

JERSEY / JUDGMENT

Le Lay v HM Attorney General

[2022] JCA 278 (15 December 2022)

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Court of Appeal 15 December 2022 Before : Sir Wyn Williams, President; Sir William Bailhache K. C., and Mr Richard McMahon, K. C., Bailiff of Guernsey. Between Shawn Le Lay Appellant And HM Attorney General Respondent Appellant representing himself. Advocate D. Steenson as Amicus Curiae . Crown Advocate S. Thomas for the Respondent.

judgment

Williams JA:

Introduction

1. On 8 June 2022, before the Royal Court (Commissioner Clyde-Smith sitting with a jury), the Applicant was convicted of 3 counts of grave and criminal assault and 1 count of causing malicious damage. On 6 September 2022, the Superior Number of the Royal Court (the Commissioner and Jurats Crill , Pitman, Dulake , Austin-Vautier and Thomas) (see AG v Le Lay [2022] JRC 185) sentenced the Applicant to a total term of imprisonment of 5 years and 6 months in respect of these offences which was constructed as follows. For the offence of grave and criminal assault (count 1) a sentence of 3 years imprisonment was imposed; for a second offence of grave and criminal assault (count 2) the sentence was 4 years and 6 months imprisonment; for a third offence of grave and criminal assault (count 3) the sentence was 12 months imprisonment; and for the offence of causing malicious damage (count 4) the sentence was 6 months imprisonment. The sentences imposed for counts 1, 2 and 4 were ordered to be served concurrently; the sentence imposed upon count 3 was ordered to be served consecutively to the other sentences - hence the total term of 5 years and 6 months. Additionally, an order restraining the Applicant from contacting the victims of counts 1 and 2 was imposed upon him for an indefinite period. 2. On 22 November 2022 the Applicant appeared in person before us to pursue an application for leave to appeal against the prison sentences imposed upon him. (He did not seek leave to appeal against the restraining order). At the conclusion of the hearing we announced that leave to appeal would be granted and that the total sentence imposed on the Applicant would be reduced

from 5 years and 6 months imprisonment to a term of 5 years. 3. This judgment (which is the judgment of the court) provides the reasons why we reached that conclusion and, additionally and where necessary, describes certain procedural issues which arose in advance of and at the hearing before us and the decisions we made upon them. The Procedural Background 4. At his trial before the Royal Court, the Applicant represented himself. An Amicus Curiae, Advocate Steenson, was appointed to assist the court. The Crown was represented by Advocate Thomas. The indictment upon which the Applicant was tried contained the 4 counts set out above. 5. Following his conviction the Applicant sought leave to appeal. That appeal was extant when he appeared before the Superior Number for sentencing on 6 September 2022. We describe below some of the events which occurred on 6 September prior to the Applicant being sentenced. 6. By Notice of Appeal dated 8 September 2022 the Applicant sought the leave of this court to appeal against the sentences imposed upon him as described above. No grounds of appeal were set out in or attached to the Notice of Appeal although the Applicant did mention that he was seeking the leave of the Court of Appeal to appeal against his convictions and that his application for leave was due to be heard 21 September 2022. 7. On 13 September 2022 the Applicant applied for leave to call further evidence in support of his appeal against sentence. In summary, the Applicant sought leave to call as witnesses the Commissioner and Jurats who had been involved in his sentencing. No proper reason was given as to why the Commissioner and Jurats should be called as witnesses. 8. On 21 September 2022, this Court (Clare Montgomery KC, President, Jonathan Crow KC and James Wolffe KC) refused an application by the Applicant for leave to appeal against his convictions. The following day the Court provided a written judgment explaining its reasons for refusing leave. 9. On 30 September 2022, under the authority of the Judicial Greffe, the Applicant was informed that his application for leave to appeal sentence would be listed before us in the week commencing 21 November 2022. He was also directed to file written contentions in support of his application for leave to appeal by 12 noon 19 October 2022. The Applicant did not comply with that direction; indeed he has never filed any written contentions in support of his application for leave. 10. On a date between 6 September and 2 October 2022 the Applicant applied for legal aid to be represented by an advocate at his application for leave. However, by the time the Applicant made his application Advocate Steenson had already been appointed as Amicus Curiae in relation to the Applicant's appeals against conviction and sentence. In the light of that appointment, the application for legal aid was refused. 11. In the few weeks preceding 22 November 2022, Advocate Steenson attempted to discuss with the Applicant the basis upon which he wished to pursue an appeal against sentence. The Applicant was not prepared to speak with Advocate Steenson face to face although he did have at least one telephone conversation with the Applicant in which potential grounds of appeal were discussed. 12. During the course of his attempts to speak to the Applicant, Advocate Steenson formed the view that the Applicant might be unwell and that, accordingly, an adjournment of the application for leave should be considered. That view was communicated to us. In the event we decided that the application for leave should be heard on 22 November 2022 unless we were provided with medical evidence to the effect that the Applicant was too unwell to attend the hearing either

