

Judgment 26/2006 Michael John Ogier – Royal Court (Criminal Appeal 23/2005) – 2nd June, 2006

Criminal appeal from the Magistrate’s Court – conviction – Supplementary Benefit (Guernsey) Law, 1971 – making false statements – whether miscarriage of justice – complaint against Advocate acting in the Court below – on appeal, oral evidence heard from the Appellant and from his Advocate – held that the Appellant had a fair trial and was properly defended – appeal dismissed

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 2nd day of June, 2006 before John Russell Finch, Esquire, Lieutenant Bailiff; sitting alone

No 23 of 2005

In the action of THE LAW OFFICERS OF THE CROWN against MICHAEL JOHN OGIER (“Appellant”) to pursue the appeal of which the said Ogier gave notice against the conviction imposed upon him by the Magistrate’s Court on the 3rd day of August, 2005;

WHEREAS on the 16th day of May, 2006 THE COURT, heard Advocate C.J. Green for the Appellant, Advocate S. Mallett in person, and Advocate F. Russell for the Crown, RESERVED Judgment and ADJOURNED the matter for Judgment to be handed down in course.

THE COURT this day handed down Judgment in the terms attached hereto and DISMISSED the Appeal.

S. M. SIMMONDS
Her Majesty’s Deputy Greffier

In the Royal Court of Guernsey

Appeal Against Conviction

MICHAEL JOHN OGIER
(Appellant)

-v-

THE LAW OFFICERS OF THE CROWN
(Respondents)

Date of hearing: 16 May 2006

Date of Judgment handed down: 2 June 2006

Before: John Russell Finch Esq., Lieutenant-Bailiff

Advocate for the Appellant: C J Green
Advocate for the Respondents: F M Russell

Statutes referred to:

- 1 Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003.
- 2 Regulation of Investigatory Powers (Guernsey) Law, 2003.

Cases referred to:

- 1 Law Officers v Rodney (1999, Criminal Appeal No. 236)
- 2 Law Officers v Halliday (2000, Criminal Appeal No. 237)
- 3 R v Clinton [1993] 1 WLR 1181
- 4 R v Doherty (1997) 2 Cr App R 218

Decision

1. On the 3 August 2005, before Assistant Magistrate C A McMillen, the Appellant was convicted of two charges: -

1. *“THAT YOU, on or about 4th August 2004, in the Island of Guernsey, for the purposes of obtaining Supplementary Benefit for yourself, under the Supplementary Benefit (Guernsey) Law, 1971 as amended, did knowingly make a false statement to the Administrator of the Guernsey Social Security Department, in that you did not declare that there had been a change in your circumstances, namely that you were working; contrary to section 24(a) of the said Law”.*

2. *“FURTHER, THAT YOU, on or about 27th September 2004, in the Island of Guernsey, for the purpose of obtaining any benefit for yourself under the Social Insurance (Guernsey) Law 1978 as amended, did knowingly make a false statement in that you declared that you had not worked in self employment or for any employer (whether full or part time, paid or unpaid) since the date of the last medical certificate you submitted; contrary to section 104(2)(c)(i) of the said Law”.*

The Appellant had pleaded “Not Guilty” to both. Evidence was heard, including his own, and he was represented by Advocate S Mallett.

On the 1 September 2005, the Appellant received, on each charge, a sentence of two months imprisonment suspended for two years, to run concurrently. Compensation of £411.43 on charge one and £2,000.00 on charge two was awarded to the States of Guernsey Social Security Department.

