ROYAL COURT

27th April, 1988

Before: the Bailiff,
assisted by
Jurats Vint and Orchard

Her Majesty's Attorney General
- v -
John Lorimer Evans

Appeal against sentence of four days' imprisonment in respect of one infraction of Article 16 (as amended) of the Road Traffic (Jersey) Law, 1956

Advocate S.C. Nicolle for the Crown
Advocate A.P. Begg for the appellant

JUDGMENT

BAILIFF: This appeal arises out of a sentence of four days' imprisonment imposed by the Assistant Magistrate on the appellent on the 21st March, 1988, for an infraction of Article 16 of the Road Traffic (Jersey) Law, 1956, (as amended) that is to say driving whilst impaired through drink or drugs. According to the evidence, the circumstances were that Mr Evans, the appellant, had indulged in a very heavy drinking session the night before to celebrate a rugby victory and that he did not use his car on that occasion and returned home that night, having consumed, according to what he told

the probation officer, at least twelve pints of beer.

The next day he returned to the Rugby Club to act as a linesman for a match and he said he consumed two pints, one at 5.30 p.m. and one at 7.00 p.m. He drove home and was arrested at about 9.00 p.m. and having given samples, they disclosed, so far as the blood alcohol level is concerned, that it was at the level of 225 milligrams per millilitre.

The basis of the appeal is that Mr Evans is a first offender and we accept, for the purposes of the argument that he was, although he had a previous conviction for a similar offence a number of years ago, but it was so far back that it is fair for us, and indeed the learnèd Assistant Magistrate did, regard him as virtually a first offender. But the basis of the appeal is also that there were exceptional circumstances which should have entitled the Magistrate not to have imposed a prison sentence of four days.

There are two aspects to the question of exceptional circumstances; the first is this (this is a matter of practice in the English Courts and it is one which I think the Court is prepared to accept here): If a judge or a magistrate postpones sentence and orders a probation or background report, and leaves the appellant, or the convicted person with the belief at the time he orders it that if the report is favourable he will not be sent to prison, and then the judge or magistrate imposes a prison sentence at the next hearing, that is a wrong principle of sentencing. We concur and we think that that is a principle which we can properly say reflects justice which we are all trying to do in these cases and we are quite sure that the learnèd Magistrates are aware of the danger, as indeed we are, of encouraging people to believe, when a report is ordered, that if it is favourable the convicted person will not go to prison. So we have to look at the first submission of Mr Begg: that there were exceptional circumstances inasmuch as the appellant was led to believe at the time the learnèd Assistant Magistrate ordered a probation report that if it were favourable, he would not go to prison. We have before us the transcript and we find on page two the following extract:

"JUDGE DOREY: Right, Mr Begg, your client has a conviction for driving under the influence but it is over twenty years' ago so I am not considering that at the moment."

(I have already referred to that, it's quite clear that the Magistrate did not take that into account).

"MR BEGG: I am obliged, Sir.

JUDGE DOREY: Careless driving in '76; he's had a clear record for 11 years. On the other hand the concentration of alcohol in his blood is so high that I must consider a custodial sentence.

ADVOCATE BEGG: Indeed, Sir.

JUDGE DOREY: And he has not been in prison before so I am going to ask for a probation report."

Now that is the sole exchange between the learnèd Assistant Magistrate and counsel upon which it is said the appellant is entitled to ask the Court to find that in ordering a probation report it was indicated to the appellant that if it were favourable he would not go to prison. We cannot read into that exchange between the learnèd Assistant Magistrate and counsel that interpretation. It is quite clear the Magistrate was not indicating in any way to the appellant that if there was a favourable report he would not go to prison. Therefore that submission of exceptional circumstances we do not find substantiated.

The second submission, as Mr Begg cogently argued, that the Magistrate, when he then received the probation report, did not take sufficient account of a number of special factors: (1) that the appellant was a first offender; (2) that he was of good character; (3) that the probation officer suggested that it wouldn't help to send him to prison; and (4) he did not take sufficient account of the actual circumstances of the offence with which, as this Court has said before, it should concern itself rather than the offender. The offence itself shows, as I have said, that the night before, the appellant drank a considerable amount and quite rightly did not attempt to drive his vehicle. Nevertheless, he drove the next day and consumed further drink and obviously had applied his mind as to whether he was fit or not. He clearly wasn't and we really cannot find that the Magistrate erred

in finding that there were not exceptional circumstances in the facts as before him that would entitle him to depart from the principle which this Court has supported that where there is a figure of 200 millilitres in the blood and over, even a first offender may go to prison unless there are exceptional circumstances. Therefore we are unable to find that the Magistrate erred in applying the principles to sentencing and although it is possible, had we being trying the case, that we might not have imposed a prison sentence, we do not think that it is wrong in principle and we do not think it is manifestly excessive and therefore the appeal fails and it is dismissed and you have your legal aid costs, Mr Begg.