Appeal against a Sentence imposed by the Magistrates Court in respect of an offence contrary to section 4 of the Protection from Harassment (Bailiwick of Guernsey) Law, 2005, following the breach of a restraining order.

[2020]GRC055

IN THE ROYAL COURT OF GUERNSEY

ON APPEAL FROM THE MAGISTRATE'S COURT

Between

DAVID BOGLE **Appellant**

-v-

THE LAW OFFICERS OF THE CROWN **Respondent**

Appeal against Sentence imposed by the Magistrate's Court on 12th March 2020

Before: Richard James McMahon Esq., Deputy Bailiff

Decision on papers

Judgment handed down: 14th April 2020

Advocate for the Appellant: **Advocate S E Steel**
Advocate for the Respondent: **Advocate R J Calderwood**

Cases and materials referred to in the Judgment:-

The Protection from Harassment (Bailiwick of Guernsey) Law, 2005
The Probation (Bailiwick of Guernsey) Law, 2018
Loi relative à la Probation de Délinquants (registered on 23 November 1929)
Billet d'État No. XI of 2015, Article VII
Becke v Smith (1836) 2 Meeson and Welsby 191
In re Sigsworth [1935] Ch 89
R (on the application of Spath Holme Ltd v Secretary of State for the Environment, Transport and Regions [2001] AC 349
Pepper v Hart [1993] AC 593
R v Evans [1959] 1 WLR 26
The Criminal Justice Act 1948
R v Carr-Thompson [2000] 2 Cr App R (S) 335
The Powers of Criminal Courts Act 1973
Fontenau v Director of Public Prosecutions [2001] 1 Cr App R (S) 15
Sentencing Council, *Totality guideline*
McGonnell v United Kingdom (2000) 30 EHRR 289

Introduction

1. On 12 March 2020, the Appellant, David Bogle, was sentenced to three months' imprisonment with effect from 20 February 2020 and a Probation Order for a period of 18 months, to which two conditions were attached. These sentences were imposed in respect of an offence, to which he had pleaded guilty at the earliest opportunity, contrary to section 4 of

the Protection from Harassment (Bailiwick of Guernsey) Law, 2005 of breaching a restraining order that had been imposed on him on 19 December 2019 for a period of 18 months. A further aspect of the sentence imposed on 12 March 2020 was that the period of operation of that restraining order was extended to 5 years. The Magistrate's Court also ordered that the contents of the envelope that the Appellant had passed to another in breach of the restraining order be forfeited and destroyed.

2. By a Notice of Appeal dated 12 March 2020, settled by Advocate Steel, who appears on behalf of the Appellant, this appeal is advanced on the single ground that "*it is wrong in law to combine a probation order with a prison sentence despite the wording of the Probations Order Law (s.4)*". As an appeal on a question of law, which effectively amounts to an issue of how to construe the Probation (Bailiwick of Guernsey) Law, 2018 ("the 2018 Law"), and so might be regarded as a test case, it falls to be determined by me sitting unaccompanied by the Jurats. Further, in the current circumstances, both Advocate Steel and Advocate Calderwood (on behalf of the Crown) have agreed that this issue can be decided on the papers and without convening an oral hearing. In those circumstances, I have had the benefit of Skeleton Arguments dated 27 March 2020 from Advocate Steel, 31 March 2020 from Advocate Calderwood and Advocate Steel's reply dated 6 April 2020.

Facts

3. The restraining order was imposed on 19 December 2019 as part of a sentence that included an immediate custodial term of two months' imprisonment. The Appellant was released from serving that sentence on 17 February 2020. The restraining order refers to the Appellant's former partner. As well as prohibiting the Appellant from assaulting, molesting or otherwise interfering with her and going within 100 yards of a specified address, by para. 1.2 it prohibits him from "*Approaching, visiting or contacting, or attempting to approach, visit or contact, by any means whatsoever and whether directly or indirectly*" his former partner.

4. On 18 February 2020, the Appellant attended at Sir Charles Frossard House. This was apparently the eighth anniversary of the start of his relationship with his former partner. He had with him an envelope containing items intended for his former partner. He saw his former partner's brother-in-law and handed the envelope to him for onward transmission. He knew that this was a breach of the restraining order. The brother-in-law passed the envelope to his wife, the Appellant's former partner's sister, who involved the Police. In interview, the Appellant made full admissions. He pleaded guilty and a social enquiry report was ordered, in which the probation officer offered the view that the Appellant is obsessed/infatuated with his former partner and described the offence as a blatant breach of the restraining order. The author took the view that some statutory supervision post-release was required and recommended imposing a suspended sentence supervision order.

