

JERSEY / JUDGMENT

Nogueira -v- AG [2011]

JRC 159B (15 August 2011)

[2011] JRC 159B

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JUDGMENT

THE BAILIFF: 1. This is an appeal by Mr Nogueira against the decision of the Assistant Magistrate on 11 th April to recommend that Mr Nogueira be deported at the end of the sentence of 12 months' imprisonment which she imposed on that occasion. 2. The facts giving rise to her decision are as follows. The first set of offences occurred on 19 th November, 2010. The appellant had been drinking at his home; a 14 year old who was known to the family asked to be taken home. Even though he had been drinking the appellant agreed and they set off on the appellant's motorcycle. The motorcycle skidded across the road at one point, injuring the appellant's leg and causing minor injuries to the 14 year old child. The child left the scene and went to a nearby home which he knew, the appellant went home. There he consumed further drink. Subsequently the police were called and the appellant was arrested at his home and taken to hospital. A back calculation showed a level of alcohol at the time of the accident of 208 micrograms of alcohol in 100 millilitres of blood, in other words about 2½ times over the legal limit. He was subsequently charged with driving without due care and attention, failing to stop and report, driving with excess alcohol, driving without insurance and driving without a licence. He appeared before the Magistrate's Court on 24 th February and an interim order disqualifying him from driving was made. He was remanded on bail for sentencing on 24 th March. 3. Despite the fact that he had been remanded for sentencing for these offences, on the 22 nd March he was seen driving a Mercedes car and swerving all over the road. Concerned members of the public telephoned the police; a police officer followed the vehicle, stopped it and arrested the appellant. A breath test showed a reading of 103 micrograms of alcohol in 100 millilitres of breath, in other words some three times over the limit. In relation to this incident he was charged with driving with excess alcohol, driving whilst disqualified and driving without insurance; and as we have already said, these offences were of course committed whilst he was on bail for the earlier offences. 4. Both sets of offences came before the Assistant Magistrate on 24 th March. On that occasion she indicated that she was considering recommending deportation and the matter was adjourned in order to give the defence time to consider this aspect. 5. The matter came back in due course for sentencing on 11 th April. The appellant's record was before the Assistant Magistrate. This showed that in March 2003 he had been fined for driving under the influence of alcohol. In July 2004 he was fined and disqualified for a further offence of driving with excess alcohol. In April

2005 he was imprisoned for 2 months and disqualified for 5 years for a further offence of driving with excess alcohol and also driving whilst disqualified and driving without insurance. In October 2006 a Community Service Order was imposed for a further offence for driving whilst disqualified and driving without insurance. Thus the excess alcohol offences that were before the Assistant Magistrate constituted his fourth and fifth convictions for such offences. He had already been convicted three times since 2003 for driving with excess alcohol. 6. His previous record also showed an assault in July 2007 for which he was placed on probation, a grave and criminal assault in December 2007, malicious damage in April 2008 and making annoying telephone calls in September 2009. These all related to the break-up with his former partner. 7. Faced with this catalogue of previous driving offences the Magistrate imposed total sentences of 12 months' imprisonment, disqualified the appellant from driving for 10 years and also recommended his deportation. As we have said earlier, it is only against that latter order that the appellant appeals. 8. The test for recommending deportation is well settled. The Court must consider first whether the offender's continued presence in the Island is detrimental to the public good. Secondly, if it does so consider, it must go on to consider whether deportation would be disproportionate, having regard to the rights of the appellant and other members of his family under the European Convention, particularly Article 8, the right to respect for private and family life. The Assistant Magistrate undertook this exercise. She found that in view of his appalling driving record, his dependence on alcohol and the risk of serious injury to others of any repeat offending, his continued presence would be detrimental. As to the second aspect, she took into account the fact that he had a son, then aged 4 now aged 5, by his former partner who lived in the Island and that he also had lived in the Island for 9 years, and that he now had a partner of some 3 years, the partner having lived in Jersey for 19 years. She also took into account the other matters put forward by his advocate but she considered that in all the circumstances it would not be disproportionate to recommend his deportation. 9. Before us Advocate Morley-Kirk has referred first to a mistake which the Assistant Magistrate made when passing sentence. She referred to the two excess alcohol offences as being the appellant's fifth and sixth convictions for such an offence whereas they were in fact his fourth and fifth, because he only had three previous convictions for such offences, whereas she indicated elsewhere in her judgment that he had four previous subsequent convictions. The Assistant Magistrate clearly realised her mistake almost immediately because on the 14 th April the Greffier Substitute wrote on her behalf, making it clear that this was a simple mis-statement on her part and that she had at all times been aware of the correct number of previous convictions. 10. This is an appeal against a decision of the Magistrate, it is not the Royal Court passing sentence as a court of first instance. It is well established that this Court may only intervene in such cases if the sentence is manifestly excessive. It may not intervene merely because the individual members of the Court, if they had been sitting at first instance, might themselves have passed a different sentence or, in this case, might not have made a recommendation for deportation. 11. Advocate Morley-Kirk submitted first that the continued presence of the appellant in the Island was not detrimental to the public good. She argued that these were not the most serious offences and that he had an extremely good work record during the time that he had been here, namely 9 years, and she referred to work references in that respect. We have to say that we disagree. The appellant came to Jersey in

