

JERSEY / JUDGMENT

McKeown v AG [2018] JRC 227A (06 December 2018)

[2018] JRC 227A

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JUDGMENT

THE BAILIFF: 1. The applicant seeks leave to appeal against a sentence imposed by the Inferior Number of this Court on 5 th October, 2018, (reported at AG-v-McKeown

[2018] JRC 187) amounting to a total of 9 month's imprisonment following a reference back to that court of a sentence of community service and probation which had been imposed earlier on 16 th February, 2018 (reported at AG-v-McKeown

[2018] JRC 039). 2. The basis on which the February offences were referred back was that the applicant was answering two counts of being drunk and incapable and it was that conduct which put him breach of the orders of the court of 16 th February. The February orders were imposed for offences involving the possession of a controlled drug, riding a pedal cycle under the influence of drink or drugs, drunk and incapable but more importantly illegal entry and larceny. 3. When the defendant was sentenced in February the court said this:- "We have considered with great care how to deal with you. We have had particular regard to the Social Enquiry Report which notes that whilst in drink you are at a high risk of reconviction. We also note however that you have accommodation and now a full time job, and have voluntarily over the last few months began to take steps to address your alcohol difficulties. You have obtained Antabuse and although that has not always kept you alcohol free in recent times, clearly you are making efforts in that regard. We have particular mind to the fact that you have recognised the detrimental effect of alcohol abuse on your life and have made serious efforts to address your consumption of alcohol. As the Crown has said the policy of the court for breaking and illegal entering is generally though not inevitably a custodial disposal, and we have asked ourselves whether we can make an exception in your case and effectively afford you a last chance to put your life on track. We have concluded with some anxious consideration that we can. I want to give you a warning in the strongest possible terms. You have recognised the part that alcohol plays in your offending, you have recognised the destructive cycle that it brings to your life. This is your last chance, do not be here again, do not squander the chance that we are going to give you because custody will, it seems to us inevitably follow should that be the case." And with those remarks the Court imposed the orders of community service and probation to

which I have referred. 4. The basis of the October sentence included the fact that before the court on that occasion the court had the advantage not only of a Probation Report from the Probation After Care Service but also a full report from Dr Tanya Englebrecht the consultant psychiatrist who works with the Alcohol and Drugs Service. 5. Advocate Bell puts forward several grounds for the application for leave to appeal but the first is that there was new evidence. The essence of the submission in relation to new evidence is that the court mistakenly considered below that it would be open to the applicant to receive assistance in prison if a custodial sentence were imposed and in order to make good that submission Advocate Bell relies upon two pieces of information. The first is that there was an email exchange between him and the States of Jersey Prison Service in which it is confirmed that since his sentence in October the applicant has seen a substance misuse worker on two occasions namely 17 th October, and 27 th November and secondly it is said that the court below was concerned enough as to what treatment might be available in prison to ask the Probation Officer for additional clarification in Chambers. That clarification was confirmed by the Probation Officer who has said " at my last visit to Mr McKeown at HMP he asked me what I was asked in Chambers and I confirmed that they asked if there was support available in prison for him. My response was that there is a Drug and Alcohol worker and a psychology department which he can access." Advocate Bell combines with those features the submission that it is clear that a particular course which might have been available in prison had the applicant been serving a longer sentence, and almost certainly will not be available to him given that he has the limited time to serve on this sentence. 6. The test for adducing new evidence was well summarised in the case of *Motofelea-v-AG*

[2014] JCA 236 and it is noteworthy that there are several principles which need to be considered in relation to any such application to advance new evidence: (i) Whether the new evidence was not available at the time of the sentencing hearing; (ii) Whether the fresh evidence is relevant; (iii) Whether the fresh evidence is capable of belief; and (iv) Whether the fresh evidence might have raised a reasonable doubt that might have led to a materially different sentence. 7. In this case this court is not satisfied that there was essentially any new evidence advanced by Advocate Bell. But if it was new it was certainly available at the time of the original sentencing hearing. We say that it was not necessarily new in any event because the Probation Officer, and this is the only direct evidence, says that the information requested of her in Chambers was whether there was support available in the prison and she said that there was. And indeed, there is because the information which Advocate Bell puts before the Court from the Prison Service shows that the applicant has seen the substance misuse worker and has seen him on two occasions. There is also some evidence which I have not mentioned yet that the applicant has seen a psychologist at the prison as well. 8. So we are not satisfied that the evidence that the applicant puts before us amounts to new evidence. We are certainly not satisfied that it was not available at the time of the sentencing hearing, but even if those two points had been decided in favour of the applicant it seems to us that the court below was fully aware of the options which were

available to it. Advocate Yates rightly points out that at paragraphs 12.18 and 12.19 of Dr Englebrecht's report which was available to the court below she sets out the two options, a non-custodial sentence and then the package of measures that would go with that, or alternatively a custodial sentence with the ability to engage with the Substance Misuse Therapist, which has happened and with the psychological provision within the prison which has happened. 9. And so we are not satisfied that there is any basis upon which we can criticise on those grounds the decision which the court below reached. 10. It is then said by Advocate Bell that if the court had asked the Probation Officer this particular information in public it would have been open to the defence to make submissions upon it. There are two answers to that submission. The first is that the Probation Officer is a *déléguee*, an officer of the court, and is able to give the court advice as she did on this occasion. The second is that there is no evidence that what she said was wrong, and in those circumstances there is nothing in that point at all. 11. Advocate Bell then goes on to say that the sentence which was imposed was either manifestly excessive or wrong in principle, but although that was set in the skeleton argument he conceded in oral submissions that really the argument was whether the sentence was wrong in principle. It seems to this court that the court below had full information about the options which were available to it. We cannot think that it breached any wrong principle and it no doubt considered all the options which had been tried in the past, options which included attendance by the applicant at Silkworth Lodge, included imposition of Probation Orders with Treatment Orders: and it is noteworthy that very often these various orders had not had any satisfactory outcome. 12. We think in the light of the warning that the Royal Court gave when imposing the sentence in February that this was the last chance not to be squandered that it was entirely within the court's appropriate exercise of discretion in October to reach the sentence that a custodial sentence needed to be imposed for breach of the February order. 13. Accordingly the application for leave to appeal is dismissed and leave is refused. 14. Mr McKeown we would like to add this. The time that you have to spend in custody is time which you can use profitably or not. While we understand that you will be disappointed with the outcome of this application it is for you to use that time, that drying out time productively and to take the advice which is available to you in the prison as well as the substance misuse advice that you have been given. Authorities AG-v-McKeown

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