

JERSEY / JUDGMENT

Gallery -v- AG [2011] JRC 040 (15 February 2011)

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JUDGMENT

THE BAILIFF: 1. This is an appeal against a sentence of 5 months' imprisonment imposed by Mr P Harris, Relief Magistrate, on 7 th January, 2011, for an offence of common assault, to which the appellant had pleaded guilty. 2. This Court dismissed the appeal on 2 nd February and we now give our

reasons.

The Factual

Background

3. There is no dispute as to the circumstances of the assault itself because it was captured on CCTV. The complainant was the girlfriend of the appellant. Although she subsequently withdrew her complaint, she did not retract what she had said and we shall for convenience refer to her as the complainant. On 3 rd December she had gone to the Christmas ball of her new employers and at about 1:40am on the morning of 4 th December, she was heading from the Hotel de France towards Stopford Road in order to meet the appellant. She was accompanied by two work colleagues as they wanted to make sure she was safe. When they met up with the appellant there was a slight exchange between the two work colleagues and the appellant. This led to an argument between the appellant and the complainant as they started walking down St Marks Road because the complainant was saying the appellant should not have spoken to the two colleagues as he did. In due course they came to the entrance of the driveway to 31 St Marks Road and it is at this stage that the CCTV captures what happened. As summarised by the Centenier from the CCTV, the appellant appeared to have his hands on the complainant's shoulders. She punched him to get him to back off and he then punched her. He then kicked towards her thigh and pinned her near a car, throwing another punch in the process. She then retaliated to try and get him to back off but he threw another punch and a kick at which point he fell over and dragged her down. He got up. She was flailing her arms at him whilst lying on the ground in order to get him to move away and he attempted to punch her whilst she was on the floor. At this point a couple came out of the adjoining house and they took the complainant into their house. The appellant in due course

left the scene and was subsequently arrested. The complainant did not sustain any injuries. In short, the appellant threw a number of punches at the complainant whilst she was standing up and kicked her twice whilst she was standing up. Once she was on the ground he aimed another punch at her. The Procedure Below 4. As a number of Advocate Landick's submissions on appeal related to the procedure followed in the Magistrate's Court, we shall describe it briefly. The appellant was originally charged with grave and criminal assault to which he reserved his plea. The matter came before the Magistrate's Court on 7 th January when the question of jurisdiction was due to be considered. However, after discussion between the Defence advocate and the Centenier, the appellant entered a plea of guilty to common assault which was accepted by the Centenier. The matter then proceeded to sentence. 5. The Centenier began to outline the case describing the lead up to the assault. The Magistrate then viewed the CCTV and the Centenier described what was seen on the CCTV in much the same terms as we have used in this judgment. Following the viewing of the CCTV, he then recounted that the complainant had suffered no injuries and that at police interview, the appellant had accepted that he and his girlfriend had been arguing but claimed that she had assaulted him. He denied that he had punched or kicked or pushed her other than trying to stop her from hitting him. He stated that the kicks had only been light and that many of the punches had not made contact. Eventually he accepted that his behaviour had been unacceptable. 6. In mitigation, Advocate Landick addressed the Magistrate in relation to the CCTV. He pointed out that the CCTV did not show the beginning of the argument between the appellant and the complainant. He stated that he was instructed that she had slapped the appellant before they had reached the area covered by the CCTV camera in St Marks Road. It was the appellant's case that she was also the first to slap him when they approached 31 St Marks Road. He did however accept that he had then overreacted and that, after they had both fallen to the ground, he had tried to lift her up but she was by then very angry with him and had flailed out at him. Advocate Landick submitted that the blows were not heavy blows and furthermore, to the extent the appellant had used his feet at all, he was using trainers and they were kicks sideways onto her upper leg and to her bottom; this was not a case of kicking a person who was on the ground. Advocate Landick then gave details of the appellant's employment and financial position and pointed out that he had completed community service which had been imposed previously. Advocate Landick emphasised that the appellant was willing to comply with any non-custodial penalty which the Court might feel minded to impose. There was then a discussion involving the probation officer who said that, although the appellant had eventually completed the previous community service order, it had not been without problems and, from her records, he would not be accepted back onto the scheme without a full assessment. The Magistrate then retired to consider his decision. Upon his return he recounted what was involved in the offence and then stated that the appellant had crossed the custody threshold. It was his second conviction for an offence of violence and the Magistrate did not believe that a non-custodial alternative would be appropriate. He imposed a sentence of five months' imprisonment. Grounds of Appeal 7. Advocate Landick raised a number of procedural criticisms which, he said, led to unfairness. 8. The first related to the use of the

