

JERSEY / JUDGMENT

Harding v AG [2010] JCA 091 (18 May 2010)

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COURT OF APPEAL 18 May 2010 Before : J. P. C. Sumption, Esq., O. B. E., Q. C., President; Sir Geoffrey Rowland, Bailiff of Guernsey, and; J. Martin, Esq., Q. C.. Gemma Littlewood Harding -v- The Attorney General Application for an extension of time and application for leave to appeal against the conviction of 12 th December, 2008 on the grounds that the defendant was unfit to plead. Advocate C. M. Fogarty for the Applicant. S. Sharpe, Crown Advocate.

JUDGMENT

THE president: 1. This is the Judgment of the Court on the appeal of Gemma Harding against her conviction on 12 th December 2008 on counts of grave and criminal assault and violently resisting arrest. Under Section 26(1) of the Court of Appeal (Jersey) Law 1961 , this court may allow an appeal against conviction on a number of grounds, one of which is that it thinks that there has been a miscarriage of justice. It is agreed between the Attorney-General and those representing the Appellant that, subject to view of this court, the present appeal ought to be allowed and the conviction set aside on the ground that there has been a miscarriage of justice because at the time of her trial Miss Harding was probably unfit to plead. The legal framework 2. Although they may give rise to overlapping issues of fact, insanity and unfitness to plead are distinct legal concepts. Insanity is a defence, which is concerned with the accused's mental capacity to commit the offence, and in particular to have the necessary mens rea at the time when he is alleged to have done so. Unfitness to plead, by comparison, depends on the accused's mental capacity to participate in the trial. It is not a defence, but a reason for not proceeding with the trial, unless and until the accused becomes fit to plead. 3. Fitness to plead is an expression which originates in English law. The leading case in England is Baron Alderson's direction to the jury in R v. Pritchard

(1836) 7 C&P 303. Baron Alderson directed that the accused's fitness to plead depended on his ability to " comprehend the course of the proceedings so as to make a proper defence, and to comprehend the details of the evidence." " This brief statement of principle has since been supplemented by a substantial body of practice and case-law, but without altering the essential elements of the direction. What is clear is that in order to be fit to plead as a matter of English law, an accused person must not only have sufficient cognitive ability to follow what is going on at his trial, but must also be capable of reacting to it by formulating and communicating decisions about the conduct of his defence to his lawyer, or to the Court if he does not have one. In R v. Friend

[1977] 1 WLR 1433, Otton LJ, delivering the judgment of the Court of Appeal, said at page 1018:-
"The test of unfitness is whether the accused will be able to comprehend the course of the proceedings so as to make a proper defence. Whether he can understand and reply rationally to the indictment is obviously a relevant factor, but the jury must also consider whether he would be able to exercise his right to challenge jurors, understand the details of the evidence as it is given, instruct his legal advisers and give evidence himself if he so desires." In other words, the English law test is not simply concerned with the accused's passive understanding of the proceedings, but also with his mental capacity to participate actively in them. 4. In some respects, the approach of the Jersey courts to the mental condition of accused persons differs from that which is taken in England. There is, for example, authority for a broader approach to the defence of insanity than would be consistent with the M'Naughton rules in England. However, there are no recorded cases in which the issue of fitness to plead has been raised or considered except for the present case and the decision of the Royal Court in Attorney-General

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[2003] JLR 390 . In that case, the Bailiff (Sir Philip Bailhache) held that the test in Jersey was as follows:- "An accused person is so insane as to be unfit to plead to the accusation or unable to understand the nature of the trial if as a result of unsoundness of mind or inability to communicate, he or she lacks the capacity to participate effectively in the proceedings. In determining this issue, the Superior Number shall have regard to the ability of the accused (a) to understand the nature of the proceedings so as to instruct his lawyer and make a proper defence; (b) to understand the substance of the evidence; (c) to give evidence on his own behalf; and (d) to make rational decisions in relation to his participation in the proceedings (including whether or not to plead guilty) which reflect true and informed choices on his part." 5. Sir Philip considered that this test differed from the English law test, mainly it seems in requiring that the accused should have been capable of making rational decisions in relation to his participation in the proceedings. For our part, we are satisfied that the test which he stated in O'Driscoll is correct, but we do not regard it as any different in principle from that which has been held to apply in England. We make this point because issues may arise in future cases in Jersey, on which it may be desirable to refer to the much more substantial body of English authority. This process serves the interests of legal certainty. We are reluctant to inhibit it by encouraging the notion that Jersey law on this question exists in a distinct juridical compartment from the corresponding law of England. 6. The procedure for dealing with such issues in Jersey is adapted from the statutory procedure which applies in England. Section 1(1) of the Criminal Justice (Insane Persons) (Jersey) Law 1964 provides that if on the accusation or trial of a person charged with an offence punishable by imprisonment, it appears to the Court that the accused "may be so insane as to be unfit to plead to the accusation or unable to understand the nature of the trial" , the Court shall adjourn the case to the Superior Number to try the question whether the accused is so insane or not. Events leading to the convictions of 12 December 2008 7. Gemma Harding is a young woman of

