

The Criminal Appeal Act, 1907, Section 4

The Criminal Appeal Act, 1968

Convention referred to in Judgment:

The European Convention on Human Rights

Part 1 of Appeal – Introduction

1. Kevin John Holland (hereafter “A”) was convicted in the Magistrate’s Court of indecent assault on 6th July, 2012. He was sentenced to 12 months imprisonment plus supervision after release, on 20th September, 2012 and entered Notice of Appeal. He was released on bail pending the determination of the appeal. The appeal falls into two parts: a preliminary issue on the constitution of the Royal Court hearing the appeal, and the substantive appeal itself. On 11th January 2013 argument was heard and submissions were considered on the first point. The main hearing is on 17th January, 2013. This part of the judgment deals with the preliminary point and is issued in advance of the main hearing.
2. The appeal is brought under the provisions of The Magistrate’s Court (Criminal Appeals) (Guernsey) Law, 1988. This Law does not set out the grounds on which an appeal can be made. The gap has been filled by making use of the Court of Appeal (Guernsey) Law, 1961, especially Section 25. Section 25(1) reads:

“The Court of Appeal 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, and in any other case shall dismiss the appeal.”

3. The wording of the section is similar to that of the English Criminal Appeal Act, 1907, Section 4(1). Putting it shortly, the “*unsafe or unsatisfactory*” test introduced in England by The Criminal Appeal Act, 1968, amended in 1995, does not appear and is not applicable in Guernsey (Guest v Law Officers [2003] GLR, Note 7), or Jersey (Bayliss v Attorney-General [2004 JLR 409]). The present appeal is launched upon the following Grounds:
 - (i) that the verdict reached by the Judge of the Magistrate’s Court was unreasonable;
 - (ii) that the verdict reached by the Judge of the Magistrate’s Court could not be supported having regard to the evidence adduced at trial; and
 - (iii) that there was a miscarriage of justice in that the Appellant was deprived of information necessary to challenge the key Prosecution witness’s credibility.
4. It is submitted on behalf of A that the Judge should only sit alone on the question of sufficiency of the evidence. The “unreasonable” and “miscarriage of justice” points required the presence of the Jurats. This is resisted by the Respondent Law Officers (hereafter “R”), who submit the substantive appeal should be dealt with by the Judge sitting alone.

Relevant Cases

5. It is helpful to look at the reported Guernsey cases that touch upon these issues. In Law Officers v Diment [1993] 16 GLJ 33, Le Quesne JA observed, at paragraph 28 of his judgment (dealing with an appeal from a Magistrate’s Court decision that had been heard in the Royal Court) that:

“.....the Bailiff correctly told the Jurats that it was for him to direct them whether there was evidence on which the Magistrate could properly convict the Appellant”

The case came about just before Law Officers v Whales [1993] 16 GLJ 46 in which Le Quesne JA said, at paragraph 16 of his judgment:

“.....It is well settled that the question whether in any case there is evidence to support a conviction is not a matter of fact, but a question of law.”

Accordingly the question of sufficiency of evidence was within the sole competence of the Bailiff, so, since the Jurats were sitting with the Bailiff:

“.....the proper course would have been for the Bailiff to decide whether there was sufficient evidence to support the conviction and direct the Jurats accordingly...”

6. Closer examination of the situation is to be found in the Royal Court case of Law Officers v Blondel (11th May, 1999) in a judgment by Harman LB. It is necessary to quote extensively from the judgment:

“Appeals to the Royal Court from the Magistrate’s Court have since been under the 1988 Law. Again, there is no specific provision for the constitution of the Court with or without Jurats other than that the Royal Court means the Royal Court sitting as a Full Court. However, it is apparent that the earlier practice of the Bailiff or the Deputy Bailiff sitting with seven Jurats continued until after the Court of Appeal cases of Diment and Whales, which were heard in 1993. Thereafter, I am told, it became the practice of the Royal Court to sit with the Bailiff or Deputy Bailiff alone for all cases other than those where there were matters of fact for Jurats to consider. It seems that the new procedure followed directly upon these two appeals and was occasioned by them.”

7. After describing what was said in Diment and Whales Harman LB continued:

“.....but it is notable that when considering these two cases subsequently, the Court of Appeal made no comment on the constitution of the Court in either case, or on possible circumstances where it would be appropriate for the Bailiff or another judge to sit alone and without Jurats, where an appeal was based on the contention, as here, that there has been a miscarriage of justice.”

And later:

“I have to decide whether, in this particular case, there may be issues of fact at the hearing of this appeal for the Court to decide. If there will be or indeed, if there may be, it seems to me that the Court should sit with Jurats, and indeed that is agreed.”

And finally (for the purposes of the present case):

“.....a miscarriage of justice is plainly an alternative third ground of appeal, and it is not to be regarded as a means, if that is what an Appellant wishes, of obtaining an appeal with Jurats to decide matters of fact when the reality is that no such issues are present in a particular Appellant’s case. Mr Merrien has submitted in his grounds of appeal that the Magistrate failed to take certain evidentiary matters into account.”

Harman LB concluded that this fell within the first of the grounds in the Court of Appeal Law, 1961 (“unreasonable or cannot be supported having regard to the evidence”) and was thus for the judge alone to determine.

