

JERSEY / JUDGMENT

Sandu v AG [2024] JRC 287 (18 December 2024)

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JUDGMENT

THE DEPUTY BAILIFF: 1. The Appellant was sentenced by the Assistant Magistrate on 10 October 2024 in relation to three offences. In respect of driving whilst disqualified, he was sentenced to 6 months' imprisonment and disqualified from driving for 12 months. In respect of failing to provide a specimen of breath without reasonable excuse, he was sentenced to 9 months' imprisonment, with 5 years disqualification from driving, and in relation to driving without insurance, he was sentenced to 3 months imprisonment and disqualified from driving for 6 months. 2. All the offences were to run concurrently making a total of 9 months' imprisonment, with a 5 year period of disqualification concurrent. He was also recommended for deportation at the end of his sentence. 3. By a Notice of Appeal, the Appellant says that he appeals the sentence of 9 months imprisonment only, although two matters arise from that. First, it is not possible as a matter of law to appeal from part of a sentence - the matter of sentence is at large on appeal. Secondly, the Appellant is really appealing against all of his sentences as he invites the Court to replace the custodial sentence he received with a period of community service as a direct alternative to custody and in those circumstance it is likely that the recommendation for deportation would fall away. 4. The Defendant has a right of appeal under Article 33 of the Criminal Procedure (Jersey) Law 2018 ("the Law") and under Article 36 the Royal Court has a general power to, inter alia, confirm, reverse or vary a decision of the Magistrate's Court. This includes a power to increase as well as reduce sentence. 5. It is well-established that in circumstances such as these, the Court will only interfere if the sentence imposed by the Magistrate's Court was wrong in principle or manifestly excessive. The Magistrate's Court has a wide discretion as to the appropriate sentence and the Royal Court will only interfere on appeal if the high threshold for intervention is met. 6. It is said that the Appellant's counsel did not properly set out his case in mitigation before the Court below. This was a point raised late in the day but Advocate Baglin (who represented the Appellant below) has had the opportunity to respond to the criticisms made of him. The criticism is, in essence, that there are various aspects of the mitigation that were not submitted to the Assistant Magistrate when the Appellant fell to be sentenced. 7. Advocate Baglin has sworn an affidavit which refutes this contention. Advocate Baglin represented the Appellant when he pleaded guilty on 26 September 2024 and was remanded in custody pending his sentence on 10 October - when Advocate Baglin also

represented him. Advocate Baglin took instructions from the Appellant via telephone from the prison following receipt of the Pre-Sentence Report and by video link at the Magistrate's Court on the morning of the sentencing hearing. 8. We have a full transcript of the hearing before the Assistant Magistrate, including the mitigation advanced by Advocate Baglin on behalf of the Appellant. 9. Before coming to the facts of the offending which led to the sentence imposed upon the Appellant, it is appropriate to have regard to his background. He was born in 1993 in Romania and he is now aged thirty one. He is a Romanian national. 10. Although not referred to on his Police National Computer antecedents, in Romania he was convicted of offences of driving whilst disqualified and failing to provide a specimen of breath in 2019 and 2020 respectively. For these offences he received sentences of 12 and 16 months' imprisonment respectively. He moved to Jersey in July 2022. 11. On 1 December 2023, he was fined and disqualified from driving for 15 months by the Magistrate's Court for an offence under Article 28 of the Road Traffic (Jersey) Law 1956 for driving a motor vehicle whilst over the prescribed limit. As to that offence, the Pre-Sentence Report indicates that the breath reading was 52 micrograms against the limit of 35 micrograms. 12. In May 2024, the Appellant was required to attend a parish hall enquiry in relation to an offence of being disorderly on licensed premises. 13. As to the offences that led to the sentence appealed, they were committed on 24 September 2024. The Pre-Sentence report said that the Appellant "did not provide a reason for driving after he had consumed alcohol". The author of the report said the Appellant reported "having had a bad day at work and drinking wine when he returned that evening". The Appellant told the author of the Pre-Sentence Report that he had drunk two large glasses of wine which was nearly a full bottle and went to go to the shop to buy some more wine. He said that the car that he was driving was parked at Falles Garage at Longueville and he walked there from his home. He planned to sit in the car in order to make a telephone call to his partner. However, upon arriving at the car it was raining and it was dark, and he could not be bothered to walk and decided to drive three hundred metres from the garage to the Morrisons supermarket in order to buy the wine. He said the shop assistant refused to serve him wine and reported him for driving owing to a grudge against him, but said that he was not visibly under the influence of alcohol at the time. He said that he was not over the legal limit to drive, which was why he had refused to provide a breath sample to the police. He had accepted he knew he was disqualified from driving and knew that he was breaking the law by driving. 14. In his written submissions in support of this appeal, the Appellant gave a slightly different story, which we recounted to him today and which he has confirmed as being his account, in that on 24 September he came back from work with a colleague and stopped by Morrisons on Longueville Road. He purchased some goods including a bottle of wine and then returned home. Two hours later, he decided to take a walk back to Morrisons to buy some cigarettes. On the way there, he decided to check on the car that he had recently purchased for his partner to use when she came to Jersey. When he got to the car, he saw that there was a notice from the garage asking him to remove the car otherwise it would be towed. He decided to move the car from the garage car park to the Morrisons car park. He did this and entered Morrisons to purchase cigarettes and another bottle of wine. The shop assistant refused to sell him the wine and he tried to explain that he was not going to drive the car onwards and a friend was going to pick him up. The shop assistant followed him outside and took his number plate and called the police. In those circumstances, he