about 2002 and since then has committed all these motoring offences that we have referred to and has also committed an assault, a grave and criminal assault, malicious damage and annoying telephone calls. He has been placed on probation and community service and has breached them both. He is an alcoholic and has shown a reckless disregard for the safety of others by repeatedly driving with excess alcohol, even after a prison sentence was imposed for the third of such offences. 12. In our judgment whether these offences of driving with excess alcohol were his fifth and sixth, as the Assistant Magistrate wrongly stated, or fourth and fifth, as is in fact the case, we have no doubt that the continued presence of the appellant in the Island would be detrimental to the public good. We were referred to the case of Dryjanski-v-AG

[2009] JRC 041 and Advocate Morley-Kirk sought to argue that the offending was less serious in this case than in that case and that the detriment to the public good was less in this case. Again we have to say that we disagree; in our judgment the situation is worse here. In Dyrjansk i there were only three excess alcohol offences all committed in close proximity to another. Here, there are five spread over several years and in addition there are the other offences of which we have spoken. 13. So we turn to the second limb. On this aspect Advocate Morley-Kirk raised a number of matters. First, she referred to his good work record in Jersey. We have been referred to references and there certainly are some excellent references and also some good personal references. We accept that he has a good work record despite his alcoholism, and that there is a good side to his personality. 14. Secondly, she places great weight upon the hardship which would be caused to his son who is now aged 5. This is a son by his former partner. She says that if the appellant has to return to Portugal as a result of deportation he may well find it very hard to find employment there because of the dire economic situation in that country; if he finds it hard to find employment he will then find it hard to afford to come back to Jersey or rather to come back to St Malo to see his son, and in any event arrangements might not be practical. All in all she submits that there will be considerable damage to the relationship with his son and this would be to the detriment of the son's welfare. 15. Thirdly, she refers to the fact that he has now had a relationship with a partner, to whom we have referred, for three years; the partner has been here 19 years, although she originally comes from Portugal. If he is deported the partner will have a very difficult decision because either the relationship will founder or she will have to leave Jersey. 16. Fourthly, Advocate Morley-Kirk refers to the fact that there is a sister here and other relatives; there is a mother in Portugal but she appears to be the only relative he has in that country. 17. We have carefully considered these arguments. It is clear that they were also very carefully considered by the Assistant Magistrate in her

judgment.

We have concluded that we cannot possibly say that her decision in that respect was unreasonable or to recommend deportation in this case was manifestly excessive. The Article 8 rights of the appellant and members of his family have to be balanced against public safety, the need for the prevention of crime and the protection of the rights and freedoms of others. As we

have already said, the appellant has shown a reckless disregard for the safety of others over many years, despite many chances to see the error of his ways and in our judgment this means that the balance must come down in favour of the interests of the community rather than the interests of the appellant and his family. 18. Finally we have asked ourselves whether the Assistant Magistrate's error in passing judgment makes any difference. We are prepared to accept for the purposes of our decision that her error certainly gave the perception that she thought that the appellant had committed one more excess alcohol offence than he in fact had. But in our judgment, that makes no difference. We have considered the correct facts, namely that these were his fourth and fifth offences; even taking that into account, it is as we say clear that the appellant has shown a reckless disregard for the interests and safety of others and we have no doubt that, even on that basis, the Assistant Magistrate would have concluded that the detriment to the public good outweighed the Article 8 rights of the appellant and his family. 19. In all the circumstances we dismiss the appeal. Authorities Dryjanski-v-AG

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