

JERSEY / JUDGMENT

Gaspar v AG [2007] JRC 064 (15 March 2007)

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JUDGMENT

THE COMMISSIONER: 1. This is an application for leave to appeal against a total sentence of twelve months imprisonment and a disqualification from driving of five years imposed by the Inferior Number on the applicant on 15 th December 2006. 2. The first four offences (counts 1-4) occurred on 13th April 2006 and the fines imposed in respect of these offences are accepted by the appellant as being perfectly reasonable. The remaining offences relate to events which took place on the 9 th May 2006. Counsel for the applicant recognised that the sentences of nine and six months imprisonment (concurrent) imposed for the offences of dangerous driving and failing to stop after the crash (Counts 9 and 10) were neither wrong in principle nor manifestly excessive. There is no criticism by Counsel for the applicant of the fine of £400 imposed for the drink driving offence (Count 8). The application is therefore only concerned with the sentences of eleven months, twelve months and twelve months' imprisonment (concurrent) imposed for the three grave and criminal assaults (Counts 5, 6 Counts 7) and the five year disqualification from driving. 3. The facts in relation to counts 5, 6 and 7 are set out in the judgment of the Inferior Number. In brief, following an incident in St James' Wine Bar, the applicant and a Mr Fabio Olim ("Mr Olim") were ejected from the premises by two bouncers. At this point, the applicant had consumed only a small quantity of alcohol. Outside the premises, the applicant became involved in a brawl with the bouncers during the course of which he assaulted the bouncers and they assaulted him. Following this, the applicant and two friends, who had been in his company, returned to his parked car in Halkett Place. From there, he drove back to James Street where he swerved towards four persons standing outside St James' Wine Bar two of whom were the bouncers. The four men were forced to jump out of the path of the applicant's car. The applicant drove off through the town streets to the Weighbridge where he and his friends went to Pure, where he consumed a number of Jack Daniels. Notwithstanding that he was aware that he would be over the legal limit to drive, he chose to get back into his car and with his two friends drove through the town streets eventually encountering Mr Olim outside the Co-op Homemaker. As he approached Mr Olim he accelerated the car and headed directly at him, forcing Mr Olim to run into the doorway of the Co-op. The applicant's car mounted the kerb, narrowly missing Mr Olim. The applicant was later intercepted by the police and a chase ensued through the town streets. Driving at speeds on occasions estimated at 50 m.p.h. and ignoring traffic lights and requests

from his passengers to slow down, he lost control of the vehicle and crashed into the Café Lisboa, causing minor injuries to his passengers, and causing damage estimated at £6,865. Having momentarily stopped, he then drove off at speed. A police vehicle pulled into the centre of the road and tried to stop the applicant's car but he drove at speed towards the vehicle and the officers had to take evasive action to avoid a collision. The applicant lost control of his car as it made the corner into Don Street where the offside front wheel was snapped off at the axle. 4. The Crown moved for a total of 2½ years' imprisonment and a total disqualification from driving for two and a half years. The periods of imprisonment were calculated to include: nine months for the driving without insurance (Count 4); twelve months for the three grave and criminal assaults (Counts 5, 6 and 7); and nine months for the dangerous driving (Count 9) all of which were to be served consecutively. 5. The Inferior Number took into account the mitigation put forward at the hearing, namely the fact that the applicant pleaded guilty to all the offences, his age (33 years), his lack of previous convictions and indeed his previous good character, the excellent references and testimonials that were produced on his behalf, the real remorse he had shown for this period of madness and the voluntary work he had done in a youth club to demonstrate his remorse. By treating the sentences it imposed concurrently, the Inferior Number felt able to reduce the Crown's conclusions by well over a half, making a total of twelve months' imprisonment as against the 2½ years sought by the Crown. 6. At the outset of counsel's plea in mitigation, the Inferior Number alerted him to the fact that it might consider a rather lengthier driving ban than that moved for by the Crown and asked counsel if he might wish to address the Inferior Number on that. The Inferior Number did not give an indication of what length of disqualification it might at that stage have had in mind. At the end of his plea in mitigation, counsel for the applicant informed the Inferior Number that he was instructed to make no further submissions in relation to the period of disqualification in respect of which the applicant placed himself in the hands of the Inferior Number and would accept whatever ban the Inferior Number deemed appropriate in all the circumstances. The Inferior Number then imposed a disqualification from driving of five years. 7. In an appeal of this nature, the Court will only generally wish to interfere where it can be shown that the sentence imposed is either wrong in principle or manifestly excessive. Furthermore, when approaching its functions an appellate court will not generally wish to "tinker" with the sentence imposed (Hunt v Attorney General

