

**Judgment 6 /2006 Colin Robilliard – Royal Court (Criminal Appeal 32/05) –
13th February, 2006**

Appeal from the Magistrate’s Court – Road Traffic (Drink Driving) (Guernsey) Law, 1989 – appeal from sentence of 21 days’ imprisonment – Hatwell guidelines (see Judgment 22/2004) – Family medical problems constituted ‘exceptional circumstances’ – appeal allowed and prison term ordered to be suspended

IN THE ROYAL COURT OF GUERNSEY

The 13th day of February, 2006 before Richard John Collas, Esquire, Deputy Bailiff present: David Charles Lowe, O.B.E., Derek Martin Le Page, Stephen Edward Francis Le Poidevin, Alan Cecil Bisson, David Michael Jory, The Reverend Peter Gerald Lane, Michael Henry De La Mare, Michael John Tanguy, Esquires, Susan Mowbray, and David Osmond Le Conte, Esquire, Jurats.

No.32 of 2005

In the action of THE LAW OFFICERS OF THE CROWN against COLIN ROBILLIARD (“the Appellant”) to pursue the Appeal of which the said Robilliard gave notice against sentence imposed upon him by the Magistrate’s Court on the 10th day of November, 2005 in the terms attached hereto;

WHEREAS THE COURT heard Advocate D. Domaille for the Appellant and Advocate G.D. McKerrell for the Crown and ALLOWED the Appeal as respects the period of imprisonment and substituted therefor an increased sentence of eight weeks imprisonment, such sentence to be suspended for a period of two years;

AND WHEREAS THE COURT ORDERED that the Appellant be made the subject of a suspended Sentence

Supervision Order for a period of nine months from the said 31st day of January, 2006;

AND WHEREAS THE COURT INDICATED that it's Reasons for reaching the decision outlined above would be handed down in due course at a date and time to be appointed by the Court:

THE COURT this day handed down its Reasons in the terms attached hereto.

S. M. SIMMONDS
Her Majesty's Deputy Greffier

sms/criminal/13Feb06 - Robilliard

Royal Court of Guernsey
Appeal Against Sentence from the Magistrate's Court
Colin ROBILLIARD

Approved Text
13.2.06

Appeal Heard 31 January 2006

Reasons delivered 13 February 2006

Deputy Bailiff

Jurats: Lowe, Le Poidevin, Bisson, Jory, Bichard, De La Mare, Tanguy, Mowbray & Le Conte

Advocate for the Appellant; D Domaille

Advocate for the Respondent: Crown Advocate G McKerrell

Introduction

1. This is an appeal by Colin Robilliard against the sentence imposed upon him in the Magistrate's Court on 10 November 2005 when he was sentenced to undergo an immediate term of imprisonment of 21 days and disqualified from holding or obtaining a driving licence in all categories for a period of 6 years following his conviction for failing without reasonable excuse to provide a specimen of breath pursuant to section 3 of the Road Traffic (Drink Driving) (Guernsey) Law 1989 as amended. The appeal is allowed to the extent that the custodial sentence is replaced with a term of imprisonment of 8 weeks suspended for 2 years with a 9 month supervision order attached. Mr Robilliard did not appeal against the disqualification and so he remains disqualified from holding or obtaining a driving licence in all categories for a period of 6 years. The appeal was heard on Tuesday 31 January. Mr Robilliard was informed of the Court's decision at the conclusion of the hearing but the Court reserved its reasons for the decision.

Circumstances of the Offence

2. Mr Robilliard was arrested on 12 June 2005. He was stopped at Les Coutures Road, Vale some time after 1.00 am because his vehicle was showing a rear fog light and had a broken position light which was showing white to the rear. The Police Officers suspected he had been drinking and a roadside breath test gave a reading of 69. He was arrested and taken to the Police Station where he failed to provide a breath sample when requested.
3. He pleaded not guilty and his trial took place in the Magistrate's Court on 7 October 2005. In his defence he gave evidence that he had consumed only 2 pints of lager during the course of the evening but the effect of the alcohol was accentuated by the medication he was taking at the time. He also argued that, for medical reasons, he had a reasonable excuse for being unable to provide an

