

Judgment 22/2004

**Roger Charles Hatwell and Michael Peter Ogier
– Royal Court – 8 June, 2004**

Criminal appeals from the Magistrates Court – sentences for driving having consumed excess alcohol – two appeals heard together – whether custodial sentence should be suspended – custody threshold for drink/driving offences – guidelines set – suspension of prison sentences imposed for drink/driving offences should be exceptional – circumstances of each offence, and the appellant’s record, considered – both appeals dismissed.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 8th day of June, 2004 before Sir de Vic Carey, Esquire, Bailiff; present David Charles Lowe, Laurence Lenfestey Guille, Derek Martin Le Page, Alan Cecil Bisson, David Michael Jory, Keith Bichard, OBE, Michael John Wilson, Michael Henry De La Mare, Michael John Tanguy, Esquires, Jurats.

In the action of THE LAW OFFICERS OF THE CROWN against ROGER CHARLES HATWELL to see the Appellant pursue the Appeal of which the said Hatwell gave notice against the sentence imposed upon him by the Magistrate’s Court on the 2nd day March, 2004;

And the said Law Officers claim costs;

WHEREAS on the 7th day of June, 2004, THE COURT heard Advocate S. Mallett for the Appellant and Advocate G.D. McKerrell for the Crown thereon and having considered a Social Enquiry Report prepared by Stuart Crisp, Senior Practitioner, DISMISSED the Appeal and ADJOURNED the matter for reasons to be delivered on 8th day of June, 2004;

THE COURT this day delivered the said reasons in the form attached hereto.

S. M. SIMMONDS
Her Majesty’s Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

The 8th day of June, 2004 before Sir de Vic Carey, Esquire, Bailiff; present David Charles Lowe, Laurence Lenfestey Guille, Derek Martin Le Page, Alan Cecil Bisson, David Michael Jory, Keith Bichard, OBE, Michael John Wilson, Michael Henry De La Mare, Michael John Tanguy, Esquires, Jurats.

In the action of THE LAW OFFICERS OF THE CROWN against MICHAEL PETER OGIER to see the Appellant pursue the Appeal of which the said Ogier gave notice against the sentence imposed upon him by the Magistrate's Court on the 26th day May, 2004 in the terms attached hereto;

And the said Law Officers claim costs;

WHEREAS on the 7th day of June, 2004, THE COURT heard Advocate J.A.S. White for the Appellant and Advocate G.D. McKerrell for the Crown thereon and having considered a Social Enquiry Report prepared by Isobel Richmond, Probation Officer, DISMISSED the Appeal and ADJOURNED the matter for written reasons to be delivered on 8th day of June, 2004;

THE COURT this day delivered the said reasons in the form attached hereto.

S. M. SIMMONDS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

SITTING AS A FULL COURT

**Before the Bailiff and Jurats Lowe, Guille, Le Page, Bisson, Jory, Bichard, Wilson,
De La Mare and Tanguy**

Between:

ROGER CHARLES HATWELL **Appellant**

v.

LAW OFFICERS OF THE CROWN **Respondent**

and

MICHAEL PETER OGIER **Appellant**

v.

LAW OFFICERS OF THE CROWN **Respondent**

Advocate for Hatwell: S. Mallett

Advocate for Ogier: J. A. White

Advocate for Respondent: Crown Advocate G. McKerrell

8th June 2004

1. These two appeals were heard together on Monday, 7th June, 2004, as they both involved appeals against custodial sentences that had been imposed for excess alcohol offences committed by persons with admitted drink problems. We propose to say something generally about what we consider should be the correct approach to be adopted in the Magistrate's Court in relation to excess alcohol offences where the option of custody is to be considered. We will then deal with the reasons why in both cases we concluded that the appeals should be dismissed.