Merits

8. It was submitted on behalf of A (paragraph 6 of first skeleton argument, 13th December, 2012) that the “question of reasonableness must be a matter for the Jurats. It is clearly separate

and was intended by the Statute to be separate from the issues which are for the judge alone". In addition the ECHR has been implemented and *"the modern requirements of a fair and proper right of appeal necessitate the involvement of Jurats in appeals of this nature"*. R relies upon the Blondel decision, cited above and paragraph 16 of the Whales decision, also cited above. Le Quesne JA said there:

"...it is well settled that the question whether in any case there is evidence to support a conviction is not a question of fact, but a question of law."

It was therefore *"within the sole competence of the Bailiff, and should not have been put to the Jurats"*.

9. As previously mentioned, it is submitted on behalf of A that the phrase in the legislation is *"unreasonable or cannot be supported having regard to the evidence"*. The disjunctive is used and *"unreasonable"* must add something to the sub-section. Accordingly, it should follow that the one phrase has the judge alone on the sufficiency of the evidence and the Jurats on the *"unreasonable"* aspect. At paragraph 17.4 of A's skeleton of 13th December 2012, the question raised is that the Royal Court has to determine the following:

"Generally to decide the reasonableness of the verdict having regard to all relevant and material matters."

10. Nowhere in any of the authorities can anything be found to support the view that the phrase in question sets out two different tests, thus necessitating sufficiency of evidence to be decided by the judge and reasonableness by the Jurats. In essence the phrase is treated as one ground and alluded to in terms of the *"sufficiency"* of the evidence. See in this connection Diment, paragraph 28; Whales paragraph 16 and Blondel pages 2, E-H, 3, A-B and E. This was the approach of the Jersey Court of Appeal in Bayliss (supra) at paragraphs 26-32. It is also the approach in the commentary to the Criminal Appeal Act, 1907 in the 36th edition of Archbold, paragraph 934. This begins:

"In order to succeed an appellant must show, in the words of the statute that the verdict is unreasonable or cannot be supported having regard to the evidence."

Part of the remainder of the paragraph is also instructive (case citations omitted):

"It is not a sufficient ground of appeal to allege that the verdict is against the weight of the evidence; nor is it sufficient merely to show that the case against the appellant was a very weak one; nor is it enough that the members of the Court of Criminal Appeal feel some doubt as to the correctness of the verdict; nor that the judge of the court of trial has given a certificate on that ground The court will set aside a verdict on a question of fact alone only where the verdict was obviously and palpably wrong"

The classic case on the quashing of a conviction under this ground remains the celebrated and still debated matter of R v Wallace (1931) 23 Cr. App R 32, where every item of circumstantial evidence allegedly incriminating the accused was capable of another explanation. Hence the totality of the evidence could not support a conviction.

11. At page 3, E of the Blondel case Harman LB refers to miscarriage of justice *"as an alternative third ground of appeal"*. This follows on from the *"unreasonable or cannot be supported having regard to the evidence"* being number one and *"a wrong decision on any question of law"* being number two. Treatment of the phrase *"unreasonable or cannot be supported having regard to the evidence"* as one ground, meaning in effect insufficiency of the evidence, is a consistent theme in all the authorities that have been found. Accordingly this aspect of the appeal falls solely within the province of the judge, as it always has been in

England. Any other construction, apart from being unsupported by authority, would, with respect, seem strained and artificial.

12. The “*miscarriage of justice*” ground now needs to be examined. In the words of A’s skeleton of 13th December, 2012:

“... In summary it is the Appellant’s case that as a result of the failure of the Prosecution to obtain and disclose either the existence or details of the complainant’s mental health issues, the Appellant was deprived of the opportunity to investigate the credibility of the complainant and properly test her evidence at trial.”

These points are set out in more detail at paragraphs 17.1 to 17.3 of the skeleton. This is all strongly contested by R and the skeleton of 10th January, 2013, paragraphs 6-15 deals with it. The substantive hearing of the appeal will have these arguments thoroughly ventilated.

13. The scope of the Prosecution’s duty of disclosure is laid down in the Court of Appeal’s case of Law Officers v Taylor [2011–12 GLR 81]. This was applied in the recent Royal Court case of Law Officers v Alvarez (Royal Court, 25th September, 2012). In Alvarez it was sought to set out the applicable legal principles in paragraphs 4-8 of the judgment - which is to be found annexed to R’s skeleton in the present case, pages 23-24 of the bundle. Suffice to say that the whole question of disclosure, its ambit and alleged effects, is one of law, or at least pre-eminently of law. It is therefore a matter for the judge. At paragraph 7 above, the judgment of Harman LB in Blondel was cited, one passage being to the effect that the miscarriage of justice ground of appeal is not to be regarded as a means of getting the Jurats to decide matters of fact, when the reality is that no such issues are present. That observation is applicable here. It therefore follows that the submission put forward on behalf of R that there are no genuine issues of fact to be determined in this appeal is correct. It is not necessary for the purposes of this judgment to set out those circumstances when issues of fact might necessitate the attendance of Jurats, but on the authorities they would seem to be potentially very rare indeed.

ECHR

14. All the authorities, especially those before the implementation of Human Rights legislation in Guernsey on 1st September, 2006 must of course be looked at in the light of the European Convention on Human Rights. There is nothing in providing for the hearing of an appeal by a legally-qualified judicial officer that offends the terms of the Convention and it cannot be regarded as affecting the position set out. There will be an oral hearing, with written arguments previously presented and a reasoned decision in accordance with the law. The Royal Court however constituted has the power to uphold or quash the conviction, or remit the matter to the Magistrate’s Court - see Section 6 of the Law of 1988. This is not a defective procedure that can only be ameliorated by the insertion of lay finders of fact into the appellate process.