felt he had to move the car back to the garage, so he did this and he was arrested as he walked home. He claims he was treated roughly on arrest by the police which is not supported by any other evidence and in any event is in our view not relevant. 15. Whichever account of the Appellant's is true - the one he gave the probation officer or the one he gives us - he had in our judgment no legitimate reason for driving at all. In any event, he had been drinking and he knew he was disqualified from driving. He had no excuse for failing to provide a specimen of breath, hence his plea of guilty to the offence. 16. Nonetheless, the Appellant says that 100 hours' community service would better fit the crimes to which he has admitted. He said that he has made what in his judgment is a "small mistake". 17. We have had regard to the transcript of the hearing before the Magistrate. The Crown's case was that the shop assistant saw the Appellant "walk unsteadily into the shop". We have not seen her statement but we accept that that must have been what she saw, because she refused to sell him alcohol on the second occasion he went to the shop and of course rang the police. She confirmed that it was the same male who had purchased a bottle of wine about an hour to an hour and a half before. The Crown has showed some CCTV footage to the court below of the Appellant parking his vehicle that evening and said that it demonstrated the level of intoxication. We have seen the footage and we do not accept that description by the Crown. It does show the Defendant having difficulty parking a car - he makes three attempts to reverse into a spot but lots of people have difficulties parking cars and there is no suggestion or appearance from his gait as he alights from and leaves the car park of intoxication in our

judgment.

18. The Crown confirmed that a deportation notice had been served on the Appellant. 19. The transcript showed that Advocate Baglin mitigated on behalf of the Appellant before the Assistant Magistrate. Advocate Baglin made the Appellant's principal points, namely that the Appellant did not believe he was going to be over the limit at the time he declined to provide a specimen of breath; that there was no accident involved, no reports of bad driving, a moderate level of impairment so far as the Appellant was concerned, that the Appellant had a stable job and accommodation and, absent the 2023 conviction, no record of offending in Jersey. Advocate Baglin addressed the Assistant Magistrate as to the test for deportation, having regard to the authority of *Camacho v AG*

[2007] JLR 462 relied upon and his low risk of re-conviction. He invited the Court to impose a sentence of community service, which he said was consistent with the guidelines. 20. As to those guidelines, initially Advocate Baglin addressed the Court by reference to guidelines which had just been superseded by guidelines that came into effect on 1 October 2024 and thereafter Advocate Baglin addressed the Court again by reference to those new guidelines. 21. We have seen those guidelines. We note that in relation to the revision of the guidelines that apply in relation to drink driving offences, as to the offence of driving with excess alcohol no real change between the pre October 1st guidelines and new guidelines save that there has been a small increase in financial penalties in respect of the two lower categories of offence - presumably consistent with inflation. In relation to

this offence, namely failing to provide a specimen for analysis under Article 30 there has been a substantial change. The guidelines in effect prior to the 1 October provided:-

Examples of nature of activity Starting point Range Disqualification Disqual. 2nd offence in 10 years

A Defendant refused test when had honestly held but unreasonable excuse £1,200 £800-£1,600 12-18 months 36 + months

B Deliberate refusal or deliberate failure 3 months 1 - 4 months 18-24 months 36 + months

C Deliberate refusal or deliberate failure where evidence of moderate level of impairment 5 months 4 - 6 months 24 - 30 months 36 + months

D Deliberate refusal or deliberate failure where evidence of high level of impairment 7 months 6 - 8 months 30 + months 42 + months

On one view the matter before us was a Category C offence pursuant to these guidelines, namely "deliberate refusal or deliberate failure to provide a specimen for analysis where there was evidence of a moderate level of impairment" yielding a starting point of 5 months' imprisonment, a range of 4 to 6 months, and disqualification from 24 to 30 months, for a first time offender pleading guilty. For a second disqualification within 10 years that the disqualification should be 3 years plus. 22. On the 1st October 2024 these guidelines were replaced with a new guideline for this offence which provides a single category with a starting point of 7 months' imprisonment, a range of 5 to 9 months imprisonment and, in relation to a second disqualification within 10 years, a period of disqualification starting at 54 months (4½ years). The maximum sentence for the offence remains 12 months' imprisonment and a fine £10,000. The notes accompanying the new guideline

