

JERSEY / JUDGMENT

Hackett v AG [2023] JRC 163 (12 September 2023)

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JUDGMENT

THE Commissioner: 1. This is an appeal by Mr Hackett against a sentence of 12 months' imprisonment, imposed by the Magistrate on 15 June 2023 for one offence of grave and criminal assault. 2. On the weekend of 19 to 21 May 2023 the Appellant and the victim had come to Jersey to celebrate the Appellant's birthday. They were staying at the Royal Yacht Hotel. They had been in a relationship since 2018, having been friends since 2008. 3. In the early hours of 21 May, at approximately 1:00 AM Mr Finn Taylor was waiting for the lift at the Royal Yacht. When the lift door opened, he saw a suitcase open on the floor of the lift and the Appellant kneeling beside the victim on the floor. He saw the Appellant punch the victim using the right hand and saw at least two punches connect to the victim's head and face area. Mr Taylor pulled the Appellant out of the lift and restrained him, and asked security at the hotel to call the police. 4. Shortly after 1:00 AM the police attended at the Royal Yacht, having been called by a member of staff. Police officers spoke to the victim, who was in a distressed state. She did not provide a statement of complaint, but did allow officers to record her injuries, which consisted of bruises. She declined medical treatment. There were marks to the sides of her face, including her forehead, marks to her cheeks, and some marks on her leg. The Appellant was arrested and taken to Police Headquarters where he was seen by the Force Medical Examiner, who recorded an injury to his upper right arm which appeared to be a red grab mark and an abrasion to the middle knuckle on his left hand. 5. Police officers were able to obtain CCTV footage from the Royal Yacht which showed the interior of the lift during the assault. The Appellant gave officers access to his phone and it was found that a number of voice notes had been recorded and sent to the victim during the course of the evening of Saturday 20 May. One of these messages was "if you don't tell me where you are I'm going to smash you up and anyone you are with. I'm going to smash up and kill". 6. It transpired that the Appellant and the victim had been on a boat trip earlier in the day when an argument took place and they separated. The Appellant had started drinking at approximately mid-day and when he was interviewed, he said he could not recall precisely what had happened the night before because his recollection was sketchy due to the amount of alcohol that he had drunk. He said that he had not drunk alcohol for nearly four months before that weekend. He had drunk in the afternoon and in the evening, some 12 whiskies interspersed with lager, and when he had returned to the hotel room alone, he had drunk the contents of the mini-bar and been sick in the

room. 7. The victim had returned to the hotel room and an argument took place. The victim had left the room with her suitcase and made her way to the lift. The Appellant told the police that he followed the victim to the lift because he thought that she had the room key. He had little recollection of the assault. He described himself as being a "violent old sod" when he drinks, especially when he drinks whisky. When he was shown the footage of the assault, his comment was "it's a good job that stranger was there" and he appeared to be disgusted with what he had seen in the footage. 8. When the victim's recollection of events was put to the Appellant in interview his response was "I'm not disputing anything that [the victim] has said and she would not lie. I deserve everything I get". 9. The Appellant had only one relevant previous conviction, this being for common assault but dating back to 2010. 10. When the Appellant was first presented before the Magistrate's Court on 22 May 2023, he entered a guilty plea and the Relief Magistrate, Advocate Sarah Fitz, having heard from the prosecution and the defence and having viewed the CCTV images of the assault accepted jurisdiction. On 15 June 2023 the Appellant came before the Magistrate, Mrs Bridget Shaw, for sentencing. 11. Before the Appellant's Advocate addressed the Magistrate in mitigation she stated, "I have to say that I'm thinking of custody", and went on to say "I am thinking of custody at the top of my jurisdiction". 12. The Appellant's Advocate urged the Magistrate to follow the recommendation in the pre-sentence report, which was the imposition of a community service order. He suggested that there were a number of unusual sets of circumstances in the case: firstly, the victim herself was urging the court to impose a non-custodial penalty. She had written a character reference, saying: "...as the victim, I hope you take my wishes into consideration, those being that I do not wish for him to spend any longer in prison, because I feel that the time he has currently served is punishment enough". 13. She said that his children would miss him, and that she did not want them to lose any more time not being able to see their father. Further character references were presented which spoke of the Appellant as a caring father who was very much present in his sons' lives, albeit that they did not live with him, and a letter from the boys' mother spoke of his qualities as a father and the effect that the current situation had on their children. 14. The Appellant's Advocate in mitigation referred to the Appellant's immediate acceptance of what he had done, his early plea of guilty and his reaction to seeing the CCTV images, which was one of disgust at his behaviour. Further mitigation was that despite a difficult childhood the Appellant had built a life for himself by studying, taking exams and by working hard, had been in employment all his adult life and had good and meaningful relationships with his former partner and his children. He was also close to the victim's own children, who were not his. 15. The Appellant's Advocate had urged the court to bear in mind that the decision to accept jurisdiction was made in the knowledge only of his guilty plea, and not in the knowledge of the additional mitigating factors which he had set out. He therefore urged the court that if it was still minded to make an immediate custodial order to reduce it from the maximum of 12 months which was the maximum jurisdiction of the court. 16. In her sentencing remarks the Magistrate pointed out that the offence was fuelled by alcohol and was aggravated by the fact that the victim was the Appellant's domestic partner and that it was therefore an abuse of that relationship. She referred to the fact that it was clear that the victim wanted to leave but that the Appellant would not allow her to do so, preventing her from getting out of the lift. She told the Appellant that the incident must have been "the most terrifying

