Court was entitled to give such weight as it thought appropriate in relation to matters of personal mitigation. We note that the Assistant Magistrate when in passing sentence said: "When I retained jurisdiction it was on the basis of this being at the top end of this Court's powers. In my judgment, retaining jurisdiction readily makes proper allowance for the mitigation available to the Defendant, and therefore the sentence is one of 12 months in custody." 14. The Court must always, absent exceptional circumstances, give substantial credit for a guilty plea, particularly an early plea, and that on any view the Court did in this case. 15. Having regard to the circumstances of the case as we have outlined them, we can detect no error made by the lower court. We do not find that the sentence imposed was manifestly excessive and we dismiss the appeal. Authorities Criminal Procedure (Jersey) Law 2018. AG v Duchesne

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