disclosure bundle. It is normal practice in the Magistrate's Court on a committal or plea of guilty for the Magistrate to see the disclosure bundle. This is the bundle of documents provided by the Prosecution to the Defence prior to the hearing. In this case, the disclosure bundle included the witness statement given to the police by the complainant as well as those given by the two people who came out of the house in order to help the complainant and a man who had been walking his dog and came upon the incident as it finished. In the course of the hearing and also when passing sentence the Magistrate referred specifically to the fact that he had read the disclosure bundle. 9. Advocate Landick submitted that it is improper for a Magistrate to take account of the disclosure bundle to the extent that anything in it goes beyond the summary of facts presented by a Centenier. He could point to only one specific example of where this had happened in this case. When describing the nature of the argument before the assault, the Centenier had simply said that the complainant and the appellant had started to have a verbal argument about the way in which the appellant had spoken to the two males who had accompanied the complainant before meeting up with the appellant. In his sentencing remarks, the Magistrate referred to the fact that the two work colleagues had told the appellant to take good care of her because it was the end of the evening and that the appellant had appeared to have taken some exception to that. This information could only have been obtained from the disclosure bundle. 10. That is true but we do not think there is anything in the point because it is clear from the record of the police interview with the appellant that he agreed that this had indeed been the nature of the verbal argument between the complainant and the appellant. Thus there was no conceivable prejudice to the appellant. 11. Advocate Landick went on to say that it was impossible for the Defence to know what aspects of the witness statements the Magistrate might have taken into account when sentencing because he had not identified those allegations from the witness statements that had not been referred to in Court but which he considered relevant to sentencing. Advocate Landick pointed out that one of the statements had referred to the complainant being in a "foetal" position during the assault and perhaps this had adversely influenced the Magistrate in assessing the seriousness of the assault. There were other comments in the witness statements which were not specifically referred to by the Centenier, such as about her distress, that she was scared, that she was crying hysterically etc. 12. We do not think there is anything in this point. The Magistrate had seen the CCTV and that was clearly the best evidence of what occurred during the assault. In any event, the Magistrate was not in possession of anything which was not also in the possession of the Defence and it was therefore open to them to make submissions on any points arising out of those statements. The position of the Magistrate's Court is very different from that in the Royal Court where there is a detailed summary of evidence prepared after careful consideration of all the witness statements. The Magistrate's Court involves summary justice and inevitably the Centenier's summary will often not be complete. It would be contrary to the interests of justice if the Magistrate were unable to take account of the disclosure bundle which is provided to him and to the Defence as well as being the material from which the Centenier summarises the case. 13. Advocate Landick was unable to point to anything in the witness statements which was sufficiently different from the Centenier's summary as to