5. When imposing the sentence now being appealed, the Judge of the Magistrate's Court gave the Appellant credit for his guilty plea, however inevitable it was, and pointed out three disturbing aspects of the case. The first was that the offence was committed the day after being released from prison, which had been a sentence imposed for hounding the Appellant's former partner. The Judge noted that the report referred to the Appellant having forgiven his former partner, whereas the Judge considered it should be the Appellant forgiving her. Thirdly, the Judge did not accept the submission made on behalf of the Appellant in mitigation that it had been a chance meeting with his former partner's brother-in-law. Instead, the Judge regarded this as a calculated act, which amounted to a direct breach of the restraining order. Whilst the Judge acknowledged that "*there is a view in certain quarters that custody and a probation order as a combined order is not a sentencing option that was intended when the new probation law came into force*", he took the view that "*the wording of the law could not be more clear, it says a probation order can be imposed in addition to any other sentence*". The Judge commented that "*such a blatant breach of the Restraining Order*

cannot … be met by other than immediate custody because it was a serious contempt". He regarded the amount of time already spent on remand (ie, three weeks) as insufficient to warrant an alternative disposal, eg, adopting the recommendation in the social enquiry report, but stated that the term of imprisonment he had in mind for this offence was 5 months, but by making a combination order, he would reduce that to 3 months to reflect the imposition of the probation order.

The Appellant's submissions

6. Advocate Steel concedes that the wording of section 4 of the 2018 Law on its face permits a combination order to be made. Section 4(1) provides: Advocate Steel concedes that the wording of section 4 of the 2018 Law on its face permits a combination order to be made. Section 4(1) provides:

> "*Where a person is convicted of an offence punishable with imprisonment, the court by or before which the offender is convicted may make a probation order, on its own or in addition to any other sentence, for the purpose of –*"*Where a person is convicted of an offence punishable with imprisonment, the court by or before which the offender is convicted may make a probation order, on its own or in addition to any other sentence, for the purpose of –*
>
> *(a) the rehabilitation of, and prevention of further offending by, an offender, and*
>
> *(b) the protection of the public.*"

Subsection (2) provides that the maximum duration of a probation order is three years and subsection (3) clarifies that the offender is supervised by a supervisor, who "*shall promote the offender's compliance with the purposes of the order*".

7. Despite that concession, Advocate Steel submits that a probation order has been created as an alternative to custody, referring to the consequences of the order being breached. He also refers to the policy letter prior to the enactment of the 2018 Law explaining that a probation order can be combined with community service orders and fines, but being silent about combining an order with a prison sentence. Consequently, the "golden rule" of statutory interpretation should be applied under which the Court is invited to read in words to ensure that a probation order remains an alternative to prison.

8. As support for these contentions, Advocate Steel explains that the scheme of the previous legislation relating to probation orders, the *Loi relative à la Probation de Délinquants*, registered on 23 November 1929 ("the 1929 Law"), shows that imprisonment and a probation order were mutually exclusive. Rather confusingly, he quotes article 1(2), which deals with what happens on conviction on indictment in this Court as opposed to what happens in the Magistrate's Court, but when combined with article 2(1) referring to the option to make a probation order as well as discharging conditionally, it is apparent that the Royal Court could not make a so-called combination order.

9. Advocate Steel next turns to the debate in the States of Deliberation on the policy letter and propositions of the then Home Department that took place on 24 June 2015. The extract from Hansard shows that there was no debate at all. The policy letter dated 13 April 2015 (Article VII of Billet d'État No. XI of 2015) refers to the proposed new legislation "*maintaining the spirit of the 1929 Law*". It also expressly refers to having considered "*extending sentencing options whereby an offender could be sentenced to a combination of a probation order and a community service order*" (para. 2.10) and, further, that the Department's proposal was "*that a court should be able to sentence an offender to a probation order and a community service*

order for the same offence, but only where the community service order is made as an alternative to custody, pursuant to s.2(4) of the 2006 Law" (para. 3.8). The States resolved *inter alia* to direct the preparation of legislation specifically to "*make a probation order a sentence of the court on conviction of an imprisonable offence with the purpose of public protection, rehabilitation and prevention of further offending*" and to "*specify the process of making a probation order, requirements which can be attached and the ability to make a probation order in conjunction with a community service order*" (paragraphs (c) and (d) respectively). Advocate Steel suggests this demonstrates that it was not envisaged that probation orders would be made alongside custodial sentences. He adds that probation orders are designed to take effect in the community, as shown by the requirements that can be attached to an order by virtue of section 6 of the 2018 Law.