in person or remotely. No medical evidence was adduced before us and the Applicant appeared at court. 13. At the start of the proceedings the Applicant made two applications which we should record in this judgment. First, he argued that Sir William Bailhache should recuse himself from sitting as part of the constitution of the court because Sir William had previously sat in the Royal Court upon an appeal brought by the Applicant and that on unspecified occasions there had been contact and/or communications between the Applicant and Sir William. Second, that the appeal should not proceed without Ms Patricia Winchester, of My Voice, Jersey, being present to offer support and guidance to the Applicant. She is well known to the Court as a provider of support to vulnerable witnesses and Defendants who suffer from problems with their mental health and she supported the Applicant at his trial and during the application for leave to appeal his convictions. 14. The application that Sir William should recuse himself was without merit. We ascertained that in 2012 Sir William did indeed preside over an appeal brought to the Royal Court by the Applicant in which he was successful. No details were forthcoming from the Applicant about other occasions when there had been contact with Sir William or what that contact was about. We were quite satisfied that a fair minded and informed observer would not conclude that there was a reasonable possibility that Sir William would be biased and, accordingly, the Applicant was informed that Sir William would continue to sit as part of the constitution of the Court. 15. Over a period of some 15 or 20 minutes both the Court and Advocate Steenson attempted to contact Ms Winchester but to no avail. We informed the Applicant that Ms Winchester could not be contacted but we invited him to continue with his appeal nonetheless. The Applicant acceded to our request and began explaining the basis upon which he wished to pursue his appeal - as to which see paragraph 28 below. The Offences for which the Applicant was sentenced 16. At the material time the Applicant was aged 51 and he was living in a flat which was one of a number within a block. The flat next door was occupied by the caretaker of the block, a man aged 62, and his wife aged 54. In this judgment we shall refer to them (as did the Commissioner in the sentencing judgment of the Royal Court) as the First and Second Complainants. There had been tension between the Applicant and the First Complainant for some time prior to August 2021. 17. On 6 August 2021 the Applicant received a letter from the property manager of the block informing him that he was going to be evicted from his flat. Upon receipt of the letter the Applicant went to speak to the First Complainant, apparently to obtain from him the property manager's contact details. However, when the First Complainant refused to provide the details (having been prohibited from providing them by his employers) the Applicant lost his temper. He began shouting at the First Complainant and then he punched him to the left side of his head. The Applicant is and was much larger and stronger than the First Complainant. Understandably, therefore, the First Complainant was fearful for his safety especially since he had undergone heart surgery some time previously. Accordingly, he took up a riding crop in order to defend himself. The Applicant's reaction was to push the First Complainant down onto a sofa, grab the riding crop and then strike the First Complainant a number of blows with it. 18. Seeing her husband under attack with the riding crop, the Second Complainant sought to intervene on his behalf by stepping between the two men. The

Applicant's response to that was to grab and twist the Second Complainant's right breast and then place both his hands around her throat as if to strangle her. During this attack upon the Second Complainant the Applicant grabbed her hand and attempted to bite it. He also grabbed her head and twisted it violently. Somehow, despite the attack upon her, the Second Complainant managed to shepherd the Applicant out of the flat and the incident came to an end. Before leaving the flat, however, the Applicant broke a chair. 19. The Applicant was arrested that day and taken into custody. While in the custody suite, the Applicant again lost his temper which meant that he had to be restrained and taken to the ground. In the ensuing struggle the Applicant bit the leg of one of the police officers engaged in restraining him. 20. The three counts of grave and criminal assault of which the Applicant was convicted related to his attacks upon the First and Second Complainants and his biting of the police officer. The one count of criminal damage was the consequence of his breaking of the chair. The Applicant's previous convictions and mental health 21. The Applicant has a number of relevant previous convictions by which we mean convictions for violence. We need not recite them in detail. It suffices to point out that in 2015 he was convicted of a large number of assaults on prison officers during the course of being restrained. In respect of this offending the Applicant received a total sentence of 3 years imprisonment. It is clear from documentation produced to us that the total sentence of 3 years imprisonment would have been longer but for the mental health problems then being suffered by the Applicant. 22. Before the Royal Court in the present case it was common ground that the Applicant was suffering from Asperger's syndrome and that he has personality disorders. Written evidence had been obtained from two consultant psychiatrists prior to trial in order to ascertain whether the Applicant was fit to stand trial. Both psychiatrists concluded that he was but offered their opinions, too, about how the Court might approach sentence in the event of convictions. In the sentencing judgment the Royal Court referred to the views of the psychiatrists as to sentencing options in the following paragraphs:- "11 Dr Irala reached this conclusion at paragraph 18.6 of his report]: "On a larger picture a connection between autism spectrum disorder and Mr. Shawn Le Lay's offending cannot be excluded although this is heavily influenced by his personality issues. He began relying excessively on the police and prison service to receive the support he needed, using his temper and anger to get his own way. In my opinion to break this chain of repeat offending, he would benefit from a stay in a Medium Secure Forensic Autism Unit for treatment, rehabilitation and to manage the risks he poses to himself and others. I recommend that if Mr Le Lay receives a prison sentence, then Jersey's Mental Health Department should support his transfer to such a facility" 12 Dr Hillier states at paragraph 79 of his report that "personality disorder is amenable to treatment" and that treatment for the defendant "is an important part", he said "of his future prognosis". He says in his conclusions at paragraph 9, "In any event Mr Le Lay will benefit from some additional specialised support for people with Autism Spectrum Disorder and Personality Problems through a specialised service depending upon the outcome of these proceedings which may include a hospital setting." The Sentencing Hearing before the Royal Court 23. No medical reports were obtained following the Applicant's conviction but prior to sentencing. The Applicant had declined to co-operate