[2003] JCA 128). 8. The applicant has referred the Court to Harrison v Attorney General [2004] JCA 046 which he accepted had been rightly cited by the Crown as being the leading case in relation to grave and criminal assaults. One of the factors in Harrison which the Court of Appeal said should be borne in mind was the nature of the deliberation with which the assault was carried out. Counsel for the applicant submitted that these assaults had not been carried out with deliberation as it was clear from the available evidence that the applicant had acted on the spur of the moment and with a degree of provocation. The Crown have pointed out that there was a lapse of time between the brawl outside St James' Wine Bar and the applicant driving at the bouncers and a considerable lapse of time before his driving at Mr Olim. In our view these assaults were not carried out on the spur of the moment and were indeed deliberate. 9. Counsel for the applicant, whilst accepting

that it is notoriously difficult to read across from one case to another, referred the Court to AG v McShane

[2005] JRC 127 which was not before the Inferior Number. In that case McShane who had been the aggressor in an altercation at the Le Hocq Inn and who was more than three times over the drink and drive limit, crashed his car into a female pedestrian crushing her against a wall and causing her very serious injuries. After the accident McShane left the scene and took steps to cover up his crime. He had also been driving without insurance or a valid driving licence. He was sentenced to a total of sixteen months' imprisonment and given a five year driving ban. Counsel for the applicant submitted that McShane's case was significantly more serious than the applicant's case and warranted a differential of more than the four months that currently exist between them. The Crown submitted that little can be gained by attempting detailed comparison with other cases but we agree with the Crown that in any event, McShane can be distinguished because:- (i) The offences charged in McShane were principally miscellaneous motoring offences, including dangerous driving. They did not include the more serious offences of grave and criminal assault with which the applicant was charged. (ii) In McShane there was one victim. In the instant case there were three. (iii) The injuries sustained by the victim in McShane were caused as a result of an accident which took place as he argued with his girlfriend whilst at the wheel of his car (contributed to by McShane's high level of intoxication - just over double that of the applicant). Whilst in the instant case there were no injuries, the applicant drove intentionally at his victims. He was not distracted at the time. 10. Counsel for the applicant accepts that the custodial sentences imposed upon the applicant in relation to the offences of grave and criminal assaults were not wrong in principle and in any event, in our view, there is nothing wrong in principle with the imposition of a custodial sentence in relation to these offences. Likewise, he accepts that a period of disqualification for holding and obtaining a licence for an episode of driving of this nature was not wrong in principle and in any event, in our view, there is nothing wrong in principle with the imposition of a period of disqualification following serious motoring offences of this kind. The Court is therefore left to consider whether the sentences imposed on Counts 5, 6 and 7 and the length of the period of disqualification were manifestly excessive. 11. In relation to the assaults, counsel for the applicant submitted that the totality of the sentences was too high considering the gravamen of the offences. Firstly, he argued that the applicant had been severely provoked as a result of the serious assault upon him by the bouncers, secondly that nobody was injured and there was no intention to injure (although there was an intention to scare) and despite accelerating aggressively and swerving in the direction of the bouncers, the car did not mount the pavement or leave the road at all. He therefore submitted that a sentence of six months would have been more than adequate to deal with this aspect of the case. He accepted that even if the Court were to agree with the submission, it would only have the effect of reducing the total sentence to nine months, bearing in mind the nine month sentence imposed under Count 9. 12. Whilst we accept that the applicant may have been provoked