2. Despite the heavy fines and relatively long periods of suspension that offences of driving with excess alcohol attract in the Magistrate's Court offending is showing no signs of abating and of particular concern is the high levels of readings in a sizeable minority of cases that come before the Magistrate's Court. The sentencing guidelines adopted by the Magistrate's Court has envisaged custody where readings are very high and where there is repeat offending.

3. Many of the sentences of imprisonment that have been imposed have been suspended and it is the fact that in this case both Appellants have been sent to prison by the Magistrate's Court that leads to their appealing and their advocates pleas have centred on the argument that the

sentences imposed should also be suspended. The legal limit for the offence of driving with excess alcohol is a recording of in excess of 35 micrograms of alcohol in 100 millilitres of breath. The present practice of the Magistrate's Court is to consider a custodial disposal in the event of a first offender where the reading is over a 110 micrograms that is to say over three times the legal limit. We endorse that threshold for custody in the case of persons who have not previously offended or whose offending is so long ago that it should be regarded as spent. In the case of second and subsequent convictions for driving with excess alcohol, custody should be considered in all cases where the reading is over 70 micrograms. Relevant considerations on second offences will be the length of time that has elapsed since the original conviction or convictions. It must be remembered that most second offenders will have been taken off the road for three years in respect of their first offence and therefore regard should be had to the time that has elapsed between their coming back on the road and re-offending.

4. If a sentence of imprisonment is to be imposed the next question is how long it should be. The maximum penalty for excess alcohol infringements is three months in prison. On the basis that that should be reserved for serious cases and those where there is no plea of guilty we would consider the starting point where there is a guilty plea and no aggravating circumstances such as serious bodily injury to a member of the public should be between four weeks and six weeks imprisonment. The next issue is whether the sentence of imprisonment should be suspended. It is not appropriate for Appellate Court to give general guidance as to where the borderline should be drawn between imposing immediate custody and suspending a prison sentence as circumstances will vary so much. The Court would however wish to state that suspension of sentences involving driving with excess alcohol should be exceptional to the extent that the Court would expect that more sentences would take immediate effect than be suspended. This may be a change in emphasis from previous practice in the Magistrate's Court.

5. The reason why the Court does not feel that the sentences should be suspended is that by their nature drink drivers will generally be persons of otherwise good character. Their driving licences are suspended even in the case of a the first offence for a period which probably will be in excess of the period during which the prison sentence is suspended and therefore the only likely offence which they will commit during the period of suspension of the prison sentence would be another drink related offence of disorderly conduct or the like. We are not dealing with a situation of a young offender who has already been through the mill of community disposals and supervision and then is given, sometimes successfully, one last chance of avoiding a substantial custodial sentence by having that sentence suspended.

6. It is also important that these sentences are seen as deterrent sentences. Heavy drinkers must not drive and if they do they can be expected to go to prison if their alcohol readings are high.

7. There is another problem. If persons who are heavily intoxicated have a prison sentence staring them in the face when they are apprehended they may be tempted to cover up their high level of reading by refusing or claiming to be unable to take the breath test. The approved devices would appear to give little difficulty for the moderately inebriated when they are asked to blow into them and therefore in our view the Magistrate's Court should consider whether the penalty should be increased for failure to provide a sample of breath. The present practice appears to be to impose a fine £500 with a suspension of licence for three years. In our view the fine should be similar to that that would be imposed for the highest reading and the Court should go further to consider imposing a custodial sentence in the case of persons, who have had previous excess alcohol convictions or in cases where there is evidence that the driving was seriously impaired.

