Birnie v Law Officers of the Crown
Royal Court
3rd October 2016

JUDGMENT
41/2016

Appeal against conviction in Magistrate's Court/ against findings of Newton hearing

IN THE ROYAL COURT OF GUERNSEY

Appeals Against Conviction and Finding in the Magistrate's Court

Between:

(i) IAN BIRNIE **Appellant ("A")**

-v-

THE LAW OFFICERS OF THE CROWN **Respondents ("R")**

(Date of convictions 23rd March, 2016)

(ii) IAN BIRNIE **Appellant ("A")**

-v-

THE LAW OFFICERS OF THE CROWN **Respondents ("R")**

(Date of Newton Hearing 15th July, 2016)

Appeal heard on: **21st September 2016**

Decision handed down: **3rd October 2016**

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

The Appellant appeared in person.

The Respondents were represented by Crown Advocate C G Dunford

Materials referred to in Judgment:

A v B 2007-8 GLR Note 22;
Law Officers v Collins (1989) 8 GLJ 8;
Law Officers v Ogier & Le Noury (1989) (Criminal Appeal No. 27);
Presland v Law Officers 2007-8 GLR Note 11;
Atty-General (Jersey) v Edmond-O'Brien [2006] JLR 133;
Re B (a Child) [2009] UKSC 33;
Fage UK Ltd & Anor v Chobari UK Ltd & Anor [2014] EWCA Civ 5

The Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988;
The Court of Appeal (Guernsey) Law, 1961.

DECISION

Introduction

1. Mr Birnie (hereafter without any intention of disrespect "B") has put forward two appeals against decisions of the Magistrate's Court, namely:

   (i) convictions in respect of four counts of assault on his son (Richard), one count of assault against his wife and one count of harassment of his wife, dated 23rd March 2016. B was sentenced to a Suspended Sentence Supervision Order totalling 4 months suspended for 2 years with 2 years' supervision on 21st April, 2016; and

   (ii) findings in a Newton hearing in respect of one count of breaching a Restraining Order concerning his wife and one count of failing to answer bail dated 15th July, 2016. B was then sentenced to a Community Service Order for 40 hours for the first offence, no order being made on the second.

   Crown Advocate Dunford accepted B had the right to appeal against an adverse finding in a Newton hearing.

2. At the appeal B represented himself and put forward a number of grounds of appeal. The appeals were heard by myself sitting alone. If any appeals against sentence are necessary then the Jurats will also sit. At the trials in the Magistrate's Court, B was represented by Advocate Dunster (i) and Advocate Eeles (ii). B strongly criticized Advocate Dunster and the Royal Court accordingly sought Advocate Dunster's response, which is attached to the file and comprises his letter plus copies of letters sent by him to B (divider 10).

The Magistrate's Court

3. In respect of (i), Judge Robey made findings of fact, including the following:

   "*It is quite clear when he gave evidence before me that B felt justified in all these actions in the same way he considers the injunction to be completely unjustified but collectively, they, without a shadow of a doubt, amounted to harassment of Mrs B. B may not have intended that, he may not even have realised that was the inevitable outcome of his behaviour but he certainly ought to have known that and that is only one of the ingredients that the prosecution have to prove and on the basis that he ought to have known that his behaviour would amount to harassment I find him guilty of that offence."* (page 56)

The incidents alleged included abuse and bad language, posting abusive messages around the house, throwing things in a temper, shouting in telephone calls, abusive writing on furniture and writing and delivering a letter in breach of the injunction, followed shortly afterwards by a verbal approach.