Decision

15. For the reasons given, the appeal will be heard and determined by a judge sitting alone.

J R Finch
Judge of the Royal Court

15th January 2013

Textbook referred to:

Archbold, 36th Edition (1966)

Article referred to:

The Right of Criminal Appeal on the Facts in Jersey and Guernsey (J. Kelleher). Jersey and Guernsey Law Review, Vol. 15, page 267.

The Substantive Appeal – Introduction

16. Having dealt with the preliminary question as to the constitution of the court hearing the appeal in the first part of this judgment, handed down on the 15th January, 2013, I now propose to address the main appeal. This judgment follows on from the earlier judgment and should be read with it. The contentions of counsel will be apparent from the paragraphs that follow. The grounds of the appeal are as set out in paragraph 3 of the earlier judgment.

Scope of the Legislation

17. Section 25(1) of the Court of Appeal (Guernsey) Law, 1961 has been taken as providing the grounds for appeal from the Magistrate’s Court under the provisions of the Magistrate’s Court (Criminal Appeals) (Guernsey) Law, 1988. The situation is set out at paragraph 2 above. The wording is essentially that of the English Criminal Appeal Act, 1907, which set up the Court of Criminal Appeal. As set out in paragraph 3 above, it has not been amended in Guernsey (or Jersey) in line with amendments in England in 1968 and 1995. The net result is that the English “*unsafe or unsatisfactory*” verdict test is not enacted in either jurisdiction.
18. It was submitted on behalf of A, in an elegant argument put forward by Advocate P.T.R. Ferbrache, that a right of appeal needs to be “*meaningful*”. As paragraph 12 of A’s skeleton of 11th January, 2013 suggested:

“In the Appellant’s submission, the grounds of appeal have historically been interpreted too narrowly in reliance on English law which has long been amended and replaced to allow a wider ground of appeal, namely that a verdict is “unsafe”. The Royal Court in 2012 ought properly to be considering such arguments”.

19. Some reliance was placed on a dictum from Lord Hoffman in the Privy Council case of Attorney-General for Jersey v O’Brien [2006] UKPC 14, where in paragraph 25 it was indicated that the restricted test followed in Jersey on appeals had been changed in England, and:

“.....No such change has been made in Jersey but their Lordships would not exclude the possibility of a more liberal interpretation of the old statutory language.”

The Jersey Court of Appeal in Attorney-General v Bhojwani 2011 J.L.R. 249 declined the opportunity to move in this direction. The judgment contained the words (at para 150 of Beloff JA’s judgment):

*“Lord Hoffman’s **dictum** was **obiter** and provisional and fell far short of a direction to this Court to abandon its long standing jurisprudence. Nor did Lord Hoffman clarify precisely what literal interpretation he would adopt.”*

20. The judgment stated that the Court of Appeal would direct itself in accordance with the propositions set out in the Guernsey case of Law Officers v Taylor [2007-8 G.L.R. 202] at 214. Paragraph 15(ii) of that judgment said:

“The powers of this court are therefore more limited than those currently enjoyed by the Court of Appeal (Criminal Division) in England and Wales, which incorporates the concept of an “unsafe” verdict, and by judicial gloss, that of a lurking doubt.”

That decision is, of course, binding upon the Royal Court of Guernsey.

21. A further significant Guernsey Court of Appeal decision is Law Officers v Guest [2003 G.L.R. N-7]. This involved an appeal to the Court of Appeal after a conviction in the Magistrate’s Court and subsequent unsuccessful appeal to the Royal Court. At paragraph 13 of the judgment the following appears:

“.....But we have no power to apply the wider test applicable in England and Wales under the Criminal Appeal Act, 1968 but not yet adopted in this jurisdiction. We cannot therefore quash the verdict because we would ourselves have reached a different conclusion on the facts, or would have attached a different significance to some or all of the evidence by which the Magistrate was persuaded.”

This, too is binding upon this Court.

22. Advocate Ferbrache prayed in aid a long article in the Jersey and Guernsey Law Review (2011, Vol. 15, page 267) by Jersey Advocate J. Kelleher, entitled “The Right of Criminal Appeal on the Facts in Jersey and Guernsey”, reproduced at tab 13 of A’s bundle. This is chiefly valuable due to an assiduous collection of cases and statutory provisions, not only from the Channel Islands but other jurisdictions. However, as Advocate Calderwood suggested in argument, this Court does not have to follow the conclusions. The task for this appeal is to seek to discern what the authorities say and, if on the point and binding, apply them. The article itself is rather prolix and various of its comments debatable - so is of limited assistance.
23. R referred to the Jersey Court of Appeal case of Bayliss v Attorney-General 2004 J.L.R. 409. This is a clear decision and consistent with other cases that have been referred to. Part(2) of the head note reads:

“The question of whether the applicant’s convictions were “unsafe or unsatisfactory” was not relevant to the review by the present court of the Royal Court’s decisions. The court was confined to exercising the supervisory powers provided in art. 25(1) of the Criminal Appeal (Jersey) Law, 1961, which did not include the “unsafe or unsatisfactory” test. The inclusion of that test in the law would be a matter for the legislature.”

In paragraph 23 of the judgment Smith JA said:

“.....In this jurisdiction, appeals against conviction fall to be analysed by this court, applying the tests set out in art. 25(1) in the light of the authorities relevant to those tests. The question of whether the verdict is unsafe or unsatisfactory does not arise for consideration and the jurisprudence pertaining to it is not germane to this court’s function.”

This, and other Jersey decisions, is not technically binding upon this court, but in dealing with like legislation to that under consideration now, is of very high persuasive authority indeed.