twenty with a serious history of psychiatric disorder, self-harm and violence against others, dating back to the age of twelve. Most of her life since the age of twelve has been passed in psychiatric hospitals or in prison. In February 2008, when she was eighteen, she was released from psychiatric hospital. Her release can be seen in hindsight to have had catastrophic consequences for herself and those with whom she has come into contact. On 8 May 2008, she was bound over in the Magistrate's Court in respect of counts of assault, malicious damage and possessing an offensive weapon. On the following day, 9 May, she entered a shop in St. Helier and threatened to kill the shopkeeper, who had previously refused to sell her twelve packets of twenty-four paracetamol tablets. The police were called and tried to arrest her. She produced a knife from her handbag, and had to be disabled with CS gas before she could be taken into custody. 8. On 8th August 2008, Miss Harding was brought before the Royal Court on an application for bail which was refused because of the risk of her re-offending. On that occasion, she jumped out of the dock, shrieking and lashing out, kicking and biting, and had to be forcibly restrained by the dock officer with the help of the court staff. 9. Miss Harding was remanded for an assize trial on an indictment charging attempted robbery, grave and criminal assault and violently resisting arrest. The trial was fixed for 11 December

2008. In preparation for the trial, Miss Harding's lawyers consulted Dr. Claire Dillon, a specialist forensic psychiatrist, about her mental health. The Attorney-General instructed Dr. Jonathan Mumford. Both psychiatrists diagnosed a Borderline Personality Disorder. Dr. Mumford was instructed to consider both Miss Harding's fitness to plead and the possibility of a defence of insanity. He concluded that she was fit to plead. She was in his opinion capable of understanding the proceedings, of giving evidence and of making rational decisions about the conduct of her defence. He advised that there was no basis for a defence of insanity, for while her mind was undoubtedly impaired, this did not affect her behaviour to such a degree as to suggest that she was not criminally responsible. Dr. Dillon took a different view of the prospect of a defence of insanity, albeit rather tentatively. She considered that although Miss Harding had the capacity to form the relevant legal intent, her actions at the time of the offence arose out of her disorder. She advised that it would be open to the Court to find that her criminal responsibility was impaired to such a degree as to give rise to a defence of insanity. However, Dr. Dillon was not asked to consider Miss Harding's fitness to plead and did not do so. The result was that the only expert evidence about her fitness to plead which was available at the time of her trial was Dr. Mumford's evidence that she was fit. 10. Miss Harding appeared before the Royal Court to answer the indictment on 11 December 2008. Shortly before the opening of the trial, she dispensed with the services of her Advocate, Advocate Pearmain, as she was fully entitled to do on the footing that she was fit to plead. At the invitation of the Court, however, Advocate Pearmain remained in court as an amicus, and it is clear from the transcript that she was able to take instruction on some points from Miss Harding despite the withdrawal of her instructions. Miss Harding specifically instructed her that she was not to raise a defence of insanity, but permitted her to put before the Court Dr. Dillon's report in which the possibility of such a

defence was considered. The Commissioner appears to have appreciated the possibility that Miss Harding might be unfit to plead. He raised Section 1(1) of the Criminal Justice (Insane Persons) (Jersey) Law 1964 with Advocate Pearmain. She responded that there was no issue on fitness to plead, which was 'fine'. When the Commissioner raised the question whether he should take the point of his own motion, Advocate Pearmain pointed out that there was no support in the evidence for a plea of unfitness. The Commissioner accepted that that was so. He subsequently directed the jury that while they might well think that the accused had psychiatric problems which required professional help, it was not their place to consider that. On 12 December 2008, they returned a verdict of not guilty on the count of attempted robbery, and guilty on the counts of grave and criminal assault and violently resisting arrest. These are the convictions which have given rise to the present appeal. 11. Because of what followed, Miss Harding was never sentenced on the two counts on which she was convicted on 12 December 2008. Proceedings arising out of the incident of 18 December 2008 12. On 18 December 2008, while she was on remand in La Moye prison awaiting sentence, Miss Harding attacked a prison health worker by repeatedly slashing her neck in the region of the jugular vein with the base of a broken glass nail varnish bottle. When interviewed after the incident, she said that she had intended to kill the victim, and the medical evidence is that she very nearly succeeded in doing so. Subsequently, on 16 January 2009, an indictment was put to her charging attempted murder or, in the alternative, grave and criminal assault. Pleas were reserved. 13. Advice was once more sought by the defence from Dr. Dillon. This time, she was asked to consider fitness to plead as well as insanity. She was referred to the O'Driscoll test and invited to advise by reference to it. In her report of 8 April 2009, Dr. Dillon repeated her earlier diagnosis. She assessed the severity of Miss Harding's impairment at eight or nine on a scale of one to ten. She expressed the view that Miss Harding had the necessary cognitive ability to understand the nature of the proceedings, to form a proper defence and to give evidence, but that she was only intermittently capable of making rational decisions about her defence. Dr. Mumford provided a new report, in which he substantially repeated his earlier opinion. 14. On 1 September 2009, the issue was argued before the Superior Number. Both experts gave oral evidence. Dr. Dillon supported the view expressed in her report. There was some convergence between the experts in the course of the hearing. Dr. Mumford agreed both with Dr. Dillon's diagnosis and with her assessment of the severity of her impairment. He thought that the impairment of her capacity to make rational decisions about her defence was such that it was open to the Jurats to conclude that she was unfit to plead, although unlike Dr. Dillon, his own opinion was on balance she was fit. The Court found that Miss Harding was unfit to plead, and referred the case back to the Inferior Number for the purpose of ordering that she should be detained at Her Majesty's pleasure. Their reasons were given in a judgment delivered on 16 October 2009. 15. Miss Harding is currently detained at a secure hospital unit in England. The present appeal 16. On 2 November 2009, Miss Harding sought leave to appeal out of time against her conviction on 12 December 2008, on the ground that she had been unfit to plead, and subsequently sought leave to rely on the evidence given to the Superior Number on 1

