

Judgment 10/2010

Uldis Bergmanis – Royal Court – (Criminal Appeal No 15 of 2009) - 11 March 2010

Criminal appeal from the Magistrate’s Court - appeal from conviction for being in charge of a motor vehicle with excess alcohol – statutory defence pleaded that there was no likelihood of the defendant driving while the proportion of alcohol in his breath still exceeded the prescribed limit – finding on the facts (as opposed to the law) in the court below could only be set aside if perverse – credibility of the defendant’s evidence – appeal dismissed.

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
(CRIMINAL CAUSES DIVISION)**

No.49 of 2009

On the 2nd day of March, 2010 before John Russell Finch, Esquire, Judge of the Royal Court, present: Alan Cecil Bisson, Esquire, Reverend Peter Gerald Lane, Susan Mowbray, Michael John Tanguy, David Osmond Le Conte and John Fergusson, Esquires, Claire Helen Le Pelley, Constance Adele Elizabeth Helyar-Wilkinson and Niall David McCathie, Esquire, Jurats.

ULDIS BERGMANIS

(Appellant)

v

THE LAW OFFICERS OF THE CROWN

(Respondents)

In the action of THE LAW OFFICERS OF THE CROWN against ULDIS BERGMANIS to pursue the appeal of which the said Bergmanis gave notice against the conviction imposed upon him in the Magistrate’s Court on the 2nd day of October, 2009 and the sentence imposed upon him on the 29th day of October, 2009 in the terms attached hereto;

WHEREAS THE COURT, consisting of a Judge sitting alone, this day heard Advocate S. Mallett for the Appellant and Advocate F. Russell for the Crown and DISMISSED the appeal against conviction;

THE COURT this day having again heard Advocate S. Mallett for the Appellant and Advocate F. Russell for the Crown ALLOWED the appeal against sentence and reduced the disqualification from holding or obtaining a driving licence in all categories from a period of four years to a period of eighteen months from the date of conviction.

S M SIMMONDS

Her Majesty’s Deputy Greffier

2 March 2010

PROCUREUR

THE LAW OFFICERS OF THE CROWN

ACTION

ULDIS BERGMANIS

to pursue the appeal of which the said Bergmanis gave notice against his **conviction** in the Magistrate's Court on the 2nd day of October, 2009, and against his **sentence** on the 29th day of October, 2009, in respect of one charge of being in charge of a motor vehicle on a road having consumed alcohol in such quantity that the proportion thereof in his breath exceeded the prescribed limit, contrary to section 2(2)(b) of the Road Traffic (Drink Driving) (Guernsey) Law, 1989, as amended, in respect of which the Court sentenced him to a Community Service Order of 60 hours of unpaid work as a direct alternative to 6 weeks imprisonment, and disqualified him from holding or obtaining a driving licence in all categories for a period of 4 years;

the whole as recorded by an Act of Court of the 29th day of October, 2009, a copy of which Act of Court, together with a transcript of proceedings, was annexed to the summons served upon the said Bergmanis.

And the said Law Officers claim costs.

Address for Service:

Advocate S. Mallett,
Atkinson Ferbrache Richardson,
Court Place,
St. Peter Port.

**Approved Judgment
11 March 2010**

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Appeal against Conviction

ULDIS BERGMANIS

(Appellant)

-v-

THE LAW OFFICERS OF THE CROWN

(Respondents)

Date of hearing: 2nd March 2010

Decision handed down: 11th March 2010

Before: John Russell Finch Esq., Judge of the Royal Court

Advocate for the Appellant: S Mallett
Advocate for the Respondents: F M Russell

Cases and Statutes referred to:-

Bracegirdle v Oxley [1947] KB 349

C.P.S. v Thompson [2007] EWHC 41 (Admin)

Sheldrake v DPP [2004] UKHL 43

The Road Traffic (Drink Driving) (Guernsey) Law, 1989, as amended, Sections 1 and 2