24. Reference has already been made to the Privy Council decision in O’Brien at paragraph 19 above. This case is chiefly notable for the rejection of a purported fact-finding exercise by the Court of Appeal ([2003] J.C.A. 228), when of course that court had not heard any evidence. This was an error which the Guernsey Court of Appeal seems to have been tempted to make in the Guest case, (supra), especially at paragraph 10 of the judgment. Dr. Kelleher’s article does not appear to fully take this into account, and his final paragraph (128) is

unfortunate. For the purposes of this judgment, there is nothing that can usefully be added to the observations in Bhojwani (supra – paragraph 19 above).

25. The celebrated Guernsey Court of Appeal decision in Morton v Paint (1996) 21 G.L.J. 61 was added to the mix. It will be recalled that this decision, regarded at the time as bold, extended the English law on occupiers' liability to the common law of Guernsey. Whilst the citation of this case in a criminal matter does not as yet quite provoke the judicial equivalent of Goring's (apocryphal) saying that "*When I hear the word 'culture' I reach for my revolver*", it is generally to be regarded as a last resort. Advocate Calderwood made sufficient answer by stating that in the present case we are concerned not with updating common law, but the interpretation of a criminal law statute. This is a matter, if any change is deemed desirable, for the legislature.
26. In the light of very clear authority, in both Guernsey and Jersey, some of which is binding and some very highly persuasive, there is no alternative but to apply the Section 25(1) grounds to this appeal. That, of course, is far from the end of the matter, as Advocate Ferbrache submitted that even if the Guernsey test is applied the conviction is unreasonable and/or wrong (paragraph 13 of A's skeleton). This now needs to be examined.

Was the Conviction unreasonable or cannot be supported having regard to the evidence?

27. The general ambit of this ground of appeal was mentioned in paragraph 10 above. It is important not to be distracted from the test which has to be applied. This is set out concisely in the Royal Court case of Law Officers v Nicolle (2004) Royal Court judgment 20/2004, and attached to R's skeleton argument. The facts do not call for any attention, but Rowland DB, at paragraph 63, set out the appropriate test as follows:

"This Court will not usually interfere with findings of fact made by a Judge sitting in the Magistrate's Court unless there was no evidence to support his findings or if the findings were such that no reasonable Judge giving himself proper direction and applying the proper considerations could reach them."

Similarly the same learned judge observed in another appeal, Law Officers v Wilson (2004) Royal Court Judgment 48/2004 (also attached to R's skeleton) at paragraph 31 of the decision:

"Where as in this case a Magistrate rejects a defendant's evidence and accepts the evidence of the principal prosecution witness after oral evidence has been given and they have been observed in the witness box it will only be in rare cases that interference by an appellate judge will be justified. Not to have seen the witnesses puts the appellate judge in a disadvantaged position."

The last sentence is very well worth noting when considering appeals on matters of fact. These Guernsey decisions are entirely consistent with English cases, such as Bracegirdle v Oxley [1947] K.B. 349 and James and another v Chief Constable of Kent (1986) The Times, 7 June, which show that on an appeal by way of case stated the Divisional Court will not usually interfere with findings of fact by Magistrates unless there was no evidence to support those findings, or they were such that no reasonable Magistrates, giving themselves proper directions and applying the proper considerations, could reach them. Finally, the Guernsey Court of Appeal in Law Officers v Taylor [2007-8 G.L.R. 207] at paragraph 15(vii) said:

"In assessing the rightness or wrongness of the verdict, the Court of Appeal must at all times bear in mind that the function of fact finding has been left to the lower court and that particularly where credibility is in issue, the lower court notoriously has the advantage, denied to the Court of Appeal, of seeing and hearing the witnesses, including, most importantly, the defendant."

28. The principles set out in these cases are clear and consistent. It is not necessary on appeal to check every line of a decision in a summary trial as if it were a tax statute. In the present case the Judge of the Magistrate’s Court gave a long and fully-reasoned judgment, which has been subjected to a detailed critical analysis on behalf of both A and R. It is worthwhile to recognize that the essence of the exercise in a criminal case is to inform the defendant why he has been found guilty. *“That could usually be done in a few simple sentences”*, see R (McGowan) v Brent Justices [2002] Crim.L.R. 412, per Tuckey LJ. The present case, although serious, was a matter of fact. In my opinion a decision to the effect that having heard all the evidence the judge accepted the account given by the aggrieved and rejected the defendant’s explanations and was sure or certain would, in the circumstances, have been adequate. It would be paradoxical for a judge in such a case to find that the more detail they gave the more they could be picked up on and criticized.

29. There is also the question of alleged inconsistencies in the Prosecution evidence. The position (albeit the case involved was a trial on indictment) was helpfully set out in Law Officers v Barnes (2004) Criminal Appeal No. 324, at paragraph 38 of the judgment, which is annexed to R’s skeleton:

“.....If an appeal against conviction had to be allowed in every case where there were inconsistencies and discrepancies precious few offenders would remain convicted. Clearly there can be cases in which the prosecution evidence is so riddled with inconsistencies and discrepancies that the appellate court feels compelled to intervene. But that is not the situation here It is apparent that neither individually nor cumulatively were they sufficient to raise a reasonable doubt. This was a conclusion the Jurats were well entitled to reach and there is no basis on which this Court could contemplate repudiating it.”