Judge Robey also found:

> *"But I found Richard to be a reasonable, rational and eloquent young man. The evidence he gave in respect of these offences I found to be entirely convincing and consistent with that of his mother who I also found to be a compelling witness. I believe and accept their accounts of these events and reject the Defendant's account and I find him guilty of each of the assaults."*

4. (ii) referred to two incidents on 10th May, 2016. B pleaded guilty, but disputed the facts. In respect of the first incident, B suggested that he had spoken to Mrs B and simply said "*good morning*". Other words were allegedly said to the effect, "*here comes the drug dealer"* or "*money launderer"*. Judge Robey found that Mrs B and her supporting witness:

> *"... did not lie, they did their best to recall what happened and what was said truthfully and honestly. Although their uncertainty, and to an extent inconsistency, leave me unsure precisely what was said, what I am sure of what was said was firstly that it was not simply 'good morning', secondly that whatever the precise words were used, it was derogatory terms to Mrs B, and thirdly I accept entirely it was not of a threatening nature and I will sentence on that basis."*

In respect of the second incident:

> *"... I am sure on the evidence I have heard that [Mrs B] did not initiate the conversation, that the comment about the dentist she alleged was made by [Mr B] indeed, but again, as with [Mrs B] herself, I am not sure precisely what was said in full beyond that. What was said, I am satisfied was not of a threatening nature. Neither encounter was of any length and I am not satisfied that either was anything, but, other than entirely unplanned by [Mr B] as has been suggested and I'll sentence on that basis."* (page 8)

Submissions at the Appeal

5. B said that, in essence, Judge Robey had got it wrong and repeated his version of the facts. He placed particular reliance upon his contention that Mrs B had been involved in illegal drug activities and money-laundering at the behest of her employer. False evidence had been given against him and he was appalled by the standard of Advocate Dunster. He had complained about Judge Robey sitting, but he had gone ahead. B had mentioned things to Advocate Dunster, e.g. concerning his son's behaviour, but they were never referred to by Advocate Dunster at the trial. B indicated he had had a Polygraph test in the UK, which although not admissible in a criminal case, amply showed that he was telling the truth. B also stated that he did not want to call any new evidence, but "*expand*" on what had been available. B also criticized the medical report and said he was in a pretty bad state at the time. B reiterated that in the conversation with his wife he had not said anything about drugs or money laundering, but Judge Robey had found against him. His wife's employer wanted him out of the way and had paid her fees and considerable sums of money. They were engaged in widespread and illegal drug activities. Whilst not seeking to be unfair to B in summarising his (courteously put) oral submissions, they essentially replicated many of the points that were dealt with in Advocate Dunster's letters (divider 10 of the appeal bundle for case (i)).

6. Crown Advocate Dunford reminded the Court of the agreed admissions, which were, of course, evidence in the proceedings against B and it was noted that several of them referred to Mrs B's working activities and B's concerns about allegedly illegal actions. Advocate Dunford also reminded the Court of the approach he suggested it should take. The Magistrate's Court (Criminal Appeals) (Guernsey) Law 1988, in effect applies the provisions of the Court of Appeal (Guernsey) Law, 1961 on appeals against conviction. So, e.g., in Law Officers v Ogier and Le Noury (1989) (Criminal Appeal No. 27), the test applied in setting aside a verdict would be that it is "*obviously and palpably wrong"*. All the relevant issues, in both cases, were placed before Judge Robey. It was also submitted that very little notice was taken of any psychiatric report in reaching a verdict and the issues were simply a question of which witnesses to believe. It was a straightforward matter of fact. There was also no scintilla of justification for Judge Robey to recuse himself. It should be mentioned that although B referred to this in his oral submissions, it was not strenuously argued; nevertheless it will be considered in dealing with his appeals, as he was acting in person, without legal assistance.