with the probation service with the consequence that there was no pre-sentence report. Advocate Thomas represented the Crown and he had prepared written contentions in relation to sentence. No written contentions were produced by the Applicant and he was not legally represented. Ms Winchester was present at the hearing to offer support to the Applicant and Advocate Steenson was present in his capacity as Amicus Curiae. 24. At the commencement of the hearing the Applicant invited the Commissioner and the Jurats to recuse themselves. They declined. Upon their announcement of that decision the Applicant indicated that he did not wish to participate in the hearing and he was taken first to the cells and then back to prison. 25. The sentencing hearing continued in his absence. Both Advocate Thomas and Advocate Steenson addressed the Court. In summary, Advocate Thomas submitted that a prison sentence was the only appropriate disposal notwithstanding the state of the Applicant's mental health and that the appropriate term, in total, was 5 years. Advocate Steenson did not dispute that a term of imprisonment was the appropriate sentence; he submitted, however, that the lesser term of 4 years and 6 months should be imposed. 26. The Commissioner and the Jurats retired to consider sentence for a significant period of time. Meanwhile, the Applicant had decided that he did wish to take part in the hearing. Accordingly, before sentence was imposed arrangements were made for the Applicant to attend Court remotely, i.e. by means of a video link from the prison. 27. When the Commissioner and Jurats returned to court for sentence to be pronounced the Applicant indicated that he wished to address the Court. This application was refused and the Commissioner proceeded to announce the sentence. As well as announcing the total sentence of 5 years and 6 months imprisonment the Commissioner announced that the Court would consider the issue of whether to make a transfer order pursuant to Article 69 of the Mental Health (Jersey) Law 2016 at a further hearing once appropriate medical evidence had been obtained. Grounds of Appeal 28. The Applicant did not provide any written grounds of appeal. However, during the course of the hearing before us we were able to persuade him to tell us orally the basis upon which he wished to appeal against his sentence of imprisonment. The grounds were as follows:- (a) the Commissioner and the Jurats should have recused themselves from determining sentence since all save Jurat Dulake had been involved in previous criminal proceedings involving the Applicant and the Applicant had assisted the Island Military Liaison Officer with various duties when Jurat Austin-Vautier had been Chief Officer of Home Affairs; (b) an overall sentence of 5 years and 6 months was far too long; (c) the Applicant should have been present throughout the sentencing hearing; (d) he should have been represented by a lawyer of choice and legal aid should have been granted to him to enable that to occur and (e) the court should have obtained medical reports before proceeding to sentence. Those grounds were confirmed to us as the basis upon which the Applicant wished to appeal by Advocate Steenson when he addressed us as Amicus . Discussion 29. Advocate Steenson did not support the Applicant's contention that the Commissioner and Jurats should have recused themselves. He accepted that they formulated the correct test when considering this issue, namely by considering whether a fair minded and informed observer would conclude that there was a real possibility that the Commissioner and Jurats would be biased. He also accepted that in the context of this case,

at least, the mere fact that the Commissioner had dealt with cases involving the Applicant previously and that four of the Jurats had been involved in earlier hearings and/or earlier proceedings would not lead the fair minded and informed observer to conclude that there was a real possibility that they would be biased. Further, the connection between Jurat Austin-Vautier and the Applicant was remote, on any view, and that of itself was no basis for the Jurat to recuse himself. 30. Advocate Steenson was correct to adopt the approach which he did. In our judgment there was nothing about the factual history presented to us to lead to the conclusion that a fair minded and informed observer would consider there was a real possibility of bias if sentence was imposed by the Jurats empanelled to deal with the sentencing of the Applicant. 31. In his application for leave to appeal against conviction, the Applicant raised as a ground that the Commissioner should have recused himself from presiding over his trial on the basis of previous dealings between the Applicant and the Commissioner. This ground of appeal found no favour with the constitution of this court mentioned at paragraph 8 above. The Court explained its conclusion at paragraphs 31 to 38 of its judgment (see *Le Lay v Attorney-General*