30. It is now intended to deal with what are the main features of the evidence which attracted comment by counsel. Throughout this exercise the principles enunciated in e.g. the Nicolle and Wilson cases (supra) must be kept in mind:

(i) Alcohol consumption. This was mentioned in the judgment at (I shall use **bundle** numbers) pages 111-C, 112-C and 124-B of the transcript. The last reference indicates as follows:

“Miss (the complainant) was consistent in her evidence before me and indeed generally I assessed her as telling me the truth, although I had to factor in and consider the quantity of alcohol that she had consumed”

This approach was open to the Judge of the Magistrate’s Court and I cannot see how, on the facts, she was not entitled to come to that conclusion;

(ii) Quarrel. The complainant and her friend gave different accounts of how their friendship, which had run aground on shoals had been reconciled a few hours before the alleged event. The complainant, at 21-D of the transcript states they had argued and both hugged and both said sorry. Her friend stated at 48-E that the complainant had come up and apologized *“and then I just left it”*. This discrepancy is not material and, in terms of witness credibility, trivial;

(iii) Appellant asleep. This point is set out at paragraph 32 of A’s skeleton argument and page 39-D of the transcript in the relevant part. The excerpt reads:

“Q When you sat up was (A) asleep?”

A *Well, I, I don't know if he was asleep, but I think he maybe leant back like that when he pulled his hand away to pretend to be asleep. I don't know if he was asleep because I didn't really look".*

Whilst a careful reading of this part of the complainant's evidence does not support the emphasis put on it in A's written and oral submissions, it is even more important to read it in context. At the end of the day it is the totality of the evidence which falls to be considered. The complainant's evidence at page 31-A-B was:

"Q Where was his hand in relation to your underwear?

A *His hand was like resting on the top, you know, of my, of my vagina and his fingers were in inside.*

Q *Do you know how many fingers?*

A *Yeah, two.*

Q *Do you know which of his fingers?*

A *I reckon it was the index and the middle, you know.*

Q *When you say you reckon, is this something you saw or felt or both?*

A *I felt. I didn't, I didn't actually see it.*

Q *What was blocking your view?*

A *Well, my dress. And maybe cover. I don't know. I don't even know if I looked."*

Then at C onwards:

"Q Were his fingers stationary or moving?

A *Moving.*

Q *In what sort of motion?*

A *Like an in and out motion.*

Q *Was your vagina dry?*

A *No*

Q *...or wet? How would you describe it?*

A *It was wet."*

It is also worthy of note that the complainant stated her underwear had been pushed or moved (pages 33-D, 34-A).

It follows that the observation in R’s skeleton at the end of paragraph 18(f) that “*most importantly, there was never any doubt on the complainant’s part as to who was responsible for touching her*” is correct. It was open to the Judge of the Magistrate’s Court on the facts to accept this evidence and she was entitled so to do. Such a finding was open to a reasonable judge in all the circumstances. This falls into the situation described by the Court of Appeal in Barnes (supra), cited at paragraph 29 above.

- (iv) Miss Le Gallez In cross-examination at page 63-C of the bundle this Prosecution witness is asked if she believed the complainant.

“Q Did you believe what Kelly was telling you?”

A Uhm, at first she seemed really shocked and startled, as I say. I don’t, I can’t really say I believe it, but I can’t, I don’t know how to word this. I was concerned for her.”

However, what was said was sufficient to make the witness go back to A’s house and speak with him. The short answer to this point is that the question of believing a complainant is for the fact-finder to determine, not another witness. A fair reading of the answer does not support the submissions here made on behalf of A. The complainant refers to this part of the case in her evidence at page 33-B-C.

- (v) Text messages. There is scope for some confusion here. The text messages were annexed to the agreed statement of the technical expert, PC Hunter, and are to be found in the appeal bundle after his statement. The prosecution in opening relied upon those next to the word “Kellie”. The opening (page 14-C) said: “*We’re only concerned with those from Kelly, who we say is the complainant, madam*”. But these are messages from A to the contact “Kellie” who is the complainant. In examination-in-chief the complainant referred to receiving these texts (page 34-C, page 35-B), including the one from A asking “*How come you left so quick x*” (not “*Why did you leave so quick*” as was said by the complainant). The next step is that at the end of the cross-examination of the complainant she was asked why she did not confront A “*either at the time or from text messages*” (page 41-B); then in re-examination her text messages were put to the witness and she explained what was sent. It is then necessary to jump forward to page 71 where the Prosecution explained that this mobile telephone “*fresh evidence*” was put in re-examination not as evidence, but to rebut any suggestion that the complainant did not confront A. This was noted by the Judge. It is apparent from the terms of the judgment that the messages regarded as significant were those emanating from A. There is nothing to show that any undue importance was attached to the complainant’s long text – see page 114-B-E and especially page 123-D. The “*How come you left so quick x*” text was mentioned and relied upon by the Judge, as she was entitled to do.

These were the main points advanced and call for particular mention, although all the submissions made on behalf of A on the facts have been considered.

31. Having seen A and heard his account it was open to the judge to reject his evidence. She concluded, at page 124-E: “*I did not assess (A) as telling me the truth*”. It was noted in the judgment (same page) that:

“*Next, there are a number of differences in the Defendant’s responses to the Police and in his evidence before me. He denied that he had kissed (the*

complainant). He accepted today in evidence he'd kissed her on the forehead although he was clear that in his interview it had been on the neck."

and

"To me it's utterly perplexing as to how the Defendant could not recall what he had done. It may well have been that there was more alcohol drunk than he thought, or he had drunk more alcohol, but there is a considerable difference between what he said between the interviews and what he told me today in evidence."

This is in accordance with some of A's account in cross-examination, at pages 94-98.