Applicable Legal Principles

7. It is well-established, in a large number of decisions, both in Guernsey and UK courts, that findings of fact by a trial judge, who has had the opportunity to see the witnesses, will only be overturned on appeal if perverse or that no reasonable tribunal could have made them. In the civil appeal A v B 2007-08 GLR Note 22, it was said: "*There is a presumption that the findings of fact by the Magistrate and his decision on them were correct and they should be accepted by the Royal Court unless perverse."* This approach was followed, in firm terms, by the Privy Council in the Jersey case of Atty-Gen (Jersey) v Edmond-O'Brien [2006] JLR 133, where wrong findings on the facts were found to have been made by the Court of Appeal, and arrived at in an impermissible manner. The situation was clearly set-out by Lord Kerr in Re B (a child) [2009] UKSC 33 at paragraph 108 (emphasis supplied):

> "*A conclusion by a judge at first instance on which facts have been proved, and which have not been, involves the judge sifting the evidence that has been led, assessing it and then deciding whether it has brought him or her to the necessary point of conviction of its truth and accuracy. Although an appellate court is competent to hear appeals against the findings of fact that the judge has made, of necessity, its review of those findings is constrained by the circumstance that, usually, the initial fact-finder will have been exposed to a wider range of impressions that influence a decision on factual matters than will be available to a court of appeal. This is not simply a question of assessing the demeanour of the witnesses who gave evidence on factual matters, although that can be important. It also involves considering the initial impact of the testimony as it unfolds – did it appear frank, candid, spontaneous and persuasive or did it seem to be contrived, lacking in conviction or implausible. These reactions and experiences cannot be confidently replicated by an analysis of a transcript of the evidence. For this reason a measure of deference to the conclusions reached by the initial fact finder is appropriate. Unless the finding is insupportable on any objective analysis it will be immune from review."*

If any further elucidation is needed, the observations of Lewison LJ in another English case, Fage UK Ltd & Anor v Chobari UK Ltd & Anor [2014] EWCA Civ 5 at paragraph 114 are highly apposite. After indicating that appellate courts have been repeatedly warned "*by recent cases at the highest level"* not to interfere with findings of fact or their evaluations and citing a number of decisions to that effect from the House of Lords and Supreme Court, Lewison LJ went on to articulate the reasons:

> "*i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

8. In relation to the calling of witnesses in an appeal, the Guernsey cases are also consistent with English decisions. In Law Officers v Collins (1989) 8 GLJ 8 the Court of Appeal set out the following principles on allowing further evidence to be called:

"*1. The evidence must be evidence that was not available at the trial.*

2. It must be evidence relevant to the issues.

3. It must be evidence which was capable of belief.

4. The court must consider whether, if that evidence had been given at trial, there might have been reasonable doubt in the minds of the jury as to guilt."

In that case the evidence had been available to the defence at the trial and there had been a deliberate decision by defence counsel not to call it. Furthermore, it was not of sufficient materiality in light of the critical issue at trial. This decision was applied in Presland v Law Officers 2007-08 GLR Note 11.

9. B's objections to Judge Robey was put forward (despite legal representation) directly by him in case (i). The transcript is very helpful in this regard. The application was one of several that Advocate Dunster felt unable to make. Of particular relevance are pages 9, 10 and 13. In essence B objected to any Guernsey (or Jersey) Judge dealing with his case as "*I've got a thing against all Guernsey Judges because I'm sure you all have a coffee together somewhere and discuss what's gone on and …"*. Judge Robey pointed out that he had retired, but to no avail; he was sitting as a Deputy Judge. He then referred to the question of whether there was actual bias or the appearance of bias, B replied "*… I'm insisting that I have a judge from off-Island and I don't mean Jersey; I mean the UK and if that's not acceptable, I'd like to go back into custody please"*. At page 13 Judge Robey gave his decision on this point, concluding with the words:

"*B does not allege actual bias in this case nor does he advance any grounds for there being a perception of bias; all he says is that he does not trust Guernsey Judges nor indeed it appears any Channel Islands Judge and insists on an English Judge being appointed to hear the case. But it is not for B to select his Judge and I would be failing in my duty if I were to recuse myself for no good reason and I can see no such reason in this case."*

10. B's criticisms of Advocate Dunster in relation to case (i) were considerable. There is some guidance on the approach to take in the Collins case (supra). There the Guernsey Court of Appeal stated:

"*… although the conduct of counsel is capable in some instances of giving rise to a ground for setting aside a conviction such cases were rare. The principle that emerged from the authorities was that flagrantly incompetent advocacy could lead to such injustice that the court would feel bound to intervene. However, Counsel's decision not to call the evidence was a reasonable and sensible one …"*

Subsequent decisions, including those of the Privy Council, concentrate on whether counsel displayed such manifest incompetence as to deprive a defendant of a fair trial.