- 2 Advocate C Green, who has undertaken his duties sensibly and responsibly, now represents the Appellant. Advocate Russell continues to appear for the Prosecution. By Notice of Application for Leave to Appeal dated 20 February 2006, the Appellant, via Advocate Green set out four Grounds of Appeal. At a late stage (indicated by a fax of 12 May 2006) it was indicated that it was likely Grounds A, B and C would be abandoned. This is now confirmed. Ground D “Miscarriage of Justice” remains and has been argued. In view of the nature of the particulars set out in Ground D, this Court drew Advocate Green’s attention to the leading English case of *R v DOHERTY (1997) 2 Cr. App R 218*, which governed the procedure to be followed. In accordance with that case, the Appellant has signed a “waiver of privilege” and made a statement. Advocate Mallett has responded by letter dated 17 March, 2006 and copied her case file in relation to the Appellant. Evidence was heard at this Appeal from the Appellant and Advocate Mallett, in accordance with the procedure set out in *DOHERTY*.
- 3 The following five matters are relied upon by the Appellant in relation to Ground D (“Miscarriage of Justice”): -

D. Miscarriage of justice – on both charges

- i the statements of Miss Guilmoto and Miss Goupillot were wrongly accepted without authority by the Appellant’s Counsel at first instance.*
- ii The Appellant’s Counsel failed to cross-examine Mr Grice. This was not done on the Appellant’s authority.*
- iii The Appellant’s Counsel failed to request disclosure of the alleged authority obtained by Guernsey Social Security under The Regulation of Investigatory Powers (Guernsey) Law ,2003. Accordingly, no issue was taken*

at first instance on the possible inadmissibility of the key evidence following on from the surveillance. The full prosecution case was therefore not tested at trial. The Law Officers of the Crown will now not permit disclosure of the alleged authority.

- iv *The Appellant lost his “shield” at first instance in evidence in chief and in closing submissions. This was done without the Appellant’s authority.*
- v *All of these factors had the cumulative effect of creating a miscarriage of justice on both of the charges. The convictions should be set aside.*

4 I had the benefit of skeleton arguments from both counsel. That of Advocate Green was dated 2 February 2006; Advocate Russell’s was dated 22 February, 2006. Shortly before the hearing Advocate Green indicated that he proposed to cite two Guernsey Court of Appeal criminal decisions: RODNEY (Appeal 236, 1999) and HALLIDAY (Appeal 237, 2000). Counsel have developed their skeleton arguments during the course of the Appeal.

5 The argument set out by Advocate Green on behalf of the Appellant, in summary is as follows: -

- (i) *Prosecution Statements were accepted and admitted without “express or implied authority from the Appellant”;*
- (ii) *the “key evidence” in the Prosecution case” followed from surveillance under the Regulation of Investigatory Powers (Guernsey) Law, 2003. No request was made by the Defence for the disclosure of the “alleged authority”. No issue was taken on the admissibility of key evidence and “it remains unclear” if the correct level of authority existed;*
- (iii) *in the course of his evidence the Appellant was asked a question in chief, which lost his “shield”. Appellant’s counsel in her submission referred to his “previous convictions”. The loss of the shield was done without the Appellant’s authority. The Assistant Magistrate made no reference to this in her judgment and the disclosure of previous convictions amounted to a miscarriage of justice.*

6 Advocate Mallett’s response to these points came in her letter of 17 March 2006 (which was restated in her oral evidence). This is as follows: -

Matters A, B and C are irrelevant in respect of my counsel. I will respond to each of the points of D in turn.

1. *It is not accepted that the statements of Miss Guilmoto and Miss Goupillot were wrongly accepted without authority at first instance. I did have Mr Ogier's authority and the matter had been discussed at length and you will find a note on the file in relation to this. It will also be apparent from Mr Ogier's evidence in chief that in fact he had no issue with the evidence of Miss Guilmoto and Miss Goupillot.*
2. *It is not accepted that I had no authority not to cross-examine Mr Grice. The only issue that was discussed between myself and Mr Ogier in relation to cross-examination was the issue of a £5 note. Mr Ogier had asked me to cross-examine in relation to the make of the £5 note (ie either English or Guernsey) and how he could see it from the distance away that he was. On further discussion, Mr Ogier confirmed that he did indeed receive a £5 note on that occasion but my instructions were that it was not in relation to payment of any fare but in relation to money owed. Therefore, following discussion with Mr Ogier it was agreed that there was little point in cross-examining Mr Grice on this as in evidence in chief (which Mr Ogier always intended to give) Mr Ogier would be accepting the fact that he received the £5 note. At no time was it asserted that Mr Ogier had received anything other than the £5 note and the item which could not be identified that was received at Les Rocquettes Hotel (Mr Ogier instructed me that this was an invitation). As you will be aware, to cross-examine witnesses (and indeed to require them to attend court) can have an impact upon sentence if a defendant is found guilty following a not guilty trial. It was no doubt relevant to Mr Ogier's sentencing that the court's time was not wasted in cross-examining witnesses for no reason.*
3. *It is accepted that I did not request disclosure of any authority obtained by the Guernsey Social Security under the Regulation of Investigatory Powers (Guernsey) Law 2003. By the time I was instructed, Mr Ogier had already given a full interview to the police in relation to his movements. Therefore, irrespective of whether or not an authority was available, by his own admission, he had carried out actions which were alleged. In any event, it was never an issue whether Mr Ogier had indeed been driving people around the island.*
4. *Mr Ogier wished to express to the court that he had driving convictions and could not have "worked" as a taxi driver. This he did. It is accepted that these were referred to in evidence in chief and closing submissions. However, Mr Ogier's shield in the true sense was not lost as the prosecution did not refer to any of the other, numerous criminal convictions. Therefore, the Magistrate was only aware of*