by the bouncers, it was, as the Inferior Number pointed out, only through good fortune that some injury, even serious injury, did not result. The four men outside St James' Wine Bar had to jump out of the path of the applicant's car and in the case of Mr Olim, his car did mount the kerb and Mr Olim was shaking with fear at having been nearly run down. We have read the applicant's letter handed to us today, but in our view, the sentences of imprisonment imposed by the Inferior Number in respect of counts 5, 6 and 7 were not manifestly excessive. 13. Turning to the disqualification, the Inferior Number gave fair warning of the possibility of it wishing to impose a lengthier ban than that proposed by the Crown but the applicant's counsel, on instructions, chose not to address the Inferior Number on the point, the applicant placing himself in the hands of the Inferior Number and agreeing to accept whatever ban the Inferior Number thought appropriate in the circumstances. 14. Counsel for the applicant submitted that neither he nor the applicant expected the Inferior Number to double the proposed ban and thought it possible that the Inferior Number simply substituted a shorter prison sentence for a longer driving ban. In our view there is no indication that the Inferior Number approached the matter in this way. 15. The Court raised with the parties a concern at the way the Inferior Number imposed the driving disqualification. In delivering its judgment on each of the ten counts the Inferior Number did not impose a disqualification under each of the relevant counts using its powers under the relevant enactments and as moved for by the Crown. 16. Having imposed its sentences and fines in respect of each Count the Inferior Number went on simply to impose a disqualification of 5 years without specifying which counts that disqualification referred to. 17. It is clear that the Inferior Number has no inherent power to disqualify a person from driving and was not using its powers under the Driving Disqualifications Non Motoring Offences (Jersey) Law 1979 . Furthermore the Inferior Number made no reference to the mandatory disqualifications required for the offence charged under Count 8. 18. We agree with Crown Advocate Belhomme that in deciding to increase the period of disqualification the Inferior Number would in all probability have increased disqualification under Count 9 i.e. that of dangerous driving but we are left in a position of some uncertainty, 19. Confusingly the published judgment records the Inferior Number as having imposed the period of disqualification on each count moved for by the Crown in addition to imposing the overall disqualification of 5 years. It occurred to us whether the Inferior Number may have increased the period of disqualification by making each of those periods run consecutively, but that would have given rise to a total period of disqualification of 5 years and 6 months as opposed to 5 years. It would also have meant making the periods imposed on Counts 8, 9 and 10, which arose out of one incident, consecutive which would be wrong in principle. However, the transcripts are clear that the Inferior Number did not impose periods of disqualification in respect of any of the Counts and certainly made no reference to periods running consecutively. 20. We have decided, therefore, that leave to appeal should be allowed in any event so that the period of disqualification can be attributed to the relevant counts. We regard this exercise of our jurisdiction to be in accordance with the principles laid down in the case of Ball -v- R

[1951] Cr. Review Reports 164 cited by the Crown as we do not regard the disqualification to have been imposed properly. 21. We then went on to consider whether the total period of disqualification was manifestly excessive, as submitted by counsel for the applicant. We were informed that there is little if any guidance on periods of disqualification either in this jurisdiction or under English law. We asked to see the guidelines issued by the Magistrates' Courts which indicate that, clearly for less serious offences, a period of 6 months' disqualification would follow a first offence for dangerous driving. We also had regard to the same guidelines in relation to Count 4, driving without insurance, and note that in the Magistrate's Court fines of £400 to £800 and disqualification of 3 - 6 months' are suggested for offences in which a person deliberately drives without insurance. We noted in McShane that the Inferior Number had imposed a disqualification of 5 years, a case which we have, however, already found unhelpful by way of comparison. 22. Crown Advocate Belhomme informed us that, in originally moving for 2½ years disqualification, he and the Acting Attorney General had taken into consideration the period of the ban that would have had to run after the applicant's release from imprisonment of 2½ years namely some 10 months. Now the applicant, in view of the lower sentence of imprisonment imposed by the Inferior Number, will have a period of over 4 years to run after his release. The Inferior Number gave no indication as to how it concluded that a period of 5 years was appropriate but the Court was unanimous in its view that a ban of 5 years was, in the circumstances of this case, excessive, notwithstanding the nature of the driving of this case. 23. We felt it appropriate that the period of disqualification for Counts 8, 9 and 10 should be concurrent to each other as they arose out of the same incident on 9 th May and that they should be consecutive to disqualification under Count 4 which offence arose out of an entirely separate earlier incident on the 13 th April. 24. We therefore quash the disqualification of 5 years imposed by the Inferior Number and pass the following sentences of disqualification: (i) On Count 4, the applicant will be disqualified from driving for a period of 6 months. (ii) On Count 8, the applicant will be disqualified from driving for a period of 18 months', consecutive to Count 4. (iii) On Count 9, the applicant will be disqualified from driving for a period of 30 months', concurrent to Count 8, but consecutive to Count 4. (iv) On Count 10, the applicant will be disqualified from driving for a period of 6 months, concurrent to Counts 8 and 9, and consecutive to Count 4. The total period of disqualification therefore is 3 years. 25. We order costs in accordance with the higher scale. *Authorities Hunt -v- Attorney General*

[2003] JCA 128 . *Harrison -v- Attorney General*

[2004] JCA 046. *A. G. -v- McShane*

[2005] JRC 127 . *Driving Disqualifications Non Motoring Offences (Jersey) Law 1979. Ball -v- R*
[1951] Cr. Review Reports 164. Page Last Updated: 20 Jul 2016 BAILII: Copyright Policy |
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