32. There is a long line of authority, some at the highest level, in England and Scotland on the approach that appellate courts should take when looking at findings of fact from a trial judge, who, unlike the reviewing court, has seen and assessed the witnesses. In the matrimonial case of Watt v Thomas [1947] A.C. 484, Viscount Simon referred to over-turning conclusions at the trial as follows (at 486):

"If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight."

Viscount Simon added that the true rule was expounded by Lord President Inglis in Kinnell v Peebles (1890) 17 R, 416, 423 that a Court of Appeal should:

"Attach the greatest weight to the opinion of the judge who saw the witnesses and heard their evidence";

And consequently should not disturb a judgment of fact unless they are satisfied that it is unsound. The other speeches in the House of Lords were to the same effect.

33. In the present case there was ample evidence to support the conclusions of the Judge of the Magistrate's Court and it cannot be said that no reasonable judge could have arrived at those conclusions. The decision is reasonable and supported by the evidence. This part of the appeal therefore fails.

"Unsafe or unsatisfactory"?

34. Under what was section 2(1)(a) of the English Criminal Appeal Act, 1968 the Court of Appeal was able to set aside a conviction "*on the ground that under all circumstances of the case it is unsafe or unsatisfactory*". For the reasons set out above this is not the test in Guernsey, unless and until there is legislation that changes the grounds presently in force. For the avoidance of doubt, and in case I am technically wrong in my assessment of the correct test, this ground will be considered. The most-quoted case was R v Cooper [1969] 1 Q.B. 267, where Widgery LJ said (at 271):

"However we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a

reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it.”

This was approved by the House of Lords in Stafford v D.P.P. [1973] 3 W.L.R. 719.

35. Of course the application of this “subjective” test in relation to a decision of the Magistrate’s Court, where as here there is a full and reasoned judgment must be more difficult than when considering a jury verdict. Bearing that in mind, the correct approach was set out by Lord Widgery C.J. in R v Lake (1976) 64 Cr. App. R. 172 at 177:

“Once you have decided that the rules of procedure were followed and there remains the only residual question of whether there is a lurking doubt in the mind of the Court, such doubts are resolved not, as I say by rules of thumb and not by arithmetic, but they are largely by the experience of the judges concerned and the feel which the case has for them.”

In the light of these considerations the findings of the Judge of the Magistrate’s Court, particularly at page 123-B to 124-E, have been reviewed in the light of the evidence available. Without having to proceed quite as far as the Court of Appeal in paragraph 10 of their judgment in Guest (supra), no “lurking doubt” exists.

It is now necessary to consider the next point put forward in support of the appeal.

What is “a miscarriage of justice”?

36. One starts with paragraph 936 of Archbold (36th Edition) (1966). Ignoring case references the paragraph begins:

“These general words in section 4(1) of the Criminal Appeal Act, 1907, cover cases where there has been misdirection on the evidence, or where the court allows further evidence owing to insufficient time to call it at the trial, or other sufficient reason, or where the trial was conducted unfairly”.

Various examples are then given, including judicial unfairness and wrongful disclosure of an accused’s previous convictions. One example given is:

“... all the material matters affecting the question of the guilt or innocence of the prisoner were not brought to the knowledge of the judge and jury by the prosecution.....”.

37. Considerable reliance was placed by A’s counsel on the case of Law Officers v Renouf (1994) 18 G.L.J. 35. At paragraph 31 of the judgment Le Quesne JA said:

“A recent authority on the meaning of ‘miscarriage of justice’ in this context is the judgment of the Privy Council in Berry v R [1992] 2 A.C. 364. That was an appeal from Jamaica, where the statutory grounds for allowing a criminal appeal are the same as the grounds laid down here by Section 25(1) of the Court of Appeal (Guernsey) Law. The Privy Council held that there had been a number of irregularities in the course of the trial in Jamaica, including a failure to disclose to the defence statements made to the Police by two important witnesses containing discrepancies from their evidence given at the trial. In approaching these irregularities, the Privy Council adopted the following passage from the judgment of the High Court of Australia in Davies v R (1937) 57 C.L.R. 170, 180 (describing the practice of the Court of Criminal Appeal in England).”

38. It is instructive to go to the original Report and locate the passage quoted. The whole paragraph should be considered and it is reproduced below. It is apparent that this was a classic example of convictions procured by very poor identification procedures and the High Court had no hesitation in ordering new trials in a capital murder case. Those parts not referred to by Le Quesne JA are underlined (apart from the reference to a Victorian statute):

“In England, where the Court of Criminal Appeal has no power to order a new trial, it has been unnecessary to draw a distinction between, on the one hand, the question whether a conviction ought to be allowed to stand when, having regard to the whole treatment of the case, including the manner in which the identification was conducted, the number of identifying witnesses, their want of familiarity with the features and characteristics of the prisoner and the nature of the charge, the court is dissatisfied with the result, and, on the other hand, the question whether, subject to a proper direction to the jury, sufficient material to justify a verdict of guilty cannot be found in the whole evidence, including the testimony of witnesses whose preliminary identification of the prisoners was carried out in a mode which the English Court of Criminal Appeal discountenances. From the beginning, that court has acted upon no narrow view of the cases covered by its duty to quash a conviction when it thinks that on any ground there was a miscarriage of justice, a duty also imposed upon the Supreme Court of Victoria (Crimes Act 1928, sec. 594 (1)). It has consistently regarded that duty as covering not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court’s view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled. This is the basis upon which the English court has set aside convictions resting upon identification conducted in an unfair or unsatisfactory manner. As is not unnatural, the judges of that court have more often than not combined with the statement of their view that in a given case a conviction cannot stand some expression of their general condemnation of the method of identification which has led to that result. Such observations, no doubt, have been made as having a salutary effect in future cases where identification might be sought. But, in strictness, they go beyond the decision of the particular case, because in each case the question must be, not whether the identification has been conducted with propriety and fairness, but whether upon the whole evidence as it in fact existed when it came to be laid before the jury, and having full regard to the treatment of the matter at the trial, the actual verdict ought not to stand because a miscarriage of the kind described occurred.”

