

**Judgment 54/2006      Wayne Patrick Mahy – Royal Court (Criminal  
Appeal 35 of 2005) – 20<sup>th</sup> January 2006**

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**Appeal from Magistrate’s Court – conviction for burglary – test to be applied –  
dictum of the Court of Appeal in Guest (Judgment 8/2003) – appeal dismissed**

**IN THE ROYAL COURT IN THE ISLAND OF GUERNSEY**

The                    20<sup>th</sup> day of January, 2006 before Richard John Collas, Esquire, Deputy  
Bailiff; sitting alone.

In the action of THE LAW OFFICERS OF  
THE CROWN against WAYNE PATRICK MAHY (“the Appellant”) to pursue the  
appeal of which the said Mahy gave notice against the conviction imposed upon him  
by the Magistrate’s Court on the 2<sup>nd</sup> day of December, 2005;

THE COURT, having heard Advocate  
M.G.A. Dunster for the Appellant and Advocate F.M. Russell for the Crown,  
DISMISSED the appeal.

M.A.TOSTEVIN  
Her Majesty’s Deputy Greffier

**FRIDAY 20<sup>TH</sup> JANUARY 2006**

**IN ROYAL COURT ONE**

**Before**

**Richard John Collas, Esq., Deputy Bailiff**

**THE LAW OFFICERS OF THE CROWN**

**- v -**

**WAYNE PATRICK MAHY**

**(Appeal against Conviction from the Magistrate's Court on 21.12.05)**

**Decision given by the Deputy Bailiff**

THE DEPUTY BAILIFF:

1. I have carefully looked again at parts of the transcript and I have considered the able submissions that I have heard from Counsel this afternoon and I have been able to reach a conclusion.
2. In this appeal Wayne Patrick Mahy was convicted in the Magistrate's Court on 2<sup>nd</sup> December 2005 on a single charge of burglary, when he was charged as follows:-

*“That you between 11.30 p.m. on 17<sup>th</sup> June 2005 and 7.30 a.m. on 18<sup>th</sup> June 2005, having entered as a trespasser a building known as Rose Lawn, Saline Lane, St. Sampson's, stole therein a DVD player valued at £120 belonging to Rosemary Sarre, contrary to Section 9(1)(b) of the Theft (Bailiwick of Guernsey) Law 1983, as amended.”*

He lodged a Notice of Appeal against that conviction on 13<sup>th</sup> December 2005 and the ground of appeal set out in the grounds attached is that the Magistrate's decision was perverse.

Decision given by the Deputy Bailiff

3. Essentially in this case there was no direct evidence that Mr. Mahy had been inside the premises on the night in question. He had no previous convictions for dishonesty. He was not short of cash. He had his own DVD player and in any event the stolen DVD player had not been found in his possession.
4. The reason he gave to explain a palm print that had been found on the open window of the house, through which the burglar gained entry, was that he may well have past the premises a few days before the burglary took place on his way home from the Pony Inn and may have urinated against the wall of the house, leaning his hand against the window.
5. At the trial in the Magistrate's Court the prosecution evidence was by way of admitted statements. Mr. Mahy was the only witness to give oral evidence. Perhaps the most incriminating piece of evidence was the palm print that was found on an open sash window that had been closed but was not secure when the owner of the property went to bed at 11.30 p.m. and was open in the morning when the burglary was discovered. The print was 70 inches above the ground and on examination was found to match Mr. Mahy's palm print.
6. The Magistrate heard the evidence and retired to consider his verdict and his findings on the evidence are at page 14C of the transcript of the trial, where he said:-

*“I find it incredible that a person wishing to urinate, if that is the explanation, would chose this position. I find it incredible to explain the Defendant's palm print in the position it was as something connected with relieving oneself, i.e. in such a high location; but above all I have had the opportunity to see the Defendant give his evidence and be cross-examined and I do not believe him. I am sure his explanation is false, I reject it. I am further sure that the explanation is advanced to explain away his involvement in the burglary. It is open to me to come to this view on the totality of the evidence.*”

Decision given by the Deputy Bailiff

*I have narrowly examined the evidence especially the palm print and find a strong conclusion of guilt and the prosecution have therefore discharged their high burden in view of these findings.”*