experience to be locked in a small space like that lift with someone who was carrying out a repeated assault, and it was not just your arms and your fists that you used, you used your feet and your knees as well, and there was nowhere that she could go. This is a truly shocking assault". 17. The Magistrate indicated that she had listened to the mitigation and were it not for that mitigation, having heard about the assault, she would have given consideration to sending the matter to the Royal Court, which would still have been within her powers to do. She went on to say that having heard about the Appellant's remorse and his background and the effects on his children she had heard nothing to dissuade her from the view that custody was the only appropriate sentence and imposed a sentence of 12 months' custody. 18. The Appellant accepted that the test that we have to apply on an appeal against sentence is that set out by the Bailiff in *Ahmed v Attorney General*

[2006] JRC 196 , namely: "...whether or not the sentence imposed by the Magistrate was wrong in principle or manifestly excessive". The Court went on to say that: "It is not for us to substitute our own view of what was the appropriate sentence. We have to ask ourselves whether the Magistrate has in effect acted unreasonably in imposing the sentence that was imposed". 19. Advocate Tremoceiro referred to the fact that the Relief Magistrate decided to accept jurisdiction taking into account only the Appellant's guilty plea and the Appellant's immediate admissions on being questioned by the police and no other mitigation (as it was not presented to the Court until sentencing). The maximum sentence the court could impose was 12 months' imprisonment. 20. He also pointed out that the Magistrate, Mrs Shaw, imposed a sentence of 12 months' imprisonment on the basis of the same facts that had led her colleague to make her decision to accept that the Magistrates Court had jurisdiction to sentence the Appellant. He therefore suggested that as a matter of logic, in accepting jurisdiction, the Relief Magistrate cannot have given any weight to the other mitigation presented on behalf of the Appellant, when the court, differently constituted, sentenced the Appellant. 21. He noted that the Magistrate asserted in her sentencing remarks that were it not for the mitigation, having heard about the assault, she would have given consideration to sending the matter to the Royal Court for sentencing, which he accepted would still have been within her power to do. He suggested that as the Magistrate at no point up until sentencing referred to the possibility of the case being sent to the Royal Court for sentencing the Magistrate could not have taken into account the matters advanced in mitigation, resulting in unfairness to the Appellant. 22. For the Crown it was argued that when delivering sentence, the Magistrate clearly set out the matters that she had taken into consideration. These include: (i) that the assault was fuelled by alcohol against his domestic partner, which she found to be an aggravating factor as an abuse of that relationship; (ii) the assault was sustained and vicious; (iii) the victim had been trying to escape from the Appellant having taken her suitcase from the room and trying to get into the lift; (iv) the footage showed the victim crawling into the lift and "desperately trying to close the lift door" by pushing the button repeatedly; (v) the Appellant had effectively made the victim a prisoner in the lift as he assaulted her; (vi) even when the lift door opened the Appellant closed it again; and (vii) the assault must