39. It is therefore arguable that the passage refers specifically to cases where there is doubtful or defective identification. The opening and closing sentences may indicate this. Fortunately it is not necessary in the present case to consider this further, as there is a more recent helpful decision to hand from the Jersey Court of Appeal, Simao v Attorney-General 2005 J.L.R. 374, from the very experienced criminal judge, Steel JA. The whole passage is worthy of note:

“32 *In R. (Mullen) v Home Secy., the concept of miscarriage of justice was considered by Lord Bingham in his speech, where he said ([2004] 3 All E.R. at 72):*

“... ‘[M]iscarriage of justice’ is an expression which, although very familiar, is not a legal term ... and has no settled meaning. Like ‘wrongful conviction’ it can be used to describe the conviction of the demonstrably innocent. But, again like ‘wrongful conviction’ it can be and has been used to describe cases in which defendants, guilty or not, certainly should not have been convicted.”

33 *The Home Secretary had contended in this case that miscarriage of justice extends only to cases where a person who was convicted of an offence is later shown, beyond reasonable doubt, by virtue of some new or newly discovered fact, to have been innocent of those offences of which he was convicted.*

34 *We have in mind that in Swanston v Att. Gen. Clarke, J.A., in the Court of Appeal in Jersey, stated that-*

“the question as to whether or not there has been a miscarriage of justice should be determined by asking the question whether it can be said that no reasonable jury could have come to the conclusion it did, having regard to the totality of the evidence.”

35 *In Bayliss v. Att. Gen., a differently constituted court approved and adopted the principle in Swanston v. Att. Gen. These were both cases in which the outcome of the appeal depended on consideration of the jury’s conclusions upon the facts before it and the formula cannot and should not be applied in the same terms in a case such as the present, where the application is based upon evidence which was not and could not have been before the jury.”*

40. There is no conflict between the Davies judgment (as applied by Le Quesne JA) and what Steel JA sets out. One thing that is made clear is that a “miscarriage of justice” is not confined to cases depending on the consideration of verdicts on the facts; paragraph 35 is very definite on this. Accordingly it is now necessary to consider the submissions put forward on behalf of A in the light of the Simao case, which is of very high authority in Guernsey, and will be followed in this judgment.

Was there a “miscarriage of justice”?

41. As argued on behalf of A this ground of appeal is based upon disclosure. The complainant’s criminal record was properly disclosed to the defence in accordance with the normal procedure, but those representing A have gone back to the complainant’s theft conviction and the sentencing hearing on 20th November, 2007 – tab 8 of A’s main bundle, pages 226 – 229. The plea in mitigation refers to “*emotional and mental health needs*” and part of the Probation report, which mentions “*mental health and substance abuse services available to her*”. A Probation Order was made (and subsequently revoked, the complainant being fined for the original offence). In the case of Alvarez (supra) I sought to deal with disclosure questions in the light of binding guidance from the Guernsey Court of Appeal in the 2011 decision in Taylor (supra). It should be noted that my rulings, which were of course at first instance, have not been scrutinized by the Court of Appeal as Mr Alvarez was acquitted. The relevant parts of the decision are:

“Applicable Legal Principles

4. *In Guernsey there is no legislation providing a framework for disclosure by either side in criminal cases. The leading case is the recent decision in Taylor [2011-12 GLR 81]. The disclosure point is covered in para 131 of Nutting JA’s judgment, as follows:*

“We hold, therefore, that the duty of the Prosecution in Guernsey is to disclose any material which might reasonably be considered capable of undermining or weakening the case for the Prosecution or of assisting the case for the accused”

Nutting JA cited with approval the words of Lord Bingham in R v H [2004] 2 AC 134 at para 35, highlighting the words:

“The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good”.

5. *Nutting JA (at para 134) also alluded to the English Protocol for the Control and Management of Unused material in the Crown Court (drafted by Fulford and Openshaw JJ) with approval. Para 3 of that document states:*

“However, it is also essential that the trial process is not overburdened or diverted by erroneous and inappropriate disclosure of unused prosecution material, or by misconceived applications in relation to such material”.

6. *Here of course, we are dealing with so-called “Third Party Disclosure”. Different considerations apply, as it recognized by the English Protocol (see Appendix 4 of Blackstone, Protocol, paras 53 – 63). This document is not binding in Guernsey, but worthy of serious consideration and respect. If it assists the Royal Court then no apology is needed for referring to it and, where appropriate, being guided by it. Care should be taken to appreciate that the English legislation does not exist in Guernsey. It appear however, that the evidence in question under the statutes must be material, i.e. immediately admissible as evidence in the case. The reported cases are consistent in this, so that in R v Reading Justices ex.p. Berkshire County Council [1996] 1Cr App R 239 it was plainly stated that documents should not only be relevant, but admissible, and documents desired merely for the purpose of cross-examination were not admissible in evidence. The same principles apply both in the Magistrates’ Court and Crown Court. The cases go back to R v Cheltenham Justices ex.p. Secretary of State for Trade [1977] 1 WLR 95. Simon Brown LJ in the Reading Justices case (at page 246), indicated that one of the “central principles” derived from the authorities was that “documents which are desired merely for the purpose of possible cross-examination are not admissible in evidence” and, significantly:*

“It is not sufficient that the applicant merely wants to find out whether or not the third party has such material documents. This procedure must not be used as a disguised attempt to obtain discovery”.