- adequate sample of breath. The Magistrate was satisfied that the charge was proved and duly convicted Mr Robilliard.
4. The sentencing was adjourned for the production of a Social Enquiry Report. Production of the report was expedited so that the sentencing could take place on 28 October as the Appellant was expecting to attend at Guys Hospital in London the following week for tests to assess his suitability to give a kidney to his wife in a transplant operation about which we will say more later. In the event, the hearing on 28 October did not take place because Mrs Robilliard had been admitted to Guys Hospital at an earlier date and the hospital had advised that it was important Mr Robilliard remained with her in order to accompany her on her return flight to Guernsey.
 5. He was sentenced on 10 November. Mr Robilliard immediately entered an appeal and the Magistrate granted bail pending the hearing of the appeal.
 6. The appeal was then delayed for a number of unavoidable reasons. The transcript was prepared and forwarded to the Secretary to the Bailiff on 20 December 2005. The appeal would have been given priority and heard during the Criminal Trials and Appeals fortnight in the middle of January, but the Appellant's Advocate indicated that would not be convenient because the Appellant and his wife would be undergoing further tests at Guys Hospital at that time. 31 January was the earliest convenient date.
 7. On 30 January 2006, the Appellant applied to the Deputy Bailiff sitting alone to adjourn the appeal hearing until some time in the summer of 2006 which would have been after the transplant operation and after a 3 month period of convalescence. The Deputy Bailiff refused the application because he considered that the interests of justice required that the appeal should proceed without undue delay. He also considered it was in the best interests of the Appellant and his family that they should know the outcome of this appeal sooner rather than later, whatever might be the decision on the appeal.
 8. It is regrettable that 7½ months have elapsed between the date of commission of the offence and the hearing of the appeal. Such delays that have occurred have all been unavoidable and no-one is to be blamed or criticised. The facts of the case do however illustrate the importance of proceeding with all criminal hearings in a timely manner. Since the date of commission of the offence in this case, Mrs Robilliard's health has deteriorated to a considerable extent and the family have had the uncertainty of the outcome of the proceedings hanging over them throughout that time. That cannot have been in their best interests and nor is it in the best interests of the administration of justice in this island.

Mitigation

9. At the sentencing hearing before the Magistrate, the mitigation presented by Advocate Fooks on Mr Robilliard's behalf included a number of points. Firstly, she said that a roadside breath test reading of 69 indicated that if Mr Robilliard had been able to provide a breath sample at the Police Station, it would have been just under twice the legal limit. Secondly, although he had two previous drink-driving convictions, the last of them was 7 years old and

Mr Robilliard had been back on the road for 3 years without previous incident. Most significantly, she pleaded that the Appellant's wife was approaching end stage renal failure and would imminently require renal replacement therapy. At that time, the Appellant was undergoing tests to assess his suitability as a donor. If he was sentenced to a prison sentence, it would delay the progress of the donor assessment and the subsequent timing of the transplant surgery which in turn would have serious implications for Mrs Robilliard's short-term quality of life, her long-term rehabilitation with a successful transplant and the potential longevity of the kidney transplant itself. Advocate Fooks argued the Appellant was the main breadwinner although, in view of his wife's illness, he was only able to work 3 days a week as he had to look after her and play a major role in looking after their 5 year old son. The Magistrate indicated that he was bound by clear Royal Court sentencing guidelines. He reduced the custodial sentence to 21 days to reflect the personal mitigation but felt it was inappropriate to suspend the sentence in view of the guidelines.

10. At the hearing of the appeal, the Appellant produced fresh evidence as to his wife's state of health. She had commenced peritoneal dialysis at the end of 2005, but had experienced a number of difficulties with it so the treatment had been discontinued. Guys Hospital intended to expedite a living donor transplant at the earliest opportunity and planned to schedule the surgery in February or March in order to avoid further attempts at dialysis and surgery for dialysis access. The Appellant is the only potential donor and tests had been completed which indicated his compatibility.
11. Mrs Robilliard is now seriously ill. The levels of urea, creatine and potassium in her body are giving cause for concern. The potassium level is only just below the level at which she has been advised that it could trigger heart failure; any additional stress could be critical and the Appellant was concerned at the stress his wife would suffer if he was sent to prison. In addition, she is unable properly to care for their 5 year old son and cannot, for example, put her hand in water. Their family circumstances are such that there is no other member of the immediate family who would be available to assist. Mrs Robilliard regularly attends at the Princess Elizabeth Hospital at least twice a week and if there was any further deterioration in her condition, admission to hospital, either in Guernsey or at Guys would be necessary. Mr Robilliard would wish to be with her and in particular he would wish to be with her if she was to suffer a heart attack. Furthermore, if a bed becomes available at Guys, so that it is possible to carry out the transplant operation at an early date, he would need to be with her. That would not be possible if an immediate custodial sentence was imposed, as was confirmed to the Royal Court by a letter from the Prison Service.
12. Mrs Robilliard's condition has deteriorated very significantly in the period that had elapsed since Mr Robilliard appeared before the Magistrate for sentencing. We agreed, without opposition from Crown Advocate McKerrell, to review the sentence on the basis of the up to date evidence available to us, and not on the basis of the medical condition as it was presented to the Magistrate. The court therefore expresses no criticism whatsoever of the sentence imposed by the Magistrate when he considered the matter in November.