8. We now turn to the circumstances of the two appeals before us.

Hatwell

9. Mr. Hatwell is a man of 56. He has a serious drink problem exacerbated we are told by the break up of a relationship at the beginning of the year. He had a previous drink driving conviction in 1987, which we are prepared to treat as spent. He appeared before Magistrate Finch on 23rd February when he pleaded guilty to driving with excess alcohol. The reading was 149 micrograms in 100 millilitres of breath – a very high reading. The Magistrate imposed a fine of £700 and three years disqualification with fourteen days imprisonment suspended for two years. It was explained to Mr. Hatwell that he must not drive his car home – he had apparently come into the Court using his own vehicle. Notwithstanding this advice he seems not to have comprehended the position and he went to drive his car. He drove along Court Row and was apprehended in a very short time by two police officers. He was returned to the Court for a further drink driving offence and driving whilst suspended the following day. On this occasion the reading was 68 micrograms of alcohol in 100 millilitres of breath. The Magistrate remanded Mr. Hatwell in custody for one week for reports and when he reappeared the Magistrate imposed a sentence of fourteen days concurrent on the two offences that had occurred on the 23rd February and activated the fourteen days imprisonment imposed on that day, such sentence to be consecutive making twenty-eight days in all. Mr. Hatwell admits to a serious drink problem. He is on sickness benefit. He lives in the house of a lady of 73 who is partly disabled and he is her carer in return for which he pays a reduced rent. She speaks well of him, as does an independent referee whose report was produced in Court. The Magistrate accepted that he, Hatwell, was not in a position to be driving a car on the day of his first appearance in the Court and accepted that because he was under the influence of alcohol when he came to Court that may have led to confusion in his mind. However, it is not seriously contested that he was told clearly more than once that he could not drive. Neither is it suggested that his condition was such that the Court should not have proceeded to try him that day. Miss Mallett has said all she can in support of the appeal. We do not accept her contention that the second offence was made less serious because he only drove a short way particularly when that short way was along Court Row. There is every indication that had officers not stopped him at the end of Court Row he would have driven on home.

10. We have no criticism of the way in which Magistrate Finch dealt with this matter except to say that we think that he was being very merciful in suspending the sentence of imprisonment on the 23rd February when the first reading of 149 micrograms was recorded. That high reading from a man who clearly has a very serious drink problem and must have been very impaired when driving fully justified an immediate custodial sentence. Going out and driving again after appearing in Court that morning could only call for an immediate custodial disposal. That is why we dismissed his appeal.

Ogier

11. Mr. Ogier is another man with a serious drink problem although he claims to be trying to sort himself out. He drove down the Rohais at 4.30 in the afternoon and failed to observe that the cars in front of him had stopped at the traffic lights. He crashed into one car which then crashed into the next one. Fortunately no one was hurt. The police arrived and arrested him for suspect drink driving. He could not blow into the portable machine but at the police station the lowest reading was 148 micrograms. Magistrate McMillen after reading a social enquiry report sent him to prison for six weeks. He has a previous conviction, on the 14th March, 1997, when the fine imposed was £650 and the licence was suspended for three years. On two grounds therefore it was open to the Magistrate to consider this an appropriate case for a custodial sentence. Firstly, the very high reading and secondly the fact that it was just over seven years since he had previously been dealt with for an excess alcohol offence. What was the mitigation? Like all people with serious drink problems Mr. Ogier is a somewhat sad individual. Miss White too has said all she could say. He has been able to hold down a job although he has lost his job with Securicor following this conviction. He looks after his elderly parents who themselves suffered injuries in a road accident a day or two before this incident. Indeed there is a suggestion that the

injuries the parents received upset Mr. Ogier and that was the reason why he started drinking. Whatever the reason it is clear that he has a serious drink problem and that his condition on the day of the offence was such that he should have been nowhere near the control of a motorcar. We have read the reports and we appreciate the effect that his incarceration will have on his family. However, we consider that the Magistrate was right not to suspend the sentence that she imposed and that period of the imprisonment was within the margin of her appreciation and accordingly should not be tinkered with. This appeal we also dismissed.

12. To sum up Mr. Ogier and Mr. Hatwell both fall into that class of persons who because of their inability to control their drinking should not be driving motorcars in any circumstances. They are extremely fortunate that their driving has not resulted in somebody being killed or seriously injured. Although they will in due time be able to drive again we trust they will not do so until such time as their drink problems have been overcome as otherwise they will risk going to prison again.