

Judgment 42/2006

**Terence Burton – Royal Court (Criminal Appeal 27/2005)
– 6th September 2006**

Criminal appeal from the Magistrate’s Court – conviction – recusation applications as respects the Assistant Magistrate and the Deputy Bailiff – role of HM Deputy Sheriff – authorities on recusation and apparent bias considered – recusation applications and the substantive appeal dismissed

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 6th day of September, 2006 before Richard John Collas, Esquire, Deputy Bailiff sitting alone.

TERENCE BURTON

Appellant

V

LAW OFFICERS OF THE CROWN

Respondent

In the action of THE LAW OFFICERS OF THE CROWN against TERENCE BURTON (“the Appellant”) to pursue the Appeal of which the said Burton gave notice against the conviction imposed upon him by the Magistrate’s Court on the 16th day of September, 2005;

WHEREAS on the 23rd day of August, 2006 THE COURT heard the Appellant in person in respect of both a recusation hearing and his appeal, and Advocate F. Russell for the Crown, and ADJOURNED the matter to Wednesday the 6th day of September, 2006 for Judgment to be handed down;

THE COURT, this day having handed down Judgment in the attached terms, FOUND that the Deputy Bailiff could sit to hear the Appeal and DISMISSED the said Appeal.

S. M. SIMMONDS
Her Majesty’s Deputy Greffier

Final Judgment 06.09.06

Royal Court of Guernsey
On Appeal from the Magistrate's Court

Terence BURTON

v

Law Officers of the Crown

Recusation and Appeal Against Conviction

Appeal Heard 23 August 2006

Judgment handed down 6 September 2006

Deputy Bailiff

Appellant appearing in person

Advocate for the Respondent: Crown Advocate F M Russell

Cases referred to:

1. R v Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte [2000] 1 AC 119.
2. Law Officers of the Crown -v- Ogier.
3. Re Medicaments & Related Classes of Goods (no. 2) (2000) [2001] 1WLR 700.
4. A W G Group Limited -v- Morrison [2006] 1 All ER 967.
5. R -v- Mirza [2004] 1AC 1118.

Introduction

1. There are two issues I must consider: the Appellant has applied to recuse me and has asked that a non-local judge be appointed to hear the appeal; and he claims that the Assistant-Magistrate should have withdrawn from hearing the case at first instance. The reason he has put forward is that the principal prosecution witness was a Deputy Sheriff whose duties include sitting in the

Magistrate's Court and so he was known to the Assistant-Magistrate, and to myself, through our working relationships.

Circumstances of the Offence

2. The Appellant pleaded not guilty to a charge:

“That you, about 2.20 pm on 6 June 2005, in the Island of Guernsey, did send, by means of a telecommunications network, to John De Carteret, a message that was of a menacing character; contrary to Section 16(1)(a) and punishable under Section 16(2) of the Telecommunications (Bailiwick of Guernsey) Law 2001”.

3. In short, the prosecution case was that Mr De Carteret's duties as Deputy Sheriff included acting as an enforcements officer and, in that capacity, he had seized some property belonging to the Appellant. Whilst doing so, documents addressed to the Appellant had been served at an address where he was not living. The Appellant made a number of phone calls to the Sheriff's Office enquiring what steps were being taken to retrieve the documents which he said contained confidential information. On 6 June the Appellant telephoned Mr De Carteret at the office of HM Sheriff to ask what they were going to do about his documents. Some abuse was exchanged and when Mr De Carteret attempted to end the conversation, the Appellant is alleged to have said *“I know where you live”*. In his defence, the Appellant said the gist of what he said was that he could find Mr De Carteret's address if he wanted to and asked why Mr De Carteret could not find his address. He denied that he spoke menacingly.

The Proceedings in the Magistrate's Court

4. Advocate Russell (who appeared on behalf of the Prosecution in the Magistrate's Court and on appeal) and the Appellant told me they recall that, prior to the hearing, the Assistant-Magistrate disclosed that she knew Mr De Carteret in his capacity as a Deputy Sheriff. The remark was made at the conclusion of the morning session of the Magistrate's Court and is not recorded in the transcript produced for the appeal. They agreed that the Assistant-Magistrate said her relationship with Mr De Carteret was purely a working relationship and there was no suggestion of any friendship or social relationship outside the working environment.
5. Advocate Lockwood, who acted for the Appellant in the lower court, did not object to the Assistant-Magistrate continuing to hear the case. The Appellant told me that Advocate Lockwood did not discuss the issue with him either before or after the Assistant-Magistrate raised it so I have to accept that there was no valid waiver by the Appellant of any objection, if a waiver was required. When they were preparing for the trial both the Appellant and his Advocate would have been aware that Mr De Carteret was a Deputy Sheriff and I find it surprising that they had not discussed the possibility of bias if there were genuine grounds for concern that she should not sit on the case.