JUDGMENT

Background

1. On the 2nd October 2009, the Appellant, Mr Uldis Bergmanis (hereafter “D”) was convicted of an offence of being in charge of a motor vehicle on a road with excess alcohol, contrary to Section 2(2)(b) of the *Road Traffic (Drink Driving) (Guernsey) Law, 1989* (as amended), (“the Law”). The evidence was agreed and all in statement form, apart from that of D, who was assisted by a Latvian interpreter. The only issue was the statutory defence under Section 2(3) of the Law, whereby a person who proves at the time of the alleged offence the circumstances were such that there was no likelihood of his driving whilst the proportion of alcohol in his breath remained likely to exceed the prescribed limit, is entitled to acquittal. It was accepted D was in charge of the vehicle and had excess alcohol in his breath. This defence must be established by D in the balance of probabilities and he bears the persuasive version, as settled in the English case of *Sheldrake v DPP* [2004] UKHL 43.
2. The judgment given was a detailed one, longer and fuller than most decisions in summary proceedings. It is necessary at this stage to mention that the views taken of the credibility of the evidence in the lower Court can only be impeached if no reasonable tribunal, properly instructed, could have reached them. In other words, a finding on the facts can only be set aside (as opposed to a point of law) if perverse. This has been said very often in appeals to this Court and can be found set out in the text books, normally accompanied by a reference to

the case of *Bracegirdle v Oxley* [1947] KB 349, a five judge Divisional Court. This is stressed in this particular appeal today, as the question of D's credibility was central to the resolution of the case and findings were set out dealing with it.

3. After correctly directing herself on the law, the learned Judge of the Magistrate's Court set out the factual background from the agreed statements (page 26 of transcript D onwards). The Police had been called following a report of loud music emanating from D's vehicle at around 9.25 pm. The Officer had difficulty in attracting D's attention and had to open the door and remove the ignition key out of the ignition so that the music would stop. D was not co-operative at the scene and refused the roadside screening test. At the Police Station, after an interpreter had been called out and some hour and 45 minutes after apprehension, a reading of 131 was obtained, in excess of three and a half times the legal limit – a very high reading indeed. It is also worthy of note that on 2nd January, the next morning at 9.45 am. D provided a specimen of 45 mcg, still over the legal limit. It was D's account that he had no intention of driving on the evening of 1st January 2009 and was not going to drive until some 36 hours later. D had not wanted to return to his home nearby because his girlfriend was asleep.
4. It was found as a fact that D was extremely intoxicated and his judgment was impaired. He was in no fit state to be interviewed (page 28-H). He was vague about what he had consumed and was found as not wanting to be specific about what he had drunk. It appears that he admitted to two pints of beer and a share of a half litre of Jack Daniels. This would not account for what the learned Judge of the Magistrate's Court called "*an extraordinarily high reading*" (page 29-E). It was also found on the facts that D was deceiving the Court, the Police and possibly himself about what he had had. His evidence on this was not believed and it was found he was minimising and indeed marginalising what he had drunk. As the judgment put it (at page 29-H):

"I am satisfied that he did not understand or had deliberately chosen not to understand how much he truly did drink on 1st January, therefore he is not in a position to fully understand the level of alcohol that was in his breath and would have no concept of when he would have been legal or safe to drive. He says "That's not a problem because I wouldn't have driven at all on 2nd January". I was not satisfied by this evidence."

5. The Court concluded (page 30-E) by indicating that it had not found D to be truthful, particularly in relation to the quantity of what he had consumed. He had taken so much alcohol "*he would barely know what he was doing*". His judgment was so impaired that he did not satisfy the Court that there was "*no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath remained likely to exceed the prescribed limit, either on the night of 1st January or the next day*". D was therefore convicted as he did not establish his case to the prescribed onus.
6. These findings on the facts were open to the Court to make and cannot be considered unreasonable or perverse. The principle set out in para 2 above applies. It was also perfectly correct for the Court to reject D's explanations, based on the assessment of his overall credibility. This is above all a case which depends upon such an assessments, as the onus was on D to establish his defence. Nor, it should be added, is D's subjective intention decisive in circumstances where he is affected by drink, well above the prescribed level, has no way of knowing when his alcohol level would fall below the legal limit and has adduced no scientific evidence as to when that point might be reached, see *CPS v Thompson* [2007] EWHC 41 (Admin) especially para 11.
7. Matters of D's veracity and reliability were entirely a matter for the learned Judge of the Magistrate's Court and there is nothing in this appeal, which fails and is dismissed.
8. Appeal dismissed.