driving matters and this was relevant to the case in hand and not particularly relevant to his credibility.

5. *It is not accepted that these factors had the cumulative effect of creating a miscarriage of justice as essentially Mr Ogier's evidence was not believed. I do not believe this was the result of any action or omission by myself.*

If I can be of any further assistance, please do not hesitate to contact me.

- 7 On hearing the evidence, I came to the conclusion that the Appellant was confused in his recollection. He had to be prompted on occasion, as his memory was not good in certain areas. He would not be an easy client. Advocate Mallett was candid and clear. She answered the questions without equivocation and with honesty, and I was impressed with her attitude under difficult circumstances. On assessing the evidence, I formed the view that Advocate Mallett had told the truth throughout and that where her evidence differed from the Appellant's she was correct. I came to this conclusion on the criminal standard of proof. Specifically, on the facts, I found that the witnesses Guilmoto and Goupillot were agreed and accepted as written statements by the Appellant (as shown in the file note); that the Appellant orally agreed that the witness Grice should not be cross-examined; that the Appellant indeed accepted the surveillance evidence, but contested that all the activity observed was "work"; and the Appellant in evidence accepted Grice's account.
- 8 It was contended on behalf of the Appellant that Advocate Mallett should have called for the "alleged authority", for surveillance under the Regulation of Investigatory Powers (Guernsey) Law, 2003. Advocate Mallett explained that it was no part of the defence case to call into question the surveillance evidence. The fact that the Appellant was driving and making the journeys was "never an issue". Advocate Green suggested that "intrusive surveillance" was being carried out and that Mr Grice had only referred to having an authority for "direct surveillance" (p.29 of transcript at H), by which is meant "directed" surveillance for the purposes of the Law. Advocate Green's point was that the surveillance was "intrusive" by virtue of Section 21(3), but I am satisfied that he has misinterpreted the wording of the subsection to construe the phrase "*involves the presence of an individual...in the vehicle*" as meaning the Appellant, rather than a person carrying out the surveillance.
- 9 Advocate Russell suggested that the Prosecutor was not obliged to produce the authority unless it was relevant to an issue at the trial. It was not disclosable unless it related to an issue in the case; the duty to disclose never arose. This chimes in with Advocate Mallett's point that the accuracy of the surveillance was never an issue at the trial, as the Appellant agreed he had made the journeys. His case was "*the only payment I've had is pleasure*" (p. 57-E). Advocate Russell also submitted that the way evidence is obtained does not affect admissibility at trial - subject to any arguments

under Section 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Laws 2003.