10. In relation to a court's powers to deal with a breach of a probation order, Advocate Steel points out that nothing is said about the position where the offender has already served a prison sentence for the offence. He expresses concern that an offender would be at risk of serving a duplicative sentence for the same offence.

11. Advocate Steel's reliance on the "golden rule" derives from the English law approach frequently quoted from *Becke v Smith* (1836) 2 Meeson and Welsby 191. This was an action in trover and so far removed from the facts of the present case, but the general principle stated by Parke B was:

> "*It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.*"

Further, Advocate Steel cites *In re Sigsworth* [1935] Ch 89 as an example of where the "golden rule" was applied even where the statutory words prima facie carry only one meaning. The short judgment of Clauson J does not expressly state that, but refers to the well-established concept under which a murderer was precluded from claiming a benefit conferred on him by his victim's will being appropriately extended to operate on an intestacy on the basis that "*general words which might include cases obnoxious to the principle must be read and construed as subject to it*". In the light of this rule of interpretation, Advocate Steel submits that the general words "*in addition to any other sentence*" in section 4(1) of the 2018 Law should be qualified as meaning "*save for immediate imprisonment*".

12. In his submissions in reply, Advocate Steel comments on what Advocate Calderwood has pointed out about the way in which the Judge in the Magistrate's Court explained that the term of imprisonment he had in mind was being reduced as a result of also imposing a probation order, which means that any sentence imposed on breach of the probation order would inevitably take that into account. He suggests that this can be equated to a form of suspension of the further term of imprisonment, which would amount to a dilution of the statutory purpose of imposing a probation order. He also suggests that the absence of any reference to punishment on the face of the 2018 Law shows that where a Court wishes to punish, that is not a purpose covered by a probation order.

The Respondent's submissions

13. On behalf of the Crown, Advocate Calderwood has indicated that the appeal is "*neither supported nor contested*". In his helpful Skeleton Argument he has identified a number of issues he suggests are worth considering, drawing on case law in England and Wales.

14. Advocate Calderwood questions whether it is permissible for a Guernsey court to have regard to *travaux préparatoires* to aid the interpretation of legislation, citing ***R (on the application of Spath Holme Ltd v Secretary of State for the Environment, Transport and Regions*** [2001] AC 349, in which the doctrine established in ***Pepper v Hart*** [1993] AC 593 was discussed, noting that where the words are clear and unambiguous, no recourse can be had to such material.

15. He also highlights that the position in the Magistrate's Court under the 1929 Law, before it was repealed by the 2018 Law, was that article 1(1) indicated that "*without proceeding to conviction*" the Magistrate's Court (and before it the Police Court) could discharge an offender conditionally and, if it wished, add a probation order. Accordingly, in the Magistrate's Court the probation order was not an alternative to imprisonment, because the power to imprison depended upon the offender being convicted.

16. Advocate Calderwood's industrious researches, though, have also led him to refer to a series of cases in which the lawfulness of these so-called combination orders was discussed as a matter of English law. The earliest is ***R v Evans*** [1959] 1 WLR 26. The appellant was sentenced first at Quarter Sessions on an indictment containing two counts, the first of which resulted in three months in a detention centre and the second of which attracted a two-year probation order. He was then sentenced the following year for two offences in the magistrates' court and fined in respect of each. He was also committed to Quarter Sessions for breach of the probation order and duly sentenced to Borstal training, which was the decision from which he appealed. In giving the judgment of the court, Lord Parker CJ commented that there was nothing express in the Criminal Justice Act 1948 to prevent the imposition of a probation order instead of a sentence such as detention in a detention centre, but took the view that "*the making of a probation order in such circumstances is contrary to the spirit and intention of the Act*". The view taken was that probation running concurrently with detention would amount to a form of after-care. Moreover, "*in the ordinary way a probation order must operate forthwith*", whereas the probation order "*would not become fully effective until he was released from the services*". Consequently, "*where one is dealing with two offences and where for one offence he is placed wholly and entirely out of the control of the probation officer, it seems to the court that an order for detention in a detention centre and an order for probation are wholly inconsistent*".