[2022] JCA 195) and we see no basis to take any different approach. We adopt those paragraphs as our reasoning for rejecting the contention that the Commissioner should have recused himself. In our judgment there was no realistic prospect of a successful appeal on the basis of this ground. 32. We were also of the view that there was no realistic prospect of a successful appeal on the basis of the refusal to grant the Applicant legal aid so that he was able to instruct an Advocate of his choice. The decision to refuse legal aid was made by Legal Aid Jersey. We have no basis upon the information provided to us to conclude that the refusal to grant legal aid was in any way unlawful or unfair and it is clear to us that the Applicant, when he chooses to do so, is capable of articulating mitigating factors and that he was well served by the assistance given to the Court by Advocate Steenson. 33. We turn to consider the contention that the Applicant was prevented from addressing the court before sentence was pronounced. We begin by stressing that we are satisfied, completely, that the Applicant voluntarily left the court shortly after the proceedings had commenced for no good reason. The Applicant had made an application to the Commissioner and the Jurats that they should recuse themselves. As we have found, their refusal to do so was entirely proper. That refusal did not constitute a proper reason for the Appellant to leave court and return to the prison. However, as we have said, belatedly, the Applicant sought to participate in the hearing. Given that he was acting in person, albeit there was an *Amicus Curiae* present to assist the Court who had already made contentions about the appropriate sentence, he should not have been refused the opportunity to advance mitigation on his own behalf. 34. We should record that we did not see a transcript of what occurred when the Applicant was linked to the court from the prison. However, Advocate Steenson was clear in his recollection that the Applicant wished to make oral submissions to the court and that his request to do so was denied to him. Advocate Thomas was less sure in his recollection of what had occurred but he was not disposed to dispute Advocate Steenson's recollection. In these circumstances we thought it appropriate to proceed on

the basis of Advocate Steenson's recollection. 35. In our judgment the refusal of the Royal Court to allow the Applicant's application to address the court prior to the pronouncement of sentence was a procedural error. We accept that the Jurats had been deliberating for a substantial period of time and that they had probably reached a conclusion about sentence before they knew that the Applicant wished to speak. Nonetheless, in our judgment the Applicant, having belatedly expressed a desire to address the Court, should have been afforded an opportunity to advance his own mitigation. 36. Had he done so, the probability is that he would have argued that his sentence should take account of his mental health and that taking that mitigating factor into account a sentence of 5 years, as advanced on behalf of the Crown, was too long in all the circumstances. Essentially that is what he argued before us in describing the term of 5 years and 6 months as "way over the top". 37. Given the procedural error we have identified, what approach was open to us? We concluded that the conventional approach of determining whether the sentence imposed was manifestly excessive or wrong in principle was too restrictive, certainly in the circumstances of this case. We resolved that it was unnecessary to remit the matter to the Royal Court and that, applying the overriding objective, we should consider all the relevant circumstances for ourselves and impose a sentence which seemed to us to be appropriate. 38. There can be no doubt that the Applicant committed assaults upon vulnerable victims and upon a police officer. These were serious offences which have had a considerable impact upon the First and Second Complainants, in particular. His previous convictions for offences of violence are aggravating features. It is doubtful whether the Applicant was remorseful in the true sense of that word and he pleaded not guilty so he could not benefit from credit for a guilty plea. On the other side of the coin the medical evidence available demonstrated clearly that there is a probable link between the Applicant's violent offending and the disorders from which he suffers. That was a factor properly to be advanced in mitigation. 39. In the absence of significant other mitigation, we reached the conclusion that the appropriate sentence of imprisonment to be imposed in this case was that suggested by Advocate Thomas before the Royal Court, namely, a total of 5 years. That result was achieved by reducing the sentence imposed upon count 2 from 4 years and 6 months to 4 years imprisonment. All other sentences imposed by the Royal Court would remain the same. 40. Like the Royal Court we saw no need for further medical reports before passing sentence. In our judgment a prison sentence was inevitable especially given that the powers conferred by Article 69 of the Mental Health (Jersey) Law 2016 can be invoked so that the Applicant serves part or the whole of his sentence at a hospital if that is thought to be appropriate following a proper investigation. 41. For completeness we should say that a sentence of 5 years and 6 months was not "way over the top". It was certainly at the upper end of an appropriate sentencing range notwithstanding the serious nature of each of the three assaults which the Applicant perpetrated. In all probability, if we had been considering whether such a sentence was manifestly excessive we would have concluded that it was not. *Authorities AG v Le Lay*

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