This case was expressly approved at House of Lords level in R v Derby Magistrates’ Court ex. P. B [1996] AC 487. A more recent English authority is R v Alibhai [2004] EWCA Crim 681, where, amongst other things, Longmore LJ pointed out that a witness summons will not be issued for documents which will not themselves constitute evidence in the case, but merely give rise to a line of enquiry which might result in evidence being obtained. Still less for the obtaining of documents merely capable of use in cross-examination as to credit.

7. *Para 63 of the Protocol is of particular importance. Part of it reads:*

“Victims do not waive the confidentiality of their medical records or their right to privacy under Article 8 of the ECHR by the mere fact of making a complaint against the accused. Judges should be alert to balance the rights of victims against the real and proven needs of the defence. The court, as a public authority, must ensure that any interference with the article 8 rights of those entitled to privacy is in accordance with the law and necessary in

pursuit of a legitimate public interest. General and unspecified requests to trawl through such records should be refused”.

Earlier on (at para 60) the Protocol states:

“It should be made clear, though, that ‘fishing’ expeditions in relation to third party material – whether by the prosecution or the defence – must be discouraged”.

8. *This is consistent with the quote from Blackstone (now at D9.42) relied upon in para 2 of the Prosecution’s skeleton that:*

“Speculative enquiries of third parties are not required: there must be some reason to believe that they hold relevant material”.

Hence the question to consider is whether the Prosecution have a reason to believe that the medical records contain relevant information. The Prosecution submit that if the answer is negative the enquiry is merely speculative and “outside the obligation of the Prosecution”. The defence state that these are not speculative enquiries and that the risk of prejudice to D is “extremely high”.

42. Advocate Ferbrache is not one to pussy-foot around when making submissions and regarded the English cases referred to in that ruling as wrong, inasmuch as they concluded that documents merely desired for the purpose of cross-examination, especially in relation to credit where there is a sexual allegation, were not admissible and not subject to disclosure. But the line of authority in the English courts is a formidable one. In the Reading Justices case (supra), Simon Brown LJ stated at 246 (in quashing an order for a witness summons in the Magistrate’s Court):

“The central principles to be derived from those authorities are as follows:

- (i) to be material evidence documents must be not only relevant to the issues arising in the criminal proceedings, but also documents admissible as such in evidence;*
- (ii) documents which are desired merely for the purpose of possible cross-examination are not admissible in evidence and, thus, are not material for the purposes of section 97;*

.....”.

(Section 97 of the Magistrate’s Courts Act, 1980, deals with the issue of witness summonses).

As indicated in the excerpt from the ruling reproduced above the stem case (Cheltenham Justices) has been approved at House of Lords level. In those circumstances this Court will once more follow this line of authorities.

43. Advocate Ferbrache developed this theme in his oral submissions. It is now known, he said, that there is material that might have assisted in challenging the credibility of the complainant. The Prosecution should have made enquiries, they had several months to do so and there is material that could be available. But one should step back a moment and consider the implications of this approach. As mentioned, there was proper disclosure of the complainant’s record and the defence at the trial had the option, had they so desired, to cross-examine on it (but did not do so, for which there was no criticism at the appeal hearing). Putting the matter very simply, there are a substantial number of Prosecution witnesses in criminal trials who have some sort of record. The Crown Advocate conducting the prosecution will receive a copy from the investigators and it will be disclosed, as a matter of

course. But does this mean that someone needs to obtain transcripts of every conviction, even those only of a non-traffic nature, and pore over them to see if something emerges that could be disclosed? What if it is necessary to consider Probation reports previously submitted to a sentencing court to locate any material possibly adverse to the witness? This is not only wholly impracticable, but highly undesirable. The wheels of the criminal justice system can move slowly as it is without what would be, with respect, an insurmountable extra burden.

44. Reliance was placed on the Renouf case (supra). Advocate Calderwood submitted that the circumstances there were far removed from the present matter. In Renouf the Prosecution were aware of the information which they decided not to disclose (see especially paragraphs 20 and 21 of the judgment). This was a discussion between a Police Officer and an important witness before the trial on the question of a reward. The Court of Appeal concluded that such a conversation should have been disclosed and this amounted to a miscarriage of justice under Section 25(1) of the Court of Appeal (Guernsey) Law, 1961. In my judgment the circumstances there were indeed far removed from those now before the Royal Court; the position was quite different and the Renouf judgment does not avail A. That scenario is covered by Stuart-Smith LJ in R v Maguire [1992] Q.B. 936 at 957:

“The court has now consistently taken the view that a failure to disclose what is known or possessed and which ought to have been disclosed is an ‘irregularity in the course of the trial’.”

That, plainly, was the situation in Renouf, but not that in this appeal. Accordingly, I accept Advocate Calderwood’s submissions here.

45. I have considered all the other points made in support of the appeal and find that they do not call for individual mention and do not assist A.

Conclusion

46. There was ample evidence upon which the Judge of the Magistrate’s Court was entitled to convict A and no miscarriage of justice. The appeal fails and is dismissed. A date, in due course, will be given for this to be announced in court.
47. Appeal Dismissed.