have been a most terrifying experience where the Appellant used his arms, fists, feet and knees. 23. The Crown further pointed to the fact that the Magistrate made specific reference to the mitigation put forward by Advocate Tremoceiro and had concluded that were it not for this mitigation she would have reconsidered jurisdiction and sent the matter to the Royal Court for sentencing. It was clear from her remarks that nothing that she had heard in mitigation dissuaded her that custody was the only appropriate sentence in this case. 24. The Crown submitted that the Magistrate was clear in her sentencing remarks that she had taken into account all of the mitigation before her. The sentence imposed was not manifestly excessive considering the offence committed, as summarised by the Magistrate in her sentencing comments. Furthermore, it was submitted that it must always be a sentencing option, where the offending merits, for the Magistrate to impose a sentence of 12 months imprisonment on a guilty plea having had regard to all mitigation in the case. 25. We were referred to a decision of the Royal Court *Fernandes v AG (MacRae, Deputy Bailiff)*

[2023] JRC 098 which was an appeal to the Royal Court against a sentence of 12 months' imprisonment in respect of an offence of making unwarranted demands for money with menaces (commonly known as blackmail). The Appellant in that case had pleaded guilty at the first opportunity in the Magistrates Court and the Assistant Magistrate had accepted jurisdiction when that plea was entered. 26. When accepting jurisdiction, the Assistant Magistrate said that in view of the guilty plea and the Appellant's criminal record, the court will 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". 27. When the defendant subsequently fell to be sentenced that was the sentence that the court imposed. One of the grounds of appeal was that the learned assistant magistrate had erred in failing to take into account matters which he ought to have taken into account : 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. It was argued that accordingly he could not have given weight to those matters when he accepted jurisdiction. Thus, it was argued that the Assistant Magistrate made an error when he imposed a sentence of 12 months' imprisonment. 28. The Royal Court, on appeal, found that it was 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. However, the Royal Court noted that although there were references to expressions of remorse by the Appellant in the pre-sentence report they needed to be put in context and whilst the pre-sentence report was a balanced document it contained material which both helped and hindered the Appellant in his mitigation. 29. The court pointed out that there were a number of references, but the Sentencing Court was entitled to give such weight as it thought appropriate in relation to matters of personal mitigation. The Assistant Magistrate when 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". 30. The Royal Court held, in dismissing the appeal, that having regard to the circumstances of the case they could detect no error made by the lower court and did not find the sentence imposed was manifestly excessive. 31. In the present case we note that the pre-sentencing report was a similarly balanced document. Whilst it drew attention to the various mitigating factors, including the Appellant's adverse experiences in childhood, his care for his own sons and also for the children of his partner and his acceptance of responsibility it also drew attention to certain adverse factors: 32. Firstly, that the Appellant had sought to minimise his responsibility by blaming the incident on the excessive use of alcohol, noting however that misuse of alcohol was a factor in his previous conviction. 33. Secondly, the potential that this was not an entirely spontaneous incident given the threatening phone messages sent to the victim during the evening. 34. Thirdly, an element of victim blaming in the Appellant's comment to the police on being apprehended that "she started it" when he was apprehended. Furthermore, in terms of the risk of reoffending the Appellant was assessed as being at the higher end of moderate risk given his issues with alcohol and his acknowledgement of a degree of previous domestic violence. 35. Having heard submissions on behalf of the Appellant and the Crown, we do not accept that there was anything wrong with the manner in which the Magistrate dealt with sentencing. The principal mitigation was the Appellant's guilty plea, and the Magistrate balanced the further mitigating factors against the aggravating factors set out in the Pre-Sentence Report to which we have referred. 36. This was a shocking assault on a victim who was helpless to defend herself or to escape from her assailant. The Appellant was fortunate, in our view, that the Magistrate decided not to remit the matter to the Royal Court for sentencing. 37. We cannot find the sentence imposed to be manifestly excessive and accordingly the appeal is dismissed. 38. We would urge the Appellant to make full use of the services available to him whilst he is in prison to enable him to overcome the serious alcohol problem that has blighted his life. We would hope that in so doing he might become a real role model for his sons and his partner's children. 39. That is the decision of this Court. *Authorities Ahmed v AG*

[2006] JRC 196 . *Fernandes v AG*

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