17. This decision was applied in ***R v Carr-Thompson*** [2000] 2 Cr App R (S) 335. The appellant admitted breaching a community service order and was committed by the youth court to the Crown Court. In the meantime, she appeared again before the youth court and was sentenced to two months in a young offender institution. Her appeal against that sentence and the breach of the community service order were dealt with by the Crown Court by dismissing her appeal, thereby leaving her subject to detention, and revoking the community service order and replacing it with a probation order. Although the applicable statute had changed, being by then the Powers of Criminal Courts Act 1973, in which section 2(1) specified the purposes of a probation order, the English Court of Appeal indicated that the principle remained unchanged from what had been said in ***Evans***. Accordingly, it ruled that "*it is impermissible to combine a probation order with an immediate custodial sentence whether in respect of the same offence or for different offences, sentenced on the same occasion, since this is inconsistent with the purpose and spirit of section 2(1).*"

18. Shortly thereafter, in ***Fontenau v Director of Public Prosecutions*** [2001] 1 Cr App R (S) 15, the Divisional Court considered both cases where the appellant had been sentenced on separate occasions, but had had a probation order imposed whilst a serving prisoner. The decision was that the probation order imposed on the later occasion was not unlawful. At para. 18 of the judgment, Lord Bingham of Cornhill CJ stated:

> "*For my part I regard it as unnecessary, insofar as it would be permissible, to reconsider at this stage whether the rule which has been derived from Evans, and which was applied in Carr-Thompson, is correct. Ordinarily it would doubtless be futile and thoroughly undesirable to impose community penalties and custodial sentences on the same occasion. There is, however, in my judgment nothing in statute, authority or principle which precludes the justices from taking the course which they did in this case.*"

19. Advocate Calderwood has also referred to the position in England and Wales under the Sentencing Council's *Totality guideline*, in which the approach to take to sentencing multiple offences where one would merit immediate custody and another would merit a community order is that:

> "*A community order should not be ordered to run consecutively to or concurrently with a custodial sentence. Instead the court should generally impose one custodial sentence that is aggravated appropriately by the presence of the associated offence(s). The alternative option is to impose no separate penalty for the offence of lesser seriousness.*"

This reflects the principle established in *Evans*, albeit it does not relate directly to whether a combined order can be imposed in respect of a single offence.

20. On the question of what would happen in a case such as the present if the probation order were subsequently breached, Advocate Calderwood recognises that it would be appropriate to take into consideration the amount of time already served in prison, which is why the spectre of "duplicate" periods of custody raised by Advocate Steel lacks reality. Further, there is nothing on the face of the 2018 Law that would prevent the requirements of a probation order being satisfied whilst the offender remains in custody on the basis that the manner of supervision at that time is a matter for the supervisor. Although the propriety of doing so is not entirely clear, Advocate Calderwood also included an e-mail exchange he had had with a senior probation officer in which it was clarified that there are no administrative difficulties for the service through the imposition of both imprisonment and a community order.

Discussion

21. The submissions made on behalf of the Appellant do not persuade me that the Judge of the Magistrate's Court fell into error. Reliance on the *travaux préparatoires* really does not assist, although it may indicate that the level of scrutiny given to the 2018 Law in draft was not as thorough as it might have been. What matters is to construe the legislation that has been enacted. Any subjective intention, as I will explain, is irrelevant. Indeed, the policy letter from the Home Department represented the views of a small minority of the States of Deliberation and the absence of any debate when the propositions therein came before Members does not mean that the legislation subsequently approved is anything other than what was the legislature's intention at the time of enacting it. I am satisfied that the words used in section 4(1) of the 2018 Law are clear and unambiguous. This is not, therefore, a case in which the "golden rule" can assist. It is clear that there is no "*manifest absurdity or repugnance*" in the result. Indeed, it could be said with some justification that the Judge was entitled to tailor the penalty for the offence for which he was sentencing the Appellant so as to reflect its seriousness whilst at the same time accepting that element of the social enquiry report that urged a form of supervision for the Appellant. I will explain why I have reached that conclusion in more detail, but in many respects this will principally be by reference to what Advocate Calderwood included in his Skeleton Argument, because he has raised the points that really should have been raised on behalf of the Appellant.