- 10** It is not the duty of defence counsel to raise every point. The observation/surveillance evidence was accepted; there was no issue on it. The operation was “directed” as opposed to “intrusive” surveillance, as Mr Grice testified. Advocate Mallett cannot be faulted for not calling for the authority and should such points similar thereto be taken in trials, where the issues are, otherwise clear, then the time of the court would be wasted. In the absence of anything, which draws attention to a possible defect, the surveillance authority need not be called for. The daily grind of criminal justice is replete with similar examples where certain things can only be authorised at a certain level of authority or by a certain person – it is rare indeed to encounter any point on validity but I consider the Prosecution would be obliged to disclose the details if, e.g. a search warrant had been irregularly signed, or an authorisation under the Police Powers and Criminal Evidence Law was given at the wrong level. In such circumstances, a Section 78 enquiry would probably ensue. There was nothing in this case to indicate irregularity, the evidence was accepted.
- 11** The Appellant has complained about the disclosure of his criminal record (p.55-H). Advocate Mallett referred to the appellant not being able to work as a taxi driver “*by virtue of the fact he has an illness and he has previous convictions*” (p.70-C). These were referred to rather sparingly after conviction as “*there are matters known, Madam, there is nothing of a similar nature in the past ten years*” (p.76-C). There is no reference to it in the Assistant Magistrate’s judgment (pages 72-76).
- 12** If this had been a jury trial, I suggest the best approach would have been to sum-up so as to avoid inflaming the issue, using words such as “any previous convictions the Defendant may have are not relevant to the issue of his guilt or innocence today. You will disregard these and look at the case solely on the evidence that I will sum up to you”. The error in the Appellant’s case is that the judgment of a legally-qualified Magistrate is not a summing-up to a jury. A professional tribunal, by dint of training and experience, will disregard such information when reaching a verdict. In a summary trial, I take the view that it was perhaps better not to refer to it in the judgment to avoid according it too much significance. The Appellant’s comment and the brief remark by Advocate Mallett were insignificant in the context of this case. As stated, the decision of a Magistrate in a summary trial does not have to reach the proportions of a summing-up. There is an obligation to give reasons in the majority of contested cases (unless it is a straight question of fact and the decision makes it obvious who has been believed - but even then, some explanation is highly desirable in my view). In a summary trial, they do not have to be lengthy, comprehensive, or cover every point, good or bad. In the words of Blackstone (2006 edition) at para D.20.11, p. 1730:

“The object of the exercise is to inform the accused as to why he has been found guilty and this could be done in a few sentences”.

- 13** Whilst it is possible that Advocate Mallett could have put her question at page 55 more specifically and narrowed it down to health, it was the Appellant who volunteered the information. Nowhere in the trial did this matter assume any significance and a professional judicial officer would have put it out of her mind. There is no merit in this point.
- 14** The legal position on the errors of counsel has moved on, so that rather than lingering on the alleged “flagrant incompetence” of the Advocate, the emphasis is now on “the impact of the lawyer’s errors rather than their extent” (Blackstone, para D.24.20, p. 1827). The approach is to be found in *R v CLINTON [1993] 1 WLR 1181*, and this Court’s attention in deciding to allow an appeal on this ground should be focused on the safety or otherwise of the conviction, rather than the behaviour of counsel. I consider that Guernsey law will have developed in this direction too. The simple question is whether the hearing of the charges against an accused was fair. Although the ECHR, Article 6 has played a part in this English case-law and Guernsey has not yet brought its Human Rights Law into force, I am satisfied this is a logical and correct development.
- 15** On the facts of this case I have found nothing to show otherwise than that the Appellant had a fair trial. There is no suggestion of incompetence against Advocate Mallett that can be upheld - indeed a study of the transcript shows a good deal of effort was expended by her in defending against a strong case, where the evidence for the Prosecution was clear and convincing. The basis for the learned Assistant Magistrate’s decision should be noted. After setting out the facts in considerable detail, she stated (p.75, E-F) that she found the Appellant’s version of events to be “*unlikely*”. She found him “*an unreliable reporter of the truth*” and “*that I am satisfied beyond reasonable doubt that the Defendant knew exactly what he was doing*”. It seems to me that, on the evidence, the conclusion was one that the Assistant Magistrate was fully entitled to reach; indeed it was inevitable whatever Advocate Mallett did.
- 16** The Appellant had a fair trial and was properly defended. There was no miscarriage of justice and he was rightly convicted. This Appeal is dismissed.
- 17** APPEAL DISMISSED.