7. I remind myself of the test that I have to apply and that is as set out by the Guernsey Court of Appeal in the case of *The Law Officers of the Crown v. Heather Helena Guest* in a judgment dated 9<sup>th</sup> January 2003. And they said the test is that which formally applied in England and Wales and is as follows:

*“The Court of Appeal (in this case the Royal Court) on any such appeal against conviction shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice.”*

8. The Appellant here is not seeking to argue that there was a wrong decision on any question of law or a miscarriage of justice. I am concerned with whether the verdict should be set aside on the grounds that it is unreasonable or cannot be supported having regard to the evidence.
9. Much of the argument I have heard today has been concerned with the height of the palm print above the ground. The palm print was found on the top half of the sash window, which at the time was fully open, and 70 inches above the ground. That is the clear statement of Sergeant Senior in a prosecution statement which had been accepted by the Defendant, hence, was not challenged at the trial and that is the basis on which the Magistrate’s Court proceeded. As has been pointed out, we do not know whether the window was in the fully open position when the palm print was placed on it, but if it was not fully open then the window would have been even higher, the palm print even higher off the ground, and hence, the Defendant’s explanation would have been even less plausible than it was.

Decision given by the Deputy Bailiff

10. As Advocate Dunster has argued, Magistrate's decisions may not always be correct, and hence they have to be capable of challenge. But whenever a Court of First Instance has made a finding of fact based on its observations of a witness whilst the witness gave his evidence and taking account of the witness's demeanour; and here in this case the witness's demonstration of how he stood when he was urinating, it is then very difficult for an Appeal Court to say that the decision was incorrect.
11. In this case the Magistrate also had the evidence of the police interviews conducted with the Defendant and in particular the first interview conducted under caution in September. The explanation the Defendant put forward was that in a drunken state he urinated at the property is a potentially credible explanation, but the Magistrate decided it was false, and having anxiously reviewed the matter I cannot say that the Magistrate's finding that the explanation was false is either unreasonable or such as cannot be supported having regard to the totality of the evidence.
12. Advocate Dunster argues that the prosecution did not seriously challenge the Defendant's explanation that he was suffering from hay fever and stayed at home on the night of the burglary. Advocate Russell points out that either or perhaps both she and Advocate Dunster might have dealt with the evidence differently. But it was put to the Defendant in cross-examination that he was the person who entered the home on the night of the burglary, so it cannot be said that the prosecution are to be taken as having accepted that he stayed at home that night.
13. Probably the most powerful piece of evidence in this case is the evidence of the palm print. There is no direct evidence to connect the Defendant with the burglary, such as cctv footage or the evidence of another witness who actually saw him entering or leaving the property, but circumstantial evidence can be powerful evidence. It must always be examined with care and the Magistrate indicated that he did that here.
14. When considering circumstantial evidence the Court has to consider the reliability of the evidence. In this case the evidence of the palm print was contained in an unchallenged prosecution statement and hence the Court was entitled to accept it. The Court must also consider whether the circumstantial evidence reveals any

## Decision given by the Deputy Bailiff

other circumstances which might be of sufficient reliability to weaken the prosecution case or even destroy it. In this case the only explanation put forward was the one that the Magistrate put forward as being false. So the Magistrate was, in my judgment, entitled to accept the evidence of the palm print.

15. Further arguments were put forward by Advocate Dunster that firstly commonsense suggests that there must be a motive for a crime, and no motive was proved in this case, he says, but he accepts the prosecution do not have to prove motive. The absence of a motive may cause a doubt and that was so argued by Advocate White in her submissions to the Magistrate and hence would have been in the mind of the Magistrate when he retired to consider his decision.

16. Mr. Dunster also argued that Mr. Mahy had no previous convictions for dishonesty, and hence does not lose his shield. But, again, that had been submitted by Advocate White and would also have been considered by the Magistrate. Similarly the facts that the DVD player was not found in Mr. Mahy's possession three months after the event and that no burglary tools were found on him are also factors that were raised at the trial and must have been considered by the Magistrate.

17. As the Magistrate showed in his decision, he was aware of the burden of proof the prosecution had to discharge and he found that the prosecution had discharged it. And having carefully considered all that has been said I cannot find that the verdict was either unreasonable or that it could not be supported by the evidence and I therefore dismiss the appeal against conviction.