September 2009. That is the appeal that is now before us. 17. No objection is taken by the Attorney-General to the lateness of the appeal, to the grant of leave to appeal, or to admission on the appeal of the evidence of unfitness which was before the Superior Number in relation to the charge of attempted murder. We therefore order that time for the application for leave should be extended and we grant leave to appeal and direct that the hearing should be treated as the substantive appeal. We also direct that the new evidence shall be admitted. It is accepted on behalf of the Attorney-General that if the Royal Court had adjourned the present case to the Superior Number to determine Miss Harding's fitness to plead, the probability is that the evidence would have been in the same terms as the evidence before the Superior Number on 1 September and would have led to the same finding. We are satisfied that this concession was correct. Neither expert psychiatrist suggested that there had been any significant development in Miss Harding's condition between October 2008, when they first saw her, and the time when they gave evidence to the Superior Number the following September. Their account of her condition suggests that it underwent no change during that period. 18. The question before us is whether there has been a miscarriage of justice. There are two possible grounds on which it may be suggested that there was. 19. The first and most straightforward ground is that on the evidence before us Miss Harding was in fact unfit to plead on 11 and 12 December 2008 for the same reason as she was found by the Superior Number to be unfit to plead on 1 September 2009. It follows that she has not had a fair trial because she was not in a position to participate in it as the law entitles her to do. We acknowledge that under the Law of 1964, it is for the Superior Number to decide whether a person accused in the Royal Court is fit to plead. If they had done so, there would have been only limited grounds on which this court could have intervened. But in a case where the point was never taken, and no finding on the question has been made by the Superior Number, it is open to this Court to make whatever findings of fact on the point are relevant to the question whether there has been a miscarriage of justice. In our judgment, Miss Harding's condition was such that she has not had a fair trial. The conviction must therefore be set aside. 20. If the evidence before the Superior Number in September 2009 had been more equivocal, and if we did not have the advantage of the Superior Number's findings about it, we would have had to consider the other ground on which it is said that there has been a miscarriage of justice, namely that the failure of the Court to adjourn the issue of fitness to the Superior Number arose from the misconduct of the proceedings by Advocate Pearmain. Clearly, in hindsight, it would have been better if Advocate Pearmain had ensured that Dr. Dillon reported on Miss Harding's fitness to plead before the trial in December 2008 and having done so drawn the issue to the attention of the Court. But many things would be better done with the benefit of hindsight, and we have considerable sympathy for the predicament in which Advocate Pearmain found herself. Dr. Dillon's views on the insanity defence were extremely tentative and Dr. Mumford's assessment was that Miss Harding was both sane at the time of the offence and fit to plead at the trial. The irrationality of Miss Harding's behaviour was not as evident on 11 and 12 December as it later became. Advocate Pearmain's instructions had been withdrawn, and her former client did not want her

mental condition raised. It would in our view have been a difficult question whether the failure to ensure that the issue of fitness was adjourned to the Superior Number would alone have justified setting aside the convictions, if we had not been in a position to decide that Miss Harding was in fact unfit to plead. As it is, the question does not arise. 21. The appeal will be allowed and the convictions set aside. The Crown does not seek a retrial at which the question could be referred to the Superior Number. The necessary directions for dealing with Miss Harding's condition having been made in September 2009, it follows that no further orders are required of us. Authorities Court of Appeal (Jersey) Law 1961. R v. Pritchard (1836) 7 C&P 303. R v. Friend [1977] 1 WLR 1433. Attorney-General v. O'Driscoll

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