amount to a significant factor. However, in order to give assistance for the future we would say this:- (i) If the Magistrate considers that there is some matter in the disclosure bundle which is going to have a material effect on the sentence passed but which has not been referred to by the Centenier, the Magistrate should draw this to the attention of the Centenier and the Defence in order to give them an opportunity of commenting on it. (ii) Conversely, there is a duty on the Defence to peruse the witness statements and if they consider that there is some significant matter which is likely to affect sentence which is contained in the witness statements but not in the Centenier's summary, they should raise it with the Magistrate in order to ensure that the Defence case in relation to that material in the witness statement is before the Magistrate. We emphasise however that the observations we have made only apply to significant matters which are likely to make a difference to sentence. The sort of matters raised by Advocate Landick come nowhere near this level of significance. 14. The second alleged procedural defect relates to the issue of provocation. In his mitigation, Advocate Landick put forward, on instruction, that, before the incident recorded on the CCTV, the complainant had been the first to use any form of violence, in that she had slapped the appellant as they walked along St Marks Road. This was contrary to the witness statement of the complainant; and the summary of the Centenier referred simply to a verbal altercation as they walked along St Marks Road and before they came to the area covered by CCTV. 15. In relation to this aspect the Magistrate said this when passing sentence:- "I have seen the CCTV footage and also read the statements. Whatever may have happened before you were shown on CCTV, whatever words may have passed between you or whatever your girlfriend may have done, when I saw the CCTV the two of you were walking without any violence, although it is apparent you may have been saying something to one another. What then followed was, to my mind, an unprovoked and cowardly assault on her. " 16. It is worth recalling at this stage the procedure which should be followed when the Defence version of events following a guilty plea differs from that put forward by the Prosecution. If the difference may affect the sentence, the Court must either proceed on the Defence version of events or hold a Newton hearing in order that it can assess which version of events is correct. If, on the other hand, the Court concludes that the difference in versions is not material for sentencing purposes, then there is no need to resolve the matter. Although the language used by the Magistrate might have been a little more specific, it is clear to us that he followed the second course of action. The use of the words "whatever your girlfriend may have done" was clearly a reference to the suggestion by the Defence that she had slapped the appellant but the Magistrate is saying that, even if this occurred, it had occurred sufficiently far ahead of the incident recorded by CCTV as to enable him to say that the assault that followed was unprovoked. 17. In our judgment he was perfectly entitled to so find. Like us, he saw the CCTV and there was a material gap between whatever had happened prior to the parties coming into the view of the CCTV and the attack by the appellant on the complainant. The Magistrate was entitled to conclude, as he did, that whatever happened earlier was no justification for what occurred subsequently and that what had occurred earlier was no longer acting as provocation leading to the subsequent assault. Accordingly we see no grounds for criticism in relation to the course adopted by the

Magistrate, although it is preferable that, where the Defence has put forward a different version of events, the Magistrate should make clear whether he is proceeding on the Defence version or whether he is specifically saying that, whichever version is correct, it makes no difference to the sentence. 18. Thirdly, Advocate Landick submitted that the Magistrate had failed to obtain all the necessary information before passing sentence. He said that the Magistrate was clearly at one stage considering community service. Thus, right at the beginning, before seeing the CCTV, the Magistrate indicated that he might at least require a stand down report from the Probation Service for the purposes of assessing suitability for community service. Later, following Advocate Landick's mitigation, the Magistrate turned to the probation officer and asked whether she was suggesting that he needed a social inquiry report and the probation officer replied that, if the Magistrate was considering community service as an alternative to prison, she would suggest a full social inquiry report would need to be prepared because, as a result of the problems during the appellant's last community service, he would not be accepted back onto the scheme without a full assessment. The Magistrate then retired to consider his decision. 19. We accept that at one stage the Magistrate was considering the possibility of community service, but when he came back to deliver his judgment, he gave a clear reason for not requiring the further report. He said that he was satisfied that the appellant had crossed the custodial threshold. It was the appellant's second conviction for an offence of violence and he did not believe that a non-custodial alternative could be ordered. 20. We see no grounds for criticism in relation to the course followed by the Magistrate. Naturally, if he was considering a Community Service Order, he would have had to have obtained an appropriate report in accordance with Article 3(1) of the Criminal Justice (Community Service Orders)(Jersey) Law 2001 . However, in this case, having considered the matter during his retirement, the Magistrate clearly came to the conclusion that, for the reasons he gave, community service was inappropriate and there was therefore no need for him to obtain the report mandated by Article 3(1). 21. Finally, Advocate Landick submitted that the sentence was manifestly excessive. We do not agree. This was an unpleasant assault on a woman at night in the streets of St Helier. The appellant not only has a previous conviction for grave and criminal assault in October 2009, for which he was given community service by the Royal Court, but he was also on that occasion sentenced for causing a breach of the peace by fighting. He has also committed other public order offences such as refusing to obey the lawful orders of a police officer in July 2008 and engaging in disorderly behaviour, for which he was fined by the Magistrate's Court on 28 th October, 2009. In our judgment the Relief Magistrate was fully entitled to conclude that the appellant had been given sufficient chances and that this further incident of violence required a prison sentence. There can be no criticism of the length of sentence which was imposed. 22. It was for these reasons that we dismissed the appeal. Authorities Criminal Justice (Community Service Orders)(Jersey) Law 2001. Page Last Updated: 04 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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