6. The only witnesses who gave “live” evidence were Mr De Carteret on behalf of the Prosecution and the Appellant. The two differed in their recollection of what was said in the telephone conversation and the Assistant-Magistrate had to decide between them. She retired for twenty-four minutes before returning to deliver her decision. She said that she found the Appellant was evasive in his evidence and conveniently recalled only what he wanted to remember. She accepted the evidence of Mr De Carteret that the words complained about were menacing or were intended to be of a menacing character and had no hesitation in finding the Appellant guilty.
7. After adjourning for a Psychiatric Report, the Assistant-Magistrate imposed a fine of £300, a prison sentence of two months suspended for two years, a Compensation Order for £100, a Probation Order for a period of twelve months and took no action in relation to an existing Probation Order which remained in force.

The Appeal Proceedings

8. The appeal has taken longer than usual to come to a hearing for reasons I will now explain.
9. After being convicted, the Appellant instructed Advocate Chris Green who, on 28 September 2005, lodged a Notice of Appeal with a general allegation of a miscarriage of justice which he was unable to particularise until receiving the transcript.
10. On 24 January 2006, Advocate Green lodged a skeleton argument on behalf of the Appellant. He asked that the verdict be set aside and the case be remitted to the Magistrate’s Court to be heard by another Magistrate. The only ground alleged was apparent bias arising from the working relationship existing prior to trial between the Assistant-Magistrate and Mr De Carteret. Advocate Green acknowledged this was not a case where the Assistant-Magistrate showed “real bias”.
11. The appeal was set down for hearing on Wednesday 22 March at 2.30 pm.
12. On 17 March, Advocate Green wrote to the Greffe saying:

“Mr Burton has instructed me that he does not wish for a local judge to handle his appeal. He would like a judge from the UK to sit to hear his appeal against conviction. He thinks that he will suffer bias if a judge from Guernsey handles the case.

Mr Burton tells me that he has no intention of attending Court on Wednesday, unless a mainland Judge is able to sit to hear it.

I would be interested to hear what the Deputy Bailiff’s views are on this matter and I am instructed to raise this matter in Court as an initial issue next week”.

13. On 21 March, the day before the appeal was due to be heard, Advocate Green wrote again. He advised that he had withdrawn from acting for the Appellant because of a matter of professional conduct which prevented him from continuing to act. He also said:

“Having met with Mr Burton on the morning of Tuesday 21 March 2006, I know that he is still pressing the point that he would like a non-local Judge to sit to hear his appeal against conviction”.

14. Advocate Green attended court on 21 March to assist if required but, in the circumstances, I had no alternative but to adjourn the case to enable the Appellant to instruct a new Advocate.
15. The matter was reviewed at a hearing on 4 May 2006. The Appellant had been unable to secure the services of another Advocate but wished to pursue the appeal and the recusation. They were set down for hearing on 8 June at 9.30 am.
16. On 22 May I directed that, due to other Court commitments, the hearing would not start before 2.00 pm on 8 June and directed that formal notice of the new time be served through the offices of HM Sheriff. The Appellant advised the Greffe that he would be unable to attend the hearing that afternoon as he had booked a seat on a flight leaving at 2.30 pm.
17. The matter was re-listed for 26 June at 2.30 pm, but again had to be re-scheduled because of other Court commitments. The Appellant was notified that I would hear the appeal on the morning of 26 June but said he would be unable to attend in the morning so it had to be postponed.
18. I eventually heard the appeal on 23 August. After submissions from Mr Burton, who represented himself, and Advocate Russell, on behalf of the Law Officers, I reserved judgment.
19. Advocate Russell had submitted a written skeleton argument and authorities on behalf of the Law Officers.

The Grounds for Recusation

20. In support of the recusation and the appeal, the Appellant relied upon the correspondence and skeleton argument from his former Advocate to which I have referred above. Summarising the complaint in his own words, he said that Guernsey is a small island, Mr De Carteret is an officer of the Court and the Assistant-Magistrate would not want to upset someone ‘in her own circle’. I understood he was making a similar complaint in respect of myself.

The Law

21. There was no suggestion of any real or actual bias on the part of the Assistant-Magistrate or any suggestion of real or actual bias on my part. The concern was of apparent bias which, the Appellant said, breached his right to a fair

trial. In *R v Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte* [2000] 1 AC 119 (which was not cited to me by counsel) Lord Browne-Wilkinson said, at p. 132G:

“The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial”.