Merits

11. In relation to case (ii) the Newton hearing, B was represented capably throughout and, on the findings, achieved (if an imperfect analogy can be used), a 'score draw'. This was a straightforward issue of fact and it is not for an appellate court to go beyond what were findings that were entirely open to the Magistrate's Court to make and demonstrates no whiff of perversity. The findings were made in considerably more detail than those normally given or indeed required in a summary trial, and show a careful and fair evaluation of the evidence.

12. In relation to the longer trial, case (i), it is instructive to consider the correspondence submitted by Advocate Dunster, who replied at the request of this Court. The letter to the Deputy Greffier of 19th May, 2016 shows Advocate Dunster acted as he was Bâtonnier and B had exhausted avenues for representation in Guernsey. The letter continues, stating that the issue was essentially whether he assaulted his wife and son. Evidence was given by the participants and B was not believed. "*This was not therefore a case which turned on any fine points of law but rather simply on who a judge believed in relation to certain facts arising in a domestic situation."* Advocate Dunster continued by stating the case, "*did not therefore turn on any contested matters of medical evidence or the like"*. Any witnesses B wanted calling who were not called would have given irrelevant and thus inadmissible evidence. The issue was whether B had assaulted his wife and son. In Advocate Dunster's view the Judge correctly applied the relevant law.

13. Advocate Dunster enclosed copies of nine letters he had sent to B. It is not necessary to go over all that is contained in these, they are plainly-expressed and speak for themselves. They set out, in considerable detail, how the case was approached and give comprehensive advice. Indeed, with respect, it is hard to see how they can be improved in terms of thoroughness and content. The letter of 31st March, 2016, is a clear exposition of the lack of grounds for any appeal. Paragraph (f) sums up the advice Advocate Dunster gave (after mentioning that appellate courts require a "*perverse*" decision on the facts before overturning a verdict):

> "*This is particularly so in this case where the evidence of your wife and your son was, in my view, clear and compelling and I simply cannot think of any grounds for saying that the Judge was wrong in preferring what they said over what you said. I certainly don't think that any Court of Appeal would say that the Judge's decision was 'perverse' bearing in mind the evidence in this case."*

After further correspondence these views were reiterated in the clearest terms on 29th April, 2016. Points 1, 2 and 3 in that letter essentially cover the arguments adduced by B in the present appeal and deal with them. In summary what is said is:

1. In relation to Judge Robey sitting "*I cannot see that there is any actual or even perceived bias. I do not think any appeal on this ground would be successful*".

2. The psychiatric report, about which B was unhappy "*was not key to how the case was determined"* and, "*The weight of the medical evidence seems to all agree that you were responsible for your actions"*. It was not a case that turned upon such evidence, but was the complainants' word against B's.

3. In the circumstances the appeal court will not interfere with the findings of Judge Robey. "*There was plenty of evidence for him to reach the conclusions he did.*

Indeed, as you know, the conclusions he reached were the very ones which I said he was likely to do."

14. Advocate Dunster's observations are correct. The Judge was entitled to make the findings he did and was not perverse; there are no grounds to permit the calling of further evidence; and the Judge was right, for the reasons given, not to recuse himself. There is no trace of unfairness still less perversity in this matter and B's contentions lack substance and weight. Indeed, Judge Robey conducted both cases fairly and B was properly represented throughout. Unfortunately, B is only able, it would seem, to see his own point of view and has persisted in appeals devoid of merit, where he has been treated fairly throughout.

15. Appeals dismissed.

J R Finch

Judge of the Royal Court