22. Dealing first with the issue of how much regard can be had in this jurisdiction of the *travaux préparatoires* on which legislation is based, there are no constraints on such use, as there were in the United Kingdom prior to *Pepper v Hart*. The process of enacting legislation differs from the parliamentary stages in other places based on the Westminster model. The main debate in the States of Deliberation usually takes place on the policy letter of the sponsoring Committee. Once the principles are approved, as was the case when the Home Department obtained approval in 2015, a direction is given to prepare draft legislation. When that draft legislation has been prepared to the satisfaction of the sponsoring Committee, it is put before what is now the Legislation Review Panel of the Scrutiny Management Committee. Once that Panel has approved the draft, it is forwarded to Her Majesty's Greffier and thereafter included on the business for a future States Meeting. The 2018 Law in draft was approved by the States on 28 November 2018. One advantage since 2012 is that there is a *Hansard* of parliamentary proceedings. On that occasion there was again no debate. (The *Hansard* shows that I was presiding in the States of Deliberation on that day and, in the light of *McGonnell v United Kingdom* (2000) 30 EHRR 289, neither party has raised any issue about me determining this appeal.) Accordingly, where there is any question about what the resulting legislation may mean, in order to resolve any ambiguity, regard can, and often is, had to the policy letter and it would now be open to anyone to refer to the debate as reproduced in *Hansard*. On that latter point, because there was nothing of substance said on either occasion, I leave open the question of whether there are any refinements to this approach similar to those discussed in the *Spath Holme* case.

23. The canons of statutory construction applied elsewhere in British jurisdictions operate in Guernsey in a similar fashion. For that reason, further assistance can be found in what the House of Lords explained in the *Spath Holme* case. For example, in the speech of Lord Nicholls of Birkenhead (at page 397), the following general comments, which I regard as helpful, were made:

> "*Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that "the intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used."*
>
> *In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute. Another recently enacted principle is that so far as possible legislation must be red in a way which is compatible with human rights and fundamental freedoms: see section 3 of the Human Rights Act 1998. The principles of interpretation include also certain presumptions. To take a familiar instance, the courts presume that a*

mental ingredient is an essential element of every offence unless Parliament has indicated a contrary intention expressly or by necessary implication.

Additionally, the courts employ other recognised aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history. This extraneous material includes reports of Royal Commissions and advisory committees, reports of the Law Commission (with or without a draft Bill attached), and a statute's legislative antecedents.

Use of non-statutory materials as an aid to interpretation is not a new development. As long ago as 1584 the Barons of the Exchequer enunciated the so-called mischief rule. In interpreting statutes courts should take into account, among other matters, "the mischief and defect for which the common law did not provide": Heydon's Case (1584) 3 Co Rep 7a, 7b. Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to sure. In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool.

This is subject to an important caveat. External aids differ significantly from internal aids. Unlike internal aids, external aids are not found within the statute in which Parliament has expressed its intention in the words in question. This difference is of constitutional importance. Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely on what they read in an Act of Parliament. This gives rise to a tension between the need for legal certainty, which is one of the fundamental elements of the rule of law, and the need to give effect to the intention of Parliament, from whatever source that (objectively assessed) intention can be gleaned. Lord Diplock drew attention to the importance of this aspect of the rule of law in Fothergill v Monarch Airlines Ltd [1981] AC 251, 279-80:

> *"The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation."*

This constitutional consideration does not mean that when deciding whether statutory language is clear and unambiguous and not productive of absurdity, the courts are confined to looking solely at the language in question in its context within the statute. That would impose on the courts much too restrictive an approach. No legislation is enacted within a vacuum. Regard may also be had to extraneous material, such as the setting in which the legislation was enacted. This is a matter of everyday occurrence.

> *That said, courts should nevertheless approach the use of external aids with circumspection. Judges frequently turn to external aids for confirmation of views reached without their assistance. That is unobjectionable. But the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. Sometimes external aids may properly operate in this way. In other cases, the requirements of legal certainty might be undermined to an unacceptable extent if the court were to adopt, as the intention to be imputed to Parliament in using the words in question, the meaning suggested by an external aid. Thus, when interpreting statutory language courts have to strike a balance between conflicting considerations.*" *That said, courts should nevertheless approach the use of external aids with circumspection. Judges frequently turn to external aids for confirmation of views reached without their assistance. That is unobjectionable. But the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. Sometimes external aids may properly operate in this way. In other cases, the requirements of legal certainty might be undermined to an unacceptable extent if the court were to adopt, as the intention to be imputed to Parliament in using the words in question, the meaning suggested by an external aid. Thus, when interpreting statutory language courts have to strike a balance between conflicting considerations.*"

