

JERSEY / JUDGMENT

Whelan v AG [2000] JRC 129 (10 July 2000)

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JUDGMENT

(on preliminary application for leave to adduce fresh evidence) THE DEPUTY BAILIFF: 1. In this appeal the appellant applies for leave to call fresh evidence. On 26 th April, 2000, he pleaded guilty before the Magistrate's Court to a single charge of failing without reasonable excuse to provide a specimen contrary to Article 16C(7) of the Road Traffic (Jersey) Law, 1956 . 2. At the hearing before the Magistrate the appellant was represented by counsel who spoke in mitigation on his behalf. However, no mention was made of the amount of alcohol which the appellant had in fact consumed on the night in question or as to the likely level of alcohol in his breath had he agreed to provide the required sample. 3. Miss Martin, on behalf of the appellant, now seeks to adduce two types of fresh evidence. First, she wishes to call evidence from a number of people who were present at the dinner attended by the appellant that evening. In general terms they would be called to support evidence which he wishes to give to the effect that he had consumed some two glasses of red wine during the meal and two glasses of port during speeches. 4. Secondly, Miss Martin wishes to adduce evidence from a Mr. Hayward, a forensic scientist. He would give evidence to the effect that, having regard to the length of time over which the alcohol was consumed, the appellant's weight, and other factors and the rate at which alcohol is lost from the body, his breath level at the time the sample was originally requested would have been at or slightly above zero and would at no stage have been above the legal limit. 5. Although it was not referred to by counsel for either side, this Court held in the case of Knapp -v- A. G.

(1991) JLR N. 7; (17 th September, 1991) Jersey Unreported that, when hearing an appeal from the Magistrates Court, it will apply the same test for the admission of fresh evidence as is applied by the Court of Appeal when hearing appeals from the Royal Court. 6. The principles to be applied were set out in Gorvel -v- A. G.

(1973) JJ 2503 . The Court has a discretion as to whether to admit further evidence and in general three conditions must be met before the Court will exercise that discretion. The Court describe them as follows: "Those principles can be summarised in this way: first, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but evidence which is capable of belief." 7. Miss Martin also referred to the case of Barnes -v- A. G. (1987/88) JLR

669 where the Court of Appeal made it clear that the guidelines in Gorvel were not to be treated as if they were words in a statute. The Court retained an overriding discretion in the interests of justice. However, the Court emphasised at page 675: "...that the reception of fresh evidence is to be regarded as wholly exceptional...". On the very special facts of that case, where the prosecution had only introduced a charge of rape, in addition to the existing charge of indecent assault, at the last moment, the Court held that the fresh evidence should be admitted as the case was wholly exceptional. It further held that, in the light of this last minute change of the prosecution case, the evidence had not in any true sense been available because counsel had been preparing on a different basis. 8. So, what is the situation here? Miss Martin accepts that the evidence was, in one sense, available in that Mr. Whelan had instructed his counsel as to the amount he had drunk that evening, and it was therefore clearly open to him and to counsel to pursue that by getting supporting evidence or by getting an expert report. In other words the facts that gave rise to this evidence were known to the defence and to defence counsel. Miss Martin concedes that the reason the matter was not laid before the Magistrate was because counsel then representing the appellant - not Miss Martin - simply failed to investigate the matter and to bring it to the Court's attention. She says therefore that the matter is similar to the case of Barnes . 9. I find that the evidence was available at the time of the trial and the first requirement set out in Gorvel -v- A. G. is therefore not met. Are there any exceptional circumstances which would lead the Court nevertheless to admit this evidence in the exercise of its discretion? This is not a case in which the prosecution changed its position or where the defence were taken by surprise on any issue; there was plenty of time before the trial. This was a simple case where the defence had the evidence, or could have easily had the evidence, in their hands; they could have put forward the matters which they had in their possession; they simply failed to do so. I do not find that that can be classified as being wholly exceptional and therefore to be put in the same category as Barnes, where the facts were so very different. In the circumstances I refuse leave for the admission of this evidence.

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(on appeal) 10. This is an appeal by Andrew Noel Whelan against a sentence of a fine of £1,000 and 20 months' disqualification from driving imposed by the Magistrate on 26 th April of this year following a plea of guilty to one charge of failing to supply a specimen of breath contrary to Article 16C 7 of the Road Traffic (Jersey) Law 1956 . The facts can be shortly stated. On the evening of Thursday, 24 th February, the appellant, who is head of the portfolio management team of a local bank, had been to a charity dinner at the Hotel L'Horizon where his firm was hosting a table for clients. He had a viral infection at the time. At the end of the evening he drove home. He was seen by police officers on mobile patrol to swerve and almost clip a bank on Mont Les Vaux. He was stopped shortly afterwards. The officer smelt alcohol on his breath and said that his eyes were glazed and that he was unsteady on his feet. The appellant refused to take a roadside breath test and was arrested. At police headquarters the breath test procedure was commenced at seven minutes past one. On being requested to provide a specimen of breath he