22. I understand the Appellant’s argument to be that this case falls within the second category envisaged by His Lordship.
23. In his skeleton argument, Advocate Green had submitted that the legal test in the case of alleged apparent bias is as set out by Lieutenant-Bailiff Talbot in *Law Officers of the Crown -v- Ogier* Royal Court 30 November 2001. The Appellant adopted his former Advocate’s arguments and Advocate Russell agreed that was the appropriate test. I gratefully adopt the judgment of Talbot LB and propose to apply the legal test quoted by him from a passage in the judgment of Lord Phillips MR in the Court of Appeal in *Re Medicaments & Related Classes of Goods (no. 2) (2000)* [2001] 1WLR 700 namely:-

“the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased”.

24. The circumstances in this case are that the principal prosecution witness was an officer of the court, a Deputy Sheriff, concerned with the administration of justice in the Island. My role as Deputy Bailiff is different from the role of the Assistant-Magistrate and initially I was concerned as to whether I had view the two positions differently. The Bailiff, as head of the judiciary, has overall responsibility for all aspects of the administration of justice including the operation of HM Sheriff’s department although, on a daily basis, HM Sheriff has a great deal of autonomy. The Assistant-Magistrate, on the other hand, has no responsibility for the operations of HM Sheriff’s department. Might it be argued that the Bailiff would be more likely to support, and less likely to criticise, a Deputy Sheriff? If so, the Deputy Bailiff is in a similar position to

the Bailiff because part of the Bailiff's duties may be delegated to the Deputy Bailiff from time to time.

25. The Appellant did not seek to argue that in this context there was any distinction to be drawn between the role of the Deputy Bailiff and the role of the Assistant-Magistrate. Advocate Russell submitted that the subtlety of the distinction between our respective roles is unlikely to be appreciated by the observer who may be concerned about alleged bias on our part. I therefore accept that no distinction is to be drawn between my role as Deputy Bailiff and the Assistant-Magistrate's role.

26. I have also considered the function of each court. At first instance, the Assistant-Magistrate had to decide whether the charge had been proved beyond reasonable doubt and, in doing so, had to consider the credibility of each of the Appellant and Mr De Carteret. My role is to decide whether to recuse myself and also whether the Assistant-Magistrate should have recused herself. The position of the English Court of Appeal on an appeal from a judge's decision not to recuse himself was considered in A W G Group Limited -v- Morrison [2006] 1 All ER 967. In paragraph 20 (at page 974f) of the judgment of Mummery L J (with which the other two judges agreed) he said:

"I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an appellate court is well able to assume the vantage point of a fair minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias".

27. I find that to be persuasive and I have adopted it as the approach that, under Guernsey law, I must take in assessing whether the Assistant-Magistrate should have recused herself.

28. From the vantage point of a fair minded and informed observer with knowledge of the relevant circumstances, I must decide whether there is a real possibility of bias. I remind myself that the Appellant's concern was that neither the Assistant-Magistrate nor myself would wish to upset a professional colleague who is "in our own circle". The Appellant was thinking particularly about the working relationship between the Assistant-Magistrate and the Deputy Sheriff. There is also a working relationship between the Assistant-Magistrate and myself. So, if the Appellant's concern is valid, it could also be said that I would not wish to upset the Assistant-Magistrate by criticising her decision.

29. If the Appellant's concern is valid, could the Bailiff, Deputy Bailiff or Judge of the Royal Court, ever sit to hear an appeal from the Magistrate's Court? In my judgment, an informed observer will be aware of a professional judge's

training and the judicial oath that he has taken. In the speech of Lord Rodger of Earlsferry in *R -v- Mirza [2004] IAC 1118* at p.1174 para 152 he recognised that the legal system does not ignore the risk of prejudice on the part of judges and said:

“indeed it constantly guards against [the risks]. It works, however, on the basis that, in general, the training of professional judges and the judicial oath that they take mean that they can and do set their prejudices on one side when judging a case.”

30. The legislation governing appeals from the Magistrate’s Court provides for an appeal to lie to the Royal Court. Any decision that a locally resident judge of the Royal Court is not able to sit on such appeals solely because of a concern of apparent bias arising from his working relationship with the Magistrate or Assistant-Magistrates would cause great difficulties in the administration of justice in this Island. However, that would not be a reason for me to sit if there was a reasonable possibility of bias on my part.
31. Having carefully considered the circumstances of this appeal I am satisfied an informed observer will recognise that by virtue of my professional training and the oath I have taken I will act impartially when reviewing the decision of the Assistant-Magistrate. Also, for the same reason, that the working relationship between the Deputy Sheriff and myself does not give rise to any real possibility of bias.
32. Similarly, the informed observer will appreciate that the Assistant-Magistrate’s professional training will have enabled her to act impartially when hearing evidence from the Deputy Sheriff.
33. I therefore conclude that I can sit to hear the appeal. For the reasons I have given I reject the Appellant’s ground for objecting to the Assistant-Magistrate sitting and as that was the only ground he was pursuing on his appeal, I dismiss the appeal.