24. In my judgment, the concession made by Advocate Steel that the literal meaning to be given to section 4 of the 2018 Law does not make the combination order imposed on the Appellant unlawful shows that the words used are clear and do not give rise to any absurdity. His reliance on the 2015 policy letter is not based on seeking to shed light on the meaning to be afforded to words that are ambiguous or to resolve what would otherwise be an absurd outcome but instead appears to me to be based upon seeking to demonstrate what the subjective intention of the legislators was. Adopting the approach explained by Lord Nicholls, this is not a permissible use of those materials. I would go further here, and add that, where a court is construing a piece of primary legislation, such as the 2018 Law, even if the Projet put before the States of Deliberation appears to go further than the previous Resolutions directing that legislation be enacted, and there was no supplementary policy letter seeking approval for something going further, this is not a basis on which any court could declare that the primary legislation then enacted, and to which Royal Sanction is given, is invalid. Consequently, the constitutional position of the courts in interpreting the legislation enacted by the States of Deliberation does not enable the Court to "correct" the words approved by the legislature, where they are clear, and any remedy for a perceived shortcoming in the clear terms of the Law lies in lobbying the parliamentarians to amend what they have already approved. In this manner, legal certainty follows and the rule of law is preserved. Accordingly, for this reason, I find there is no scope to invoke the "golden rule" in the present case.

25. In any event, I have looked beyond the words in section 4(1) at the rest of the statute to ascertain whether there is anything in the scheme of the 2018 Law, taken as a whole, which might lead to a different conclusion. For example, I have considered whether the consequences of breaching a probation order create the type of risk to which Advocate Steel has referred. Upon breach, the court concerned can continue the probation order (with or without variation) and, if so, decide whether, in addition, to order the offender to pay a fine, or it may revoke the order and, if it does that, "*may deal with the offence in respect of which the order was made, in any manner in which the offender could have been dealt with for that offence*". If the court dealing with the breach were to re-sentence without having any regard to what has happened prior to that exercise, the risk of imposing a sentence that is manifestly

excessive arises. By way of analogy, although there is nothing explicit about giving credit for time spent on remand, it is so commonplace to take into account any time already spent in custody, that the same approach would, as Advocate Calderwood points out, most likely, if not inevitably, follow. This also applies if the offender is convicted of a further offence during the currency of the probation order. The risk of serving time in prison twice for the same offence, which I think would be repugnant, is, in my view, no more than fanciful.

26. I have also considered whether there is any merit in Advocate Steel's reference to the regime under the 1929 Law and the apparent intention to retain the spirit of that Law in the 2018 Law. As I have already acknowledged, in the Royal Court, article 1(2) of the 1929 Law provided that, upon conviction, instead of imprisoning for an offence, a probation order could have been made. Whether the position would have been the same if two or more offences fell to be sentenced, as was the position in the English cases to which Advocate Calderwood has referred, is unclear. In the Magistrate's Court, if the option of a probation order was taken, this would be in place of a conviction. Article 1(1) of the 1929 Law provided:

> "*Where any person charged before the [Magistrate's Court] with an offence punishable by such Court and the Court thinks that the charge is proved but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the Court may without proceeding to conviction, make an order, either–*
>
> *(a) dismissing the charge; or*
>
> *(b) discharging the offender conditional on his taking an oath or finding bail with or without sureties in such sum as the Court shall think fit, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.*"

The details of the probation order were then found in article 2:

> "*(1) In addition to taking an oath or finding bail as provided in the preceding article the Court may order that the offender be under the supervision of such person as may be named in the order during the period specified in the order and may make such conditions for securing such supervision as the Court thinks fit. Such order in this law is referred to as a probation order.*
>
> *(2) A probation order may contain such additional conditions with respect to residence, abstention from intoxicating liquor and any other matters as the Court may, having regard to the particular circumstances of the case, consider necessary for preventing a repetition of the same offence or the commission of other offences.*"

27. Whilst I accept that, prior to the 2018 Law, the type of sentence imposed in the Magistrate's Court for a single offence as in the present case would not have been available, meaning that such a sentence, if imposed, would have been wrong in law, as I have explained, I am not persuaded that it is the function of this Court to conclude that the States of Deliberation must have intended to have included the qualifying words suggested by Advocate Steel. If it were that obvious, those words would have been included when the 2018 Law was enacted. If there has been an omission on the part of the legislature with these unintended consequences,

remedying that error is a simple and straightforward process through the States of Deliberation. When considering the range of sentencing options available, a suspended sentence supervision order under the Criminal Justice (Suspended Sentence Supervision Orders) (Bailiwick of Guernsey) Law, 1984 is a combination of a custodial sentence, albeit not one taking immediate effect, and supervision by a probation officer, so I do not think it can be asserted with any confidence that the legislature did not intend to make a combination order available.