- which again applies to a first time offender pleading guilty - say that there is "a presumption towards custody in the event of a second relevant offence within [a] 10 year period", which is perhaps inconsistent with the starting point of 7 months' custody for any offender committing this offence, even a first time offender pleading guilty. 23. We do not want to say too much about the new guideline for the following reasons. Firstly, these guidelines are not binding on the Royal Court. Secondly they are a matter that the Magistrate's Court is entitled to take into account. Nevertheless it is obvious that the new guidelines do not offer the flexibility that the old guidelines provided. In our view they should be revisited by the Magistrate for consideration as to whether or not they need to be revised. 24. Nonetheless, the general principle is - absent cases where the statutory maximum for an offence has changed or the definition of the offence has changed - that defendants are to be sentenced in accordance with the prevailing sentencing practice when they are sentenced, not the practice (if different) at the time that the offence was committed or when they pleaded guilty. 25. In this case when the Assistant Magistrate returned, to announce the sentence of the Court, he stated that he was sentencing the Appellant in accordance with the guidelines that came into effect on 1 October 2024. He made the following remarks: "Mr Sandu you have been convicted and entered guilty plea in regard to three offences, failure to provide a specimen, driving whilst disqualified and driving without insurance. In my view the most serious of these is the failure to provide a specimen, perhaps even more so when it constitutes a second offence of a similar nature within 12 months, you having previously being convicted for driving with excess alcohol. Under those guidelines to which I have

referred, the starting point for a first time offender entering a guilty plea is 7 months' custody. The Defendant is not a first offender and so I am comfortable and capable of stepping outside of those guidelines where appropriate. In my view there is little mitigation available despite your counsel's very best efforts. The guilty plea was for all intents and purposes inevitable but I do accept, as counsel has said, that there is evidence of it being a short distance that was driven. It was a deliberate attempt to evade detection. Having viewed the CCTV evidence there is an obvious level of intoxication. I do not consider this a matter that could be dealt with or disposed of within the community and as a result the sentence of the Court is that you are sentenced to 9 months in custody in regard to that charge. I also have to disqualify you further from holding or seeking to obtain a Jersey driving licence. Because this is a second offence within the 10 year period the greater periods apply and in light of all the circumstances I hereby disqualify you for a further 5 years. Article 35 of the Law applies which means that at the end of that period, or the end of all your disqualifications you must retake your test before driving once more, successfully retake your test before driving once more. In regards to driving whilst disqualified, whilst this is indeed a first offence, so far as the Court's concerned and you have pleaded guilty. This was a flagrant breach of the Court's previous order in 2023. Such actions must be dealt with in a manner that appropriately illustrates the dissatisfaction of the Court. In this case it warrants custody. I see no reason to deviate from the starting points that exist within the guidelines and I therefore on this offence sentence you to 6 months' imprisonment and disqualify you for a further 12 months. I say further - it's 12 months - that sentence is concurrent with the previous sentence. As to the no insurance, I take the view that this was deliberate. You knew you were disqualified from holding a licence and were not insured. There is no reason again to deviate from the starting point within the guidelines and I sentence you to 3 months' custody and again disqualify for 6 months, again, that is concurrent with the previous sentences. The total therefore is 9 months' custody and 5 years disqualification." 26. While we have reviewed what the Assistant Magistrate said, we have indicated already that the CCTV footage which we saw, which we are told is the same that he saw, does not in our view demonstrate an obvious level of intoxication. But a moderate level of impairment at least must have been obvious to the shop assistant else she would not have acted in the way that she did. On any view this was an offence of failing to provide a specimen for analysis in circumstances where the Defendant was visibly intoxicated and had no legitimate reason either to drive or fail to provide a specimen for analysis. This was a deliberate refusal and the offence was aggravated by firstly his 2020 conviction in Romania for the same offence, secondly his conviction in 2023 in Jersey for driving with excess alcohol, thirdly, the fact that he was knowingly driving whilst disqualified at the time and fourthly that he was uninsured from driving as well. In those circumstances, entirely putting to one side the Magistrate's Court Guidelines, the Assistant Magistrate was entitled to impose a sentence of 9 months' imprisonment and the other sentences which he chose to impose. 27. The Assistant Magistrate went on to consider the issue of deportation, which he recommended. There is no appeal against this recommendation and although the matter was not the subject of submission, we agree with the Assistant Magistrate's conclusions in relation to this matter

and we note that he correctly directed himself in accordance with the relevant legal principles. 28. We have had regard to all that has been said by the Appellant but there is no merit in this appeal. The Assistant Magistrate was entitled to reach the decision that he did and the appeal is accordingly dismissed. Authorities Criminal Procedure (Jersey) Law 2018. Road Traffic (Jersey) Law 1956. Camacho v AG

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