asked to consult his advocate, who in fact is an English solicitor. The procedure was stopped and unsuccessful attempts were made to contact the solicitor in question. The appellant stated that he had been advised by the solicitor that he should not give a specimen of breath but only a specimen of blood. He in fact offered to give blood. He also asked for a copy of Article 16C of the law in order to see for himself whether he had to give breath or whether he had an option to give blood. However, it transpired that a copy of the law was not available at Police Headquarters - and we mention in passing that we think this is an undesirable state of affairs and recommend that a copy of the law should always be available at Police Headquarters in case a person arrested wishes to see it. The procedure was recommenced shortly afterwards but the appellant again refused to provide a specimen of breath and he was subsequently charged. 11. When the matter came before the Magistrate, counsel was heard in mitigation on behalf of the appellant and, when the Magistrate came to sentence, he referred to bands C and D of the guidelines issued by the Magistrates because those guidelines make it clear that the general policy is to treat a failure to provide a specimen under paragraph 7 of Article 16C as being an offence which should be sentenced in accordance with the penalties set out either at band C or, in a more serious case, at band D. On this occasion the Magistrate imposed a penalty towards the lower end of band C, namely the fine of £1,000 and the disqualification of 20 months to which we have referred. 12. On this appeal Miss Martin, who was not the counsel who appeared below, raised two grounds, but we have to say we think they are extremely closely connected. First, she said that the effect of the guidelines, when read with the decision in this case, meant that the minimum sentence of twelve months referred to in paragraph 8 of Article 16C was really rendered nugatory. Secondly, she said that the Magistrate failed to have sufficient regard to the mitigating factors which were present. 13. We have been referred to the guidelines issued by the Magistrate in September, 1999, and which were the guidelines to which he made reference when passing sentence. We note that paragraph 2 of the foreword says as follows: "Penalties here suggested are for adult offenders. They are guidelines, but only guidelines, for summary disposal of the most common offences. Guidelines are not tramlines. Within the guidelines there is a great deal of flexibility." Paragraph 10 says as follows: "Each guideline penalty is designed for the case of the one offence of average seriousness committed by a first offender of average means who pleads guilty and who does not so significantly challenge the basis for sentence as outlined by the Centenier as to compel a remand for a "Newton" hearing. 14. The Court strongly supports the issuing of these guidelines. We believe they offer assistance to the Magistrates and they offer the best hope of achieving a reasonable degree of consistency, which is important for the public when considering the confidence which they have in the sentencing process. Similarly, the Court endorses the general approach of the guidelines in saying that, for an offence under paragraph 7 of Article 16C, the normal sentence can be expected to fall within band C or, in a more serious case, within band D. Otherwise it would be far too easy for a person who has consumed a considerable amount of alcohol to refuse to provide a specimen in the hope of being treated at a lower band than he would were he to have provided a sample. The clear policy of the legislature is that arrested persons should provide breath specimens if required to do so and if they refuse to do so, they must take the consequences which may well be that they suffer a higher penalty than if they had provided the sample. Nevertheless, as the passages which I have read make clear, the guidelines

are only guidelines; they are not tramlines; they are not a statute. 15. Miss Martin referred us to a passage in Archbold (2000 Ed'n) at paragraph 7142 which says this: "In relation to all guideline cases, what was said by Lord Lane C. J in R. v. Nicholas, The Times, April 23, 1986, should be borne in mind. His Lordship emphasised that the guidelines were only guidelines and were not meant to be applied rigidly to every case. They were for assistance only and were not to be used as rules never to be departed from. See also R.v. Mawson, 13 Cr. App. R. (S). 219, CA, in which it was said that no guideline case could cover the entire field of offences arising under a particular section of an Act." 16. We endorse that approach. Whereas the vast majority of offences can be expected to be dealt with within the guidelines, nevertheless it is always open to the Magistrate to depart from the guidelines either in cases of less seriousness or, of course, in cases of greater seriousness. In other words he may depart either way where he thinks that the circumstances are justified. The question in this case is whether the mitigation available takes this matter below band C so as to lead to a sentence below the band being imposed. It is certainly the case that, when giving his decision, the Magistrate does not appear to have considered going outside the guidelines but to have considered merely where within the guidelines he should impose the sentence. 17. Miss Martin has raised a number of matters in mitigation. I do not propose to rehearse them all. They were made to the Magistrate and many of them were conventional points of mitigation which would not result in the matter falling below band C. But her main point is that Mr. Whelan was acting in good faith throughout this process. He had received advice, - advice which, we should add, was extremely poor advice, - from a solicitor to the effect that, if ever he were arrested, he should offer blood rather than breath and that he was entitled to do this. He heeded this advice and this was the course which he followed on the night. He asked for a copy of the law when the police said that he was not entitled to do this, but a copy of the law was not available. Equally, he did offer to give blood. 18. In the circumstances we are satisfied that he had no intention of trying to escape the consequences of his actions that evening and was content that the level of alcohol within him should be established and that he was merely concerned that it should be by blood rather than by breath. Furthermore, there is no evidence in this case that he had in fact consumed a very high level of alcohol. All that the police officers said when he was arrested was that his eyes were glazed, his breath smelled of alcohol, and he seemed a little unsteady on his feet. We have heard that he was suffering from a viral infection at the time and he had problems with his eyes. 19. All in all, we have come to the conclusion that these were fairly exceptional circumstances in that no attempt was being made by the defendant to escape the consequences of his actions; it was simply a case of his acting on bad legal advice. We think this is one of those cases which can properly be taken to fall outside the normal band and therefore fall below band C. We therefore allow the appeal and order a disqualification of 15 months and reduce the fine to £750. *Authorities On application to adduce fresh evidence Gorvel - v- A. G.*

(1973) JJ 2503 . Barnes -v- A. G.

(1988) JLR 669. Knapp -v- A. G.

- (1991) JLR Note 7 & (17 th September, 1991) Jersey Unreported. On appeal Road Traffic (Jersey) Law 1956: Article 16C. Archbold (200 Ed'n): paras 7-136 to 7-142. R. -v- Mawson
- (1992) 13 Cr. App. R. (S) 218 C. A. Graham -v- A. G. (16 th January, 1995) Jersey Unreported. R.-v- Ball
- (1992) 35 Cr. App. R. 164. Cox -v- A. G. (24 th July 1995) Jersey Unreported. Oliver -v- A. G. (25 th July, 1995) Jersey Unreported. Boyle -v- A. G. (23 rd October, 1995) Jersey Unreported. Page
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