28. What has led to some hesitation on my part is what Lord Bingham had to say in the ***Fontenau*** case brought to the Court's attention by Advocate Calderwood: "*it would doubtless be futile and thoroughly undesirable to impose community penalties and custodial sentences on the same occasion.*" The statutory framework at the time was found in the Powers of Criminal Courts Act 1973. This was a consolidation measure. The terms of section 2 of the 1973 Act were drawn from what had been section 3 of the Criminal Justice Act 1948, to which reference had been made in ***Evans***, and subsection (1) of the 1973 Act (since repealed) provided:

> "*Where a court by or before which a person of or over seventeen years of age is convicted of an offence (not being an offence the sentence for which is fixed by law) is of opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order, that is to say, an order requiring him to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years.*"

The inclusion of the words "*instead of sentencing him*" strike me as comparable to the scheme of the 1929 Law. It perhaps explains why reference was made to "*the spirit and intention of the Act*". In comparison, the wording used in section 4(1) of the 2018 Law is quite different. The offence must be one punishable with imprisonment and there must be a conviction (again being a different approach to how a probation order would be made in the Magistrate's Court under the old 1929 Law) and, in such a case, the court is empowered to make a probation order "*on its own or in addition to any other sentence*". In doing so, the purpose must be "*the rehabilitation of, and prevention of further offending by, an offender*" and "*the protection of the public*".

29. Returning briefly to the Home Department's 2015 policy letter and para. 3.8, to which I have already referred, it explains that it was envisaged that both a probation order and a community service order could be imposed for the same offence "*but only where the community service order is made as an alternative to custody*". It follows from that concept that the custody threshold for the offence must have been found to have been passed, because otherwise a community service order would not be being made as a direct alternative. In respect of such an offence, it means that a suspended sentence supervision order would also be available. Accordingly, it appears to me that the combination of an immediate custodial sentence and a probation order might equally be available because it is a pre-condition of both of those other outcomes that the court must have satisfied itself that the custody threshold was passed, and would then turn its mind to whether some disposal other than immediate custody was appropriate. Perhaps the purpose of the probation order might be thwarted if the term of immediate imprisonment imposed were so long that the supervisory aspect of the probation order would prove ineffective, but a sentence of three months' imprisonment, where the period of supervision thereafter under the probation order reflects what might otherwise have been available and imposed under a suspended sentence supervision order (or a combination of a community service order and a probation order), does not, in my judgment, offend against the purpose specified in section 4(1) of the 2018 Law. Following that reasoning, I am

satisfied that the concerns expressed by Lord Bingham do not make the sentence imposed on the Appellant futile.

Conclusion

30. For the reasons I have given, this appeal is dismissed.

31. As the Judge of the Magistrate's Court stated, the wording of the 2018 Law "*could not be more clear*" and a probation order can be made "*in addition to any other sentence*". Accordingly, when looking at the other provisions in the 2018 Law, there is nothing I find that suggests the intention of the legislature has not been expressed accurately in that subsection. Moreover, I find no manifest absurdity or repugnance in the availability of such a combination order for an offence such as that committed by the Appellant, where a short custodial sentence is warranted and supervision under a probation order is eminently sensible to rehabilitate the Appellant, prevent him from further offending and to protect the public, and particularly his former partner. If the restraining order were to be treated as a form of civil non-molestation order, what the Appellant did, especially so soon after being released from prison, was a serious contempt and such a blatant breach of the Magistrate's Court's order needed to be visited with a custodial penalty. In my judgment, there is nothing in the 2018 Law, or by reference to any other authority or principle, which precluded the Judge from crafting a sentence for this offence that served as punishment and combined all the purposes for which a probation order is made. I consider that a combination order serves the ends of justice more suitably than imposing a longer, but still short, sentence of imprisonment in isolation, as the Judge indicated. However, if those who have responsibility for justice policy disagree, then returning to the legislature to amend the 2018 Law is the solution available.