Hatwell Guidelines

13. On 8 June 2004, in an Appeal from the Magistrate's Court in the case of *Hatwell v Law Officers of the Crown* and *Ogier v Law Officers of the Crown*, the Royal Court laid down guidelines to be followed by the Magistrate's Court when sentencing drink drive offenders. The Royal Court endorsed the Magistrate's Court's policy of imposing a custodial sentence when the reading is over 110 micrograms, that is to say over three times the legal limit. It directed that 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. The Royal Court considered the length of the sentence of imprisonment which is to be imposed. On the basis that the maximum penalty of three months in prison should be reserved for serious cases and those where there is no plea of guilty, the Royal Court indicated that the starting point where there is a guilty plea and no aggravating circumstances should be between 4 weeks and 6 weeks imprisonment. The Royal Court then went on to consider whether the sentence for imprisonment should be suspended and said the following:-

"It is not appropriate for Appellate Courts to give general guidance as to where the border line 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 the 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".

Authorities on Suspending Sentence

14. In the present appeal Advocate Domaille, (who appeared on behalf of Mr Robilliard) in his helpful and thorough submissions, referred to a number of decisions of the English Court of Appeal as to when situations amount to "exceptional circumstances" for the purpose of deciding whether to suspend a custodial sentence. They included the case of *Dilaver Bellikli [1998] 1 Cr.App.R.(S.) 135*. We cite the head note :

"A sentence of two years' imprisonment for facilitating illegal entry suspended in view of the grave illness of the appellant's child.

The appellant was convicted of facilitating illegal entry. The appellant drove off a Channel ferry at Dover and was found to have an illegal entrant concealed in the rear of his van behind a quantity of canned beer. Sentenced to two years' imprisonment and ordered to pay prosecution costs of £700. The appellant's child was gravely ill and would probably require major surgery in the near future. The appellant's wife was not fluent in English, and it was essential that there should be a member of the family who spoke English available if the treatment were to be successful.

Held: *the problem for the Court was to determine whether the situation amounted to "exceptional circumstances" for the purposes of Powers of*

Criminal Courts Act 1973 section 22(2). The Court had been persuaded that the circumstances did fall into that category, and the Court would suspend the sentence, having reduced it to 18 months to take account of the period already spent in custody by the appellant”.

Conclusion

15. The Royal Court is satisfied that the medical condition of the Appellant’s wife at the date of hearing the appeal, combined with the fact that the Appellant is the only potential donor, are sufficient to amount to “exceptional circumstances” which justify a suspended sentence. We reject the Appellant’s first two grounds of appeal namely that a custodial sentence was wrong in principle and that the sentence imposed was manifestly excessive.
16. We confirm the guidelines in *Hatwell* and state that they are to continue to be applied. We reiterate that it is not appropriate to give general guidance as to what will amount to exceptional circumstances which would justify suspending a custodial sentence in particular cases. The circumstances in this case are exceptional and highly unusual.
17. By virtue of Section 6 of the Magistrate’s Court (Criminal Appeals) (Guernsey) Law 1988 the Royal Court has power to award any punishment whether more or less severe, than the Magistrate’s Court.
18. The Magistrate had already given credit for the mitigation in reducing the length of the custodial sentence to 3 weeks. We consider that if that 3 week sentence is to be suspended because of the further mitigating factors, the Appellant would have had a double benefit from the mitigation. Applying the *Hatwell* guidelines and taking account of the facts that Mr Robilliard has previous convictions, in 1994 and in 1998 for drink driving offences, that he had failed to give a breath sample and that he had pleaded not guilty, the appropriate length of sentence is 8 weeks.
19. In the Social Enquiry Report prepared for the Magistrate, and which had not been updated for the appeal, the recommendation was to attach a Supervision Order to any suspended sentence so as to allow the Probation Service to complete a piece of work focusing on alcohol education with a particular emphasis towards driving and the effect alcohol has on the body. We accept and adopt that recommendation but extend the period of supervision to 9 months, to allow for the length of time during which the Appellant will be undergoing surgery and convalescing thereafter. As we said above, the period of disqualification remains as decided by the Magistrate.

R J Collas

13 February 2006